

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 26, 2021 Session

**FILED**  
02/22/2022  
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Appellate Courts

**STATE OF TENNESSEE v. JOHN WILLIAM GAY**

**Appeal from the Criminal Court for Bradley County  
No. 2018-CR-038 Sandra Donaghy, Judge**

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**No. E2020-01559-CCA-R3-CD**

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Defendant, John William Gay, was convicted following a jury trial of aggravated robbery and theft of property under \$1,000. The trial court ordered Defendant to serve a twelve-year sentence in the Tennessee Department of Correction for the aggravated robbery and a concurrent eleven-month, twenty-nine-day sentence for the theft conviction. On appeal, Defendant argues that the evidence is insufficient to support his convictions for aggravated robbery and theft of property. Defendant further argues that the trial court abused its discretion by misapplying every enhancement factor it cited, failing to apply mitigating factors, and violating the purposes and principles of sentencing. Following our review of the entire record and the parties' briefs, we affirm the judgments of the trial court. However, the trial court's failure to merge the theft conviction and the aggravated robbery conviction constituted plain error. The case is remanded to the trial court for merger of those convictions and entry of corrected judgment forms to reflect said merger.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which D. KELLY THOMAS and CAMILLE R. MCMULLEN, JJ., joined.

Brian D. Wilson, Franklin, Tennessee, for the appellant, John William Gay.

Herbert H. Slatery III, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Stephen D. Crump, District Attorney General; and Coty Wamp, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

## Factual and Procedural Background

This case arises from the robbery of Harry's Convenience Store ("Harry's") in Cleveland, Tennessee on September 5, 2017. The following day, the Cleveland Police Department arrested and charged Defendant with aggravated robbery and theft over \$1,000. After a preliminary hearing, the Bradley County General Sessions court ordered a forensic examination of Defendant to determine his competency to stand trial and his mental condition at the time of the crime, and bound the case over to the grand jury. The Bradley County grand jury returned a true bill charging Defendant with aggravated robbery and theft over \$1,000<sup>1</sup>. Two forensic examiners determined that Defendant was competent to stand trial and was able to appreciate the nature or wrongfulness of his acts. Following Defendant's arraignment in the Bradley County Criminal Court, another order was entered directing a forensic evaluation of the Defendant. The results of that examination are not in the record, but all parties agreed at trial that Defendant had been determined to be competent to stand trial.

Yogeshkumar Patel ("Mr. Patel") testified that at the time of the robbery, he worked as a clerk at Harry's. He remembered Defendant previously purchasing cigarettes and beer from the store and testified that on the night of the robbery, Defendant entered the store while Mr. Patel swept. Defendant used the ATM then approached Mr. Patel and asked where he was from. Mr. Patel answered that he was from India and then walked away to retrieve a dustpan. When he returned, Mr. Patel saw Defendant "standing there with a knife." At knifepoint, Defendant forced Mr. Patel to go behind the store's counter, open the register, and place the money from the register in a bag. Mr. Patel testified that he attempted to escape by jumping over the counter but was unable to do so given the height of the counter.

Mr. Patel testified that Defendant then walked him toward the store's storage room where he and Defendant began to argue when Mr. Patel refused to enter the room. When Defendant became distracted, Mr. Patel ran toward the bathroom and felt "something heavy" hit him in the back. Mr. Patel testified that when he reached the bathroom and locked the door, Defendant tried to break down the door by stabbing at the door with a knife. The store's doorbell rang when another customer walked through the door and Mr. Patel began yelling for help. Defendant left the store, taking the bag of money with him. Mr. Patel then exited the bathroom and pressed the store's "emergency button" which alerted the police that the store's alarm had been activated. Mr. Patel did not know the exact amount of money that Defendant had taken. On cross-examination, Mr. Patel

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<sup>1</sup> Prior to trial, the trial court granted the State's motion to amend the indictment by reducing the theft charge to \$1,000 or less.

confirmed that he could not recall whether Defendant had slurred speech on the night of the robbery.

