

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
November 1, 2022 Session

FILED

01/20/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. GEORGE E. BURNS, III**

**Appeal from the Circuit Court for Benton County  
No. 16-CR-6 Charles Creed McGinley, Judge**

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**No. W2021-00939-CCA-R3-CD**

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Following his indictment for first degree murder, a Benton County jury convicted the Defendant, George E. Burns, III, of the lesser-included offense of second degree murder. The trial court imposed a sentence of 17 years. The trial court subsequently granted the Defendant's motion for new trial. The Defendant later entered a best-interest plea to voluntary manslaughter, a Class C felony, where the agreed sentence would be eight-and-one-half years at 60 percent, with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court ordered the Defendant to serve the sentence in confinement. On appeal, the Defendant contends that the trial court erred by denying his request for probation. We affirm the trial court's judgment.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and J. ROSS DYER, JJ., joined.

Steven Luther West, Huntingdon, Tennessee, for the appellant, George E. Burns, III.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General Pro Tempore; and Jeffrey George, Assistant District Attorney General Pro Tempore, for the appellee, State of Tennessee.

**OPINION**

**I. FACTUAL AND PROCEDURAL HISTORY**

On February 16, 2016, a Benton County grand jury indicted the Defendant with one count of first degree murder of the victim, Michael Nuzzo. On September 16, 2016, a jury

convicted the Defendant of the lesser-included offense of second degree murder, and the trial court sentenced the Defendant to 17 years.<sup>1</sup>

#### A. Trial and Motion for New Trial Proceedings

At the trial, Meilea Lindsey testified that she knew the Defendant and the victim. Ms. Lindsey explained that she, the Defendant, and the victim were friends and that they spent time together. Ms. Lindsey said that she dated the Defendant but that in October 2015, she ended the relationship because “the drug use was too much.” Ms. Lindsey said that shortly after she ended her relationship with the Defendant she began dating the victim. She said that the Defendant told her not to trust the victim. Ms. Lindsey said that she and the victim saw the Defendant and the Defendant’s friend, Chris Neubauer, at a bonfire on November 7, 2015. Ms. Lindsey said that as she and the victim were leaving the bonfire, the Defendant called her a “w----.” She said that the victim approached the Defendant and the two had a conversation about what the Defendant called Ms. Lindsey but that it was not a confrontation. She explained that the Defendant said he called his sister a “w----” and not Ms. Lindsey. She said that Phylander Collier and Justin Harper were also at the bonfire.

Ms. Lindsey testified that on November 15, the victim sought out the Defendant at Kyleigh Wood’s home. She said Ms. Wood was Mr. Neubauer’s girlfriend. She explained that the victim wanted to “straighten out” the name-calling incident at the bonfire. She said the victim was not in a “violent mood” nor was he “extremely angry.” Ms. Lindsey said when she and the victim arrived at Ms. Wood’s home, the victim went inside, the Defendant was not at the home, and she and the victim left. She said that while she was with the victim on November 15, he never found the Defendant.

Ms. Lindsey testified that on November 16, she and the victim made plans to spend time with Mr. Collier in town. She explained that as she drove into town, she and the victim were directly behind the Defendant’s car. She said that they were close enough to see the Defendant driving and Mr. Neubauer riding with him. Ms. Lindsey explained that the Defendant slowed down and then “sped off.” She said that she continued driving until she reached Doherty’s Quick Mart (“Doherty’s”).

