IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 15, 2022 Session

STATE OF TENNESSEE v. JOSHUA X. BEASLEY

Appeal from the Criminal Court for Knox County
No. 117534 Steven Wayne Sword, Judge

No. E2021-01483-CCA-R3-CD

The Defendant, Joshua X. Beasley, was convicted in the Knox County Criminal Court of various drug offenses committed within a drug-free zone and received an effective fifteen-year sentence to be served at one hundred percent in confinement. Subsequently, the trial court granted his motion to resentence him pursuant to the amended version of the Drug-Free Zone Act and imposed an effective twelve-year sentence to be served at thirty percent release eligibility. On appeal, the Defendant contends that the evidence is insufficient to support his convictions and that the trial court erred by initially sentencing him under the previous version of the Act. Based upon the oral arguments, the record, and the parties' briefs, we affirm the Defendant's convictions but remand for resentencing as to his conviction in count four, delivering fentanyl, and correction of the judgment.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and TIMOTHY L. EASTER, J., joined.

Jonathan Harwell (on appeal) and David Skidmore (at trial), Knoxville, Tennessee, for the appellant, Joshua X. Beasley.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Ta Kisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In June 2020, the Knox County Grand Jury returned a seven-count indictment, charging the Defendant as follows: count one, possession of fifteen grams or more of heroin with intent to sell, deliver, or manufacture on July 25, 2019; count two, delivery of less than fifteen grams of heroin on July 23, 2019; count three, sale of less than fifteen grams of heroin on July 23, 2019; count four, delivery of less than two hundred grams of fentanyl on July 23, 2019; count five, sale of fentanyl on July 23, 2019; count six, delivery of gabapentin on June 27, 2019; and count seven, sale of gabapentin on June 27, 2019. Each count alleged that the offense occurred within 1,000 feet of the real property of a public elementary school. The State dismissed count five on the morning of trial.

At trial, Officers Jeffrey Torres and Kevin Varner of the Knoxville Police Department ("KPD") testified that on July 25, 2019, they assisted the KPD's "SWAT team" and the Drug Enforcement Administration ("DEA") with the execution of a search warrant at a home on Knoxville College Drive. Their job was to block traffic with their marked patrol car and arrest the suspect, who was the Defendant, if he was present. During the execution of the warrant, Officers Torres and Varner heard over the police radio that the Defendant was in a red sedan, so they approached the sedan and arrested him. Officer Torres searched the Defendant incident to arrest and found a brown, powder substance that appeared to be heroin in his front, left pocket. On cross-examination, the officers testified that during the Defendant's arrest, he said he had drugs on his person. The State played a video of the arrest for the jury.

Lloyd Grimes testified that he lived in Blount County, that one of his hands was "ripped off" during an automobile accident, and that he became addicted to oxycodone he was taking for pain. The pain clinic from which he obtained oxycodone closed, so he began using heroin. In 2019, Mr. Grimes was arrested for selling heroin and went to jail. He agreed to help the Fifth Judicial District Drug Task Force and gave agents information about the Defendant, whom he knew as "Q."

Mr. Grimes testified that he began making undercover drug buys from the Defendant for the Drug Task Force. On June 27, 2019, Mr. Grimes made a controlled telephone call to the Defendant in the presence of law enforcement. After the call, police officers searched Mr. Grimes to make sure he did not have any drugs on his person, equipped him with a video camera, and gave him money to buy heroin. A police officer drove Mr. Grimes to the Defendant's house on Knoxville College Drive, and Mr. Grimes went inside and purchased heroin from the Defendant for $1,100. Mr. Grimes gave the heroin to the police officer.

Mr. Grimes testified that he and law enforcement repeated that scenario on July 17, 2019. During the second drug buy, the Defendant went downstairs into his basement, returned upstairs, and handed a substance to Mr. Grimes. Mr. Grimes thought the substance was heroin, paid the Defendant $1,200, and gave the substance to a police officer. On July 23, 2019, Mr. Grimes participated in a third drug buy from the Defendant at the Defendant's home and paid the Defendant $900 or $1,000 for heroin.

