

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 11, 2026

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JOHN WESLEY McELHINEY

Appeal from the Circuit Court for Dickson County
No. 22CC-2024-CR-134, 22CC-2024-CR-135 David D. Wolfe, Judge

No. M2025-01986-CCA-R3-CD

The defendant, John Wesley McElhiney, pled nolo contendere to one count each of aggravated burglary, burglary of an automobile, and attempted aggravated burglary. As a condition of his plea, the parties agreed that the defendant would receive an effective sentence of ten years or less as a Range III offender with the length of each sentence and manner of the service to be determined by the trial court. After a sentencing hearing, the trial court sentenced the defendant to an effective ten years' confinement with the Tennessee Department of Correction. On appeal, the defendant contends the trial court erred in sentencing him to confinement. Upon our review of the record and the parties' briefs, we affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal; Judgments of the Circuit Court Affirmed

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Zachary L. Talbot, Ashland City, Tennessee, for the appellant, John Wesley McElhiney.

Jonathan Skrmetti, Attorney General and Reporter; Andrew R. Runions, Assistant Attorney General; Ray Crouch, Jr., District Attorney General; and Sarah Wojnarowski, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On August 1, 2024, at approximately 9:00 p.m., Dickson County Sheriff's Deputy Cody Hargrove was dispatched to the home of Michael Zajak, concerning a report of a suspicious person on Mr. Zajak's property. Mr. Zajak had observed motion-activated flood lights outside of his home illuminate as he was putting his children to bed. To determine the cause, Mr. Zajak walked onto his front porch where he encountered the defendant in "the shadows" of his yard, appearing "sleepy" and "aloof." Mr. Zajak asked the defendant to leave the property. In response, the defendant said he was there to see a guy named John. Mr. Zajak replied, "[t]here's no John here and you need to go." Mr. Zajak withdrew into his home to retrieve his firearm. However, when Mr. Zajak returned, the defendant was no longer present in the yard.

Additionally, Mr. Zajak's property was equipped with surveillance cameras. The surveillance footage, which was provided to Deputy Hargrove, showed the defendant "exploring" other areas of Mr. Zajak's property prior to being discovered by Mr. Zajak, including entering an unlocked garage and barn, as well as peering into the windows of two recreational campers.

After leaving Mr. Zajak's property, Deputy Hargrove patrolled the nearby area and discovered the defendant sitting in a parking lot. When questioned about his presence on Mr. Zajak's property, the defendant claimed he had been "mowing all day" and had run out of gasoline. He claimed that he went onto Mr. Zajak's property looking for gasoline in order to return home. Deputy Hargrove warned the defendant that he had trespassed on Mr. Zajak's property but left the defendant without placing him under arrest.

At approximately 11:30 p.m., Deputy Hargrove received a second dispatch concerning a suspicious person on the property of Mildred Thaxton. Ms. Thaxton reported that she heard a "jiggling" of her front doorknob but told Deputy Hargrove that she "never heard anyone knocking." Deputy Hargrove searched Ms. Thaxton's property but did not initially find anyone. However, a second deputy, who responded to the call at Ms. Thaxton's property, discovered the defendant drinking from Ms. Thaxton's water faucet in the backyard and detained him.

Upon hearing the deputies confront the defendant in the backyard, Ms. Thaxton opened her front door and discovered a firearm lying on a chair on her porch. She recognized the firearm as belonging to her son, Kelly Thaxton, and brought the firearm inside.

As the two deputies questioned the defendant, Kelly Thaxton approached them and demanded to know if the defendant had stolen a firearm from his vehicle. Mr. Thaxton told Deputy Hargrove that he saw someone on his property earlier in the evening with a flashlight. Additionally, he stated that he kept a firearm in his vehicle and that the vehicle

had been locked earlier in the day. The defendant claimed that he was on Ms. Thaxton's property to drink from the water faucet because he was hot and thirsty, but he maintained that he had no knowledge of Mr. Thaxton's firearm.

