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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2023

STATE OF TENNESSEE v. VINCENT JOHN ELLIOTT, JR.

Appeal from the Circuit Court for Coffee County
No. 42983 Vanessa A. Jackson, Judge

No. M2022-00789-CCA-R3-CD

The Defendant, Vincent John Elliott, Jr., pled guilty to second degree murder and reserved a certified question of law concerning whether his right to a speedy trial was violated. Also on appeal, the Defendant argues that the trial court abused its discretion by sentencing him to eighteen years instead of the minimum sentence of fifteen years. Upon review, we conclude that we lack jurisdiction to review the Defendant's certified question and respectfully dismiss that portion of the appeal. We further conclude that the trial court acted within its discretion in sentencing the Defendant. Accordingly, we respectfully affirm the Defendant's conviction and sentence in all respects.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed in Part, Dismissed in Part

TOM GREENHOLTZ, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Joseph E. Ford, Winchester, Tennessee, for the appellant, Vincent John Elliott, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Charles Craig Northcott, District Attorney General; and Marcus D. Simmons, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A. INDICTMENT AND PLEA

On April 6, 2016, the Defendant was arrested for the first degree murder of the victim, David Lee Brooks. The affidavit of complaint accompanying the arrest warrant reflected that when the victim's body was discovered earlier that day, the Defendant "stated that he killed the victim by striking the victim in the head [four] times with a breaker bar and shooting him an unknown amount of times with a .22 caliber rifle . . . [because of] the victim['s] beating the [Defendant's] dog." A preliminary hearing was held on May 5, 2016. On June 16, 2016, the Coffee County Grand Jury returned an indictment charging the Defendant with the first degree murder. The Defendant was arraigned on June 29, 2016.

On January 27, 2022, the Defendant filed a motion to dismiss the indictment, alleging his right to a speedy trial had been violated. Following a hearing, the trial court entered an order denying the motion to dismiss. Finding that the length of the delay triggered the analysis, the court found that the delays were "necessary for the fair and effective prosecution of the case or were acquiesced to by the defense." In particular, the trial court found that delays were attributable to the COVID-19 pandemic, changes in counsel and judges, forensic evaluations of the Defendant, and the need for defense investigation and motion practice:

> This is a complex and serious case in which the Defendant is charged with premeditated first degree murder. Some of the delay in the case justifiably results from the time necessary to discover[] and examine the evidence. In addition, the Defendant requested a forensic medical examination, and the report from said examination was received on July 28, 2017.
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> The case was then set for trial on November 15, 2018. In September of 2018, counsel for the Defendant requested a continuance and the State agreed. The case was rescheduled for trial on May 29, 2019. On May 8, 2019, the Defendant appeared before Judge L. Craig Johnson and requested that his attorney be removed from the case and trial be continued. Judge Johnson informed the Defendant that dismissal of his attorney would result in appointment of another attorney and a delay of his trial. The Defendant indicated that he understood this and acquiesced in the delay. Attorney Will Lockhart was appointed to represent the Defendant.
>
> Mr. Lockhart filed a Motion to Suppress on December 6, 2019. Before that Motion could be heard the Tennessee Supreme Court declared a state of emergency in response to the COVID-19 pandemic and suspended

> in-court proceedings. As set forth in the procedural timeline, the case was set for trial on March 29, 2021, but was continued due to extension of the suspension of jury trials due to the pandemic.
>
> In addition, during this period, Judge Johnson announced his retirement, and Will Lockhart was appointed to fill his position and had to withdraw from representation of the Defendant. Attorney Chris Stanford was appointed to replace Judge Lockhart as attorney for the Defendant. The case was set for trial on April 4, 2022. On October 19, 2021, Mr. Stanford announced his intention to run for District Attorney, and he was allowed to withdraw as counsel on November 19, 2021. Joe Ford was appointed to represent the Defendant on December 15, 2021.
>
> The Court finds that the delays in this case have not been intentional delays by the State to gain a tactical advantage or to harass the Defendant, nor have the delays been the result of bureaucratic indifference or negligence. The delays in this case were necessary for the fair and effective prosecution of the case or were acquiesced to by the defense. (Paragraph spacing added)

The trial court also found that the Defendant had not previously asserted his right to a speedy trial and that he failed to show prejudice. As to the latter factor, the court observed that "[t]he Defendant admits that he killed the victim in this case. The only issue is his state of mind to determine if he is guilty of the indicted offense of premeditated first degree murder or one of the lesser included offenses."

