IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
June 6, 2023 Session

STATE OF TENNESSEE v. DEMETRICE LIVINGSTON

Appeal from the Circuit Court for Dyer County
No. 19-CR-312 Mark L. Hayes, Judge

No. W2022-01474-CCA-R3-CD

The Defendant, Demetrice Livingston, was convicted by a Dyer County Circuit Court jury of second degree murder and was sentenced by the trial court as a Range I offender to twenty years at 100% in the Department of Correction, to be served consecutively to his sentence in a drug case for which he had been sentenced to probation. The Defendant raises three issues on appeal: (1) whether the evidence was sufficient to sustain his conviction; (2) whether the trial court imposed an excessive sentence; and (3) whether the State made an improper closing argument by referencing facts not in evidence and making a comment that impermissibly bolstered the testimony of a State's witness. Based on our review, we affirm the judgment of the trial court but remand for the trial court to enter an amended judgment imposing a concurrent sentence.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which J. ROSS DYER and TOM GREENHOLTZ, JJ., joined.

Martin E. Dunn, Dyersburg, Tennessee (on appeal) and Jason Creasy, Dyersburg, Tennessee (at trial), for the appellant, Demetrice Livingston.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; and Danny Goodman, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On the night of June 10, 2019, the victim, Demarko[1] Robinson, was standing with a group of individuals outside a home on Liberty Street in Dyersburg when someone in a passing Toyota Sequoia shot and killed him. The Defendant was developed as a suspect, and the Dyer County Grand Jury subsequently returned an indictment charging the Defendant in count one with the first degree premeditated murder of the victim, and the Defendant's then-girlfriend, Jordyn Bell, in count two with being an accessory after the fact.

The Defendant was tried separately before a Dyer County Circuit Court jury in March 2022. Jim Joyner, who at the time of the shooting was a lieutenant in the Dyersburg Police Department assigned to the Criminal Investigative Division, testified that the victim was standing directly in front of the residence when shot. He said a tan SUV was reported as the vehicle involved. Three individuals were on the porch of the residence when Lieutenant Joyner arrived at the scene, but they refused to provide any information, instead cursing at the police officers. Two days after the shooting, Lieutenant Joyner interviewed Co-Defendant Bell, and one or two weeks later, he interviewed Taylor Kennedy. No one other than the Defendant was developed as a suspect.

On cross-examination, Lieutenant Joyner testified that he did not know how many other individuals were present at the time of the shooting or what they were doing. He acknowledged his familiarity with four of the individuals reported to have been present. When asked how many were convicted felons, he replied, "[p]robably all of them." He testified that four shell casings were found on the scene and a fifth shell casing was found inside Co-Defendant Bell's vehicle. No weapons were found on the scene.

Dyersburg Police Department Detective Chris Clements identified three surveillance videos that showed a Toyota Sequoia traveling west from the scene approximately one minute after the 9:54 p.m. shooting. On cross-examination, he testified that he saw the vehicle on the day that other officers recovered ammunition from it. Although not certain, he thought there were bullet holes in the vehicle and a bullet or bullet fragments inside the vehicle.

[1] The victim's first name is spelled as "Demarco" in the trial transcript but as "Demarko" in the indictment and in the autopsy report.

Sergeant Logan Abbot of the Dyersburg Police Department testified that he arrived at the scene at the same time as the EMS workers. He said the victim was lying at an angle on the northeast side of the residence so close to the road that his legs were possibly on the road. Officer Hammond was applying pressure to the victim's gunshot wounds, three or four individuals were sitting on the porch railing of the residence, and several other individuals were in the yard. He considered the individuals on the porch to be witnesses, but they would not provide any information. He collected into evidence four shell casings - - three found in the road very close to the victim's body, and one found after the victim's body was moved.

On cross-examination, Sergeant Abbot testified that the three shell casings in the road were within a two- or three-foot radius of each other, while the fourth shell casing was approximately two or three feet further away. He agreed that he was familiar with several of the individuals present at the residence "[d]ue to their criminal conduct." He recalled seeing alcohol bottles but said he would describe the individuals present as "unruly and out of control" rather than impaired.