Officer Will Espinoza of the Cleveland Police Department testified that he responded to the scene of the robbery and that when he arrived at Harry's store, the doors were locked, but he could see Mr. Patel inside of the store. Officer Espinoza recalled that Mr. Patel looked "scared, anxious. You can really tell he was afraid of something." Officer Espinoza viewed the surveillance video of the robbery but he did not recognize the suspect.

Lieutenant Andy Ratcliff of the Cleveland Police Department testified that he also responded to the robbery and that other officers were on the scene when he arrived. He testified that he spoke with Mr. Patel and described Mr. Patel's demeanor as being so "extraordinarily shook up" that he offered to call an ambulance, but Mr. Patel declined. Lieutenant Ratcliff also testified that he watched the surveillance video with Harsh Patel, the owner of Harry's, but Lieutenant Ratcliff did not recognize Defendant. Lieutenant Ratcliff then captured screen images of the surveillance footage and distributed them to the Cleveland Police Department's public information officer who then distributed the photos on Facebook and sent them to media sources. Lieutenant Ratcliff testified that he later received information that Defendant was the suspect and found out that Defendant lived "virtually across the street" from the convenience store. Lieutenant Ratcliff and other officers went to Defendant's home. Lieutenant Ratcliff stated that Defendant appeared to be the man that he saw in the surveillance footage and that Defendant had markings on his arm that were similar to the markings that could be seen on the robbery suspect in the video.

Lieutenant Ratcliff obtained a search warrant for Defendant's home and subsequently searched Defendant's home. Lieutenant Ratcliff testified that the hat worn by the robbery suspect was located on a table in Defendant's apartment and that in Defendant's bedroom, officers located a knife, shirt and shoes that were visible in the surveillance footage.

On cross-examination, Lieutenant Ratcliff confirmed that Defendant had been identified as a suspect as a result of the Facebook posting, but he did not show Mr. Patel a photo lineup or a photo of Defendant. Lieutenant Ratcliff further acknowledged that he observed alcohol containers in the trash at Defendant's apartment but he could not remember whether they were beer cans or an empty liquor bottle.

Lieutenant Corey Foxx, of the Cleveland Police Department, worked as a crime scene technician at the time of the robbery and aided in executing the search warrant at Defendant's apartment. He testified that he did not speak with Defendant but documented and collected all evidence with the help of Shane Clark, another crime scene technician.

At trial, Lieutenant Foxx identified twelve photographs he took at the scene, and confirmed that they accurately depicted how Defendant's apartment looked on the day of the search.

On cross-examination, Lieutenant Foxx testified that he would have been able to identify the clothing worn by the robbery suspect from either the surveillance footage or Facebook post. He further acknowledged that the photographs of Defendant's home showed prescription pill bottles, several beer cans, and a liquor bottle in the trash in the apartment. Like Lieutenant Ratcliff, Lieutenant Foxx could not recall the amount of beer cans in the apartment, nor could he remember if any cash was found. Lieutenant Foxx testified that that items seized from Defendant's apartment were not checked for fingerprints, swabbed for DNA, or sent to the Tennessee Bureau of Investigation crime lab. He did not follow up on the pill bottles because to his knowledge, the investigation was not drug-related.

Lieutenant Brian Quinn with the Bradley County Sheriff's Office testified that the day after the robbery he and another officer went to Defendant's home around "lunchtime" after learning that Defendant was a suspect in an aggravated robbery. Upon entering Defendant's apartment, the officers *Mirandized*<sup>2</sup> Defendant when they observed "some of the stuff in the photos were present in the house." The officers did not ask Defendant any questions; however, Defendant made several unprompted statements. He told them he "had taken a bunch of pills" the previous night. Based on that statement, Lieutenant Quinn called emergency medical services to come "check him out." Defendant then told the officers that he had passed out after taking the pills and when he got up there was a knife on the counter or on the table in his apartment, and he put it in a drawer. Lieutenant Quinn testified that while talking to the officers, Defendant appeared to be "alert and oriented to [them]".