On March 23, 2022, the Defendant agreed to enter a plea of guilty to the offense of second degree murder, reserving sentencing for the trial court. In the plea agreement, the Defendant sought to reserve for appeal the certified question of whether the State had violated his right to a speedy trial, and the court later filed a "Supplement to Judg[]ment Order," providing as follows:

> It appearing to the Court that at the entry of the plea of guilty in this matter the Defendant herein explicitly reserved, with the consent of the state and the Court, the right to appeal a certified question of law, therefore the Judg[]ment Order being entered is supplemented as follows:
>
> a. The certified question of law reserved for appeal by the defendant is as follows:
>
> "Whether the Trial Court erred in denying the Defendant's Motion to Dismiss indictment based upon the denial of the Defendant's right to a speedy trial?"

b. The trial Court, the State of Tennessee, and the Defendant agree that the above statement of the issue reserved for appeal by the Defendant identifies the scope and limits of the legal issue reserved.

c. The above cited reserve[d] certified question for appeal was expressly reserved with the consent of the State and Trial Court.

d. The Trial Court, the State and the Defendant are of the opinion that the certified question is dispositive of the case in that, had the Motion to Dismiss the indictment due to the denial of the Defendant's right to a speedy trial been granted, the prosecution of this case would have ended.

B. SENTENCING HEARING

1. The Parties' Arguments

The trial court held the sentencing hearing on April 4, 2022. At the beginning of the hearing, the State announced that the Defendant was pleading guilty as a standard, Range I offender to second degree murder, a Class A felony. The State also identified the sentencing range as being between fifteen and twenty-five years and noted that the Defendant was statutorily required to serve one hundred percent of the sentence imposed in confinement.

The State asserted that "under the nature of this case[,] the circumstances strongly require a sentence of 20 to 25 years." It argued that the trial court should apply enhancement factor (5), that "[t]he defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense," and enhancement factor (9), that "[t]he defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense." Tenn. Code Ann. § 40-35-114(5), (9). As to possible mitigating factors, the State acknowledged that the Defendant had a minimal criminal history. *See* Tenn. Code Ann. § 40-35-113(13).

For his part, the Defendant argued that the trial court should impose the minimum sentence of fifteen years. Although the Defendant conceded that enhancement factor (9) applied, he disagreed that he treated the victim with exceptional cruelty. In addition, the Defendant asserted that several mitigating factors applied. For example, he argued that he acted under strong provocation, Tenn. Code Ann. § 40-35-113(2); that substantial grounds

existed to justify the offense, though failing to establish a defense, *id.* § 40-35-113(3); and that he committed the crime "under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct," *id.* § 40-35-113(11). Finally, the Defendant argued that he was remorseful for his behavior, had a minimal criminal history, and was physically disabled. Tenn. Code Ann. § 40-35-113(13).

2. State's Proof

a. State's Proffer of the Factual Basis

Before calling witnesses, the State provided a synopsis of the allegations. According to the State, the Defendant lived alone in Coffee County with his dog, Buddy. On April 3, 2016, Buddy went missing, and when the Defendant found him, the dog was severely injured, "[l]ike he'd been hit by a car or beat by someone."