A Doherty’s surveillance video recording of the shooting was played for the jury, and Ms. Lindsey testified about what the video showed. The recording showed a black car

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<sup>1</sup> Attorney Benjamin Powers represented the Defendant during the trial and sentencing hearing. On December 18, 2017, while the motion for new trial was pending, the trial court allowed Mr. Powers to withdraw and appointed attorney Steven Luther West, who represented the Defendant for all subsequent proceedings. Matthew F. Stowe, District Attorney General for the 24th Judicial District, represented the State throughout the Defendant’s trial, sentencing hearing, and motion for new trial proceedings. After the trial court granted the Defendant’s motion for new trial, explained *infra*, it appointed Glenn R. Funk from the 20th Judicial District as District Attorney General pro tempore for the remainder of the Defendant’s trial court proceedings.

parked next to a silver car. Ms. Lindsey explained that she pulled in to park the car and that the victim got out of her car to wait on Mr. Collier. She said that the Defendant parked his car next to the passenger's side of her car. She explained that the victim put his hands on the Defendant's driver's side car door and said to the Defendant, whose window was down, "Hey, let me talk to you, dude." She said that the Defendant's car jerked back and forth as if the Defendant pressed the gas pedal; that this motion knocked the victim off balance; and that when the victim regained balance, he punched the Defendant one time. Ms. Lindsey said that immediately after the victim punched the Defendant, she heard a gunshot and saw the victim falling. Ms. Lindsey explained that when she saw the punch, she began to climb out of her car. She heard the gunshot before she had fully exited. Ms. Lindsey said that she ran over to where the victim had fallen to the ground, the victim told her to call for an ambulance, and that she ran inside Doherty's to call 911. The video recording was entered as an exhibit.

Ms. Lindsey testified that when she was inside Doherty's, she heard Mr. Neubauer, who was sitting in the front passenger seat of the Defendant's car, say to the Defendant, "What the f---, dude." She explained that Mr. Neubauer then ran into Doherty's. Ms. Lindsey said that after she called 911, she ran back outside to check on the victim. Ms. Lindsey said that while she was kneeling over the victim, the Defendant said, "He hit me first. It's perfectly legal. It's self-defense." She explained that she remained on the ground next to the victim and that the Defendant stood near his car until police and medical responders arrived.

Ms. Lindsey testified that the victim had a "temper" but was never violent. She said that she had never seen the victim hit anyone until that day. Ms. Lindsey explained that the only thing she heard the victim say during the exchange was "Hey, let me talk to you, dude." Ms. Lindsey said that there was a knife in her car used for cutting filters off cigarettes but that the victim never had a weapon in his hand during the altercation with the Defendant. Ms. Lindsey identified the Defendant as the person who shot the victim.

Darrin Broyles testified that on November 16, 2015, he was at work at Doherty's Quick Mart. Mr. Broyles explained that as he was leaving the store, he saw the Defendant drive up to the store in a black Oldsmobile Aurora. He said that there was a passenger in the car but that he did not know the person. Mr. Broyles said that as he walked over to his own truck, he heard raised voices. He said he turned and observed a second car parked next to the Defendant's car. Mr. Broyles said he saw the victim walk over to the Defendant, who was sitting in the driver's seat. He said that the Defendant's car's motor was running and that the driver's side window was partially lowered. He said he saw the victim reach through the Defendant's window and punch the Defendant one or two times. Mr. Broyles said that he then heard a gunshot and saw the victim collapse. He said that he called 911 and heard the Defendant remark that the shooting was justified. Mr. Broyles said that he did not see any physical injuries on the Defendant and that the Defendant appeared calm.

On cross-examination, Mr. Broyles agreed that he initially told officers at the scene that he saw the victim punch the Defendant three or four times.

Emergency medical responder James Scott Phifer testified that on November 16, 2015, he was not working but was at a store near the shooting. He said he saw police cars parked at Doherty's and a person on the ground. He attempted to render aid to the victim but detected no signs of life. Mr. Phifer explained that the victim was moved into an ambulance and driven to the hospital but that none of the life-saving measures were successful.

Lisa Houglund testified that she worked at a bank near Doherty's. She explained that she was outside taking a smoke break when she heard a commotion. She said she saw two cars and one man fall down. She explained that she walked toward the scene and that the Defendant told her he shot the victim because the victim "had come at him." Ms. Houglund said that the Defendant was sitting in his car and that the engine was still running. She said that the Defendant was holding a gun and that she backed away from him. She said the Defendant had no blood on him, did not have visible injuries, and appeared calm. She said the Defendant placed the gun between the seat and the console, grabbed his phone, got out of the car, and walked into Doherty's. She said that aside from the Defendant's gun, she saw no weapons.