Defendant testified that he attended school until the eighth grade and later obtained his GED. He served in the Navy for nine or ten months but left after being "sodomized and raped." Defendant testified that he felt "extremely depressed" on the day of the robbery and that he began drinking whiskey at ten o'clock in the morning although he usually drinks beer. Defendant testified he has a total of fourteen prescriptions for pills and that he intended to commit suicide when he took a handful of sleeping pills, a handful of pain pills, and a handful of muscle relaxers on the day of the robbery, all of which were prescribed. Defendant testified that he continued to drink after taking the pills, although he did not typically drink after taking his prescribed pills. He testified that after taking the pills and drinking, he did not remember anything on the day of the robbery, until he awoke the next morning when his son called and asked him, "What'd you do daddy?" Defendant's son told him that he had robbed a store, but Defendant believed that his son was "kidding."

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Defendant testified after talking to his son, he drank more whiskey and went back to bed because he was “still in the same state of mind” he was in that morning and was also “drugged” so he “didn’t care.”

Defendant testified that he believed that he was an alcoholic, but alleged that he had not been an alcoholic during the thirty-two years that he worked as a truck driver. Defendant could not recall many details of the robbery. He testified that, in the past, he had used his scooter to get to Harry’s, but he did not know how he got to the store on the day of the robbery. Defendant testified that he did not recall what he did with the money taken from the store or whether he went anywhere else that night. Defendant did not know whether the beer pictured in his apartment had been purchased on the day of the robbery or at another time. Defendant lived alone, but he could not recall if anyone else was at his house on the day of the robbery. Ultimately, Defendant conceded that he was the person in the surveillance footage but contended that “mentally [he] was not there.” Defendant insisted that he had no recollection of the events depicted in the video surveillance footage.

In the surveillance footage, Defendant could be seen wearing a hat that reads, “If you love your freedom, thank a vet.” This hat was found on a table in Defendant’s apartment. Defendant did not know if he owned the hat or where the hat came from, but testified that he did not usually wear hats.

Based on this evidence, the jury convicted Defendant of aggravated robbery, a Class B felony, with a sentence range of eight to twelve years, and theft of \$1,000 or less, a Class A misdemeanor.

### *Sentencing Hearing*

At the sentencing hearing, the presentence investigation report was entered as an exhibit after correction and redaction of some information. Chief Mark Gibson of the Cleveland Police Department then testified that he was the prosecuting detective in a 2006 jury trial in which Defendant had been charged and convicted of two counts of reckless aggravated assault, one count of attempted aggravated arson, and one count of reckless endangerment with a deadly weapon. He testified that Defendant had used lighter fluid to saturate a tobacco store, the counter, the clerk and two individuals who tried to subdue him. Defendant then used a lighter to try to light the accelerant that he had poured. In that trial, Defendant had alleged that he was under the influence of alcohol and pills at the time of the offense. The nationality of the victim of the offense was of Asian, specifically Indian, descent. The convictions were entered as an exhibit to the sentencing hearing. Regarding the 2006 convictions, Chief Gibson testified that he did not personally interview Defendant, nor did he visit the tobacco store on the night of the offense. This court’s opinion on direct appeal was admitted as an exhibit. *See State v. John William Gay*, No.

E2007-02466-CCA-R3-CD, 2008 WL 4830722 (Tenn. Crim. App., at Knoxville, Nov. 6, 2008).

The State requested the trial court to apply several enhancement factors pursuant to Tennessee Code Annotated section 40-35-114: factor (1) the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; factor (3) the offense involved more than one victim; and factor (10) the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. §§ 40-35-114(1), (3), (10) (2021). The State further noted the similarities between the facts of the prior case and the instant case—most notably, the fact that both victims were of Indian descent. As a result, the State asked the court to apply enhancement factor (17) to reflect that Defendant intentionally selected the person against whom the instant crime was committed because of Defendant’s belief or perception regarding the race, religion or color of the victim. *See* T.C.A. § 40-35-114(17). Finally, the State argued that because Defendant had only been unsupervised for one year and eight months after his last conviction before he re-offended, less restrictive means had been applied to Defendant and were unsuccessful.

