

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

September 2, 2026 Session Heard at Memphis

STATE OF TENNESSEE v. CLIFTON COX

Appeal from the Criminal Court for Shelby County
No. C21-02544 Lee V. Coffee, Judge

No. W2025-00723-CCA-R3-CD

A Shelby County jury convicted the defendant, Clifton Cox, of attempted first-degree murder, aggravated assault, unlawful possession of a firearm by a convicted felon, and employing a firearm during the commission of a dangerous felony, for which he received a sentence of sixty-five years in confinement. On appeal, the defendant contends the evidence presented at trial was insufficient to support his convictions. The defendant also contends the trial court erred in denying his motion to bifurcate, in allowing the State to introduce evidence of a recovered handgun, in preventing the defendant from cross-examining the victim about a prior conviction, and in imposing an excessive sentence. After reviewing the record and considering the applicable law, we affirm the judgments of the trial court. However, we remand the case for a corrected judgment form in count one.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed
and Remanded for Entry of Corrected Judgment**

J. ROSS DYER, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and TOM GREENHOLTZ, JJ., joined.

Josie S. Holland (on appeal) and Juni Ganguli (at trial), Memphis, Tennessee, for the appellant, Clifton Jerome Cox.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FILED

10/09/2026

Clerk of the
Appellate Courts

Facts and Procedural History

This case arises from the shooting of the victim, David Dunlap, on December 29, 2020. On July 13, 2021, a Shelby County grand jury indicted the defendant for attempted first-degree murder (count one), especially aggravated robbery (count two), unlawful possession of a firearm by a convicted felon (count three), and employing a firearm during the commission of a dangerous felony (count four).

The evidence produced at trial showed that in June 2020, the victim allowed the defendant, whom he had known for thirty years, to move in with him. However, in November 2020, while the victim and his girlfriend were out of town, the victim received a phone call from the defendant, accusing the victim of having a baby with the defendant's wife. The victim denied the allegation, and the defendant moved out of the victim's house. A short time later, the victim brought some of the defendant's clothing to the defendant's aunt's house. As the victim assisted the defendant in removing the clothing from the victim's trunk, the defendant suddenly jumped on him and said, "[T]ell [me] the truth, tell [me] the truth." The victim then left without further incident.

At approximately 6:00 p.m. on December 29, 2020, the victim stopped at a neighborhood gas station to buy cigarettes and talk with friends. According to the victim, he parked on one side of the convenience store, purchased a pack of cigarettes, and then backed into a parking spot on the other side to wait for his uncle. The victim had just backed into the parking spot and still had the change from his purchase in his lap when his door "flew open." The defendant immediately shot the victim "about five times," saying, "Y'all got me f****d up. You and Donny got me f****d up."¹ The victim instantly recognized the defendant because he "heard his voice, and [he knew the defendant's] structure. [He knew] his build." The victim attempted to run away; however, the initial gunshots shattered his leg, so he began rolling on the ground. The defendant stood over the victim and continued to shoot him until he ran out of bullets. The victim then observed the defendant enter the victim's vehicle, but he could not see what the defendant did once inside. After the defendant left the scene, one of the victim's god sisters looked inside his car, but "[s]he didn't see no money or nothing in there, so evidently he got it."

Officers Gregory Turner and Brent Davis with the Memphis Police Department ("MPD") responded to a shots fired call around 7:00 p.m. Upon arriving at the scene, Officer Turner observed the victim on the ground with multiple gunshot wounds. The victim, who was in critical condition, immediately told Officer Turner that the defendant was responsible for the shooting. Officers Turner and Davis attempted to speak with the bystanders at the scene, but they refused to provide the officers with any information.

¹ The victim explained that Donny was the defendant's uncle.

Sergeant Charles Lewis with the MPD Crime Scene Investigation Unit processed the scene, photographing and collecting all evidence. In particular, Sergeant Lewis collected six Smith & Wesson .40 caliber casings and two bullet fragments. While at the scene, Sergeant Lewis was directed to a nearby dumpster, where he collected a pair of black, cut-up jogging pants riddled with holes. He also photographed possible blood spatter on the ground in front of the victim's vehicle. Sergeant Lewis testified that he was tasked with recovering the victim's clothing from the hospital. However, when he arrived, "there was nothing to be picked up," and according to Sergeant Lewis, this was not a common occurrence. After watching the surveillance footage from the shooting, Sergeant Lewis agreed that it appeared that one of the paramedics took the victim's clothing and walked toward a dumpster.

Lieutenant Bryan Culley, previously with the MPD Crime Scene Investigation Unit, supervised the processing of the victim's vehicle. Inside the vehicle, Lieutenant Culley collected a .40 caliber casing on the floor by the driver's seat, a .40 caliber casing on the driver's side rear seat, and a bullet on top of the rear center console.

