IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 12, 2022 Session

**STATE OF TENNESSEE v. KELLYE RHEA CRABTREE**

**Appeal from the Criminal Court for Fentress County**
**No. 20-38 E. Shayne Sexton, Judge**

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**No. M2021-01154-CCA-R3-CD**

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Defendant, Kellye Rhea Crabtree, appeals from the trial court's sentencing and restitution orders connected with her guilty-pleaded convictions for theft over $60,000, theft over $1,000, and official misconduct, arguing that the trial court abused its discretion by ordering consecutive sentencing; finding that she was a professional criminal; denying probation or an alternative sentence; ordering the maximum in-range sentence; and imposing restitution in an ex parte order filed after the sentencing hearing. We affirm the judgments of the trial court regarding consecutive sentencing and the manner of service. However, we reverse the trial court's restitution order and remand the case for a full restitution hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part; Reversed in Part; Case Remanded**

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

Gordon A. Byars, Cookeville, Tennessee, for the appellant, Kellye Rhea Crabtree.

Jonathan Skrmetti, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Jared R. Effler, District Attorney General; and Phillip A. Kazee, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

This case arises from Defendant's misappropriating Fentress County funds, which she had access to as a Fentress County Finance Department employee, between 2014 and 2018. In addition, Defendant misappropriated funds in her role as treasurer for the Kirby Johnson Memorial Ballpark (KJMB). In January 2020, the Fentress County Grand Jury

indicted[1] Defendant for theft of property valued at over $60,000, a Class B felony; forgery of $60,000 or more, a Class B felony; theft of property valued at over $1,000, a Class E felony; and official misconduct, a Class E felony. On June 28, 2021, Defendant entered a guilty plea to Counts 1, 3, and 4, with the length and manner of service to be determined by the trial court; Count 2 was dismissed pursuant to the plea agreement.

The parties filed an agreed stipulation of facts, which was as follows:

**COUNT I - THEFT OVER $60,000, CLASS B FELONY**

> The parties stipulate that [D]efendant committed the offense of [t]heft over $60,000. Specifically, from December 15, 2014[,] through December 9, 2018, [D]efendant, who was the Accounts Payable Clerk for the Fentress County Finance Department, used the Fentress County Walmart Community Credit Card to make unauthorized transactions totaling $237,615.99. Of that total, [D]efendant, without authorization, purchased pre-paid Visa cards totaling $163,041.70. The remaining $74,574.29 of unauthorized transactions involved using the Fentress County Walmart Community Credit Card to purchase items such as food, cigarettes, clothing, personal hygiene items, electronics, entertainment items, home items, and phone cards all for personal use.
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> [D]efendant concealed these unauthorized transactions by issuing checks and signing the name of either the sitting County Executive or the Deputy Finance Director or both, without their consent or knowledge, on 93 separate occasions. These checks were paid on the Fentress County Walmart Community Credit Card on which the unauthorized transactions were made.
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> Both the unauthorized transactions and the subsequent concealment were part of a continuing course of criminal conduct by [D]efendant. As such, all of those acts, both the unauthorized transactions using the Fentress County Walmart Community Credit Card and the subsequent concealment through the signing of county officials' names without their knowledge or permission, are encompassed in Count 1 of this indictment. Count 2 of this indictment is simply an alternate theory of Count 1 and involves no transactions or concealment acts not already encompassed in Count 1. More simply, because the proof in Count 2 would consist of the exact same evidence as the proof in Count 1, Count 2 is dismissed as . . . Defendant is being held accountable for each and every unauthorized transaction and

[1] According to an appendix to Defendant's appellate brief, she was initially indicted in September 2019 for one count of theft of property valued at over $60,000.

concealment act in Count 1. There is no criminal act committed by the [D]efendant that is not encompassed in her guilty plea.

**COUNT 3 - THEFT OVER $1,000, CLASS E FELONY**

The parties stipulate that the [D]efendant committed the offense of [t]heft over $1,000. Specifically, [D]efendant, in her role as Treasurer for the [KJMB] Committee, between the dates of July 17, 2018 - December 12, 2018[,] issued unauthorized checks to herself and signed the President of the Committee's name without his knowledge or permission. [D]efendant engaged in this conduct on 9 separate occasions with the unauthorized checks totaling $2,065.

**COUNT 4 - OFFICIAL MISCONDUCT, CLASS E FELONY**

The parties stipulate that [D]efendant committed the offense of Official Misconduct. [D]efendant, in her role as an Accounts Payable Clerk for the Fentress County Finance Department, a public servant pursuant to T.C.A. § 39-16-402, used that position to commit an unauthorized exercise of official power with the intent to obtain a benefit. Specifically, . . . Defendant used her position to make unauthorized transactions using the Fentress County Walmart Community Credit Card, of which she had access because of her position as a public servant, totaling $237,615.99. Additionally, . . . Defendant used her position as a public servant to issue checks and sign either the sitting County Executive or Deputy Finance Director's signature without their knowledge or permission to pay the bill on the Fentress County Walmart Community Credit Card on which the unauthorized transactions were made.

This guilty plea by [D]efendant holds her accountable for all criminal activity discovered by the Comptroller of the Treasury and Tennessee Bureau of Investigation during their investigation. Furthermore, said investigation did not reveal any accomplices or co-conspirators to [D]efendant's criminal activity.

**Sentencing Hearing**

At the August 16, 2021 sentencing hearing, the parties and the trial court agreed that Defendant was a Range I, standard offender. Fentress County Finance Director Tyler Arms testified that he met Defendant when she was the interim director of the finance office; Defendant became deputy director once Mr. Arms was hired as director, and they worked together for five months. Mr. Arms stated that, for the first ninety days of Mr. Arms'

employment, Defendant received "director pay" equating to a $57,000 per year salary. After ninety days elapsed, her pay dropped to $37,000 per year. Mr. Arms estimated that in 2018, the median income in Fentress County was between $33-34,000 per year.

When asked how the investigation into Defendant's stealing from Fentress County began, Mr. Arms stated, "So it actually originated in court through her ex-husband, I believe that ran during court. And as he came back into the courtroom, he was telling people that he was not the criminal . . . she was." Mr. Arms stated that a court employee called him and that he then spoke to Defendant about the allegation and asked her for invoices. According to Mr. Arms, Defendant responded that "she reconciled her receipts to the invoice and then shredded the invoice." Mr. Arms stated that he looked into the issue further during a day Defendant was off from work and that he "started finding issue upon issue" and referred the situation to the Tennessee Bureau of Investigation and the State Comptroller's Office.

Mr. Arms testified that shredding invoices in the manner Defendant described was not a sound accounting practice. When asked how the sum of money Defendant took would have affected Fentress County's tax rate for 2018, Mr. Arms stated, "In 2018, we had a penny value of just over $30,000 . . . . So what that means is to make that up at that time you would have to raise 7.8 cent of property tax the next year in order to accumulate what was gone within those four years." He added that the county had a "negative fund balance" between 2014 and 2018, "meaning we hit our savings or fund balance for roughly [$]250,000 across all those years." Mr. Arms said that between 2019 and 2021, they had added $1.9 million to the county fund balance due to "new management policies and new internal controls and more diligence with our money as a county government." Mr. Arms affirmed that, to his belief, Defendant's theft negatively impacted the county fund balance.

Mr. Arms testified that he worked closely with Defendant and attended meetings with her; he agreed that Defendant would have become aware of the theft's effect on Fentress County's financial operations during those meetings. Mr. Arms elaborated that Defendant was a long-term employee of the Finance Department, that Defendant trained Mr. Arms during his first year as director, and that their "big concern" at that time was "a fund balance issue and trying to . . . pass a balanced budget." Mr. Arms said that Defendant was "well aware of how the fund balance worked and how money missing out of a budget could affect a fund balance."

Mr. Arms testified that Fentress County's theft insurance carrier had paid $81,195 toward the amount Defendant took, bringing the county's out-of-pocket loss to $156,420.99. Mr. Arms stated that he had lived in Fentress County his entire life except for his college years, that Defendant's investigation and prosecution had created community interest, and that the county commission was asked about Defendant's case "probably daily." Mr. Arms noted that the county commissioners forwarded questions to

him about the status of the case "pretty frequent[ly]." He denied that any other case had generated that level of interest in his time living in Fentress County.