Defendant’s trial counsel argued that there was no evidence to support a finding that Defendant had targeted victims of Indian descent. Further, trial counsel argued that Defendant had successfully completed parole, indicating that less restrictive means had been successful in Defendant’s past. Trial counsel requested that the trial court apply the following mitigating factors pursuant to Tennessee Code Annotated section 40-35-113: factor (6) the defendant, because of youth or old age, lacked substantial judgment in committing the offense; factor (8) the defendant was suffering from a mental or physical condition that significantly reduced the defendant’s culpability for the offense; however the voluntary use of intoxicants does not fall within the purview of this factor; and factor (11) the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct; or factor (13) any other factor consistent with the purposes of this chapter. T.C.A. § 40-35-113(6), (8), (11), (13) (2021). Trial counsel asked the court to consider as a mitigating factor the fact that Defendant was, at the time of the sentencing hearing, seventy-two years old. As a result of his age, trial counsel argued that Defendant was unlikely to recommit. The defense further requested that the court apply a mitigating factor to Defendant’s sentence with respect to the mental condition from which Defendant was suffering at the time of the offense. Finally, Defendant’s trial counsel asked that his physical health be considered with respect to his sentence given that Defendant was in a wheelchair at the time of both his trial and the sentencing hearing.

Because the State’s notice of intent to seek enhanced punishment inadvertently requested the court to punish Defendant as a Range I offender, the trial court restricted its

evaluation to a Range I sentence, rather than what could otherwise have been a Range II sentence based on Defendant's criminal history. In sentencing Defendant, the court found that Defendant had a previous history of criminal convictions and applied enhancement factor (1) accordingly. The trial court found that the offense involved more than one victim, and applied enhancement factor (3) stating, "The clerk was the person that was threatened and robbed, but the money that was stolen was property of the store. So the two victims are the clerk and the Citgo gas station." The trial court also applied enhancement factor (10) finding that Defendant acted with no hesitation about committing the crime when the risk to human life was high. While the State requested the court to apply enhancement factor (17), involving the race or national origin of the victims from both the 2006 criminal activity and this crime, the court found that the proof did not support that factor.

With respect to mitigating factors, the trial court applied factor (3) that substantial grounds exist tending to excuse or justify Defendant's criminal conduct, but failing to establish a defense, and mitigating factor (13) that Defendant had suffered physical problems and had a long mental health history. The trial court declined to apply mitigating factor (6) finding that Defendant's age was not a factor, and declined to apply factor (8) because Defendant "voluntarily used intoxicants." The court considered factor (11) and found that the facts "fit easier under factor (13)." The court noted that the sentence of aggravated robbery was non-probatable, and further noted that it had reviewed the most recently published information from the Administrative Office of the Courts on sentencing statistics. The court also considered sentencing factors under Tennessee Code Annotated section 40-35-103, and sentenced Defendant as a Range I offender to twelve years' incarceration for aggravated robbery, and a concurrent eleven-month and twenty-nine-day sentence for the misdemeanor theft conviction. It is from these judgments that Defendant now appeals.

### **Analysis**

On appeal, Defendant contends that this court should reverse his convictions for lack of sufficient evidence. Defendant specifically argues that either his voluntary intoxication or his mental condition prevented the State from establishing the requisite mens rea for aggravated robbery and theft. Defendant further contends that this court should reverse Defendant's prison sentence because the trial court failed to adhere to the purposes and principles of sentencing when issuing the maximum prison term. The State argues that the evidence was sufficient and that the jury was entitled to assess the credibility of Defendant's testimony as to his voluntary intoxication and his mental condition. The State further argues that the trial court acted within its broad discretion in sentencing Defendant. We agree with the State.