Lieutenant David Tisdell with the MPD was assigned to lead the investigation the day after the shooting. Lieutenant Tisdell collected surveillance footage from the shooting, which was played for the jury. Upon reviewing the footage, Lieutenant Tisdell observed the defendant approach the victim's vehicle immediately prior to the shooting. On December 30, 2020, Lieutenant Tisdell spoke with the victim on the telephone, and the victim confirmed that the defendant was responsible for the shooting. Using this information, Lieutenant Tisdell prepared a photographic lineup from which the victim identified the defendant. The victim also informed Lieutenant Tisdell that the defendant posted Facebook videos with a woman named "T" who lived behind a church at the corner of Shelby Drive and Paula Drive. Using that information, Lieutenant Tisdell identified the woman as Trivia Taylor, whose address was on Paula Drive.

Sergeant Walter Doty with the MPD's U.S. Marshals Task Force received information that the defendant was staying with Ms. Taylor on Paula Drive. Sergeant Doty and his team set up surveillance around Ms. Taylor's house on January 7, 2021, and apprehended the defendant, who was hiding in a second-floor bedroom behind a wall. Sergeant Doty also recovered a Smith & Wesson .40 caliber handgun with 14 live rounds in the same area where the defendant was hiding.

Special Agent Shandra Lynch, an expert in firearms examination with the Tennessee Bureau of Investigation ("TBI"), examined the bullet, two bullet fragments, and six .40 caliber casings recovered from the scene of the shooting and thirteen .40 caliber casings and the Smith & Wesson .40 caliber handgun recovered from the area where the defendant

was apprehended. Special Agent Lynch concluded that the six casings from the shooting were fired from the same .40 caliber firearm. Although she could not determine whether the casings were fired from the firearm found with the defendant, she opined that “[t]hey shared class characteristics that would be common to other firearms of the same make and model.” She also testified that she could not exclude the defendant’s firearm as the weapon used in the shooting.

The victim suffered extensive injuries as a result of the shooting. He was shot five times in the right thigh, four times in the buttocks, once in the left wrist, once in the right knee, three times in the left thigh, and twice in the left calf. The victim has “pins and rods” in his left leg. Prior to the shooting, the victim was a chef but is no longer able to work in a kitchen because he cannot stand for long periods of time. Due to his injuries, the victim testified that he is in “excruciating pain” every day. The victim testified that in 2022, the defendant called him on a three-way call and offered him money in exchange for not testifying. The victim informed the district attorney’s victim-witness coordinator about the call. While the victim admitted he had an unlawful possession of a controlled substance conviction from 2018, he also noted that he successfully completed six years of probation for that conviction.

On cross-examination, Lieutenant Tisdell testified that latent prints belonging to Louis Dunlap and Carolyn Fitzpatrick were found on the outside of the victim’s vehicle. However, he noted that Mr. Dunlap and Ms. Fitzpatrick were related to the victim, so it was not surprising that their fingerprints were found on the outside of his vehicle. Additional fingerprints were also found but could not be matched. Lieutenant Tisdell also testified that he was unaware of any jail phone calls made from the defendant to the victim in 2022. Yet, he agreed that it was common for inmates to exchange PIN numbers to evade detection on the jail phone call system.

A stipulation of fact was entered into proof which stated that the defendant had been previously convicted of a felony crime involving the use or attempted use of violence to the person: to wit, aggravated assault, on September 29, 2015, and that the offense of aggravated assault for which the defendant was convicted is a felony offense involving the use or attempted use of violence.

The defendant declined to present evidence. Following deliberations, the jury convicted the defendant of attempted first-degree murder (count one), the lesser-included offense of aggravated assault (count two), unlawful possession of a firearm by a convicted felon (count three), and employing a firearm during the commission of a dangerous felony (count four), and the trial court subsequently imposed an effective sentence of sixty-five years in confinement. The defendant filed a motion for new trial which the trial court denied. This timely appeal followed.

Analysis

On appeal, the defendant argues the evidence presented at trial was insufficient to support his convictions. The defendant also contends the trial court erred in denying his motion to bifurcate, in allowing evidence of a recovered handgun, in precluding cross-examination of the victim regarding his prior conviction, and in imposing an excessive sentence. The State contends that the evidence is sufficient and that the trial court reasonably accepted a stipulation, correctly admitted proof of the handgun, and properly sentenced the defendant. The State further contends the defendant has waived his claim regarding the cross-examination of the victim and is not entitled to plain error relief.

I. Bifurcation

The defendant argues the trial court erred in denying his motion to bifurcate his charge for unlawful possession of a firearm by a convicted felon from the remaining counts of his indictment. While the defendant concedes bifurcation is not mandatory, he argues that the stipulation “taint[ed] the jury’s deliberations with impermissible propensity evidence.” The State contends the trial court reasonably accepted a stipulation rather than bifurcating the trial.

