IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2023 Session

STATE OF TENNESSEE v. JEREMY JEROME HARDISON

Appeal from the Criminal Court for Knox County
No. 114655 G. Scott Green, Judge

No. E2022-00207-CCA-R3-CD

A Knox County jury convicted the Defendant, Jeremy Jerome Hardison, of first degree premeditated murder. The Defendant appeals, contending that (1) the trial court erred by denying the Defendant's motion to recuse the trial judge; (2) the trial court erred by denying the Defendant's motion to suppress evidence obtained from the execution of a search warrant on his residence; (3) the trial court unconstitutionally limited the Defendant's ability to cross-examine a witness; (4) the trial court erred by admitting expert ballistics testimony at trial; and (5) the evidence was insufficient to prove the Defendant's identity as the perpetrator. After review, we affirm the judgment of the trial court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JILL BARTEE AYERS, JJ., joined.

Joshua D. Hedrick (on appeal) and Gregory P. Isaacs and J. Franklin Ammons (at trial), Knoxville, Tennessee, for the appellant, Jeremy Jerome Hardison.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Charme P. Allen, District Attorney General; and Hector I. Sanchez and Joanie Stallard Stewart, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On the afternoon of September 24, 2017, Jonathan Stewart was shot in the back on Selma Avenue in Knoxville and died as a result of his injuries. The shooting occurred near a home-renovation site that was owned by the Defendant and his brother. Workers present at the renovation site gave initial statements to investigators with the Knoxville Police

Department ("KPD") but denied having any information as to the identity of the shooter. On October 14, 2018, however, a KPD investigator spoke with some of these witnesses again, and three of them provided statements implicating the Defendant. On January 16, 2019, a Knox County grand jury returned a presentment against the Defendant charging him with the first degree premeditated murder of the victim and two alternative counts of possession of a firearm by a convicted felon. *See* Tenn. Code Ann. §§ 39-13-202, -17-1307(b)(1)(A), (B). The next day, KPD officers executed a search warrant on the Defendant's residence on Upland Avenue and seized, among other items, a firearm that was consistent with the description provided by the witnesses. The trial court severed the firearm counts prior to trial, and the Defendant proceeded to trial on the first degree murder charge on September 13, 2021.

A. Defense Motions

1. Recusal of the Trial Judge

On January 9, 2020, the Defendant filed a motion to recuse the trial judge. According to his motion, the trial judge had previously informed the parties that during his prior employment as a Knox County prosecutor, "he participated in investigations concerning allegations against [the Defendant]." This circumstance, the Defendant argued, could cause a reasonable person to perceive that a conflict of interests existed and that the trial judge could not impartially preside over the Defendant's proceedings.

The trial court heard the motion on January 17, 2020. During the hearing, the trial judge indicated that he had not worked as a prosecutor since 2002. The trial judge further explained that he did not remember personally prosecuting the Defendant but had "been involved in several investigations that [the Defendant] was a suspect in[.]" The trial judge recalled that the Defendant's previous prosecutions occurred in the late 1990s and early 2000s and were conducted by another prosecutor. The trial judge continued,

> I don't remember anything about . . . [the Defendant] other than his nickname, Big Country, and we looked at some things in Austin Homes that involved him. Beyond that, I couldn't tell you anything about it. I mean, that's all I remember.

With this explanation, the trial judge stated, "I'm not inclined to get out of it. . . . [I]t's not going to affect my impartiality." The trial judge agreed with the prosecutor's argument that the trial judge's prior knowledge of the Defendant, which consisted of knowledge of the Defendant's nickname and his prior place of residence, did not create a conflict of interests.

2. Suppression

Prior to trial, the Defendant filed a motion seeking to suppress all evidence obtained during the execution of the search warrant at his residence on Upland Avenue. The Defendant set forth two theories supporting suppression of the evidence in his motion. First, the Defendant argued that the warrant constituted an overbroad, general warrant because it authorized law enforcement to search for numerous items that were not supported by probable cause in the affidavit. Second, citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), and *State v. Little*, 560 S.W.2d 403, 407 (Tenn. 1978), the Defendant argued that the affidavit supporting the search warrant contained false statements, thus rendering the warrant invalid. The trial court heard the motion on September 9, 2021.

a. The Witnesses' Statements of October 14, 2018

KPD officers spoke with Daniel Rudd, Robert Daugherty, Jody Richards, and Chris Equitani immediately after the shooting on September 24, 2017. These witnesses were working at the renovation site at the time of the shooting, but all four men denied any knowledge of the identity of the shooter at that time. On October 14, 2018, KPD Investigator Robert Cook separately interviewed these four men again at KPD headquarters based upon new information that he had recently received. Recordings of these interviews were received as exhibits to the suppression hearing. Our summaries of these statements are limited to the facts pertinent to this appeal.