Michael Houglund, Ms. Houglund's husband, testified that he was working at Doherty's on November 16, 2015. He explained that someone told him that there had been a shooting and that his wife was outside the store. He thought something had happened to Ms. Houglund and went outside. He said he saw two cars parked side by side, one black car and one silver car. Mr. Houglund said he saw the victim lying on the ground and "quite a bit" of blood pooling around him, so he called 911. Mr. Houglund said that he also saw the Defendant and another man, whose name he did not know. Mr. Houglund said that before the Defendant walked into the store, the Defendant told him that the gun was in the car. When Mr. Houglund went back into the store, he heard the Defendant say that he "had shot some punk . . . in the face."

Louis Weber testified that he knew the Defendant, the victim, and Ms. Lindsey. He said the Defendant and Ms. Lindsey were in a romantic relationship until about one month before the victim's death. Mr. Weber explained that the Defendant and Ms. Lindsey ended their relationship and that Ms. Lindsey then began dating the victim. Mr. Weber said that the Defendant was jealous of their relationship, though the Defendant claimed that it did not "bother him."

Nicholas French testified that he knew the Defendant, the victim, and Ms. Lindsey. He said the Defendant and Ms. Lindsey were in a romantic relationship, which ended, and then Ms. Lindsey began a romantic relationship with the victim. Mr. French said the Defendant was jealous of their relationship.

Rachel Stepp testified that she knew the victim because they had been in a three-year romantic relationship, which ended a few weeks before the victim's death. She said that she also knew the Defendant and that he confided in her that he was upset about Ms. Lindsey's and the victim's relationship. Ms. Stepp said that the Defendant told her the victim and Ms. Lindsey used methamphetamine together. Ms. Stepp said she arrived at the crime scene approximately 30 to 45 minutes after the Defendant shot the victim. She said that she did not see the Defendant but that she saw Mr. Neubauer sitting in the backseat of a police car.

Phylander Collier testified that he was friends with the Defendant and the victim. He said that during the weeks leading up to the victim's death, the Defendant and the victim were not speaking because of the victim's romantic relationship with Ms. Lindsey. Mr. Collier said that the Defendant "acted jealous" over the victim's relationship with Ms. Lindsey. He said that on multiples occasions he saw the Defendant carrying a gun in his waistband and that the Defendant had a gun at the bonfire on November 7, 2015. Mr. Collier said he heard the Defendant yell "w----" at Ms. Lindsey as she and the victim left the bonfire. He said the victim confronted the Defendant, who said he was talking about his sister, not Ms. Lindsey. Mr. Collier said that on November 15, 2015, he and the victim drove to Ms. Wood's house because the victim was looking for the Defendant. He explained that when the victim learned the Defendant was not at the home, they left.

Mr. Collier testified that he went to Doherty's on November 16, 2015, to pick up the victim. He explained that when he arrived, he saw the Defendant standing next to his car, the victim lying on the ground, and Ms. Lindsey kneeling over the victim. He said he saw Mr. Neubauer walk out of Doherty's. Mr. Collier said he heard the Defendant say, "It was perfectly legal. It was self-defense." Mr. Collier explained that he walked over to the victim to check his breathing and that the Defendant walked into Doherty's.

Benton County Sheriff's Department ("BCSD") Officer Kyle Bennett testified that he was working on the night of November 15, 2015, and received a call from a someone named Kyleigh Wood. He explained that Ms. Wood told him that the victim had come to her grandmother's house looking for the Defendant, that she had asked him to leave, and that she wanted to know her "options" if the victim were to return. Officer Bennett said that he informed Ms. Wood that officers would come to her grandmother's home if the victim returned.