As relevant here, Tennessee Code Annotated section 39-17-1307(b)(1)(A) provides that a person commits an offense “who unlawfully possesses a firearm” and “[h]as been convicted of a felony crime of violence.” There was no dispute that the defendant had a qualifying felony conviction for aggravated assault.

Prior to trial, the defendant filed a motion to bifurcate the trial, arguing the jury would be alerted to his criminal history if the firearm count were not severed. The trial court addressed the defendant’s motion several days before trial. The prosecutor objected to bifurcation, argued that bifurcation was not required, and offered to enter a stipulation. During the trial, the parties entered into a stipulation that provided that

It is stipulated or agreed by all parties that on December 29, 2020, Clifton Cox, had been previously convicted of a felony crime involving the use or attempted use of violence to the person: to wit, Aggravated Assault. This previous conviction is enumerated in Count 3 of indictment 21 01472. It is stipulated or agreed that as to Count 3, Convicted Felon in Possession of a Firearm, the State has proven beyond a reasonable doubt, that Clifton Cox was convicted on September 29, 2015, in Indictment 13 04227 of Aggravated Assault in violation of Tenn. Code Ann. 39-13-102. It is further stipulated that the offense of Aggravated Assault for which Clifton Cox was convicted

in Indictment 13 04227 is a felony offense involving the use or attempted use of violence.

Here, the defendant agreed to the stipulation, including the specific language it contained. The stipulation was signed by the prosecutor, defense counsel, and the defendant. Before the stipulation was read to the jury, the trial court instructed the jury that “[the defendant] and [defense counsel] are not stipulating that he is guilty of [unlawful possession of a firearm by a convicted felon].”

This Court has noted that bifurcation is “the better procedure” when “the defendant is charged with offenses involving the use of violence and force and also charged with the status offense of unlawful possession of a firearm for having a similar prior felony conviction.” *State v. Foust*, 482 S.W.3d 20, 46-47 (Tenn. Crim. App. 2015). Furthermore, this Court has recognized that a trial court may order bifurcation upon concluding that a bifurcated proceeding is “necessary ‘in order to avoid undue prejudice.’” *State v. Johnson*, No. W2018-01222-CCA-R3-CD, 2019 WL 6045569, at *13 (Tenn. Crim. App. Nov. 14, 2019), *perm. app. denied* (Tenn. Apr. 1, 2020) (quoting *State v. Nash*, 294 S.W.3d 541, 546 (Tenn. 2009)). Nevertheless, this Court has repeatedly held that bifurcation is not mandated. *See id.*; *State v. Buchanan*, No. M2017-02268-CCA-R3-CD, 2019 WL 852192, at *6 (Tenn. Crim. App. Feb. 21, 2019), *perm. app. denied* (Tenn. Apr. 11, 2019); *State v. Richardson*, No. W2016-02227-CCA-R3-CD, 2018 WL 821775, at *16 (Tenn. Crim. App. Feb. 9, 2018); *State v. Carter*, No. M2014-01532-CCA-R3-CD, 2016 WL 7799281, at *27 (Tenn. Crim. App. Mar. 8, 2016), *overruled on other grounds by State v. Menke*, 590 S.W.3d 455, 468 (Tenn. 2019).

Here, the parties entered into a stipulation at trial. “Stipulating to prior felonies and requesting bifurcated proceedings are both valid avenues for a defendant charged with possession of a firearm as a convicted felon.” *Johnson*, 2019 WL 6045569, at *14 (citing *State v. Smith*, No. W2012-01931-CCA-R3-CD, 2013 WL 12182606, at *4 (Tenn. Crim. App. Aug. 29, 2013)). Additionally, the trial court instructed the jury that the defendant’s prior criminal conviction did not impair his presumption of innocence. The trial court properly instructed the jury, and the jury is presumed to follow the instructions of the court. *See State v. Butler*, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Thus, we conclude the trial court did not abuse its discretion by denying the defendant’s motion to bifurcate.

Regarding the defendant’s claim that the trial court “could have insisted on a properly sanitized stipulation that referred only to a ‘qualifying prior felony’ without naming the violent offense,” the defendant failed to make a contemporaneous objection when the trial court read the stipulation, he agreed to the stipulation that was read to the jury, and he failed to raise the issue in his motion for new trial; thus, this issue is waived. *See Tenn. R. App. P. 3(e)* (“[N]o issue presented for review shall be predicated upon error

in the admission or exclusion of evidence . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.”); *see also State v. Nunez*, No. M2024-00179-CCA-R3-CD, 2025 WL 1892446, at *3 (Tenn. Crim. App. July 9, 2025), *no perm. app. filed* (“To preserve an issue, the party must first assert a timely objection identifying a specific ground. The party then must later raise that issue in a motion for new trial.”). The defendant has waived this issue.

