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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 23, 2023 Session

STATE OF TENNESSEE v. WILLIAM DAVID PHILLIPS

Appeal from the Circuit Court for Jefferson County
No. 14914 O. Duane Slone, Judge

No. E2022-01148-CCA-R3-CD

A Jefferson County jury convicted the defendant, William David Phillips, of four counts of reckless homicide, one count of reckless endangerment, and one count of felony reckless endangerment, for which he received an effective sentence of fourteen years, eleven months, and twenty-nine days in confinement. On appeal, the defendant contends the trial court erred in imposing an excessive sentence, denying probation, and imposing consecutive sentences. After reviewing the record and considering the applicable law, we affirm the judgments of the trial court. However, we remand the case for a corrected judgment form in count three.

Tenn. R. App. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed and Remanded for Entry of Corrected Judgment

J. ROSS DYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., joined. ROBERT H. MONTGOMERY, JR., J., concurring in results only.

Edward C. Miller, Jefferson City, Tennessee, for the appellant, William David Phillips.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Jimmy B. Dunn, District Attorney General; and Jeremy Ball and Kelsi Pratt, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On June 17, 2019, the defendant entered the Compassionate Buds Dispensary, LLC, a CBD store in Morristown owned by Megan and Nicholas Robinson, to purchase CBD

products at approximately 2:40 p.m. The defendant and Ms. Robinson previously worked together at Longhorn Steakhouse, and the defendant told Ms. Robinson that he was currently ten days sober. According to Mr. Robinson, the defendant seemed "jittery," and the defendant told Mr. Robinson that he was upset about an AA meeting he had attended that morning. Mr. Robinson gave the defendant samples of CBD honey sticks and a CBD isolate sucker, and the defendant left the store.

Twenty minutes later, Tillman Gunter was walking on East Main Street in Jefferson City when he briefly stopped to speak with Sierra Cahoon, who was pushing her two-year-old son N.C.[1] in a stroller. As Mr. Gunter crossed to the other side of the road, he heard a noise and used his crutch to get onto an embankment. Mr. Gunter then watched as the defendant lost control when he came around a curve and fishtailed. The defendant appeared to regain control of his vehicle, so Mr. Gunter got off the embankment. However, the defendant sped up and swerved toward Mr. Gunter, knocking him into a ditch. Mr. Gunter sustained injuries as a result of the incident, including bruises and contusions to his arms and legs.

Robert Frayer was stopped at the street light near the Sustainable Aquatics building when he saw the defendant's car travelling approximately eighty to one hundred miles an hour out of the corner of his eye. Mr. Frayer "heard the boom from [the defendant's car] hitting the curb, and [he] saw an impact with [Ms. Cahoon and N.C.]" Mr. Frayer then heard "the boom of [Ms. Cahoon] slamming into the side of the building" and ran towards her to see if he could offer any assistance. However, he realized there was nothing he could do for either Ms. Cahoon or N.C. at that point. Mr. Frayer also attempted to help the defendant; however, the defendant began threatening and cursing at everyone on the scene. Later that evening, Mr. Frayer was treated for a nervous breakdown due to the stress of what he had witnessed.

Billy Ray Jones was in a parking lot near Sustainable Aquatics and "heard [the] sound of [a] car coming." He looked up and saw a stop sign going "across the [Sustainable] Aquatics building and [Ms. Cahoon] disappeared." When Mr. Jones ran to the scene, he observed Ms. Cahoon and N.C. on the ground against a light pole and the defendant's car inside the Sustainable Aquatics building. According to Mr. Jones, the defendant, who did not attempt to check on the victims, stated "that somebody told him to hit that stroller, it was full of meth."

Elizabeth Coin was driving on Russell Avenue when she saw a car driving extremely fast towards a woman, who "disappeared." Ms. Coin called 911, and as she

[1] It is the policy of this Court to refer to minors by their initials.

approached the scene, she saw where the defendant drove his car into the side of the Sustainable Aquatics building. The defendant climbed out of the hole in the building, and Ms. Coin attempted to speak with him. However, he "kept trying to walk past [her] and walk past [her] van." She flagged down a city worker and asked him to stop the defendant from leaving the scene.

Kathryn McCord, who was working at Sustainable Aquatics at the time of incident, was walking towards a sink when the defendant's car crashed through the wall on the other side of the room. Ms. McCord "heard a loud sound, and water was coming at [her]." Although she did not see the driver of the vehicle, she heard him repeating "get the f**k out of here" several times. During the crash, she suffered a cut on her thumb that required four stitches, a cut on her leg that required two stitches, and other minor cuts from shattered glass.