On October 10, 2024, a Dickson County grand jury indicted the defendant with one count each of aggravated burglary and burglary for his offenses against Mr. Zajak.¹ The defendant was also indicted with one count each of burglary of a automobile, theft of property valued less than \$1,000, illegal possession of a weapon after having been convicted of a felony drug offense, attempted aggravated burglary, and criminal trespass for his offenses against the Thaxtons.² Pursuant to a plea agreement, the defendant pled nolo contendere to aggravated burglary in Case No. 134 and burglary of an automobile and attempted aggravated burglary in Case No. 135. The parties also agreed that the defendant would receive an effective sentence of ten years or less as a Range III offender with the length of each sentence and manner of service to be determined by the trial court. Additionally, the defendant's sentence was to run concurrently with a sentence imposed in an unrelated case from Maury County. The State dismissed the remaining charges.

The trial court conducted a sentencing hearing on November 7, 2025. The defendant's presentence report was admitted into evidence and contained the defendant's criminal history. The defendant's criminal history consisted of over twenty convictions, including multiple felony convictions and spanning more than two decades. The defendant's validated risk and needs assessment resulted in a risk score of high with moderate needs in the areas of "friends, associates and residential," "aggression," and "partner, family and children." Yet, the defendant was assessed with low needs in the areas of "mental health," "education and employment," and "alcohol and drug use."

At the sentencing hearing, the State presented Wendy James, a probation officer with Tennessee's Board of Probation and Parole, who testified that she had prepared the defendant's presentence report. Ms. James testified to the defendant's criminal and probationary history, highlighting that he had been on probation at the time the current offenses were committed. Ms. James acknowledged that the defendant suffered from substance use disorder and had experienced a heroin overdose in 2019. As a result of the defendant's high risk of recidivism, drug use, and criminal history, Ms. James recommended the defendant undergo a long-term drug treatment program and a mental health assessment.

In addition to factual testimony consistent with the report provided to Deputy Hargrove on the night of the incidents, Michael Zajak described the "very significant and

¹ Case No. 22CC-2024-CR-134 ("Case No. 134")

² Case No. 22CC-2024-CR-135 ("Case No. 135")

profound impact” of the defendant’s actions on himself and his family. Mr. Zajak testified that his family had trouble sleeping since the incident, instigating him to invest in a security system. He stated that his family “is in fear when [he] leaves for work.” Mr. Zajak acknowledged that while no tangible property was stolen, his family’s “sense of security has been stolen and no amount of money can give that back.” He requested the trial court impose the maximum sentence possible.

The trial court also heard testimony from Mildred Thaxton. Regarding the incident, Ms. Thaxton explained that she received a phone call from her son, Kelly Thaxton, warning her to lock her doors and turn on her porch lights. Mr. Thaxton had observed a man in his yard who appeared to be heading towards Ms. Thaxton’s home. Ms. Thaxton testified that, through the crack of her window, she could see the defendant on her porch, pounding on her door and jiggling the doorknob. She also could see a firearm lying on a chair by the front door. Ms. Thaxton testified that she then armed herself with her own firearm, because “if someone is going to come in and try to kill me, I’m going to take revenge.”

Additionally, Ms. Thaxton testified that she had lived in her home for 65 years and that the impact of the defendant’s actions had been “devastating” to her. Immediately after the attempted burglary, Ms. Thaxton was treated at an emergency room for anxiety. At the time of sentencing, Ms. Thaxton continued to have nightmares, necessitating medication to help her sleep.

The defendant presented the testimony of Kim Hodgin, his aunt, who testified concerning the defendant’s history of substance abuse. She explained that the defendant’s father died when he was young and that his stepfather was physically and mentally abusive. She opined that the defendant’s criminal history was the result of his drug addiction. Ms. Hodgin then described a time during which she observed the defendant under the influence of drugs, describing the defendant as appearing “sleepy” and stating that “[h]e don’t even know what is he is doing.”