In the October 14 interview, Daniel Rudd maintained that he did not know who owned the house under renovation and stated that he had never seen the owner. He heard two "big bangs" on the day in question, but he denied knowing the identity of the shooter. Mr. Rudd admitted that "Sonny" asked him to work on the house, but he was unable to identify "Sonny" in multiple photographs that were presented to him by the investigator.

In his statement, Robert Daugherty told Inv. Cook that the Defendant and his brother[1] owned the Selma Avenue house under renovation. Mr. Daugherty identified the Defendant in a photographic lineup. Mr. Daugherty said that he was installing plywood on the house on the day of the shooting when he heard two shots. He then saw the Defendant exit the woodline next to the street with a firearm that Mr. Daugherty described as an "AR."

[1] The various witnesses knew the Defendant as "Sonny" or "Big Country." They knew the Defendant's brother, Bryan Hardison, as "Country." For clarity, we will refer to the Defendant simply as "the Defendant." Because the brothers share a surname, we will refer to the Defendant's brother by his first name. We intend no disrespect in so doing.

Up to this point, Mr. Daugherty was unaware that the Defendant had been at the scene. He saw the Defendant place the gun in the trunk of a black, two-door coupe with tinted windows that was parked on the renovation property. As this happened, Mr. Daugherty heard the Defendant say, "Well, he won't f--- with our s--- no more." The driver of the car, who was unknown to Mr. Daugherty, then backed out of the driveway and left the property. The Defendant walked away from the property, causing Mr. Daugherty to assume that his vehicle was parked elsewhere. Mr. Daugherty clarified that no one at the scene actually saw the shots being fired but that "everyone kn[ew] who did it."

Jody Richards told Inv. Cook that his friend, Will Inklebarger,[2] picked him and his co-workers up around 7:00 a.m. on the morning of the shooting in a black Chevrolet king cab truck to drive them to the worksite. The Defendant drove a black Honda with tinted windows to the property and arrived approximately forty-five minutes after the crew. When the Defendant arrived, Mr. Richards saw the Defendant go into the woodline next to Selma Avenue with a "long gun" in a black duffel bag. He said the Defendant stayed "camped out" in the woodline all day. Mr. Richards understood that the victim had stolen lumber from the property on the previous night. Later in the day, Mr. Richards heard four or five gunshots. Mr. Richards then saw the Defendant bring the gun back to his car and place it inside. He also saw Mr. Inklebarger back his truck out of the driveway to allow the Defendant to exit in his car.

Toward the end of the interview, Inv. Cook and Mr. Richards discussed Mr. Richards' pending driving on a revoked license charge in Humphreys County. Mr. Richards expressed frustration that he had traveled to Humphreys County multiple times but had been unable to resolve the charge. Inv. Cook offered to call the Humphreys County authorities to inform them that Mr. Richards was assisting him in this investigation.

Chris Equitani told Inv. Cook that, on the morning of the shooting, he got a ride to the worksite from Bryan in his black truck. Mr. Equitani said that the Defendant was also driving a truck on that day. Mr. Equitani saw the victim walking down the street later that afternoon. Mr. Equitani had been told that the victim had stolen lumber from their worksite. Mr. Equitani heard gunshots and saw the victim hit the ground. He then saw the Defendant run out of the woods and place a gun in the back of his truck, which Mr. Equitani described as being a "black, step-side." Mr. Equitani described the gun as looking like "a machine gun" or an "AR-15." The Defendant left the scene in his truck. Mr. Equitani said that Mr. Inklebarger also left the scene in the other black truck, which had been backed into the driveway along with the Defendant's. Mr. Equitani said that the Defendant

[2] Many of the witnesses knew Will Inklebarger and Brenda Carroll only by their first names. Because the identities of these individuals are not in dispute and for the sake of clarity, we will refer to them by their surnames throughout this opinion.

mentioned something about the victim's stealing a two-by-four board. He said that the Defendant stated that "he was going to do what he had to, because if [the victim] would steal a board, he would steal anything else there."

b. The Search Warrant and Supporting Affidavit

On January 17, 2019, Inv. Cook presented to the trial court an affidavit in support of a search warrant for the Defendant's residence on Upland Avenue. Copies of the search warrant and its supporting affidavit were entered as exhibits to the suppression hearing. The affidavit of Inv. Cook contained the following facts supporting the issuance of the warrant:

> 1. On September 24th 2017, at about 13:30 hours, your affiant, Investigator R. Cook, with the [KPD] responded to Ben Hur and Selma Avenue on a homicide investigation. There, your affiant observed the victim, Jonathan Stewart, (hereafter referred to as "victim") deceased on Selma Avenue. Stewart had been shot one time in the upper left back area . . . .
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> 2. On 09/24/2017, at about 13:36 hours, 911 received a call that a white male had been shot and was laying on Selma Avenue near Ben Hur Avenue. Witnesses stated that they had heard between 5-8 gun shots and then observed the "victim" fall down on the corner of Ben Hur Avenue and Selma Avenue. It appeared the "victim" had been shot one time in the upper part of his back. Witnesses stated that they did not hear any arguing before the shots.
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> 3. Your affiant, along with other officers, observed that the home located [on] Ben Hur Avenue had what appeared to be a bullet strike in the concrete block of the home. That bullet strike left a bullet fragment inside the block and was confiscated by [KPD] crime lab.
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> 4. During the course of the investigation, the affiant spoke to four witnesses that were outside working on a house located [on] Selma Avenue at the time of the shooting. At that time, those witnesses stated that they heard gun shots and lay [*sic*] down on the ground. At that time, those witnesses stated that they did not see anyone shooting.
>
> 5. Your affiant, on 09/25/2017, attended the autopsy for the victim. The medical examiner removed small bullet fragments from the

victim. The medical examiner found that the shot that killed the victim appeared to travel from left to right at a slightly upward angle.

6. On 10/09/2018, your affiant received information from another investigator that he was currently working on a missing person's case that involved three missing persons. That investigator informed your affiant that they had spoken to a female that informed him that there were two other witnesses that were working on the house located [on] Selma Avenue the day of the shooting. That investigator informed your affiant that one of the missing persons had told her that the person responsible for killing the victim was [the Defendant]. The investigator stated to your affiant that the missing person told the female that all of the people working on the house that day witnessed the suspect shooting the victim.

7. On 10/14/2018, your affiant re-interviewed the four witnesses that were working on the home located [on] Selma Avenue the day of the shooting. Witnesses stated to your affiant that the [Defendant] shot and killed the victim. Witnesses stated to your affiant that two of the missing persons were working on the home with them the day of the shooting. Witnesses stated to your affiant that the [Defendant] was angry because one of the missing persons had informed him that the victim had stolen wood from the work site the day before the shooting. Witnesses stated to your affiant that on the day of the shooting the [Defendant] arrived at the home with a black bag. Witnesses stated to your affiant that inside of the bag was what they described as a "long gun." Witnesses stated to your affiant that the "long gun" was like an AR type of gun. Witnesses described to your affiant that the gun was long and black. All the witnesses stated to your affiant that the Defendant removed the gun from the black bag and walked into a small wood line just to the east of the home. Witnesses stated to your affiant that as the victim was walking south on Selma towards Ben Hur Avenue, the [Defendant] shot and killed the victim from the wood line that would have been to the left of the victim. Witnesses stated to your affiant that the suspect then placed the "long gun" back inside of the black bag and left prior to officer's arrival. Witnesses stated to your affiant the reason they did not tell your affiant the day of the homicide was because they were afraid of the suspect.

8. Your affiant had sent the bullet fragment from the block wall of the house located [on] Ben Hur Avenue along with the bullet fragments from the victim to the Tennessee Bureau of Investigation ["TBI"] to have

> ballistics examination conducted. The [TBI] found that both sets of fragments were consistent with .223 caliber boat tail bullets. The [TBI] found that both bullets could have been fired through the same barrel of a firearm.
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> 9. Your affiant believes that based on experience of witness, victim and suspect interviews during the course of being an investigator, the description of the "long gun" that was provided by witnesses, the [Defendant] used a rifle that was capable of firing a .223 caliber bullet. Your affiant believes that the [Defendant] still has in his possession the gun that was used to kill the victim on 09/24/2017.
>
> 10. Your affiant confirmed using a police data base that the [Defendant] is living at the residence located [on] Upland Avenue. The police data base shows the [Defendant] lived at the residence months prior to the shooting and is still residing at the residence. Officers with the [KPD] observed the [Defendant] leaving the residence.

The trial court issued the search warrant for the Defendant's Upland Avenue residence on January 17, 2019. Based upon a request made in the affidavit, the search warrant authorized the seizure of the following items:

> [A]rticles of identification (e.g. credit/debit cards), mail, correspondence, receipts, newspaper clippings, recordings, writings, cell phones, computers, hard drives or other digital media that may contain evidence of motive, planning, preparation, and evidence of dominion, ownership and/or control of the residence, and blood, seminal fluid, soiled bed clothes, soiled sheets, prophylactics, DNA, hair, fibers, cleaning supplies, latent prints, edged weapons or items that can be used as a weapon, hand guns, long guns, rifles, items used to transport[,] conceal[,] or store hand guns, long guns, rifles and microscopic particles, [and] possible drug paraphernalia . . . .

