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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 19, 2026 Session

STATE OF TENNESSEE v. AMANDA HURST

Appeal from the Criminal Court for Knox County
No. 128340 Hector Sanchez, Judge

No. E2025-00736-CCA-R3-CD

The Defendant, Amanda Hurst, entered a guilty plea to child abuse with the trial court to determine sentencing. The trial court held a hearing and sentenced the Defendant to two years in confinement. The trial court denied the Defendant's requests for judicial diversion and probation. On appeal, the Defendant asserts that the trial court erred when it denied judicial diversion and probation. After review, we affirm the trial court's judgment.

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

ROBERT W. WEDEMEYER, P.J., delivered the opinion of the court, in which JILL BARTEE AYERS and MATTHEW J. WILSON, JJ., joined.

Eric M. Lutton, District Public Defender, Jonathan P. Harwell, Halle Hammond, and Keith Lowe, Assistant Public Defenders, Knoxville, Tennessee, for the appellant, Amanda Hurst.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Assistant Attorney General; Charme P. Allen, District Attorney General; and Heather Ens, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the Defendant, who was a daycare worker, physically attacking a two-year old child at a daycare facility. As a result, a Knox County grand jury indicted the Defendant for aggravated assault by strangulation and child abuse.

The Defendant and the State entered an agreement for the Defendant to plead guilty to the child abuse charge, a Class D felony, with the trial court to sentence the Defendant. The State dismissed the charge for aggravated assault by strangulation. At the guilty plea

hearing, the State recited the following as the factual basis to support the trial court's acceptance of the plea agreement:

> [O]n, approximately, July 2nd, 2024, officers responded to . . . Munsey Road, in regard to a child abuse incident.
>
> Upon arrival, officers made contact with the victim's mother, who was advised by someone at the daycare . . . at Union Child Enrichment C enter, that there had been an incident involving her two-year-old daughter. They . . . noticed bruising, scrapes, redness along the . . . front of [the victim's] body and her neck, and the side of her face.
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> They were able to pull the surveillance video from the daycare itself. In the video, you can see multiple children in a room, where the [D]efendant was their caretaker . . . at the facility. They are laying down. It's around nap time. You see the [D]efendant go over to the two-year-old victim in this case, grab her, pick her up very violently, and then hold her and shake her several times. This . . . lasts for several minutes, actually. And, again, after the fact, there were abrasions, bruises, scratches, redness noted on the two-year-old victim.
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> Officers interviewed the [D]efendant. After watching the video, the [D]efendant did admit to the conduct.
>
> And these events occurred in Knox County.

The Defendant agreed that there was sufficient evidence to show that she caused injury to a child under eight, and the trial court accepted the Defendant's guilty plea.

At a subsequent sentencing hearing, the State submitted the daycare surveillance video footage showing the incident, photographs of the victim's injuries, and the Presentence Investigation Report. The State then provided the following summary with facts additional to those presented at the guilty plea hearing:

> Th[e] defendant . . . worked at a daycare. She cared for a number of children, including the victim in this case. She had worked there for many years in this capacity. The victim in this case [wa]s two years old at the time that this took place.
>
> On the day in question, the victim's mother had actually received some text messaging, Facebook messages, I believe, some phone calls from

the [D]efendant, who had told her that the two-year-old victim had been injured by another child on the playground at the daycare. She sent some photographs showing some bruising on the [victim]'s ribs, things like that. So, initially, the [D]efendant told the victim's mother that these injuries were sustained by another, presumably, two- or three-year-old, because that is the age of the children that she had in her classroom.

After that, I guess, another worker within the daycare actually looked at the injuries, did not feel that the stories lined up and actually pulled the footage from the room that the [D]efendant was in charge of. In that video footage, we can see it's, kind of – it's a little bit prolonged, as far as what the footage shows. What we submitted to the Court is about, I think, almost 10 minutes' worth of footage.

It essentially shows the [D]efendant attempting to get all of the children – I think there were eight or nine kids in the classroom at the time. Seems like she was trying to get them down, maybe, for a nap. She can be seen – this kind of all starts out, she grabs a sippy cup from the victim, while the victim is sitting at the little table. She makes her go lay down in her little cot. She balls up the victim's blanket, throws it in her face.