## *Sufficiency of the Evidence*

When a defendant challenges the sufficiency of the evidence, this court is obliged to review that claim according to certain well-settled principles. A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). The burden is then shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The relevant question the reviewing court must answer is whether *any* rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, “the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003). As such, this court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

A person commits robbery when he intentionally or knowingly commits theft of property from another person by violence or putting the other person in fear. T.C.A. § 39-13-401. A robbery becomes aggravated when it is accomplished with a deadly weapon. *Id.* § 39-13-402(a)(1). A deadly weapon is defined as anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury. T.C.A. § 39-11-106(a)(6)(b). Theft of property occurs when a person knowingly obtains or exercises control over the property of another without the owner’s consent with an intent to deprive the owner of his property. *Id.* § 39-14-103. A knowing mental state requires a showing that the accused was aware that his conduct was reasonably certain to cause the result. *Id.* § 39-11-302(b). An intentional mental state is the conscious objective or desire to cause a certain result. *Id.* at § 39-11-302(a).

Here, the testimony of the victim as well as the video surveillance establish that Defendant entered Harry’s armed with a knife and forced Mr. Patel into opening the cash register. Defendant then instructed Mr. Patel, at knifepoint, to fill a bag with money from the cash register and ordered him to enter a storage room, causing Mr. Patel to fear for his life. From this evidence, the jury could reasonably conclude that Defendant had a conscious objective or desire to obtain control over the money in the cash register and that he caused Mr. Patel to fear for his life with the use of a deadly weapon.



Defendant's sole argument against the evidence presented is that his voluntary intoxication or his depressed mental condition negate the mental state required of the charges brought against him. In support of this argument, Defendant testified that he began drinking whiskey heavily on the morning of the robbery and that he took a variety of pills while he was drinking in a suicide attempt that was the result of his depressed mental condition. Defendant further claimed that he had no memory of the events that occurred on the day of the robbery. The jury weighed the testimony and rejected Defendant's argument that he did not possess the mental state to be convicted. In addition to Defendant's testimony, the jury also heard testimony from Mr. Patel and multiple officers, and watched the video surveillance footage. The jury accredited the State's proof over Defendant's testimony. This court will not displace the jury's credibility and weight determinations with its own. Further, the trial court charged the jury with the intoxication defense in the following instruction:

If you find that the defendant was intoxicated to the extent that he could not have possessed the required culpable mental state, then he cannot be guilty of the offense charged.

With its verdict, the jury rejected Defendant's testimony as to his alleged voluntary intoxication. Therefore, Defendant is not entitled to relief on this claim.

Although not raised by either party, we note that Defendant's conviction for theft of property should be merged with his conviction for aggravated robbery because both convictions were based on the taking of the same property. "Merger . . . is required when a jury returns guilty verdicts on two counts that represent alternative theories of the same offense." *State v. Berry*, 503 S.W.3d 360, 362 (Tenn. 2015); *see State v. Ziberia Marico Carero*, No. E2015-00140-CCA-R3-CD, 2015 WL 9412836, at \*5-8 (Tenn. Crim. App., at Knoxville, Dec. 22, 2015) *perm. app. denied* (Tenn. May 5, 2016). The trial court's failure to merge the convictions constituted plain error; *see also State v. Edgar Allgood*, No. W2008-00870-CCA-R3-CD, 2010 WL 455000 at \*8 (Tenn. Crim. App. at Jackson, Feb. 10, 2010). When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal. *See Tenn. R. App. P. 36(b)*. Therefore, we remand the case to the trial court for merger of the theft conviction into the aggravated robbery conviction and for entry of corrected judgments reflecting the merger.

## *Sentencing*

When an accused challenges the length of a sentence, this court reviews the trial court's sentencing determinations under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). "This abuse of discretion standard, accompanied by a presumption of reasonableness, applies to within-range sentences that reflect a decision based upon the purposes and principles of sentencing." *State v. Caudle*, 388 S.W.3d 273, 278 (Tenn. 2012). A finding of abuse of discretion indicates the "trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case." *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001). A trial court has not abused its discretion unless "the record [is] void of any substantial evidence that would support the trial court's decision." *Id.*

In making sentencing decisions, trial courts must consider the following: (1) the evidence received at 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 conduct involved; (5) evidence and information offered by the parties regarding the statutory mitigation and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant wishes to make on his own behalf; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* T.C.A. § 40-35-210(b).