The victim in this case was Mr. David Brooks, and Mr. Brooks lived with his mother and brother. According to the Defendant, the victim's brother told him that the Defendant was responsible for injuring his dog. The next day, the Defendant confronted the victim near the Defendant's home, and following an altercation, the Defendant began striking the victim in the head with a breaker bar. According to the State, the autopsy report indicated that the victim suffered nine blows to his skull.

The Defendant returned home to get his car to drag the victim back to the victim's house. When the Defendant returned to the victim, he began to attach a tow strap to the victim, and the victim then began to ask why this was happening. The Defendant responded, "Did my dog ask you why?" The Defendant then retrieved a .22 caliber rifle from his car and shot the victim four times. The State proffered that the medical examiner would testify that these gunshots caused the victim's death.

The Defendant then finished attaching the tow strap to the victim's ankle and dragged the victim's body back to the Defendant's property. He left the body next to a fence and concealed it with "some items." The State also alleged that the Defendant attempted to conceal other items belonging to the victim, such as a bicycle and a backpack.

b. Testimony of Victim's Mother

The State then called the victim's seventy-nine-year-old mother, Elva Allui. Ms. Allui testified that she found the Defendant's dog in her backyard mating with her dog on April 3, 2016. After she was unsuccessful in attempting to separate the dogs with water and with a shovel, the victim took the shovel and hit the Defendant's dog on the backside

several times. When asked if she saw the victim beat the Defendant's dog, Ms. Allui initially stated, "No." She then acknowledged, "I mean, I don't know. At the time, yeah, I know he took the shovel away from me. I didn't stay to see what was going on because I had to go back to the dog."

Ms. Allui picked up the Defendant's dog and "lay him over on the other side of the road by the ditch so that if he came to, he could go on his way." She did not know if the Defendant's dog was unconscious but knew she "had to carry it across the road and lay it on the side of the road, because I figured it was safer to be there than back in my yard."

3. Defendant's Proof

a. Testimony of Defendant's Friends

Leah Hoffman testified that the Defendant helped raise her with her mother, though he was not her biological father. She asserted that the Defendant was never violent "outside your typical discipline from a parent." Ms. Hoffman noted that Buddy was the "center of the [Defendant's] conversation" and that the Defendant and Buddy "had a good bond." Ms. Hoffman said that the Defendant's behavior was "entirely out of character."

Melissa Gissell testified that she had known the Defendant for approximately nine years. She said she had never known the Defendant to be violent and was shocked when she heard about the murder charge. After the Defendant was arrested, he called Ms. Gissell and asked her to get Buddy. She has cared for Buddy since the incident, taking him to veterinary appointments and giving him seizure medication daily.

Cotanda Burks testified that she had known the Defendant since 2009 and that they had dated for approximately one year. Ms. Burks said, "He loves Buddy like his child," and referred to Buddy as his son. When Ms. Burks later learned that the Defendant had been charged with the victim's murder, she was shocked because the Defendant had never been violent. She did not think the Defendant would ever do something similar in the future. However, Ms. Burks acknowledged that the Defendant "said he would like to find the person who did this to his dog so that person could feel like Buddy."

b. Defendant's Testimony

The fifty-four-year-old Defendant testified that he was born in Dubuque, Iowa. His parents divorced when he was two years old and remarried other people. The Defendant graduated from high school. When he was thirty-two, he attended computer science classes

at Northern Iowa Community College. He stopped attending six months before graduation, though, because he preferred working in painting or construction.

The Defendant said he injured his cervical spine while working on a "boom lift." He had also been involved in several automobile accidents and suffered injuries. He eventually had back surgery and had cadaver bones, plates, and rods put in his spine. He suffered ongoing pain after the surgery and developed an addiction to opioids. The Defendant said he had not taken opiates for six years. The Defendant said that he had also taken methamphetamine to help with his pain, and he acknowledged that he had tried marijuana, alcohol, hallucinogens, and cocaine.

The Defendant acknowledged that he had previously been convicted of vandalism and public intoxication in Bedford County in 1989. He also had a domestic assault conviction in Dubuque, Iowa, in January 1992. The Defendant's last conviction before this case was for driving under the influence in 2000.