The State played for the jury audio-recorded telephone calls Mr. Grimes made to the Defendant on June 27, July 17, July 22, July 23, and July 24, 2019, to set up the three drug buys. The State also played video recordings of the June 27 and July 17 drug buys.

On cross-examination, Mr. Grimes acknowledged that he agreed to help the Drug Task Force because he was facing serious charges for selling heroin. The Drug Task Force wanted him to purchase heroin, so he told agents about the Defendant. In return for helping law enforcement, Mr. Grimes received a sentence of eight years on probation for his drug convictions. He also received one hundred dollars for each drug buy.

Agent Michael Davis of the DEA in Knoxville testified that the Fifth Judicial Drug Task Force gave him information about Mr. Grimes, who claimed he could make drug purchases in Knox County. Agent Davis spoke with Mr. Grimes, and Mr. Grimes said he could buy drugs from "Q." Agent Davis obtained Q's cellular telephone number and address from Mr. Grimes and used that information to identify Q as the Defendant. Agent Davis then set up controlled drug buys with Mr. Grimes acting as a confidential informant. For each buy, Mr. Grimes telephoned the Defendant and arranged a time to buy heroin. Agents searched Mr. Grimes for drugs and weapons, and an undercover agent accompanied him to the Defendant's house. On June 27, July 17, and July 23, 2019, Mr. Grimes went into the Defendant's home and bought drugs from him.

Agent Davis testified that he obtained a search warrant for the Defendant's house and that the DEA executed the warrant on July 25, 2019. During the search, agents found a set of scales, "an unknown substance that's twisted in a corner plastic baggie," and ammunition. KPD officers helped execute the warrant, and Agent Davis received a substance from Officers Torres and Varner. The substance looked like heroin and appeared to be for resale. Agent Davis explained that the substance weighed twenty-two grams, which could be broken down into two hundred twenty "hits." Each hit of heroin was worth twenty to forty dollars. Agent Davis sent the substances purchased by Mr. Grimes and the substance obtained by Officers Torres and Varner to the DEA laboratory for analysis.

On cross-examination, Agent Davis testified that Mr. Grimes was not in jail when he first spoke with Mr. Grimes. The three controlled buys occurred at the Defendant's residence, and Mr. Grimes entered the home all three times specifically to buy heroin. The

substance Mr. Grimes bought from the Defendant on July 23 and the substance officers found in the Defendant's pocket on July 25 were heroin. However, the substances Mr. Grimes bought from the Defendant on June 27 and July 17 were not heroin. Mr. Grimes wore a camera during all three drug buys, but the July 23 transaction was not video recorded. Agent Davis said, "I don't know exactly if there was a technical issue with the camera or what exactly happened, but the camera -- we didn't record it." Agent Davis said, though, that Mr. Grimes' recorded telephone calls reflected that he was going to the Defendant's home to buy heroin that day.

Heather Keith, a senior forensic chemist at the DEA's National Regional Laboratory in Nashville, testified as an expert in forensic chemistry that she analyzed the substances obtained from the Defendant on July 17, July 23, and July 25, 2019. The substance Mr. Grimes bought from the Defendant on July 17 was not a controlled substance. The substance Mr. Grimes bought from the Defendant on July 23 was a mixture of heroin and fentanyl and weighed 6.94 grams. The substance police officers found in the Defendant's pocket on July 25 was heroin and weighed 22.71 grams. Danielle Lavictoire, a senior forensic chemist at the DEA's Mid-Atlantic Laboratory in Maryland, testified as an expert in forensic chemistry that she analyzed the substance Mr. Grimes bought from the Defendant on June 27, 2019. The substance was gabapentin and weighed 3.60 grams.

Donna Roach testified that she was employed by Knoxville Geographic Information Systems (KGIS), which prepared maps for Knox County. Ms. Roach created a map of Maynardville Elementary School with a one-thousand-foot buffer around the school's property line, and the Defendant's house was within the buffer. The State introduced the map into evidence.

Martin L. Timms testified that he was an investigator in the Security Division for Knox County Schools and that Maynardville Elementary was a school in Knox County in June and July 2019. Summer programs were being held at the school during that time, and adults and children were present at the school. On cross-examination, Mr. Timms testified that he had never seen the Defendant previously and that, to his knowledge, the Defendant had never been on the property of Maynardville Elementary. Mr. Timms did not know anything about what occurred at the Defendant's home.