Officer Robert Bolden with the Jefferson City Police Department ("JCPD") received a dispatch call regarding a motor vehicle accident involving two pedestrians. When Officer Bolden arrived on the scene, he began walking towards the hole in the side of Sustainable Aquatics and noticed Ms. Cahoon and N.C. on the ground to his left. Because a large crowd was gathering in the parking lot, Officer Bolden attempted to remove them in order to preserve the scene. At that time, another officer informed him that the defendant was pacing back and forth on the corner of Tallent Street and Russell Avenue, and when Officer Bolden arrived at that location, he was instructed to handcuff the defendant and place him in the back of his patrol car.

Once the defendant was placed in the patrol car, he began complaining of shoulder pain. Lieutenant Eric Fortner with the Jefferson City Fire Department approached the defendant to treat his shoulder; however, the defendant refused to give Lieutenant Fortner consent to treat him. While Lieutenant Fortner was speaking with the defendant, the defendant told him that he went to an AA meeting that day and that the government told him to hurt the victims. Lieutenant Fortner then informed Officer Bolden of the defendant's statement.

Detective Roland Holt with the JCPD was off-duty at the time of the incident but received a call at 3:44 p.m. advising him of a serious crash with the possibility that it was intentional. Detective Holt immediately responded to the scene and began his investigation. After observing the scene and speaking with his captain, Detective Holt "felt like it was an intentional act." He spoke with the defendant for several hours, both in the back of Officer Bolden's patrol car and at the hospital while they waited to have the defendant's blood drawn. The defendant did not appear to be intoxicated and could clearly recall what he had done. However, he gave several different stories as to why he ran into Ms. Cahoon and N.C., including the government, a dream, a movie about the apocalypse,

9/11, and a voice that told him to kill methamphetamine addicts. The defendant told Detective Holt that Ms. Cahoon was hiding methamphetamine under N.C. in the stroller and that he needed to kill her because N.C. was being exposed to methamphetamine. The defendant admitted that Ms. Cahoon saw him driving towards her and attempted to run away but was unable to. The defendant appeared remorseful and stated that he was sorry for what he had done. When Detective Holt informed the defendant that Ms. Cahoon and N.C. had died, the defendant "wail[ed] and yell[ed]."

The defendant also agreed to give a written statement regarding the incident. According to the defendant, he went to an AA meeting at a new location that morning and had an uncomfortable interaction with some of the other participants. Afterward, he went to Compassionate Buds to buy CBD because he believed it "would help [his] post-acute withdrawal symptoms." As he was leaving the store, a red truck cut him off which "triggered some kind of rage in [him] and PTSD."

Detective Joseph Reff, an accident reconstructionist with the JCPD, responded to the scene and observed an eight-foot-wide hole in the side of the Sustainable Aquatics building. Inside the building, Detective Reff saw a tan Impala with the taillights on and the driver's side door open. As Detective Reff walked the scene, he noted tire marks, gouges in the pavement, street signs in the road, a missing stop sign, and a guidewire that had become disengaged from a telephone pole. According to Detective Reff, the defendant jumped the curb at the corner of the intersection and hit Ms. Cahoon and N.C. After the initial impact, Ms. Cahoon, N.C., and the stroller slid ninety-five feet until they came to rest against the side of the Sustainable Aquatics building. Detective Reff observed hair fibers from Ms. Cahoon embedded in the pavement. He also noted a child's sock, a pair of women's shoes, a pair of children's shoes, and a stroller tire in the parking lot. When the defendant jumped the curb, he hit a stop sign; however, officers were initially unable to find the missing sign. Detective Reff eventually located it on the hood of a vehicle on the other side of the Sustainable Aquatics building.

Trooper Christopher Best, an expert in accident reconstruction with the Tennessee Highway Patrol, visited the site of the accident and reviewed the airbag control module data collected from the defendant's vehicle. The data showed the defendant drove into Ms. Cahoon and N.C. while driving at a rate of eighty-six miles per hour and one hundred percent throttle. Additionally, the data showed that the defendant did not apply the brakes at any time.

Special Agent Bailey Short with the Tennessee Bureau of Investigation analyzed the defendant's blood sample for the presence of alcohol, the results of which were negative. Special Agent Melanie Carlisle performed a basic presumptive screening for multiple different classes of drugs. The defendant tested positive for Sertraline at 0.05

micrograms per milliliter and positive for Trazodone. However, she could not quantify the amount of Trazodone in the sample. Sertraline, an anti-depressant, was within therapeutic levels. Special Agent Regina Askanov analyzed the defendant's blood sample for benzodiazepine, and the sample tested positive for diazepam at 67 nanograms per milliliter and nordiazepam at 115 nanograms per milliliter. Diazepam, which can be prescribed as an anti-anxiety medication, was within therapeutic levels. Nordiazepam, a metabolite of diazepam, was also within therapeutic levels. Special Agent Michael Tiller performed a cannabinoid analysis on the defendant's blood sample, which tested positive for delta-9 THC at 2 nanograms per milliliter, 11-Hydroxy delta-9 THC at 2 nanograms per milliliter, and Carboxy THC at 35 nanograms per milliliter. According to Agent Tiller, CBD would not cause a positive test for THC in the small amounts that a normal person would take. Agent Tiller opined that the THC levels found in the defendant's blood were consistent with someone consuming THC at least four hours prior to the sample being taken.