The Defendant said that he lived alone with his dog, Buddy, who was ten years old. The Defendant said Buddy was "my sun and stars, everything" and that they did everything together, such as working, sleeping, eating, hunting, and fishing.

The Defendant said that on April 3, 2016, he and Buddy were in his yard when Buddy got away. Searching for Buddy, the Defendant saw some children walking down the street with his dog. The Defendant took the dog from the children and put the dog in the backseat of the vehicle. The dog yelped, and the Defendant noticed that "his head was almost twice the size that it should be" and that he had blood coming out of his nose, mouth, and ears. The children told the Defendant they found Buddy across the street from the victim's house.

Because it was Sunday, the veterinarian's office was closed, but the Defendant went to the veterinarian's home. The Defendant took the dog home and stayed up with him all night. Buddy was "[n]ot good. He was having seizures, unresponsive. Couldn't see, couldn't hear. He had blood coming out of his nose and his mouth." The Defendant and Ms. Burks took Buddy to the veterinarian's office the next day.

When they returned to the Defendant's home, the victim's brother, Mr. Donny Brooks, was there with another friend. After he saw Buddy, the victim's brother started crying and said that his brother had beaten the dog with a breaker bar. The Defendant said, "You know what I'm gonna do," meaning that he "was gonna whoop his ass."

Mr. Brooks told him to do what he had to do. The next day, April 5, Mr. Brooks told the Defendant that the victim might come by the Defendant's house as he returned from the store.

The Defendant worked outside to keep watch for the victim. When he saw the victim approaching, he "grabbed the breaker bar and went out the road to confront him." The Defendant wanted to know why the victim had injured Buddy. The victim was on a bicycle and stopped when the Defendant approached. They "had words," and the victim shoved the Defendant into a ditch. The Defendant came out of the ditch and hit the victim with the breaker bar. The victim "[w]ent to the backside of the road and into the other ditch." The Defendant asked the victim if he liked beating animals, and after hitting the victim a few more times with the breaker bar, the Defendant asked, "How does it feel?"

The Defendant drove his Chevrolet Blazer up to the victim. The Defendant noted that he was only 122 pounds at the time and could not move the victim without using the vehicle. The Defendant wanted to drag the victim to his yard before calling an ambulance. The Defendant opened the door to the Blazer to get the tow strap when the victim asked, "why?" The Defendant responded, "Did Buddy ask you 'why' when you beat him?"

According to the Defendant, the victim said he would ensure he killed the dog "next time." The Defendant was shocked. He grabbed the rifle from the backseat of his car and shot the victim, killing him. The Defendant said that he "was in a rage like I had never been in before in my life, and I hope to God I never feel it again." The Defendant pulled the trigger as many as twelve times and stopped when he heard it "click."

The Defendant hooked the tow strap to the victim's body and dragged him back to the Defendant's property. There, the Defendant covered the body and hid the victim's other effects, such as his bicycle and backpack.

The next day, the police came to the Defendant's home. The Defendant initially denied knowing what happened, but he eventually confessed and performed a "walkthrough" of what happened. The Defendant said, "I wish it never, ever happened. I wish none of it ever happened. It wasn't supposed to be like that. I don't ever want to feel that way again. No, I don't. I wish it never happened." The Defendant said that he did not think he would ever do such a thing again, stating, "I don't want no part of it."

4. Trial Court's Sentencing Order

Following the sentencing hearing, the trial court took the matter under advisement and issued a written sentencing order on April 7, 2022. At the beginning of its order, the trial court stated:

> In determining the appropriate sentence for this offense in accordance with Tenn. Code Ann. § 40-35-210, this Court has considered the evidence presented at the sentencing hearing, the presentence report, the principles of sentencing and argument made as to appropriate sentence, the nature and characteristics of the criminal conduct involved, the evidence and information offered by the parties on the mitigating and enhancement factors, the statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee, the Defendant's statement on his own behalf and the result of the risk and needs assessment contained in the presentence report.