On cross-examination, Mr. Arms testified that the Comptroller Office's report included conclusions regarding the Finance Office's policies that led to change within the department. Mr. Arms stated that, before he became director, the office had "issues with internal controls," which he described as how bank cards and cash were handled, "how things are reconciled, [and] the segregation of duties that you have." He explained that at the time Defendant worked there, the finance office had five employees, not including the director, and that Defendant as the accounts payable clerk was solely responsible for reconciling accounts. When asked whether an external method existed to verify that the accounts were balanced, Mr. Arms responded, "Not really." Mr. Arms testified that, at the time of the hearing, they had "very limited cards" he could access online and reconcile and that the accounts payable clerk paid the bill for those cards.

When asked how he computed the average income of Fentress County residents, Mr. Arms testified that he had seen "budget book and census data, economics, demographics" for 2021 in connection with a project to provide online data to the public. He stated that based on those documents, the average income for a family of four was between $35,000 and $36,000, and that "just thinking back, inflation and the growth rate that we have, a few years ago that's where I say 33, 34." Mr. Arms said that the data he examined came from "Data USA or the census web site."

Mr. Arms testified that the KJMB Fund was not insured by the county government's policy. He stated that the insurance carrier was only contractually obligated to reimburse them for thefts occurring in the current fiscal year; he noted that the insurer voluntarily paid for seventeen months in total.

Tennessee Comptroller of the Treasury Senior Investigator Kelsey Earl testified that she investigated Defendant's case, which involved the Fentress County government and the KJMB Fund. Ms. Earl testified that the Fentress County Finance Department's office functions included "accounts payable, payroll, budgeting, and employee benefits, among other things." She explained that Defendant was the accounts payable clerk, who was responsible for paying bills, issuing checks and having them signed by two authorized individuals, entering expenses into the budget, allocating expenses to budget line items, maintaining purchase orders, and entering them into the accounting system.

Ms. Earl elaborated that purchases through the county would occur when an employee requested a purchase order, which was entered into a "manual logbook" until the purchase occurred. In the case of the county Walmart Community Credit Card, the purchase order would be entered electronically. Ms. Earl said that oftentimes in the

electronic system, the vendors' names listed for various purchase orders had been changed to Walmart.

Ms. Earl testified that in "many instances," Defendant did not obtain the two required signatures on county-issued checks. She stated that Defendant forged the signatures of the county executive, his executive assistant, and the finance director.

Ms. Earl stated that, according to her public report, Defendant misappropriated "at least $239,680.99, which in the super[s]eding indictment was increased to" $243,148.17. She also found that Defendant signed other individuals' names on 181 checks without their knowledge, which totaled $120,105.19. Ms. Earl stated that, in addition, "expenditures totaling $13,324.40 were questionable[.]" Relative to the KJMB Fund, Ms. Earl said that Defendant, who was the treasurer, forged the president Richard Tallent's signature on nine checks made out to herself, totaling $2,065.

PowerPoint slides composed by Ms. Earl for her presentation to the grand jury were received[2] as exhibits. Ms. Earl stated that Defendant purchased prepaid Visa gift cards at Walmart and loaded $163,966.25 onto them. When asked how Defendant spent the money on the cards, Ms. Earl recounted the following purchases:

> American Eagle Outfitters; Aaron's; . . . Advance Auto Parts; several Amazon purchases; iTunes; sporting good[s] stores such as Academy . . . and Cabela's; discount fireworks; tickets to Dollywood; marina purchases at Eagle Cove and Sunset Marina; Etsy; Expedia; Fashion Nails; Geico Auto Insurance; pharmacy purchases at Hall Family Pharmacy and Walgreens; [indiscernible] Auto Sales; Kirkland's; Little Kobe Japanese Restaurant; Maurice's; a medical group; Potter's; Beach Body; Smoky Mountain Knife; Sub Hub; The Boutique; The Resort at Governor's Crossing in Sevierville; TJ Maxx; a tobacco shop; Tractor Supply; Twin Lakes; Ulta; Under Armour; Verizon; tickets to Grand Ole Opry; Volunteer Energy Corporation; and Kohl's.

When asked to describe the items Defendant purchased directly from Walmart, Ms. Earl stated the following:

> She purchased shrimp; steak; premium tenderloins; ribs; thick-sliced bacon; chicken breasts; candy; cigarettes; personal hygiene items such as women's and men's razors; makeup; hair care products such as shampoo and conditioner; pregnancy test; clothing such as bras, underwear, capris, leggings, shorts, dresses, sunglasses; electronic and entertainment items such

[2] The slides themselves were not included in the appellate record; however, because we are remanding the case for a restitution hearing, they are not necessary to our review.

> as an Otterbox iPod case, . . . a phone car charger, video games, DVD movies; toys such as baby dolls, Nerf products, board games; home items such as wedding rings . . . , propane gas, lawn and garden supplies, furniture, home decor, kitchen supplies; Mucinex; Claritin; Advil medicine and vitamins; Tide pod laundry detergent; pet supplies such as food, medicine, and puppy pads; craft supplies; and additional gift cards and iTune[s] cards.

Ms. Earl stated that, between December 15, 2014, and December 20, 2018, Defendant executed 993 total unauthorized transactions using the county's Walmart Community Credit Card.

Ms. Earl testified that 277 transactions occurred on weekends, federal holidays, days when the county's offices were closed, or days when Defendant was on leave. She stated that forty-five Walmart transactions occurred at locations outside Jamestown. Ms. Earl said that, although government expenditures normally did not incur sales tax, "in the instances of the 0-7 credit card for Fentress County," $5,435.33 in sales tax was charged; she noted that this sum was included in the total funds misappropriated in the report. Ms. Earl testified that she also found that the finance office "[m]anagement did not provide adequate oversight or use . . . sufficient operational controls to promote accountability for the use of funds," as well as a failure to pay "obligations" on time.

On cross-examination, Ms. Earl testified that a second investigator in her office assisted her in analyzing the underlying data and preparing the summaries shown on the PowerPoint slides. She stated that the Comptroller Division of Local Government Audit was responsible for conducting annual audits of county expenditures. She added that within the Fentress County Finance Office, "there were checks and balances . . . that were supposed to be in place but did not occur because that was [Defendant]'s job." When asked whether an additional employee in Defendant's role would have reviewed her actions, Ms. Earl replied, "[Defendant] was not supposed to make purchases at all. She was supposed to be the reconciling step between the statements and the receipts[.]"

When asked how Defendant's "doing something so far outside her duty" was overlooked for four years, Ms. Earl testified that Defendant "had control over the entire purchasing process"; that she was in possession of and responsible for the county's credit cards; that she had access to the accounting records; and that she manipulated the accounting records to conceal her theft. Ms. Earl noted that Defendant's making purchases was not discovered until the investigation began because Defendant had secretly obtained a third Walmart credit card on the county account.

Fentress County Executive, Jimmy Johnson, stated that he had lived in Fentress County most of his life, that he had been in his current position for three years and that, previously, he was a county commissioner for four years. He stated that he "was on the

fire department" for thirty years and that he was involved with "Little League, Youth Services" for twenty-five years.

When asked to describe how Defendant's theft adversely affected the county, Mr. Johnson testified that Fentress County had always been "distressed," although he noted that they were "out of that at this time." He stated that the theft averaged $60,000 per year, which was "almost two cents of tax revenue." Mr. Johnson said that Fentress County had one of the lowest tax rates in the state and the county commission tried to use every penny on county services. He added that "when you need to take pennies away from it, it makes it pretty hard to take care of . . . what you need to do."

Mr. Johnson testified that he interacted often with the public and that "a lot" of public interest existed relative to Defendant's case. He stated that

> several people have called. And . . . you see them someplace, they want to know what the status of the trial and such is. At that point they . . . don't want to see things brushed under the rug, they want to see, you know, something come to . . .
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> Not saying an example made, but saying that the -- the crime gets, you know, what it should have . . . .
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> When you take that much money out of the county, it . . . affects a lot of people. It really does . . . .

Mr. Johnson estimated that the median income in Fentress County was $19,000 per individual or $35,000 for a family. He noted that when taxes increased or a household was otherwise financially burdened it "just makes it that much harder."