Unfortunately, – there's no sound on the video from the classroom, so we only have the actual, you know, footage itself.

After this, the [D]efendant can be seen – the victim can be seen crying a little and being a little squirmy, like a two-year-old is. The [D]efendant can be seen, kind of, picking her up very abruptly, making her – putting her back on her cot, but facing the other way on her stomach, again, throwing her blanket over her.

She – at some point, when the victim was laying there – again, I'm not sure if the victim was crying or what it was, but the [D]efendant actually takes the victim's cot, kicks it over into a corner of the room, goes about sitting with the other children for a little while. And then, once again, goes over to the victim, who is in the corner of the room, laying on her little cot, and you can see her, sort of, violently jerk her up out of that cot. It appears that she, actually, is holding her by the neck area whenever she jerks her up. She takes her over to the other side of the room, where the other children are laying on the floor. And she begins just, violently shaking this little two-year-old girl. She, kind of, tosses her in the floor several times. She's

pushing her away. She keeps, you know, laying her down and picking her up and grabbing her and shaking her pretty violently.

This is not a . . . one-off, sort of, incident. In fact, this secondary portion, the portion of the video that was submitted to the Court, I mean, it goes on for about seven minutes, honestly, of her just repeatedly picking this little two-year-old up – the little two-year-old can be seen, what looked like, screaming. Again, there's no sound, so we don't know. But just her facial expression, it looks like she's screaming. And she just continues to do this over and over for about seven minutes.

As the photographs reveal, the victim did sustain pretty significant bruising on her neck, shoulders and around her rib cage. And, actually, I would submit to the Court that the ones on her rib cage, actually, look like handprints. And I think that the video also supports that, given the manner of violence in which this [D]efendant was shaking the victim over and over.

The State indicated that it was not in agreement as to the Defendant's request for judicial diversion or a probation sentence based upon "the overall nature of it and the circumstances involved." The State asked the trial court to apply enhancement factor (14), that the Defendant abused a position of public or private trust, or used a professional license in a manner that significantly facilitated the commission of this offense. T.C.A. § 40-35-114.

The victim's mother and father were present at the hearing, and the victim's mother read a victim impact statement aloud. The victim impact statement was, in part, as follows:

As a parent, your first natural instinct is to protect and love your children. And from the moment of conception, there is nothing that can compare to . . . the love that you feel for something that you can't even see or feel yet. Once your baby is in your arms, there is nothing that you won't do to protect your child. And I know, personally, I was met with thoughts, and even dreams, of some of the worst-case scenarios that could possibly happen to my kids. And, frankly, I never dreamed that I'd be standing here today.

With the magnitude of love for your child, there is a fear and an anxiety that comes with placing your child in the care of someone else. There is no one that can, or will, take care of your child the way that you do as a parent; however, as a working-class citizen, we have no other choice.

Daycare is a place where parents pay thousands of dollars a month now so that their children will, hopefully, be loved and cared for while they work. The reality of the matter is, when you work a full-time job, with your children, they do truly spend more time in a childcare facility with their teachers than they do with you at home.

We searched all around Knoxville when our son [ ] was born in 2019, and we were so lucky to have found, not only a childcare facility, but a family in Union Child Enrichment Center, which is also known as UCEC. . . . We would receive updates and pictures throughout . . . our children's day; we got to see developmental progress with the curriculum that was taught and hear about our babies come and singing how Jesus loves them. Some teachers would even come to birthday parties and celebrate us with our children. And we truly felt that our kids were loved and cared for.

Then things started to feel off, after [the victim] made her way into the Toddler II classroom. [The victim]'s Toddler II teacher, the defendant, Amanda Hurst, was not new to UCEC. She was a veteran childcare worker for many years and her career spanned across multiple childcare facilities, as well as caring for children outside of the daycare setting.

She had also been a teacher over our son . . . . She was not a stranger. She was someone that we had put our faith and our trust in for a while, at this point.

On multiple occasions, this trust began to thin. [The Defendant]'s stories began to cross, change and, most of the time, wouldn't even make sense, including stories of her personal life. There were even several times that she made comments to other teachers and other parents about how she and I were related, and that she . . . had known me my whole life. None of these things were true, as we only had a mutual friend, until my family came to UCEC. But it seemed harmless at the time, so we let it go.