Dr. William Oliver, an expert in forensic pathology, performed the autopsies on Ms. Cahoon and N.C. Dr. Oliver testified that both Ms. Cahoon's and N.C.'s cause of death was multiple blunt trauma. Dr. Oliver noted that Ms. Cahoon suffered from severe injuries to her pelvis and torso region including a shattered pelvis and fractures in her thoracic and cervical spine. The upper part of her right leg was fractured, causing "almost a complete amputation." This, in turn, caused a portion of Ms. Cahoon's bowel and pelvic contents to be "extruded from the body out into the environment." Ms. Cahoon also suffered from a number of internal injuries including a transected aorta, transected esophagus, transected trachea, lacerated heart, torn liver, torn spleen, torn kidneys, torn bladder, broken ribs, broken sternum, disarticulation of the right hip, bruised lung, and hemorrhaging in the lining of the brain.

In evaluating Ms. Cahoon's cervix and uterus, Dr. Oliver noted an implantation site. He performed a histology and microscopic examination of the uterus, which showed changes associated with pregnancy. Specifically, Dr. Oliver testified there was a placenta attached to the endometrium and "a small fragment of neural tissue that indicated [] a fetus." The fetus itself was not present, and Dr. Oliver opined that it had been "expelled" when Ms. Cahoon's pelvis shattered.

Dr. Oliver testified that most of N.C.'s injuries were to the head and chest. The base of N.C.'s skull was "all popped apart, which of course [led] to disruption of the blood vessels going to the brain and disruption of the brain tissue itself." N.C. subsequently suffered from cerebral edema and diffuse hemorrhage into the lining of the brain. Dr. Oliver noted that there were 50 milliliters of blood in N.C.'s left pleural space and 20 milliliters in his right. Dr. Oliver opined that 20 milliliters of blood is a notable amount in the pleural space of a small child. Additionally, N.C. had a torn liver, torn spleen, and bruises to his lungs.

The defendant called Marie White, Robert Peterson, Dorien Peterson, Ben Applegate, David Applegate, Mary Christianson, Dr. Daniel Spica, and Dr. Kimberly Brown as witnesses. Marie White, a manager at Longhorn Steakhouse, worked with the defendant for six months prior to this incident. She testified that he was a good server and "was one of those employees that you liked seeing come in." She stated that in June 2019 the defendant told her that he needed time off to get some help for himself.

Robert Peterson testified that he and his family lived next door to the defendant's family in Illinois beginning when the defendant was three years old. The defendant and Mr. Peterson's son, who were the same age, became friends, and Mr. Peterson thought of the defendant as one of his own children. Although Mr. Peterson described the defendant as a calm and happy person, Mr. Peterson became aware of the defendant's mental health issues during a rock-climbing trip when the defendant was in college. The defendant acted agitated, disturbed, and unfocused and also became increasingly paranoid that a car was following them. Mr. Peterson cut their trip short and took the defendant to the defendant's sister, who checked the defendant into a psychiatric ward. On cross-examination, Mr. Peterson admitted he was unaware that the defendant had experimented with drugs in the past, although he knew the defendant had gone to rehab for alcohol issues.

Dorien Peterson, Mr. Peterson's wife, testified that, even after her own children had moved away, the defendant would "spend an hour having a cup of tea with [her]." She described the defendant as "a nice kid" who never said anything mean about anyone. According to Ms. Peterson, the defendant still called her on her birthday and on Mother's Day.

Ben Applegate, the defendant's uncle, testified that their family had a history of mental illness. Mr. Applegate's mother, the defendant's grandmother, attempted suicide and had bipolar disorder. Additionally, Mr. Applegate's brother had bipolar disorder, and two of Mr. Applegate's sons were diagnosed with severe depression. Although the defendant's mother had not been formally diagnosed, Mr. Applegate also believed she suffered from severe depression following her divorce from the defendant's father. Mr. Applegate also testified that several members of their family struggle with alcoholism. In December 2016, Mr. Applegate invited the defendant and his mother over for an early Christmas. The defendant's mother informed Mr. Applegate that the defendant was newly sober but stated that he was not doing well. When the defendant arrived, it was clear the defendant "was in a state." He was hearing voices and talking about the Russians and the government. Mr. Applegate immediately approached the defendant's mother and stated that they needed to get the defendant to a hospital. They took the defendant to Chicago Lakeshore Hospital where he stayed for approximately a week. Upon discharge, the

defendant stayed with Mr. Applegate for several months, attending regular AA meetings and an intensive outpatient program until he moved to Tennessee.