Mr. Johnson agreed that other charges were pending against unspecified individuals for taking money from Fentress County. He stated that the county government had job vacancies and was actively hiring.

When asked how the county commission "prioritize[d]" Defendant's paying restitution or being punished with incarceration, Mr. Johnson stated that if it were possible to pay the money back in a lump sum, that would be good, but that if restitution would take thirty or forty years, he believed the citizenry "would rather see something else happen besides a – a payoff of it, you know, whatever that is recommended."

On cross-examination, Mr. Johnson clarified that Defendant's theft created the potential that the "tax base" would have to be raised, not that it had, in fact, been raised. To Mr. Johnson's knowledge, no taxes had gone up as a result of the theft. He noted that

"[y]ou could look at using that type of money over four years . . . . You're looking at the possibility of if you . . . could give raises, you can make other jobs. But if the money's not there, you can't." Mr. Johnson discussed that, unrelated to the theft, property values had been reassessed at a lower rate, causing the county budget to lose $300,000 annually, and that the approximate $60,000 per year of theft added to that amount. He agreed that it "puts the county in a bind[.]"

Mr. Johnson reiterated his belief that he, individually, and the citizens of Fentress County would prefer that Defendant serve a sentence in confinement. He agreed that he would rather Defendant be in custody than accept restitution of $100 or $200 per month. When asked whether Fentress County could use $500 per month, Mr. Johnson replied, "Well, we could use a hundred dollars a month. But it's not been paid so far." Mr. Johnson stated that a "possibility" existed that such small sums could be useful to the county.

When asked whether he would rather have the state "taxed on what it costs to house [Defendant] and the citizens of Fentress County have to offset her restitution around than [have] her be able to work in the community and pay the money back," Mr. Johnson answered affirmatively. He stated that the citizens benefitted by Defendant's going to prison because she stole from them. Mr. Johnson stated that he would personally feel better in that scenario and that he believed the same of the public. He said, though, that "when people steal[] off someone, it needs to be paid back." Mr. Johnson agreed that, if Defendant had a job allowing her to pay "thousands of dollars a month," the money stolen was more likely to be paid back. He clarified that his "problem" was with the amount of time it would take to pay restitution; he added that, "if you steal from someone, you're expected to get what's coming with it." Mr. Johnson agreed that a felony conviction was not enough and that Defendant needed to be incarcerated.

Richard Tallent, the president of the KJMB baseball league, testified that Defendant was the league treasurer, that she began writing unauthorized checks to herself, and that she forged Mr. Tallent's signature on the checks. Mr. Tallent stated that he became aware of the forgeries when he received a telephone call "to freeze our account once all this had started up." He explained that his penmanship was difficult to replicate, and he identified a copy of a check bearing his forged signature.

Mr. Tallent testified that, as a result of Defendant's case, none of the remaining board members wanted to serve as treasurer because they "don't want access to money and they don't want to be held responsible if something's not right." He said that the $2,065 stolen was "a ton of money" for the ballpark. Mr. Tallent noted that a quantity of cash also came into the organization and that he did not know if the $2,065, which only accounted for the forged checks, was the true amount stolen. He denied that Defendant had made any effort to pay back the money, and he had not spoken to her since he was alerted to the theft.

On cross-examination, Mr. Tallent testified that the bank talked to him about "a process" for fraud insurance and that "none of them had ever . . . helped me to get that money back through the bank for that situation[.]" He acknowledged that he had not followed up with the bank and explained that "they said they would make contact with me. But truthfully, I don't know . . . how I could go about that." Mr. Tallent stated that unspecified people at the bank "said they would try to put me in contact, and I never heard anything else back from the bank[.]"

When asked whether he would rather have the money back or have Defendant go to prison, Mr. Tallent responded that "she's probably better in jail" to prevent her from stealing from others. He noted that the money could be replaced, but the damage of lacking a treasurer was "pretty long-term[.]"

Department of Children's Services (DCS) family support services worker Lori Looper testified that she was assigned a case involving Defendant in July 2021 after the previous caseworker transferred to another position. Ms. Looper stated that DCS received a referral to the family and "initially removed the children from the father and restrained his access and gave [Defendant] custody." Ms. Looper stated that Defendant had "not maintained good contact" with her in spite of "several" requests to do so. Ms. Looper noted that, although Defendant agreed each time to maintain better contact, she did not follow through. Ms. Looper cited as an example that Defendant was supposed to message her the previous Friday with the contact information of where her children would stay if Defendant were sentenced to prison. Defendant had not provided the information at the time of Ms. Looper's testimony.

Ms. Looper testified that she was unable to "verify the services [Defendant was] reporting that she [was] participating in" because Defendant had not signed an information release. Ms. Looper said that, although Defendant had previously agreed to sign a release, Ms. Looper had been unsuccessful in her attempts to contact Defendant about obtaining the release.

Ms. Looper testified that, during an unannounced home visit the previous week, she heard "a bunch of people moving around inside the home, and a gentleman left through the back door" as she approached the front door. Defendant told Ms. Looper the man's name. Ms. Looper stated, though, that she had no concerns about the children's safety relative to Defendant's "associates." Ms. Looper said that Defendant was in a romantic relationship with her children's father. When asked if Defendant had been "forthcoming" with information about her children's father, Ms. Looper responded, "I can't verify that because he's not maintained contact with me either. She says that she gives him the messages that I give to her for him, but he's yet to contact me. But he sees the children every weekend." Ms. Looper opined that she was unsatisfied with the level of cooperation she had received from Defendant.

On cross-examination, Ms. Looper testified that Defendant had three children, two of whom lived with her; they were two years old and between nine and eighteen months old, respectively. She agreed that Defendant was their primary caretaker. According to Ms. Looper, Defendant's last court date was "supposed to be" August 9.[3] She disagreed that, at the scheduled hearing, DCS would have sought to close the case. Ms. Looper acknowledged that Defendant maintained custody of the children, and they had not been removed from her custody at any point. Ms. Looper stated that Defendant's case had been open for more than one year. When asked whether she was required by regulations to "begin staffing a [Termination of Parental Rights]" if Defendant was not "complying with services," Ms. Looper responded, "It's a non-custodial case." Ms. Looper did not remember if regulations required her to convert the case to a custodial case if Defendant was not cooperating. Ms. Looper stated that Defendant was not compliant in attending therapy sessions since Ms. Looper had been assigned the case on July 1, and she did not know if Defendant attended the therapy sessions previously. Ms. Looper clarified that, when she was assigned the case on July 1, Defendant had missed her last scheduled therapy appointment and had not called the office to reschedule. Ms. Looper admitted that she had "very little knowledge" of what happened before July 1.

Ms. Looper testified that, since July 1, Defendant had communicated with her three times. Ms. Looper did not have trouble finding Defendant when she conducted unannounced home visits. Ms. Looper stated that she was unable to verify whether Defendant attended a support group because the agency required an internal release form and would not accept the release Defendant signed for DCS. Ms. Looper said that she notified Defendant of the need for another release the "Friday or Thursday" before the sentencing hearing. When asked again whether Defendant failed to maintain contact, given that she saw Ms. Looper the Thursday before the sentencing hearing, Ms. Looper stated that she conducted an unannounced home visit after "several attempts to contact" Defendant.

Ms. Looper testified that Defendant's DCS case was related to her being the victim of domestic violence and that this was the reason Defendant's children were not removed from her custody. Ms. Looper said that the father of Defendant's children was allowed court-ordered supervised visitation. She stated that, to her knowledge, Defendant had not violated a no contact order with her children's father.[4] Ms. Looper stated that Defendant lived with the grandparents of her children's father. She acknowledged that the juvenile court judge had heard proof of unspecified facts related to the DCS case and had taken "no adverse action" against Defendant; she added, though, that she planned to "update the court." Ms. Looper said that Defendant had completed a domestic violence class and had been prescribed mental health medication. Ms. Looper testified that, during her time

[3] The sentencing hearing occurred on August 16, 2021.

[4] It was unclear whether the no contact order was obtained by DCS or based upon an order of protection related to the domestic violence.

working on Defendant's case, Defendant was unemployed and had not asked DCS for help obtaining employment. She acknowledged that she did not know what happened prior to that time.

