IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 14, 2019

STATE OF TENNESSEE v. JOSEPH R. PATTON

Appeal from the Criminal Court for Wilson County
Nos. 17-CR-744, 18-CR-979 John D. Wootten, Jr., Judge

No. M2018-02035-CCA-R3-CD

The Appellant, Joseph R. Patton, pled guilty in the Wilson County Criminal Court to three counts of soliciting sexual exploitation of a minor and three counts of sexual battery by an authority figure. Pursuant to the plea agreements, the trial court was to determine the length and manner of service of the sentences. After a sentencing hearing, the Appellant received a total effective sentence of fifteen years to be served in confinement. On appeal, he contends that his sentence is excessive and that the trial court erred by denying his request for alternative sentencing. Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and J. ROSS DYER, JJ., joined.

Raymond D. Jones (on appeal) and G. Frank Lannom, Donnavon Vasek, Melanie Bean, and Andrew Nutt (at trial), Lebanon, Tennessee, for the appellant, Joseph R. Patton.

Herbert H. Slatery III, Attorney General and Reporter; Ruth Anne Thompson, Senior Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Thomas Harwell Swink and Justin Guy Harris, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On June 13, 2017, the Wilson County Grand Jury indicted the Appellant in case number 17-CR-744 for ten counts of especially aggravated sexual exploitation of a minor, a Class B felony; ten counts of sexual battery by an authority figure, a Class C

felony; and two counts of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2), a Class E felony. On August 16, 2018, the Appellant was charged by information in case number 18-CR-979 with two counts of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(a), a Class B felony. That same day, he entered guilty pleas in case number 17-CR-744 to three counts of sexual battery by an authority figure and one count of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2) and entered guilty pleas in case number 18-CR-979 to two counts of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(a). Pursuant to the plea agreements, the Appellant was to serve the sentences in case number 17-CR-744 concurrently and serve the sentences in case number 18-CR-979 concurrently. However, the trial court was to determine the length and manner of service of the sentences and whether he would serve the sentences in case number 18-CR-979 concurrently with or consecutive to the sentences in case number 17-CR-744. The plea agreements also provided that the Appellant was to register as a violent sex offender, have no contact with the victim or her family, and pay the victim $5,000 "toward future restitution." The remaining charges were dismissed.

The trial court held a sentencing hearing on October 12, 2018. At the outset of the hearing, the State introduced into evidence a video recording of the Appellant's thirty-four-minute interview with Detective B.J. Stafford of the Wilson County Sheriff's Department (WCSO) and played the video for the trial court. During the September 8, 2016 interview, Detective Stafford advised the Appellant, who also was a law enforcement officer with the WCSO, that he could leave at any time. The Appellant responded, "I'm here until we get done with this." Detective Stafford then advised the Appellant that "this involves a girl that is friends with your daughter," and the Appellant responded, "I suspected that's what it was about." The Appellant explained to Detective Stafford that the victim was "friends with the family" and that "we got close, too close." The Appellant stated that "[t]here was no touching" and that "[w]e didn't have sex" but that "[w]e sent some texts and we sent some pictures that we shouldn't have sent, and we have cut ties." The Appellant said that he did not know when his contact with the victim began but that it ended about December 2015.

Detective Stafford informed the Appellant that he also had interviewed the victim and that the victim told him the following: She and the Appellant exchanged text messages that were sexual in nature, the Appellant sent her a photograph of his penis, and she sent him naked photographs of herself. No penetration occurred, but the victim and the Appellant "[made] out" about ten times in the Appellant's truck. During those times, they kissed, the Appellant felt the victim's breasts under her shirt, and they put their hands down each other's pants "sometimes underneath the underwear and on top of the underwear." The Appellant told Detective Stafford that he did not remember touching

the victim under her underwear but that "I'm not going to sit there and say that I didn't do it." Detective Stafford said the victim also claimed that during one incident, the Appellant pulled down his pants and asked her to touch his penis. The victim told Detective Stafford that she did so. Detective Stafford asked the Appellant, "Is that accurate?" The Appellant answered, "Yeah. That sounds accurate." The Appellant stated that his relationship with the victim began when she was fifteen years old and that he was aware of her age.

