

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 8, 2020 Session

FILED

11/25/2020

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. YOLANDA TUCKER

Appeal from the Criminal Court for Shelby County
No. 17-00303 Paula L. Skahan, Judge

No. W2019-01368-CCA-R3-CD

The Defendant-Appellant, Yolanda Tucker, pleaded guilty to one count of aggravated assault,¹ a Class C felony, in violation of Tennessee Code Annotated section 39-13-102, in Shelby County Criminal Court. Following the Defendant's testimony at her guilty plea hearing, the trial court denied her request for judicial diversion and imposed a sentence of three years to be served on supervised probation. On appeal, the Defendant contends that (1) the trial court committed plain error in denying her statutory right to allocution and requiring her to testify under oath in order to request judicial diversion, and that (2) the trial court erred in failing to adequately explain its reasoning for denying the Defendant's application for judicial diversion. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and J. ROSS DYER, J., joined.

Phyllis Aluko, District Public Defender, and Glover Wright, Assistant Public Defender, for the Defendant-Appellant, Yolanda Tucker.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Steve Crossnoe, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

¹ The Defendant was initially charged by a Shelby County Grand Jury of two counts of aggravated assault and one count of attempted second degree murder.

This case stems from an incident occurring on July 2, 2016, in which the Defendant and her co-defendant, who also pled guilty to one count of aggravated assault, became involved in an altercation with the victim, Shownae Davis. During this altercation, the co-defendant provided the Defendant a pocketknife, which she used to stab the victim multiple times, causing extensive injuries. On July 25, 2019, the trial court accepted the Defendant's guilty plea to one count of aggravated assault and subsequently held a hearing to determine the Defendant's length and manner of sentence, including whether the Defendant's request for judicial diversion would be granted. At the hearing, the trial court informed the Defendant that she would be required to testify in order to be considered for judicial diversion. The Defendant read a statement that she prepared, and she was cross-examined by the State. The Defendant's sister, Kassandra Tucker, also testified at the hearing.

Prior to the Defendant's entry of her guilty plea, trial counsel informed the trial court that the Defendant was "intellectually disabled," and, although she underwent a forensic evaluation and was found competent to stand trial, she was also determined to be "low functioning and [would] need extra assistance from her attorney and the court." The parties stipulated to the facts surrounding the assault. The trial court informed the Defendant of her rights and found that she had entered the plea "freely, knowingly, voluntarily, [and] intelligently." Following the trial court's acceptance of the Defendant's guilty plea, trial counsel informed the trial court that he had discussed with the Defendant the possibility of her testifying at the hearing, but "due to her unique circumstances[,] the Defendant prepared an allocution to read to the trial court instead. To this the trial court responded, "She is going to have to testify if she is going to apply for diversion." Trial counsel's sentencing memorandum, which included proof of the Defendant's diagnosis of "mental retardation" for Social Security purposes, proof of her enrollment in "Life Skills, Conflict Resolution, and Health[y] Relationships" classes, and a witness interview form stating, "We were all drinking and we were all really, really high that day[,] was entered as an exhibit.

The Defendant read the following statement into evidence, which was subsequently entered as an exhibit:

To whom this may concern. First I would like to express how sorry I am that the incident happened. I apologize for my actions to the Court and to the young lady that I hurt. I regret that my anger got the best of me. I know that what I did was wrong and could you please forgive me, I have been working on my anger problems and trying to learn how to walk away. I can promise that nothing like this will ever happen again and that I am deeply sorry for what I did. Please accept my apology I never meant for anything like this to ever happen. I will be attending my first anger management classes today.

And please forgive me, I regret this ever happened. Sincerely, Yolanda Tucker.

Defense counsel proceeded to question the Defendant, who said that she was forty-four-years old and lived in Mississippi near family, including her sister, Kassandra.² The Defendant stated that she did not work and had been receiving disability benefits since 1992. She agreed that, before her arrest in this case, she had never previously been arrested, and she stated that she was “staying out of trouble” since she was released from jail. She said that Kassandra helped take care of her, which included driving her to her court appearances. The Defendant agreed that defense counsel had “work[ed] for a very long time to try to get [her] into a program to help [her] with a disability.” She stated that she had recently enrolled in a “life skills program” at the Family First Resource Center in Mississippi, which included classes on conflict resolution, healthy relationships, and anger management. She said that this was the first time that she had ever been to any classes like this and that she was looking forward to attending them.

The Defendant stated that she did not have a “great memory of what happened in this incident[,]” but she acknowledged that she stabbed the victim and took responsibility for her actions. She understood that the trial court did not have to put her on probation or judicial diversion and could send her to jail, but she stated that she was “committed to doing whatever [she] need[ed] to do, to be successful at diversion” and that her sister would be supporting her in the process. She said, “I am really going to try all my best and strength.” The Defendant stated that she suffered from many medical issues and that she regularly went to her doctors in Mississippi for treatment.

On cross-examination, the Defendant stated that she remembered speaking to a probation officer with her sister. She affirmed that she graduated from high school and received a certificate. She agreed that, on the day of the incident, she went to the Bent Tree Apartments with the co-defendant, who was her boyfriend at the time. She had recently met the victim through the co-defendant, who was the victim’s cousin. The victim gave the Defendant and co-defendant a ride, they stopped at McDonald’s to get food, and they all got into an argument over the co-defendant throwing up in the victim’s car, although the Defendant said that she did not remember everything that happened. The Defendant said that everyone was drinking that day. She and the victim got into an argument, although the Defendant said it was a “quiet, polite” argument. As the State was questioning the Defendant about the argument, the Defendant did not answer several questions, although she eventually said that the victim became angry at her and “came at [her].” The Defendant denied asking the co-defendant for a knife, but she agreed that the co-defendant did provide

² Because the Defendant and her sister share a last name, we will refer to her sister by her first name to distinguish them. We intend no disrespect in doing so.

her with a knife after the victim hit her. The Defendant agreed that she cut the victim, but she could not remember how many times or where she cut her. The Defendant said she did not remember the victim bleeding because she and the co-defendant left after the altercation. The Defendant had not seen the victim since the altercation, and she said that she was unaware that the victim was partially paralyzed, needed sixteen stitches, had her throat slit, had four surgeries, and had to undergo physical and occupational therapy.

The Defendant said that she took responsibility for stabbing the victim, that this made her feel bad, and that she thought she had made amends with the victim by writing the letter. The Defendant stated that her sister helped her make many decisions, including helping her write the letter, although she said that the words were her words, not her sister's words. The Defendant told the trial court that her argument with the victim did not involve the victim accusing the Defendant and co-defendant of stealing six-hundred dollars from her. The Defendant said she lived with her aunt, and her sister lived "practically next door."

Kassandra, the Defendant's sister, testified that she took the Defendant to all of her court appearances and doctor's appointments. She described her relationship with the Defendant as "very close." Kassandra said that she lived a "few doors down" from the Defendant and saw her or talked to her every day. Kassandra described the Defendant as "very lovable" and friendly and said she loved to play with kids and spend time with her family. Kassandra said that she helped the Defendant shop for groceries and personal items, helped the Defendant understand things, and helped her with personal grooming and cooking because the Defendant was "slower." Kassandra said that the Defendant was not a violent person, although she acknowledged that both she and the Defendant knew that what she did was wrong, and she stated that the Defendant "just [couldn't] say how enough how sorry she [was] for the incident that happened." Kassandra understood that the Defendant would have responsibilities if she were put on diversion or probation and that the Defendant would have difficulties completing these requirements because of her disabilities, but she believed that the Defendant wanted to do so. She said she would do whatever she needed to do to help the Defendant complete these requirements, and she said that she was going to enroll in the Defendant's classes with her. At this point, the trial court said that the Defendant had anger issues, which the court discerned from the Defendant's responses to the State's questions. Kassandra assured the trial court that the Defendant would "be learning tools to control and manage [her] anger" through her classes and that she was motivated to complete the classes. On cross-examination, Kassandra said that the Defendant "sometimes" went out on her own, including the night of the incident with the victim.

During arguments, while defense counsel was discussing the Defendant's interest in judicial diversion, the trial court stated, "But, what difference does that make for her, she is not going to be working, it doesn't make any difference for her." The trial court

strongly disagreed that the Defendant acted under duress or domination of another person in committing the offense. The State summarized the victim's injuries as follows: "The victim was in the hospital for three weeks, was stabbed six times, once in the face and twice in the upper chest, was a long scar through her throat. Victim's also paralyzed in her right arm, is having to learn to write with her left hand." In considering the required factors for judicial diversion, the trial court stated as follows:

Well, looking at the sentencing memorandum, there's no question that [the Defendant] qualifies for consideration of diversion.

As far as, I'm going to go to the mitigating factors;

That [D]efendant acted under strong provocation. I can't deny that there was some strong provocation, so I will find that as some mitigation here.

As far as mitigating factor six; Defendant lacked substantial judgment in committing the offense. I am not going to find that, because of the fact that she is on social security disability for her disability. I think that she acted out of anger, not because she's a slow learner.

Mitigating factor eight; That [D]efendant was suffering from a mental, or physical condition that significantly reduces defendant's culpability to the offense and this condition was not the result of voluntary use of intoxicants. I don't think that she was suffering from a mental, and I am taking it from a mental or physical condition, I am suspecting from a mental condition, I think it was a result of use of intoxicants and from her anger issues that that's what caused that, the fact that she was pushed and she lost her temper and she was intoxicated. So I am not going to find mitigating factor eight.

Mitigating factor eleven; That [D]efendant committed the offense under such unusual circumstances that it is unlikely that sustained intent to violate the law motivated her conduct. I am not going to find that, that is just - Her involvement was complicated - confrontation was brief and provoked. Well yes, and she could have easily killed this woman. So there is criminal responsibility clearly here, and; Had no sustained intent to violate the law. Well, [the victim] easily could have been dead. So whether it was brief or not, I don't find that mitigating factor to be present.

Mitigating factor eight; Defendant acted under duress. Under the domination of another person, even though the duress or domination of another person was not sufficient to constitute a defense to the crime. I don't see any

domination of another person, at all, because she asked for a knife and was handed a knife. It's just a horrible, horrible set of events where [the victim] is greatly, greatly suffering and it is not because of [the Defendant's] slowness intellectually, it is because of her being intoxicated and her anger issues.

So looking at factors considering granting or denying diversion, accused amenability to correction, again, she does have anger issues. She is slow. She does have her sister's help and that is very fortunate for [the Defendant]. So I am hoping she is amenable to correction and with her attorney's help and her sister's help she is enrolled in a program that is designed to help her. So I am hopeful, hopeful she is amenable to correction, I don't know.

Circumstances of the offense, I have already discussed with the co-defendant, are extremely bad in this case. We've got a victim who was stabbed, slashed many times in the face, in the throat, in the chest and her life is ruined. Very, very, very serious injuries, in the hospital for three weeks, is paralyzed in the right arm, will never, ever be the same, lives in constant pain.

Accused social history, is very tough, comes from -well, it is written here in the presentence report, which we will make an exhibit, also; Bad eye-sight, iron deficiency, anemia, weakened bones, torn ligaments in both knees, arthritis, low calcium, migraine headaches, physical mental health included there. Did graduate from high school.

Deterrence value to accused as well as others, we've already talked about the fact that many members of the family in the community are aware of this event and how horrible this was, deterrence value to accused. I do think this type of behavior does need to be deterred, as well as for others, as well as for [the Defendant].

Whether diversion will serve the interest of the public as well as the accused. I think people do need to be warned about someone like [the Defendant] who acted with such anger and seriously injured somebody else.

And, I did witness her on the stand today to show anger directed at the prosecutor because of his questions. I do think Judicial diversion being denied here will serve the interest of the public.

And, I don't see any reason why [the Defendant] has to have Judicial

Diversion. She is not employed. That will not prevent her from obtaining employment. She is basically unemployable. Weighing all of the factors I am denying Judicial Diversion in this case.

The trial court sentenced the Defendant to three years to be suspended and served on probation. The Defendant timely appealed the trial court's sentencing determinations.

ANALYSIS

I. Right to Allocution. The Defendant contends that the trial court committed “plain error” in denying her the statutory right to allocution by “refus[ing] to allow her to ask for judicial diversion unless she testified under oath and subjected herself to rigorous cross-examination.” She also asserts that she was “obviously prejudiced by the trial court’s seeming reliance on ‘anger issues’ the trial court believed to be apparent ‘when she was responding to [the State’s] questions.’” She asks this Court to find plain error, reverse the trial court’s denial of judicial diversion, and place the Defendant on diversion under its power of de novo review. In response, the State asserts that the Defendant was not denied her statutory right to allocute and that the trial court did not comment on her desire to allocute; rather, “[the trial court] simply informed the [D]efendant that it would not be inclined to grant judicial diversion unless she testified on her own behalf.” Nevertheless, the State asserts, “[E]ven if the trial court’s statement were to be interpreted as requiring testimony in lieu of an allocution-in spite of the fact that she was then permitted to read a statement before testifying-any error was certainly harmless.”

Allocution has been defined “as the formality of the court’s inquiry of a convicted defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on the verdict of conviction.” State v. Keathly, 145 S.W.3d 123, 125 (Tenn. Crim. App. May 21, 2003) (citing State v. Stephenson, 878 S.W.2d 530, 551 (Tenn.1994); Black’s Law Dictionary 76 (6th ed.1990)) (footnote omitted). It is “an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination.” Id. (citing Black’s Law Dictionary (11th ed. 2019); see also United States v. Gilbert, 244 F.3d 888, 924 (11th Cir. 2001)).

Tennessee Code Annotated Section 40-35-210(b)(7) states that, in a non-capital case, a defendant be allowed allocution before a sentencing judge or jury. See id. This section provides, “To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider . . . [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.” Tenn. Code Ann. § 40-35-210(b)(7). In this case, defense counsel informed

the trial court that the Defendant had prepared an allocution to read to the court, to which the trial court responded, “She is going to have to testify if she is going to apply for diversion.” Defense counsel responded, “And I understand that, You Honor, but [what] I will be asking her to do is to read this statement that she has prepared . . . And then whatever questions the Court has [the Defendant] will do her best to answer.” The Defendant then read her statement, defense counsel asked her questions on direct examination, and the State cross-examined her.

In Keathly, the defendant, who was convicted of vehicular assault, requested that he be allowed to read a statement to the trial court at his sentencing hearing. 145 S.W.3d at 125. The State objected, asserting that, “in order to read a statement to the court, the [defendant] must first be placed under oath and thus subject to cross-examination[,]” and the trial court agreed. Id. The defendant was then placed under oath, read his statement to the court, and was “rigorously cross-examined by the prosecutor and the trial judge.” Id. Based on this, this Court concluded that the trial court erred by denying the defendant his statutory right of allocution. Id. In State v. Ketchum, this Court held that the trial court did not deny the defendant his statutory right to allocution, noting that the defendant was permitted to make an unsworn allocution statement, and that, even though the trial court questioned the Defendant during his statement, “the trial court’s questioning of the [d]efendant did not reveal any evidence not already in the record . . . [, and] the trial court did not use the [d]efendant’s statements against him.” No. M2016-00685-CCA-R3-CD, 2017 WL 2261763, at * 9 (Tenn. Crim. App. May 23, 2017). In this case, even though the trial court did not require the Defendant to be placed under oath to read her statement, the trial court did state that the Defendant would be required to testify in order to receive judicial diversion. Therefore, the Defendant was placed under oath, read her statement, and was cross-examined by the prosecutor. Based on Keathly, we conclude that the trial court erred by denying the Defendant her statutory right of allocution.

Accordingly, we must determine whether the trial court’s denial of the Defendant’s statutory right to allocution constitutes reversible error. In Keathly, this Court quoted as follows from United States v. Pagan, 33 F.3d 125, 129-30 (1st Cir. 1994):

[W]hile we do not attach talismanic significance to any particular string of words, a defendant must at least be accorded the functional equivalent of the right. And, moreover, functional equivalency should not lightly be assumed. Though there may be cases in which a defendant, despite the absence of the focused inquiry that the language of the rule requires, can be said to have

received its functional equivalent, such cases will be few and far between. Doubts should be resolved in the defendant's favor.

To achieve functional equivalency (or, put another way, substantial compliance with the imperative of Rule 32(a)(1)(C)), it is not enough that the sentencing court addresses a defendant on a particular issue, *see, e.g., United States v. Walker*, 896 F.2d 295, 300-01 (8th Cir.1990), affords counsel the opportunity to speak, *see, e.g., United States v. Posner*, 868 F.2d 720, 724 (5th Cir.1989), or hears the defendant's specific objections to the presentence report, *see, e.g., United States v. Phillips*, 936 F.2d 1252, 1255-56 (11th Cir.1991). Rather, the court, the prosecutor, and the defendant must at the very least interact in a manner that shows clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence. *See Green v. United States*, 365 U.S. 301, 304-05, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961).

...

We say "reversible" because, in this type of situation, we cannot dismiss the error as harmless. As early as 1689, the common law acknowledged that a court's failure to invite a defendant to speak before sentencing required reversal. *See United States v. Barnes*, 948 F.2d 325, 328 (7th Cir.1991) (citing *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.1689)). This axiom has survived the passage of time. It is settled that a failure to comply with the mandate of Rule 32(a)(1)(C) ordinarily requires vacation of the sentence imposed without a concomitant inquiry into prejudice. *See United States v. Maldonado*, 996 F.2d 598, 599 (2nd Cir.1993); *Barnes*, 948 F.2d at 332; *Phillips*, 936 F.2d at 1256; *Walker*, 896 F.2d at 301; *Posner*, 868 F.2d at 724; *United States v. Buckley*, 847 F.2d 991, 1002 (1st Cir.1988), *cert. denied*, 488 U.S. 1015, 109 S.Ct. 808, 102 L.Ed.2d 798 (1989); *United States v. Navarro-Flores*, 628 F.2d 1178, 1184 (9th Cir.1980); *cf. United States v. Miller*, 849 F.2d 896, 897-98 (4th Cir.1988) (remanding for failure to meet strictures of Fed. R. Crim. P. 32(a)(1)(A) and (C)). This is so precisely because the impact of the omission on a discretionary decision is usually enormously difficult to ascertain.

In line with this virtually unbroken skein of authorities, we hold, that if the trial court fails to afford a defendant either the right of allocution conferred by Rule 32(a)(1)(C) or its functional equivalent, vacation of the ensuing sentence must follow automatically.

“This is not necessarily so, of course, when the sentence is the minimum possible.” Keathly, 145 S.W.3d at 126 (citing Pagan, 33 F.3d at 130 n. 5). Thus, courts have “undertaken harmless-error analysis in certain cases in which a defendant has been denied his right to allocution, limited, however, to instances in which a sentence is ‘already as short as it could possibly be’” Pagan, 33 F.3d at 130 n. 5 (quoting United States v. Carper, 24 F.3d 1157, 1162 (9th Cir.1994); see also United States v. Ortega-Lopez, 988 F.2d 70, 72–73 (9th Cir.1993)). Reversible error may not always occur when a defendant is placed under oath and subjected to cross-examination. Keathly, 145 S.W.3d at 126-27.

In Keathly, this Court found that the prosecutor and the trial court extensively cross-examined the defendant after he read a statement to the trial court, including extensive questioning on why the defendant believed that the victim and a witness in his case had lied on the stand. 145 S.W.3d at 129. This Court held that this type of questioning was prejudicial to the defendant, that the defendant’s responses were “so detrimental to his case that defense counsel asked for a recess to talk with the [defendant][,]” and that the trial court “greatly emphasized the [defendant’s] testimony in denying probation.” Id. We find this case to be distinguishable from Keathly. Here, although the prosecutor did cross-examine the Defendant on aspects of the assault and on her background, these questions did not lead to any testimony that was not already in evidence. The trial court noted the Defendant’s “anger directed at the prosecutor because of his questions,” but we do not believe that the trial court applied great weight to this in denying judicial diversion. As we will explain in greater detail below, the trial court weighed the factors for denying diversion and explained its reasoning. Additionally, we note that the Defendant received three years of supervised probation, the minimum sentence in this case for a Class C felony. See Tenn. Code Ann. § 40-35-112(a)(3). Accordingly, we conclude that, although the Defendant was denied her statutory right of allocution, this does not constitute reversible error, and she is not entitled to relief on this issue.

II. Denial of Diversion. The Defendant also contends that the trial court failed to properly weigh the common law factors for denying judicial diversion and to articulate these reasons on the record. The Defendant urges this Court to apply a de novo review to the trial court’s decision denying diversion and to reverse the trial court’s determination and place her on judicial diversion. In response, the State contends that the trial court properly addressed the relevant factors for denying judicial diversion, placed its explanation on the record, and did not err in its decision.

In State v. King, 432 S.W.3d 316, 324-25 (Tenn. 2014), the Tennessee Supreme Court held that the abuse of discretion standard of review accompanied by a presumption of reasonableness, which was delineated in Bise and its progeny, applied to appellate review of a trial court’s decision to grant or deny judicial diversion. State v. Bise, 380 S.W.3d 682 (Tenn. 2012). However, the court made clear that the application of the Bise

standard of review does not abrogate the common law factors for judicial diversion set out in State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996), and State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998).

Tennessee Code Annotated section 40-35-313 outlines the requirements for judicial diversion. A qualified defendant is defined as a defendant who pleads guilty to or is found guilty of a misdemeanor or a Class C, D, or E felony; is not seeking diversion for a sexual offense or a Class A or B felony; and does not have a prior conviction for a felony or a Class A misdemeanor. Tenn. Code Ann. § 40-35-313(a)(1)(B)(i). After a qualified defendant either pleads guilty or is found guilty, a trial court has the discretion to defer further proceedings and place that defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A). Upon the qualified defendant completing a period of probation, the trial court is required to dismiss the proceedings against him. Tenn. Code Ann. § 40-35-313(a)(2). The qualified defendant may then request that the trial court expunge the records from the criminal proceedings. Tenn. Code Ann. § 40-35-313(b).

The trial court must consider the following factors in deciding whether a qualified defendant should be granted judicial diversion: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the interests of the public as well as the defendant. Electroplating, Inc., 990 S.W.2d at 229 (citing Parker, 932 S.W.2d at 958; State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993)). The trial court may consider the following additional factors: "the [defendant]'s attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement." State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993) (quoting State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988) (citations omitted)). The trial court must weigh all of the factors in determining whether to grant judicial diversion. Electroplating, Inc., 990 S.W.2d at 229 (citing Bonestel, 871 S.W.2d at 168). Finally, "a trial court should not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration." State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997) (citing Bonestel, 871 S.W.2d at 168).

In King, the court explained how the Bise standard of review is applied to the trial court's consideration of the Parker and Electroplating factors:

Under the Bise standard of review, when the trial court considers the Parker and Electroplating factors, specifically identifies the relevant factors, and

places on the record its reasons for granting or denying judicial diversion, the appellate court must apply a presumption of reasonableness and uphold the grant or denial so long as there is any substantial evidence to support the trial court's decision. Although the trial court is not required to recite all of the Parker and Electroplating factors when justifying its decision on the record in order to obtain the presumption of reasonableness, the record should reflect that the trial court considered the Parker and Electroplating factors in rendering its decision and that it identified the specific factors applicable to the case before it. Thereafter, the trial court may proceed to solely address the relevant factors.

If, however, the trial court fails to consider and weigh the applicable common law factors, the presumption of reasonableness does not apply and the abuse of discretion standard, which merely looks for "any substantial evidence" to support the trial court's decision, is not appropriate. See [State v.] Pollard, [423 S.W.3d 851, 863-64 (Tenn. 2013)]

King, 432 S.W.3d at 327-28 (internal footnote omitted).

Turning to the case sub judice, the Defendant argues that a proper review of the required factors shows that she is a proper candidate for judicial diversion. She notes that she had been "proactive in finding and enrolling in a community-based program to address difficulties related to her intellectual disability," that she had not violated the conditions of her release, and that she had shown up to every court date since being released on bond. She states that the trial court only "briefly acknowledged" her "very tough" social history and her "poor physical condition and social disability." The Defendant argues that the facts of the offense "while unsettling, were already incorporated into the conviction offense." See State v. Lacy, No. W2016-00837-CCA-R3-CD, 2017 WL 1969764, at *6 (Tenn. Crim. App. May 12, 2017). She asserts that the trial court discounted her interest in diversion because "she [was] basically unemployable" and did not articulate the deterrence value to her or to the public. She states that she has a "strong interest in not bearing forever the brand of a felony conviction" and that society "would seem to have little gain in applying such a brand to a 44-year-old intellectually disabled woman who lacks the capacity to navigate daily life on her own." Finally, she states that giving her "an opportunity to . . . demonstrate substantial and better judgment by adhering to a program of diversion will not defeat the cause of justice."

In denying judicial diversion, not only did the trial court consider the Parker and Electroplating factors, it also considered several mitigating factors proposed by defense counsel. The Defendant's main complaint is that the trial court did not properly consider and weigh these factors and articulate why it was denying diversion. However, the trial

court is not required to “utilize any ‘magic words’ or specifically reference the case names ‘Parker’ and ‘Electroplating’ when discussing the relevant factors in order to receive the presumption of reasonableness.” King, 432 S.W.3d at 327 n. 8. Our review of the record shows that the trial court considered and weighed each of these factors, except for the Defendant’s criminal record, which the trial court acknowledged through the presentence report, and placed on the record its reasons for denying judicial diversion. Therefore, we afford the trial court’s decision a presumption of reasonableness, and we must only determine whether there is “any substantial evidence” in the record to support the trial court’s decision.

The Defendant was a forty-one-year-old woman at the time of the offense, she had received disability benefits since graduating high school, was considered “low functioning,” and received substantial assistance from her family members. The Defendant’s presentence report revealed that she did not have any prior felony convictions. Although the trial court found that the Defendant acted under “strong provocation” and hoped that she could be amenable to correction with her family’s help, the other factors did not weigh in the Defendant’s favor. The trial court found that the Defendant had poor physical and social history and was concerned with the circumstances of the offense and the Defendant’s amenability to correction due to her anger issues. While we acknowledge that the Defendant was taking steps to address her anger problems, we agree that the deterrence value is high to the Defendant as well as to the public. The record shows that the Defendant got into an argument with the victim, during which the Defendant received a knife from her co-defendant and used it to repeatedly stab and slash the victim, resulting in extensive injuries to the victim, including multiple stab wounds in the face, throat, and chest and paralysis, and a three week hospital stay. While the trial court did not deny diversion based solely on the circumstances of the offense, the record supports the determination of the trial court on this ground alone. See State v. Moore, No. E2014-01790-CCA-R3-CD, 2015 WL 4314107, at *4 (Tenn. Crim. App. July 15, 2015) (affirming the denial of judicial diversion and finding that “[t]he circumstances of the offenses [were] very disturbing and weigh[ed] heavily against judicial diversion”); State v. Parson, 437 S.W.3d 457, 496 (Tenn. Crim. App.2011) (affirming denial of judicial diversion where Defendant’s amenability to correction and the circumstances of the offense “weighed heavily” against judicial diversion despite the satisfactory remaining factors) (citing State v. Jonathan B. Dunn, No. M2005-01268-CCA-R3-CD, 2006 WL 1627335, at *9 (Tenn. Crim. App. June 12, 2006) (affirming denial of judicial diversion where, even though factors (3), (4) and (5) weighed in the defendant’s [favor], the circumstances of the offense were “particularly troublesome” where defendant held a gun six inches from the victim’s head)); State v. Brian Carl Lev, No. E2004-01208-CCA-R3-CD, 2005 WL 1703186, at *3 (Tenn. Crim. App. Mar. 22, 2005) (“The denial of judicial diversion may be based solely

on the nature and circumstances of the offense, so long as all the other relevant factors have been considered, and this factor outweighs others that might favorably reflect on the [defendant]’s eligibility.”) (citing State v. Curry, 988 S.W.2d 153, 158 (Tenn.1999)).

While we agree with the Defendant that some of the trial court’s comments were irrelevant and inappropriate, including its comment that the Defendant was “basically unemployable,” we do not believe that these statements influenced the trial court’s analysis on the denial of diversion. We also conclude that the trial court properly considered the mitigating factors proposed by the Defendant as well as the Defendant’s attitude towards the prosecutor during cross-examination. See Washington, 866 S.W.2d at 951. Accordingly, we conclude that the trial court properly considered and weighed the Parker and Electroplating factors on the record and did not abuse its discretion in denying the Defendant judicial diversion. She is not entitled to relief.

CONCLUSION

Based on the foregoing authorities and analysis, we affirm the judgment of the trial court.

CAMILLE R. MCMULLEN, JUDGE