Angela Wade testified for the defense that she was the grandmother of Defendant's two younger children, who were two years old and seven months old. Neither of the children attended daycare. She had known Defendant for three years; she was unsure whether the theft case had commenced at that point. Ms. Wade stated that Defendant lived with Ms. Wade's mother, or the children's great-grandmother. Ms. Wade saw Defendant every one or two days. She described Defendant's caretaking responsibilities as a "24-hour-a-day-thing." Ms. Wade stated that Defendant had not worked outside the home during the time they had known one another and that she had not discussed with Defendant any efforts to obtain employment. Ms. Wade thought that Defendant "tried with the Dairy Queen one time," but she did not know if Defendant's efforts were successful.

Relative to the DCS case, Ms. Wade testified that her son had visitation with the children and that the DCS caseworker visited Defendant at home. Ms. Wade stated that Defendant had done what DCS required of her, including meeting with them in person and speaking over the telephone and through text messages. Ms. Wade noted that Defendant's telephone had broken recently and that she had been unable to contact DCS. Ms. Wade said that she watched the children while Defendant attended counseling sessions and child and family team meetings. Ms. Wade had not seen Defendant take any mental health medication.

Ms. Wade testified that Defendant's children were very attached to Defendant, that their relationship was "[v]ery caring," that Defendant interacted with the children "all the time," and that Defendant was "all [the children] kn[e]w." She noted that the two-year-old cried when Defendant left and that both children needed her. Ms. Wade stated that her mother was seventy-one years old, that her father also lived in the home, and that her father had "the beginnings of dementia." Ms. Wade said that Defendant helped Ms. Wade's father get around the house and use the bathroom; she noted that Defendant was "a huge help."

Ms. Wade testified that, if Defendant were ordered to serve her sentence in confinement, Defendant's children would live with Ms. Wade's sister. Ms. Wade said that she would worry about the children in that scenario because they were so attached to Defendant. She stated, though, that "[i]t's going to be a village" caring for the children. Ms. Wade agreed that she would also worry about her parents and her father's care. She elaborated that they did not have money to hire a caretaker and that, although Ms. Wade's mother "does what she can do," caretaking was physically difficult for her. Ms. Wade opined that, in light of Defendant's young children, she should serve a probationary sentence.

On cross-examination, Ms. Wade testified that she did not "ask a lot of questions" about how her son met Defendant; she noted that "from hearsay . . . they talked when he was in jail or something" but that she did not know the exact circumstances. Ms. Wade thought that, at the time, her son was in jail for violating his probation related to a drug conviction for "sale and delivery." Ms. Wade added that her son also had a "domestic" conviction and "years and years ago, I think there was a . . . theft."

Ms. Wade maintained that she did not discuss with Defendant her employment search. She did not know if Defendant sought federal stimulus money to pay for childcare so that she could work. When asked how involved her son was with Defendant's children, Ms. Wade stated that he visited but that he was not involved in their care.

Ms. Wade noted again that she did not know "anything about all of this stuff" related to Defendant's charges. She acknowledged, though, that Defendant would have become pregnant with her seven-month-old child after she was charged in September 2019. When asked whether Defendant had ever expressed remorse for stealing from the KJMB, Ms. Wade denied knowing about that theft. When asked whether Defendant had expressed remorse for stealing from Fentress County, Ms. Wade reiterated that she did not talk to Defendant about it.

On redirect examination, Ms. Wade testified that her conversations with Defendant were limited to family dynamics, childcare, and the DCS case. She stated that her "number one concern" was Defendant's children.

Defendant testified that she lived in Fentress County her entire life until she moved to Byrdstown six months before the sentencing hearing. Defendant attended two years of college after high school studying elementary education. She worked for the Fentress County Executive for eight years beginning in 2002, after which she worked for the finance department for eight years. She noted that, in spite of having no formal education, she learned about the county finances in the county executive's office, which made her a "good candidate" for the finance office position.

Defendant testified that she was in good physical health and that she took antidepressant medication. She stated that caring for her children "takes up every single minute of [her] day" and that she helped Ms. Wade's parents, particularly her father.

Defendant testified that she had applied to various employers in the pendency of her case, noting, "Of course, I have been pregnant twice and able to stay home with both of those boys." She stated that, recently, she had submitted more applications and "just kind of missed the mark." Defendant added that she had a "pretty good job opportunity" at a Dairy Queen in Byrdstown, which was aware of the case but needed workers. She said,

"[T]hey've pretty much told me that I have a job there when I want one." Defendant agreed that, if she received a probationary sentence, she would work there. She thought that the position was full-time and paid between eight and nine dollars per hour. Defendant said that the restaurant was ten minutes from her home and that the location was "convenient . . . to be able to maintain all the rest of [her] responsibilities[.]"

Relative to her income, Defendant testified that she had received federal stimulus and child tax credit funds over the past two years. She stated that, before moving to Byrdstown, she lived in her father's house, where she only paid the utility bills. Defendant said that she moved to Ms. Wade's parents' house in January 2021, after she had a c-section and needed more help. Defendant stated that she had "minimal bills" other than necessities for the children and that she received state assistance through WIC, TennCare, and food stamps. She described the family's financial situation as "comfortable."

Defendant testified that the DCS case was opened in December 2020, when "[t]here was a domestic between me and the kids' father." She said that her children's father was charged with domestic assault, and that in January 2021, DCS removed the children from his custody and granted full custody to Defendant. Defendant stated that the only requirement imposed upon her by DCS was to attend a domestic violence class, which she completed. Defendant said that, when DCS asked if she was interested in additional services, she requested counseling, and it was "tacked on that I was doing that." She stated that she also reached out to another local agency and began an additional domestic violence class. Defendant noted that neither the counseling nor the second class was required by DCS.

Defendant testified that, to her understanding, her August family court hearing was a status hearing to determine if the DCS case could be closed. She stated that the hearing was continued because her attorney had COVID.

Defendant testified that she met Ms. Looper at the end of June at a child and family team meeting. She noted that she had about six caseworkers since the beginning of the DCS case. Defendant said that Ms. Looper came to her home two weeks later to see the children, that Ms. Looper "went over several different things," and that "everything was fine." Defendant added that Ms. Looper came back to the house the week before the hearing, that Ms. Looper briefly saw the children, "and that was it."

Relative to Ms. Looper's concern about keeping in contact with Defendant, Defendant testified that she did not have a cell phone for the previous three weeks and that she did not have a lot of contact with her previous caseworkers outside of unannounced home visits. Defendant noted that she was not "really used to having to reach out" to a caseworker. Defendant agreed that she had completed any obligations ordered by the juvenile court judge and that she had no problem following the court's orders.

Defendant testified that in December 2018, she arrived at work, and Mr. Arms asked for her keys, informed her that they were investigating "some issues," and stated that he might be in contact at a later date. On December 21, Defendant received a letter terminating her employment. Defendant stated that she was unsurprised and knew they had discovered the thefts.

Defendant testified that, the first time she used the Walmart Community Credit Card, she was about to lose her vehicle. She noted that her husband at the time did not contribute to the bills and that she was "scrambling[.]" Defendant averred that she intended only to use the card once and pay it back but that, when she was not caught, she kept doing it. When asked why she did not stop, Defendant responded that she was unsure. She stated that, at times, she wanted to stop because she knew she would be caught and "knew what a terrible person I was[.]" Defendant agreed that she had admitted her guilt, and she denied ever having "prior allegations of misconduct" not included in her guilty plea.

Defendant testified that in September 2019, she spoke to a TBI agent, who informed her that she had been indicted and needed to turn herself in to the police. Defendant's older son was three weeks old, and the agent urged her to post bond so that she would not be incarcerated. Defendant stated that she had turned herself in and had never missed a court appearance. Defendant affirmed that she knew she would be required to pay all or a portion of the money back. She said that she planned on obtaining a job or multiple jobs and "do[ing] whatever I have to do to make it right."

Defendant testified that she had not made restitution payments while the case was pending because "if I hadn't pled guilty or if I hadn't been convicted of it, me paying anything towards that would automatically make me guilty." She averred that, in the month between the guilty plea hearing and the sentencing hearing, she did not have excess funds with which to begin restitution payments.