The court applied two enhancement factors: that the Defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense; and that the Defendant possessed or employed a firearm during the commission of the offense. Tenn. Code Ann. § 40-35-114(5), (9). The trial court also applied three mitigating factors: that the Defendant acted under strong provocation; that substantial grounds exist tending to excuse or justify the Defendant's criminal conduct though failing to establish a defense; and 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. Tenn. Code Ann. § 40-35-113(2), (3), and (11). The trial court also found that

> the Defendant was not a violent person and had a minimal criminal history which occurred much earlier in his life. The facts of this case which led to the Defendant's criminal behavior are extremely unusual, and it is unlikely that the Defendant would engage in criminal behavior after serving his sentence. This assumption is supported by the risk and needs assessment in the presentence report, which assessed the Defendant with the Strong-R assessment resulting in a score of low risk.

The trial court sentenced the Defendant to a lower, mid-range sentence of eighteen years.

ANALYSIS

A. JURISDICTION AND CERTIFIED QUESTIONS

In his first issue, the Defendant argues that he was denied his right to a speedy trial. This case was resolved by a guilty plea, and typically, a defendant who enters a guilty plea waives all non-jurisdictional defects in the prosecution. *See Rigger v. State*, 341 S.W.3d 299, 316 (Tenn. Crim. App. 2010) (recognizing that "a valid guilty plea 'constitutes an admission of all facts necessary to convict and waives all non-jurisdictional defects and constitutional irregularities which may have existed prior to the entry of the guilty plea.'" (quoting *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999))). As a practical matter, this principle means that a defendant who pleads guilty will often waive, or give up, any argument that his or her constitutional rights have been violated, including that he or she did not receive a speedy trial. *See State ex rel. Lewis v. State*, 447 S.W.2d 42, 45 (Tenn. Crim. App. 1969) ("We, therefore, conclude that the petitioner has, by his plea of guilty, waived his right to raise the question that he was denied a speedy trial.").

An exception to this general rule exists, however. Tennessee Rule of Criminal Procedure 37(b)(2) provides that "a defendant may plead guilty and appeal a certified question of law that is dispositive of the case as long as certain conditions are met." *State v. Springer*, 406 S.W.3d 526, 530 (Tenn. 2013). These "certain conditions" were initially established in *State v. Preston*, 759 S.W.2d 647 (Tenn. 1988), and they were later incorporated into the text of Rule 37(b). *See State v. Lonnie Lynn Graves*, No. E2021-00647-CCA-R3-CD, 2022 WL 4835190, at *8 (Tenn. Crim. App. Oct. 4, 2022) ("Indeed, Rule 37(b) was amended in 2002, to specifically include the *Preston* requirements."), *no perm. app.* This rule provides that a defendant who pleads guilty may nevertheless seek an appeal, if:

> the defendant entered into a plea agreement under Rule 11(c) but explicitly reserved—with the consent of the state and of the court—the right to appeal a certified question of law that is dispositive of the case, and the following requirements are met:
>
> (i) the judgment of conviction or order reserving the certified question that is filed before the notice of appeal is filed contains a statement of the certified question of law that the defendant reserved for appellate review;
>
> (ii) the question of law as stated in the judgment or order reserving the certified question identifies clearly the scope and limits of the legal issue reserved;

(iii) the judgment or order reserving the certified question reflects that the certified question was expressly reserved with the consent of the state and the trial court; and

(iv) the judgment or order reserving the certified question reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case[.]

See Tenn. R. Crim. P. 37(b)(2)(A).

