

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 11, 2023

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. THEODORE DEVON WELLS

**Appeal from the Circuit Court for Lincoln County
No. 20-CR-149 Forest A. Durard, Jr., Judge**

No. M2022-00512-CCA-R3-CD

A Lincoln County jury convicted the Defendant, Theodore Devon Wells, of sale of a Schedule II narcotic, cocaine, and delivery of a Schedule II narcotic, cocaine. The trial court sentenced the Defendant as a Range III offender to twenty-eight years. On appeal, the Defendant contends that the evidence is insufficient to support his convictions and that the trial court erroneously admitted certain items of evidence. He further contends that his Sixth Amendment right of confrontation was violated. Finally, he contends that the trial court erred when it sentenced him. After review, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which CAMILLE R. MCMULLEN, P.J., and MATTHEW J. WILSON, J., joined.

William F. Wallace, Fayetteville, Tennessee, for the appellant, Theodore Devon Wells.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Robert J. Carter, District Attorney General; and Amber L. Sandoval and Jeff Ridner, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Background and Facts

This case arises from the Defendant selling drugs to a confidential informant ("CI"), which was audio and video recorded by law enforcement officers. Lincoln County Sheriff's Deputies observed the sale in a gas station parking lot. Based on this, a Lincoln County grand jury indicted the Defendant for sale of a Schedule II controlled substance, 0.5 grams or more of cocaine, delivery of a Schedule II controlled substance, 0.5 grams or more of cocaine, and possession of drug paraphernalia.

A. Pre-Trial Hearing

Prior to trial, the State requested a ruling on the admissibility of the recording of the drug transaction, and the trial court held a hearing, at which the following evidence was presented: Lincoln County Sheriff's Sergeant Mike Pitts testified that on November 13, 2019, he met with the CI to prepare for a controlled purchase of cocaine from the Defendant. Sergeant Pitts utilized the sheriff's department's undercover recording equipment, which was used for every controlled purchase. He testified that the time and date stamp on the equipment automatically reset every time the equipment was powered off, thereby displaying the factory-set time and date unless altered by the department.

For this controlled buy, Sergeant Pitts met with the CI, searched his person and vehicle for contraband, and then fitted him with the recording equipment. He gave the CI prerecorded funds and then followed the CI to the place where the CI had arranged to meet the Defendant. Sergeant Pitts parked his vehicle across the street from the meeting place and observed the meeting and listened to the audio feed via his mobile phone. Sergeant Pitts observed the CI and the Defendant complete the drug transaction, after which the CI returned to Sergeant Pitts with a plastic bag of cocaine and the remaining prerecorded funds. The CI used \$1,060 of the prerecorded funds to purchase the cocaine from the Defendant. The Defendant was later arrested while in possession of \$1,060 of prerecorded funds.

On cross-examination, Sergeant Pitts testified that the transaction took place in the middle of the night while it was dark. He stated that he was able to see the Defendant clearly and recognized his vehicle and his voice on the audio feed, which he monitored through the recording equipment's connection to his cell phone. Sergeant Pitts recalled giving the CI \$1,800¹ in prerecorded confidential funds before the transaction.

At this point, the State played a redacted version of the audio and video recording of the confidential drug transaction. On the recording, the CI can be heard telling Sergeant Pitts to move further away because he was parked too close to the meeting spot. The CI feigned having an issue with his vehicle's tire and began changing the tire in the parking lot. He called the Defendant to tell him where to meet. Sergeant Pitts testified that the video recording showed the Defendant arriving in his vehicle and the CI getting inside with him. The Defendant's face is visible in the video and a photographic image of his face was introduced as part of the exhibit.

Based on this evidence, the trial court made the following statements about the admissibility of the recording:

[The factual scenario] we have here as it was observed by law enforcement, they did this in real time, they witnessed the transaction from a

¹ We note that the sergeant testified at trial that he gave the CI \$1,500 in prerecorded funds.

distance. Granted I doubt that Sergeant Pitts could actually see what was going on in the car but we have direct evidence, we have circumstantial evidence. And to bolster or support that this is authentic was the fact the [D]efendant was caught a short time later down the road in that car with the marker currency. That also goes to support what we are saying here.

Sergeant Pitts also testified he did recognize [the Defendant] because he was familiar with him from some past dealings. . . .

So those facts, I think if you look at this in the totality of everything we have here, what occurred before as far as meeting the CI, setting it up, the equipment, Sergeant Pitts conducting surveillance while this transaction was taking place, a recording made in real time and then we have . . . the [D]efendant pulled over a half a mile . . . away with the same \$1,060 on his person that was prerecorded and given to the CI to make the buy, I think all of that coming together would lend toward the authentication and admissibility of the evidence in this case.

Based on this finding, the trial court ruled that the video and audio recording could be authenticated by Sergeant Pitts and ruled the recordings admissible. At the conclusion of the hearing, upon motion of the State, the trial court dismissed the count for possession of drug paraphernalia.

B. Trial

On the morning of trial, the trial court heard a late-filed motion to suppress photographs of the prerecorded funds used in the drug transaction. The Defendant argued that Sergeant Pitts was negligent in his handling of the evidence because the actual photographs of the prerecorded funds were contained on his mobile phone which had been destroyed in a house fire. The prerecorded funds were also not in evidence. The Defendant argued that an image of a photograph of the prerecorded funds did not constitute physical evidence and that the State had failed in its duty to preserve the physical evidence. The Defendant suggested that if the trial court would not dismiss the charges on this basis, then the appropriate remedy would be to give the jury a “spoliation” instruction on the State’s duty and failure to preserve the physical evidence. The State argued that the evidence did not have great exculpatory value to the Defendant’s case and that it would be introducing comparable evidence in the form of photographs of the images contained on Sergeant Pitts’s mobile phone. The trial court responded:

I have to look at the degree of negligence here involved, and . . . the data should have been downloaded to the evidence custodian or some medium there at the Sheriff’s office for safe keeping. . . . I understand there was also a conscious decision to use those funds that maybe diverted to other

operations. So I mean there is some negligence involved in this. And then we talk about the significance of that evidence and its probative value, of course you are correct it is always significant and does have quite a bit of probative value.

The reliability of the secondary or substitute evidence that remains available. We do have pictures of [the evidence] and you can vigorously cross exam on that.

The sufficiency of other evidence used to support the conviction. Of course I have not heard the trial The question becomes is it fundamentally unfair to go forward in this matter I don't know that, particularly without hearing the case, I don't know if the nuclear option [of dismissing the charges] is appropriate. When we go through the charge later I fully intend to give that [requested] instruction.

The Defendant then argued that the State had not provided full discovery to defense counsel before trial because it had not provided an information packet about the CI. The State responded that it was not in possession of the information packet and that it would not be relevant because the CI would not testify at trial. The trial court instructed the State to inquire about the existence of the packet with Sergeant Pitts.

Thereafter, the following evidence was presented at the Defendant's trial: Sergeant Pitts testified that he was employed by the Lincoln County Sheriff's Department and handled the majority of the narcotics investigations done by the department. He testified consistently with his pre-trial hearing testimony about his interactions with the CI, preparing him for the drug transaction with the Defendant, and fitting him with recording equipment. He also stated that the CI was paid \$200 for his participation. He recalled that the CI was given \$1,500 in funds and that the monies were photographed on a "Buy Log Sheet." Sergeant Pitts identified a photograph of the monies given to the CI.

At the meeting spot, the Defendant arrived in a white Dodge and the CI got inside the vehicle. Sergeant Pitts heard on the audio feed a brief discussion between the CI and the Defendant about the police being nearby. The purchase took place inside the vehicle and was not viewable to Sergeant Pitts, but he monitored the transaction in real time over audio equipment. Following the purchase, the CI reported back to Sergeant Pitts, who took possession of the remaining prerecorded funds and removed the recording equipment. The recording was played aloud for the jury, and Sergeant Pitts identified the Defendant's voice. The video recording showed an obscured view of the exchange that took place inside the vehicle. Sergeant Pitts testified that he recognized the Defendant from a previous photograph. During a jury-out hearing, the Defendant objected to the mention of the photograph, which had not been included in discovery. Sergeant Pitts testified that the photograph came from the Defendant's Facebook page. In the presence of the jury,

Sergeant Pitts testified that, after the Defendant left the scene, law enforcement effectuated a traffic stop of his vehicle, and the Defendant was found in possession of \$1,060 in the prerecorded funds. The CI returned from the transaction with rock cocaine. Sergeant Pitts stated that his state-issued mobile phone had been destroyed in a house fire and the pictures of the prerecorded funds were lost in the fire. He testified that the prerecorded funds were used for other transactions and not preserved as evidence.

On cross-examination, Sergeant Pitts agreed that the CI had a criminal history and had participated in five prior controlled transactions. He agreed that his search of the CI's person and vehicle were not recorded. He agreed that he was not able to view the exchange, because it took place inside the Defendant's vehicle, and that he did not conduct a field test on the drugs. Sergeant Pitts reiterated that he provided the CI with \$1,500 in prerecorded funds and that he asked the CI to buy an ounce of cocaine from the Defendant. Sergeant Pitts agreed that the search of the CI prior to the arranged transaction was not recorded, as that was not part of the standard operating procedures for a controlled transaction. Those procedures dictated that the CI be searched, as well as their vehicle, and that the CI would be fitted with recording equipment. Sergeant Pitts testified that the standard operating procedures were contained in the "CI packet" that contains the rules and regulations of a controlled transaction which the CI would sign.

Sergeant Pitts stated that he instructed the CI to purchase an ounce of crack cocaine from the Defendant and did not specify a price or amount to spend. He agreed that he could not tell what went on inside either of the vehicles and that he did not know if the two men had contact outside of the drug transaction.

Sergeant Jesse Mills testified that she was employed by the Lincoln County Sheriff's Department as a K-9 officer. Sergeant Mills was to conduct a traffic stop of the Defendant following the drug transaction. Sergeant Pitts radioed Sergeant Mills after the transaction was complete, notifying her that the Defendant was traveling her direction. In less than a minute, Sergeant Mills encountered the Defendant's vehicle, a white Chrysler, and stopped his vehicle. The Defendant produced identification with his name on it. Sergeant Mills searched the Defendant's person, revealing the \$1,060 in prerecorded funds.

The trial court instructed the jury on the State's duty to preserve evidence for trial in line with the Tennessee Pattern Instructions. *See* T.P.I. – Crim. 42.23. Based on the evidence presented, the jury convicted the Defendant of sale and delivery of 0.5 grams or more of cocaine.

C. Sentencing

The following evidence was presented at the Defendant's sentencing hearing: Jamaura Mayhue, a Tennessee Department of Correction employee, testified that she prepared the Defendant's presentence report, which was admitted into the record. The

report detailed that the Defendant had been convicted of sale of cocaine in 1997 and received an effective sixteen-year sentence. Prior to that, he had been convicted of sale of cocaine twice in 1994 and received a probationary sentence for each conviction. In 1993, the Defendant was convicted of a misdemeanor drug charge and given a suspended sentence. The record showed that the Defendant violated his probation in all three instances. The report further detailed a 1987 conviction for burglary, where the Defendant received a four-year sentence, as well as several other misdemeanor convictions. In his interview with Ms. Mayhue, the Defendant admitted to participating in the drug transaction with the CI.

Jon White, Sr., testified that he had been employed by the Lincoln County Drug Task Force in the 1990's. Mr. White recalled that the Defendant was implicated in several crack cocaine purchases during that time period.

The Defendant's mother testified on his behalf stating that he was a drug "user" and not a drug "dealer."

Based on this evidence, the trial court determined that the Defendant was a Range III offender based upon his having five prior felony convictions. The trial court applied sentencing enhancement factor (1), that the Defendant had a previous history of criminal convictions in addition to those necessary to establish his sentencing range, and factor (8), that the Defendant had failed to comply with conditions of release in prior sentences, based on his multiple prior violations of probation. T.C.A. § 40-35-114(1), (8) (2018). The trial court stated:

The more history you have the higher the ladder you climb. So by way of example [the Defendant] had five prior felonies and of course we have enhancing factors one and eight, . . . but then we have misdemeanors and the Court gives great weight to prior felonies in this case. I understand his mother's plea and she does not want to acknowledge that her son is a drug dealer, I don't know that any mother would want to do that. But the facts just don't bear that out. This is now his sixth time he has gotten caught selling drugs during his lifetime and that is significant.

And so I think in this particular case after we apply the five felonies that get him to the Range [III] . . . then there is enough enhancing factors in here, . . . but I think a 28 year sentence is appropriate for Count One and Two.

The trial court merged the Defendant's conviction for delivery of a Schedule II narcotic, cocaine, into his conviction for sale of a Schedule II narcotic, cocaine, and ordered the Defendant's twenty-eight-year sentence to be served in the Tennessee Department of Correction. It is from these judgments that the Defendant now appeals.

II. Analysis

A. Sufficiency of the Evidence

On appeal, the Defendant contends that the evidence is insufficient to support his convictions for sale and delivery of cocaine. He contends that because the actual transaction was not on the audio or video recording and was not observed by law enforcement, there is insufficient evidence to show that the Defendant sold the drugs to the CI. He additionally argues that the purchase amount was inconsistent for the price of a half of an ounce of cocaine. He further argues that the evidence was not properly logged and preserved by the State. The State responds that, based on the evidence presented, the jury could reasonably conclude beyond a reasonable doubt that the Defendant was guilty of both the sale and delivery of contraband. We agree with the State.

When an accused challenges the sufficiency of the evidence, this court's standard of review is whether, after considering the evidence in the light most favorable to the State, "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 *Tenn. R. App. P. 13(e)*; *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). "The standard of review [for sufficiency of the evidence] 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

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

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This court must afford the State of Tennessee the ““strongest legitimate view of the evidence”” contained in the record, as well as ““all reasonable and legitimate inferences”” that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000) (citations omitted). This standard is identical whether the conviction is predicated on direct or circumstantial evidence. *State v. Casper*, 297 S.W.3d 676, 683 (Tenn. 2009); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977). In the absence of direct evidence, a criminal offense may be established entirely by circumstantial evidence. *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010) (citing *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973); *Marable v. State*, 313 S.W.2d 451, 456-58 (1958)).

Tennessee Code Annotated sections 39-17-417(a)(2) & (3) provide that it is an offense for a defendant to knowingly deliver and sell a controlled substance. Cocaine is a controlled substance. T.C.A. § 39-17-408(b)(4) & § 39-17-415(a)(1) (2018). The statutory definition of delivery is: the actual, constructive, or attempted transfer from one person to another. *See* T.C.A. § 39-17-402(6) (2018).

The evidence presented at trial, viewed in the light most favorable to the State, was that law enforcement provided the CI with prerecorded funds to arrange for the purchase of drugs from the Defendant. Law enforcement testified that the CI’s person and vehicle had been thoroughly searched for contraband prior to the transaction. The CI and the Defendant met at a gas station, and the CI got into the Defendant’s vehicle. The transaction occurred inside the vehicle, and the CI returned to law enforcement a bag of crack cocaine and the remaining prerecorded funds. Immediately thereafter, law enforcement stopped the Defendant’s vehicle, and he was found to be in possession of \$1,060 of the marked funds given to the CI by law enforcement. This is sufficient evidence from which a rational jury could conclude that the Defendant sold and delivered cocaine to the CI and therefore is sufficient to sustain his conviction. The Defendant is not entitled to relief.

B. Admission of Evidence

The Defendant next contends that the trial court erred when it ruled that photographs taken of the prerecorded funds used in the drug transaction were admissible and when it allowed Sergeant Pitts to authenticate the photographs. He contends that the State violated its duty to preserve the evidence used to support his conviction. The State responds that the trial court remedied this issue by providing a jury instruction about the State's duty to preserve evidence.

The State has a general duty to preserve all evidence subject to discovery and inspection as part of Tennessee Rule of Criminal Procedure 16. *State v. Ferguson* governs claims regarding the State's duty to preserve potentially exculpatory evidence. 2 S.W.3d 912, 917 (Tenn. 1999); *see also State v. Merriman*, 410 S.W.3d 779, 785 (Tenn. 2013). *Ferguson* requires a trial court to determine “[w]hether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair.” *Ferguson*, 2 S.W.3d at 914. When this claim is raised by a defendant, *Ferguson* first requires the trial court to determine whether the State had a duty to preserve the evidence. The State's duty to preserve evidence is limited to constitutionally material evidence described as “evidence that might be expected to play a significant role in the suspect's defense.” *Id.* at 917 (quoting *California v. Trombetta*, 467 U.S. 479, 488, (1984)). To meet this materiality standard, the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Ferguson*, 2 S.W.3d at 915, 918. If the trial court determines that the State had a duty to preserve the evidence, the court must determine if the State failed in its duty. *Id.* at 917.

If the proof demonstrates the existence of a duty to preserve the evidence and demonstrates that the State failed in that duty, “the analysis moves to considerations of several factors which guide the decision regarding the consequences of the breach.” *State v. Merriman*, 410 S.W.3d 779, 785 (Tenn. 2013). Those factors include: “(1) The degree of negligence involved; (2) The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) The sufficiency of the other evidence used at trial to support the conviction.” *Id.* at 785 (citing *Ferguson*, 2 S.W.3d at 917). If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction. *Id.*

In this case, the trial court determined that the State had committed some degree of negligence in failing to maintain the prerecorded funds to produce at trial and failing to keep records of those funds in an evidence locker or other appropriate storage. The trial court found that a dismissal of the charges was not warranted. Pursuant to the Defendant's request, the trial court opted to instruct the jury about the State's duty to preserve the evidence.

Looking to the *Ferguson* factors to determine the effect of the State's failure to preserve the evidence, we first acknowledge that the State was potentially negligent by failing to maintain the evidence properly. The second factor, addressing the significance of the destroyed evidence, weighs in favor of the Defendant. Presenting the prerecorded funds used in the drug transaction would clearly be significant. However, in our view, a photograph of the prerecorded funds is a sufficient substitute for the actual money when the physical attributes of the same are not in question. The third factor, the sufficiency of the other evidence supporting the conviction, strongly weighs in favor of the State. The Defendant was found with the prerecorded funds within minutes of meeting with the CI and selling him crack cocaine. The vehicle in which the sale was made is the same vehicle in which the Defendant was stopped. The serial numbers in the photograph taken by Sergeant Pitts prior to the transaction matched the serial numbers on the funds found in the Defendant's possession. There was, therefore, sufficient other evidence supporting his conviction without the production of the funds during the trial. Furthermore, the trial court properly instructed the jury as requested. Accordingly, we conclude that the trial court did not err when it allowed the State to introduce the substitute evidence, and the Defendant is not entitled to relief on this issue.

C. Authentication of Evidence

The Defendant next contends that the trial court erred when it allowed Sergeant Pitts to authenticate the recording of the drug transaction. He argues that Sergeant Pitts was not a voice identification expert and had not had contact with the Defendant in years, and therefore should not have been allowed to identify his voice on the recording. The State responds that Sergeant Pitts's firsthand monitoring of the drug transaction and the audio feed was sufficient for him to authenticate the Defendant's voice on the recording.

As a prerequisite to admissibility, a witness with knowledge of the facts must verify and authenticate the evidence, and its relevance must be demonstrated. *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978); *see* Tenn. R. Evid. 401, 901(a), (b)(1). The authentication requirement "is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Tenn. R. Evid. 901(a). The party offering the evidence is required to "reasonably establish the identity and integrity of the evidence"; however, "this rule does not require that the identity . . . be proven beyond the possibility of all doubt[.]" *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008) (citing *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000)).

Here, Sergeant Pitts fitted the CI with the audio recording equipment and connected the feed to his mobile phone to monitor the drug transaction while it was occurring. He observed the Defendant arrive at the scene and the CI get inside his vehicle with the recording equipment activated. Therefore, Sergeant Pitts had knowledge that the audio recording was what it was purported to be, a recording of the interaction inside the

Defendant's vehicle. Accordingly, Sergeant Pitts was able to authenticate the recording of the transaction. With regard to his identification, the same vehicle in which the transaction occurred was stopped minutes away from the scene with the Defendant and the prerecorded funds inside. Sergeant Pitts testified that he identified the Defendant's voice from prior dealings, but it is clear from the evidence that this testimony about the Defendant's voice was not the only evidence identifying him as the seller of the drugs.

The Defendant argues that *State v. Walker*, 910 S.W.2d 381 (Tenn. 1995) governs the admissibility of recordings such as this one, and that it requires that the witness present and monitoring the recorded conversation testify with certainty as to the participants in the recording. He argues that no conversation regarding drugs or money took place between the Defendant and the CI and that Sergeant Pitts could not identify the Defendant's voice with certainty. We do not agree. Sergeant Pitts testified that he visually observed the two men interacting and monitored their interaction via audio feed. The CI went to the arranged purchase with money and returned with drugs – this was observed firsthand by Sergeant Pitts. Sergeant Pitts identified the Defendant's voice as well as his face with certainty. His monitoring of the recording was done in real time.

Based on the foregoing reasons, we conclude that trial court did not abuse its discretion when it allowed Sergeant Pitts to authenticate this recording. The Defendant is not entitled to relief as to this issue.

D. Sixth Amendment Right to Confrontation

The Defendant next contends that his Sixth Amendment confrontation right was violated because the CI did not testify at his trial. He contends that the CI was the only eyewitness to the actual transaction and that, without his testimony, the Defendant was denied his right to confront his accuser. The State responds that, as no testimonial hearsay was presented from the CI, the Defendant's confrontation rights were not implicated. We agree with the State.

The confrontation clause of the Sixth Amendment provides two types of protection for criminal defendants: the right to physically face those who testify against them, and the right to cross-examine witnesses. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see also Crawford v. Washington*, 541 U.S. 36 (2004). We conclude that no confrontation issue arises here because any out-of-court statement made by the CI on the recordings were non-testimonial in nature, were not admitted for the truth of the matter asserted, and only provided context to the Defendant's admissions on the recordings. We have repeatedly held that the introduction of this type of evidence does not violate a defendant's Sixth Amendment confrontation rights. *See State v. Bell*, No. M2008-01187-CCA-R3-CD, 2009 WL 3925370 at *5 (Tenn. Crim. App. Nov. 19, 2009), *perm. app. denied* (Tenn. Apr. 16, 2010); *State v. Smith*, No. M2010-02077-CCA-R3-CD, 2012 WL 3776679 at *4 (Tenn. Crim. App. Aug. 31, 2012) *perm. app. denied* (Tenn. March 21, 2013); *State v. Webster*,

No. E2016-02127-CCA-R3-CD, 2018 WL 1953221 at *6 (Tenn. Crim. App. April 25, 2018) (no perm. app. filed). The CI's unavailability at trial does not amount to a violation of the Defendant's Sixth Amendment rights, and the Defendant cites no controlling authority to the contrary. The Defendant is not entitled to relief on this issue.

E. Sentencing

The Defendant lastly contends that the trial court sentenced him excessively because: his offense was not a violent crime, he had not committed a felony in twenty years, and he had lived a clean and responsible lifestyle. He contends that this made him a good candidate for an alternative sentence. The State responds that his sentence was appropriate. We agree with the State.

On appeal, a defendant bears the burden of establishing that his sentence is improper. T.C.A. § 40-35-401 (2019), Sentencing Comm'n Cmts; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). Appellate review of sentences is under the abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012); *see also State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). A finding of abuse of discretion “reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case.” *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)). As the *Bise* Court stated, “[a] sentence should 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 708.

In determining the proper sentence, the trial court must consider: (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 the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made in the defendant's own behalf about sentencing; and (8) the result of the validated risk and needs assessment conducted by the [Department of Correction] and contained in the presentence report. *See* T.C.A. § 40-35-210(b) (2019); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses,

possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant shall be eligible for probation, subject to certain exceptions, if the sentence imposed on the defendant is ten years or less. T.C.A. § 40-35-303(a) (2018). A defendant is not, however, automatically entitled to probation as a matter of law. The burden is upon the defendant to show that he or she is a suitable candidate for probation. T.C.A. § 40-35-303(b) (2018); *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). In order to meet this burden, the defendant “must demonstrate that probation will ‘subserve the ends of justice and the best interest of both the public and the defendant.’” *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (quoting *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)).

The trial court stated that it had considered the evidence at trial, the parties’ arguments as to sentencing, the presentence report, the principles of sentencing and the statistical information provided by the Administrative Office of the Courts. The trial court found two applicable enhancement factors, which it applied to the Defendant’s sentence. The trial court applied enhancement factor (1), that the Defendant had a history of prior criminal convictions, particularly for use of or sale of narcotics. T.C.A. § 40-35-114(1). The trial court applied enhancement factor (8), based on the Defendant’s multiple failed attempts at probation. T.C.A. § 40-35-114(8). The trial court also considered applicable mitigating factors, noting the evidence that supported mitigation. Based upon the applicable enhancement factors, the trial court ordered the maximum sentence in the range.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

- (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
- (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c) (2019).

We conclude that the trial court properly sentenced the Defendant. The trial court considered the relevant principles and sentenced the Defendant to a within range sentence.

Based on the evidence at trial and his criminal history provided in the presentence report, the sentence imposed on the Defendant was not excessive, and the trial court did not abuse its discretion. Furthermore, the Defendant's multiple probation violations in his record indicate that he was not a suitable candidate for an alternative sentence. Accordingly, we conclude that the Defendant is not entitled to relief as to this issue.

III. Conclusion

After a thorough review of the record and relevant authorities, we affirm the trial court's judgments.

ROBERT W. WEDEMEYER, JUDGE