David Applegate, the defendant's cousin, testified that the defendant is "one of the most warm-hearted, gracious and genuine individuals [he knows]."[2] According to David, the defendant would never purposely harm another person, and the "the events that took place [were] out of [the defendant's] control due to his mental illness."

Mary Christianson, the defendant's sister, testified that she would often let the defendant stay alone with her two young children and had no hesitation in doing so. Although she was aware the defendant had a substance abuse problem, he would not come over to her house while he was drunk. Additionally, she was aware that the defendant had been hospitalized several times for bipolar disorder. However, when he was not experiencing a psychotic break, the defendant appeared normal. Ms. Christianson testified that she was the first member of their family to move to Tennessee, and the defendant followed her in 2017. Before this incident, the defendant checked himself into the CenterPointe rehabilitation facility because he was concerned about the effect that his drinking was having on his physical health. He was also depressed and wanted to safely stop drinking alcohol. After the defendant left CenterPointe, he stayed at Ms. Christianson's house for several days leading up to this incident. At first, the defendant was upbeat and positive, and he spoke with Ms. Christianson about possibly changing jobs. However, she began to notice that the defendant could not stop moving; he would wake up at 5:00 a.m. and begin washing dishes, which was very unusual for him.

Dr. Daniel Spica, a clinical neuropsychologist and an expert in neuropsychology, evaluated the defendant at the Jefferson County Justice Center a month after the incident. However, Dr. Spica was unable to complete his examination because the defendant was too disorganized and psychotic for Dr. Spica to assess the defendant's ability. Dr. Spica described the defendant as "simultaneously [] being very disheveled and disorganized, very sleepy, insomnolent and very frightened." The defendant believed the guard outside of his room was controlling the defendant's thoughts, and he was so distracted by that thought that he was unable to attend to Dr. Spica's questions. Dr. Spica did not find any indication the defendant was malingering or feigning his mental illness.

Dr. Kimberly Brown, a clinical and forensic psychologist and an expert in forensic psychology, conducted a forensic evaluation on the defendant to evaluate his competency to stand trial and his mental condition at the time of the incident. Prior to speaking with the defendant, Dr. Brown reviewed the defendant's previous medical records. In 2003, at

[2] Because Ben Applegate and David Applegate share the same last name, we will refer to David Applegate by his first name. We intend no disrespect.

the age of 17, the defendant was hospitalized and diagnosed with a psychotic disorder with signs of mania due to increasing paranoia, hearing voices, disorganized behavior, pacing, chanting, talking to himself, lack of sleep, restlessness, and hyperactivity. In 2009, the defendant was hospitalized following the incident with Mr. Peterson. The records indicated the defendant was experiencing increasing paranoia, manic symptoms, hearing voices, and having loose associations. He was diagnosed with bipolar disorder and treated with medication. In 2016, the defendant was again hospitalized after Mr. Applegate noticed the defendant was acting erratically at Christmas. The defendant was diagnosed with bipolar disorder and was described as manic with racing thoughts, poor sleep, and paranoia. Dr. Brown also reviewed records from the Tennessee Department of Correction, where the defendant was diagnosed with bipolar disorder, and Middle Tennessee Mental Health Institute, where he was diagnosed with major depressive disorder with psychotic features, alcohol use disorder, and cannabis use disorder. Dr. Brown also reviewed body cam footage of the defendant immediately following the incident. In the videos, Dr. Brown witnessed signs of both mania and psychosis, including rambling, continuous speech, disinhibition, thought disorganization, racing thoughts, flight of ideas, restlessness, and agitation. According to Dr. Brown, this was consistent with what the Crisis Evaluation Team at Jefferson Memorial Hospital saw on the day of the incident when they also diagnosed the defendant with bipolar disorder.

As part of the forensic evaluation, Dr. Brown also interviewed the defendant twice in February 2021 for a total of five hours. Ultimately, Dr. Brown diagnosed the defendant with bipolar disorder with psychotic features due to the psychotic symptoms he exhibits while he is in a manic episode. Because the defendant was having psychotic symptoms at the time of the incident, Dr. Brown opined that the defendant had a severe mental illness at the time of the incident that impaired his perception of reality. Additionally, Dr. Brown concluded that "there [was] a direct link between [the defendant's psychotic and manic symptoms] that he was experiencing and the act that occurred." According to Dr. Brown, the defendant's mental state "was so impaired at that time that he was not able to exercise reflection and judgment, which is part of the definition of premeditation." Dr. Brown testified that the defendant's condition is treatable because there are periods of remission and because he responds well to medication.