At the conclusion of Mr. Timms's testimony, the State rested its case. The Defendant did not present any proof, and the jury convicted him as charged in the indictment of possession of fifteen grams or more of heroin with intent to sell within a drug-free zone, a Class A felony, in count one; delivery of less than fifteen grams of heroin within a drug-free zone, a Class A felony, in count two; sale of less than fifteen grams of heroin within a drug-free zone, a Class A felony, in count three; delivery of less than two hundred grams of fentanyl within a drug-free zone, a Class B felony, in count four; delivery

of gabapentin within a drug-free zone, a Class D felony, in count six; and sale of gabapentin within a drug-free zone, a Class D felony, in count seven.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant claims that the evidence is insufficient to support his convictions related to the drug buy on July 23, 2019, because the transaction was not captured on video to corroborate Mr. Grimes's testimony.[1] The State argues that the evidence is sufficient. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

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

[1] In his brief, the Defendant contends that the evidence is insufficient to support his convictions of delivering and selling heroin in counts two and three, respectively. However, given that his conviction of delivering fentanyl in count four also resulted from the drug buy on July 23, we will assume that he is challenging the sufficiency of the evidence for that conviction as well.

It is an offense for a defendant knowingly to deliver or sell a controlled substance. Tenn. Code Ann. § 39-17-417(a)(2), (3). Heroin is a Schedule I controlled substance, and fentanyl is a Schedule II controlled substance. Tenn. Code Ann. §§ 39-17-406(c)(11), 408(c)(9).

Taken in the light most favorable to the State, the evidence shows that on July 23, 2019, Mr. Grimes participated in a controlled drug buy for the DEA. Mr. Grimes testified that prior to the drug buy, he spoke with the Defendant on the telephone to set up the buy. The State played three recorded calls related to the July 23 drug buy for the jury, and we have reviewed the recordings. During the first call, which occurred on July 22, the Defendant told Mr. Grimes that "I got a mean ass deal for you." Mr. Grimes told the Defendant that he could not meet the Defendant until the next day, that he wanted "the same deal," and that he would see the Defendant about noon on July 23. During the second call, which occurred on July 23, Mr. Grimes told the Defendant that he would be "there" in about an hour. During the third call, which also occurred on July 23, Mr. Grimes told the Defendant that he was "getting close," and the Defendant replied that he was "waiting on" Mr. Grimes. Mr. Grimes testified that when he arrived at the Defendant's home, he paid the Defendant $900 or $1,000 for heroin. Agent Davis testified about the July 23 drug buy and corroborated Mr. Grimes's testimony. Agent Davis sent the substance Mr. Grimes purchased from the Defendant on July 23 to the DEA laboratory, and analysis showed that the substance was a mixture of heroin and fentanyl. The State also presented proof that the Defendant's home was within 1,000 feet of Maynardville Elementary School.

Although the July 23 drug buy was not captured on video like the other two drug buys, the jury, as was its prerogative, obviously chose to accredit the State's witnesses. Therefore, we conclude that the evidence is sufficient to support the Defendant's convictions of delivering heroin within a drug-free zone in count two, selling heroin within a drug-free zone in count three, and delivering fentanyl within a drug-free zone in count four.

II. Drug-Free Zone Act

The Defendant contends that the trial court erred by initially sentencing him pursuant to the "old" version of the Drug-Free Zone Act rather than the amended version that went into effect after he committed the crimes but prior to sentencing. Although the trial court ultimately resentenced the Defendant pursuant to the amended version of the Act, the Defendant asserts that the resentencing did not render his issue moot because he may have received an even lesser sentence if the trial court initially had been required to sentence him under the amended version of the Act. The State argues that the trial court properly sentenced the Defendant pursuant to the prior version of the Act, which was in

effect at the time of the crimes, and that the trial court's subsequent resentencing of the Defendant renders the issue moot. We agree with the State.

The Defendant committed the crimes in June and July 2019. At that time, the Drug-Free Zone Act provided that a violation of Tennessee Code Annotated section 39-17-417 that occurred within 1,000 feet of the real property that comprised a public or private elementary school, middle school, secondary school, preschool, child care agency, public library, recreational center, or park required that a defendant be punished one classification higher than the statute provided for the offense. Tenn. Code Ann. § 39-17-432(b)(1) (2018). The defendant also was required to pay certain fines based on the class of felony and was required to serve at least the minimum sentence for the defendant's appropriate range of sentence. Tenn. Code Ann. § 39-17-432(b)(2), (c) (2018). A defendant convicted of violating Tennessee Code Annotated section 39-17-417 near a preschool, childcare center, public library, recreational center, or park was subject to the additional fines but not "additional incarceration." Tenn. Code Ann. § 39-17-432(b)(3) (2018).

In 2020, our legislature made it more difficult to trigger the Drug-Free Zone Act by reducing the drug-free zone around the real property at issue from 1,000 feet to 500 feet. *See* Tenn. Code Ann. § 39-17-432(b)(1)(B) (2020). Additionally, the previous Drug-Free Zone Act's requirements that the defendant be punished one classification higher, pay additional fines, and serve at least the minimum sentence for the defendant's appropriate range of sentence became discretionary in the 2020 amendments to the Act. *See* Tenn. Code Ann. § 39-17-432(b)(1), (b)(2), (c)(1) (2020). Finally, the 2020 amendments to the Drug-Free Zone Act created a rebuttable presumption that the defendant was not required to serve the minimum sentence for the defendant's appropriate range of sentence at one hundred percent and provided that the presumption was overcome if the trial court found that the defendant's conduct "exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity." Tenn. Code Ann. § 39-17-432(c)(2) (2020). Public Chapter 803, section 12 of the Public Act specified that the 2020 amendments to the Drug-Free Zone Act were to apply to offenses committed on or after September 1, 2020. Tenn. Code Ann. § 39-17-432 (2020), Compiler's Notes.

The Defendant went to trial in July 2021. Before trial, he filed a motion in limine, stating that under Tennessee Code Annotated section 39-11-112, commonly known as the criminal savings statute, the trial court should sentence him under the new version of the Act if convicted. On the morning of trial, defense counsel reminded the trial court about the motion in limine and stated that the motion "might be something more properly taken up at sentencing." The trial court agreed, stating, "Yeah. Let's wait. If they don't convict him of anything, then we don't need to worry about it." During the final jury charge, the trial court instructed the jurors that if they found the Defendant guilty of the drug offenses alleged in the indictment beyond a reasonable doubt, then they also were to determine

whether the offenses occurred within 1,000 feet of an elementary school beyond a reasonable doubt. The jury convicted the Defendant of all six counts and found that he committed the offenses within Maynardville Elementary School's drug-free zone.

The trial court held a sentencing hearing on September 17, 2021. At the outset of the hearing, defense counsel addressed the motion in limine and maintained that under the criminal savings statute, the trial court could sentence the Defendant pursuant to the amended version of the Drug-Free Zone Act. Defense counsel also contended that because the State failed to prove that the Defendant's drug offenses actually affected school children or children of a vulnerable age, the rebuttable presumption in the amended version of the Act had not been overcome; accordingly, the trial court could sentence the Defendant as a Range I, standard offender, which would make him eligible for release after serving thirty percent of his sentence. The State argued that the amended version of the Drug-Free Zone Act did not apply in this case because the plain language of the amended Act's enabling legislation stated that the amendments applied to offenses committed on or after September 1, 2020.

Investigator Terry Pate of the KPD testified for the State that he was on a task force responsible for investigating overdose deaths and that for the past ten years, drug dealers had been selling fentanyl, a synthetic opioid that was more potent and powerful than heroin, to drug addicts and claiming the fentanyl was heroin. As a result, overdose deaths had dramatically increased. People from outside of Knox County traveled to Knoxville to obtain heroin. On cross-examination, Investigator Pate testified that, to his knowledge, no overdose deaths were related to the Defendant's drug sales.

The Defendant testified that he was born in 1991 and lived with his grandmother and father. When the Defendant was about fourteen years old, he went into the custody of the Department of Children's Services (DCS) and ended up in a woman's foster home. The woman introduced him to crack cocaine and molested him. The Defendant acknowledged that he got into trouble as a juvenile but said that he had never been convicted of a violent offense. As an adult, the Defendant pled guilty to a drug offense and received an eight-year sentence to be served on probation. He violated probation by testing positive for marijuana, went to prison, and was released on parole in 2017. While on parole and with just fifty days left to serve on his sentence, he was charged with a firearm offense, which was later dismissed, and was charged with the offenses in this case. The Defendant said that his oldest son had Down Syndrome, that he recently had become a father again, and that he wanted to be in the lives of his children.

On cross-examination, the Defendant acknowledged that he became associated with the Gangster Disciples as a juvenile and that he went to live with his mother on Knoxville College Drive when he was seventeen or eighteen years old. When he pled guilty to the

drug charge and received the eight-year probation sentence, he was granted judicial diversion. However, a couple of months after his guilty plea, he tested positive for marijuana, stopped reporting to probation, and went to prison. The Defendant started using heroin in prison. After he was released on parole, he was "clean" for two years but then started using heroin, fentanyl, and gabapentin. He denied ever selling any of those drugs.

Yolanda Denise Smith, the Defendant's mother, testified that the Defendant was diagnosed with ADHD in elementary school and that he did not like going to school because he could not read well and "was being picked on." The Defendant went into DCS custody due to truancy and possession of tobacco and was "introduced to drugs." When the Defendant returned to Ms. Smith, he was a drug addict. After the Defendant was released from prison and placed on parole in 2017, he moved into Ms. Smith's home and got married. The Defendant and his wife had a baby with Down Syndrome, but the Defendant's wife took the baby and moved to Oregon. The Defendant "spiraled out of control again on drugs" and picked up the gun charge and the charges in this case with just fifty days left to serve on his sentence. The Defendant served that fifty days in confinement while his father was dying of cancer. The Defendant was unable to get out of jail before his father died, so he missed his father's funeral. Ms. Smith said that she had been "fighting a battle of getting him off of drugs" and that "he does well until something tragic happens." She said that the Defendant became a father again recently and that she had seen "a tremendous change" in him. She said that he was showing up for court and that "[h]e's done everything that we've asked him to do." Ms. Smith stated that the Defendant obtained his GED in prison and that he could be successful in the community if he received help with his drug addiction.

The State introduced the Defendant's presentence report into evidence. According to the report, the Defendant was thirty years old, divorced, and had two sons, who were three and seven years old. In the report, the Defendant said he attended high school until sometime in the eleventh grade when he was removed and placed in a group home. He obtained his GED in 2015. The Defendant described his mental health as "'poor'" due to past and recent suicidal thoughts but described his physical health as "'good.'" The Defendant said in the report that he first consumed alcohol when he was nine years old, that he began using marijuana when he was eleven years old, and that he had never received treatment for his drug use. The report showed that the Defendant worked for Custom Foods for one month in 2017, as a laborer for Industrial Cleaning for one month in 2021, and as a cashier for Pilot for one month in 2021. The report showed no other employment for the Defendant.

According to the report, the Defendant was convicted of possession of cocaine in 2013, received an eight-year sentence, and was granted judicial diversion and placed on probation. However, his probation was revoked and his sentence was placed into effect.

The report also showed that, as a juvenile, the Defendant was adjudicated to have committed voluntary manslaughter and criminal impersonation. He also violated the statute that requires a license to be carried and exhibited, and he violated runaway statutes related to DCS commitments. Finally, the State introduced into evidence a juvenile court petition, showing that the Defendant was adjudicated delinquent of possession of a weapon when he was seventeen years old.