The Appellant denied having oral sex with the victim or "fingering" her. Detective Stafford asked, "What would you do when you put your hand down her underwear?" The Appellant answered that he "[j]ust rub[ed]" the victim for "not even minute." He said that he sent two or three photographs of his penis to the victim and that she sent him fifty to one hundred photographs of herself. He acknowledged that he picked up the victim one time in his patrol car. He said that he did so because the victim was going to spend the night with his daughter and that he and the victim "may have kissed" in the car. The Appellant stated that he was "embarrassed" and "regretful" and that "I'm the adult here. I shouldn't have let it go this far[.]" He said he was afraid he was going to lose his job of twenty-four years with the WCSO.

Julie Raines of the State of Tennessee Board of Probation and Parole testified that she prepared the Appellant's presentence report. The Appellant elected not to give a statement for the report, but the victim and her parents submitted victim impact statements. Raines testified about the information in the report, which was introduced into evidence. The Appellant graduated from high school in 1989 and did not have a prior criminal record. The Appellant described his mental health as good but said he had been diagnosed with anxiety and depression. He also described his physical health as good and said he had been diagnosed with high blood pressure. The Appellant said he had never had a substance abuse problem or addiction, and he submitted to a voluntary drug screen, which was negative. The Appellant worked for the WCSO from September 1992 until September 27, 2018, when he was terminated due to the charges in this case. The Appellant also worked for Mayekawa from July 2017 to August 2018 and Builder's First Source from April to July 2017. However, he was unemployed at the time of Raines's investigation. Raines stated that the Appellant was "calm, cooperative and [respectful]" throughout her investigation and that a psychosexual risk assessment was completed. On cross-examination, Raines acknowledged that the $5,000 the Appellant agreed to pay the victim was "consistent with the amount of estimated counseling that the victim might need."

The State introduced the Appellant's psychosexual assessment into evidence. According to the assessment, the Appellant stated that he was a recovering alcoholic and denied that he sexually abused a child, which suggested that he did not consider the

victim to be a "child." The following tests were administered to the Appellant: the Adult Sex Offender Packet, the Abel Assessment for Sexual Interest-3 for men, the Sexual Adjustment Inventory (SAI), and the Vermont Assessment of Sex Offender Risk-2 (VASOR-2). Of note, the Appellant's Child Molest Scale Score in the SAI was in the "Problem Risk" range, meaning that he manifested "some pedophile interests." For the Abel test, the Appellant's Visual Reaction Time (VRT) graph showed that he had an interest in fourteen- to seventeen-year-old females and adult females and that he was at medium risk to reoffend with the estimated risk to reoffend at one year as two percent, five years as six percent, ten years as ten percent, and fifteen years as fourteen percent. The Appellant's VASOR-2 score was considered a low risk to reoffend. The psychologist who prepared the report made various recommendations for the Appellant, including that he attend and actively participate in an outpatient sex offender treatment program.

The victim's mother wrote a statement and read it to the trial court. In the statement, the victim's mother said that when the victim was "going through this" with the Appellant, the victim became "withdrawn, angry, and very hard to deal with." The victim also "went through a time where she hated men in general, especially law enforcement and men in authority, teachers and so forth." The victim no longer slept or ate well and was "just overall angry." She also had anxiety attacks and pulled out her hair as a stress reliever. The victim attended some counseling sessions but was not yet ready to discuss the abuse with strangers and would need additional counseling when she was ready. The victim's mother stated that the Appellant pled guilty to only a few of the charges and that he confessed to the crimes. She requested that he serve time in confinement because he "was trained against the offenses," "knew better," and "was sworn to serve and protect, not do harm." The victim's father testified briefly that the Appellant needed to go to jail for his crimes.

