IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2023 Session

STATE OF TENNESSEE v. LUTHER RAY MABE, JR.

Appeal from the Criminal Court for Hawkins County
No. 20CR152 Alex E. Pearson, Judge

No. E2022-00149-CCA-R3-CD

The defendant, Luther Ray Mabe, Jr., appeals his Hawkins County Criminal Court jury convictions of aggravated robbery and theft of property valued at more than $1,000, for which he received an effective sentence of 10 years' incarceration. On appeal, the defendant challenges the sufficiency of the evidence supporting his aggravated robbery conviction and argues that his sentence is excessive. We affirm the judgments of the trial court but remand for entry of a corrected judgment reflecting the correct grade of theft for which the defendant was convicted and merging the theft conviction into the aggravated robbery conviction.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and KYLE A. HIXSON, JJ., joined, concurring in results only.

Mitchell A. Raines, Assistant Public Defender-Appellate Division (on appeal); J. Todd Estep, District Public Defender; and Russell Mattocks, Assistant District Public Defender (at trial), for the appellant, Luther Ray Mabe, Jr.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Dan E. Armstrong, District Attorney General; and Amy Hinkle, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Hawkins County Grand Jury indicted the defendant on charges of aggravated robbery, aggravated burglary, and theft of property valued at more than $1,000

but less than $2,500 for taking a rifle and a shotgun from the home of the victim, Steve Smith, on July 29, 2020.[1] The trial commenced on September 27, 2021.

The victim testified that he had difficulty hearing and that as a result of a stroke, his arms were weakened, and he required the use of a cane to walk down steps. He stated that the defendant, whom he had not previously met, came to his home on July 29, 2020. The victim did not hear the defendant's knocking but felt a vibration as the victim was sitting by a wall. The victim looked up and saw the defendant standing at the threshold of the front door. The victim did not have a front porch but had three steps and a "wide step going into the house," and he said that the front door was not open prior to the defendant's arrival. The victim stated that the defendant was "standing on the steps[,] sweating like a hog," and "moving his mouth." The victim was unable to hear what the defendant was saying, and although the victim informed the defendant of his hearing difficulties, the defendant continued talking.

The victim testified that he had placed a Marlin .45-70 rifle loaded with a "510 grain bullet" by the door because he was preparing to shoot a deer. He stated that the "first thing [he] realized [was] that [the defendant] had the rifle." The victim attempted to take the rifle away from the defendant, but the victim was unable to do so due to his weakened condition and the flour on his hands where he had been baking prior to the defendant's arrival. The defendant continued talking to the victim, but the victim could not hear what the defendant was saying. The victim also had a 12 gauge shotgun "up . . . on the door," and he saw the shotgun in the defendant's possession. The victim stated, "I don't exactly know what went on, okay, how he got the weapons." The victim denied pointing the guns at the defendant. The victim stated that the defendant pointed both guns at him and that he did not attempt to take the guns from the defendant. The victim explained that he was watching whether the defendant would pull the hammer on the rifle and stated that had the defendant done so, "I wouldn't be sitting here." The defendant took the guns, and he and another person left the scene in a truck. The victim learned the name of the defendant from Gary Parker, a neighbor who was standing outside when the incident occurred.

The victim testified that he purchased the rifle in 1978 for $225 and that the replacement cost was $1,500. He received the shotgun as a gift, and the replacement cost was $500.

[1] Although not applicable to this appeal, we note that Tennessee Code Annotated section 39-14-105(a)(2) was amended effective July 1, 2021, to provide that in addition to theft of property valued at more than $1,000 but less than $2,500, theft of a firearm "worth" less than $2,500 is a Class E felony. *See* T.C.A. § 39-14-105(a)(2) (Supp. 2021). Code section 39-14-105(d) also was amended to require a defendant convicted of theft of a firearm to serve a minimum term of confinement of 180 days. *See id.* § 39-14-105(d) (Supp. 2021).