When asked why the trial court should grant her an alternative sentence, Defendant testified that she could not make restitution payments if incarcerated, that she was certain she could get a job, that she had always been a hard worker, and that she was ashamed and embarrassed of the trust and respect she had lost. She stated, "[F]irst and foremost . . . I want to pay back whatever the [c]ourt decides[.]" Defendant added that she was her children's "whole world," that she arranged babysitters when she had appointments that they could not attend, and that the longest she was away from her children was for court.

Defendant testified that her children's father had visitation "at [Defendant's] convenience," although the visits were supervised. She stated that he saw the children as often as possible within the children's established schedule. Defendant stated that, if she were not released after the sentencing hearing, the children would live with an aunt and

uncle, who saw the children daily when they visited Ms. Wade's parents. Defendant agreed that the juvenile court was aware of the arrangement.

Relative to Ms. Wade's father, Defendant testified that, when Ms. Wade's mother ran errands, Defendant stayed upstairs with Ms. Wade's father, cooked meals for him, and made sure he did not fall while going to and from the bathroom. Defendant added that she also ran errands for Ms. Wade's mother and cleaned the house. Defendant denied that anyone else was available to provide the same degree of care for Ms. Wade's father and Defendant's children. Defendant stated that she was not nursing her younger child.

On cross-examination, Defendant testified that the first unauthorized purchase she made was in December 2014 and that she bought fresh fruit. She agreed that, in her sentencing memorandum, she indicated that she was originally motivated by providing necessities for her family. She agreed that, on December 17, 2014, she purchased a $490 Visa gift card. She stated that she used this sum toward her car payment, which was three payments in arrears. Defendant estimated that her salary at the time was $28,000 or $29,000. When asked whether her salary was higher than the average Fentress County citizen, she responded, "I guess."

Defendant acknowledged that she abused her positions in Fentress County and the KJMB to accomplish the thefts. The prosecutor recited in detail the purchases Defendant made beginning on December 26, 2014, and Defendant admitted that each of the purchases was not for necessities.

Defendant testified that she met her children's father when he was a jail trustee helping to move the finance office furniture. She stated that they spoke a couple of times when he was incarcerated and that they resumed speaking after his release. She noted that they only spoke and that "[t]here was nothing out-of-the-way." Defendant agreed that her youngest child was conceived after she was indicted in this case. Defendant stated that she had a sixteen-year-old son, of whom she had custody, but who lived with his grandmother in Jamestown. Defendant explained that she did not have many family members in Jamestown and that, when she moved to Byrdstown to get help with her younger children, her oldest son had been staying with his grandmother "off and on," and they had decided to have him stay permanently. Defendant agreed that she was not involved in taking care of him on a daily basis.

Defendant acknowledged that Fentress County was owed $237,000, minus the amount covered by insurance, and that the KJMB was owed more than $2,000. She agreed that more than one victim existed because Fentress County was composed of its citizens. Defendant stated that she had no physical limitations preventing her from working full-time. When asked whether she held a job since she was fired from the finance office, Defendant stated that she had done "some odd jobs for people," including cleaning houses

and babysitting. Defendant said that, after she was fired in December 2018, she found out that she was pregnant. She noted that her children's father was working at the time and wanted her to stay home with the baby, so she did not "necessarily have to work."

Defendant testified that she had not saved any money from her odd jobs to pay restitution. She stated that she was unable to pay anything toward restitution on the day of the hearing.

Relative to Ms. Looper, Defendant acknowledged that she had not kept in contact; she noted, however, that she explained to Ms. Looper that her cell phone was broken and that she had contacted Ms. Looper "several times" previously "just to let her know, you know, 'Hey, I'm in contact.'" Defendant stated that Ms. Wade's parents had a telephone and would have allowed her to use it.

Defendant testified that she submitted between ten and twenty online job applications to Amazon, a florist website, and work-from-home jobs. Locally, Defendant said that she had applied to work at a hotel, with a lady who cleaned houses, and Dairy Queen. She estimated that she had personally visited between five and ten establishments to apply for a job. Defendant stated that no one would hire her, that she "wasn't aware of any childcare money," and that some jobs paid so little that her entire paycheck would be spent paying for daycare. Defendant acknowledged her testimony on direct that the family was financially comfortable, but she noted that they were "not living [an] extravagant life by any means." When asked whether a comfortable person was not as motivated to work, Defendant replied, "You could say that."

When asked whether she cooperated with the TBI and Comptroller's Office investigators, Defendant testified that she spoke to Darby Hutchinson but that she did not give an interview. Defendant acknowledged that she conducted more than 900 unauthorized transactions and that she "really [didn't] have anything to show" for it. She agreed that she had led an "extravagant lifestyle" using the stolen funds.

On redirect examination, Defendant testified that her theft charges and convictions appeared on background checks. She stated that prospective employers asked for the status of the case and that she had to disclose the information. Defendant said that it "put a hardship" on her ability to obtain employment. Defendant denied having any prior criminal history or having committed any crimes while released on bond. She affirmed that, if she were to receive an alternative sentence, she would comply with the court's orders and do "[e]verything in [her] power" to make restitution payments.

The presentence report reflected that Defendant had no criminal history, that she graduated from high school and attended some community college, that her health was good apart from her depression diagnosis, that she took antidepressant medication and

attended therapy, and that she did not use illegal drugs. Defendant reported that her father and Ms. Wade's family were sources of support, that she lived with Ms. Wade's parents, and that her bills were minimal. The STRONG-R assessment rated her a moderate risk to reoffend "with moderate in family."

After the parties presented argument, the trial court made the following remarks:

> And I have some comments I want to make before I take a short break . . . . I do want to say a few things about — about the sentencing. We have . . .
>
> I hope those that are interested[5] in what we've been doing here, [are] able to see the analysis argued by both sides. Every court in Tennessee . . . must follow a schematic on how we render a sentence. It isn't feeling. You've heard a couple of witnesses talk about, you know, what the citizens of Fentress County want; what they might want.
>
> And — and I understand that, as a citizen of a county, a taxpayer. Yes, I get that. Except judges can't fall into that. We have to look at the ostensible facts and apply the law to those facts and — and come up with justice, not how we feel.
>
> So I'm — I'm not saying I don't appreciate what those — what the citizens of Fentress County feel[.] The same time, my job is a little different. I have to decide if there are factors that support what each side is saying in terms of the length of sentence and manner of service.
>
> So I want to say that before I take the break, that each side has made a very able presentation of what I need to consider.

**Trial Court's Findings and Sentencing Order**

At the sentencing hearing, the trial court found that, as a Range I offender, the range of punishment in Count 1, theft over $60,000, was eight to twelve years, and in Counts 3 and 4, theft over $1,000 and official misconduct, the range was one to two years. Relative to enhancement factors, the court applied factor (1), that Defendant had a prior history of criminal behavior and gave it "some weight," finding that Defendant engaged in almost 1,000 instances of theft over a period of time. *See* Tenn. Code Ann. § 40-35-114(1). The court also applied factor (3), that the offenses involved more than one victim, finding that "that has been shown through the separate counts[.]" *See* Tenn. Code Ann. § 40-35-114(3). The court applied factor (6), that the amount of property taken was particularly great,

[5] Based upon other comments the trial court made, it was apparent that some number of observers were in the gallery during the sentencing hearing.

finding that Count 1 charged theft of property over $60,000 when Defendant took about $240,000. *See* Tenn. Code Ann. § 40-35-114(6). The court also applied factor (14), that Defendant abused a position of public trust, only to Counts 1 and 3; the court noted that abuse of public trust was an element of Count 4, official misconduct. *See* Tenn. Code Ann. § 40-35-114(14).

Relative to mitigating factors, the trial court found that it was "inherent within the offense[s]" that Defendant's conduct neither caused nor threatened serious bodily injury; the court noted that it "certainly will take note" that the offenses were non-violent. *See* Tenn. Code Ann. § 40-35-113(1). Regarding Defendant's motivation to provide necessities for her family, the court stated that, "if that were the initial basis, it fell quickly" and that Defendant's purchases had "very little" to do with the family's necessities. *See* Tenn. Code Ann. § 40-35-113(7). The court declined to apply the factor, noting that "[w]hatever largess the family received, it was due to [Defendant's] greed, frankly, taking advantage of a situation and continuously . . . engaging in the same type of conduct."