The victim testified that at the time of the sentencing hearing, she was an eighteen-year-old college student. She explained that when she was fourteen years old, she became friends with the Appellant's daughter and would spend the night with her at the Appellant's house. One time when the victim was spending the night, the Appellant's wife and daughter went to bed. The victim let the dogs out, and the Appellant followed her onto the porch. They began talking about "a hard time" the victim was having at home, and the Appellant hugged the victim and kissed the top of her head. The victim did not think the incident was inappropriate because she thought of the Appellant as a "second father-figure." The Appellant and the victim exchanged telephone numbers, and he told her to call him if she needed anything. The victim and the Appellant began calling and texting each other. They talked every day for three months, and the Appellant gained the victim's trust.

The victim testified that in late November of that year, she went to the Appellant's house to spend the night with the Appellant's daughter. When she arrived, she found out that the Appellant's daughter was going on a date and that Appellant's wife was at work. The victim took a shower and put on her pajamas, and she and the Appellant watched a football game on television in the Appellant's bedroom. The Appellant put his hands under her shirt, grabbed her breasts, and rubbed her thighs and vagina over her clothes. They heard the Appellant's wife returning home, so the victim went into the living room. The Appellant's wife was suspicious because the victim had changed clothes and accused the victim of having sex with the Appellant. The victim no longer felt welcome in the Appellant's house and called her parents to take her home. The Appellant told the victim that he would "fix everything."

The victim testified that a few weeks later, she returned to the Appellant's home to spend the night with his daughter. While the victim was lying in a recliner, the Appellant put his "balls" in the palm of her hand. Another time when she was spending the night, he pushed her against the kitchen cabinets, kissed her face and neck, and grabbed her breasts. She stated that he picked her up in his patrol car several times while he was on duty and that he used "back roads . . . to avoid getting caught." One afternoon when the Appellant was driving the victim home in his truck, he pulled onto a dead-end road, parked the truck, and came around to her side. He kissed her, put his hand under her shirt, and grabbed her breast. He put her hand on his penis, but she told him no and pulled her hand away. The Appellant told the victim how much he loved her and that he wanted to marry her when she was "legal age."

The victim testified that she attended the 2015 State Horse Show with the Appellant and his daughter. The Appellant and the victim left the show to get food, and the Appellant pulled onto a dead-end road and asked if the victim would have sex with him. She told him no. When they arrived at McDonald's, the Appellant "made out" with the victim in the parking lot and expressed his love for her. The Appellant told the victim that she was "perfect and everything he'd ever wanted."

The victim testified that a counselor found out about the abuse and reported it to the police. After the story "spread," people began pointing fingers at the victim, talking about her, and treating her differently. She developed depression, anxiety, and insomnia; began losing her hair due to the stress; and stopped eating. She said that she "went through a time" in which she hated all men, especially men in uniform; that she lost the ability to have a relationship with a boy her age because she could not tolerate being kissed; and that she lost her love for horses. She said that she struggled with low self-confidence, that she felt like a disappointment to her family, and that "[p]eople blame me while the Appellant and his family prance around town claiming his innocence." The victim's parents trusted the Appellant to care for her like his own daughter, and they felt

angry and betrayed. The victim asked that the Appellant serve his sentences in confinement.

James Kubic testified for the Appellant that he and the Appellant went to high school together and that he had known the Appellant about thirty-five years. Kubic worked for the WCSO from 1993 to 2003 and worked in the police academy from 2003 to 2012. In 2012, Kubric left the police academy to become an associate pastor at a church in Madison. At the time of the sentencing hearing, he was the pastor of a church on Baddour Parkway.

Kubric testified that when he worked at the WCSO, he and the Appellant "hung out" together all the time. He said that the Appellant "gave of himself completely" to his job and the community and that he never saw the Appellant "behave badly and certainly not in any capacity such as we're discussing today." The Appellant was honest, and Kubric never knew him to lie. After the Appellant's relationship with the victim came to light, the Appellant sought help for his marriage from Kubric.

