IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2007

STATE OF TENNESSEE v. KIMBERLY E. CUNNINGHAM

Appeal from the Circuit Court for Blount County
No. C-14818 D. Kelly Thomas, Jr., Judge

No. E2006-00189-CCA-R3-CD - Filed September 7, 2007

The State of Tennessee tried the defendant, Kimberly E. Cunningham, for the second degree murder of the victim, Coy Hundley, *see* T.C.A. § 39-13-210 (2006), who was cohabiting with the defendant's sister and fathered the sister's children. A Knox County Criminal Court jury convicted the defendant of voluntary manslaughter. *See id*. § 39-13-211. The defendant killed the victim because he allegedly raped her youngest daughter. The trial court sentenced the defendant to four years in the Department of Correction. On appeal, the defendant claims that (1) the evidence is insufficient to support the conviction of voluntary manslaughter; (2) the trial court erred in denying the defendant judicial diversion; (3) the sentence of four years was too lengthy; (4) the trial court erred in denying probation; and (5) the trial court erred in denying other alternative sentencing. We hold that the evidence is sufficient, and we hold that the trial court neither erred in denying judicial diversion nor erred in denying full probation. However, upon our de novo review of the rehabilitation factor relating to alternative sentencing, we sentence the defendant to serve six months in confinement and the remaining three years and six months on supervised probation. In addition, she must perform 120 hours of community service as a condition of her post-confinement probation.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed as Modified.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Bruce E. Poston, Knoxville, Tennessee, for the Appellant, Kimberly E. Cunningham.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; Michael E. Flynn, District Attorney General; and Robert Headrick, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

At trial, Ulis Williams testified that he worked with the victim at Slide Lock Tools in Alcoa on October 7, 2003, and at approximately 9:30 or 10:00 a.m., the defendant, whom Mr. Williams knew, drove into the business's parking lot and asked Mr. Williams to tell the victim to come outside. Mr. Williams followed her instructions, and the victim approached the driver's side door of the defendant's automobile. Mr. Williams testified that when the defendant spoke with him, she seemed "normal." He also testified that he neither heard the defendant and the victim's conversation nor heard the defendant's laughing at the victim.

Mr. Williams testified that the defendant suddenly started shooting, and then he heard the victim say, "Don't do this." He testified that the defendant shot the victim three or four times while the victim ran away. The victim then fell beside a truck, and the defendant got out of her car, cursed the victim, and shot the victim a few more times. Mr. Williams testified that the defendant said, "I told you, you son of a b----, I'd kill you."

Mr. Williams testified that after the defendant stopped shooting, she returned to her car and left. Mr. Williams called 9-1-1.

On cross-examination, Mr. Williams testified that he never told the police officers that the defendant pointed the gun at everyone there. However, in his statement to police, he stated that "[s]he was trying to hit anybody that got around." At trial, Mr. Williams denied exaggerating in his statement to police. He testified that the defendant had previously told the victim that the victim's son, who is the defendant's nephew, had molested her youngest daughter and her son. Mr. Williams also admitted that he stayed at the victim's house on several occasions and that he saw the defendant's youngest daughter and son visiting their aunt and cousins.

Mary Katherine Gibson testified that on October 7, 2003, she was employed at Resource Associates located across the street from Slide Lock Tools and that she heard shots when she was on the way to the business's mailbox. Ms. Gibson observed a man, who had blood on his shoulder, lying on the ground, and she heard the defendant yelling at the man from her automobile, calling him "a stupid son of a b----."

Ms. Gibson ran to her office and called 9-1-1, and while she was on the phone, she heard more gunshots. Ms. Gibson testified that she neither saw the defendant with a gun nor saw her exit her automobile. After the shooting, she did observe the defendant's automobile stop at a stop sign, wait, signal, and drive off.

On cross-examination, Ms. Gibson testified that the defendant never pointed the gun at her and that she did not see anyone else outside Slide Lock Tools, except the victim.

Knox County Sheriff's Lieutenant Mike Grissom testified that on October 7, 2003, the defendant turned herself in at the Knox County Sheriff's Department, saying she was involved

in a shooting. He asked the defendant for her name and identification and whether he could search her purse. The defendant cooperated, and Lieutenant Grissom found a nickel-plated revolver in the purse. At that point, the Knox County Sheriff's Department contacted Blount County law enforcement personnel and learned of a shooting in Alcoa.