During cross-examination, the victim testified that although he gave a statement to the police, asserting that the defendant stepped inside of his home and asked to purchase the victim's truck, the victim was unable to hear the defendant as he was talking. Rather, after the incident, the victim learned from Mr. Parker that the defendant had wanted to purchase the truck. The victim acknowledged that he told the defendant that the truck was not for sale, explaining that people often came to his home seeking to purchase the truck and that he assumed that the defendant also wanted to purchase it.

The victim testified that the defendant was holding the rifle with both hands when the victim attempted to take the rifle from him. The victim stated that "[w]hen he took the rifle away from me, I did not argue at all because I [knew] the rifle was loaded." The victim said that the defendant "had the shotgun then in his right hand. How he got it, I do not remember." The defendant walked down to the bottom of the steps outside the victim's house while holding the shotgun in his right hand and the rifle in his left hand and then pointed them at the victim. The victim testified, "You think I'm going to argue with a rifle that I know has got a 510 grain bullet in it? You're crazy."

Once Mr. Parker provided the victim with the defendant's name, the victim reported the incident to the sheriff's office. The victim provided the officers with an estimated value of the guns. He later went to a pawn shop and researched the value of the guns in "the gun book." He stated that he would not be surprised if he testified at the preliminary hearing that the value of the rifle was $750, and he maintained that the value increased due to inflation.

During redirect examination, the victim affirmed that the defendant first took the rifle, and the victim attempted to take the rifle away from him while they were at the top of the steps. The victim stated, "When I tried to take it away from him, the shotgun was missing." The victim testified, "He flew down the steps fast paced like down at the bottom of the steps, point[ed] them at me point blank. I still don't know what he was saying at the time, but I was not going to argue with him pointing them point blank at me."

Gary Parker, the victim's neighbor, testified that on July 29, 2020, the defendant and Bo Mullins came to his home to retrieve car parts that they had purchased. At some point, the defendant stated that he was going next door to ask the victim about a few trucks parked in the driveway. Mr. Parker continued talking to Mr. Mullins and did not pay attention to anything that occurred at the victim's home. Mr. Parker saw the defendant walk across the yard with a gun in each hand, and the defendant reported, "The old SOB pulled a gun on me." Mr. Parker saw that the victim's front door was "crack[ed]" open and believed the victim was afraid to come outside. The defendant and Mr. Mullins

placed the guns inside their truck and left. After they left, the victim came outside and spoke to Mr. Parker.

After the victim reported the incident to the Hawkins County Sheriff's Office, Detective Brian Boggs was assigned to the case and interviewed the victim and Mr. Parker. Detective Boggs testified that he attempted to locate the defendant and Mr. Mullins but was unsuccessful. A warrant was issued for the defendant's arrest, after which he was located and taken into custody. The defendant gave a statement in which he maintained that while he was standing outside on the victim's porch talking to him about his truck, the victim "pulled a shotgun" on him, and the defendant took it away from him. The defendant stated that the victim then "pulled a rifle" on him, and the defendant also took the rifle away from the victim. The defendant said that he "backed off the porch" as the victim was demanding that his guns be returned. The defendant stated that as the victim bent down, the defendant threatened to shoot the victim if the victim produced another gun. The defendant ran away from the victim's home and threw the guns to Mr. Mullins, who put them in his truck, and they left. The defendant told Detective Boggs where he believed the guns were located. Detective Boggs attempted to locate the two men who potentially had the guns and Mr. Mullins, but Detective Boggs was not able to recover the guns.

During cross-examination, Detective Boggs testified that when the victim made the initial report, the value of the rifle was listed as $500, and the value of the shotgun was listed as $300. Detective Boggs conducted internet research and found similar guns valued at $750 to $1,500 each.