Further, Ms. Hodgin testified that when the defendant was not using drugs, he was a good electrician, maintained employment, and was trustworthy. She explained that the defendant had previously sought treatment for his drug addiction at Hope Center. Ms. Hodgin attempted to help the defendant seek additional treatment at Synergy in Memphis, but the defendant thought he could handle it on his own and did not attend. Now, however, the defendant had asked for her help, and she believed he was ready for that help.

Scott Barnhill, a case manager for the 23rd Judicial District Drug Court Program, testified that the defendant had been provisionally accepted into the program. Based upon an assessment of the defendant, Mr. Barnhill found the defendant was ready for drug

addiction treatment. Mr. Barnhill described the Drug Court³ program as a disciplined program whereby 82% of those who complete their treatment do not reoffend. However, if an attendee did not complete the program, they were terminated from Drug Court and ordered to serve their sentence. Mr. Barnhill recommended a 28-day treatment program for the defendant but acknowledged that a longer program may be needed.

The defendant also testified at his sentencing hearing, chronicling his history with substance abuse. According to the defendant, he began using drugs at the age of 14, claiming he “got tangled up in the wrong bunch” while attempting to escape from his abusive stepfather. Following the death of his father in a car accident, his stepbrother was killed in a dirt bike accident. Then, when he was 21 years old, the defendant’s son passed away. Initially, the defendant only smoked marijuana, but after he graduated from high school, he started using cocaine, “pills,” and heroin. The defendant testified that while he was “clean there for a little while,” his mother’s death in 2018 prompted him to begin experimenting with methamphetamine. Four months after his mother’s death, the defendant overdosed on heroin.

Regarding the offenses at issue, the defendant testified that he was under the influence of methamphetamine on the night of the incident. He claimed that he had walked on Mr. Zajak’s property looking for gasoline to return home. After he was confronted by Deputy Hargrove in the parking lot, he walked through Mr. Thaxton’s yard to avoid being seen on the road by the police. The defendant stated that he was hot and thirsty; therefore, when he arrived at Ms. Thaxton’s yard, he drank from her water faucet. While he did not think he touched Ms. Thaxton’s house, the defendant conceded that he did enter her front porch. On cross-examination, the defendant admitted that at the time of this offense, he was on probation for a conviction of burglary of a building other than a habitation. The defendant also acknowledged that he had not sought further treatment for his drug addiction prior to the current offense, even after losing custody of his children.

When the trial court inquired as to how Mr. Thaxton’s firearm came to be on Ms. Thaxton’s porch, the defendant replied, “I’m not sure about the gun I pled guilty to the car broken [sic] into it because it was part of the plea, and I asked why it was being charged with that if the gun was being dismissed. Because I don’t have any idea how the gun got there.” The trial court then asked, “[s]o even though you pled no contest to the charge of burglary of an automobile, you have no way to explain what was taken out of the automobile and that sort of thing.” The defendant responded, “[N]o sir.”

³ The terms “Drug Court” and “Recovery Court” were used interchangeably throughout Mr. Barnhill’s testimony and the sentencing hearing.

The defendant requested the trial court allow him to serve his sentence with the Drug Court as an alternative to confinement because he wanted to “change [his] life.” As evidence of his desire to change, the defendant tallied a list of certificates he had completed since being incarcerated, including programs for electricians, HVAC, plumbing, building maintenance, and a wellness recovery program.

At the conclusion of the hearing, the trial court acknowledged the required sentencing guidelines enumerated in Tennessee Code Annotated section 40-35-102 and the considerations set forth in section 40-35-103. The trial court considered the defendant’s long history of criminal conduct and noted that the defendant was on probation at the time of the current offenses.

As to the application of enhancement factors, the trial court, relying on the defendant’s 20-year criminal history, found enhancement factor (1), the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, applicable. *See* Tenn. Code Ann. § 40-35-114. The trial court also applied enhancement factor (3), the victim of the offense was particularly vulnerable because of age or physical or mental disability, acknowledging that while Ms. Thaxton was not “particularly so elderly that she was disabled, . . . she is not a young person.” *Id.* The trial court also stated that this factor was applicable because Ms. Thaxton lived alone and isolated. Additionally, the trial court applied enhancement factor (13), noting the defendant was on probation at the time he committed the instant offenses. *Id.* Lastly, the trial court applied enhancement factor (29), the offense involved the theft of a firearm from a motor vehicle. *Id.* The trial court found that the evidence “clearly established that there was a theft of the firearm from the motor vehicle,” noting that his inquiry of the defendant concerning the firearm was to determine “number one, [the defendant’s] acceptance of responsibility, and number two, his credibility as a witness.”