Officer Mason Hammond of the Dyersburg Police Department testified that he responded to the scene to find the victim lying beside the road with a large group of people surrounding him. He immediately began to render medical aid to the victim and notified dispatch to send an ambulance. After the victim had been transported, he began talking to individuals in an attempt to gather information but was unsuccessful.

Taylor Kennedy, who said that she and the Defendant were friends, testified that on the day of the shooting, she was "[r]iding around" with the Defendant and Co-Defendant Bell in the Defendant and Co-Defendant Bell's vehicle. Co-Defendant Bell was driving, the Defendant was in the back seat, and Ms. Kennedy was in the front passenger seat. They first booked a hotel room in Dyersburg, where they stayed a short while until the Defendant said, "Let's go." The Defendant, who was acting "fidgety" and "skittish"[,] directed Co-Defendant Bell to drive to the "east side" toward the railroad tracks. Ms. Kennedy testified that she was lying down attempting to sleep when "shots went off[,]" which made her jump up. She recalled going over the railroad tracks and hearing the Defendant tell Co-Defendant Bell "to drive and go."

Ms. Kennedy testified that the Defendant instructed Co-Defendant Bell to drive somewhere so that he could get rid of the gun. She said she wanted to go home, but the Defendant would not allow it because he "thought [she] was gonna snitch." She stated that they drove approximately twenty-five minutes from where the shooting occurred before the Defendant told Co-Defendant Bell to stop. The Defendant wrapped his gun in a gray shirt, got out of the vehicle, and buried the gun. While the Defendant was out of the vehicle,

she unsuccessfully attempted to convince Co-Defendant Bell to take her home. The Defendant then returned to the vehicle and said, "We got to leave town."

Ms. Kennedy testified that the Defendant burned the clothing he had been wearing during the shooting and changed into another set of clothing, which she assumed he must have brought with him. Afterward, they drove hours away to stay overnight with some people that the Defendant knew. She thought it was somewhere in Illinois but was not certain. The following day, they returned to Dyersburg, where she was finally able to "[s]neak away" from the Defendant and go home.

On cross-examination, Ms. Kennedy denied that she was using cocaine or methamphetamine or drinking alcohol with the Defendant and Co-Defendant Bell. She said she heard two or three gunshots and saw the Defendant "hanging out the window" with a gun, so she assumed it was the Defendant shooting. She stated she saw numerous individuals standing outside the residence in the driveway and partially in the road. She did not know if anyone fired at their vehicle or who initiated the gunfire.

After waiving her Fifth Amendment right not to testify, Co-Defendant Jordyn Bell identified the Defendant as her ex-boyfriend and testified that she had been charged as an accessory after the fact in the victim's murder. She said that on the day of the shooting, she, the Defendant, and Ms. Kennedy were "riding around" together in her 2004 gold Toyota Sequoia listening to music while the Defendant and Ms. Kennedy drank. She was driving, Ms. Kennedy was in the front passenger seat, and the Defendant was in the rear passenger seat directing her where to drive. She said she wanted to go home and was crying, but the Defendant put a gun to her side and said, "Bitch, take me where I asked you to go."

Co-Defendant Bell testified that the Defendant gave her street by street directions until he eventually directed her to turn left onto Liberty Street. She said there was a group of people standing in the yard in front of a house, and that the Defendant asked her if someone called "T-something was out there." She said she did not know who the Defendant was talking about. As she drove past the house, she heard a gunshot, and the Defendant said, "S**t! It jammed. Go! Go! Go! They're shooting!" As she sped away, Co-Defendant Bell heard more gunshots. She did not think she heard those gunshots before the Defendant said that his gun had jammed.

Co-Defendant Bell testified that she drove to the road on which the hotel in which they were living was located. She said she started to turn into the hotel drive, but the Defendant told her not to. The Defendant hit her on the back of the head with the gun and then hit Ms. Kennedy and said that they needed to go where he told them to go. The

Defendant directed her to a field "in the middle of nowhere" and told her to drop him off, turn around, and return to get him. She did as he instructed, returning to find that he had taken his clothes off and was burning them. Ms. Kennedy got out of the vehicle and helped the Defendant put the clothes in a bag and "they threw the clothes." After the Defendant and Ms. Kennedy had returned to her vehicle, the Defendant told her to take him somewhere else. When they were almost to Dyersburg, the Defendant instructed her to stop and follow the same procedure of letting him out, turning around, and returning to pick him up.