However, on October the 19th of 2023, I received messages and pictures from [the Defendant] that [the victim] had been playing on her cot and she fell and hit her mouth. She sent pictures of bruising and scratching that were not conclusive with her story. This immediately made [my husband and me] uneasy, because our baby girl had bruising on her cheeks, her forehead, under her eye and an abrasion on her mouth and her nose. But with no cameras at the time for proof, we were forced to accept the situation and move on. Our final straw is, of course, the reason that we are all here today.

On July 2nd of 2024, I received calls through Facebook from [the Defendant], which I had declined, due to the fact that I was at work. She then sent me photos and Facebook messages stating that [the victim] had been pushed up against a fence by a friend outside. And she wanted to make me aware of the bruising that it left. Once again, this was not the case. And after viewing the photos, the uneasy feeling returned.

The assistant director . . . texted me immediately after the falsified report and story was brought to her attention. [The assistant director] stated that she was going to do some more investigating and that she would look through the camera system footage that had just been installed a few months prior.

In the words of our detective, Vanessa Nieves, [the Defendant] had treated my baby like a rag doll. She squeezed her so hard on her neck and back that she left bruising, all because [the victim] didn't want to take a nap. This woman that [we] had placed our trust in had hurt my baby, and then coerced her to tell a made-up story. She was absolutely cruel towards my defenseless two-year-old, a little girl, who, in reality, was forced to love this person who supposedly cared for her every single day.

As [the victim]'s parents, this began to make us question all the other incidents that didn't just make sense. But at the end of the day, we have no proof. So here we stand, nine months later, since [the Defendant] assaulted [the victim]. Not only did this traumatizing event ruin our trust as parents, but it also ruined [the victim]'s.

My little girl was scared of her own grandparents, family friends and even other children her own age. For months after the incident, [the victim] would cower behind mine and her daddy's legs whenever she was approached by anyone who we knew truly loved and cared for her, crying if they even attempted to give her a hug.

I quit my job, working for a State office, in order to keep my girl at home full time. The anxiety of anyone caring for my child after this was excruciating. And this, of course, created severe financial stress on our family, but [my husband] and I were determined to keep [the victim] safe at all costs.

[The victim] developed fears that seemed irrational to us, but were very real for her. [The victim] became terrified of naptime and bedtime. She would cry and scream for hours, fearful of sleeping until she would finally just cry herself to sleep.

. . . .

[The victim] then became afraid of the bathtub. She had loved bathtime, but was now terrified. She would scream and try to force her way out. So one night, I just decided to try to take a bath with her, holding her and assuring her that there was nothing to be afraid of. And, eventually, that's what it took. For four weeks of me bathing with my daughter and reassuring her that she was safe, a two-year-old that, up until this assault, was severely independent and would, most of the time, respond with, "Me do it." [The victim] had lost faith in everything that was supposed to be normal.

During this entire process, [my husband and I] have not discussed the events that [the victim] suffered with her directly, or even in her presence, if we can help it. We felt that this was best so that, maybe, just maybe, she was too young to remember what had been done to her.

Up until this point, [we] have been able to assist [the victim] with her fears and nullify them, but I worry that one day she will need therapy beyond what we can give her. And as a mother, that is a heartbreaking thought, that you are no longer to help your children and that you cannot comfort them in their time of need.

[Defendant], I address you now. You allegedly came claimed to be having a bad day, but you ultimately made July the 2nd, 2024, the worst day ever to a little girl that mistakenly chose to love and trust you, a little girl that you even had the audacity to have her call you Aunt Manda.

The prosecution cannot prove the aggravated assault charge. You know why? [The victim] was only two years old. Meaning, that she was too little to testify against you. You get wrote off on that charge all because of a technicality. Just a few more seconds with your hands around my daughter's throat, and you could have killed her. You could have squeezed her little body just a little harder and you could have potentially broke a rib. The force that you used caused severe bruising on [the victim], and then you try to abuse the trust that [my husband] and I put in you, by thinking that we would just believe your story and move on. You were highly mistaken.

You threw her down on her cot; you drug her by her ankles across the floor, trying to hide where the camera couldn't see you; and then had the audacity to use the excuse that you were having a bad day. You could have taken a break from the class. You could have went home. You could have asked for help. There are no excuses for your actions that day. And I am disappointed and disgusted.