With regard to the application of mitigating factors, the trial court acknowledged the defendant’s requested mitigating factor (1), the criminal conduct neither caused nor threatened serious bodily injury. *See* Tenn. Code Ann. § 40-35-113. The trial court concluded that Ms. Thaxton “deserves to live in her home without fear” and that the Zajaks have been “robbed” of their “sense of security.” Ultimately, the court stated that, while the victims’ fear of living in their homes “night [*sic*] rise to the level of serious bodily injury, it is a consideration that this [c]ourt finds to be appropriate in determining the sentence in this case.”

Turning to mitigating factor (7), the defendant was motivated by a desire to provide necessities for his family or self, the trial court found that the defendant’s behavior was inconsistent with simply looking for gasoline or cooling off with water. *Id.* Additionally, the trial court noted that the factor was more applicable to situations of a person committing

theft to feed their family, not obtaining gasoline. Therefore, the trial court did not apply mitigating factor (7). Similarly, the trial court did not apply mitigating factor (11), the defendant committed the crime under such unusual circumstances it is unlikely that a sustained attempt to violate the law motivated the criminal conduct. *Id.* The trial court found that the defendant's prior criminal record and behavior on the night of the offenses did not make it an unusual circumstance, but a consistent pattern of behavior and criminal conduct. Lastly, as to mitigation factor (13), the "catch-all" provision, the trial court acknowledged that the defendant had a drug problem and "has been for many years suffering from a drug addiction and for many years has been in need of treatment." However, the trial court found that the defendant had been offered repeated opportunities for treatment in the past and failed to take advantage of them.

Ultimately, the trial court found that the defendant had been placed on probation "over and over and over again" but had failed to take advantage of those opportunities and get the help he needed. The trial court also noted that the defendant was on probation at the time he committed the offenses in the instant matter. While the trial court hoped the defendant was serious about wanting treatment for his addiction, the court was of the opinion that placing him with the Drug Court was not in the best interest of society and did not comply with the requirements of the law. Accordingly, the trial court sentenced the defendant to serve an effective ten-year sentence in confinement with the Tennessee Department of Correction.⁴

This timely appeal followed.

Analysis

On appeal, the defendant challenges the trial court's sentencing determination that he serve his effective ten-year sentence in confinement. Specifically, the defendant contends the trial court misapplied sentencing enhancement factors (4) and (29), failed to apply appropriate mitigation factors (1), (11), and (13), and failed to consider the defendant's potential for rehabilitation in compliance with the requirements of Tennessee Code Annotated sections 40-35-102 and -103. The State maintains the trial court acted within its discretion when it imposed confinement. After a review of the record, we agree with the State.

⁴ Specifically, in Case No. 134, Count 1, aggravated burglary, the trial court sentenced the defendant as a Range III offender and imposed a ten-year sentence to be served at 100 percent. In Case No. 135, Count 1, burglary of an automobile, the trial court sentenced the defendant as a Range III offender and imposed a six-year sentence. In Count 4, attempted burglary, the trial court sentenced the defendant as a Range III offender and imposed a ten-year sentence. Pursuant to the plea agreement, each of the sentences were to run concurrently to limit the aggregate sentence to the agreed-upon ten years.

In determining an appropriate sentence, a trial court must consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on mitigating and enhancement factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant makes on his own behalf as to sentencing; and (8) the result of a validated risk and needs assessment. Tenn. Code Ann. §§ 40-35-103(5), -113, -114, -210(b). When an accused challenges the length and manner of service of a sentence, this Court reviews the trial court's determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). This Court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709-710.