Another female officer searched the defendant's person, and then that officer and Lieutenant Grissom escorted the defendant to an interview room. Lieutenant Grissom testified that, while in the elevator, the defendant started crying. She said that her "heart hurt" because "he raped [her] ten-year-old baby." Lieutenant Grissom testified that the defendant seemed "dazed and confused." He said, "It was almost like she didn't understand or didn't hear what I was saying." Also, the defendant could not remember where she had parked her car; however, police officers later found it in a parking garage near the Sheriff's Department. After Lieutenant Grissom placed the defendant in the interview room, he had no more contact with her. The defendant and her vehicle were subsequently transferred to the Alcoa Police Department.

On cross-examination Lieutenant Grissom testified that the defendant was not aggressive and was compliant. He also stated that the defendant said she was involved in a "shooting," not a murder.

Knox County Sheriff's Officer Shelly Sherrill testified that she was asked to search the defendant's person on October 7, 2003. Officer Sherrill testified that it appeared the defendant had been crying, and she started crying again once they got in the elevator. Officer Sherrill said that the defendant said that her "heart hurt" and that she was crying for her children, not for herself.

On cross-examination, Officer Sherrill testified that the defendant "seemed upset but distant"; she was not "hysterical or loud."

Alcoa Police Sergeant Detective Terry McGill testified that he responded to the October 7, 2003 shooting at Slide Lock Tools. He took measurements, drew sketches, and collected evidence. While at the scene, he learned that Knox County Sheriff's officers had transported the defendant to the Alcoa Police Department. The Knox County officers also delivered the defendant's purse, which contained a .38 caliber handgun and a permit to carry the weapon.

At approximately 10:30 a.m., Detective McGill interviewed the defendant. He testified that during the interview the defendant "became pretty much hysterical"; however, she was not violent and cooperated with him. Detective McGill said that when asked about drug use, the defendant admitted that she was taking Zoloft and Klonopin, which were prescribed by her doctor. Detective McGill also stated that at times, the defendant put her head in her arms as she talked. He also inquired about the child abuse allegations that the defendant's children made against the victim's son, and Detective McGill testified that at that time, no allegations had been proven "one way or the other."

Detective McGill also testified that officers searched the defendant's vehicle, and they found ten .38 caliber empty shell casings and a box of ammunition. Detective McGill testified that the defendant's gun was a five-shot revolver, and no speed loader was found in the automobile.

On cross-examination, Detective McGill testified that the defendant was "hysterical" but not "agitated." He also testified that in Mr. Williams' interview, Mr. Williams told him that the defendant shot at him and others. On recross examination, Detective McGill testified that the defendant's handgun permit only listed an expiration date and no issuance date, although he identified a gun safety course certificate, which stated the defendant completed the course on August 4, 2003.

Doctor Darinka Mileusnic-Polchan testified that she completed the victim's autopsy on October 8, 2003. She testified that the victim's blood tested negative for drugs and alcohol. Doctor Mileusnic-Polchan testified that the victim received eight gunshot wounds, and she recovered four of the bullets from the body. Four of the eight shots were to the head, and three of these were serious wounds that would incapacitate the victim and lead to death. Of the other four potentially survivable gunshot wounds, one was to the victim's right shoulder, another to the upper back, one to the right forearm, and the fourth to the upper chest. Finally, Dr. Mileusnic-Polchan testified that some of the wounds would be consistent with someone standing over the victim and firing.

On cross-examination, Dr. Mileusnic-Polchan testified that none of the shots were fired from close range. She also testified that there were no signs that the victim was a drug or alcohol abuser, which did not mean that he was not an actual user.

S.C.,[1] the defendant's son, testified on her behalf that he and his sisters, J.C. and A.C., would go to the victim's house approximately every weekend. S.C. knew Mr. Williams because Mr. Williams would be at the victim's house on the occasions that he would visit. S.C. testified that several of the victim's friends, including Mr. Williams, called themselves "Bonfire Buddies" and would "hang out" by the bonfire drinking alcohol and "smoking weed." S.C. testified that he never told anyone about the "Bonfire Buddies," not even his mother or father.

In July 2003, while at a McDonald's restaurant, S.C. told his mother that his older cousin, the victim's oldest son, who lived with the victim, had sexually abused him. The abuse began when S.C. was six or seven years old and ended on his 11th birthday. S.C. testified that when he told his mother, she would not stop crying. S.C. had told no one else. After he told his mother, he and his sisters were not allowed to visit the victim's house.

S.C. also testified that on the morning of October 7, 2003, the house was unusually quiet as he and his sisters got ready for school. He testified that A.C. typically played loud music and that his mother normally talked frequently as she motivated them to get ready. However, on October 7, his mother hardly talked. The defendant drove S.C. to school, as she frequently did, yet

[1] We opt to refer to the defendant's children by their initials.

she did not talk, tell jokes, or play the radio as was typical. S.C. testified that after school, he rode the bus home as usual.

On cross-examination, S.C. testified that when he spent the night with his cousins, his grandmother or his mother took him there. After he told his mother of the abuse in July 2003, he went to "Child Help" and spoke with a female. He further testified that he did not tell her what happened because he was embarrassed; however, he did tell a male worker about the abuse. S.C. testified that he did not tell his mother and father about the abuse because he was embarrassed, and he was afraid of how his cousin would react.

The defendant's youngest daughter, A.C., testified that in July 2003, the defendant constantly asked her why her personality had changed. According to A.C., her mother had been asking her these questions for months. A.C. then told her mother in July 2003 that her cousin had been molesting her. The abuse started when she was nine or ten years old, and she had not told anyone about the abuse up to that point. A.C. testified that her mother started crying and blamed herself for what had happened.

After telling her mother, A.C. went to Child Help and talked to a counselor. She also went to Peninsula Hospital and was treated for depression. When she was released from Peninsula Hospital, she returned home to a newly decorated bedroom compliments of her parents; however, she continued to act strangely, and the defendant continued to question her.

A.C. testified that on October 6, 2003, "[she] blew up and told [the defendant] that she didn't know everything." That night A.C. told her mother that she had been having dreams about the victim, but she did not tell the defendant the details. A.C. then went to sleep and woke up on October 7 with her mother staring at her. At this point, A.C. told the defendant about the two times that the victim raped her.

A.C. testified she told the defendant that when she was nine years old, she went to the victim's house to spend the night with her cousins. The victim was hosting a bonfire, and at one point, A.C. went inside the victim's trailer alone to watch television. The victim came inside and asked A.C. to come to his bedroom. He then asked her to take off her clothes, but she refused. The victim took off her pants and pulled her underwear down to her ankles. He left her purple "Little Mermaid" t-shirt on. The victim then touched her breasts and digitally penetrated her vagina.

A.C. testified that after the rape, she did not want to visit the victim's home again; she testified that she was scared and blamed herself for what happened. However, her aunt called and wanted A.C. and S.C. to visit for their younger cousin's birthday. During their visit, the aunt had to go to the store, and A.C., S.C., and their younger cousin wanted to go. Due to limited space in the automobile, A.C. had to stay behind with the victim. She went into her cousins' bedroom to play video games, and the victim entered the room and took off all of her clothes except her socks. He again touched her breasts and digitally penetrated her. The victim then made her perform oral

sex, and then he performed oral sex on her. He stopped when his oldest son walked into the room. After that day, the victim's oldest son started molesting A.C.

A.C. told the defendant these details on October 7, and the defendant was "devastated, sad, [and] crying." A.C. rode to school with her sister J.C., as she normally did, and went to a friend's house after school.

On cross-examination, A.C. testified that her older cousin began molesting her when she was nine or ten years old, and he did not stop until she was 13 or 14. She had never told anyone about this abuse until she told the defendant in July 2003. A.C. did not tell the defendant sooner because she was scared of her older cousin. She also did not tell her mother about the victim raping her until October 7 because she was scared of the victim.

A.C. testified that when she went to Child Help, she talked about the abuse from her cousin, but she failed to tell the counselor about the abuse inflicted by the victim because she had not told the defendant about it. Also, she was scared, was not comfortable talking to a stranger, and was not there voluntarily.

The defendant testified that she was born in South Knoxville and married her husband when she was 15 years old. They worked hard, bought a house, and raised their three children in Knox County. She testified that her sister had been with the victim, although they never married, since the defendant was 13 years old. Her sister and the victim had two boys. The defendant testified that she and her husband had more money than her sister and the victim, and the defendant gave them money on several occasions. She testified that the victim spent his money on alcohol, drugs, and gambling.

The defendant testified that A.C. was very outgoing and active. However, the defendant noticed that A.C. would come home from school and "fall apart and cry." She would throw "fits and had bouts of anger." The defendant questioned A.C. about her behavior, and in July 2003, A.C. told the defendant that her older cousin had been molesting her. Therefore, the defendant asked S.C., while they were alone at the McDonald's restaurant, if the older cousin had been molesting him as well. Once she learned that he had been abused as well, the defendant called the Knox County Sheriff's Department and reported the abuse; the Sheriff's Department began investigating. She then took the children to Child Help.

The defendant told the victim about the allegations in July. She testified that she was angry and hurt, but she wanted the older cousin to get treatment. The victim did not believe her and encouraged her to "drop it." The victim also threatened to burn the defendant's house down with her children inside. Thus, the defendant became afraid, and in August, she bought a gun and obtained a gun permit.

After A.C. was released from Peninsula Hospital, she still "had problems." A.C. would say, "Mama, you just don't know everything." On October 6, A.C. told the defendant that she

had been having dreams about the victim. The defendant inquired about the nature, but A.C. "shut down on [her], [and] went to sleep." The defendant stayed in A.C.'s room that night, and that morning A.C. told her that the victim had raped her twice. She also told the defendant the details of both rapes.

The defendant testified that she was in "[t]otal shock and heartache." She felt that she was an "unfit" parent, and she blamed herself for letting her children go to the victim's house. The defendant testified that she had to speak with the victim, so after taking her son to school, she drove to the victim's work. She testified that she kept imagining the victim raping her daughter and her daughter crying.

When the defendant arrived at Slide Lock Tools, she asked Mr. Williams to tell the victim to come outside. The victim came to the driver's side door, and he said that he did not want her to bring "this s--- to his job," referring to the abuse allegations against his oldest son. She informed the victim that A.C. told her that he had raped her. The victim stepped back, laughed at her, and asked her what she was going to do about it. The defendant said, "I lost myself. I just -- I heard gunshots and then I heard screaming, but I didn't know it was me." She testified that she did not remember shooting the victim. The next thing she remembered was talking to a lady at the Knox County Sheriff's Department. She testified that she had an appointment with the investigator in charge of her children's abuse investigation at 1:00 p.m. that day.

The defendant further testified that she did not remember Lieutenant Grissom or Officer Sherrill at the Sheriff's Department, but she did remember riding in a police car and talking to Detective McGill.

The defendant also testified that on October 7, she took the prescribed dosage of her depression medications, which were prescribed to her on July 5 due to her despair over the abuse of her children. She further testified that due to this incident and the expense of her defense, she and her husband had to sell their house and file for bankruptcy. Finally, the defendant testified that she felt hurt and sorry for her actions on October 7, 2003.

On cross-examination, the defendant testified that she was not a violent person, unless provoked. She testified that in July, after she learned of the abuse inflicted by the victim's son, the victim's son pulled into the defendant's mother's driveway. He blew the horn, made noise, and spun his tires as he drove off. The defendant felt that he was "throwing [what he had done] in [her] face." The defendant then hit the window of the victim's son's car with a stick, and she agreed that this was a violent action.

The defendant admitted that she knew that the victim took drugs, drank alcohol, and gambled. However, she did let her children go to the victim's house to visit their aunt and cousins.

The defendant also testified that her gun always stayed loaded in her "gun purse," and her children knew not to get into that purse. She carried another purse with other belongings inside. In August, she moved her driver's license to the gun purse and started carrying it when the victim started threatening her. She testified that she normally left the gun purse in her automobile, but she could not recall whether she did so on the night of October 6. She stated that she always left the ammunition in the automobile.

The defendant further testified that when she confronted the victim about the rapes on October 7, he laughed at her and taunted her. She did not remember firing shots or reloading the gun. She said, "[I]t just all seemed like a blur." The defendant also testified that she did not know why she went to the Knox County Sheriff's Department other than she knew she had an appointment there later that day.

The jury found the defendant guilty of voluntary manslaughter.

At the sentencing hearing, Evelyn Hundley, the victim's mother, testified that the victim's death devastated her family. She took custody of his younger son, and his older son is now married with a family. She opined that the defendant should receive the maximum sentence.

The defendant's youngest sister testified on her behalf that the defendant's husband worked long hours to provide for the family and that the defendant worked hard taking care of her children. She testified that the defendant's remorse for what she had done was genuine and that her "children would be lost without their mom."

A.C. testified over objection that the defendant is the person helping her cope with the abuse. She stated that she wished that she had never told her mother about the abuse. On cross-examination, she stated that she attends counseling only when school in is session.

The trial court applied the enhancement factor that the defendant "employed a firearm . . . during the commission of the offense," *see* T.C.A. § 40-35-114(10) (2003),[2] and the mitigating factor that "[t]he defendant . . . committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct," *see id*. § 40-35-113(11).[3] The court sentenced the defendant to four years in the Department of Correction.

Regarding alternative sentencing, the trial court stated that the presumption that she was a favorable candidate was overcome because "a sentence that didn't involve confinement would depreciate the seriousness of [the offense]." In addition, the court found that the evidence showed

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[2] We discern that the trial court declined to find that she treated the victim with exceptional cruelty. *See* T.C.A. § 40-35-114(6) (2003).

[3] The trial court declined to find the mitigating factor that "[t]he defendant acted under strong provocation," *see* T.C.A. § 40-35-113(2) (2003), because that was the reason the jury convicted her of voluntary manslaughter instead of second degree murder.

that the offense was "especially violent, horrifying, shocking, reprehensible" and that this outweighed the defendant's genuine remorse. The court stated that the nature of the offense outweighed other factors primarily because while the victim lay wounded, the defendant reloaded her weapon and shot the victim "three times in the head while he was trying to get away."

After sentencing, the defendant filed a timely notice of appeal challenging the sufficiency of the convicting evidence, the denial of judicial diversion, and her sentence.

I. Sufficiency of the Evidence

When a defendant challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering 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. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id*. at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, 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 which may be drawn from the evidence. *Id*.

Voluntary manslaughter, a Class C felony, "is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." T.C.A. § 39-13-211 (2006). In order to qualify as an intentional act, one must act "when it is the person's conscious objective or desire to . . . or cause the result." *Id*. § 39-11-302(a). A knowing act requires one to be "aware of the nature of the conduct" and "aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-302(b).

Here, a rational trier of fact could reasonably conclude, at least, that the defendant knowingly killed the victim in a state of passion. The defendant drove to Slide Lock Tools with the intention of confronting the victim about the rape. She had a loaded weapon in her purse. The defendant then shot the victim, reloaded the weapon, and shot him several more times. There was testimony that she said, "I told you, you son of a b----, I'd kill you." This evidence supports a knowing killing committed in a state of passion produced by adequate provocation. Thus, we hold the evidence sufficient to support the conviction of voluntary manslaughter.

II. Diversion

The defendant also argues that the trial court erred in not granting her judicial diversion.

"Judicial diversion" is a reference to Tennessee Code Annotated section 40-35-313(a)'s provision for a trial court's deferring proceedings in a criminal case. *See* T.C.A. § 40-35-313(a)(1)(A) (2003). The result of such a deferral is that the trial court places the defendant on probation "without entering a judgment of guilty." *Id*. To be eligible or "qualified" for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not "a sexual offense or a Class A or Class B felony," and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id*. § 40-35-313(a)(1)(B)(i). Diversion requires the consent of the qualified defendant. *Id*. § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). The statute states that a trial court may grant judicial diversion in appropriate cases. T.C.A. § 40-35-313(a)(1)(A) (2003) ("court may defer further proceedings"). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

"Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion." *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

> [T]he defendant's criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Id. at 343-44; *see State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id*.

On appeal, this court must determine whether the trial court abused its discretion in

failing to grant judicial diversion. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168. Accordingly, when a defendant challenges the denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

Here, although vague, the trial court's remarks reasonably can be interpreted as agreeing that the defendant possessed numerous favorable attributes supporting the award of judicial diversion, and the record clearly shows the existence of those attributes. The record also fairly reflects why the trial court believed that the "seriousness" of the offense outweighed all other factors. The defendant's armed mission to call the victim from his workplace supports the trial court's exercise of discretion in denying diversion. We hold that the trial court did not abuse its discretion in denying judicial diversion.

III. Sentencing

The defendant also contends that her sentence is excessive and that the trial court erred in denying probation or any other alternative sentencing.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to 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 enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -35-103(5) (2003).

According to the record, the trial judge erroneously believed that the defendant's sentencing was governed by the 2005 "*Blakely*" amendments to the Sentencing Act.[4] Thus, our sentencing review will be de novo without a presumption of correctness.

A. Length of Sentence

Here, the trial court applied the enhancement factor that "[t]he defendant possessed or employed a firearm . . . during the commission of the offense." T.C.A. § 40-35-114(10) (2003). The court also applied two mitigating factors:

> (11) [t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct; [and]
>
> . . . .
>
> (13) [a]ny other factor consistent with the purposes of this chapter.

T.C.A. § 40-35-113(11) & (13) (2006). In applying subsection (13), the court found that the defendant was genuinely remorseful. The trial court weighed the factors and sentenced the defendant to fours years in the Department of Correction.

In the present case, the record supports the application of enhancement factor (10) that a firearm was used in the commission of the offense, a factor that warrants significant weight. Thus, we hold that the defendant's sentence of four years is proper.

B. Probation

We note that the defendant was statutorily eligible to serve a suspended sentence. *See* T.C.A. § 40-35-303(a) (2003). The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App.

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[4] In response to *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee Legislature amended Tennessee Clde Annotated 40-35-210 so that Class A felonies now have a presumptive sentence beginning at the minimum of the sentencing range. *Compare* T.C.A. § 40-35-210(c) (2003) *with* T.C.A. § 40-35-210(c) (2006). This amendment became effective on June 7, 2005. The legislature provided that this amendment would apply to a defendant who committed a criminal offense on or after July 1, 1982, and was sentenced after June 7, 2005, if such defendant elected to be sentenced under the 2005 provisions by executing a waiver of his or her *ex post facto* protections. The defendant in the present case executed no such waiver.

We also note that the defendant has not challenged her sentence in light of the United States Supreme Court decisions in *Blakely*, or, more recently in *Cunningham v. California*, 549 U.S. __, 127 S. Ct. 856 (2007). Due to the defendant's failure to raise the challenge to her sentence via *Blakely* or *Cunningham*, we decline to address any issue in that regard.

1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish her "suitability for full probation as distinguished from [her] favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2006); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

In the present case, the record indicates that the defendant was in a stable marriage with a hard-working husband, had steady employment when not home raising her three children, had no criminal record, and did not use alcohol or drugs. In addition, the record shows that she turned herself into the police after the crime, and at the sentencing hearing, the trial court found that her remorse for her actions was genuine.

Nevertheless, the trial court referred to the "nature and circumstances of the criminal conduct involved," *see* T.C.A. § 40-35-210(b)(4) (2003), and stated in essence that "[c]onfinement is necessary to avoid depreciating the seriousness of the offense," *id*. § 40-35-103(1)(B).

The defendant drove to the victim's place of employment and, with a loaded pistol at the ready, she called him out and ultimately shot him several times. The record supports the trial court's implicit finding that the defendant failed to carry her burden of showing that full probation would "subserve the ends of justice and the best interest of both the public and the defendant." *Dykes*, 803 S.W.2d at 259, *overruled on other grounds by Hooper*, 29 S.W.3d at 9; *see also State v. Michael D. Frazier*, No. 03C01-9602-CR-00084, slip op. at 14 (Tenn. Crim. App., Knoxville, June 4, 1997) (upholding denial of probation based solely upon the nature and circumstances of the offense).

C. Alternative Sentencing

The defendant argues that the trial court erred in denying her an alternative sentence.

The defendant is a standard, Range I offender convicted of a Class D felony. As such, she is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See* T.C.A. § 40-35-102(6) (2003). However, this presumption does not entitle all offenders to alternative sentences; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The presumption of favorable candidacy for alternative sentencing in general, which is applicable in the present case, may be overcome by showing that at least one of the conditions set forth in Tennessee Code Annotated section 40-35-103(1) is met. *See, e.g., State v. Jimmy Ray Dockery*, No. E2004-00696-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Nov. 30, 2004) ("Although the defendant enjoyed the presumption of favorable candidacy for alternative

sentencing, the record reveals two solid bases for overcoming the presumption: (1) that confinement is necessary to restrain a defendant who has a long history of criminal conduct and (2) that measures less restrictive than confinement have recently been applied unsuccessfully to the defendant."); *State v. Christopher C. Rigsby*, No. E2003-01329-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Knoxville, Dec. 29, 2003) ("[T]he record in this case amply demonstrates that the presumption of favorable candidacy for alternative sentencing in general was soundly rebutted by the defendant's extensive history of lawless behavior," citing Tennessee Code Annotated section 40-35-103(1)(A)); *see also State v. Nunley*, 22 S.W.3d 282, 286 (Tenn. Crim. App. 1999) (stating that although the factor "'social history' must be considered in determining whether to grant probation. . ., social history is not specifically mentioned by the code as a factor to be used in overcoming the presumption of suitability for alternative sentences"). These considerations include:

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

T.C.A. § 40-35-103(1) (2003). Only subsection (1)(B), "[c]onfinement is necessary to avoid depreciating the seriousness of the offense," is applicable in this case.

In Tennessee, there is a well-recognized nexus between the "nature and characteristics" of the offense and sentencing to avoid depreciating the seriousness of the offense. The nature and characteristics, or circumstances, of the offense have long been recognized as grounds for denying probation. *Stiller v. State*, 516 S.W.2d 617, 621 (Tenn. 1974); *Powers v. State*, 577 S.W.2d 684, 685-86 (Tenn. Crim. App. 1978); *Mattino v. State*, 539 S.W.2d 824, 828 (Tenn. Crim. App. 1976). The courts have used this rationale for denying probation often in cases of homicide or in other cases in which the offense was violent. *See Kilgore v. State*, 588 S.W.2d 567, 568 (Tenn. Crim. App. 1979); *see also Powers*, 577 S.W.2d at 685-86; *Mattino*, 539 S.W.2d at 828. The nature and circumstances of the offense may serve as the sole basis for denying any probation when they are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree; and it would have to be clear that, therefore, the nature of the offense, as committed, outweighed all other factors . . . which might be favorable to a grant of probation." *State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981); *see also State v. Cleavor*, 691 S.W.2d 541, 543 (Tenn. 1985), *overruled on other grounds by Hooper*, 29 S.W.3d at 9. Significantly, "[t]his standard has essentially been codified in the first part of T[ennessee] C[ode] A[nnotated] [section] 40-35-103(1)(B) which provides for confinement if it 'is necessary to avoid depreciating the seriousness of the offense.'" *State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App. 1991), *perm. app. denied* (Tenn. 1991). Thus, in a proper case, all probation may be denied

solely on the basis of Code section 40-35-103(1)(B) when the nature and circumstances of the offense justify confinement to avoid depreciating the seriousness of the offense, provided that one of the *Travis* qualifiers is present.

We are mindful that although the defendant bears the burden of establishing suitability for full probation and although we do not find that the defendant demonstrated that full probation was appropriate in this case, she enjoyed the presumption of favorable candidacy for alternative sentencing. Moreover, the record does reflect suitability for alternative sentencing. Because of the nature and circumstances of the defendant's offense, we conclude that some period of incarceration is necessary to avoid depreciating the seriousness of the offense; however, although the death of the victim caused by the defendant's criminal behavior is certainly a serious matter, on de novo review, we are unable to conclude that the circumstances of the offense outweigh all other factors that demonstrate the defendant's suitability for alternative sentencing.

Upon our de novo review, we afford weight to the fact that the defendant was in a stable marriage with a hard-working husband, had steady employment when not home raising her three children, had no criminal record, and did not use alcohol or drugs. In addition, she turned herself into the police after the crime, fully cooperating. At the sentencing hearing, the trial judge found that she committed the crime under usual circumstances and that her remorse for her actions was genuine. The sentencing hearing testimony also revealed that the defendant was the caretaker helping her children cope with their problems. Finally, we believe she evinces a good chance of rehabilitation.

Thus, upon our de novo review, we sentence the defendant to serve six months in confinement and the remaining three years and six months on supervised probation. *See* T.C.A. § 40-35-306 (2006) ("A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense."); *see also State v. Louis Lavergne*, No. 01C01-9803-CR-00128, slip op. at 11 (Tenn. Crim. App., Nashville, July 8, 1999) (ordering split confinement for defendant convicted of voluntary manslaughter for killing his stepfather who was abusing his mother). In addition to the usual and customary rules of probation, the defendant shall be required to perform 120 hours of community service as a condition of her post-confinement probation.

IV. Conclusion

The judgment of the trial court is affirmed as modified.

JAMES CURWOOD WITT, JR., JUDGE