Despite the seeming simplicity of Rule 37, these "certain conditions" have proven to be vexing in practice. In part, the vexing nature of the conditions arises because the conditions must be "strictly construed" and because a defendant may not satisfy the conditions through "substantial compliance" with the Rule. *State v. Armstrong*, 126 S.W.3d 908, 912 (Tenn. 2003). To add a layer, a defendant who does not comply with *Preston* and Rule 37 will fail to confer jurisdiction on the appellate court to hear the certified issue. *See, e.g.*, *State v. Jeffrey Van Garrett*, No. E2018-02228-CCA-R3-CD, 2020 WL 1181805, at *3 (Tenn. Crim. App. Mar. 11, 2020) ("Because of Defendant's failure to properly frame his certified questions of law, this Court is unable to reach the merits of Defendant's claim. This Court has no jurisdiction to entertain this appeal."); *State v. James F. Mason*, No. M2010-01350-CCA-R3-CD, 2011 WL 856934, at *4 (Tenn. Crim. App. Mar. 11, 2011) ("We are without jurisdiction to review the merits of the Defendant's claim because he has failed to properly reserve his certified question of law.").

Consequently, we have been careful to warn the bar and the trial courts of the dangers inherent in a Rule 37 appeal. We have characterized *Preston* and Rule 37 as "the quagmire of criminal jurisprudence in Tennessee." *State v. Thompson*, 131 S.W.3d 923, 923-24 (Tenn. Crim. App. 2003). We have also described the conditions as "'a trap' for the unwary." *State v. Joseph Frank Bolka*, No. W2018-00798-CCA-R3-CD, 2019 WL 1958110, at *3 (Tenn. Crim. App. Apr. 30, 2019) (citations omitted). Fearful of consigning yet another case "to the growing heap of appellate fatalities that have resulted when would-be appellants failed to heed the [*Preston*] litany of requirements for certified-question appeals," *State v. Harris*, 280 S.W.3d 832, 836-37 (Tenn. Crim. App. 2008), we observe a similar issue here.

In this case, the Defendant phrased his certified question in clear and simple language: "Whether the Trial Court erred in denying the Defendant's Motion to Dismiss indictment based upon the denial of the Defendant's right to a speedy trial?" Yet, in providing a clear and simple issue, the Defendant's issue statement did not identify the reasons he relied upon in advancing his motion to dismiss. It also failed to identify the reasons passed upon by the trial court in denying his motion.

And this presents a problem. Our supreme court has been clear that an issue must be stated in such a way as "to clearly identify the *scope* and the *limits* of the legal issue reserved." *Preston*, 759 S.W.2d at 650 (emphasis added). Because a pretrial motion to dismiss or suppress evidence may be advanced and denied for many different reasons, a generic issue statement that references only the denial of a motion itself will typically fail this *Preston* requirement. *See, e.g.*, *State v. Ernest Seard*, No. W2021-01485-CCA-R3-CD, 2022 WL 14207657, at *6 (Tenn. Crim. App. Oct. 25, 2022), *no perm. app.*; *Graves*, 2022 WL 4835190, at *10. To that end, we again stress that the defendant's certified issue must identify, among other things,

- "the reasons relied upon by defendant in the trial court" to advance the motion; and

- the reasons "passed upon by the trial judge" in denying the motion.

Preston, 759 S.W.2d at 650.

Importantly, this *Preston* requirement applies as much in the speedy trial context as it does elsewhere. In *State v. Bryant K. Pride*, No. E2010-02214-CCA-R3-CD, 2011 WL 4424354 (Tenn. Crim. App. Sept. 23, 2011), *perm. app. denied* (Tenn. Feb. 16, 2012), we addressed a certified question that is practically identical to the one presented here: "[w]hether the trial court erred in denying the Defendant's Motion to Dismiss Indictments pursuant to Tenn. R. Crim. P. 48(b)(2) due to the unnecessary delay in bringing the Defendant to trial." We observed that this issue, as stated, "is not specific and does not offer reasoning to identify the scope and limits of the alleged speedy trial violation." *Id.* at *3. Without this required information, we concluded that we lacked jurisdiction under *Preston* to consider the issue on its merits. *See id.*