On cross-examination, Kubric testified that he worked with the Appellant from 1995 to 2003 but that they never worked the same shift. Kubric acknowledged that in 2013, the Appellant worked as an elementary school resource officer. Kubric also acknowledged that he would be surprised to learn a request was made that the Appellant no longer be a resource officer at the school due to comments the Appellant made to some of the female staff and due to some of Appellant's interactions with the children.[1] Although the Appellant sought marriage counseling from Kubric, Kubric was unable to counsel the Appellant and his wife because the Appellant had not been honest with his wife about his relationship with the victim. On redirect examination, Kubric testified that he had never known the Appellant to make crude or inappropriate sexual comments.

Jerry Taylor testified that he had been a certified public accountant for forty-seven years and that he had known the Appellant since the Appellant was born. He said that he prepared the Appellant's tax returns for several years and that the Appellant always gave him accurate information for those returns. The Appellant had been employed his entire adult life, and Taylor knew him to be helpful and courteous. Taylor said that if the trial

[1] The State introduced the Appellant's personnel file from the WCSO into evidence. The file showed that on October 1, 2013, the Appellant received a written reprimand due to "inappropriate behavior . . . over a 2 month period in front of the school faculty, staff, and student body." According to the reprimand, the school principal reported that some of her employees were uncomfortable in the Appellant's presence due to comments he made that were "sexual in nature." In a September 26, 2013 letter from the principal to the WCSO, the principal requested that the Appellant no longer work as a resource officer at the school.

court granted the Appellant's request for alternative sentencing, the Appellant could be a contributing member to the community.

On cross-examination, Taylor acknowledged that at the time of the sentencing hearing, the Appellant was unemployed. He said, though, that he thought the Appellant lost his jobs due to the charges in this case. Taylor stated that he knew the Appellant's wife and daughter but that he had never been to the Appellant's home. He acknowledged that he would be surprised to learn that complaints had been made about the Appellant's vulgar language and disrespectful behavior toward people at a truck stop.[2] He also acknowledged that he would be surprised to learn the Appellant had acted inappropriately while working as a resource officer at an elementary school and was asked to leave by the faculty.

The Appellant made an allocution, saying that he was guilty of the crimes and that he was sorry for the pain he had caused his family. The Appellant said that he served as a deputy sheriff for twenty-four years and saved lives and marriages during that time. He also raised money for St. Jude. The Appellant stated that he had done "a bad thing" but that he had done a lot of good by caring for his father during his father's battle with cancer and by taking care of his elderly mother's finances and farm after his father died. The Appellant said that his relationship with the victim started because he was unsatisfied in his marriage. After the death of his father, the Appellant became depressed, and he and his wife began having marital problems. At the time of the sentencing hearing, though, the Appellant and his wife were in "a great place" in their marriage and "closer than ever." The Appellant stated that he loved his family and asked that the trial court consider his accomplishments and successes, not just his "shortcomings," when determining his sentences.

At the conclusion of the hearing, defense counsel noted that "some 20-plus" people were in the courtroom in support of the Appellant and introduced into evidence letters written on his behalf by friends and family, including his mother, daughter, and sisters. The State argued that the Appellant should serve his sentences in confinement whereas defense counsel argued that he should receive alternative sentencing.

The trial court noted that the Appellant was a Range I, standard offender and that he was facing sentences of eight to twelve years for his convictions of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(a), a Class B felony; three to six years for his convictions of sexual battery by an authority

[2] The Appellant's personnel file showed that in February 1995, he was verbally reprimanded because "[d]uring the past few weeks it has been reported by employees of the I-40 Truck Stop and the [restaurant] manager, that Officer Patton has been warned about his vulgar language and his disrespect [toward] them."

figure, a Class C felony; and one to two years for his conviction of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2), a Class E felony. The trial court stated that it had considered the facts announced at the guilty plea hearing, the presentence report, the psychosexual evaluation, a sentencing memorandum submitted by the Appellant, the Appellant's interview with Detective Stafford, the testimony of the witnesses, the Appellant's allocution, the victim impact statements, and the purposes and principles of sentencing.