After the State rested its case, the defendant opted to testify. He stated that he and Mr. Mullins were at Mr. Parker's house to retrieve car parts when the defendant saw an old truck in the victim's driveway. The defendant went to the victim's house to talk to the victim about purchasing the truck. The defendant stated that, when he knocked on the front door, it opened and the victim came outside and stood on the porch where they talked. The defendant asked the victim about the truck, but the victim stated that he did not wish to sell it. The defendant testified that as he was leaving, the victim stated, "Well, when I get up in the morning my damn truck better be there." The defendant responded that he was sure that the truck would still be there and that he needed to leave. The defendant said that the victim asked him whether he had been in the penitentiary, that the defendant replied that he had not, that the victim said he had, and that the defendant said he was sorry.

The defendant testified that the victim then grabbed a rifle and pointed it at the defendant's stomach. The defendant said that he was afraid and took the rifle away from the victim. The victim then grabbed a shotgun from above his doorway, and the defendant took it away from the victim. The defendant denied pointing the guns at the

victim. The defendant stated that the victim bent over and appeared to be reaching for something underneath his couch. The defendant jumped off the porch and threatened to shoot the victim if the victim pulled another gun on him. The defendant stated that he walked backwards as the victim followed him to the fence where Mr. Parker and Mr. Mullins were standing. The defendant told Mr. Mullins that the victim pulled a gun on him. The defendant gave the guns to Mr. Mullins, who put them in his truck, and they left. The defendant stated that as he was leaving, he saw the victim standing outside and talking to Mr. Parker. During cross-examination, the defendant testified that he took the guns to his home, but they disappeared after other people came to his house.

The jury convicted the defendant of aggravated robbery and theft of property valued at more than $1,000 but less than $2,500. The jury acquitted the defendant of aggravated burglary.

During the sentencing hearing on November 1, 2021, the defendant objected to the trial court's reliance on the presentence report because the defendant received the report on the day of the hearing and had not had the opportunity to determine the basis for each of his prior charges and convictions. The trial court noted that the presentence report listed "a considerable amount" of prior charges which had been dismissed or on which the grand jury had declined to return an indictment. The court stated that it would not rely on these charges in determining the defendant's sentence. The court continued the sentencing hearing to allow the defendant the opportunity to review his prior convictions and to offer any objections to the court's consideration of those prior convictions. The defendant subsequently filed a motion setting forth specific objections for each of his prior convictions and attaching certified copies of the judgments. During the sentencing hearing on January 4, 2022, the defendant argued that the entire presentence report was unreliable.

The trial court reviewed each of the defendant's prior convictions listed in the presentence report and the corresponding judgments and made findings sustaining some of the defendant's objections and overruling others. The court noted the prior convictions that the court considered on a copy of the presentence report and entered the report with the court's notations as an exhibit. According to the exhibit, the court considered the following prior convictions:

Conviction	Offense Date	Disposition
Violation of Habitual Motor Vehicle Offender Act ("HMVO") Case no. CR490	July 29, 2004	One year
Child abuse Case no. 93368	June 14, 2001	11 months, 29 days suspended to 45 days

Driving on a revoked license Case no. 90755	May 1, 2000	11 months, 29 days suspended to 48 hours
Assault Case no. 90758	May 1, 2000	Six months, suspended to five days
Assault Case no. 6645	March 19, 1994	11 months, 29 days
Simple assault Case no. 72848	March 19, 1992	$25 fine
Vandalism and multiple counts of assault Case no. 5913	March 23, 1991	11 months, 29 days
Vandalism Case no. 70281	October 17, 1990	$50 fine

The defendant objected to the court's consideration of the prior HMVO violation, arguing that it was no longer a criminal offense. The court found that the judgment was valid and that consideration of the prior conviction was appropriate. The defendant objected to the court's consideration of some of the other convictions because there was no indication that the defendant waived his right to counsel, but the court found that the judgments reflected that the defendant was represented by counsel for each of the convictions.