Benton County Sheriff Kenny Christopher testified that on November 16, 2015, he responded to a shooting at Doherty's. Sheriff Christopher said that when he arrived at the scene, the victim was nonresponsive on the ground and that he assisted the emergency responders in placing the victim in an ambulance. Sheriff Christopher said that the Defendant had been placed in a police car across the street from the crime scene for safety reasons because a "rowdy" crowd had gathered. Sheriff Christopher said that he interviewed witnesses and helped organize the investigation.

Sheriff Christopher testified that the investigation revealed that there were two cars involved in the shooting incident. Sheriff Christopher said that the two cars traveled closely together on the same road on their way to Doherty's.

BCSD Officer Jason Lowery testified that on November 16, 2015, he responded to a call regarding the victim's shooting. He said that he and other officers arrived approximately fifteen minutes after receiving the call and had been informed that a person had been shot and that the shooter was inside Doherty's. Officer Lowery said that when they arrived at Doherty's, he noticed a crowd gathered outside the store. He said he walked into the store and approached the Defendant. He said that the Defendant raised his hands and indicated that he was the one the officers were looking for. He said the Defendant appeared calm and did not appear to be injured. Officer Lowery said he handcuffed the Defendant, patted him down for weapons, and then walked him out of the store. He handed the Defendant over to Deputy Andy Clem, who took the Defendant to a different parking lot away from the crowd. Officer Lowery said that the Defendant told him he "had to do it[,] that the victim "had left him no choice."

Officer Lowery testified that the Defendant was taken to the jail. He said that he assisted another officer who photographed the Defendant's face, which depicted some redness and swelling on his cheek. The photograph was entered as an exhibit.

Investigator Tim Meggs testified that he worked for the district attorney's office. On November 16, 2015, he responded to a call regarding the victim's shooting. He explained that when he arrived at the scene, officers had already detained the Defendant, and medical responders were attending to the victim. Investigator Meggs said he walked over to the two parked cars and observed a gun located between the driver's seat and the console in the Defendant's car. He said that a paring knife, approximately six inches long, was on the driver's seat of Ms. Lindsey's car.

Investigator Meggs testified that he and BCSD Investigator Ricky Padford questioned the Defendant at the jail. He said the Defendant told him that the Defendant and the victim had been friends up until the day before the incident. Investigator Meggs said the Defendant explained that he believed the victim was upset with him because of a social media post about the victim's smoking methamphetamine. Investigator Meggs said that regarding the events of November 16, 2015, the Defendant said he parked his car next to the driver's side of Ms. Lindsey's car because he wanted to talk to Ms. Lindsey. Investigator Meggs said that Doherty's surveillance video recording showed that the Defendant actually parked his car on the passenger side, where the victim was seated. He said the Defendant explained that the victim got out of Ms. Lindsey's car, confronted the Defendant, and punched the Defendant in the face. Investigator Meggs said that the Defendant told him the victim hit him twice in the face, but Investigator Meggs did not observe any injuries to the Defendant's face. He said the Defendant explained he could not fight the victim because he had asthma. Investigator Meggs said that during the

interview, the Defendant never mentioned being threatened with a weapon and appeared to be calm and “nonchalant.”

Investigator Padford testified that he investigated the victim’s shooting. He explained that after he arrived at the scene, he went into Doherty’s and located the Defendant. He said that the Defendant’s demeanor was calm and that the Defendant told the officers, “I’m the one you’re looking for.” Investigator Padford said that bullets, keys, and a cell phone were collected from the Defendant’s pockets. He said that the Defendant told the officers where he had placed the gun, that officers photographed the crime scene, and that an officer retrieved the gun from the Defendant’s car. Investigator Padford said the Defendant was placed in custody in a police car and moved to another parking lot because a tense crowd had gathered at the crime scene. He said that the Defendant had no injuries and did not require medical treatment.

Investigator Padford testified that on the night of the shooting, he interviewed the Defendant at the police station. He said the Defendant told him that the victim hit him once and that he acted in self-defense. He said that the Defendant was arrested on November 19, 2015, after he had completed his investigation.