Other decisions are arguably less emphatic. *See State v. Matthew Melton Jackson*, No. M2005-01374-CCA-R3-CD, 2006 WL 1896350, at *3 (Tenn. Crim. App. July 7, 2006); *State v. Dennis Watson*, No. W2004-00153-CCA-R3-CD, 2005 WL 659020, at *3 (Tenn. Crim. App. Mar. 22, 2005). But we are mindful of *Preston*'s specific admonition that the reasoning of the defendant and the trial court must appear in the certified issue itself, "[r]egardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise[.]" *Preston*, 759 S.W.2d at 650; *see also State v. Erik Sean Potts*, No. M2020-01489-CCA-R3-CD, 2021 WL 4714716, *5 (Tenn. Crim. App. Oct. 11, 2021) (concluding that a certified question does not comply with *Preston* if it requires the appellate court "to 'comb the record' to discern" the reasons advanced by the defendant and trial court), *no perm. app.*; *State v. Christopher Ray Rickman*, No. W2019-00778-CCA-R3-CD, 2020 WL 1894693, at *2 (Tenn. Crim. App. Apr. 16, 2020) (stating that the reasons relied upon by the defendant and trial court "should be discernable from the certified questions of law

without looking at any other portions of the appellate record."), *no perm. app*. As such, because the very purpose of the certified statement is to define our jurisdiction in a situation where jurisdiction would not otherwise exist, we are compelled to conclude that the Defendant's certified question was not properly reserved.

As we recognized in *Pride*, "We take no satisfaction in the dismissal of this or the many other failed Rule 37(b)(2) appeals. We, however, cannot assume jurisdiction where it is denied due to failures in meeting the strict prerequisites." *Pride*, 2011 WL 4424354, at *3. As such, we respectfully dismiss this issue.

B. SENTENCING

The Defendant next challenges the length of his sentence, and we recognize that this issue is properly before the Court. *State v. Bobby Lewis Parks*, No. W2018-01752-CCA-R3-CD, 2019 WL 6040722, at *4 (Tenn. Crim. App. Nov. 13, 2019) ("Separate from the ability to appeal a certified question of law, a defendant may appeal from a guilty plea if 'the defendant seeks review of the sentence and there was no plea agreement under Rule 11(c).'" (quoting Tenn. R. Crim. P. 37(b)(2)(B))). More specifically, the Defendant argues that the mid-range sentence violates the principles of sentencing because it is "greater than that deserved for the offense committed" and because it is not the "least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103. The Defendant emphasizes the mitigation evidence presented in the case, and he asserts that, because "[c]ruelty is inherent in any murder," enhancement factor (5) should not have been applied to enhance his sentence.

Initially, the Defendant pled guilty to the Class A felony offense of second degree murder as a Range I, standard offender. The appropriate statutory sentencing range for this offense and offender classification is between fifteen and twenty-five years. *See* Tenn. Code Ann. §§ 39-13-210(c)(1); 40-35-112(a)(1). As such, the trial court's sentence of eighteen years is within the statutorily authorized sentencing range.

Our supreme court has recognized that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). As such, this Court is "bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out" in the Sentencing Act. *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008); Tenn. Code Ann. §§ 40-35-101 and -102 (2019). While trial courts need not comprehensively articulate their findings with regard to sentencing, "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and

mitigating factors, have been properly addressed [on the record]." *Bise*, 380 S.W.3d at 706.