The trial court determined that the defendant was a Range I, standard offender. The court applied enhancement factor (1), "The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range[.]" T.C.A. § 40-35-114(1). The court noted that some of the information in the presentence report could be considered prior criminal behavior. However, the court determined that consideration of the defendant's prior criminal behavior was not necessary because his prior criminal convictions were sufficient to support the application of enhancement factor (1). The court also applied enhancement factor (4), "A victim of the offense was particularly vulnerable because of age or physical or mental disability." *Id.* at (4). The court found that no mitigating factors applied. The court imposed concurrent sentences of 10 years for the aggravated robbery conviction and two years for the theft conviction to be served in confinement.

The defendant filed a timely motion for new trial, which the trial court denied following a hearing. The defendant then filed a timely notice of appeal.

A. Sufficiency of the Evidence

The defendant challenges the sufficiency of the evidence supporting his conviction for aggravated robbery. He asserts that the evidence failed to establish that he

used violence or fear to obtain the guns or that the theft of the guns was accomplished with a deadly weapon. Rather, he argues that any display of the weapons and any use of violence or fear did not occur until after the theft was completed.

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—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. Tenn. R. App. P. 13(c); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

Aggravated robbery, as charged in the instant case, is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear" when the theft is "[a]ccomplished with a deadly weapon or by display or any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." T.C.A. §§ 39-13-401(a); -402(a)(1). Theft is committed when the perpetrator "with intent to deprive the owner of property . . . knowingly obtains or exercises control over the property without the owner's effective consent." *Id.* § 39-14-103(a).

Violence, as used in the robbery statute, means "physical force unlawfully exercised so as to injure, damage or abuse." *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001) (quoting *State v. Fitz*, 19 S.W.3d 213, 217 (Tenn. 2000)). Fear is "fear of present personal peril from violence offered or impending" which "intimidates and promotes submission to the theft of the property." *Id.* (quoting *Britt v. State*, 26 Tenn. 45, 46 (1846)). When no direct testimony regarding fear is presented, fear may be inferred by circumstantial evidence. *State v. Dotson*, 254 S.W.3d 378, 395 (Tenn. 2008). "[T]he jury's task is to determine from all of the evidence whether the victim was placed in fear by the conduct of the defendant or should have been under the circumstances." *Id.* at 396. Pointing a gun at a victim meets both elements of "violence" and "putting the person in fear." *State v. Allen*, 69 S.W.3d 181, 186 (Tenn. 2002).

Our supreme court adopted the common law view that "the use of violence or fear must precede or be contemporaneous with the taking of property from the person to constitute the offense of robbery." *State v. Owens*, 20 S.W.3d 634, 641 (Tenn. 2000). The theft "must be the result of the force or fear or must have been facilitated or made less

difficult by the violence." *Id.* at 638 (citing *Register v. State*, 97 So.2d 919, 921-22 (Miss. 1957)). "Force used to retain property already unforcibly taken or force used to escape, however, is not the force essential to satisfy the elements of force required for robbery." *Id.* (citing *State v. Holley*, 604 A.2d 772, 774 (R.I. 1992)). In *Owens*, the defendant was convicted of robbery when he took an article of clothing from a store and left without paying, and two employees chased him for several blocks after which he dropped the clothing, turned toward one of the employees, and brandished a knife. *Id.* at 636. Our supreme court concluded that the evidence was insufficient to support the robbery conviction because "the use of violence or fear was subsequent to the taking and temporally remote." *Id*. at 641.