Despite the fact the defendant agreed to the wording of the stipulation, we caution the trial court against allowing the specific name or nature of a defendant’s prior conviction to be included in a stipulation when the defendant stipulates to his status as a felon. Although Tennessee courts have “long held that the name or nature of crimes other than that for which the defendant is on trial is relevant to establish an essential element of the crime for which the defendant is being tried,” *State v. James*, 81 S.W.3d 751, 760 (Tenn. 2002) (citing *State v. Wingard*, 891 S.W.2d 628, 633-34 (Tenn. Crim. App. 1994)), “in the limited circumstance when the sole purpose of introducing evidence of a defendant’s prior convictions is to prove the status element of an offense and the defendant offers to stipulate his status as a felon, the probative value of the evidence is, as a matter of law, outweighed by the risk of unfair prejudice.” *Buchanan*, 2019 WL 852192, at *5 (citing *James*, 81 S.W.3d at 762).

II. Admission of Firearm

The defendant argues the trial court erred in denying his motion to exclude reference to a firearm recovered during his arrest. The defendant argues that the firearm’s admission allowed the jury to “reason that because [the defendant] allegedly possessed a firearm a month after the charged shooting, he was more likely the type of person who would have used a firearm in the earlier incident.” The State contends the trial court correctly admitted proof of the handgun.

Tennessee Rule of Evidence 401 provides that “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. Relevant evidence is typically admissible, while irrelevant evidence is inadmissible. Tenn. R. Evid. 402. However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403. The admissibility of evidence is within the sound discretion of the trial court, and this Court will not interfere with that discretion absent a clear showing of abuse of discretion. *See State v. Clayton*, 535 S.W.3d 829, 859 (Tenn. 2017). This Court finds an abuse of

discretion when the trial court applies “an incorrect legal standard or reaches a conclusion that is ‘illogical or unreasonable and causes an injustice to the party complaining.’” *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

The defendant filed a pretrial motion pursuant to Tennessee Rules of Evidence 401, 403, and 404(b) to exclude reference to the firearm recovered from the area in the house where he was found hiding when arrested. The defendant argued the firearm was “barely relevant” because the victim “never identified the firearm from January 2021 as being the gun that [the defendant] allegedly had earlier. The TBI cannot say for certain that the January 2021 gun was used in the December 2020 conduct.”

The trial court heard the defendant’s motion on the day before trial. At the hearing, the State argued the firearm was admissible because of the similarities between the firearm used during the shooting and the one recovered during the defendant’s arrest. Specifically, the State noted that the defendant “was arrested and in possession of [a] weapon, which is [a] .40 caliber Smith & Wesson, the same kind of weapon that was utilized at the scene.” The State noted that the TBI concluded that the casings found at the scene share “similar class characteristics to this weapon which was test fired.” Finally, the State argued that the act of possessing a weapon alone is not a “bad act.” The defendant responded that the victim never identified the firearm used during the shooting and that there was no proof that the firearm recovered during the defendant’s arrest was the same firearm used during the shooting. He also noted that the firearm was recovered “seven to ten days after the matter with [the victim].” Following argument, the trial court denied the defendant’s motion to exclude any reference to the firearm, finding it admissible because “the State is, in fact, allowed to present proof of the [defendant’s] arrest.”

On appeal, the defendant argues that “[g]iven the TBI’s inconclusive findings, the absence of any victim identification of the January 2021 gun, and Tennessee’s deliberately restrictive approach to other-act evidence, the probative value of the firearm was minimal while its potential for unfair prejudice and confusion was substantial.” Here, however, we conclude that the admissibility of the recovered firearm is governed by Rules 401 and 403 rather than Rule 404(b).² The evidence possessed significant probative value because officers recovered a .40-caliber Smith & Wesson firearm from the area where the defendant was found hiding shortly after the shooting, and the firearm shared class characteristics consistent with the ammunition recovered from the scene. Although the firearm could not be conclusively identified as the weapon used in the shooting, that limitation affected the weight of the evidence rather than its admissibility. Its probative value was not

² Rule 404(b) of the Tennessee Rules of Evidence generally prohibits “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity with the character trait.” Tenn. R. Evid. 404(b).

substantially outweighed by the danger of unfair prejudice. Additionally, our supreme court has noted, the possession of a firearm, “standing alone, does not constitute a crime,” and in that respect, the fact that a defendant possessed a firearm is not generally inherently prejudicial. *See State v. Reid*, 213 S.W.3d 792, 813-14 (Tenn. 2006), *abrogated on other grounds by State v. Miller*, 638 S.W.3d 136, 150-51 (Tenn. 2021); *see also State v. Jones*, No. M2023-00799-CCA-R3-CD, 2024 WL 4442058, at *10 (Tenn. Crim. App. Oct. 8, 2024) (“[P]ossession of a firearm generally standing alone is not overly prejudicial.”), *perm. app. denied* (Tenn. Mar. 12, 2025). Accordingly, the probative value of the firearm was not outweighed by the unfair prejudice in this case, and the trial court did not abuse its discretion by admitting it. The defendant is not entitled to relief on this issue.