As to enhancement factor (5), this factor applies where "[t]he defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense." Tenn. Code Ann. § 40-35-114(5). It is "well established" that this factor "requires a finding of cruelty under the statute over and above what is required to sustain a conviction for an offense." *State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001) (citations and internal quotation marks omitted). In other words, "'[e]xceptional cruelty,' when used as an enhancement factor, denotes the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged." *State v. Reid*, 91 S.W.3d 247, 311 (Tenn. 2002). We have recognized that whether a defendant treats a victim with exceptional cruelty is "a matter of degree." *State v. Valrie Hart*, No. E2020-01144-CCA-R3-CD, 2022 WL 261950, at *7 (Tenn. Crim. App. Jan. 28, 2022), *no perm. app.*

The State contends that the exceptional cruelty enhancement factor applied because the Defendant struck the victim several times with a breaker bar and fractured his skull before finally shooting him. We agree. The Defendant's encounter with the victim began with the Defendant beating the victim some nine times with a breaker bar, fracturing the victim's skull. Although the beating resulted from the Defendant wanting to treat the victim as the victim treated his dog, this beating did not kill the victim. Following this brutal beating, the Defendant attached a tow strap to the victim's leg to drag him to the Defendant's property. Before dragging the victim, though, the Defendant retrieved his rifle and shot the victim four separate times. Afterward, the Defendant dragged the victim's body to the Defendant's property.

We have upheld the application of enhancement factor (5) in the context of a second degree murder conviction where the defendant inflicted multiple gunshot wounds on the victim. *See State v. Kristopher Michael Martin*, No. M2020-01384-CCA-R3-CD, 2022 WL 1817293, at *8 (Tenn. Crim. App. June 3, 2022), *perm. app. denied* (Tenn. Oct. 19, 2022); *State v. Ruben Walton*, No. W2019-01762-CCA-R3-CD, 2020 WL 4919875, at *12 (Tenn. Crim. App. Aug. 20, 2020), *perm. app. denied* (Tenn. Dec. 4, 2020). In addition, because the Defendant's shooting was the cause of the victim's death, we agree with the State that the Defendant's beating of the victim "went over and above what was required for second degree murder." *State v. L.B. Rittenberry*, No. M2011-00857-CCA-R3-CD, 2012 WL 3041344, at *19 (Tenn. Crim. App. July 26, 2012). Accordingly, we conclude that the trial court acted within its discretion in applying enhancement factor (5). Tenn. Code Ann. § 40-35-114(5).

Although the Defendant emphasizes the mitigating proof in the case, the trial court fully considered and credited these arguments. For example, the trial court applied the

following mitigating factors: that the Defendant acted under strong provocation; that substantial grounds exist tending to excuse or justify the Defendant's criminal conduct, while failing to establish a defense; that the Defendant, though guilty of the crime, committed the offense under such unusual circumstances that it is unlikely a sustained intent to violate the law motivated the criminal conduct. The trial court also expressly found that the Defendant was not violent and had only a minimal criminal history. It also concluded that his criminal behavior was unusual and that he would not likely engage in criminal behavior after serving his sentence.

Based on our review, the trial court acted within its discretion in sentencing the Defendant. The record reflects that the trial court carefully and conscientiously considered the principles of sentencing in this case, and it appropriately considered and balanced the mitigating evidence presented by the Defendant. In our view, nothing in the record shows that the trial court departed from the purposes and principles of sentencing by enhancing the Defendant's sentence from the minimum of fifteen years to a lower, mid-range sentence of eighteen years. To the extent that the Defendant asks us to reweigh the enhancement and mitigating factors, we respectfully decline to do so. *See State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008) (recognizing that "if the trial court recognizes and enunciates several applicable mitigating factors, it does not abuse its discretion if it does not reduce the sentence from the maximum on the basis of those factors" and that "a disagreement [as to the weighing of those factors] is not grounds for reversal under the revised Sentencing Act"). As such, we affirm the sentence imposed by the trial court as being fully within its considered discretion to impose.

CONCLUSION

In summary, we hold that we lack jurisdiction to consider the Defendant's certified question and respectfully dismiss that portion of the appeal. However, we also hold that the trial court acted within its discretion to impose a sentence of eighteen years upon the Defendant's conviction for second degree murder. Accordingly, we respectfully affirm the Defendant's conviction and sentence in all respects.

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TOM GREENHOLTZ, JUDGE