In *State v. Swift*, the defendant was convicted of aggravated robbery when he removed two games from their cases at a store and concealed them in his pants, two employees watched the defendant while in the store but waited to confront him at the front door in accordance with the store's policy to minimize potential "commotion," and the defendant brandished a knife when confronted by the employees at the front door. *State v. Swift*, 308 S.W.3d 827, 829 (Tenn. 2010). Our supreme court stated that it was required to determine whether the evidence was "sufficient to elevate theft to robbery without regard to the location of the use or violence or fear." *Id*. at 831 (citing *Owens*, 20 S.W.3d at 641). The court concluded that "[t]he temporal proximity between the taking of property and the use of violence or fear is the sole relevant factor." *Id.* The court stated that "[t]o assess the temporal proximity between the taking and the use of violence or fear," the court was required to determine "when the taking was complete." *Id.* The court concluded that the taking was complete when the defendant removed the games from their cases and hid them in his pants, "evincing his intent to deprive [the store] of the property." *Id.* The court also concluded that the defendant did not walk toward the exit and swing at employees with a knife until several minutes after the taking was complete and that, therefore, the defendant's "use of violence or fear did not precede or occur contemporaneously with the removal or concealment of the games." *Id.*

Our supreme court next addressed the issue of "temporal proximity" in *State v. Henderson*, in which the defendant challenged his conviction for especially aggravated robbery on the basis that the serious bodily injury to the victim occurred after the robbery was complete. *State v. Henderson*, 531 S.W.3d 687, 689 (Tenn. 2017). The court reviewed various statutory provisions and concluded that "the victim of an especially aggravated robbery must suffer his or her serious bodily injury during the commission of the underlying theft, i.e., before the accused has completed the theft of property." *Id.* at 694. In examining the point at which the theft underlying a robbery is complete, the court reviewed its prior holdings in *Owens* and *Swift* and noted that the opinions "recognized, at least implicitly if not explicitly, the significance of the accused's conduct and intent with respect to determining whether he had completed his theft by the time the violence

occurred." *Id*. at 695. The court noted that the court in *Swift* did not determine at what point under other circumstances that a defendant finally demonstrated his "intent to deprive a merchant of the stated price of merchandise" and that "this moment might not occur until the defendant reaches the door of a retail establishment (or drives off in the stolen car) because, until that time, the defendant has the opportunity to change his mind about stealing the items." *Id.* (citations omitted). The court concluded that "a more helpful application of the 'temporal proximity'" requirement focuses on "the circumstances indicative of the defendant's conduct and intent to determine whether, at the moment in time at issue, the defendant has definitively completed every element of the underlying theft." *Id.* "This focus should include an examination of whether the defendant has completed his theft of all the property he intended to steal." *Id.*

In *Henderson*, the defendant produced a gun and demanded the victim's wallet, cellular phone, and keys, and the victim complied. *Id.* at 698. The defendant remained on the scene during which the defendant and the co-defendant discussed what to do with the victim, and the defendant ordered the victim to get into the trunk of his car. *Id.* The victim began struggling with the defendant, and the victim was shot four times. *Id.* In upholding the defendant's conviction for especially aggravated robbery, the court concluded that the evidence supported the inferences that the defendant intended to steal the victim's car and that the defendant had not completed his intended theft at the time that the victim suffered serious bodily injury. *Id.*

In accordance with our supreme court's holding *Henderson*, we must first determine when the theft was complete. According to the victim's testimony at trial, the victim looked up and saw the defendant standing in the doorway; the victim could not hear what the defendant was saying but told the defendant that his truck was not for sale; the victim saw the defendant with the victim's rifle, which the victim knew was loaded, and attempted to take it away from the defendant while they were standing in the threshold of the doorway; the victim realized at some point that the defendant also had the victim's shotgun; and the defendant then quickly went down the remaining two or three steps and pointed the guns at the victim. Proof that the defendant pointed the guns at the victim was sufficient to establish the defendant's use of violence or fear. *See Allen*, 69 S.W.3d at 186. During oral argument, however, the State conceded the defendant's argument that based upon the victim's testimony, the theft was complete when the defendant walked down the steps with the two guns, evidencing that he completed the theft of all the property that he intended to steal, and before he pointed the guns at the victim.