Ken Rager testified that he worked for the Alabama Department of Revenue and that his primary duties included computer and cell phone forensics. He said that he performed a forensics data extraction on the Defendant’s cell phone. Mr. Rager identified a copy of his report, and it was entered as an exhibit. Mr. Rager explained that the Defendant had sent a text message stating that the Defendant shot someone who had attacked him.

Forensic pathologist Dr. David Zimmerman testified that he conducted the autopsy of the victim. He said that the victim’s cause of death was a gunshot wound to the chest.

Kyleigh Wood testified for the defense. She said that she was friends with the Defendant and Mr. Neubauer and that she was with them at her grandmother’s home on the night of November 15, 2015. She explained that after the Defendant left but while Mr. Neubauer was still there, the victim arrived, uninvited, looking for the Defendant. She said that she and Mr. Neubauer told the victim the Defendant was not there and that she asked him to leave. Ms. Wood explained that she meant to call a friend but accidentally called the victim. She said they argued, and she told him he should not come to her grandmother’s house to “start s---” with the Defendant. Ms. Wood said she was concerned the victim would return, so she called the police hoping that they would arrest the victim; however, they did not.

Ms. Wood testified that on November 16, 2015, Mr. Neubauer called her and the Defendant texted her to tell her that the victim was dead. She explained that she went to the police station and gave a statement to police. She told them about the incident at her grandmother’s home.

Chris Neubauer testified that he had previously made statements to police regarding the events of November 15 and 16, 2015, and that he was invoking his Fifth Amendment privilege not to testify. A redacted transcript of Mr. Neubauer's testimony at Mr. Neubauer's preliminary hearing regarding a collateral matter was given to the jury. A corresponding redacted recording of Mr. Neubauer's testimony during his preliminary hearing was also played for the jury.

Attorney James Melton testified that he was certified to teach firearm safety classes in Tennessee. He said that the Defendant took one of his firearm safety classes in November of 2015 and that the Defendant passed the required class exams. He explained that he believed the Defendant understood the responsibilities of firearm ownership.

At the conclusion of the trial, the jury convicted the Defendant of second degree murder. The trial court later sentenced the Defendant to 17 years following a sentencing hearing. The Defendant filed a motion for new trial on November 22, 2016, and a second motion for new trial on May 30, 2017. On May 16, 2018, the trial court granted the motion for a new trial after finding that due to the State's misconduct, the Defendant was denied important exculpatory evidence and testimony. The court found that Mr. Neubauer's testimony was crucial to the Defendant's theory of self-defense and found that the State indicted Mr. Neubauer in order to prevent him from testifying favorably for the defense. The court also found error in the State's opening statement and ruled that the cumulative effect of the State's misconduct required the motion for new trial to be granted.

#### B. Plea and Sentencing Proceedings

On May 27, 2021, the Defendant entered a best-interest guilty plea to voluntary manslaughter and agreed to a Range II sentence of eight-and-one-half years at 60-percent service with the manner of service determined by the trial court. A second sentencing hearing was held.

At the July 13, 2021 sentencing hearing, an updated pre-sentence report was entered as an exhibit, which indicated that the Defendant had no criminal history. The trial court summarized the case history and, without objection, relied on the trial facts.

Betty Nuzzo, the victim's mother, read Meilea Lindsey's victim impact statement. Ms. Lindsey wrote that the victim's death was so painful she was "consumed" by it and "wondered if [she] wanted to keep living" herself. Ms. Lindsey also stated that she was afraid for her son to grow up in a world where a "jealous, vengeful" person could taunt someone into a reaction and then plead self-defense. Ms. Lindsey said the Defendant was a "very manipulative" person." Ms. Lindsey said the victim's death had scarred her for life, and she asked the trial court to give the Defendant the maximum sentence. Ms. Lindsey's statement was entered into evidence.