I honestly feel that the only reason you have no prior history of abuse is only because you were never caught.

Your Honor, my prayer is that you serve max judgment upon [the Defendant], on the behalf of my daughter[,] For months, [the Defendant] has been allowed to walk around town, work and, quote, live her best life, while my family has lived in fear of running into her at the grocery store or at the local gas station. I pray that she never has the opportunity to harm another child or a person, 'cause it takes an absolute monster to harm an innocent and defenseless child.

[We] have been filled with so much hatred and anger during this entire process. And I truly believe that parents will do anything that they can for their children. But it is difficult when you are placed in the mercy of this judicial system.

I, as a mother, ask that you reflect on this matter as if it was your own child. Our wish, as [the victim]'s parents, would be for her to be locked away forever and for the keys to be thrown away, but we know that that is sadly not the way the law is written. So [we] place our trust in you to sentence her with a punishment to fit this malicious event.

The Defendant presented one exhibit, a certified Tennessee Bureau of Investigation Diversion Certificate, and five witnesses. Kevin Hurst, the Defendant's brother-in-law, testified that he had known the Defendant around twenty-five years. Mr. Hurst explained that his brother had cancer and a lot of anger in relation to his diagnosis. The Defendant was her husband's primary caregiver, and she took care of him when she was not at work. Before her husband's diagnosis, Mr. Hurst would have described the Defendant as "really nice." He stated that she helped to care for his seven children and that he never had any concern about his children in her care. After the cancer diagnosis, the Defendant was sad and worried about losing her husband. Mr. Hurst stated that in the entire time he had known the Defendant, he had never known her to harm anyone. The Defendant appeared to him to be remorseful about what had occurred.

Stephen Cole, a long-time family friend, described the Defendant as "a sweet, loving caring person . . . a great mother." Mr. Cole was aware of the Defendant's husband's medical condition, which included cancer, COPD, and emphysema. He knew the Defendant to be her husband's primary caretaker. Mr. Cole had observed the Defendant with children, and she was loving and treated the children with kindness. Mr. Cole also believed the victim to be remorseful.

Kim Meek met the Defendant, about a year ago, at a McDonald's restaurant where the Defendant worked following the incident related to this case. Ms. Meek often went through the drive-thru to get a Diet Coke, and the Defendant worked at the window. Ms. Meek described the Defendant as friendly. Ms. Meek was unaware of the details of the case but said that she knew that the Defendant was "sorry that whatever happened, happened." Nova James, another McDonald's restaurant customer, met the Defendant at the drive-thru. Their friendship developed into text conversations about their lives over the past year. She described the Defendant as friendly and kind.

Rebecca Dykes worked with the Defendant at the McDonald's restaurant for the prior six or seven months. Ms. Dykes said that she and the Defendant had "mutual friends." The Defendant had taken care of the children of some of Ms. Dykes's childhood friends. During the time Ms. Dykes had known the Defendant, the Defendant had been "kind and compassionate" to the people with whom she interacted.

After hearing argument from the parties, the trial court found, for purposes of sentencing, that the Defendant was a Range I, standard offender. The trial court considered the Defendant's application for judicial diversion. The trial court recounted the testimony from the hearing in relation to the relevant factors. The trial court first found that the Defendant was eligible for diversion. It then considered the relevant factors, as follows:

> So in considering diversion, under *Parker* and *Electroplating*, first, the Court needs to make a determination as to the [D]efendant's amenability to correction. So I think it was accurately stated, she has not been in any trouble since, she has not been in any trouble before. I think that would, generally, tend to establish that she is amenable to correction. And I think, perhaps, she has self-corrected at this point.
>
> What's troubling to the Court is the circumstances of the offense. So in reviewing that video, I mean, if I was going to describe it as disturbing, that would be putting it mildly. I think the defense described it as terrifying, I think that's, rather, accurate.

In that video, it's – it really depicts an assault that just goes on for upwards of eight minutes. There's a – it's a ten-minute video and for two minutes or so, there's no interaction, but she is targeting this one child. And while she's, at the same time, simultaneously comforting and, kind of, petting other children, violently shaking that little girl. The inherent risks associated with that, with regard to brain injuries – numerous times she did that, securing her with her legs against her body, the Court was able to see that. It was evident, in the video, that the child was screaming, although, there was no sound. So that was the video.