In *State v. Caudle*, our supreme court applied the standard of review in *Bise* to trial court decisions on the manner of service. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). The Court held that "the 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, including the questions related to probation or any other alternative sentence." *Id.* "[A] trial court's decision to grant or deny probation will not be invalidated unless the trial court wholly departed from the relevant statutory considerations in reaching its determination." *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014).

In general, a court abuses its discretion "when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). In practice, application of the abuse of discretion standard to sentencing determinations focuses the inquiry on "whether the trial court recite[d] a proper basis" for its decision. *Caudle*, 388 S.W.3d at 279 (citing *Bise*, 380 S.W.3d at 705 n.41, 706).

Generally, alternative sentencing is available to a defendant sentenced to ten years or less. Tenn. Code Ann. § 40-35-303(a). In determining whether incarceration is appropriate, the trial court should consider whether:

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

Tenn. Code Ann. § 40-35-103(1)(A)-(C). Additionally, “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5).

The burden of establishing suitability for alternative sentencing rests with a defendant, who must demonstrate that it will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (quoting *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)); see Tenn. Code Ann. § 40-35-303(b); *State v. Russell*, 773 S.W.2d 913, 915 (Tenn. 1989); *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Recovery-based treatment programs, such as a drug court, are proper community-based sentencing alternatives to incarceration. Tenn. Code Ann. § 40-35-104(c)(9).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory presumptive minimum sentence and rendered enhancement factors advisory only. See Tenn. Code Ann. § 40-35-114, -210(c). The 2005 amendments set forth certain “advisory sentencing guidelines” that are not binding on the trial court; however, the trial court must nonetheless consider them. See *id.* § 40-35-210(c). Although the application of the factors is advisory, a court shall consider “[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.” *Id.* § 40-35-210(b)(5). The trial court must also place on the record “what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.” *Id.* § 40-35-210(e). The weighing of mitigating and enhancement factors is left to the sound discretion of the trial court. *Carter*, 254 S.W.3d at 345. The trial court’s weighing of the various enhancement and mitigating factors is not grounds for reversal under the revised Sentencing Act. *Carter*, 254 S.W.3d at 345 (citing *State v. Banks*, No. W2005-02213-CCA-R3-DD, 2007 WL 1966039, at *48 (Tenn. Crim. App. July 6, 2007), *aff’d as corrected*, 271 S.W.3d 90 (Tenn. 2008)).

Here, because the sentence imposed upon the defendant was ten years or less, he was eligible for probation or a community-based alternative to incarceration. Tenn. Code

Ann. § 40-35-303(a). However, the trial court ordered the defendant to serve his sentence in confinement after considering the evidence presented at the sentencing hearing, including the enhancement and mitigating factors. On appeal, the defendant contends the trial court abused its discretion in its application of enhancement factors (4) and (29); its failure to apply mitigating factors (1), (7), (11), and (13); and its failure to consider the defendant's potential for rehabilitation.

I. Enhancement Factors

a. Enhancement Factor (4) – Victim was Particularly Vulnerable

Initially, we address the defendant's contention that the trial court misapplied enhancement factor (4) by finding that Ms. Thaxton was particularly vulnerable. The trial court found that Ms. Thaxton was particularly vulnerable because of her age and because she lived alone. While Ms. Thaxton did not explicitly testify to her age, she stated that she lived in her residence for 65 years. However, enhancement factor (4) is not appropriate where there is "no proof at trial that the vulnerability of the victim of the crime was a factor in the commission of the offense." *State v. Lewis*, 44 S.W.3d 501, 504 (Tenn. 2001). Additionally, when a trial court considers this factor, "[i]t should consider whether evidence in the record with the regard to the victim's age or physical and mental attributes demonstrated an ability to resist the crime, summon help, or testify at a later date." *State v. Christopher*, No. M2024-00247-CCA-R3-CD, 2025 WL 1428088, *4 (Tenn. Crim. App. May 19, 2025).