Although the defendant pointed the guns at the victim after the theft was completed, the evidence demonstrates the defendant's use of fear prior to the completion of the theft. The victim testified that when the defendant "took the rifle away from me, I did not argue at all because I [knew] the rifle was loaded." This proof supports an inference

that the defendant placed the victim in fear by forcibly rejecting the victim's efforts to retrieve the rifle from him while they were in the threshold of the victim's home and before the defendant walked down the steps and pointed both guns at the victim. We conclude that a reasonable jury could infer that when the defendant picked up the victim's loaded rifle and forcibly retained it, "the victim was placed in fear by the conduct of the defendant or should have been under the circumstances." *Dotson*, 254 S.W.3d at 395. The evidence demonstrates that the defendant's use of fear occurred contemporaneously with or prior to his completion of the theft. *See State v. Demetris J. Pirtle*, No. W2014-02222-CCA-R3-CD, 2016 WL 4009712, at *7 (Tenn. Crim. App., Jackson, July 22, 2016) (holding that the fear or violence was contemporaneous with the taking when the defendant reached into the victim's truck as the victim was inside the truck, pulled the victim's gun out of the window, and pointed it at the victim).

The defendant also challenges the sufficiency of the evidence establishing that he accomplished the theft with a deadly weapon. The State responds that the evidence established that the defendant took the rifle first and used the rifle to facilitate his taking the shotgun. The State maintains that based on the victim's testimony that he saw the defendant with the rifle and that the defendant was holding the rifle with both hands when the victim attempted to take it from him, a reasonable jury could infer that the defendant picked up the rifle first and did not pick up the shotgun until after he forcibly rejected the victim's efforts to retrieve the rifle, placing the victim in fear. However, the victim testified that he did not know how or when the defendant obtained the shotgun and that the defendant was in possession of the shotgun when the victim attempted to take the rifle from him. Thus, the evidence presented at trial does not support the State's theory on appeal.

Our rejection of the State's argument, however, does not end our analysis of the proof. In examining the requirement that the theft be "[a]ccomplished with a deadly weapon," our supreme court noted that "accomplish" is not defined by statute and utilized the dictionary definition, defining "accomplish" as "'to bring about (a result) by effort'" or "'to bring to completion: fulfill.'" *Henderson*, 531 S.W.3d at 692-93. Thus, like the use of violence or fear, the use of a deadly weapon must occur prior to or contemporaneously with the theft. *See State v. Ambrus Gray*, No. E2021-01418-CCA-R3-CD, 2023 WL 356021, at *10 (Tenn. Crim. App., Knoxville, Jan. 23, 2023) (upholding the defendant's aggravated robbery convictions when the thefts were completed contemporaneously with the defendant's producing a gun and leaving without paying for the items), *perm. app. denied* (Tenn. June 13, 2023). The defendant's forcibly and visibly retaining the loaded rifle when the victim attempted to retrieve it enabled the defendant to accomplish or complete the theft of the guns by placing the defendant in fear. The defendant's use of the rifle to place the victim in fear occurred prior to or contemporaneously with the defendant's completion of the theft of the guns. Accordingly, the evidence is sufficient to support the defendant's convictions for aggravated robbery.

B. Sentencing

The defendant challenges his sentence as excessive. He asserts that his criminal history set forth in the presentence report was unreliable and that the trial court erred in finding that the defendant had a previous history of criminal convictions and in applying enhancement factor (1) based on the information in the presentence report. The State responds that the trial court properly applied enhancement factor (1) and exercised its discretion in imposing the sentence.

Our supreme court has adopted an abuse of discretion standard of review for sentencing and has prescribed "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The application of the purposes and principles of sentencing involves a consideration of "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant…in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5). Trial courts are "required under the 2005 amendments to 'place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.'" *Bise*, 380 S.W.3d 698-99 (quoting T.C.A. § 40-35-210(e)). Under the holding in *Bise*, "[a] sentence should be upheld 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." *Id.* at 709.