The return on the search warrant indicated that the following items had been seized pursuant to the warrant:

> Various Paper Work
> (1) Ruger SR 40C #34387274
> (1) Springfield XD 9mm XD957706
> (1) Ruger 4[illegible] REV

(1) 223 AR Long gun
(1) Black Wallet
(1) Various Ammo
(1) Black suitcase containing (1) drum for Glock (1) Spikes TACT. ST15 60280
(1) Smith Wesson [illegible] CP31583 Gun Case under Bed
(1) AERO [illegible] X15 scope. Light AR23729
(1) EBT Jennifer Presuttio [illegible] Sierra Lowry
[illegible] I Pads
(9) Cell Phones
[illegible] Bag of Marijuana

The return was executed by Inv. Cook on January 17, 2019.

c. Inv. Cook's Testimony

Inv. Cook was the sole witness to testify at the suppression hearing. He testified that he had worked at KPD since 2008 and that he had been assigned to the violent crimes department for almost seven years. He acknowledged that he was the lead investigator on this case.

Inv. Cook testified that, immediately following the shooting, KPD investigators interviewed four people who were working on the house at the time of the shooting: Mr. Rudd, Mr. Daugherty, Mr. Richards, and Mr. Equitani. He maintained that paragraph four of his affidavit was correct in that all of these witnesses told police at that time that they "did not see anyone shooting."

Inv. Cook acknowledged that, while paragraph seven of the affidavit initially refers to four witnesses' being interviewed in October 2018, only three of the witnesses gave statements that implicated the Defendant. He conceded that his affidavit did not inform the trial court that Mr. Rudd had persisted in his claim of not knowing the identity of the shooter.

Inv. Cook acknowledged that he did not include in his affidavit the fact that both Mr. Daugherty and Mr. Richards described the Defendant as placing the gun in a car, while Mr. Equitani stated that the Defendant had placed it in a truck. Inv. Cook testified, however, that the three witnesses were consistent as to the facts of the actual shooting and that their description of the Defendant's vehicle was the only inconsistency among their three accounts. He believed that one or more of the witnesses were simply "mistaken" as to the description of the Defendant's vehicle.

Inv. Cook acknowledged that paragraph seven of his affidavit provided that "[w]itnesses stated to your affiant that the [Defendant] shot and killed the victim[,]" but that the affidavit failed to explicitly state that none of the witnesses actually saw the Defendant fire the shots. Inv. Cook explained repeatedly throughout his testimony that this conclusion was based upon a "reasonable inference" drawn from the information provided to him by the witnesses.

d. The Trial Court's Ruling

Regarding the Defendant's *Franks* issue, the trial court acknowledged that the affidavit did not "contain every single fact that every single" witness stated about the incident. The trial court found, however, that any excluded information went to the credibility of the witnesses and that "[t]heir credibility is called as directly into question as possible in paragraph [four]" of the affidavit. The trial court explained that the affidavit alerted the court that the witnesses had "committed a class D felony" after the incident when they falsely told police that they "didn't see anything." The trial court concluded that the issue did not "rise[] to the level of *Franks*" and denied relief on this basis.

Regarding the Defendant's overbreadth argument, the trial court asked the parties what the remedy should be were the trial court to find that the search warrant authorized the seizure of items that were not supported by probable cause in the affidavit. The Defendant asked for the exclusion of all evidence seized from his residence. The State argued for a "line-strike" exclusion of only those items not supported by probable cause in the affidavit. Counsel for the Defendant responded by contending that, if the trial court accepted the State's argument, "anything other than a long gun or ammunition should be excluded." The State then informed the trial court that it only intended to introduce at trial "the long gun and ammunition" and "a black face mask[.]" The trial court suppressed the black face mask but denied suppression as to the "long gun" and ammunition.

3. The Cross-Examination of Jody Richards

In the months prior to trial, Mr. Richards incurred criminal charges in Knox County that were still pending at the time of trial. These charges included "drug possession charges," introduction of contraband into a penal facility, simple possession, and evading arrest. Prior to Mr. Richards' trial testimony, the parties addressed with the trial court the admissibility of these cases. When asked by the trial court what questions the defense sought to ask Mr. Richards, defense counsel responded,

> I'm going to ask him everything about his pending charges [be]cause it goes to whether he was on meth that day, whether he got a deal. There was a conversation with [Inv.] Cook about his drug charges. He had some trepidation.
>
> I mean, I think it's fair game on his perception.
>
> Why aren't they prosecuting him, etcetera? I mean, you're—you're here with pending charges. You got a [failure to appear] and you're not in jail.

The trial court stated that the defense could ask Mr. Richards about his potential bias or expectation of favoritism as a result of his testimony but added that "it gets tricky" if the defense sought to inquire as to the factual details of his pending charges. Defense counsel responded that the details of these offenses were probative of Mr. Richards' credibility because it was important for the jury to see Mr. Richards' "body language" if he decided to invoke his Fifth Amendment right in response to this line of questioning.

The trial court ruled that the defense could ask Mr. Richards about "what he's got pending on the table . . . ; the fact that he[] hasn't been prosecuted yet, he's not been held to account, [and] the State's not pushed [his] cases to trial[,]" adding that it was "fair game" to impeach Mr. Richards on these topics in any way the defense saw fit. As to inquiry into the details of these pending charges, the trial court noted that a jury-out hearing with Mr. Richards' counsel present would be necessary to determine if Mr. Richards planned to invoke his Fifth Amendment right to these questions. If Mr. Richards did not invoke his right to silence at this hearing, the trial court noted, the defense could then proceed to ask about the facts of his pending cases during his testimony. The trial court indicated that it would not allow the defense to inquire about the underlying facts of Mr. Richards' pending charges if he chose to invoke his right to silence as to those questions at the jury-out hearing.

4. The Defendant's Motion to Exclude the TBI Firearms Reports

Prior to trial, the Defendant filed a motion to exclude the TBI firearms reports related to his case prepared by Special Agent Teri Arney. Citing Tennessee Rules of Evidence 401, 403, and 703, the Defendant argued in his motion that the findings in the reports were "inconclusive and speculative" because they could not definitively link the bullet fragments collected to the weapon confiscated from the Defendant's home. The Defendant contended that the findings merely stated that the bullet fragments collected "could have been fired through the barrel of the same firearm." The Defendant argued that

the findings in the report were irrelevant because they did not make a fact of consequence more or less probable. Even if relevant, the Defendant argued that the admission of the reports would be unfairly prejudicial because "the jury [would] likely presume that the .223 caliber rifle s[e]ized during the execution of the search was the same weapon that discharged the bullet even though there [was] no evidence to support that conclusion." The Defendant noted that, in finding that the weapon seized from his residence "could have discharged" the bullet fragments collected in the case, the forensic scientist relied upon weapon characteristics that were also found in other .223 Remington caliber weapons. At the pretrial hearing on his motion, the Defendant added that the inconclusive nature of the findings prevented those findings from substantially assisting the trier of fact, as required by Tennessee Rule of Evidence 702 for the admission of expert testimony.

Following the argument of the parties at hearing, the trial court compared the findings in the instant reports to the probability findings generally admitted by forensic scientists in DNA cases. After reviewing the reports in question, the trial court summarized the findings therein as follows: "I can't say within a reasonable degree of . . . certainty that this is the gun that fired it. But by the same token, I can't exclude this gun." The trial court found that such a finding "assists the trier of fact in a substantial fashion." The trial court intimated that any argument surrounding the reports should "go to the weight, not the admissibility[.]" The trial court noted that Ms. Arney's findings were not speculative because they were based on observable characteristics from both the bullet fragments and the firearm. The trial court informed the parties that the reports would likely be admissible at trial but left open the possibility of a jury-out hearing prior to Ms. Arney's testimony to address the issue further if necessary.

B. Trial

1. The Testimony of Jeffrey Stewart

Jeffrey Stewart testified that the victim was the youngest of his two children. The victim had been living with Mr. Stewart and his family in South Carolina until about five weeks before the shooting, when the victim moved to Sevierville to be with his girlfriend, Desiree Yon, and their three children. The victim called Mr. Stewart the day before the shooting and asked Mr. Stewart "to come get him [be]cause he was in a bad area." The victim gave his father no details but indicated that he would explain later.

2. The Testimony of Robert Daugherty

Mr. Daugherty testified that he had a "significant" crack cocaine problem at the time of the shooting but that he had been sober for almost nine months at the time of the trial. Prior to this period of sobriety, Mr. Daugherty used methamphetamine and cocaine. He had attended drug treatment twice but maintained that he had never "blacked out" when using drugs. At the time of trial, he was participating in a Day Reporting Center program as part of his probation and was employed at a local fast-food restaurant. He acknowledged having criminal convictions for robbery in 2018, burglary in 2019, and theft in 2020 and 2021. He maintained that he had not been offered nor had he received any benefit in exchange for his testimony.

Mr. Daugherty met the Defendant and Bryan through his friend, Mr. Equitani. At the time of the shooting, Mr. Daugherty had known the Defendant for about three months. For the two weeks leading up to the shooting, Mr. Daugherty had been working for the Hardisons' business, Namtaf, renovating a house on Selma Avenue.

Around 8:00 a.m. on September 24, 2017, Mr. Daugherty arrived at the Selma Avenue property in the Defendant's gray Silverado, along with Mr. Richards, Mr. Equitani, Mr. Inklebarger, and Ms. Carroll. Mr. Equitani's father was also working at the house that day. Mr. Daugherty had planned to work with Mr. Equitani to patch the roof on the house. Mr. Daugherty had smoked approximately forty-dollars' worth of crack cocaine—which he had obtained from Bryan's girlfriend, Casey—that morning but maintained that he was not "high."

While at the house, Mr. Daugherty observed that Mr. Inklebarger had placed a phone call to an unknown recipient concerning "this guy [that was] walking up and down the street[.]" Within thirty minutes of this phone call, sometime in the "midmorning," Mr. Daugherty and Mr. Equitani were inside the house retrieving a ladder for the roof work. Mr. Daugherty then heard two loud shots that sounded as though they came from an automatic weapon. Mr. Daugherty went to the ground because he did not know the source of the gunfire. After about ten to fifteen seconds, Mr. Daugherty looked down Selma Avenue and saw the victim—the same person who had been walking up and down the road earlier—staggering in the street and reaching for his back. The victim fell in the street and "was motioning" for help. Mr. Daugherty did not render aid because he was afraid and still did not know the source of the gunfire. None of the other workers attempted to help the victim.

Mr. Daugherty had, to this point, been unaware that the Defendant was on the property. But Mr. Daugherty exited the house through a door to the left and saw the

Defendant calmly walking out of the woods next to the house holding a black AR-15 rifle at his side. Mr. Daugherty knew the gun to be an AR-15 because he "know[s] guns." The Defendant was wearing "all black" clothing, with a black gaiter over his face. Even though Mr. Daugherty could only see the Defendant's eyes, he testified, "I work for him. I knew it was him."

A black Honda with an unknown driver arrived at the property within ten minutes of the shooting. The driver "popped" the trunk. The Defendant placed the gun inside, closed the trunk, and looked at the workers. The Defendant then walked back into the woods, and Mr. Daugherty did not see him again at the scene that day.

An ambulance arrived at the scene approximately eight to ten minutes after the victim became motionless. Mr. Daugherty and the other workers gathered at the side of the house and spoke to two or three police officers. Mr. Daugherty acknowledged that he lied to these officers when he told them that he did not know who shot the victim. The other workers told the officers the same. Mr. Daugherty acknowledged that it was a felony to lie to the police and could lead to a penitentiary sentence. Mr. Daugherty explained that he lied because he was under the influence of drugs and because he was afraid of the Defendant. He explained, "We all knew who the person was that shot the guy and what would happen if we did say something to law enforcement."

Mr. Daugherty stayed at the scene for about thirty to forty minutes after the police left before returning to Bryan's apartment with Mr. Richards, Mr. Equitani, Mr. Inklebarger, and Ms. Carroll. The Defendant was at the apartment when they arrived. The Defendant spoke to each of the workers individually in the presence of his brother. The Defendant asked Mr. Daugherty what he had seen that day, and Mr. Daugherty told him that he "didn't see anything." "That's a good answer," the Defendant responded, "because . . . the same f---ing thing could happen to you that just happened to him."

Over a year had passed when, on October 14, 2018, KPD officers arrived at Mr. Daugherty's residence and told him that he needed to speak with an investigator at police headquarters. Mr. Daugherty had not used drugs that day but also would not describe himself as being "clean" at that time. "Clean," Mr. Daugherty explained, means that "you've not used drugs over a period of time." The officers did not tell Mr. Daugherty why the investigator needed to speak with him, nor did Mr. Daugherty see Mr. Rudd, Mr. Richards, or Mr. Equitani at the police station. Mr. Daugherty had cut ties with these individuals a few months after the shooting, and Mr. Daugherty denied that they had collectively agreed to change their stories prior to the October 2018 interviews.

Mr. Daugherty told the investigator that the Defendant was responsible for the victim's death and identified the Defendant in a photographic lineup, which was received as an exhibit to his testimony. Mr. Daugherty testified that he changed his story in the October 2018 interview because he "came to the conclusion that it was probably the right thing for [him] to do." Mr. Daugherty acknowledged that he did not mention the Defendant's black clothes or gaiter to Inv. Cook in October 2018 but surmised that he might not have been asked those details. Mr. Daugherty denied that his prior drug use had impaired his ability to recall these events. Mr. Daugherty reiterated that he was sober at the time of his testimony and had been for almost nine months.

3. The Testimony of Chris Equitani

Mr. Equitani testified that he was a friend of the Defendant in September 2017 and that he worked for the Defendant as a carpenter at the Selma Avenue property. On September 24, 2017, Mr. Equitani was working at the property with Mr. Rudd—his father, as well as Mr. Daugherty, Mr. Richards, Mr. Inklebarger, Ms. Carroll, and the Defendant. Mr. Equitani received crack cocaine in exchange for his work, and he and the other workers, with the exception of his father, had smoked crack cocaine frequently throughout the day on September 24. Mr. Equitani stated that his cocaine usage did not affect his memory of the events of that day, nor did it affect his trial testimony, as he had quit using cocaine at some point after the shooting.

Between 1:30 and 3:00 that afternoon, Mr. Equitani was hanging plywood in the back of the house when he heard ten to fifteen gunshots in rapid succession. He believed that the shots were fired from the front of the house, not from the rear of the house from the trees. He walked around the side of the house and saw the victim fall in the street. The victim asked for help, but Mr. Equitani did not render aid due to fear. He then saw the Defendant, wearing black clothing, run from the woods holding a black gun that looked like a "machine gun." The Defendant entered a "little black Honda" and left the scene.