Co-Defendant Bell testified that the Defendant did not tell her what he was doing, but when he got back in her vehicle, he said, "55. Remember that." She asked, "55, what?" and he responded, "55 steps. That's where that's at." She stated that she knew that the Defendant was talking about the gun. She said they returned to their hotel room in an attempt to calm down but left again when they heard others talking about the shooting and saw a white car pull up outside with "a bunch of people" inside.

Co-Defendant Bell testified that they slept that night in a field. The next day, they drove to St. Louis, where they slept overnight at a truck stop. The Defendant's brother lived in St. Louis, and they briefly visited him but did not stay overnight. Later that same day, they returned to Tennessee, stopping first at the Defendant's mother's home in Jackson and then at a home in Humboldt where the Defendant's children lived. In the meantime, police detectives kept calling her, so she dropped the Defendant and Ms. Kennedy off in a field and went to an interview with the police. Co-Defendant Bell testified that she was interviewed again the following morning. She acknowledged that she did not tell the police the truth in her initial interviews and explained that she was scared. She stated that she eventually gave a truthful statement, consistent with her trial testimony, after she was arrested.

On cross-examination, Co-Defendant Bell conceded that she gave three different statements to police in which she denied that the Defendant had a gun or shot anyone. She said she had not been promised anything in exchange for her trial testimony. She acknowledged, however, that she was originally charged with first degree murder and that the charge was changed to accessory after the fact after she gave her statement implicating the Defendant. She testified that the Defendant and Ms. Kennedy were both drinking alcohol and using cocaine and methamphetamine on the day of the shooting. She said she heard a lot of gunshots, "more than just a couple." She then expressed certainty that the multiple additional gunshots she heard occurred after the Defendant's statement about his gun having jammed. She said there were bullet holes in her vehicle after the shooting. She stated she had no idea how many individuals were shooting that night.

John Lewoczko, a retired firearms examiner with the Jackson Police Department and an expert in the field of firearm identification, testified that he examined the five cartridge casings submitted in connection with the case - - four recovered from the shooting scene and one recovered from Co-Defendant Bell's vehicle. He determined that two of the cartridge casings had been fired in the same gun and that three others had been fired from the same gun, but he was unable to "make a conclusion of those three and the two, of all being fired in the same gun." On cross-examination, he acknowledged it was possible that there were two different firearms involved. On redirect examination, he testified that he was able to conclusively determine that one of the cartridge casings recovered from the shooting scene and the cartridge casing recovered from inside Co-Defendant Bell's vehicle had both been fired from the same gun.

Sergeant Todd Thayer of the Dyersburg Police Department's Criminal Investigative Division testified that Co-Defendant Bell gave the police permission to search her vehicle. During the search, officers found a live 9 mm round in the back seat, a spent 9 mm casing in the cargo area behind the back seat, and a fired bullet fragment in the cargo area. On cross-examination, he acknowledged that Co-Defendant Bell provided three different accounts before she finally provided the fourth version of events that was consistent with her trial testimony. He further acknowledged that the bullet fragment found inside her vehicle indicated that someone, at some point in time, had fired a bullet at the vehicle.

Dr. Marco Ross, the medical examiner who performed the autopsy of the victim's body, testified that the victim sustained gunshot wounds to his right hip area in which the bullet entered at his right hip, traveled through tissue underneath his skin, exited, reentered, and "continued across the front of the lower pelvic region by transecting blood vessels in the right and left hip region as well as also transecting and perforating some of the small intestine[.]" The victim had an additional gunshot wound in which the bullet entered on the back side of his right forearm and exited on the front part of the forearm. He was unable to determine if the victim's gunshot wounds were caused by two bullets or by a single bullet that entered and exited the victim's forearm before continuing into the victim's abdominal area. He testified that the cause of death was the gunshot wound to the hip. On cross-examination, Dr. Ross testified that the victim's toxicology report revealed that the victim had used methamphetamine and had a blood alcohol level of .141.