The Sentencing Act allows for the admission of "reliable hearsay," T.C.A. § 40-35-209(b), and a presentence report constitutes reliable hearsay, *State v. Baker*, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997). Before a trial court may admit a presentence report as reliable hearsay, "the party opposing the evidence must receive a fair opportunity to rebut any hearsay admitted into evidence," and "'indicia of reliability must be present to satisfy the due process requirement.'" *State v. Roy Thomas Rogers, Jr.*, No. W2021-00807-CCA-R3-CD, 2022 WL 2733698, at *9 (Tenn. Crim. App., Jackson, July 14, 2022), *no perm. app. filed* (quoting *State v. Taylor*, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987)). The trial court may rely on a presentence report "'absent a showing that the report is based upon unreliable sources or is otherwise inaccurate.'" *Id*. (quoting *State v. Richard J. Crossman*, No. 01C01-9311-CR-00394, 1994 WL 548712, at *6 (Tenn. Crim. App., Nashville, Oct. 6, 1994)).

The trial court continued the sentencing hearing to allow the defendant the opportunity to review the information in the presentence report. The defendant filed a pleading setting forth specific objections to the prior convictions listed in the record. The trial court declined to consider any of the defendant's prior charges that did not result in

convictions. The record reflects that the trial court reviewed the judgments of the defendant's prior convictions, found that the defendant's objections to some of the prior convictions were correct, and declined to consider those convictions. The trial court rejected the defendant's objections to other prior convictions based on the court's review of the judgments and relied on the convictions in applying enhancement factor (1). On appeal, the defendant does not challenge the trial court's specific findings for each conviction upon which the trial court relied. Rather, the defendant asserts that the entire presentence report is unreliable. We conclude that the trial court did not err in declining to exclude the entire presentence report and in considering the defendant's prior convictions that the court determined were reliable based upon its review of the judgments. Accordingly, the trial court's application of enhancement factor (1) is supported by the evidence.

Even if the trial court misapplied enhancement factor (1), "a trial court's misapplication of an enhancing or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Bise*, 380 S.W.3d at 706. Nothing in the record suggests that the trial court "wholly departed from" the Sentencing Act. To the contrary, the record reflects that the trial court considered all the relevant principles associated with sentencing when imposing the sentences, and the defendant does not challenge the trial court's application of the enhancement factor of the victim's particular vulnerability due to his physical disabilities. We conclude that the trial court did not abuse its discretion in imposing the within-range sentences after thorough consideration of the purposes and principles of sentencing.

We note that the defendant was charged with and convicted of theft of property valued at more than $1,000 but less than $2,500, a Class E felony. *See* T.C.A. § 39-14-105(a)(1). However, the judgment lists the defendant's charge and conviction as "Theft of Property-$1,000-$10,000" as a Class D felony. We also conclude that the defendant's dual convictions for aggravated robbery and theft of the same rifle and shotgun violate the constitutional protections against double jeopardy. *See State v. Martinos Deering*, No. W2017-02290-CCA-R3-CD, 2019 WL 244471, at *7-8 (Tenn. Crim. App., Jackson, Jan. 16, 2019) (holding that the defendant's dual convictions for robbery and theft violated the constitutional protections against double jeopardy and rose to the level of plain error); *see also State v. Angela Kilgore*, No. M2020-00121-CCA-R3-CD, 2021 WL 3124249, at *11 (Tenn. Crim. App., Nashville, July 23, 2021) (concluding that the defendant's dual convictions for especially aggravated robbery and theft of the same property violated the constitutional principles against double jeopardy). Accordingly, we remand for entry of a corrected judgment of conviction of theft in Count 3 reflecting that the defendant was convicted of theft of property valued more than $1,000 but less than $2,500 as a Class E felony and that the theft conviction is merged into the aggravated

robbery conviction. *See State v. Berry*, 503 S.W.3d 360, 364 (Tenn. 2015). We otherwise affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE