FILED
06/07/2023
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2023 Session

STATE OF TENNESSEE V. WILLIAM RIMMEL, III

Appeal from the Circuit Court for Marion County
No. 11136A J. Curtis Smith, Judge

No. M2022-00794-CCA-R3-CD

Defendant, William Rimmel, III, was indicted by the Marion County Grand Jury for one count of aggravated assault, two counts of reckless endangerment, one count of false imprisonment, one count of vandalism over $2,500, and one count of burglary of an automobile. The charge of false imprisonment was dismissed prior to trial. A jury found Defendant guilty of attempted aggravated assault, reckless endangerment, attempted reckless endangerment, vandalism under $1,000, and attempted burglary of an automobile. Following a sentencing hearing, the trial court denied Defendant's request for judicial diversion and imposed an effective sentence of two years on probation following service of 11 months and 29 days in confinement. On appeal, Defendant contends that the evidence was insufficient to support his convictions, that the trial court abused its discretion in denying Defendant's request for an alternative sentence and in ordering consecutive sentencing, that his convictions should be vacated due to the State's failure to preserve evidence, and that the trial court gave confusing jury instructions. Based on the record, the briefs, and oral arguments, we affirm the judgments of the trial court but remand for entry of a judgment in Count 4 and amended judgment in Count 3, reflecting that those counts were dismissed, and for entry of corrected judgments in Counts 5 and 6.

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

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

Patrick T. McNally (on appeal) and Byron Pugh (at trial), Nashville, Tennessee, for the appellant, William Rimmel.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Courtney C. Lynch, District Attorney General; and Steven Strain and Julia Veal, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Evidence at Trial

On Sunday, August 12, 2018, Bobbie Burke went to church and lunch with her husband in Chattanooga. Afterward, she was driving her Honda Civic to Decatur, Alabama, where she was staying during the week for her job at the Browns Ferry Nuclear Plant. She testified that she was driving westbound in heavy traffic on Interstate 24 when a yellow Ninja motorcycle driven by Defendant "came out of nowhere" and drove between her car and the car in the lane adjacent to hers and then drove ahead of her. Mrs. Burke saw the motorcycle again when it "dropped back behind [her] again." Mrs. Burke began to merge into the passing lane to pass slower traffic and "heard a motorcycle engine rev up really loud[.]" She was startled because she "didn't know where it came from." She merged back into the slower lane to let the motorcycle pass.

According to Mrs. Burke, after the motorcycle had passed, she again merged into the passing lane to pass the slower traffic. Defendant then "started dropping back again in speed, and this time he started motioning for [Mrs. Burke] to pull over to the side of the road." Mrs. Burke testified that Defendant "was motioning in an erratic manner" for her to pull over. She continued driving, and Defendant merged into her lane and "start[ed] trying to force [her] off the road." She testified, "It's either hit him or go off the road." She "hit [her] brakes to keep from hitting him, and that's when he reached out and kicked" the driver's side door of her vehicle. Mrs. Burke "was able to maneuver around him[,]" and she kept driving. She testified, "I knew I had to keep moving, I couldn't let him get me on the side of the road alone. I didn't know what he wanted, . . . and I was afraid of him." Mrs. Burke called 9-1-1.

A companion of Defendant's was driving a larger "cruiser" motorcycle. According to Mrs. Burke, while she was on the 9-1-1 call, the two motorcycles repeatedly attempted to force her to the side of the road by forming a "V" around her vehicle, getting in front of her and slowing down to get her to stop. Mrs. Burke's car and the two motorcycles eventually came to a stop on the interstate. Mrs. Burke was "hemmed" in and "could not move." Defendant's companion got off his motorcycle "as if he was going to come to [Mrs. Burke's] side of the car." Mrs. Burke testified that she "was in panic mode at that point," and drove forward and "bumped" Defendant's rear tire with her car, causing it to get stuck under her bumper. Defendant revved his engine and "tore the whole underside

of [Mrs. Burke's] car up." Defendant beat on the hood of Mrs. Burke's car and began "slamming" her passenger side window with his fist. He tried to break the window with his fist and his foot. He then pulled an object out of his pocket and broke the window. Defendant then backed away from the car "and started screaming profanities" at Mrs. Burke, stating that she had tried to run him off the road. A recording of the 9-1-1 call was played for the jury. Mrs. Burke testified that Defendant caused "just under $7,000" worth of damages to her vehicle.

Charles David McVey, an off-duty Tennessee Highway Patrol ("THP") Sergeant, arrived at the scene and saw Defendant's motorcycle laying on the ground with its rear tire "partially under the front bumper" of Mrs. Burke's car. Defendant told him that Mrs. Burke's vehicle had struck his motorcycle while they were driving on the interstate. Sergeant McVey testified that he was certified as a crash reconstructionist. He examined Mrs. Burke's vehicle and Defendant's motorcycle and did not observe any indications that they had collided.

Sergeant McVey's THP vehicle was equipped with a dash cam, but when asked whether there was a video of the scene from the dash cam, he testified, "I didn't save it." Sergeant McVey explained that if a video is not categorized "as a special event, crash or arrest," it is automatically deleted after 90 days. Sergeant McVey was not wearing a body cam. He testified that Defendant was cooperative. He described Mrs. Burke as "hysterical."

THP Trooper Dale Herring spoke to Defendant at the scene. Defendant stated that Mrs. Burke had hit his motorcycle or tried to run him off the road. Defendant stated that he kicked her vehicle several times and that he was trying to get her to pull over and stop. Defendant stated that Mrs. Burke ran into his motorcycle after they stopped and "that was when he jumped off the bike and broke the window." Defendant stated that he broke the window using a loaded handgun, which Trooper Herring retrieved from Defendant. Trooper Herring observed "a lot of damage" and "what looked like . . . melted rubber" from Defendant's rear tire on the front bumper of Mrs. Burke's vehicle. Trooper Herring observed that Defendant's motorcycle was "scuffed up" and "there was a peg that had been damaged." Trooper Herring's body cam video was entered as an exhibit at trial and played for the jury.

Defendant's neighbor, Jerry Walter, was riding his motorcycle alongside Defendant when he saw Mrs. Burke's vehicle hit Defendant's motorcycle as she moved from the slow lane into the fast lane. After "she bumped into him," Defendant "kicked off of her car." Mr. Walter testified he "was actually a distance away" when he saw the vehicles collide. Defendant "yelled" to Mr. Walter that Mrs. Burke had hit him. Mrs. Burke then drove her car between the two motorcycles, "splitting" them.

Defendant testified that he and his girlfriend had spent the weekend whitewater rafting and horseback riding with Mr. Walter and his wife. Defendant and Mr. Walter were driving their motorcycles back to their homes in Murfreesboro, and Mr. Walter's wife and Defendant's girlfriend were driving Defendant's truck. Defendant recalled that he was "about to pass" Mrs. Burke's vehicle when she "swerved into [his] lane," and he "narrowly avoided" a collision. Defendant revved his engine to warn Mrs. Burke that he was there, "[b]ut she kept coming[.]" Defendant said Mrs. Burke almost ran him into the guardrail, and he "gassed it, and got away as quick as [he] could."

Once Defendant was safely past Mrs. Burke's vehicle, he slowed down to allow Mr. Walter and his girlfriend to catch up to him. Defendant testified, "I caught a glimpse in my right mirror that [Mrs. Burke's] car was coming towards me, so as soon as I turned my head and looked back, she was crossing the line like coming to hit me again." Defendant said Mrs. Burke's car made contact with his motorcycle, and he used his foot to push off of her car. Defendant motioned for Mrs. Burke to pull over. Defendant thought Mrs. Burke was going to pull over, so he "started working [his] way to the shoulder." Mrs. Burke then "sped up on [him]," and she "kind of PIT maneuvered the rear of the motorcycle, and pinned [Defendant's] leg to the rear." Defendant's girlfriend called him, and he told her to call 9-1-1. Defendant did not see Mrs. Burke's vehicle again until it "hit the rear and got lodged on to the tire[.]" Defendant said he had no control over the motorcycle, and it "started rocking back and forth." Defendant said they were still on the roadway and that he "was just being pushed down the highway." Defendant testified, "I felt it lean to the right and I knew I was going under the car, and I didn't think I was going to make it out."

When the motorcycle fell over, Defendant jumped off. He testified, "I had pulled my pistol and I hit the window a couple of times, so I could either grab the keys, put it in park or something to keep from getting hit again." Defendant said he only intended to use the weapon as a "tool" to break the window and denied that he intended to cause Mrs. Burke any harm. After Defendant used the gun to break Mrs. Burke's car window, he put it back in his pocket. Defendant acknowledged that he yelled at her, "bitch, you tried to kill me."

Defendant described photos he took of the incident that were admitted as evidence. Defendant testified that the photos showed a "small white mark" and "a line" on the driver's side of Mrs. Burke's car that was caused by his motorcycle handlebar and exhaust when the car veered into his lane. He said the photos also showed damage to Mrs. Burke's vehicle caused by Defendant's boot when it "was scuffed from the side of the car." Defendant identified a photo of his motorcycle after it "fell under the car" and said, "if I was still on it, I'd be dead right now." He also identified photos that showed "the melted bumper" of Mrs. Burke's car and "the melt mark [on his rear tire] from the bumper being

wedged on it." Defendant testified that his motorcycle was "totaled" as a result of the accident.

On cross-examination, Defendant acknowledged that his motorcycle was a "crotch rocket" capable of going very fast and that he told an insurance adjuster that he was going to have "fun" around the curves that day. Defendant agreed that he was "free and clear" of any danger after the first time Mrs. Burke drove into his lane and he avoided an accident. Defendant denied that he tried to engage Mrs. Burke further because he was angry that she almost hit him, but testified instead that Mrs. Burke "came and tried again." He testified that he believed Mrs. Burke was trying to kill him.

The jury found Defendant guilty of attempted aggravated assault by use of a handgun in Count 1, reckless endangerment by use of a deadly weapon (the handgun) in Count 2, attempted reckless endangerment by use of a deadly weapon (the motorcycle) in Count 3, vandalism under $1,000 in Count 5, and attempted burglary of an automobile in Count 6.[1] Following a sentencing hearing, the trial court denied Defendant's request for judicial diversion and imposed sentences of two years on probation for his attempted aggravated assault conviction in Count 1, one year on probation for his reckless endangerment conviction in Count 2, and 11 months and 29 days for each of Defendant's three misdemeanor convictions in Counts 3, 5, and 6. The court ordered that Defendant's probationary sentences be served concurrently with each other but consecutively to his 11-month-29-day sentences, which the court ordered be served concurrently with each other and in confinement.

Defendant filed a timely motion for new trial and an amended motion for new trial and for judgment of acquittal. The State filed a response, in which the State conceded that the offense of attempted reckless endangerment, the convicted offense in Count 3, is not recognized as a crime in Tennessee. *See State v. Marquail Patterson*, No. E2019-01139-CCA-R3-CD, 2020 WL 3172669, at *7-8 (Tenn. Crim. App. June 15, 2020), *no perm. app. filed*. In its order denying Defendant's motion for new trial, the trial court agreed and dismissed the attempted reckless endangerment conviction; however, the record does not contain an amended judgment for Count 3.

Defendant filed a timely notice of appeal to this Court.

Analysis

[1] The record contains an order entered on May 9, 2022, in response to the State's oral motion "for a written order to assist with entering the Judgments into the Clerk's computer system." The order states that the indicted offenses in Counts 5 and 6 were renumbered and submitted to the jury as Counts 4 and 5 after Count 4 was dismissed. However, the record contains judgment forms for Counts 5 and 6, and the record does not contain a judgment form for Count 4.

Sufficiency of the Evidence

Defendant asserts that the evidence was insufficient to support his convictions. The State asserts that the evidence was sufficient.

When a defendant challenges the sufficiency of the evidence, the relevant question for this 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) (emphasis in original). On appeal, "'the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.'" *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003) (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Therefore, this Court will not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Instead, it is the trier of fact, not this Court, which resolves any 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." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997).

A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). The burden is then shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This Court applies the same standard of review regardless of whether the conviction was predicated on direct or circumstantial evidence. *State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011). "Circumstantial evidence alone is sufficient to support a conviction, and the circumstantial evidence need not exclude every reasonable hypothesis except that of guilt." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012).

Defendant challenges his conviction for attempted aggravated assault, arguing that he did not intentionally or knowingly cause Mrs. Burke to reasonably fear imminent bodily injury when he "used the slide of his firearm to break Mrs. Burke's passenger window with the intention of removing her keys from the ignition after she rammed her vehicle into his motorcycle, [which] became lodged on his rear tire, and continued revving her engine as he jumped off his motorcycle to avoid being run over."

"A person commits aggravated assault who . . . [i]ntentionally or knowingly commits an assault as defined in § 39-13-101, and the assault . . . [i]nvolved the use or display of a deadly weapon." T.C.A. § 39-13-102(a)(1)(A)(iii). "A person commits assault who . . . [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." T.C.A. § 39-13-101(a)(2). "A person commits criminal attempt who, acting with

the kind of culpability otherwise required for the offense[,] . . . [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." T.C.A. § 39-12-101(a)(3).

Defendant argues that because Mrs. Burke did not see Defendant's gun and "only later learned that he had a gun[,]" she did not perceive a threat sufficient to put her in fear of imminent bodily injury. Defendant asserts that he did not use the gun in a manner that could cause death or serious bodily injury but "only used the slide [of the gun] to break the passenger window in order to remove M[r]s. Burke's keys as she continued to rev her engine on top of his motorcycle."

In the light most favorable to the State, the evidence at trial showed that Defendant attempted to force Mrs. Burke's vehicle off the interstate. When the vehicles came to a stop, still at least partially on the roadway, Defendant approached the side of Mrs. Burke's vehicle and beat on the passenger side window, eventually breaking the glass with his gun. Mrs. Burke testified that she was afraid she was going to die. A recording of Mrs. Burke's 9-1-1 call was played for the jury. A rational juror could certainly have concluded that Defendant took a substantial step toward intentionally causing Mrs. Burke to reasonably fear imminent bodily injury and that he used a deadly weapon in doing so. Defendant is not entitled to relief.

Defendant also challenges his conviction for reckless endangerment with a firearm, arguing that he never put Mrs. Burke in danger of death or serious bodily injury. A person commits the offense of reckless endangerment "who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." T.C.A. § 39-13-103(a). If the offense is committed with a deadly weapon, it becomes a Class E felony. T.C.A. § 39-13-103(b)(2). "Serious bodily injury" includes a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, or protracted loss of substantial impairment of a function of a bodily member, organ, or mental faculty. T.C.A. § 39-11-106(37). "[F]or the threat of death or serious bodily injury to be 'imminent,' the person must be placed in a reasonable probability of danger as opposed to a mere possibility of danger." *State v. Alder*, 71 S.W.3d 299, 305 (Tenn. Crim. App. 2001).

A person "acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." T.C.A. § 39-11-106(34).

The State compares the facts of this case to those in *State v. Danny Wayne Ratliff*, No. E2000-00673-CCA-R3-CD, 2001 WL 30201 (Tenn. Crim. App. Jan. 11, 2001), *no perm. app. filed*. In *Danny Wayne Ratliff*, the victim tapped his brakes causing the defendant to swerve. The defendant then "passed the victim and yelled and made motions as he passed." *Id*. at *1. The defendant "brought his vehicle to a stop on the interstate causing the victim to do likewise." *Id*. The victim drove around the defendant, and the defendant followed the victim to his house. The victim confronted the defendant with a knife, "and the defendant went to his car with the announced intention to get a gun." *Id*. The victim then ran inside his home and called the police. The defendant went to the victim's front door holding a metal toolbox tray but left when he heard the victim's dog barking. The defendant then broke the victim's back window with the toolbox and left. *Id*.

On appeal, the defendant in *Danny Wayne Ratliff* argued that any conflicts in the evidence should have been resolved in his favor because the testimony of his passenger corroborated his version of events, which differed from the victim's in that the defendant and his passenger testified that the victim swung at the defendant with the knife and the defendant attempted to block it and missed, hitting the victim's back window instead. A panel of this Court affirmed the defendant's convictions for reckless endangerment with a deadly weapon and vandalism, declining to reweigh the credibility of the witnesses at trial. *Id*. at *3.

There are similarities in the two cases. Both are cases of road rage wherein the respective defendants broke the windows of the victims' vehicles. The defendant's breaking the window with a toolbox in *Danny Wayne Ratliff*, however, was not the basis of his felony reckless endangerment conviction. Rather, it was the use of his vehicle as a deadly weapon. Here, Defendant's use of his gun to break the victim's window is the subject of analysis in determining the sufficiency of the evidence for his felony reckless endangerment conviction in Count 2.

Defendant asserts that he used "non-lethal force to neutralize the ongoing threat posed" by Mrs. Burke. Defendant asserts that his "use of his gun was limited to hitting the passenger side window with the gun's slide" and that he never fired the gun or threatened to fire the gun. The proof at trial showed that Defendant, after several aggressive encounters with Mrs. Burke, forced her car to a stop on a busy interstate. With the vehicles still at least partially on the roadway, Defendant, while directing threatening and abusive language to Mrs. Burke, used the butt of a loaded handgun to smash the passenger side window of her vehicle. Such conduct certainly created an imminent risk of death or serious bodily injury to Mrs. Burke, the only alleged victim named in the reckless engangerment indictment. This was not a situation where *any* other human being *might possibly be* present or where a stray bullet *might possibly* strike another person. *See State v. Fox*, 947 S.W.2d 865,866 (Tenn. Crim. App. 1996) (emphasis in orginial). There was at least a

reasonable probability that Defendant's loaded gun could have discharged when he used it to break the window of the vehicle occupied by Mrs. Burke, placing her within the zone of danger. This proof, taken in the light most favorable to the State, supports that the threat of danger or serious bodily injury to Mrs. Burke was not just a mere possibility. *State v. Christopher Bengtson*, 2000WL 1456926 at *5, E1999-01190-CCA-R3-CD (Tenn. Crim. App. Oct. 2, 2000). The threat was real. The evidence was sufficient to support Defendant's conviction.

Defendant also challenges his conviction for vandalism under $1,000, arguing that he broke Mrs. Burke's window out of necessity while in fear for his own life. A conviction for vandalism requires proof that the defendant knowingly caused damage to or the destruction of any real or personal property of another, knowing that the defendant did not have the owner's effective consent. T.C.A. § 39-14-408(b)(1). The defense of necessity provides that conduct is justified if the person reasonably believes the conduct is immediately necessary to avoid imminent harm and the desirability and urgency of avoiding the harm clearly outweighs the harm sought to be prevented by the law proscribing the conduct, according to ordinary standards of reasonableness. T.C.A. § 39-11-609. If evidence is introduced supporting the defense of necessity, the burden is on the State to prove beyond a reasonable doubt the defendant did not act out of necessity. *State v. Culp*, 900 S.w.2d 707, 710 (Tenn. Crim. App. 1994).

Defendant's argument requires this Court to reweigh the evidence and credit his version of events. He argues that he "was left with no options but to try to take the keys out of Mrs. Burke's ignition to stop her from continuing to apply her gas pedal as she crushed his motorcycle and presented an immediate threat to him as he was stranded on the interstate and terrified for his life." Interestingly, by his own account, Defendant did not reach for Mrs. Burke's keys after he broke her window with his gun. Rather, he yelled obscenities at her. Regardless, this Court will not reweigh the credibility of the witnesses on appeal. The jury was instructed on the defense of necessity and rejected it, as was their prerogative. Defendant is not entitled to relief.

Finally, Defendant challenges his conviction for attempted burglary of an automobile. Burglary, as is applicable here, occurs when a person, "without the effective consent of the property owner . . . [e]nters any . . . automobile . . . with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault." T.C.A. § 39-14-402(a)(4). As used in section 39-14-402, "'enter means . . . (1) [i]ntrusion of any part of the body; or (2) [i]ntrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." *Id*. § 39-14-402(b)(1)-(2). As we have already stated, a person commits criminal attempt when he or she "[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and

the conduct constitutes a substantial step toward the commission of the offense." *Id*. § 39-12-101(a)(3).

We conclude that the evidence was sufficient to establish that Defendant took a substantial step toward entering Mrs. Burke's vehicle for the purpose of causing her to reasonably fear imminent bodily injury when he pounded on her car window with his fists and then broke the window with a loaded handgun. Defendant is not entitled to relief.

Sentencing

Defendant contends that the trial court abused its discretion in denying his request for an alternative sentence and ordering partial consecutive sentencing. Defendant also asserts that the trial court misapplied an enhancement factor. The State responds that the trial court acted within its discretion in sentencing Defendant.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider: (1) the evidence received at 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 conduct involved; (5) evidence and information offered by the parties regarding the statutory mitigation and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (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 wishes to make on 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* T.C.A. § 40-35-210(b). When an accused challenges the length and manner of service of a sentence, this Court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). This standard of review also applies to "the questions related to probation or any other alternative sentence," *see State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012), and also to consecutive sentencing determinations, *see State v. Pollard*, 432 S.W.3d 851, 860-61 (Tenn. 2013). The burden of showing that a sentence is improper is upon the appealing party. *See* T.C.A. § 40-35-401, Sentencing Comm'n Cmts.; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001).

This Court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). Those purposes and principles include "the imposition of a sentence justly deserved

in relation to the seriousness of the offense," Tennessee Code Annotated section 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," Tennessee Code Annotated section 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," Tennessee Code Annotated section 40-35-103(5). *Carter*, 254 S.W.3d at 344. Ultimately, in sentencing a defendant, a trial court should impose a sentence that is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. § 40-35-103(2) and (4).

Following a sentencing hearing, the trial court entered a "Sentencing Memorandum" and an "Amended Sentencing Memorandum" setting forth its findings of fact and conclusions of law. The trial court found that "Defendant and his motorcyclist friend chased the victim, M[r]s. Burke, down a busy Interstate 24 and forced her car to stop. [Defendant] testified that he believed she was attempting to kill him because . . . her automobile had bumped his motorcycle." The court found no applicable mitigating factors and one applicable enhancement factor, that Defendant had no hesitation about committing a crime when the risk to human life was high. *See* T.C.A. § 40-35-114(10).

In considering whether to grant Defendant's request for judicial diversion, the trial court found that Defendant had no criminal record and a favorable social history, including military service, and the court weighed those factors "moderately in [D]efendant's favor." The court found there was insufficient proof presented of Defendant's physical and mental health and determined that factor was neutral. The trial court determined that Defendant's amenability to correction was "very poor" and weighed that factor "heavily against" Defendant because Defendant refused to "admit that his actions were wrong in chasing down the victim and breaking her passenger's side window[.]" The court also weighed the circumstances of the offense "heavily [ ] against [D]efendant[,]" finding that Defendant "became enraged when the victim accidentally bumped his motorcycle on a crowded interstate." The court found Defendant "took matters into his own hands" and "his actions were grossly inappropriate." Finally, the trial court considered the deterrence value to the accused as well as to others and whether judicial diversion would serve the interests of the public as well as the accused and weighed both factors "moderately" against Defendant.

The trial court imposed concurrent sentences of 11 months and 29 days for each of Defendant's two misdemeanor convictions,[2] two years on probation for the attempted aggravated assault conviction, and one year for the reckless endangerment with a deadly weapon conviction. The court ordered that Defendant serve his misdemeanor sentences incarcerated and concurrently with each other, and his felony sentences were suspended to

[2] The trial court also imposed a sentence of 11 months and 29 days for Defendant's attempted reckless endangerment conviction, which offense the court subsequently dismissed.

probation but ordered to run concurrently with each other and consecutively to the misdemeanor sentences.

Defendant asserts that the trial court misapplied enhancement factor (10) when it found that Defendant had no hesitation about committing a crime when the risk to human life was high. *See* T.C.A. § 40-35-114(10). Defendant contends there was no proof that his actions posed a high risk to the life of the victim or anyone else because Sergeant McVey testified that when he arrived at the scene, the vehicles had all been safely moved to the side of the interstate.

As the State points out, Defendant received the minimum sentences within the range for each of his felony convictions. *See* T.C.A. §§ 39-13-102(a)(1)(A)(iii), 39-13-102(e)(1)(A)(ii), 39-12-101(a)(1), 39-13-103(b)(2), 40-35-112(a)(4) and (5). Defendant does not challenge the length of his felony sentences, but rather he appears to argue that the trial court abused its discretion in relying on enhancement factor (10) to impose incarceration for his misdemeanor sentences. Trial courts are afforded considerable latitude in misdemeanor sentencing. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999). The "trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998); *see* T.C.A. § 40-35-302.

With regard to enhancement factor (10), Defendant asserts "there was no proof that [Defendant]'s actions created a high risk to the life of anyone other than the victim (or the victim, for that matter)." We disagree. Defendant's actions posed a high risk to the lives of both the victim and other motorists on the interstate. The record supports the trial court's application of enhancement factor (10). With respect to Defendant's challenge to the trial court's determination that he should serve his misdemeanor sentences incarcerated, Defendant contends that his lack of a criminal record, history of steady employment and military service, and the fact that he was not the aggressor weigh strongly in favor of granting probation.

Given the latitude afforded to trial courts in misdemeanor sentencing, the record reflects a basis for requiring confinement in this case, despite Defendant's lack of criminal history. Defendant repeatedly blamed the victim and refused to accept any responsibility for his actions, insisting that Mrs. Burke targeted him and attempted to run him over multiple times and that he did nothing to engage or aggravate the situation. The trial court did not abuse its discretion in denying probation.

Defendant also contends that the trial court erred in ordering partial consecutive sentencing. Specifically, Defendant asserts that the trial court failed to make the requisite

findings to support its decision to run his felony sentences consecutively to his misdemeanor sentences. The State concedes that the trial court failed to provide its reasons on the record for imposing partial consecutive sentencing, but the State asserts that the record supports a finding that Defendant is a "dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high," T.C.A. § 40-35-115(b)(4), and asks this Court to conduct a de novo review of the record.

Tennessee Code Annotated section 40-35-115(b) provides that a trial court may order consecutive sentencing if it finds any one of the statutory criteria by a preponderance of the evidence. The trial court may impose consecutive sentences upon finding by a preponderance of the evidence that "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high[.]" T.C.A. § 40-35-115(b)(4). In order to impose consecutive sentences based upon the dangerous offender classification, however, "trial courts must conclude that the evidence has established that the aggregate sentence is 'reasonably related to the severity of the offenses' and 'necessary in order to protect the public from further criminal acts.'" *Pollard*, 432 S.W.3d at 863 (citing *Wilkerson*, 905 S.W.2d at 938); *see State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999) (recognizing that two additional findings must be made prior to ordering consecutive sentences only under the dangerous offender category).

"Where . . . the trial court fails to provide adequate reasons on the record for imposing consecutive sentences, the appellate court should neither presume that the consecutive sentences are reasonable nor defer to the trial court's exercise of its discretionary authority" and can either conduct a de novo review to determine if an adequate basis exists for consecutive sentences or remand the case to the trial court for consideration of the requisite *Wilkerson* factors. *Pollard*, 432 S.W.3d at 864-65. We determine that the record is sufficient for a de novo review.

We conclude that the evidence showed that Defendant was a "dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high." T.C.A. § 40-35-115(b)(4). The trial court specifically found that Defendant "had no hesitation about committing a crime in which the risk to human life was high." Additionally, the court found that Defendant "became enraged when the victim accidentally bumped his motorcycle on a crowded interstate" and that Defendant "took matters into his own hands and chased the victim to a stop on the busy interstate[.]" Even if Mrs. Burke inadvertently brushed against Defendant's motorcycle while attempting to merge into his lane, Defendant's response posed a danger to his own life, Mrs. Burke's life, and the lives of the other motorists on the interstate. He repeatedly chased her down, kicked her car, tried to make her stop, and when

she was finally forced to stop, Defendant pounded on her car, broke her window, and yelled obscenities at her. As evidenced by Trooper Herring's body cam video, this happened on an extraordinarily busy interstate, where Defendant's actions could have resulted in a serious or fatal accident. Other far less dangerous options were available to Defendant, but he continued to engage Mrs. Burke.

Considering the *Wilkerson* factors, the evidence supports a finding that the sentence imposed by the trial court is reasonably related to the severity of the offenses and is necessary to protect the public from further criminal acts by Defendant. Although the trial court did not make these specific findings, it noted the "deterrence value" in denying judicial diversion. Additionally, Defendant's lack of remorse and refusal to accept any responsibility for his conduct demonstrates the need to protect the public from further criminal acts. We conclude that the trial court's partial consecutive sentencing is reasonably related to the severity of the offenses. Defendant is not entitled to relief on this issue.

State's Duty to Preserve Evidence

Defendant argues that the State's failure to preserve evidence, specifically, Trooper McVey's dash cam recording, denied him due process. The State argues that it was not under any obligation to preserve the evidence and that Defendant has waived the issue. We agree with the State.

In *State v. Ferguson*, our supreme court "explained that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *State v. Ferguson*, 2 S.W.3d 912, 915-16 (Tenn. 1999)). When a defendant raises a *Ferguson* claim, a trial court must first "determine whether the State had a duty to preserve the evidence." *Merriman*, 410 S.W.3d at 785. "[T]he 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*. (quoting *Ferguson*, 2 S.W.3d at 917). To meet this constitutional 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." *Id*. (footnote omitted). If the proof shows "the existence of a duty to preserve and further shows that the State has failed in that duty," then the trial court must consider the following factors to determine the consequences of that failure:

(1) [t]he degree of negligence involved;

> (2) [t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
>
> (3) [t]he sufficiency of the other evidence used at trial to support the conviction.

Ferguson, 2 S.W.3d at 917 (footnote omitted). The trial court must balance these factors to determine whether a trial conducted without the missing or destroyed evidence would be fundamentally fair. *Id*. 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*.

Trooper McVey testified on cross-examination that his dash cam recorded video after his arrival at the scene and that he allowed the footage to be automatically deleted, explaining that unless the incident involves "a significant event like a crash [or] an arrest," the recording is not saved. Defendant argues that because the incident involved both a crash and arrest, Trooper McVey's failure to preserve the video "was a clear violation of standard protocol of which he was admittedly aware." Regarding the probative value of the recording, Defendant argues that it "was potentially exculpatory as it would have proven that [Defendant] was in fact cooperative and calm, providing him with the credibility necessary to overcome Mr[s]. Burke's testimony to the contrary." In fact, Trooper McVey testified that Defendant was cooperative and calm. Mrs. Burke testified that Defendant was yelling obscenities at her prior to Trooper McVey's arrival and the same can be heard in the 9-1-1 call recording. Therefore, the "potentially exculpatory" value that Defendant suggests the dash cam recording would have provided is insignificant.

Furthermore, Defendant never raised an issue at trial regarding Trooper McVey's dash cam recording, failing to move for a dismissal of the charges or ask for a curative instruction. Defendant did not raise the issue until his amended motion for new trial. Accordingly, we deem the issue waived. *See State v. Gary Mitchell Hestand*, No. M2014-02208-CCA-R3-CD, 2015 WL 10684326, at *5 (Tenn. Crim. App. Oct. 7, 2015) (agreeing the defendant waived *Ferguson* claim by not asserting it prior to amended motion for new trial), *no perm. app. filed*.

Waiver notwithstanding, we agree with the State that it was not under a constitutional obligation to maintain the dash cam video. Defendant's demeanor after the arrival of law enforcement was not so significant or material to the issues that the State had a duty to preserve it. We have previously stated "that the mere possibility of exculpatory content does not trigger a finding that the State failed in its general duty to preserve

evidence under *Ferguson*." *State v. Ronnie D. Sims*, No. M2004-02491-CCA-R3-CD, 2005 WL 3132441, at *8 (Tenn. Crim. App. Sept. 21, 2005) (citing *State v. Coulter*, 67 S.W.3d 3, 54-55 (Tenn. Crim. App. 2001), *perm. app. denied* (Tenn. Mar. 20, 2006). Moreover, comparable evidence was available and admitted at trial. In addition to Trooper McVey's testimony that Defendant was calm and cooperative, Trooper Herring's body cam video was shown to the jury. Defendant is not entitled to relief on this issue.

Jury Instructions

Lastly, Defendant asserts that his convictions should be reversed because the trial court provided the jury with "confusing, marked-up jury instructions that contained numerous inconsistencies and inapplicable instructions that were crossed out but still legible." Defendant argues that the trial court's "befuddling instructions" deprived him of the right to a jury trial. The State responds that Defendant failed to object to the manner in which the court provided written instructions to the jury and that the instructions were not so confusing as to require reversal. We agree with the State.

Rule 30(c) of the Tennessee Rules of Criminal Procedure provides, "[E]very word of the judge's instructions shall be reduced to writing before being given to the jury." Tenn. R. Crim. P. 30(c). However, failure to follow this rule, although error, is not reversible unless it "more probably than not affected the judgment." Tenn. R. App. P. 36(b); *State v. Gorman*, 628 S.W.2d 739, 740 (Tenn. 1982). It is not error for part of the charge to be handwritten while the remainder is typewritten unless it falls to the level of the writing described in *Pedigo v. State*, 236 S.W.2d 89, 90 (Tenn. 1951), of "contain[ing] incompetent and irrelevant matter, illegible interlineation and meaningless annotations [that] might as well have been written in a foreign language and could serve no purpose except to confuse the jury." *State v. Tyson*, 603 S.W.2d 748, 754 (Tenn. Crim. App. 1980). In *Pedigo*, the supreme court noted that the jury's verdict also indicated that the jury was confused and not clearly instructed. 236 S.W.2d at 90. The form of the instructions is not as important as their content. *See State v. Cravens*, 764 S.W.2d 754 (Tenn. 1989) (holding that the reversal in *State v. Martin*, 702 S.W.2d 560 (Tenn. 1985), was for the content of the instructions, not the form, and that the form of the instructions in that case, although not as clear as directed by *Martin*, did not warrant reversal).

Initially, we note that Defendant again failed to present this issue prior to his amended motion for new trial. Defendant did not object during the trial court's preparation of the jury instructions or reading of the jury charge. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

In any event, the trial court's written instructions consisted of a series of typewritten pattern instructions with inapplicable portions crossed out.[3] The court explained to the jury: "[T]his charge is always a work in progress, I'm taking out some pages that don't apply, and I will mark through portions that do not apply. If you look and you see that I've marked through some particular lines, then that does not apply to this case." In reading the instructions to the jury, the court read only the applicable instructions and again reminded the jury to ignore the crossed-out portions: "Again, ladies and gentlemen, I'm marking through portions that do not apply here in this case." Juries are presumed to follow the trial court's instructions. *State v. Banks*, 271 S.W.3d 90, 137 (Tenn. 2008) (citations omitted).

Citing *Pedigo* and *Adcock v. State*, 236 S.W.2d 88 (Tenn. 1949), Defendant argues that because the written charge contained crossed-out but still legible portions that were inapplicable, it resulted in "incompetent, illegible and confusing instructions that contained much irrelevant and inapplicable law, mandating reversal of [Defendant]'s convictions. However, our supreme court has long since rejected this argument, concluding, "when the jury saw these parts the [j]udge had struck out, instead of taking them as part of the charge, they naturally understood that, inasmuch as the [j]udge had struck them out, they were not intended to be, and were not, part of the charge." *Tomlin v. State*, 339 S.W.2d 10, 13-14 (Tenn. 1960).

We have reviewed the instructions provided to the jury in this case, and they were not so illegible or confusing as to fall to the level described in *Pedigo*, nor did they contain points of law that were inapplicable and confusing as in *Adcock*. Defendant is not entitled to relief on this issue.

Judgment Forms

The result of Defendant's 6 count indictment is convictions for 4 counts: 2 felonies (Counts 1 and 2) and 2 misdemeanors (Counts 5 and 6). As noted above, the record before us does not contain a judgment form for Count 4, false imprisonment, which was dismissed prior to trial. Furthermore, the record does not contain an amended judgment form dismissing the conviction for the non-offense of attempted reckless endangerment in Count 3. We also note that the judgment form in Count 5 incorrectly indicates a convicted offense of felony vandalism between $2,500 and $10,000, whereas the jury verdict form shows that Defendant was convicted of misdemeanor vandalism under $1,000. Likewise, the judgment form in Count 6 incorrectly indicates a convicted offense of felony burglary of an automobile, whereas the actual conviction in Count 6 was attempted burglary of an

[3] The written instructions contained in the record were not provided by the circuit court clerk, but rather submitted by Defendant in a notice of filing after the filing of his amended motion for new trial.

automobile, a misdemeanor. The convictions in Counts 5 and 6 were properly classified as Class A misdemeanors on the respective judgment forms for sentencing purposes, and Defendant received misdemeanor sentences in both counts. Accordingly, we remand for entry of corrected judgments in Counts 5 and 6, and entry of judgments of dismissal in Counts 3 and 4. In all other respects, the judgments of the trial court are affirmed.

_____

TIMOTHY L. EASTER, JUDGE