Following deliberations, the jury found the defendant guilty of one count of reckless homicide with regards to his actions against Sierra Cahoon (count one), two counts of reckless homicide with regards to his actions against N.C. (counts two and three), one count of reckless homicide with regards to his actions against Sierra Cahoon's unborn child (count four), one count of reckless endangerment with regards to his actions against Tillman Gunter (count five), and one count of felony reckless endangerment with regards to his actions against Kathryn McCord (count six). Following a sentencing hearing, the

trial court merged count three into count two and imposed an effective sentence of fourteen years, eleven months, and twenty-nine days in confinement. This timely appeal followed.

Analysis

On appeal, the defendant argues the trial court erred in imposing an excessive sentence, denying probation, and imposing consecutive sentences. The State contends the trial court properly sentenced the defendant to within-range sentences, denied probation, and imposed consecutive sentences.

I. Length of Sentences

The defendant argues the trial court erred in imposing an excessive sentence. Specifically, the defendant argues the trial court failed to consider the purposes and principles of sentencing, and therefore, the sentence should not be presumed reasonable. The State contends the trial court properly sentenced the defendant to within-range sentences.

In determining an appropriate sentence, a trial court must consider the following factors: (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 mitigating and enhancement factors; (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 makes on his own behalf as to sentencing; and (8) the potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -113, -114, -210(b). In addition, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* § 40-35-103(4).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory presumptive minimum sentence and rendered enhancement factors advisory only. *See* Tenn. Code Ann. §§ 40-35-114, -210(c). Although the application of the factors is advisory, a court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114." *Id.* § 40-35-210(b)(5). The trial court must also place on the record "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." *Id.* § 40-35-210(e).

When an accused challenges the length and manner of service of a sentence, this Court reviews the trial court's sentencing determination under an abuse of discretion

standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). If a trial court misapplies an enhancing or mitigating factor in passing sentence, said error will not remove the presumption of reasonableness from its sentencing determination. *Bise*, 380 S.W.3d at 709. This Court will uphold the trial court's sentencing decision "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 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

Here, the defendant was convicted of reckless homicide, a Class D felony, reckless endangerment, a Class A misdemeanor, and felony reckless endangerment, a Class E felony. The trial court applied enhancement factors (3) the offense involved more than one victim; (4) a victim of the offense was particularly vulnerable because of age; (6) the personal injuries inflicted upon the victims was particularly great; (9) the defendant possessed a deadly weapon during the commission of the offense; and (10) the defendant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(3), (4), (6), (9), (10). The trial court specified that enhancement factor (4) only applied to the defendant's convictions regarding N.C. and Ms. Cahoon's unborn child. In mitigation, the trial court found the defendant had a history of severe mental illness and was suffering from severe mental illness at the time the offenses were committed. The trial court merged count three into count two and imposed a sentence of four years for counts one, two, and four, eleven months, twenty-nine days for count five, and two years for count six. The trial court further ordered all sentences to run consecutively, for an effective sentence of fourteen years, eleven months, and twenty-nine days.

The defendant's contention that the trial court did not consider the purposes and principles of the sentencing act is without merit. In addition to thoroughly analyzing the applicable enhancement and mitigating factors, the trial court stated that it considered the evidence, the presentence investigation report, evidence of the defendant's prior DUI conviction, victim impact statements, and the defendant's employment history. Because the record shows the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing within-range sentences, the defendant has failed "to either establish an abuse of discretion or otherwise overcome the presumption of reasonableness afforded sentences which reflect a proper application of the purposes and principles of our statutory scheme." *State v. Caudle*, 388 S.W.3d 273, 280 (Tenn. 2012). Additionally, a trial court's duty to impose the least severe method of punishment does not entitle the defendant to a presumptive minimum

sentence. Trial courts have the discretion "to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" *Carter*, 254 S.W.3d at 343 (quoting Tenn. Code Ann. § 40-35-210(d)). The record fully supports the sentences imposed by the trial court, and the defendant is not entitled to relief on this issue.