The trial court ordered a ten-year sentence in Count 1 and two-year sentences in Counts 3 and 4. Relative to consecutive sentencing, the court noted that it was "prepared to find" that Defendant was a professional criminal who had devoted her life to criminal acts as a major source of her livelihood. The court stated that, although Defendant had no criminal record before 2014, between 2014 and 2018, she "devoted her life to a life of crime" and had "received in her ill-gotten gains double what she would normally have gotten through her payroll." The court ordered Count 1 and Count 3 to run consecutively, with Count 4 to be served concurrently because it covered "the span of . . . both thefts," making the effective sentence twelve years at thirty percent service.

Relative to alternative sentencing, the State and the trial court discussed that Defendant was not eligible for diversion in her Class B felony theft conviction but would be eligible in her two Class E felony convictions. After hearing argument, the trial court stated the following:

> Now, the . . . ma[nn]er of service. This has been presented as — as a tragedy for the Defendant in some respects. We have young children and we have families who are in disarray. One of the most persuasive parts of — of my ruling is going to be the Defendant . . .
>
> And I -- and one thing I do want to say. Expecting . . . Defendant to pay [restitution] in the interim before the plea would be unreasonable. Now, we only have a month out, so that's not part of this. We're not talking about money here.

We're talking about maintaining and conducting oneself in a manner that shows an interest in being an integral part of community and — and part of a family. And I see none of that here. I see someone . . . who is totally disengaged from culpability as to what she has done and what — as to what her responsibilities are going forward. I'm not talking about money; I'm not talking about paying in the interim. I'm talking about how you put your life back together.

Nothing. Nothing.

It's been argued . . . [that] Defendant can't find gainful employment because of this.

Yes. That's right. That . . . is a consequence in engaging in this kind of behavior.

And if you look further into the proof, what I heard here today is not only the start of a criminal enterprise, but the — but the momentum of gaining more and more through the criminal enterprise. And it's my opinion that she was not going to stop until she was caught.

Many times throughout this that the General noted in his argument that, you know, it could have stopped after the 400th, the 30th, whatever. All true. And . . . it's argument; I understand that. But it's true.

When someone decides . . . , "I'm not going to do it anymore," . . . you just stop.

But not this one. Not [Defendant]. She kept going and was going to go. And even when she was confronted . . . by her co-worker, she was, like, "Yeah, I kind of knew it was coming."

I mean, very indifferent. Very disengaged and culpable. In 23 years of judging cases, I . . . don't think I've seen this level . . . of public theft at all . . . not that it matters.

But you . . . keep looking for: What's the best sentence here? We've got a lady with kids at home and a family and all that. And I find nothing redeeming at all about the version that [Defendant] presented. Very disengaged and not . . . persuasive at all as to why anyone should let her take a crack at redemption. I find none.

Because of that, I'm going to order this sentence be served, Tennessee Department of Correction[.]

The trial court also filed a written findings of fact form, which reflected that the court considered the evidence presented at the trial and the sentencing hearing; the presentence report; the principles of sentencing and arguments made as to sentencing alternatives; the nature and characteristics of the criminal conduct involved; mitigating and enhancement factors; statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee; Defendant's statement; and Defendant's potential for rehabilitation. The document contained a checked list of items indicating the enhancement and mitigating factors, which were generally consistent with the court's oral findings; however, the written order indicated that the court applied mitigating factor (7), that Defendant was motivated by a desire to provide necessities to her family, which contradicted the court's oral finding that factor (7) did not apply.

The written form reflected the trial court's finding that Defendant was a professional criminal for purposes of consecutive sentencing. The form also noted relative to probation that the trial court considered the presentence report; Defendant's physical and mental condition; Defendant's social history; the facts and circumstances of the offenses; Defendant's lack of criminal history; Defendant's previous actions and character; Defendant's potential for rehabilitation; whether it appeared Defendant would abide by the terms of probation; whether society's interest in being protected from Defendant's possible future criminal conduct was great; whether measures less restrictive than confinement had frequently or recently been applied to Defendant; whether a probationary sentence would unduly depreciate the seriousness of the offenses; whether confinement was particularly suited to provide an effective deterrent to others; and whether the offenses were particularly enormous, gross, or heinous. The trial court wrote on the form that probation was denied.

**Post-Sentencing Proceedings**

On September 2, 2021, the trial court entered a *sua sponte* "Order regarding restitution," in which it stated that it "inadvertently omitted" restitution from the sentencing order and ordered Defendant to pay KJMB $2,065 and the Government of Fentress County $156,420.99. The court stated that it had "carefully considered" Defendant's resources and ability to pay and ordered Defendant to pay $100 per month toward restitution upon her release from prison.

On November 15, 2021, the trial court held a hearing regarding the sua sponte restitution order, at which the parties discussed that the restitution amounts correctly reflected the amount of money stolen, as offset by the county's insurance payment.

Defendant's judgments in Counts 1, 3, and 4 were dated as having been entered on August 16, 2021, but were stamp filed on November 16, 2021. Defendant timely appealed.

## Analysis

Defendant claims that the trial court abused its discretion by (1) ordering consecutive sentencing; (2) finding that Defendant was a professional criminal; (3) denying probation or an alternative sentence; and (4) imposing restitution sua sponte by an order filed after the sentencing hearing. The State responds that the court properly sentenced Defendant but agrees that the case should be remanded for a restitution hearing.

We note that, interspersed with Defendant's argument regarding alternative sentencing, Defendant summarily contests the trial court's imposing "top of the range" sentences. Although Defendant's brief contains no further argument or citations to authority regarding the length of sentencing, insofar as she raises a separate issue regarding the length of her sentences, we will address it in the interest of thoroughness.

*1. Length of sentences*

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) (2020).

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. Tenn. Code Ann. § 40-35-210(e) (2020); *State v. Bise*, 380 S.W.3d at 682, 706 (Tenn. 2012). Although the trial court should consider enhancement and mitigating factors, such factors are advisory only. *See* Tenn. Code Ann. § 40-35-114 (2020); *see also Bise*, 380 S.W.3d at 698 n. 33, 704; *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). We note that "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." *Carter*, 254 S.W.3d at 345. In other words, "the trial court is free 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].'" *Id.* at 343 (quoting Tenn. Code Ann. § 40-35-210(d)). A trial court's "misapplication of an enhancement 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. "[Appellate courts are] bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Carter*, 254 S.W.3d at 346.

When the record clearly establishes that the trial court imposed a sentence within the appropriate range after a "proper application of the purposes and principles of our Sentencing Act," this court reviews the trial court's sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *Bise*, 380 S.W.3d at 707. The party challenging the sentence on appeal bears the burden of establishing that the sentence was improper. Tenn. Code Ann. § 40-35-401 (2020), Sentencing Comm'n Cmts.

In this case, the trial court selected within-range sentences, detailed its findings on the record, and its decision is presumptively reasonable. *Bise*, 380 S.W.3d at 707. The trial court determined that Defendant was a Range I standard offender. Theft of property valued at $60,000 or more but less than $250,000 is a Class B felony and has a sentencing range of eight to twelve years; theft of property valued at over $1,000 and official misconduct are Class E felonies and have a sentencing range of one to two years. Tenn. Code Ann. §§ 39-14-103, -14-114, -16-402 (2018); 40-35-112(a)(2), (5) (2021).

The trial found that four enhancement factors applied: factor (1), that Defendant had a prior history of criminal behavior in excess of that necessary to establish the sentencing range; factor (3), that the offenses involved more than one victim; factor (6), that the amount of property taken was particularly great; and factor (14) relative only to Counts 1 and 3, that Defendant abused a position of public trust. Contrary to Defendant's assertion on appeal that the court applied no mitigating factors, the court applied mitigating factor (1), that Defendant's conduct neither caused nor threatened serious bodily injury. Relative to the conflict between the court's written notation that it applied mitigating factor (7), that Defendant was motivated by a desire to provide necessities for her family, even if the court applied this factor, the trial court indicated at the hearing that it applied greater weight to the enhancement factors than any mitigating factors.