The Defendant elected not to testify and rested his case without presenting any evidence. Following deliberations, the jury, which was instructed on self-defense, convicted the Defendant of the lesser-included offense of second degree murder.

At the May 3, 2022 sentencing hearing, the State called Sergeant Todd Thayer, who testified that he had been involved in numerous investigations of similar shooting cases in

the past year, and that shootings had become an issue for the police department and the community as a whole. He said that shootings were occurring at all hours of the day and night, that the police department was experiencing difficulty finding witnesses willing to cooperate, and that it was a safety concern for the neighborhood because innocent people were having their homes and vehicles "shot up[.]" He provided the following rough statistics on the number of shootings the community had experienced in recent years: five cases with fourteen victims in 2019; eleven cases with twenty-two victims in 2020; twenty-three cases with thirty-six victims, nine of which were shot, in 2021; and six cases involving four deaths in the first five months of 2022.

On cross-examination, he acknowledged that there were several bullet holes in Co-Defendant Bell's vehicle that showed signs of repair, which indicated that the vehicle had been involved in previous shootings. He testified that, to his knowledge, the Defendant had been shot at in two separate incidents that occurred approximately one month prior to the Liberty Street shooting.

The victim's mother, Lashanda[2] Michelle Armstrong, testified that the victim was twenty-seven at the time of his death, was married with six children and a seventh on the way, lived with and supported his wife and six children, and was a full-time employee of "NSK." The victim was one of four siblings, and his death had had a devastating impact not only on his wife and children, but also on Ms. Armstrong, the victim's siblings, and the victim's nieces and nephews. Ms. Armstrong testified that she forgave the Defendant, but she requested that the trial court impose the maximum sentence as punishment for his crime.

Before the parties began argument on sentencing for the offense, the prosecutor announced that the parties had reached an agreement on the Defendant's pending probation violation, which was set to be heard the same day. Defense counsel stipulated that there was a sufficient basis for revocation of the Defendant's probation but requested that the trial court "run the probation violation concurrent; he has served a substantial amount of time on that." Defense counsel declined the trial court's offer to put on any proof regarding the probation violation.

The trial court found that the Defendant had violated his probation in Case 16-CR-159 and revoked his probation in that case. With respect to sentencing for the second degree murder conviction, the trial court found the following enhancement factors applicable to the offense: that the Defendant had a previous history of criminal behavior or criminal convictions in addition to those necessary to establish the appropriate range; that

[2] This witness's first name is spelled "Lashonda" in the trial transcript but when asked to spell her name for the court reporter, she spelled it as "Lashanda."

the Defendant had failed to comply with the conditions of a sentence involving release into the community; that the Defendant possessed or employed a firearm during the commission of the offense; that the Defendant had no hesitation about committing a crime when the risk to human life was high; and that the Defendant had been adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult. *See* Tenn. Code Ann. § 40-35-114 (1), (8), (9), (10), (16). The trial court found no applicable mitigating factors. The trial court found that confinement was necessary to provide an effective deterrent and that a minimal sentence would unduly depreciate the seriousness of the offense. Accordingly, the trial court sentenced the Defendant to twenty-years in the Department of Correction, the maximum sentence in the range. The trial court ordered that the twenty-year sentence be served consecutively to the two-year sentence in Case 16-CR-159 on the basis that the Defendant was a dangerous offender who had no hesitation about committing a crime when the risk to human life was high, and the crime was committed when the Defendant was on probation for a previous offense. *See* Tenn. Code Ann. § 40-35-115(b)(4), (6).

Following the denial of his motion for new trial, the Defendant filed a timely notice of appeal to this court.