The trial court noted that the Appellant "faced many, many counts" but that the State agreed to dismiss those counts in exchange for his guilty pleas. The trial court also noted that the crimes occurred over an extended period of time and said that it hoped the victim could "put her life back together." The trial court stated that law enforcement officers should be held to a high standard of ethics and morals and that the sexual contact happened at least one time in the Appellant's patrol car while he was on duty. The trial court said that it had compared the list of mitigating factors submitted by the Appellant to the list of enhancement factors submitted by the State.[3] The trial court found that enhancement factor (7), that "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," applied to all of the Appellant's sentences and "above all else" outweighed any mitigating factor. Tenn. Code Ann. § 40-35-114(7). The trial court also found that enhancement factor (14), that the defendant abused a position of public trust, applied to the Appellant's sentences for soliciting sexual exploitation of a minor. See Tenn. Code Ann. § 40-35-114(14).

The trial court sentenced the Appellant to ten years for each count of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(a), five years for each count of sexual battery by an authority figure, and two years for soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2). The trial court noted that pursuant to the plea agreement, the Appellant would serve the five- and two-year sentences in case number 17-CR-744 concurrently and that he would serve the ten-year sentences in case number 18-CR-978 concurrently. However, the trial court determined that the Appellant should serve the

[3] The Appellant filed a notice of mitigating factors, arguing that he was entitled to mitigation of his sentences for showing remorse; cooperating with authorities; pleading guilty; offering to pay $5,000 to the victim "for any possible future counseling needs"; ceasing inappropriate contact with the victim before the contact was discovered; having no prior criminal record; being a productive member of society; and maintaining employment, even after he lost his profession as a law enforcement officer. See Tenn. Code Ann. § 40-35-113(13). The State filed a notice of enhancement factors, arguing that factor (7), that "the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," applied to all of his sentences and that factor (14), that the defendant abused a position of public or private trust, applied to his three sentences for soliciting sexual exploitation of a minor. See Tenn. Code Ann. § 40-35-114(7), (14).

effective ten-year sentence consecutive to the effective five-year sentence for a total effective sentence of fifteen years in confinement.

II. Analysis

On appeal, the Appellant contends that his effective fifteen-year sentence is excessive and that the trial court erred by ordering that he serve the sentence in confinement. The State argues that the length and manner of service of the Appellant's sentence is proper. We agree with the State.

This court reviews the length, range, and manner of service of a sentence imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. State v. Bise, 380 S.W.3d 682, 708 (Tenn. 2012); see also State v. Pollard, 432 S.W.3d 851, 859 (Tenn. 2013) (applying the standard to consecutive sentencing); State v. Caudle, 388 S.W.3d 273, 79 (Tenn. 2012) (applying the standard to alternative sentencing). In determining a defendant's sentence, the trial court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the defendant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also Bise, 380 S.W.3d at 697-98. The burden is on the Appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sent'g Comm'n Cmts.

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).

Although the trial court should consider enhancement and mitigating factors, the statutory factors are advisory only. See Tenn. Code Ann. § 40-35-114; see also Bise, 380 S.W.3d at 701; State v. Carter, 254 S.W.3d 335, 343 (Tenn. 2008). Our supreme court has stated 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)). 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." Id. at 346.