III. Right to Confrontation

The defendant argues the trial court violated his right to confrontation and to present a defense when he was precluded from cross-examining the victim about a prior conviction. The defendant contends this restriction limited the jury’s ability to assess the victim’s character for truthfulness and possible biases toward the prosecution. The State contends the defendant waived this issue by raising it for the first time on appeal and is not entitled to plain error review.

Prior to the victim’s testimony, the defendant moved to question the victim regarding his 2013 conviction for unlawful possession of a firearm by a convicted felon pursuant to Tennessee Rule of Evidence 609. The State argued that because the crime does not involve dishonesty, the defendant should be precluded from using it to question the victim. The defendant contended that a “felony, by its nature, indicates dishonesty,” and “one of the issues in this case is how truthful [the victim] is.” The trial court denied the defendant’s motion, finding the victim’s convicted felon in possession of a firearm conviction “has absolutely no bearing on honesty or veracity.”

We note, as did the State, that the defendant failed to raise in the trial court the Confrontation Clause claim he has presented on appeal. At the out-of-jury hearing, the defendant argued that he should be permitted to cross-examine the victim regarding his prior conviction pursuant to Tennessee Rule of Evidence 609, and the trial court analyzed Rule 609 in ruling on the issue. However, the defendant now raises a Confrontation Clause and right to a defense claim. Because the defendant failed to raise the instant claim at the trial level and raised it for the first time on appeal, the issue is waived. *See Tenn. R. App. P. 36(a)* (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”); *State v. Franklin*, No. M2017-00180-CCA-R3-CD, 2018 WL 1100962, at *4 (Tenn. Crim. App. Feb. 27, 2018) (holding the defendant’s issue was “waived because the [d]efendant raised it for the first time on appeal”); *State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016) (“It is well-settled that a

defendant may not advocate a different or novel approach on appeal.”); *State v. Johnson*, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996) (“Issues raised for the first time on appeal are considered waived.”). Additionally, in his motion for new trial, while the defendant generally argued that “[t]he trial court erred by precluding the defendant from asking the victim as to his 2013 conviction for felon in possession of a handgun,” he did not contend that the trial court’s ruling implicated the Confrontation Clause or impaired his ability to present a defense. Because the defendant failed to raise this issue in his motion for new trial, it is waived. “Grounds not raised in a motion for new trial are waived for purposes of appeal.” *State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018); Tenn. R. App. P. 3(e). See *State v. Kennedy*, No. M2013-02207-CCA-R3-CD, 2014 WL 4953586, at *10 (Tenn. Crim. App. Oct. 3, 2014) (recognizing that by failing “to present this argument in the trial court, the trial court did not have the opportunity to pass on it, and we will not consider it.”), *no perm. app. filed*.

Moreover, the State specifically argued in its brief that the defendant waived the issue by failing to raise it in the trial court. Despite being notified that his issue may be waived, the defendant failed to respond to this argument or otherwise request plain error relief in a reply brief. “Where a defendant fails to respond to a waiver argument, only particularly compelling or egregious circumstances could typically justify our sua sponte consideration of plain error relief.” *State v. Thompson*, No. W2022-01535-CCA-R3-CD, 2023 WL 4552193, at *5 (Tenn. Crim. App. July 14, 2023), *no perm. app. filed*; *State v. Powell*, No. W2011-02685-CCA-R3-CD, 2013 WL 12185202, at *8 (Tenn. Crim. App. Apr. 26, 2013), *perm. app. denied* (Tenn. Sept. 11, 2013). Because no “particularly compelling or egregious circumstances” exist here, we decline to consider plain error relief. The defendant has waived this issue.

Despite the waiver of the defendant’s constitutional claims, we will address his Rule 609 argument. However, we note that this portion of his brief consists of a single paragraph that merely cites the rule without offering any substantive argument. Rule 609 of the Tennessee Rules of Evidence permits a party to attack the credibility of a witness by presenting evidence of prior convictions if four conditions are satisfied. See Tenn. R. Evid. 609. As applicable here, the prior conviction must be punishable by death or imprisonment over one year or must involve a crime of dishonesty or false statement. *Id.* at § 609(a)(2). The trial court must find that the impeaching conviction’s probative value on credibility outweighs its unfair prejudicial effect on substantive issues.