ANALYSIS

I. Sufficiency of the Evidence

As his first issue, the Defendant contends that the evidence was insufficient for a rational jury to find him guilty of second degree murder. In support, he cites evidence that he submits shows that he shot the victim in self-defense: the presence of several convicted felons at the scene, the bullet holes and bullet fragment found in Co-Defendant's Bell's vehicle, the presence of methamphetamine and alcohol in the victim's blood; Ms. Kennedy's inability to identify who was shooting, and the fact that Co-Defendant Bell never testified that she witnessed the Defendant firing the first shots. The State responds that the evidence presented at trial was sufficient to support the jury's verdict. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, 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 finding 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).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). 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. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "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).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

Second degree murder is defined as the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). Second degree murder is a "result-of-conduct" offense, which means that the statute focuses upon "the result and punishes an actor who knowingly causes another's death." *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000); *see State v. Brown*, 311 S.W.3d 422, 431-32 (Tenn. 2010). A person acts "knowingly" as it pertains to second degree murder "when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b). The issue of whether a defendant acted knowingly is a question of fact for the jury. *See State v. Inlow*, 52 S.W.3d 101, 104-05 (Tenn. Crim. App. 2000). When a defendant relies upon a theory of self-defense, it is the State's burden to show that the defendant did not act in self-defense. *State v. Sims*, 45 S.W.3d 1, 10 (Tenn. 2001). However, it is within the prerogative of the jury to reject a claim of self-defense. *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997).

Viewed in the light most favorable to the State, the evidence established that the Defendant, armed with a gun, directed Co-Defendant Bell to drive to a house on Liberty Street where a large number of individuals were standing outside. When they were approaching the residence, the Defendant, who was in the back seat of the vehicle with his gun, asked Co-Defendant Bell if she saw a particular individual. As Co-Defendant Bell continued past the house, the Defendant fired two gunshots out of the window, striking and killing the victim. The Defendant then announced that his gun had jammed and urged Co-

Defendant Bell to accelerate from the scene as an individual or individuals in the crowd returned gunfire. Afterward, the Defendant burned his clothing, buried the gun, and fled to Missouri. From this evidence, a rational jury could reasonably conclude that the Defendant did not act in self-defense and that he committed a knowing killing of the victim. We, therefore, affirm the Defendant's conviction for second degree murder.

II. Excessive Sentence

The Defendant next contends that the sentence "imposed by the trial court should be vacated because it was excessive and unlawful." He first argues that the trial court erroneously ordered that the twenty-year sentence be served consecutively to the sentence in the case for which he was on probation at the time, asserting that the instant offense "appears to have occurred after probation for 16-CR-159 should have expired." He then argues that the trial court misapplied one of the enhancement factors because "it was not apparent from [appellate counsel's] review of the TDOC presentence report and the WestState Corrections Network Pre-Sentence Report that [the Defendant] had a juvenile record that would have constituted a felony as an adult." Finally, he argues that Sergeant Thayer's sentencing hearing testimony about similar shooting cases was irrelevant and should not have been considered by the trial court in its determination that confinement was warranted as a deterrence to others. The State responds that the record demonstrates that the trial court imposed a lawful sentence within the appropriate range that complied with the purposes and principles of sentencing.

This court reviews the length, range, and manner of service 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); *State v. Caudle*, 388 S.W.3d 273, 79 (Tenn. 2012). The trial court is granted broad discretion to impose a sentence anywhere within the applicable range and the sentencing decision of the trial court will be upheld "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. We, likewise, review the trial court's order of consecutive sentencing for abuse of discretion, with a presumption of reasonableness afforded to the trial court's decision. *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013) (applying the same deferential standard announced in *Bise,* 380 S.W.3d at 682, to the trial court's consecutive sentencing decisions).

In determining a defendant's sentence, the trial court is to 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 enhancement and mitigating 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 by the Defendant in his own behalf; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* Tenn. Code Ann. § 40-35-210(b); *see also Bise*, 380 S.W.3d at 697-98.

In determining if incarceration is appropriate in a given case, a trial court should consider whether:

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

Id. at § 40-35-103(1). The sentence imposed should be (1) "no greater than that deserved for the offense committed" and (2) "the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* at § 40-35-103(2), (4).

The Defendant first argues that the trial court erred by ordering his twenty-year sentence served consecutively to his sentence in the case for which he was on probation at the time of the instant offense, asserting that it appears that his probation in that drug case might have already expired by the time he committed the instant offense. The State argues that the Defendant stipulated at the sentencing hearing that he had violated his probation in that case, and whether or not the sentence has expired is within the purview of the Tennessee Department of Correction, which is "responsible for calculating the sentence expiration date and the earliest release date of any felony offender sentenced to the department of correction[.]" Tenn. Code Ann. § 40-28-129. However, at oral argument, the State conceded that there was no real proof offered that showed that the Defendant's prior period of probation was still active. Therefore, since there was no proof, the trial court's order to run the sentences consecutive is error. The order for consecutive sentencing is reversed and the case remanded for entry of an amended judgment.