The trial court agreed with the State that the language in the amended version of the Drug-Free Zone Act "trump[ed]" the savings statute and that the trial court had "no choice" but to sentence the Defendant under the previous version of the Act. The trial court noted that the Defendant was a Range I, standard offender and found that the following enhancement factors applied to his convictions: (1), that the Defendant "has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; (8) that the Defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community; and (13), that at the time the felony was committed, the Defendant was released on parole. Tenn. Code Ann. § 40-35-114(1), (8), (13)(B). In mitigation, the trial court found that the Defendant "had a very difficult life." *See* Tenn. Code Ann. § 40-35-113(13) (allowing mitigation of a sentence for "[a]ny other factor" consistent with the purposes of sentencing). However, the trial court said it did not believe the Defendant's claim that he did not sell drugs in this case and that the enhancement factors "greatly" outweighed the mitigating factor. The trial court then stated as follows:

> [E]ven though I would be justified to sentence you to 25 years, I think that is just way too much time, since there's no parole eligibility for this. So I do think 15 years is the least amount that I can give you.
>
> Now, if the Appellate Court comes back and tells me I'm wrong about that, that, in fact, it can be sentenced at 30 percent, if the Court finds, under the new statute, that the Court should make those considerations, then we're going to have to have a resentencing hearing. 'Cause it's possible -- if you're not serving 100 percent, it's possible you could end up getting more than 15. 'Cause the only reason I'm saying 15, with all this enhancement there, is because I think that is plenty of time for what you're doing. That is a long sentence. No doubt about it. But that is the logic that I'm going to use in applying your judgment.

The trial court sentenced the Defendant to fifteen years, the minimum punishment in the range for a Class A felony, in counts one, two, and three and merged count three into count two. *See* Tenn. Code Ann. § 40-35-112(a)(1). The trial court stated that it was

sentencing the Defendant to six years for a Class C felony in count four[2] and to four years for a Class D felony in counts six and seven and merged count seven into count six. *See* Tenn. Code Ann. § 40-35-112(a)(3), (4). The trial court ordered that the Defendant serve all of the sentences concurrently for a total effective sentence of fifteen years and noted that he would have to serve the fifteen-year sentence at one hundred percent pursuant to the Drug-Free Zone Act. *See* Tenn. Code Ann. § 39-17-432(c) (2018).

The trial court denied the Defendant's motion for new trial, and the Defendant filed a timely notice of appeal to this court. In addition to his sufficiency claim, the Defendant asserted in his appellate brief that the amended version of the Drug-Free Zone Act should apply to offenses sentenced after the effective date of the amendment pursuant to the criminal savings statute and that his "disproportionately enhanced sentence" pursuant to the previous version of the Act constituted cruel and unusual punishment.

On September 27, 2022, while his appeal was pending, the Defendant filed a motion in the trial court to reduce his sentences pursuant to Tennessee Code Annotated section 39-17-432(h), which became effective on April 29, 2022, and allowed defendants sentenced for offenses committed before September 1, 2020, to file a motion for resentencing under the amended version of the Drug-Free Zone Act.[3] At a hearing on the motion on December 6, 2022, defense counsel argued that resentencing the Defendant was appropriate because the Defendant's drug offenses did not affect any school children. The State acknowledged that the proof at trial showed that the Defendant's drug offenses occurred more than five hundred feet from the elementary school but argued that his repeatedly selling drugs in the Mechanicsville community was a danger to that community.

The trial court took a recess to consider whether it should grant the Defendant's motion to resentence him pursuant to the amended version of the Act. When the hearing resumed, the trial court stated that because the Defendant's offenses occurred more than five hundred feet from the elementary school and did not subject any children to the dangers inherent in drug activity, the Defendant should be resentenced under the amended

[2] Delivering less than two hundred grams of fentanyl within a drug-free zone was a Class B felony; therefore, the trial court erred by sentencing the Defendant for a Class C felony. *See* Tenn. Code Ann. § 39-17-417(i)(12) (2018) (violating Tennessee Code Annotated section 39-17-417(a) with respect to less than two hundred grams of any Schedule I or II substance not listed in subdivisions (i)(1)-(11) was a Class C felony); Tenn. Code Ann. § 39-17-417-432(b)(1) (2018) (punishing offenses within a drug-free zone one classification higher).

[3] When a defendant files a notice of appeal, this court's jurisdiction attaches, and the trial court loses jurisdiction. *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). This court heard oral arguments in this case on November 15, 2022. We later entered an order granting the Defendant a motion to stay the appellate proceedings pending the trial court's adjudication of his motion to reduce his sentences and remanded the case to the trial court for the limited purpose of said adjudication.