We note that mitigating and enhancement factors are advisory only, and the trial court was not obligated to reduce Defendant's sentence due to the existence of mitigating factors. *See* Tenn. Code Ann. § 40-35-114 (2021); *see also Bise*, 380 S.W.3d at 698 n. 33, 704; *Carter*, 254 S.W.3d at 346. Even "a maximum sentence within the appropriate range, in the total absence of any applicable enhancement factors, and even with the existence of applicable mitigating factors, should be upheld as long as there are reasons consistent with the statutory purposes and principles of sentencing." *State v. Christopher Scott Chapman*,

No. M2011-01670-CCA-R3-CD, 2013 WL 1035726, at *9 (Tenn. Crim. App. Mar. 13, 2013) (citing *Bise*, 380 S.W.3d at 706; *Carter*, 254 S.W.3d at 345-46), *no perm. app. filed*. Moreover, any error in the application of enhancement and mitigating factors is no longer a proper basis for this court to reverse a within-range sentence, provided that the trial court articulated other reasons consistent with the purposes and principles of sentencing. *Bise*, 380 S.W.3d at 706.

The record does not reflect that the trial court abused its discretion in determining the length of Defendant's sentences. As the court noted, the amount that Defendant stole in Counts 1 and 3 far exceeded the respective $60,000 and $1,000 accounted for by the elements of the offenses. Defendant engaged in a lengthy course of criminal conduct in which she performed more than 900 unauthorized transactions using taxpayer money and funds belonging to a community ballpark, which, relative to Counts 1 and 3, was possible due to her position of trust with the county and as KJMB's treasurer. Defendant is not entitled to relief on this basis.

*2. Consecutive Sentencing*

Defendant contends that the trial court abused its discretion by imposing partial consecutive sentencing, arguing that the court erroneously found Defendant to be a professional criminal. The State responds that the court's finding was correct.

In *State v. Pollard*, the Tennessee Supreme Court expanded its holding in *Bise* to trial courts' decisions regarding consecutive sentencing. 432 S.W.3d 851, 859 (Tenn. 2013). "So long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal." *Id.* at 862 (citing Tenn. R. Crim. P. 32(c)(1)). In this case, the trial court detailed its findings on the record, and its decision is presumptively reasonable. *Id.*

The statutory factors governing the alignment of sentences for a defendant convicted of multiple offenses are codified at Tennessee Code Annotated section 40-35-115(b), which provides, in pertinent part:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood[.]

Tenn. Code Ann. § 40-35-115(b)(1) (2021). Any one ground set out in Tennessee Code Annotated section 40-35-115(b) is "a sufficient basis for the imposition of consecutive

sentences." *Pollard*, 432 S.W.3d at 862 (citing *State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013)).

Our supreme court has defined a "professional criminal" as "one who has knowingly devoted himself to criminal acts as a major source of livelihood or who has substantial income or resources not shown to be derived from a source other than criminal activity[.]" *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976). In *State v. Clifford Leon Farra*, this court noted that "the appellate courts have typically considered the offender's age, criminal history, and constancy of regular employment" in reviewing the application of the professional criminal factor to a determination of consecutive sentencing. No. E2001-02235-CCA-R3-CD, 2003 WL 22908104, at *14 (Tenn. Crim. App. Dec. 10, 2003) (internal citation omitted), *perm. app. denied* (Tenn. May 10, 2004). This court has previously held that, "[w]hile the amount of income derived from illegal acts may be significant, it is not determinative. Only a 'major source of livelihood or . . . a substantial income or resources not shown to be derived from [a source] . . . other than criminal activity' is required" to establish the need for consecutive sentencing under the "professional criminal" ground. *State v. Roscoe C. Smith*, No. 01C01-9502-CR-00031, 1995 WL 599012, at *4 (Tenn. Crim. App. Oct. 12, 1995) (quoting *Gray*, 538 S.W.2d at 393).

In *State v. Wesley Lynn Hatmaker*, No. E2017-01370-CCA-R3-CD, 2018 WL 2938395, at *2 (Tenn. Crim. App. June 8, 2018), *perm. app. denied* (Tenn. Oct. 11, 2018), the defendant was an attorney who stole money from various clients over a six-year period. After the defendant entered an open guilty plea, the trial court ordered partial consecutive sentencing, finding that the defendant was a professional criminal because $300,000 was "a lot for a county lawyer" and composed a major source of his livelihood for six years. *Id.* at *4. This court stated that

> "[i]t remains true that factor (1) is implicated when the defendant's criminal acts provide a major source of livelihood and not just when criminal activity provides the only, or even the major, source of livelihood." *State v. James Dewayne Bass*, No. M2005-01471-CCA-R3-CD, 2006 WL 1381607, at *3 (Tenn. Crim. App. May 12, 2006), *no perm. app. filed*. However, "[a] defendant's record of steady, gainful employment often militates against a finding of a professional criminal status." *Id.* at *2 (citing *State v. Linda Culver*, No. 01C01-9503-CC-00057, 1995 WL 702793, at *2 (Tenn. Crim. App. Nov. 30, 1995)).

This court affirmed the trial court's application of consecutive sentencing, concluding that, although the defendant had been consistently employed as an attorney, the $500,000 "amount[ed] to a 'major source of livelihood' for at least six years." *Id.* at *11. This court also noted that the defendant's acknowledgment that he took money because his family

"began to have financial problems" supported the trial court's finding that the defendant "used the stolen funds as a 'major source of livelihood' and was therefore a 'professional criminal.'" *Id.* (citing *State v. Marques Sanchez Johnson*, No. M2012-00169-CCA-R3-CD, 2012 WL 5188136, at *4 (Tenn. Crim. App. Oct. 18, 2012) (upholding the trial court's finding that the defendant was a "professional criminal" because he committed thefts "in part to provide for himself and his family"), *perm. app. denied* (Tenn. Jan. 22, 2013)).

In this case, Defendant used her position as Deputy Finance Director to misappropriate county funds, and her position as treasurer to misappropriate KJMB's funds, in more than 900 unauthorized transactions. She expressed that, initially, she used the Fentress County Walmart Community Credit Card to pay her car payment and that, at the time, she was the sole earner in her household and had fallen behind on her car payments. Defendant's salary was about $37,000 per year on average, and she almost tripled her income by her theft. The trial court did not abuse its discretion by finding that the stolen funds were a major source of Defendant's livelihood and that she was, therefore, a professional criminal.

We are similarly unpersuaded by Defendant's argument that we should treat her differently than the defendant in *Wesley Lynn Hatmaker* because he was a licensed attorney, whereas she only attended some college. Defendant had more than fifteen years of on-the-job experience, possessed enough expertise to train the incoming finance director, and was amply aware of the impact of her thefts. Mr. Arms testified that Defendant attended meetings regarding Fentress County's trouble balancing its budget, and she admitted that, in spite of her intent to pay back the money and stop conducting unauthorized transactions, she continued stealing. Defendant also knew how to conceal her criminal activity by shredding invoices after reconciling the transactions accounting for her theft. Defendant is not entitled to relief on this basis.

*3. Alternative Sentencing*

Defendant contends that the trial court abused its discretion by denying her request for probation or other alternative sentencing, arguing that the court reached an illogical conclusion when it found that Defendant was not sufficiently remorseful and had not taken responsibility for her actions. The State responds that Defendant did not carry her burden of demonstrating her suitability for probation.

"Any sentence that does not involve complete confinement is an alternative sentence." *State v. Gregory Tyrone Dotson*, No. M2018-00657-CCA-R3-CD, 2019 WL 3763970, at *10 (Tenn. Crim. App. Aug. 9, 2019) (citing *State v. Fields*, 40 S.W.3d 435 (Tenn. 2001)). Tennessee Code Annotated sections 40-35-102(5) and (6)(A) provide:

> (5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and
>
> (6)(A) A defendant who does not fall within the parameters of subdivision (5), and who is [a] . . . 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[.]

Probation is "a privilege" or "an act of grace" which may be granted to an accused who is eligible and "worthy of this largesse." *Stiller v. State*, 516 S.W.2d 617, 620 (Tenn. 1974). A defendant who is statutorily eligible for probation pursuant to Tennessee Code Annotated section 40-35-303(a) has the right to "a full and fair evidentiary hearing[,] and the right to all the procedural requirements contained in or necessarily contemplated by the statutory scheme." *Id.* at 619-20.