Next, we go into criminal record. So the [D]efendant's criminal record, it's clear that she does not have any sort of criminal record. Again, she is an ideal candidate for diversion.

Social history. I did gain some of that through the PSI. Defendant's mental and physical health. It's undisputed that she, you know, is going through a tough time, there's no doubt about that. Her physical health seems to be good, based on the PSI and what was described through the testifying witnesses.

Next, is the deterrent effect of the sentencing decision on, both, the [D]efendant and other similarly situated, so general and specific deterrents. I think that does apply in this case, particularly as it relates to general deterrence, in this type of conduct generally – the nature of this conduct.

And, finally, whether judicial diversion will serve the interest of the public, as well as the [D]efendant. So, of course, it will serve the interest of the [D]efendant, she would not be a convicted felon, after the sentence that the Court imposes.

And with respect to the public, that's a different inquiry. The Court needs to be mindful of whether the public should be on notice that she has engaged in this type of conduct in a position of trust and works for an agency that requires licensure. And with diversion, she could conceivably do that again. And she could conceivably have another bad day and conceivably hurt a child worse than she did in this case.

So I think, in considering all the factors, that she is not a candidate for judicial diversion. So that will be the order of the Court with respect to judicial diversion.

Next, the trial court considered enhancement and mitigating factors. The trial court found two applicable mitigating factors. Mitigating factor (11), that the Defendant committed the offense under such unusual circumstances that there was no sustained intent to violate the law, and mitigating factor (13), the "catch-all" provision. *See* T.C.A. § 40-35-113. The trial court found factor (13) applicable given that the forty-five-year-old Defendant had "lived a productive life." *Id.* The trial court also found applicable enhancement factor (14), that the Defendant abused a position of public or private trust to commit the offense. T.C.A. § 40-35-114.

The trial court then considered the manner of service of the sentence. The trial court noted that the Defendant had no criminal history per the Presentence Investigation Report. The trial court stated that it had considered the principles of sentencing, arguments of counsel, and the nature of the criminal conduct. In considering the nature of the conduct, the trial court offered that the Defendant's actions were "abhorrent and disgusting and very dangerous." The trial court considered the purpose and intent of sentencing, "to promote justice," in light of the video recording of the incident. He found that the Defendant had never been on probation, that incarceration was not necessary to protect the public, and that the Defendant was generally amenable to rehabilitation.

The trial court also found that confinement was necessary to avoid depreciating the seriousness of the Defendant's conduct toward a two-year-old victim and that "some degree of deterrence" would result from a sentence involving incarceration.

After consideration of all the relevant factors, the trial court found that confinement was warranted but imposed the minimum sentence within the range of two years. It is from this judgment that the Defendant appeals.

II. Analysis

The Defendant asserts in her appeal that the trial court abused its discretion when it denied the Defendant's request for judicial diversion and a probation sentence. The State responds that the record supports the trial court's denial of judicial diversion and denial of a probation sentence. We agree with the State.

On appeal, a defendant bears the burden of establishing that his sentence is improper. T.C.A. § 40-35-401, *Sentencing Comm'n Cmts*; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). Appellate review of sentences is under the abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (2012); *see also State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). A finding of abuse of discretion "'reflects that 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) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)).

To find an abuse of discretion, the record must be void of any substantial evidence that would support the trial court's decision. *Id.*; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). In the context of sentencing, as long as the trial court places the sentence within the appropriate range and properly applies the purposes and principles of the Sentencing Act, this Court must presume the sentence to be reasonable. *Bise*, 380 S.W.3d at 704-07. As the *Bise* Court stated, "[a] sentence should be upheld so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 708.

In determining the proper sentence, the trial court must consider: (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 the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made on the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210; *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

A. Judicial Diversion

The Defendant asserts that the trial court erred by relying on deterrence to support denial of diversion and by "provid[ing] almost no explanation" for the weighing of the relevant diversion considerations. The State responds that the trial court's denial is supported by substantial evidence that weighs against a grant of diversion. We agree with the State.