Here, the record is void of evidence that suggests Ms. Thaxton's age or residential status was a factor in the defendant's offense of attempted burglary. However, the record does show that Ms. Thaxton, despite any perceived limitation due to age, was able to lock her doors, call for assistance, and arm herself against the threat of entry by the defendant. Therefore, the record does not support the trial court's application of this enhancement factor. Accordingly, the trial court's consideration of Ms. Thaxton as particularly vulnerable under enhancement factor (4) was in error.

b. Enhancement Factor (29) – Theft of a Firearm from a Motor Vehicle

Next, we review the trial court's finding that the offense involved the theft of a firearm from a motor vehicle. Tenn. Code Ann. § 40-35-114(29). The record reflects that Mr. Thaxton told Deputy Hargrove that he kept a firearm inside his motor vehicle and that he observed a person on his property with a flashlight. While Deputy Hargrove did not personally search Mr. Thaxton's vehicle, he stated in the affidavit of complaint that Mr. Thaxton verified his firearm was taken from his vehicle. At the sentencing hearing, Ms. Thaxton testified that she saw Mr. Thaxton's firearm on her porch after hearing the

defendant at the front door. While the defendant maintains that he did not know how the firearm appeared on the porch, he pled nolo contendere to the burglary of Mr. Thaxton's vehicle. Therefore, the trial court was within its discretion to find that the evidence established that the defendant's offense of burglary of Mr. Thaxton's automobile involved the theft of a firearm. Accordingly, we find no error in the trial court's application of enhancement factor (29).

II. Mitigating Factors

a. Mitigating Factor (1): Absence of Actual or Threatened Serious Bodily Injury

The defendant argues that the trial court erred by failing to apply mitigating factor (1) to his sentence because his offenses did not cause or threaten serious bodily injury. The trial court, however, found this factor did not apply.

"Serious bodily injury" is defined as bodily injury that involves a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty, or a broken bone of a child who is twelve years of age or less. Tenn. Code Ann. § 39-11-106(37)(A)(F). While psychological injuries can constitute "serious injury" for purposes of sentence determination, there must be "specific and objective evidence demonstrating how a victim's mental injury is more serious or more severe than that which normally results from [an] offense." *State v. Messick*, No. M2014-0016-CCA-R3-CD, 2015 WL 2128671, *9 (Tenn. Crim. App. May 6, 2015)

i. Mr. Zajak

Here, the record establishes that the defendant wandered among the structures on Mr. Zajak's property, purportedly searching for gasoline. The defendant peered into windows of Mr. Zajak's home and entered two buildings that were unlocked and unoccupied, including the garage attached to Mr. Zajak's home. Upon being alerted by the motion sensitive lights around his house, Mr. Zajak went outside, confronted the defendant, and told him to leave. Luckily, the defendant complied without further incident. Additionally, Mr. Zajak testified as to the psychological injury the defendant's conduct caused. Since the incident, his family was in fear when he left the house, had "trouble sleeping," and no longer felt "secure in the home."

Based on Mr. Zajak's encounter with the defendant, the trial court found that the defendant's actions of wandering the property and entering the attached garage in the middle of the night did, in fact, threaten serious bodily injury, and therefore, this mitigating

factor was not applicable. More specifically, in discussing the defendant's actions that evening, the trial court noted,

I'm happy that there was no serious bodily injury. Mr. McEliney might want to consider the fact that in my growing up if somebody had showed up on my father's doorstep in the middle of the night banging on the door, they might not be alive the next day to have to deal with anything. So luckily there was no serious bodily injury or harm.

The same thing with the other cases that were involved in this situation. I don't know that Mr. Zajak would, you know, would have done anything like that, but I think there is -- it is applicable to me that he is lucky that there was not a more serious result of this.

While no one was injured as a result of the defendant's actions, the situation created by the defendant placed both the defendant and his victims at risk of serious bodily injury. *See generally State v. Alexander*, 957 S.W.2d 1 (Tenn. Crim. App. 1997) (breaking into a person's house in the dead of night under circumstances in which it is reasonable to assume that a person is home creates a situation for potential for bodily injury). As outlined by the trial court, that potential for serious bodily injury is not limited to the victims of crime but also includes the perpetrator as well, and the language of the mitigating factor also does not limit itself to only the victims of the crime. Therefore, the trial court's denial of the factor based on the potential for serious bodily injury was proper.