Tennessee Code Annotated section 40-35-103 states, in relevant part, that sentences involving confinement

> should be based on the following considerations: (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses.

Our supreme court has stated that the guidelines "applicable in determining whether to impose probation are the same factors applicable in determining whether to impose judicial diversion." *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (quoting *State v. Scott*, No. M2010-01632-CCA-R3-CD, 2011 WL 5043318, at *11 (Tenn. Crim. App. Oct. 24, 2011)).

> Those factors include (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) special and general deterrence value. *See State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998).

*Id.*

The same abuse of discretion with a presumption of reasonableness standard used to review the length of a sentence and consecutive sentencing also applies to "questions related to probation or any other alternative sentence." *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). "*Bise* specifically requires trial courts to articulate the reasons for the sentence in accordance with the purposes and principles of sentencing in order for the abuse of discretion standard with a presumption of reasonableness to apply on appeal." *Pollard*, 432 S.W.3d at 861 (citing *Bise*, 380 S.W.3d at 698-99); *see Trent*, 533 S.W.3d at 292.

Defendant was eligible for probation because the actual sentences imposed for each conviction was ten years or less and because the offenses for which Defendant was sentenced were not specifically excluded for eligibility by Tennessee Code Annotated section 40-35-303(a). Relative to Defendant's Class E felony convictions for theft and official misconduct, because she was a Range I offender, she was a favorable candidate for probation. *See* Tenn. Code Ann. § 40-35-102(6)(A). However, relative to her Class B felony theft conviction, she was not considered a favorable candidate for probation. *See id.*

A defendant who is eligible for probation has the burden of establishing his or her suitability for probation. Tenn. Code Ann. § 40-35-303(b) (2021). Based on the findings announced at the sentencing hearing, the trial court determined that Defendant had not proven her suitability for probation based upon her lack of potential for rehabilitation. *See* Tenn. Code Ann. § 40-35-103(5). Relative to Defendant's argument that the trial court should have found her assertions of remorse credible, credibility determinations are the province of the finder of fact, in this case the trial court. *See State v. Adkins,* 786 S.W.2d 642, 646 (Tenn. 1990). We note that the trial court "may appropriately consider 'the defendant's candor and credibility, or lack thereof, as indicators of his [or her] potential for rehabilitation[.]'" *State v. Jaffton Benay Richardson*, No. M2005-00942-CCA-R3-CD, 2006 WL 1931818, at *4 (Tenn. Crim. App. July 10, 2006) (quoting *State v. Michael K. Miller,* No. W2003-01621-CCA-R3-CD, 2004 WL 1686605, at *2 (Tenn. Crim. App. July 27, 2004)); *see State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999). The trial court did not abuse its discretion by finding that Defendant's lack of credibility weighed against her potential for rehabilitation or amenability to correction.

Although the court's sentencing form indicated that it had considered each of the purposes and principles of sentencing before denying alternative sentencing, it contains no finding regarding which principles weighed in favor of alternative sentencing. Accordingly, we conclude that the trial court inadequately articulated its reasoning on the record, and we cannot apply the abuse of discretion with a presumption of reasonableness standard. *See Pollard*, 432 S.W.3d at 861 (citing *Bise*, 380 S.W.3d at 698-99); *see Trent*, 533 S.W.3d at 292. However, the record is sufficient for us to conduct a de novo review.

*Cf. Trent*, 533 S.W.3d at 295 (concluding that the record was insufficient to allow "meaningful appellate review" and remanding for a new sentencing hearing).

The trial court found that Defendant was not amenable to rehabilitation; that Defendant's four-year course of conduct established a history of criminal behavior in addition to that required to determine her sentencing range and rendered her a professional criminal; that the amount of money taken was particularly great and constituted the greatest instance of public theft in the court's experience; and that Defendant abused positions of public trust. The court also found that Defendant, who executed more than 900 fraudulent transactions over four years to fund a relatively lavish lifestyle for herself and her family, would have continued her criminal activity if she had not been caught. The court spoke in some detail about the extent of the thefts, and it discredited Defendant's expressions of remorse in light of her appearing to be "disengaged from culpability as to what she has done and . . . what her responsibilities are going forward." The court also acknowledged the public interest in the case and the witness testimony about the citizens' desire that Defendant be punished, although it characterized that desire as "feeling," in contrast with the court's duties in sentencing.

Some factors weigh in favor of granting an alternative sentence. Defendant has no criminal record; consequently, measures less restrictive than confinement have not been applied to her previously. Her physical and mental health are generally good, and she is taking medication and attending therapy to manage her depression. Relative to her social history, she has two very young children, over whom she had sole custody and was a full-time caretaker prior to her confinement in this case, and she assisted Ms. Wade's parents as a member of their household. Defendant had taken some steps toward obtaining employment, which the trial court recognized was difficult in light of her pending charges.

However, several factors weigh against granting probation, the most serious of which is the circumstances of the offenses. The lengthy amount of time during which Defendant stole money, the excessive amount of money involved, Defendant's awareness of the county's financial troubles and the impact of her theft, Defendant's spending the money on a lavish lifestyle, and her failure to stop stealing until she was caught indicate that confinement is necessary to protect society from Defendant and to provide specific deterrence from similar conduct in the future. Similarly, we conclude that confinement is necessary to avoid depreciating the seriousness of the offenses. Defendant stole about $240,000 from Fentress County and $2,000 from KJMB, tripling her income over a four-year period; the trial court noted that it was the most serious amount of public theft the court had ever encountered. We conclude that the factors against granting probation outweigh those in favor of it and affirm the trial court's denial of alternative sentencing.

*4. Restitution*

The State and Defendant agree that the trial court's sua sponte restitution order, which was entered after the sentencing hearing, did not comply with the procedural requirements of Tennessee Code Annotated section 40-35-304. We agree that a new restitution hearing is required.

Tennessee Code Annotated section 40-20-116(a) provides that, when a defendant is convicted of felony theft, the trial court "shall" order restitution in the amount of the value of the property. Tennessee Code Annotated section 40-35-304 contains the following procedure relative to restitution:

> (b) Whenever the court believes that restitution may be proper . . . the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.
>
> (c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.
>
> (d) In determining the amount and method of payment or other restitution, the court shall[6] consider the financial resources and future ability of the defendant to pay or perform.

Tenn. Code Ann. § 40-35-304 (2021).

Relative to Defendant's commentary that she did not anticipate both a restitution order and incarcerative sentence, we note that trial courts possess the authority to order confinement in conjunction with restitution. Tenn. Code Ann. § 40-35-104(c)(2), (8) (2021); *State v. Jeannette Jives-Nealy*, No. W2018-01921-CCA-R3-CD, 2020 WL 974201, at *23 (Tenn. Crim. App. Feb. 28, 2020), *perm. app. denied* (Tenn. Aug. 11, 2020). However, orders of restitution, including orders issued pursuant to section 40-35-104(c)(2), must follow the procedure outlined in Tennessee Code Annotated section 40-35-304. *See* Tenn. Code Ann. § 40-35-304(g) (2021); *Jeannette Jives-Nealy*, 2020 WL 974201, at *23. In this case, the presentence report contained no information about the pecuniary loss to Fentress County or KJMB. *See* Tenn. Code Ann. § 40-35-304(b) (requiring that, if the trial

[6] The statutory language was amended on January 1, 2022, to read that the trial court "may" consider the defendant's financial resources and ability to pay.

court believes restitution may be proper, "the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss"). The trial court made no findings of fact at the sentencing hearing or in the sentencing order regarding Defendant's ability to pay or the amount of the pecuniary loss. Finally, as noted by the State, the court's payment schedule of $100 per month would extend far past Defendant's total sentence of twelve years; at that rate, it would take Defendant 132 years to repay $158,485.99. Accordingly, we remand the case for a new restitution hearing complying with the procedure mandated by Code section 40-35-304.

## Conclusion

The judgments of the trial court are affirmed as to the length and manner of service of Defendant's sentence; however, the trial court's order regarding restitution is vacated, and the case is remanded for a restitution hearing.

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ROBERT L. HOLLOWAY, JR., JUDGE