"Judicial diversion" occurs when, following a determination of guilt by plea or trial, a trial court, in its discretion, defers further proceedings and places a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A); *State v. Dycus*, 456 S.W.3d 918, 925 (Tenn. 2015). "Upon successful completion of the probationary period under judicial diversion, 'the court shall discharge the person and dismiss the proceedings against the person.'" *Dycus*, 456 S.W.3d at 925 (quoting T.C.A. § 40-35-313(a)(2)). Following such dismissal, the defendant may seek expungement of his or her criminal record. *Id*. (*citing* T.C.A. § 40-35-313(a)(1)(A) and *State v. King*, 432 S.W.3d 316, 323 (Tenn. 2014)). As such, "judicial diversion is not a sentence; rather, the grant or denial of judicial diversion is simply a decision to defer a sentence or to impose

one." *State v. Sheets*, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *6 (Tenn. Crim. App., Apr. 12, 2023) (*citing King*, 432 S.W. 3d at 324-25). "Our supreme court has described judicial diversion as a 'legislative largess' available to a qualified person." *Id*. (quoting *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999)).

A defendant may qualify for diversion if the defendant is found guilty of, or pleads guilty or nolo contendere to, an offense that is not "a sexual offense or a Class A or Class B felony," and the defendant does not have a prior conviction for a felony or Class A misdemeanor. T.C.A. § 40-35-313(a)(1)(B)(i)(b). In this case under submission, the Defendant was eligible for judicial diversion. She pleaded guilty to a Class D felony, which was not a sexual offense, and she does not have a prior conviction for a felony or a Class A misdemeanor.

A defendant eligible for judicial diversion is not entitled to diversion as a matter of law. *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993*), overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). A trial court's decision to grant or deny judicial diversion is reviewed for an abuse of discretion with a presumption of reasonableness. *King*, 432 S.W.3d at 329.

In determining whether to grant diversion, the trial court is to consider the following factors: (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the accused's physical and mental health, (f) the deterrence value to the accused as well as others and (g) whether judicial diversion will serve the interests of the public as well as the accused. *State v. Electroplating*, 990 S.W.2d 211, 229 (Tenn. Crim. App 1998) (*citing State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996); and *Bonestel*, 871 S.W.2d at 168). Our supreme court has observed:

> Under the *Bise* standard of review, when the trial court considers the *Parker* and *Electroplating* factors, specifically identifies the relevant factors, and places on the record its reasons for granting or denying judicial diversion, the appellate court must apply a presumption of reasonableness and uphold the grant or denial so long as there is any substantial evidence to support the trial court's decision. Although the trial court is not required to recite all of the *Parker* and *Electroplating* factors when justifying its decision on the record in order to obtain the presumption of reasonableness, the record should reflect that the trial court considered the *Parker* and *Electroplating* factors in rendering its decision and that it identified the specific factors applicable to the case before it. Thereafter, the trial court may proceed to solely address the relevant factors.

King, 432 S.W.3d at 327 (footnote omitted).

If the trial court decides to deny judicial diversion, "the court should clearly articulate and place in the record the specific reasons for its determinations." *Parker*, 932 S.W.2d at 958-959. "If, however, the trial court fails to consider and weigh the applicable common law factors[,] . . . the appellate courts may either conduct a *de novo* review or, if more appropriate under the circumstances, remand the issue for reconsideration." *King*, 432 S.W.3d at 327-28. Such a decision "is within the discretion of the reviewing court." *Id*. at 328.

The record in this case demonstrates that the trial court considered the factors and identified those specifically applicable to the facts. The trial court considered the Defendant's lack of criminal history as showing her amenability to correction but also considered the circumstances of this particular case and the video footage of the assault. The trial court said the video reflected that the Defendant "targeted" the victim and was "violently shaking" the victim. The trial court also noted the risk of brain injury. The trial court described the video footage as "terrifying," noting that the victim appeared to be screaming as a result of the abuse. The trial court acknowledged the challenges of the Defendant's role as caretaker for her husband but found the Defendant to be in good health. The trial court considered the deterrent effect for those similarly situated in the childcare profession and the importance of notification to the Defendant's future employers. In considering all the factors, the trial court concluded that the Defendant's assault of a two-year-old child while in the capacity of a childcare worker outweighed the factors favoring the grant of judicial diversion.