During a jury-out hearing, the trial court stated that it would allow the defendant to question the victim about his 2018 conviction for unlawful possession of a controlled substance. However, it concluded that the victim’s 2013 conviction for possession of a firearm was not admissible because it had “absolutely no bearing on honesty or veracity,” pursuant to Rule 609(a)(2). While the trial court failed to specifically rule as to whether

the conviction's probative value outweighed its unfair prejudicial effect, this Court previously determined that a conviction for "[p]ossession of a firearm by a convicted felon is not a crime involving dishonesty or false statement, and its probative value is very limited in terms of the balancing test." *State v. Stasher*, No. M2024-00222-CCA-R3-CD, 2025 WL 2112312, at *13 (Tenn. Crim. App. July 29, 2025), *perm. app. denied* (Tenn. Dec. 11, 2025). Accordingly, the trial court did not abuse its discretion in denying the defendant's Rule 609 motion.

IV. Sufficiency

The defendant challenges the sufficiency of the convicting evidence. The defendant does not challenge the elements of any of the offenses, but instead, challenges the proof establishing his identity as the perpetrator. The State contends that the evidence is sufficient to sustain the defendant's convictions. We agree with the State.

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court has stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523 (1963)). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a

convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977); *Farmer v. State*, 343 S.W.2d 895, 897 (Tenn. 1961)). The standard of review for sufficiency of the evidence “‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses’ testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury. *Dorantes*, 331 S.W.3d at 379 (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). This Court, when considering the sufficiency of the evidence, shall not reweigh the evidence or substitute its inferences for those drawn by the trier of fact. *Id.*

The defendant was convicted of one count of attempted first-degree murder, one count of aggravated assault, one count of unlawful possession of a firearm by a convicted felon, and one count of employing a firearm during the commission of a dangerous felony. “A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.” Tenn. Code Ann. § 39-12-101(a)(3). Relevant to this case, first degree murder is the premeditated and intentional killing of another. *Id.* § 39-13-202(a)(1). As charged in count two, aggravated assault occurs when a person intentionally or knowingly causes another to reasonably fear imminent bodily injury by using or displaying a deadly weapon. *Id.* §§ 39-13-101(a)(2), -102(a)(1)(A)(iii). As charged in count three, “[a] person commits an offense who unlawfully possesses a firearm” and “[h]as been convicted of a felony crime of violence[.]” *Id.* § 39-17-1307(b)(1)(A). Aggravated assault is a “crime of violence.” *Id.* § 39-17-1301(3). As charged in count four, “[i]t is an offense to employ a firearm during the . . . [c]ommission of a dangerous felony.” *Id.* § 39-17-1324(b)(1). One such “dangerous felony” is attempted first-degree murder. *Id.* § 39-17-1324(b)(2), (i)(1)(A).

The identity of the perpetrator “is an essential element of any crime.” *Rice*, 184 S.W.3d at 662 (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). The

identification of the defendant as the perpetrator is “a question of fact for the jury upon its consideration of all competent proof.” *State v. Bell*, 512 S.W.3d 167, 198 (Tenn. 2015) (citing *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005)). The perpetrator’s identity “may be established solely on the basis of circumstantial evidence.” *State v. Lewter*, 313 S.W.3d 745, 748 (Tenn. 2010).

In the light most favorable to the State, the evidence shows that the victim allowed the defendant, whom he had known for thirty years, to live with him in mid-2020. However, he asked the defendant to leave when the defendant accused the victim of sleeping with the defendant’s wife. On December 29, 2020, the victim was parked at a neighborhood convenience store when his door “flew open,” and the defendant shot the victim multiple times. The defendant told the victim, “Y’all got me f****d up. You and Donny got me f****d up.” The victim testified that he immediately recognized the defendant by both his voice and build. The victim was unable to run away due to a broken leg but attempted to roll away on the ground. However, the defendant continued to shoot the victim until he ran out of bullets. When the defendant was arrested a week later, hiding behind a wall, he had a Smith & Wesson .40 caliber handgun in his possession. Special Agent Lynch testified that the casings found at the crime scene shared the same “class characteristics that would be common to other firearms of the same make and model.” While she could not positively identify the defendant’s handgun as the weapon that fired the casings, she could not rule it out. Additionally, the defendant stipulated that he “had been previously convicted of a felony crime involving the use or attempted use of violence to the person.” Accordingly, this evidence is sufficient to support the defendant’s convictions, and the defendant is not entitled to relief on this issue.

V. Sentencing

The defendant challenges several of the trial court’s decisions regarding the length of his sentence. He asserts the trial court misapplied enhancement factor (1) and failed to consider provocation as a mitigating factor. He further argues the trial court’s “pronouncement of [his] aggregate sentence is fatally ambiguous.” The State contends the trial court properly sentenced the defendant to a within-range sentence.

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 the validated risk and needs

assessment conducted by the department and contained in the presentence report. In addition, the court should consider the defendant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -113, -114, -210(b). In addition, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* § 40-35-103(4).

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). 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).