The trial court also found mitigating factor (1) was not applicable based on the serious psychological injury suffered by Mr. Zajak and his family. While Mr. Zajak gave examples of the psychological harm the defendant caused to his family, his claims, while genuine and real, fail to meet the applicable definition for "serious bodily injury" as the psychological harm described by Mr. Zajak is not more serious or more severe than other victims of aggravated burglary or a substantial impairment to their mental faculties. Accordingly, the evidence preponderates against the trial court's finding that the defendant's conduct caused or threatened to cause serious psychological injury towards Mr. Zajak or his family. However, despite the trial court's determination that mitigating factor (1) was applicable to the crimes against Mr. Zajak and his family based on serious psychological injury was in error, the trial court's denial of the factor based on the potential for serious bodily injury was proper.

ii. Ms. Thaxton

The record shows that the defendant walked onto Ms. Thaxton's property, jiggled the doorknob, and proceeded to drink water from the faucet in the backyard. While Ms.

Thaxton testified at the sentencing hearing that the defendant “pounded” on her door and appeared as if he was going to come inside, Deputy Hargrove’s testified contrarily that Ms. Thaxton reported only hearing a jiggling of the doorknob. As to her psychological injuries, Ms. Thaxton stated that after the incident she sought medical treatment in an emergency room for anxiety and that she continued to have nightmares, necessitating medication to help her sleep.

Although the trial court acknowledged that this level of injury may not rise to “serious bodily injury,” this Court has previously held that mitigating factor (1) can be declined where a victim suffered nightmares and could not sleep through the night. *See State v. Allen*, No. M2005-02573-CCA-R3-CD, 2007 WL 516391, *13 (Tenn. Crim. App. Feb. 20, 2007). Here, Ms. Thaxton provided specific and objective testimony concerning her diagnosis of anxiety and continuing nightmares. Therefore, the trial court did not abuse its discretion in considering that injury when refusing to apply mitigating factor (1) to the defendant’s sentence determination.

We would note that trial court’s refusal to apply this factor in Ms. Thaxton’s case for threatening serious bodily injury would also be supported by the record. Ms. Thaxton testified that she armed herself and was ready to defend herself if the defendant had entered her home. And since, as discussed above, this mitigating factor should not be limited to the victims and should include the potential of serious bodily injury to the perpetrator as well, the decision not to apply this mitigating factor on those grounds would not have been an abuse of discretion.

b. Mitigating Factor (7): Motivation to Provide Necessities

As to mitigating factor (7), the defendant was motivated by a desire to provide necessities for the defendant’s family or the defendant’s self, the defendant argues that the trial court erred in not finding that his conduct was in furtherance of obtaining a necessity. Tenn. Code Ann. § 40-35-113(7). However, this factor “is more properly addressed to individuals who, because of their destitution, may choose to steal bread or milk for their children or themselves due to their dire circumstances.” *State v. Williamson*, No. 03C01-9210-CR-00371, 1993 WL 335433, *2 (Tenn. Crim. App. Sept. 1, 1993). Here, the defendant contends that gasoline was a necessity for him to return to his residence; however, the record does not establish by a preponderance of the evidence that gasoline was an actual necessity for the defendant or that the defendant’s actions were driven by dire circumstances. Therefore, we find the trial court did not abuse its discretion in failing to find mitigating factor (7) applicable.

c. Mitigating Factor (11): Unusual Circumstances

Concerning mitigating factor (11), the defendant, though 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, the defendant argues that the trial court's refusal to apply this factor ignored the dissimilarities between the defendant's present charges and his past convictions. Tenn. Code Ann. § 40-35-113(11). This Court has previously held that this mitigating factor is applicable when the defendant's offense "arises from aberrant conduct." *State v. Martin*, 146 S.W.3d 64, 70 (Tenn. Crim. App. Jan. 28, 2004). Here, however, the trial court found that the defendant's offenses were consistent with a pattern of criminal conduct. We agree.