Act, making each offense one classification lower than the convicted offense. The trial court specifically adopted its findings from the previous sentencing hearing and found that the enhancement factors weighed in favor of more than the minimum punishment in the range for the offenses. The trial court stated that it was resentencing the Defendant as a Range I, standard offender to concurrent sentences of twelve years for the convictions in counts one, two, and three, Class A felonies; four years for the conviction in count four, a Class D felony; and two years for the convictions in counts six and seven, Class E felonies. The trial court noted that the Defendant's effective sentence was being modified from fifteen years at one hundred percent to twelve years at thirty percent release eligibility.

Subsequently, the Defendant notified this court that his being resentenced had rendered his "disproportionately enhanced sentence" claim moot but that his claim regarding whether he should have been sentenced under the amended version of the Drug-Free Zone was "not completely" moot because, had the trial court been required to sentence him under the amended version of the Act in the first place, the trial court may have chosen an even lesser effective sentence than twelve years. This court entered an order, directing that the Defendant and the State rebrief the latter issue.

In his supplemental brief, the Defendant maintains that although he has received relief from the trial court in the form of resentencing and a new effective sentence under the amended version of the Drug-Free Zone Act, the issue is not moot because he may have received an even lesser effective sentence if the trial court initially had been required to sentence him pursuant to the amended version of the Act. The State responds that the Defendant's claim that he may have received a lesser sentence if he originally had been sentenced under the amended version of the act is "based on nothing more than mere speculation" and that his resentencing has rendered the issue moot. We agree with the State.

"A moot case is one that has lost its character as a present, live controversy; thus, a suit brought to enjoin a particular act becomes moot once the act sought to be enjoined takes place." *Giovanny Morpeau v. State*, No. M2002-00060-CCA-R3-CO, 2002 WL 1905332, at *1 (Tenn. Crim. App. Aug. 12, 2002) (citing *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994)). The Defendant sought resentencing by the trial court pursuant to the amended version of the Drug-Free Zone Act, and resentencing occurred. Therefore, the issue of whether he initially should have been sentenced under the amended version of the Act is moot. In any event, this court already has rejected claims that defendants who commit offenses prior to September 1, 2020, but are sentenced after that date, are entitled to be sentenced pursuant to the amended version of the Act. *See State v. Carrie Joann Hamlin*, No. E2022-00139-CCA-R3-CD, 2023 WL 177105, at *5 (Tenn. Crim. App. Jan. 10, 2023), *perm. app. filed* (Tenn. Mar. 13, 2023); *State v. James Clark McKenzie*, No. E2021-00445-CCA-R3-CD, 2022 WL 2256338, at *10 (Tenn. Crim. App.

June 23, 2022), *perm. app. denied* (Tenn. Nov. 16, 2022). The Defendant is not entitled to relief on this issue.

Nevertheless, we conclude that we must remand the case to the trial court for resentencing as to count four, delivering fentanyl. Without the drug-free zone enhancement, that offense was a Class C felony.[4] However, the trial court said during resentencing, "The C felony in Count 4 will drop to a D. That will be four years." (p.11, line 5) The amended judgment of conviction for count four also reflects that the trial court sentenced Defendant for a Class D felony. Thus, we remand the case to the trial court for resentencing in count four and for correction of the amended judgment.

CONCLUSION

Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court but remand the case to the trial court for further proceedings consistent with this opinion.

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JOHN W. CAMPBELL, SR., JUDGE

[4] We note that effective April 25, 2019, prior to the Defendant's offenses, Tennessee Code Annotated section 39-17-417(i)(12) was amended specifically to list fentanyl. The statute provides that a violation of Tennessee Code Annotated section 39-17-417(a) with respect to any substance containing fifteen grams of more of fentanyl is a Class B felony. Here, the substance containing fentanyl weighed 6.94 grams. Therefore, under either Tennessee Code Annotated section 39-17-417(i)(12) (2018) or (2019), delivering fentanyl in this case, without the drug-free zone enhancement, was a Class C felony.