Though not raised by the defendant, our review reveals that the trial court misapplied enhancement factor (3), "the offense involved more than one victim," *see* Tenn. Code Ann. § 40-35-114(3), as it is "well established" that this factor is not applicable when a defendant is convicted separately for each victim. *State v. Williamson*, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995). Additionally, though not completely clear from the transcript of the sentencing hearing, it also appears the trial court misapplied enhancement factor (9), "the defendant possessed or employed a . . . deadly weapon during the commission of the offense," *see* Tenn. Code Ann. § 40-35-114(9), to the defendant's conviction for felony reckless endangerment. While factor (9) is applicable to the defendant's other convictions and sentences, use of a deadly weapon, an automobile in the instant matter, is an essential element of the offense of felony reckless endangerment; thus, factor (9) cannot be applied to the sentence for this conviction. *State v. Mosby*, No. W2009-02575-CCA-R3-CD, 2011 WL 287345, at *5 (Tenn. Crim. App. Jan. 24, 2011) (the use of enhancement factor (9) is inapplicable if a defendant was charged with a crime which was committed "by use of a deadly weapon."); *State v. Wilson*, 211 S.W.3d 714 (Tenn. 2007) (An automobile is considered a deadly weapon under the reckless-endangerment statute, which provides that reckless endangerment committed with a deadly weapon is a Class E felony.) However, the trial court's misapplication of an enhancement factor, however, is not "a basis in and of itself for vacating a sentence." *State v. Trent*, 533 S.W.3d 282, 294 (Tenn. 2017).

Despite the trial court's misapplication of enhancement factors (3) and (9), the sentences imposed are within the statutory range and consistent with the purposes and principles of sentencing, and we accordingly conclude there was no abuse of discretion. In *Bise*, the trial court misapplied the single enhancement factor supporting the sentence. *Bise*, 380 S.W.3d at 708. The sentence was nevertheless upheld because the trial court articulated reasons for the sentence which were consistent with the purposes and principles of sentencing. *Id.* at 709. "The application of a single enhancement factor can justify an enhanced sentence." *State v. John M. Banks*, No. M2019-00017-CCA-R3-CD, 2020 WL 5015888, at *10 (Tenn. Crim. App. Aug. 25, 2020) (citing *State v. Bolling*, 75 S.W.3d 418, 421 (Tenn. Crim. App. 2001)), *perm. app. denied* (Tenn. Dec. 2, 2020). Based on the foregoing, the record supports the judgments of the trial court, and the defendant is not entitled to relief.

II. Probation

The defendant argues the trial court erred in denying probation when it failed to consider any of the appropriate factors in denying an alternative sentence. The State contends the trial court properly denied probation.

A trial court's decision to grant or deny probation is reviewed under an abuse of discretion standard with a presumption of reasonableness when the sentence reflects the purposes and principles of sentencing. *State v. Caudle*, 388 S.W.3d at 278-79. "[A] trial court's decision to grant or deny probation will not be invalidated unless the trial court wholly departed from the relevant statutory considerations in reaching its determination." *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014) (order) (per curiam). The burden of establishing suitability for probation rests with a defendant, who must demonstrate that probation will "'subserve the ends of justice and the best interest of both the public and the defendant.'" *State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (quoting *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)); *see* Tenn. Code Ann. § 40-35-303(b); *State v. Russell*, 773 S.W.2d 913, 915 (Tenn. 1989); *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008).

Generally, probation is available to a defendant sentenced to ten years or less. Tenn. Code Ann. § 40-35-303(a). A defendant who is convicted as an especially mitigated or standard offender of a Class C, D, or E felony is considered a favorable candidate for probation. Tenn. Code Ann. § 40-35-102(6)(A). In determining whether incarceration is appropriate, 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;
>
> (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). Additionally, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed," and "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." *Id.* § 40-35-103(4), (5).

Because the sentence "actually imposed" upon the defendant was ten years or less, he was eligible for probation. Tenn. Code Ann. § 40-35-303(a). However, in imposing

confinement, the trial court failed to state its reasons for denying probation on the record. Although the State argues in its brief that the trial court properly imposed incarceration to avoid depreciating the seriousness of the offenses, the record does not show that the trial court made that finding or found that the circumstances of the offenses were "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense [] outweigh[ed] all factors favoring sentencing other than confinement." *See State v. Trotter*, 201 S.W.3d 651, 654 (Tenn. 2006); *see also State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981). "[T]he key to meaningful appellate review under the abuse of discretion standard is whether the trial court recites a proper basis for the sentence." *Caudle*, 388 S.W.3d at 279. Accordingly, an appellate court should perform a de novo review when the trial court fails to articulate the specific facts upon which it relies in denying probation. *See State v. Tammy Marie Harbison*, No. M2015-01059-CCA-R3-CD, 2016 WL 613907, at *3 (Tenn. Crim. App. Feb. 12, 2016) (conducting a de novo review when the trial court, in denying probation, "stated simply, 'the court finds that [a probationary sentence] would [depreciate the severity of the offense]'"), *no perm app. filed*. Therefore, we will perform a de novo review with no presumption of reasonableness.