"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 sentencing statutes. *Bise*, 380 S.W.3d at 706. A sentence within the appropriate range will be upheld "so long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute." *Id.*

Defendant argues that the trial court abused its discretion by imposing a sentence greater than the minimum in-range sentence. The record clearly supports the application of the enhancement factor reflecting Defendant's previous criminal history. *See* T.C.A. § 40-35-114(1). The presentence report shows that Defendant had two misdemeanor convictions for driving under the influence, and four felony convictions including reckless endangerment involving the use of a deadly weapon, attempted aggravated arson, and two aggravated assaults. Defendant argues that the trial court abused its discretion in relying on his convictions for aggravated assault, attempted aggravated arson, and reckless endangerment involving a deadly weapon because they stemmed from a single incident. Defendant relies on a misinterpretation of the applicable law. In situations where the

accused has “no prior criminal record” the court looks to the time period over which the offenses at issue were committed. *State v. Christopher Blockett*, No. 02C01-9509-CC-00258, 1996 WL 417659, at \*7 (Tenn. Crim. App., at Jackson, July 26, 1996). That is not the situation presented by the facts of this case. Defendant has a prior criminal history. He has not identified any precedent justifying discounting prior convictions based on their temporal proximity. Defendant’s six previous convictions were more than that necessary to establish his sentencing range. Therefore, the trial court properly applied enhancement factor (1). The application of this factor alone justified the trial court’s imposition of a greater-than-minimum in-range sentence. *State v. Lawrence Hailey*, No. W2009-00759-CCA-R3-CD, 2010 WL 2219574, at \*11 (Tenn. Crim. App., at Jackson, May 24, 2010).

However, the trial court improperly applied enhancement factor (3) when it found that the charged offense involved more than one victim. Our supreme court has held that there cannot be multiple victims for any one offense committed against a specific, named victim. *State v. Imfeld*, 70 S.W.3d 698, 706 (Tenn. 2002). “Victim,” within the meaning of enhancement factor (3) for an offense involving more than one victim, is limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime. *State v. Kelley*, 34 S.W.3d 471, 480 (Tenn. Crim. App. 2000). In *State v. Williams*, this court concluded that the trial court improperly applied enhancement factor (3) where the defendant was convicted of two counts of aggravated robbery for the robbery of the market where a clerk was working. *State v. Marlow Williams*, No. W2005-02803-CCA-R3-CD, 2007 WL 2781720 at \*10 (Tenn. Crim. App., at Jackson, Sept. 25, 2007). The indictments in *Williams* named one specific victim, therefore, this court concluded that enhancement factor (3) was improperly applied. *Id.* Here, the indictment of Defendant lists Mr. Patel as the victim of both charges for which Defendant was convicted. The trial court improperly applied enhancement factor (3).

The trial court also misapplied enhancement factor (10) finding that Defendant acted without hesitation when the risk to human life was high. A robbery is aggravated if it is accomplished through the use of a deadly weapon. T.C.A. § 39-13-402(a)(1). Enhancement factors are not intended to allow sentence adjustments based on the general nature of the offense. *State v. Robert L. Adams*, No. M2010-00916-CCA-R3-CD, 2011 WL 5553485, at \*17 (Tenn. Crim. App., at Nashville, Nov. 8, 2011) (citing *State v. Kissenger*, 922 S.W.2d 482, 488 (Tenn 1996)). In *State v. Lavender*, our supreme court held that the application of enhancement factor (10) to an aggravated robbery conviction should be decided on a “case-by-case basis.” *State v. Lavender*, 967 S.W.2d 803, 807 (Tenn. 1998). Our supreme court further reasoned that a sentencing court should “consider the elements of the offense and the evidence adduced at the trial and sentencing hearing.” *Id.* “If the facts which establish the elements of the offense charged also establish the enhancement factor, then the enhancement factor may not be used.” *Id.* Further, in *State v. Dinguss*, this court concluded that enhancement factor (10) was misapplied where there