Initially, we note that the Appellant has failed to include the transcript of the guilty plea hearing, in which the State would have presented the factual basis for the pleas, in the appellate record. Our supreme court has held that when a record does not include a transcript of the guilty plea hearing, this court should determine "on a case-by-case basis whether the record is sufficient for a meaningful review under the standard adopted in Bise." Caudle, 388 S.W.3d at 79. We conclude that the testimony and numerous exhibits introduced into evidence at the sentencing hearing provide us with sufficient information for appellate review. As a result, we may presume that the missing plea hearing transcript would support the ruling of the trial court. See id.

A. Enhancement Factor (7)

First, the Appellant contends that the trial court erred by applying enhancement factor (7), that "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," to his sentences for sexual battery by an authority figure and his sentence for soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2) because that factor is an essential element of the offenses. The State acknowledges that the trial court erred.

As charged in the indictment, sexual battery by an authority figure is "unlawful sexual contact with a victim by the defendant or the defendant by a victim"; the victim was at least thirteen years old but less than eighteen years old at the time of the offense; and "[t]he defendant . . . had supervisory or disciplinary power over the victim by virtue of the defendant's legal, professional or occupational status and used the position of trust or power to accomplish the sexual contact"; or "[t]he defendant had, at the time of the offense, parental or custodial authority over the victim and used the authority to accomplish the sexual contact." Tenn. Code Ann. § 39-13-527(a)(1), (a)(3)(A), (a)(3)(B). "Sexual contact" is defined as

> the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification[.]

Tenn. Code Ann. § 39-13-501(6).

Tennessee Code Annotated section 39-13-529(b)(2), soliciting sexual exploitation of a minor, provides that it is unlawful for any person eighteen years old or older to intentionally, by means of electronic communication,

> [d]isplay to a minor, or expose a minor to, any material containing simulated sexual activity that is patently offensive or sexual activity if the purpose of the display can reasonably be construed as being for the sexual arousal or gratification of the minor or the person displaying the material[.]

A trial court may not consider an enhancement factor if it is an essential element of the offense. Tenn. Code Ann. § 40-35-114; State v. Imfeld, 709 S.W.3d 698, 704 (Tenn. 2002). Our supreme court has held that because sexual battery contains the element of "sexual contact," the offense necessarily includes the intent to gratify a desire for pleasure or excitement. See State v. Kissinger, 922 S.W.2d 482, 489 (Tenn. 1996). Likewise, the offense of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2) includes that the purpose of the display can reasonably be construed as being for sexual arousal or gratification. Therefore, enhancement factor (7) was an essential element of both offenses, and the trial court could not use it to enhance the Appellant's sentences.

The State argues that despite the trial court's error, the Appellant has failed to demonstrate the impropriety of his sentences because the trial court's sentencing decisions are supported by the reasons articulated in the record. We agree with the State. As our supreme court has explained, a trial court's "misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed. . . . So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld." Bise, 380 S.W.3d at 706. In pronouncing the length of the Appellant's sentences, the trial court noted that the abuse occurred over an extended period of time and that the abuse occurred at least one time in the Appellant's patrol car while he was on duty. The trial court stated that it hoped the victim could "put her life back together," demonstrating that the court was troubled by the effect of the abuse on the victim. Moreover, with regard to the Appellant's sentence for soliciting sexual exploitation of a minor pursuant to

Tennessee Code Annotated section 39-13-529(b)(2), the trial court also applied enhancement factor (14), that "[t]he defendant abused a position of public trust." Therefore, we conclude that the trial court did not err by sentencing the Appellant to five years for sexual battery by an authority figure and two years for soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2)

B. Consecutive Sentencing

Next, the Appellant contends that the trial court erred by ordering consecutive sentencing under Tennessee Code Annotated section 40-35-115(b)(5). The State argues that the trial court did not err. We conclude that consecutive sentencing was proper in this case.

Tennessee Code Annotated section 40-35-115(b) contains the discretionary criteria for imposing consecutive sentencing. Because the criteria for determining consecutive sentencing "are stated in the alternative[,] . . . only one [criterion] need exist to support the appropriateness of consecutive sentencing." State v. Mickens, 123 S.W.3d 355, 394 (Tenn. Crim. App. 2003). In this case, the trial court imposed consecutive sentencing upon finding that the Appellant was

> convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

Tenn. Code Ann. § 40-35-115(b)(5).