In considering whether the circumstances of the offenses were especially violent, our supreme court explained that:

> before a trial court can deny probation solely on the basis of the offense itself, the circumstances of the offense *as particularly committed in the case under consideration* must demonstrate that the defendant committed the offense in some manner more egregious than is contemplated simply by the elements of that offense.

State v. Trent, 533 S.W.3d 282, 292-93 (Tenn. 2017) (emphasis in original). The defendant was convicted of four counts of reckless homicide and two counts of reckless endangerment. Reckless homicide is the "reckless killing of another." Tenn. Code Ann. § 39-13-215(a). A person commits reckless endangerment who "recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." *Id.* at § 39-13-103(a). As relevant to these offenses, our criminal code provides,

> "Reckless" refers to a person who acts recklessly with respect to . . . the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Id. at § 39-11-302(c).

To support a denial of probation based upon a finding that the circumstances of the offense were "especially violent, horrifying, shocking, reprehensible, [or] offensive" the record must demonstrate that the defendant's actions were more egregious than that which is required by the statute. *See Trotter*, 201 S.W.3d at 654. In the present case, while driving by Mr. Gunter, the defendant swerved towards him, hitting Mr. Gunter while he was walking down the street. Mr. Gunter was forced into a ditch on the side of the road and suffered bruising on his legs. The defendant then immediately sped towards a nearby intersection where Ms. Cahoon was pushing her two-year-old son, N.C., in a stroller. The defendant drove over the curb, striking the victims at speeds approaching ninety miles per hour. Ms. Cahoon and N.C. suffered multiple blunt trauma, resulting in their deaths. Additionally, Ms. Cahoon was pregnant at the time of her death, and her unborn child also died when Ms. Cahoon was struck by the defendant's vehicle. After hitting Ms. Cahoon and N.C., the defendant drove his vehicle into the side of the Sustainable Aquatics building where Ms. McCord was working. Because of the multitude of broken glass that surrounded her after the defendant drove into the building, Ms. McCord suffered two cuts that required stitches. At the sentencing hearing, Ms. Cahoon's husband testified to the devastating consequences of the incident and how it negatively impacted his life.

Clearly, the defendant killed Ms. Cahoon, N.C., and Ms. Cahoon's unborn child in an "especially violent, horrifying, shocking, reprehensible, [or] offensive" manner." *Trotter*, 201 S.W.3d at 654. The evidence also demonstrates the defendant's conduct was more egregious than is necessary to establish the reckless elements of the offenses. Accordingly, the record supports a finding that confinement is necessary to avoid depreciating the seriousness of the offenses and that the circumstances of the offenses were especially violent and reprehensible. The defendant hit multiple people with his vehicle, killing three people, before driving into a business.

The presentence report indicates that the defendant had one prior conviction for driving under the influence. Regarding the defendant's social history, the record reflects that the defendant graduated from high school and college, that he had a steady employment history, that he drank alcohol daily and attended two treatment programs, that he tried crack cocaine in 2003 and began smoking marijuana at the age of sixteen. Regarding the defendant's physical and mental health, the defendant reported that his mental health was "poor," complaining that he was "sexually frustrated [], scatter-brained, repressed, social anxiety, manic depression/bipolar disorder (type 1 episodic), psychotic features, easily influenced/hypnotized when sleep deprived, OCD, temper[a]mental, sens[i]tive . . . brutally honest, passive aggressive. Too much." Although the defendant

reported that his physical health was fair, he noted that he had previously been diagnosed with high blood pressure, heart disease, and genital herpes.

Upon our de novo review, we conclude that the trial court did not err in denying probation, and the defendant is not entitled to relief on this issue.

III. Consecutive Sentences

The defendant argues the trial court erred in imposing consecutive sentences. Specifically, the defendant contends the trial court failed to make adequate findings supporting the imposition of consecutive sentences. The State contends the trial court properly ordered the defendant's sentences to be served consecutively.

In *State v. Pollard*, 432 S.W.3d 851 (Tenn. 2013), the Tennessee Supreme Court expanded its holding in *Bise* to also apply to decisions by trial courts regarding consecutive sentencing. *Id.* at 859. This Court must give "deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)." *Id.* at 861. "Any one of [the] grounds [listed in section 40-35-115(b)] is a sufficient basis for the imposition of consecutive sentences." *Id*. at 862 (citing *State v. Dickson*, 413 S.W.3d 735 (Tenn. 2013)).