was no proof that anyone other than the victim was placed at risk by the defendant's conduct. *State v. Aaron Joseph Dinguss*, No. E2020-01459-CCA-R3-CD, 2021 WL 3418842 at \*1 (Tenn. Crim. App., at Knoxville, Aug. 5, 2021). Enhancement factor (10) may be applied where the defendant creates a high risk to the life of a person other than the victim, because the facts establishing the enhancement factor would be separate from the facts necessary to establish a high risk of death to a person. *State v. Bingham*, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). Here, the record reflects that only Defendant and Mr. Patel were present in the store at the time of the offense; therefore, no one other than Mr. Patel suffered a high risk of death as a result of Defendant's actions. Consequently, the trial court erred in its application of enhancement factor (10) in sentencing Defendant.

Defendant next alleges that the trial court erred in failing to apply the mitigating factors for which he argued, specifically the factors that would reflect his claims that he was unable to appreciate the nature of his conduct due to his age, that he suffered from a mental or physical condition, and that he committed an offense under such unusual circumstances that it is unlikely that the criminal conduct was motivated by a sustained intent to violate the law. *See* T.C.A. § 40-35-113(6), (8), (11). The trial court applied mitigating factor (3), that substantial grounds exist tending to excuse or justify Defendant's criminal conduct, but failing to establish a defense, and mitigating factor (13) finding that Defendant had suffered physical problems and had a long mental health history, but declined to find Defendant's age of sixty-nine years old at the time of the offense a mitigating (factor (6)) and further finding that Defendant's voluntarily use of intoxicants negated the application of factor (8). The court considered factor (11), but found that the facts of the case aligned more under factor (13) which was applied.

Mitigating factors are advisory only, and the weight given to those factors is entirely within the trial court's discretion. T.C.A. § 40-35-210(c)(2); *Bise*, 380 S.W.3d at 701. Our supreme court has provided further direction on the trial court's discretion in applying enhancing and mitigating factors:

Even if a trial court recognizes and enunciates several applicable enhancement factors, it does not abuse its discretion if it does not increase the sentence beyond the minimum on the basis of those factors. Similarly, if the trial court recognizes and enunciates several applicable mitigating factors, it does not abuse its discretion if it does not reduce the sentence from the maximum on the basis of those factors. The appellate courts are therefore left with a narrower set of circumstances in which they might find that a trial court has abused its discretion in setting the length of a defendant's sentence.

*State v. Carter*, 254 S.W.3d 335, 345-46 (Tenn. 2008); *see also State v. Michael David Carter and Steven Edward Carter*, No. M2018-01329-CCA-R3-CD, 2019 WL 3856583

(Tenn. Crim. App., at Nashville, Aug. 16, 2019) (This court concluded that the trial court did not abuse its discretion when it sentenced defendant to twenty years for aggravated robbery after rejecting the defendant's requested mitigating factors.) Here, the trial court considered each of the enhancement and mitigating factors requested by both parties, and although we conclude that enhancement factors (3) and (10) were misapplied, the trial court did not wholly depart from the principles of the applicable sentencing act in its application of enhancing and mitigating factors. The record reflects that the trial court imposed a within-range sentence after proper consideration of all the evidence, the purposes and principals of the sentencing act, and consideration of the enhancement and mitigating factors. In light of the presumption of reasonableness of the trial court's sentencing determinations, we affirm the sentence.

### **Conclusion**

For the foregoing reasons, the judgments of the trial court are affirmed. However, the trial court's failure to merge the theft conviction and the aggravated robbery conviction constituted plain error. The case is remanded to the trial court for merger of those convictions and entry of corrected judgment forms to reflect said merger.

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JILL BARTEE AYERS, JUDGE