Our review of the record reveals that there is substantial evidence to support the trial court's decision. The Defendant worked with toddlers and babies who were vulnerable for many reasons, not the least of which is their inability to communicate the existence of abuse to their parents or guardians. The Defendant was in a position of trust and attempted to cover up her abuse by falsifying the report of the victim's injuries and lying to the victim's parents. Further the length of the assault on the two-year-old victim and the injuries sustained by the victim support the trial court's findings. The Defendant's conviction will serve as a deterrent to others in this profession, as well as provide notice to future employers to prevent re-offense. Based upon this evidence, we cannot conclude that the trial court abused its discretion in denying the Defendant judicial diversion. The Defendant is not entitled to relief.

B. Probation

The Defendant asserts that the trial court erred in denying a probation sentence. The Defendant argues that either factor the trial court relied upon was in isolation and therefore

required a heightened standard. She further argues that she is entitled to probation because she has no criminal record, is amenable to correction, and the circumstances do not demonstrate a sustained intent to violate the law. The State responds that the record supports the trial court's decision to deny probation and order a sentence of confinement. We agree with the State.

The standard of review for questions related to probation or any other alternative sentence is "'an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act.'" *State v. Caudle*, 388 S.W.3d at 278-79 (quoting *State v. Bise*, 380 S.W.3d at 707). With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> 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.

A defendant shall be eligible for probation, subject to certain exceptions, if the sentence imposed on the defendant is ten years or less. T.C.A. § 40-35-303(a). A defendant is not, however, automatically entitled to probation as a matter of law. The burden is upon the defendant to show that he or she is a suitable candidate for probation. T.C.A. § 40-35-303(b); *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). In order to meet this burden, the defendant "must demonstrate that probation will 'subserve the ends of justice and the best interest of both the public and the defendant.'" *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (quoting *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)).

There is no bright line rule for determining when a defendant should be granted probation. *Bingham*, 910 S.W.2d at 456. Every sentencing decision necessarily requires a case-by-case analysis considering "the nature of the offense and the totality of the circumstances . . . including a defendant's background.'" *State v. Ashby*, 823 S.W.2d at 168 (quoting *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). In determining if incarceration is appropriate in a given case, a trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103.

In this case, after much consideration, the trial court found that based on the nature of the offense, confinement was necessary to avoid depreciating the seriousness of the offense and that confinement was particularly suited to provide an effective deterrence to others likely to commit similar offenses. The trial court found that there was a need for deterrence, giving that consideration "some weight," and found that confinement was necessary to avoid depreciating the seriousness of the offense. The trial court highlighted the "terrifying" video recording of the offense. The Defendant abused a two-year-old victim who lacked the ability to report the abuse to an adult. The Defendant's assault on the two-year-old was a sustained assault lasting over seven minutes, and the Defendant preemptively contacted the victim's parents with a fabricated story to avoid detection of the offense on a vulnerable child. The defense attorney characterized this as a momentary lapse in judgment on the part of the Defendant, but the Defendant's acts to cover her conduct bely this assertion.

The trial court considered the pertinent facts of this case and appropriate sentencing principles. The trial court denied alternative sentencing based on the nature of the offense and to avoid depreciating the seriousness of the offense. The Defendant has not established that the trial court abused its discretion by denying an alternative sentence.

The Defendant specifically argues that, because the trial court based its decision on deterrence alone, it should have considered additional factors enumerated in *State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). We disagree. The trial court based its denial on both the nature of the offenses and the necessity to avoid depreciating the seriousness of the offense. Therefore, the court was not required to consider the factors discussed in *Hooper*. *Id.* at 10, 11 (holding that a denial of an alternative sentence may be "based solely on a need for deterrence" under certain circumstances.). The trial court did not abuse its discretion, and its failure to consider additional factors is not a basis for reversal by this court. *See State v. Sihapanya,* 516 S.W.3d 473, 476 (Tenn. 2014) (holding that the heightened standards of *Hooper* and *Trotter* apply when the need for deterrence or the

circumstances of the offense are the sole basis for a denial of probation); *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008). The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude the trial court did not abuse its discretion when it denied judicial diversion and when it denied an alternative sentence. As such, we affirm the trial court's judgment.

S/ *ROBERT W. WEDEMEYER*
ROBERT W. WEDEMEYER, PRESIDING JUDGE