A trial court "may order sentences to run consecutively" if it finds the defendant is "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high[.]" Tenn. Code. Ann. § 40-35-115(b)(4); *see State v. Wilkerson*, 905 S.W.2d 933, 936 (Tenn. 1995). Before a trial court may impose consecutive sentences on the basis that a defendant is a dangerous offender, the trial court must find "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences . . . reasonably relate to the severity of the offenses committed." *Wilkerson*, 905 S.W.2d at 939. Our supreme court has stated that the trial court must make specific findings about "particular facts" which show the *Wilkerson* factors apply to the defendant. *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

In imposing consecutive sentences, the trial court articulated its reasons, as follows:

> Turning to consecutive sentencing. Again, the court finds that this defendant did not hesitate to commit a crime and the risk to human life was high as demonstrated by the facts of this case.
>
> . . .

> Court finds that the aggregate length of the sentence in this case does reasonably relate to the necessity of protecting society and for the purposes of the Criminal Sentencing Act and is appropriate and necessary to protect this public. The court finds that consecutive sentencing with regard to each sentence, again, is necessary to protect the public, so that would be a total sentence of, what is that, fourteen years, eleven months and twenty-nine days. That's the maximum the law allows.

In imposing consecutive sentences on the basis that the defendant is a dangerous offender, the trial court first determined the defendant had no hesitation about committing a crime in which the risk to human life was high. *See* Tenn. Code Ann. § 40-35-115 (b)(4). The trial court then proceeded to consider the *Wilkerson* factors. Although the trial court stated on the record that an extended sentence was necessary to protect the public from further criminal activity by the defendant, it failed to state the specific facts it found to satisfy its conclusion. *See State v. Scott M. Craig*, No. E2001-01528-CCA-R3-CD, 2002 WL 1972892, at *8 (Tenn. Crim. App. Aug. 27, 2002), *no perm. app. filed* ("A mere statement that confinement is necessary to protect society and that the severity of the sentence is reasonably related to the convicted offenses, without more, is insufficient to justify consecutive sentences."); *Wilkerson*, 905 S.W.3d at 938 (holding the trial court must make "*specific findings* regarding the severity of the offenses and the necessity to protect society before ordering consecutive sentencing under Tenn. Code Ann. § 40-35-115(b)(4)") (emphasis added). Moreover, the trial court failed to find that the length of the defendant's sentence reasonably related to his offenses. Because the trial court failed to make the required findings regarding factor (4), this factor does not support consecutive sentencing. *Pollard*, 432 S.W.3d at 869 ("[W]hen trial courts fail to include the two additional findings before classifying a defendant as a dangerous offender, they have failed to adequately provide reasons on the record to support the imposition of consecutive sentences."). Accordingly, this Court cannot defer to the trial court's exercise of discretion nor presume that the imposition of consecutive sentences was reasonable.

In *Pollard*, our supreme court explained that, when facing this situation, this Court has two options: "(1) conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences; or (2) remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentences." *Pollard*, 432 S.W.3d at 864 (citing *Bise*, 380 S.W.3d at 705 & n.41). Therefore, we will review the imposition of consecutive sentences de novo.

The defendant's actions took three lives: Ms. Cahoon's, N.C.'s, and Ms. Cahoon's unborn child. The defendant took those lives in an extremely brutal fashion by slamming into them with his vehicle while driving ninety miles per hour. The defendant told

Detective Holt that Ms. Cahoon attempted to get herself and young child to safety but was unable to outrun the defendant's vehicle. The injuries sustained by the victims were catastrophic. Additionally, prior to hitting Ms. Cahoon and her son, the defendant also intentionally hit Mr. Gunter, who sustained minor injuries, and after the defendant drove his vehicle into a building, Ms. McCord suffered several cuts that required stitches. When run consecutively, the defendant's total sentence is only fourteen years, eleven months, and twenty-nine days. Based on the facts and circumstances, we conclude that the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and he had no hesitation about committing crimes in which the risk to human life was high. The sentence imposed by the trial court is reasonably related to the severity of the offenses and is necessary in order to protect the public from further criminal acts by the defendant. *Pollard*, 432 S.W.3d at 863; *Wilkerson*, 905 S.W.2d at 939. Following our de novo review, we conclude the trial court did not err in imposing consecutive sentences.

Finally, we must note one problem with the judgments in this case. The trial court merged count three into count two. However, no sentence was imposed in count three. While not required, "the best practice is for the trial court to impose a sentence on each count and reflect the sentence on the respective uniform judgment document." *State v. Berry*, 503 S.W.3d 360, 365 (Tenn. 2015). This eliminates the need for an additional sentencing hearing if the greater conviction is later reversed. *Id.* Therefore, we remand the case to the trial court for entry of a corrected judgment reflecting a separate sentence for count three.

Conclusion

For the aforementioned reasons, the judgments of the trial court are affirmed. However, we remand this case for entry of a corrected judgment as specified in this opinion.

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J. ROSS DYER, JUDGE