Mr. Equitani denied that the Defendant fled in a truck, indicating that the truck at the scene was driven by Mr. Richards and used to transport the workers. He further denied that he had told Inv. Cook in October 2018 that he saw the Defendant place the gun in a truck. No one else was in the car when the Defendant fled, according to Mr. Equitani, and Bryan was not at the worksite that day.

Police officers arrived shortly after the shooting and spoke to all of the workers present as a group. Mr. Equitani acknowledged that the workers were all using cocaine at the time and that they lied to the police, but that they had not agreed to be untruthful beforehand. He stated, "I didn't want to put myself in jeopardy[,]" and further explained,

"I was afraid to tell the truth at the time." Mr. Equitani and the others continued working and later packed their equipment into a truck and returned to Bryan's apartment to receive their pay.

Mr. Equitani testified that the Defendant was not present at Bryan's apartment when they arrived, but he stated that the Defendant visited him at his house on occasion after the shooting. During these visits, the Defendant asked Mr. Equitani if he had "heard anything" or if "anybody's been coming to [him] trying to talk to [him] about anything that'd be[en] going on." Mr. Equitani described that he and the Defendant were friends at one point, "so [the Defendant] would come and talk to [him] all the time about it." Mr. Equitani was afraid during these discussions. He feared that if he "said something wrong, . . . [he] didn't know how [the Defendant] was going to react towards [him]." Eventually, Mr. Equitani stopped working for the Hardisons and "backed off everybody[.]" He explained, "I didn't want to be that much involved[.]"

In October 2018, Mr. Equitani was incarcerated due to a child support arrearage. He had quit using cocaine "cold turkey" by this time. While in custody, he was transported to the police station to speak with Inv. Cook. He did not see or speak to Mr. Daugherty or Mr. Richards during this trip, nor had he spoken to them since the shooting, owing this to his abstinence from cocaine. Mr. Equitani testified that he was truthful when he spoke to Inv. Cook on October 14, 2018. Mr. Equitani identified the Defendant in a photographic lineup during this interview.

Mr. Equitani testified that no benefit had been offered to him in exchange for his testimony at trial. He acknowledged that he had met with prosecutors prior to his testimony but maintained that he had not reviewed his prior recorded statement to Inv. Cook.

4. The Direct Examination of Jody Richards

Mr. Richards testified that he had worked in construction for twenty-eight years. He was employed by the Defendant in September 2017 to work on the foundation of the Selma Avenue house. On the morning of September 24, 2017, he gathered at an apartment with the work crew to load their equipment into a car. He testified that someone loaded "the gun" into the car and that a few of the workers also carried pistols. When they arrived at the worksite, Mr. Richards began working on the foundation at the front corner of the house. He saw the Defendant take an "army type assault rifle" from the hatchback of a black Honda and walk into the woodline next to the house.

While he worked, Mr. Richards noticed the victim walking down the street. A few minutes later, he heard three or four gunshots. He saw the victim spin and fall in the street.

He then saw the Defendant return from the woodline and place the gun back into the car. The Defendant then exited the property by walking through an alley. Mr. Richards did not help the victim because he was afraid to go into the street.

Mr. Richards denied that he was dishonest to officers when they questioned him at the scene. He maintained that they did not ask him who shot the victim and that he did not volunteer any responses due to his fear. He told the officers that he heard gunshots but offered no further details.

He spoke with Inv. Cook approximately a year later. He testified that his account to Inv. Cook was the same as his trial testimony. He identified the Defendant in a photographic lineup presented by Inv. Cook, which was entered as an exhibit.

5. The Cross-Examination of Jody Richards

Following Mr. Richards' direct examination, attorney Adam Elrod, Mr. Richards' attorney in his pending criminal matters, joined counsel for a bench conference outside the hearing of the jury. At this conference, the trial court asked Mr. Elrod if he had instructed Mr. Richards to assert his Fifth Amendment privilege "if he [was] questioned about any of the . . . facts related to any pending charge[.]" Mr. Elrod responded that he had instructed Mr. Richards to assert his Fifth Amendment right "on those specific questions" related to his arrests occurring on April 17, August 14, and August 18.

On cross-examination, Mr. Richards testified that he was a drug addict. At the time of his testimony, he was incarcerated for pending charges in Knox County, which included introduction of contraband into a penal facility. He admitted that he smoked crack cocaine on September 24, 2017, but not until after work and after the shooting. He denied that he smoked crack cocaine before work with the other crewmembers.