The Defendant next argues, and the State concedes, that it is unclear from the record whether enhancement factor (16) was appropriately applied. However, as the State notes,

the Defendant does not challenge the applicability of the several other enhancement factors found by the trial court, which are supported by the record, and "a trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 [Sentencing] Act, as amended in 2005." *Bise*, 380 S.W.3d at 706.

The Defendant next argues that the trial court improperly enhanced his sentence on the need for general deterrence. The Defendant cites *State v. Hall*, 976 S.W.2d, 121 (Tenn. 1998) and *State v. Bates*, 804 S.W.2d 868 (Tenn. 1991), to argue that the trial court erred by considering, through Sergeant Thayer's testimony, the need for deterrence in determining the Defendant's sentence. We agree with the State that the Defendant's reliance on *Hall* and *Bates* is misplaced, as those two cases addressed a wholly different issue of whether the State may properly argue the need for specific deterrence to the jury in a capital case. In both cases, our supreme court held that the need for specific deterrence should generally be avoided by the State in closing argument in a capital sentencing hearing because it is usually irrelevant to the aggravating circumstances in the death penalty statute. *Bates*, 804 S.W.2d at 881-82; *Hall*, 976 S.W.2d at 167.

Deterrence may not be used as an unenumerated enhancement factor, but trial courts must ensure that the length of any sentence complies with the purposes and principles of sentencing. Tenn. Code Ann. § 40-35-210(d). One of these several principles is "to prevent crime and promote respect for the law by . . . [p]roviding an effective general deterrent to those likely to violate the criminal laws of this state." Tenn. Code Ann. § 40-35-102(3)(A). Here, because the trial court's sentence complies with the purposes and principles of sentencing, we affirm the twenty-year sentence imposed by the trial court.

III. Improper Closing Argument

As his final issue, the Defendant contends that the State gave an improper closing argument by referring to facts that had not been introduced into evidence, thereby unfairly prejudicing his case and requiring that his conviction be vacated and the charges dropped. The State argues that the Defendant has waived consideration of the issue in one instance by his failure to request a curative instruction by the trial court, and that in the other two instances the issue does not rise to the level of plain error. We, again, agree with the State.

The Defendant complains about three different brief portions of the State's closing argument: the prosecutor's apparent attempt to display a photograph of the victim and his family; the prosecutor's referring to the victim as a husband and a father, and a comment the prosecutor made when reviewing Ms. Kennedy's testimony to explain why she might have lied about her alcohol and drug use. The Defendant did not make a contemporaneous

objection to the comment regarding Ms. Kennedy's testimony but made an immediate objection to the photograph and the comment about the victim's familial status. In each of these later instances, the trial court sustained the objections. In neither instance did the Defendant request a curative instruction from the trial court.

The complained-of comment with respect to Ms. Kennedy's testimony occurred as the prosecutor was reviewing the State's evidence and arguing that Ms. Kennedy's account essentially corroborated the account of Co-Defendant Bell and the other witnesses:

> Now, she did say she wasn't drinking. She did say she wasn't using drugs. So there is a little conflict in the testimony there, but I would submit to you, not a lot of people who are out intoxicated and using illegal drugs like to admit that. However, all of the other statements that she made match perfectly with everyone else's statements that were given.

The complained-of portion with respect to the display, or attempted display, of the photograph occurred as follows:

> [PROSECUTOR]: Who was [the victim]? Was he just some guy, random, who was on the side of the street?
>
> [DEFENSE COUNSEL]: Objection. Your Honor, may we approach?
>
> THE COURT: Yes.
>
> (WHEREUPON, bench conference was held, to wit:
>
> [DEFENSE COUNSEL]: Need to take that picture out. It was not introduced into evidence.
>
> TRIAL COURT: Yeah, I know. It's not proof about who - - about your - - identity of your victim. Just a name is all we got. So, I think we probably need to move on.
>
> [DEFENSE COUNSEL]: I think that picture of the family is - - if it's not into evidence, it doesn't come in.
>
> THE COURT: I agree. I agree.
>
> [PROSECUTOR]: Okay. Okay, that's fine.