The record reflects that on January 2, 2024, the defendant was convicted of one count each of burglary and theft and was granted probation. Less than one year later, while under the influence of methamphetamines, the defendant committed three additional acts of burglary and attempted burglary. The current offenses follow years of criminal conduct relating to theft and drugs. Therefore, the trial court did not abuse its discretion in determining that the defendant's current convictions were a continuation of his pattern of criminal conduct.

d. Mitigating Factor (13): Defendant's Drug Addiction and Potential for Rehabilitation

Lastly, the defendant contends that the trial court erred by not applying mitigating factor (13), the "catch-all" provision. Tenn. Code Ann. § 40-35-113(13). The defendant argues that the trial court should have applied this factor based upon his drug addiction and potential for rehabilitation. The record establishes that the trial court considered the defendant's drug addiction and need for treatment. However, the court balanced that need and potential for rehabilitation against the evidence of the defendant's prior history of drug use and failure to seek treatment, implicitly giving it little weight in its determination. Ultimately, the trial court stated that it assessed the defendant's potential for rehabilitation against the need to protect society as a whole.

Although the trial court misapplied enhancement factor (4) and failed to apply mitigating factor (1) as to Mr. Zajak, these factors are advisory only. "Erroneous application of enhancement and mitigating factors is no longer a basis to reverse a sentence." *State v. Allman*, 712 S.W.3d 467, 558 (Tenn. Crim. App. Sept. 27, 2024). Further, the defendant does not contest the application of enhancement factors (1) and (13), which were properly applied. The trial court's proper application of enhancement factors (1), (13), and (29) shows that the court did not wholly depart from the appropriate purposes and principles of sentencing.

Moreover, our supreme court has recently made clear that the “application of the abuse of discretion standard to sentencing determinations focuses the inquiry on ‘whether the trial court recite[d] a proper basis’ for its decision.” *State v. Holley*, --- S.W.3d ---, 2026 WL 2149085, *4 (Tenn. 2026) (quoting *State v. Caudle*, 388 S.W.3d 273, 279 (Tenn. 2012)). Here, the trial court recited the bases of its decision to deny alternative sentencing as the “fact that this gentleman has been on probation over and over and over again” and the need to protect “society as a whole.” These bases reflect a proper application of Tennessee Code Annotated sections 40-35-103(1)(A) and (C). Accordingly, we conclude that while the trial court did commit errors, the court did not abuse its discretion when it imposed confinement. Therefore, the defendant is not entitled to relief on this issue.

III. Compliance with Tennessee Code Annotated sections 40-35-102 and -103

Finally, the defendant contends the trial court failed to properly apply Tennessee Code Annotated sections 40-35-102 and -103 which require a sentencing court to consider a defendant’s potential or lack of potential for rehabilitation in determining whether to impose confinement and encourages the court to impose effective rehabilitation where reasonably feasible. Tenn. Code Ann. §§ 40-35-102, -103. The defendant argues that these portions of the Tennessee Criminal Sentencing Reform Act of 1989 should have resulted in the trial court imposing Drug Court as an alternative sentence. As discussed above, the record is clear that the trial court acknowledged the defendant’s drug addiction and the potential for rehabilitation with the Drug Court, even if implicitly. However, the defendant has a long history of felony and misdemeanor convictions and has been granted probated sentences in the past. Yet, the defendant has repeatedly failed to abide by the terms of probation. The trial court weighed the defendant’s potential for future rehabilitation against his failed past opportunities, thus giving it the consideration required by statute. Therefore, the trial court properly complied with Tennessee Code Annotated sections 40-35-102 and -103. We would also note that pursuant to Tennessee Code Annotated section 40-35-102(6)(A), “a defendant who is being sentenced for a third or subsequent felony conviction involving separate periods of incarceration or supervision shall not be considered a favorable candidate for alternative sentencing.” Accordingly, the defendant is not entitled to relief on this issue.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

s/ J. ROSS DYER

J. ROSS DYER, JUDGE