In ordering consecutive sentencing, the trial court again addressed the duration of the abuse and the effect of the abuse on the victim, stating,

> Now, this went on a long time, in this Court's mind. There's no question but, although she did not have to endure a trial, there's no question in this Court's mind that this has had an emotional impact upon the young girl. There is no question in this Court's mind that this went undetected for a period of time. The State has carried its burden by the weight of the evidence.

The Appellant contends that the trial court erred by finding that his sexual contact with the victim occurred over an extended period of time. He also contends that the trial court

did not take into consideration that the nature and scope of the sexual acts involved only touching and fondling, not penetration or oral sex, and that the State presented no expert testimony that the physical and mental damage to the victim was great.

During the Appellant's interview with Detective Stafford, he claimed that he did not know when his sexual contact with the victim began but that it ended in December 2015. We note that the indictment and information alleged that all of the offenses occurred between January 2015 and May 2016, more than one year. In addition, the proof presented at the sentencing hearing established that the Appellant's contact with the victim was not limited to a few incidents over a brief period of time but that they occurred repeatedly over a span of at least months. Therefore, the record supports the trial court's conclusion that the offenses occurred over an extended period of time.

As to the nature and scope of the sexual contact, the trial court did not address the type of sexual acts. However, the Appellant did not contest the victim's version of events in that their contact involved kissing, the touching of her breasts, the touching of their private parts over and under their clothes, and the sending of texts that were sexual in nature. In addition, the Appellant admitted sending several photographs of his penis to the victim. Thus, the record supports the trial court's conclusion that the nature and scope of the sexual contact warrants consecutive sentencing.

Regarding the extent of the residual, physical, and mental damage to the victim, the victim testified that as a result of the abuse, she developed depression, anxiety, and insomnia; began losing her hair due to the stress; and stopped eating. The victim even "went through a time" in which she hated all men, especially men in uniform. She also struggled with low self-confidence, felt like a disappointment to her family, and thought that people blamed her for the abuse. The victim's mother testified that as a result of what the victim went through with the Appellant, the victim was angry, suffered from anxiety, and pulled out her hair as a stress reliever. The victim's mother also stated that the victim would need counseling when she was ready to talk about the abuse. The Appellant even agreed to pay the victim $5,000 for future counseling. As noted by this court, "nothing in the plain language of the statute requires that this aggravating circumstance be proven by expert testimony." State v. Doane, 393 S.W.3d 721, 737 (Tenn. Crim. App. 2011). Furthermore, "on several occasions this court has found the existence of residual harm based on testimony from the victim or other non-experts." Id. (citing State v. Michael Martez Rhodes, No. M2009-00077-CCA-R3-CD, 2010 WL 5061016, at *4 (Tenn. Crim. App. at Nashville, Dec. 8, 2010); State v. Floyd "Butch" Webb, No. E2002-01989-CCA-R3-CD, 2004 WL 199824, at *17 (Tenn. Crim. App. at Knoxville, Feb. 3, 2004); State v. Steven Paul Deskins, No. M2002-01808-CCA-R3-CD, 2003 WL 21957083, at *8 (Tenn. Crim. App. at Nashville, Aug. 14, 2003)). Accordingly, we conclude that the trial court properly ordered consecutive sentencing.

C. Alternative Sentencing

Finally, the Appellant contends that the trial court erred by denying his request for alternative sentencing and that he is a suitable candidate for probation. The State argues that the trial court properly denied the Appellant's request for alternative sentencing. We agree with the State.