THE COURT: Okay.

After the bench conference was concluded, the prosecutor resumed his closing argument and the following exchange occurred:

> [PROSECUTOR]: Who was [the victim]? He was not just an individual who is on the side of the street. He was not some unlawful person who was out there doing things he shouldn't. He was a husband. He was a father.
>
> WHEREUPON, bench conference was held, to wit:
>
> [DEFENSE COUNSEL]: Objection. Same - - May we approach? You can't look outside of proof.
>
> [PROSECUTOR]: Okay.
>
> THE COURT: Not in proof. We gotta - -
>
> [PROSECUTOR]: Okay. Okay.
>
> THE COURT: Thank you.

The bench conference concluded without the Defendant making any further objection or requesting a curative instruction by the trial court. The Defendant now argues that he was unfairly prejudiced by the prosecutor's introduction of the photograph and the prosecutor's comment about the fact that he was a husband and a father. The Defendant also argues that he was unfairly prejudiced by the prosecutor's impermissible bolstering of Ms. Taylor's testimony, which constituted plain error. We disagree.

The five generally recognized areas of improper closing argument occur when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence or the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside the record, other than those which are matters of common public knowledge. *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Tennessee courts "have

traditionally provided counsel with a wide latitude of discretion in the content of their final argument" and trial judges with "wide discretion in control of the argument." *State v. Zirkle*, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). A party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Middlebrooks*, 995 S.W.2d 550, 557 (Tenn. 1999).

With respect to the two back-to-back instances in which the prosecutor spoke about the victim's familial status and non-criminal character, we note that the trial court immediately sustained the Defendant's objections, and that the Defendant did not request a curative instruction. As such, we agree with the State that these issues are 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."). Moreover, it is unclear from the record if the jury saw the photograph of the victim's family, and the complained-of portion comprised only a small portion of closing argument in a case in which the evidence against the Defendant was very strong.

The Defendant argues that the prosecutor's comment explaining why Ms. Kennedy may have lied about her alcohol and drug use constituted an impermissible bolstering of her testimony that rose to the level of plain error. We respectfully disagree. "[I]t is incumbent upon defense counsel to object contemporaneously whenever it deems the prosecution to be making improper argument[,]" as "[a] contemporaneous objection provides the trial court with an opportunity to assess the State's argument and to caution the prosecution and issue a curative instruction to the jury if necessary." *State v. Jordan*, 325 S.W.3d 1, 57-58 (Tenn. 2010) (footnote omitted). A defendant's failure to object contemporaneously will constitute a waiver of the issue on appeal. *Id.* at 58 (citing Tenn. R. App. P. 36(a)). "[P]lain error review is the appropriate standard of review to apply to claims of alleged prosecutorial misconduct during closing argument when no contemporaneous objection was lodged at the time of the alleged misconduct but the claim is raised in the motion for a new trial." *State v. Enix*, 653 S.W.3d 692, 700-01 (Tenn. 2022).

We may consider an issue to be plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did

not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); *see also State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the *Adkisson* test for determining plain error). Furthermore, the "'plain error' must be of such a great magnitude that it probably changed the outcome of the trial." *Adkisson*, 899 S.W.2d at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)).

We conclude that the complained-of comment does not rise to the level of plain error, as no substantial right of the Defendant was affected and consideration of the alleged error is not necessary to do substantial justice. Moreover, it is unclear whether a clear and unequivocal rule of law was breached or that defense counsel did not waive the alleged error for tactical reasons. The prosecutor did not personally vouch for the credibility of Ms. Kennedy, and his suggested explanation for why she may have lied about her alcohol and drug use was, arguably, a reasonable inference to be drawn from the evidence and the jury's common knowledge of human nature. The Defendant is not entitled to relief on the basis of this claim.

CONCLUSION

Based on our review, we affirm the judgment of the trial court but remand the case for the trial court to enter an amended judgment imposing a concurrent sentence.

_____

JOHN W. CAMPBELL, SR., JUDGE