After reading Ms. Lindsey's statement, Ms. Nuzzo testified that the Defendant had no remorse for killing the victim and that the Defendant purposely antagonized the victim. She said that despite the Defendant not having other convictions, he had no respect for the law. Ms. Nuzzo stated that she believed the Defendant would make "another bad judgment call" if he were not incarcerated. She said she believed incarceration might have a positive impact on the Defendant and help him to accept responsibility for his actions.

Richard Collier, one of the victim's family members, read his victim impact statement to the court. In that statement, Mr. Collier said that the Defendant had shown no remorse for his actions and that the Defendant purposely provoked the victim so that the Defendant could shoot him and claim self-defense. Also, in the statement, Mr. Collier said that it was a "punch in the face" to the victim's family for the Defendant to be asking for probation and that the Defendant needed to be punished so that the victim's family could find "some semblance of closure." His statement was entered as an exhibit.

A prosecutor read a victim impact statement written by the victim's father, Nick Nuzzo, in which he said that he felt pain and loss every day because of the victim's death. He said that the Defendant had no remorse for killing the victim. Mr. Nuzzo said that eight and one-half years was not a just sentence for the Defendant who was motivated by "hate" and "vengeance" to kill the victim. His statement was entered as an exhibit.

Erica Eva Burns, the Defendant's wife, testified that she and the Defendant were married in 2018 and had a child together in 2021. Ms. Burns said that the Defendant had maintained employment since their marriage. She said that the Defendant worked and supported her while she stayed at home with their child. She explained that the Defendant had not spoken to her much about the victim because the case was ongoing, but she could tell that the incident had affected him. Ms. Burns said the Defendant meditated to help deal with the situation. She said that the Defendant was an "incredible" father and husband. She said he also supported his parents and sister when he could.

Matthew Fugett testified that the Defendant was one of his employees at Two Men and a Truck. He said the Defendant was an "exemplary" employee. He explained that the Defendant supervised two employees who each supervised two other employees. He said the Defendant trained all employees to meet the company's standards. He said the Defendant built relationships with everyone and was kind. He never observed the Defendant fight or argue with anyone while at work.

During Mr. Fugett's cross-examination, the trial court called a recess to take a phone call. The court returned to the bench and explained that the call was related to retirement. Following the conclusion of the proof, the court stated that the only matter for consideration was a determination of whether the Defendant was eligible for any alternative sentence. The court noted that enhancement and mitigating factors had no bearing on this decision.

As the trial court began its ruling from the bench, the judge's phone rang, and he answered it. After a brief conversation, the judge explained that one of his friend's son-in-law had cancer.

The trial court then continued its sentencing determination. The court determined that the Defendant did not have a history of criminal activity, thus, this confinement factor, protecting society by restraining a defendant with a long criminal history, did not apply to the Defendant. *See* Tenn. Code Ann. § 40-35-103(1)(A). The court determined that the second factor, measures less restrictive than confinement have been applied unsuccessfully to the defendant, did not apply because the Defendant had never been on probation. *Id.* at § -103(1)(C). The court said that the remaining factor, confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses, was the controlling factor. *Id.* at § -103(1)(B).

The trial court reasoned that it had read the Defendant's statement in which he said he was sorry the incident occurred, but the court did not find "any strong expression of remorse or contrition." The court acknowledged that five letters had been written on the Defendant's behalf, which portrayed the Defendant as "a good role model." The court said that the letters were entered as exhibits and that the court had read and considered them. The court determined that the Defendant was not an appropriate candidate for alternative sentencing and ordered him to serve his sentence in confinement. This appeal followed.

## II. ANALYSIS

The Defendant contends that the trial court erred by ordering the Defendant to serve his sentence in confinement rather than an alternative sentence of probation. Specifically, he argues that the court failed to consider the factors listed in Tennessee Code Annotated section 40-35-210, that the court was distracted by taking phone calls during the Defendant's sentencing hearing, and that the court erred by considering victim impact statements in determining the Defendant's manner of service. The State responds that the trial court did not err by ordering the Defendant to serve his sentence in confinement.