When an accused challenges the length and manner of service of a sentence, this Court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). If a trial court misapplies an enhancing or mitigating factor in passing sentence, said error will not remove the presumption of reasonableness from its sentencing determination. *Bise*, 380 S.W.3d at 709. 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 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

A. Ambiguous Sentence Length

The defendant argues the trial court's oral pronouncement of the defendant's effective sentence is fatally ambiguous. Specifically, the defendant contends the trial court stated two different sentence lengths when announcing the defendant's effective sentence term. According to the defendant, this ambiguity "directly impacts the calculation of [the defendant's] sentence credits, his release eligibility date, and the overall length of this incarceration."

At the sentencing hearing, the trial court imposed sentences of twenty-five years at 85% for count one, ten years at 35% for count two, twenty years at 35% for count three, and ten years at 100% for count four. The trial court ordered counts one, two, three, and

four to be served consecutively. At the conclusion of the sentencing hearing, the trial court stated that this made an

effective sentence of 65 years confinement in the Tennessee Department of Correction. Ten of those years being at a 100 percent release eligibility. Thirty years being at a 35 percent eligibility. And on the attempted murder serious bodily injury, 25 years at an 85 percent release eligibility. And that's an effective sentence of 60 years in prison.

Additionally, on the judgment form for count one, under the section entitled "Special Conditions," the trial court listed the defendant's effective sentence as sixty-five years.

Despite the trial court's linguistic inconsistency, the record makes clear that the trial court imposed an effective sentence of sixty-five years. This is particularly so given that the trial court individually listed the sentences for each count multiple times. Accordingly, the trial court's inadvertent reference to "sixty years" at the close of the sentencing hearing does not create any ambiguity, as the record, including the judgment forms, clearly reflects an effective sentence of sixty-five years. *See State v. Dukes*, No. M2007-01164-CCA-R3-CD, 2008 WL 343163, at *2 (Tenn. Crim. App. Feb. 4, 2008) (citation omitted) (noting that "[a] court speaks through its orders"). The defendant is not entitled to relief on this issue.

B. Enhancement and Mitigating Factors

The defendant argues the trial court misapplied enhancement factor (1). Specifically, the defendant contends the trial court improperly relied on pending charges. The defendant also argues the trial court failed to consider provocation as a mitigating factor. The State contends the trial court exercised its discretion in weighing the enhancement factors and in finding that mitigating factor (2) did not apply.

Here, the trial court applied enhancement factors (1)—the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; (5)—the defendant treated the victim with exceptional cruelty during the commission of the offense; (6)—the personal injuries inflicted upon . . . the victim [were] particularly great; (8)—the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community, (10)—the defendant had no hesitation about committing a crime when the risk to human life was high, (11)—the felony resulted in death or serious bodily injury, or involved the threat of death or serious bodily injury, to another person, and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury, and (13)—at the time

the felony was committed the defendant was released on parole. Tenn. Code Ann. § 40-35-114(1), (5), (6), (8), (10), (11), (13).³

In considering enhancement factor (1), the trial court noted

The [c]ourt has also considered [the defendant's] criminal history, criminal behavior. And he has other behavior in addition to those that establishes the appropriate range that are in this case. And the [c]ourt gives great weight to those findings.

He has multiple felony convictions, has multiple arrests in his history. [The defendant] is now 49 years of age. He will be 50 next January. January 3rd, he will be 50 years old.

[The defendant] got arrested, started getting arrested early on in his life at the age of – according to this report, let me back up. He has no juvenile record.

At the age of 18 arrested for drinking, underage drinking. Charge dismissed. Got arrested for possessing marijuana at the age of 19 in Union City, 11 months and 29 days probation. Age of 19, pled guilty to possessing a controlled substance, two years of supervised probation.

Many other charges. Will not specify all of them on the record. Charges dismissed. Four years for an attempted arson. Guilty plea to that offense on or about April 24 in Obion County, four years for attempted arson. In 2021, failure to appear on November 16, 2021. Pled guilty to that, 11 months and 29 days. On the arson, it was four years in prison.

Violated the probation that was granted to him in 2003. Reckless endangerment with a deadly weapon. Pled guilty to one year on January 3rd, 2006. That was reduced from an aggravated assault.

Ninety days for possessing marijuana on February 14, 2006. Other cases that were dismissed. Eleven months – I'm sorry, three days for driving on a revoked license. Multiple convictions for driving on a revoked license.

³ The defendant does not challenge the application of enhancement factors (5), (6), (8), (10), (11), and (13).

He also has a convict[ion] for attempted burglary of a motor vehicle. Twenty days in 2014. July 2014. Eight years for aggravated assault. Convictions out of this court in 2015. Two different counts of aggravated assault, an eight-year sentence.

[The defendant] has been arrested and convicted of crimes for all of his adult life. Starting at the age of 18 and now until he got arrested and charged with this offense. He has committed crimes against the State of Tennessee for as long as he has been an adult. And the [c]ourt does find that he is, in fact, an ongoing danger to Shelby County.