A defendant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a). The Appellant's sentences meet this requirement. Moreover, a defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the Appellant is considered to be a favorable candidate for alternative sentencing with regard to his convictions of sexual battery by an authority figure, a Class C felony, and soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(b)(2), a Class E felony, but not his conviction of soliciting sexual exploitation of a minor pursuant to Tennessee Code Annotated section 39-13-529(a), a Class B felony.

The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, a court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of

past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

Ordinarily, this court reviews a trial court's denial of alternative sentencing under an abuse of discretion standard with a presumption of reasonableness. However, in order to ensure fair and consistent sentencing, the trial court must place on the record, either orally or in writing, the enhancement or mitigating factors it considered, and the reasons for the sentence. Tenn. Code Ann. § 40-35-210(e). Here, the trial court did not say whether it considered the Appellant's request for alternative sentencing or explain why it denied the request. Therefore, we will review the trial court's denial of alternative sentencing de novo.

As noted by the Appellant, he has no prior criminal history. Accordingly, confinement is not necessary to protect society by restraining a defendant who has a long history of criminal conduct and measures less restrictive than confinement have not frequently or recently been applied unsuccessfully to the defendant. Defense counsel acknowledged at the sentencing hearing, though, that the "elephant in the room" was whether confinement was necessary to avoid depreciating the seriousness of the offenses or confinement was particularly suited to provide an effective deterrence to others likely to commit similar offenses. On appeal, the Appellant contends that a lifetime of supervision on the Sexual Offender Registry and the residential and work restrictions imposed by the registry are sufficient to avoid depreciating the seriousness of the offenses and provide an effective deterrent.

In our view, the circumstances of this case are troubling. Particularly, the Appellant was a forty-five-year-old police officer and the father of the fifteen-year-old victim's friend. The evidence shows that his contact with the victim began when he followed her onto the porch of his home, listened to her talk about her problems, and told her to call him if she needed to talk about anything. Over the next three months, the Appellant and the victim talked and exchanged text messages daily. The Appellant gained the victim's trust, and their relationship progressed to sexual contact. Some of that sexual contact occurred in the Appellant's patrol car while he was on duty and in the home he shared with his wife and daughter. The Appellant knew that his relationship with the victim was improper, going as far as driving on back roads so that she would not be seen in his patrol car. Additionally, while the Appellant touts that their sexual contact did not involve penetration, the victim testified that the Appellant asked her to have sexual intercourse with him but that she refused. Therefore, we believe confinement is necessary to avoid depreciating the seriousness of the offense and particularly suited to provide an effective deterrence to others likely to commit similar offenses.

The Appellant contends that his truthfulness and accepting responsibility for his crimes support alternative sentencing. Granted, "a defendant's credibility and willingness to accept responsibility for the offense are circumstances relevant to determining his rehabilitation potential." State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). However, the offender's likeliness to reoffend also should be considered. State v. Martin Charles Jones, No. E1999-01296-CCA-R3-CD, 2001 WL 30198, at *2 (Tenn. Crim. App. at Knoxville, Jan. 12, 2001). According to the Appellant's psychosexual assessment, the Appellant "denied having been accused of sexually abusing a child or sexually abusing a child. This is not consistent with the records or during his clinical interview. It is possible that he did not consider his victim a 'child.'" The Appellant's presentence report reflects that he told Julie Raines he never had a substance abuse problem or addiction, but the psychosexual assessment reflects that he claimed to be a recovering alcoholic. While some testing in the assessment concluded that the Appellant was at a low risk to reoffend, other testing showed that he had "some pedophile interests," exhibited an interest in fourteen to seventeen-year-old females, and was at a medium risk to reoffend. Therefore, while the Appellant may have confessed to his relationship with the victim and accepted responsibility for his crimes, the psychosexual assessment is not particularly favorable to his potential for rehabilitation. Accordingly, we conclude that alternative sentencing is not appropriate in this case.

III. Conclusion

Based upon the record and the parties' briefs, we conclude that the trial court properly sentenced the Appellant.

_____

NORMA MCGEE OGLE, JUDGE