We review the length and manner of service of a sentence imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). Before a trial court imposes a sentence upon a defendant, it must consider: (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; (g) any statement the defendant wishes to make

in the defendant's own behalf about sentencing; and (h) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. Tenn. Code Ann. § 40-35-210(b). 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. 2007).

While a defendant is no longer presumed to be a favorable candidate for alternative sentencing, probation is generally available to a defendant sentenced to 10 years or less. *Carter*, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-102(6); Tenn. Code Ann. § 40-35-303(a)). The advisory sentencing guidelines provide that a defendant “who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary[.]” Tenn. Code Ann. § 40-35-102(6)(A).

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 Cm'ts.; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). Furthermore, a defendant bears the burden of proving suitability for probation, including showing that probation will serve the ends of justice and the best interests of the public and the defendant. *Carter*, 254 S.W.3d at 347. In determining whether to grant probation, a trial court should consider whether: (1) “confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;” (2) “confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses;” or (3) “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, the trial court should consider a defendant's potential or lack of potential for rehabilitation as well as: “(1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) special and general deterrence value.” *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017); Tenn. Code Ann. § 40-35-103(a). In assessing a defendant's potential for rehabilitation, candor is a relevant factor, and “the lack of candor militates against the grant of probation.” *State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002); *see State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983).

To facilitate meaningful appellate review, the trial court must state on the record the sentencing principles it considered and the reasons for the sentence imposed. Tenn. Code Ann. § 40-35-210(e)(1)(B); *Bise*, 380 S.W.3d at 705. Mere inadequacy in the articulation of the reasons, however, should not negate the presumption [of reasonableness].” *Bise*, 380 S.W.3d at 705. A sentence should be upheld if the trial court provided “enough to satisfy the appellate court that [it] has considered the parties' arguments and [that it] has a

reasoned basis for exercising [its] . . . legal decision making.” *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 356-57 (2007)).

The Defendant argues that the court was distracted by answering two phone calls during the Defendant’s hearing. While we do not encourage such behavior, we do not find that the court was so preoccupied during the hearing that its conduct affected the sentencing hearing. *See State v. Davidson*, 509 S.W.3d 156, 228 (Tenn. 2016) (holding that a trial judge’s out-of-court misconduct, by itself does not constitute[ ] structural error unless there is proof that the misconduct affected the trial proceedings) (internal quotations omitted); *see also State v. Adolphus L. Hollingsworth*, No. E2015-0146-CCA-R3-CD, 2017 WL 111331, at \*25 (Tenn. Crim. App. Jan. 11, 2017) (rejecting the defendant’s argument that the trial judge failed in its role as thirteenth juror when the trial judge, among other things, “was distracted by telephone calls”). Here, the trial court considered the facts of the trial and proof presented at the sentencing hearing, as well as addressed various alternative sentencing considerations, consistent with its obligations.

The Defendant also argues that the court erred by considering victim impact statements because the sole issue was determining the manner of service. However, a court may consider victim impact statements when determining a defendant’s manner of service. *State v. Ring*, 56 S.W.3d 577, 587 (Tenn. Crim. App. 2001) (holding “any victim impact testimony must be considered in determining the length of the defendant’s sentence and the manner of service of that sentence, to the extent that such testimony contains relevant and reliable evidence establishing enhancing or mitigating factors and/or any other sentencing considerations”).

The trial court found that Tennessee Code Annotated section 40-35-103(1)(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,” was the controlling factor in determining the Defendant’s manner of service. The court also found that the Defendant was not remorseful for his actions. *See State v. Richardson*, 612 S.W.2d 194, 196 (Tenn. Crim. App. 1980) (holding that “lack of remorse has a direct bearing on a defendant’s prospects for rehabilitation”); *see also State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002) (“the lack of candor militates against the grant of probation”). The record supports the trial court’s denial of probation, and the court did not abuse its discretion by ordering the Defendant to serve his sentence in confinement.

### **III. CONCLUSION**

Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

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KYLE A. HIXSON, JUDGE