....

I put his convictions on the record. And he also has pending cases. One of these cases was superseded by another indictment.

But he also has other charges that are still pending in this court specifically. Convicted felon in possession of a firearm. Indictment 21-01473. That case is still pending. And has other conduct which has not yet been adjudicated. And this [c]ourt gives great, great, great, extreme weight to the fact that he does have a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.

Although the defendant argues that the trial court erred in relying on the defendant's pending charges as evidence of criminal behavior for enhancement purposes, our Court has recognized that "a trial judge may find evidence of criminal behavior even though there has been no conviction." *State v. Ward*, 138 S.W.3d 245, 282 (Tenn. Crim. App. 2003) (citing *State v. Massey*, 757 S.W.2d 350, 352 (Tenn. Crim. App. 1988)). "There is no per se rule in Tennessee against considering unadjudicated conduct. The trial court is merely prohibited from relying upon a mere arrest record to enhance a defendant's sentence." *State v. Robinson*, 971 S.W.2d 30, 46 (Tenn. Crim. App. 1997) (citing *State v. Newsome*, 798 S.W.2d 542, 543 (Tenn. Crim. App. 1990)).

Here, the trial court found that the defendant had a history of criminal behavior based on his multiple prior convictions and pending charges. Even if the trial court improperly relied on the defendant's pending charges to find a history of criminal behavior, it still properly considered the defendant's prior convictions. *See State v. Keel*, 882 S.W.2d 410, 419 (Tenn. Crim. App. 1994), *distinguished on other grounds by State v. Kelley*, 34 S.W.3d 471, 483 (Tenn. Crim. App. 2000).

The defendant also contends the trial court erred in failing to consider provocation as a mitigating factor, resulting in an excessive sentence. *See* Tenn. Code Ann. § 40-35-113(2) (“The defendant acted under strong provocation.”). When discussing provocation, the trial court noted that

[t]here are absolutely no mitigating factors that I can find in this case. His conduct did, in fact, threaten serious bodily injury. [The defendant] asked the [c]ourt to consider whether or not he acted under provocation. There’s nothing on the record, nothing on the record, that would indicate that [the defendant] acted from any provocation in this case.

[The defendant], according to the proof that was accredited by the jury, [the defendant] simply shot [the victim] out of rage. [The victim] says [the defendant] accused him, and others, multiple others, of sleeping with [the defendant’s] wife or impregnating his wife. Indicating that they had him, quote/unquote, “f****d up.”

But there’s nothing on the record, nothing on the record, that would support those allegations, again, because he’s not required to present any proof. But [the defendant] did not present anything to this jury that a reasonable trier of fact could conclude that that was right. In fact, [the victim] absolutely denied that he had done anything or had any relationship with [the defendant’s] wife.

It is clear the trial court specifically considered the defendant’s alleged provocation and chose not to give it any weight in mitigation. “A trial court’s weighing of various mitigating and enhancement factors [is] left to the trial court’s sound discretion.” *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008). Accordingly, we are precluded from reweighing appropriately applied enhancement and mitigating factors. *See id.* at 344-45. We find no error in the trial court’s refusal to apply the requested mitigating factor.

Our review of the record indicates the trial court imposed applicable within-range sentences after properly considering the evidence adduced at trial and the sentencing hearing, the presentence report, the principles of sentencing, the parties’ arguments, the nature and characteristics of the crime, the potential for rehabilitation, and the evidence of enhancement and mitigating factors. Tenn. Code Ann. §§ 40-35-103(5), -114, -210(b). Accordingly, the defendant is not entitled to relief on this issue.

Finally, we note one issue concerning the judgments in this case. While the transcript from the sentencing hearing shows the trial court ordered a sentence of twenty-five years at 85% for count one, the judgment form indicated the defendant had a release

eligibility of 100%.⁴ At the time of the offense, Tennessee Code Annotated section 40-35-501(k)(5) provided:

There shall be no release eligibility for a person committing attempted first[-]degree murder as defined in § 39-13-202 where the victim suffers serious bodily injury as defined in § 39-11-106, on or after July 1, 2013, and before July 1, 2022, until the person has served eighty-five percent (85%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236, or by any other provision of law, shall operate to reduce below seventy-five percent (75%) the percentage imposed by the court such person must serve before becoming release eligible.

Therefore, the defendant's release eligibility for attempted first-degree murder is 85%, and we remand the case to the trial court for entry of a corrected judgment in count one.

Conclusion

For the aforementioned reasons, the judgments of the trial court are affirmed. However, we remand this case for the entry of a judgment in count one as specified in this opinion.

s/ *J. ROSS DYER*

J. ROSS DYER, JUDGE

⁴ While this issue was not raised by either party in their brief to this Court, both parties were questioned about the issue, able to discuss the issue, and ultimately agreed that the release eligibility percentage was incorrect.