Counsel for the Defendant referenced Mr. Richards' pending charge for introduction of contraband into a penal facility from August 18 and asked Mr. Richards to "tell the [j]ury how that happened." Mr. Richards responded, "I didn't smuggle it." At this point, the trial court interjected, "Mr. Isaacs, the [c]ourt has ruled." The trial court then asked Mr. Richards, "Were you charged with that offense? Were you charged?" Mr. Richards answered, "Yes[,] I was charged with it." The trial court then stated, "That's the end of it." Upon further questioning by defense counsel, Mr. Richards acknowledged that he had been charged with possession of methamphetamine on April 17 and with evading arrest on August 14 and that these charges were still pending.

Later in the cross-examination, counsel for the Defendant asked Mr. Richards if his lawyer had informed him of the degree of his charged felony and his potential jail time, to which Mr. Richards responded negatively. In the midst of a colloquy between defense counsel and the trial court regarding the felony classification of Mr. Richards' charge, Mr. Richards interjected, "And they also wrote on my statement that it was . . . heroin that they busted me with, but it wasn't." The following then occurred:

> [Defense counsel:] What'd you have up your buttocks?
>
> [Mr. Richards:] Huh?
>
> [Defense counsel:] What'd you have up your buttocks?
>
> [Trial court:] Mr. Isaacs—
>
> [Mr. Richards:] They wrote that on my paper.
>
> [Trial court:] –stop.
>
> [Defense counsel:] Okay. I thought he[—] Okay.
>
> [Trial court:] Do not inquire into the facts. He has a Fifth Amendment privilege not to discuss pending charges. You know that.

The trial court then ordered defense counsel to continue the cross-examination.

Mr. Richards acknowledged that he had a pending driving on a revoked license charge in Humphreys County and that, during his October 2018 interview, Inv. Cook offered to "help [him] out" with that charge. Mr. Richards explained, however, that Inv. Cook "couldn't help [him] out" with that charge. While Inv. Cook offered to call Humphreys County authorities on his behalf, Mr. Richards was unsure if Inv. Cook actually made this call.

Mr. Richards denied changing his story for Inv. Cook in order to gain assistance with his Humphreys County charge. Instead, he explained, "I've always been on the wrong side of the fence on things. And for once I'm standing up for what I know . . . is right." Mr. Richards continued, "I don't care about Humphreys County. I don't care one bit about Humphreys County. I'll go today and serve my time up there. It ain't but maybe six months. Who cares? Six months here, six months there; same difference." Mr. Richards

later stated that he could serve his time in Humphreys County "standing on [his] head." Nevertheless, Mr. Richards acknowledged that he had asked Inv. Cook to tell the Humphreys County authorities that he was helping with this case, but he explained that he did this because "[he] was serving time already, and [he] didn't want to have another warrant." Mr. Richards testified that the Humphreys County charge was not affecting his ability to post bail on his Knox County charges. He explained that he had not posted bail on his Knox County charges only because he had no one to post it for him. "I'm by myself," he stated, "pretty much homeless now."

Mr. Richards reiterated that he did not change his story in his October 2018 interview because the officers at the scene had never asked him directly if he had seen the shooter. He testified that the initial questioning in September 2017 was brief and consisted of only one question. He later acknowledged, however, that he had been untruthful with the investigators at the scene. While admitting that all witnesses at the scene claimed no knowledge regarding who shot the victim, Mr. Richards explained, "You'd say it too if you'd been there." He insisted that he was now telling the truth and stated, "I didn't have to . . . testify, but I did it because I thought . . . I needed to do what was right because that guy . . . had a father, had a mother, or he was a father or a son or something to that nature, and he deserves . . . what's right." He admitted that, even though he wanted to do the "right thing," he did not call law enforcement on his own volition to provide a statement. He explained that, at the time, he was trying his "best to stay away from it all."

Mr. Richards testified that he quit working for the Defendant a day or so after the shooting. Following his departure, Mr. Richards stated that he never again spoke with the other crewmembers. He explained that he broke ties with the group because no one had heard from Mr. Inklebarger or Mr. Inklebarger's girlfriend, "Bonnie." Mr. Richards was afraid that "something bad" might happen to him if "something bad" also happened to Mr. Inklebarger and Bonnie.

Mr. Richards admitted that he was struggling with a heroin addiction at the time of trial. However, at the time of the shooting, he was only addicted to crack cocaine. His drug abuse had caused "blackouts," and he had overdosed on more than one occasion. His drug abuse had impacted his ability to remember things and make good decisions, but his drug abuse had never caused him to hallucinate. He described the event in question as being "dramatic" and something "that sticks to you."

He stated that Bryan was at the worksite that day for a few minutes but that he only saw the Defendant walking to and from the woodline. Mr. Richards reiterated that he heard three to four gunshots and denied that fifteen shots were fired. He said it was possible that there was a pause between the gunshots. Upon hearing the shots, Mr. Richards crawled

underneath the house briefly and then exited to see the Defendant leaving the woodline. He witnessed the Defendant place the gun in a soft duffle bag in the back "hatch" of the Honda. Mr. Richards remembered that there were definitely two vehicles at the worksite that day—the Honda and the truck—but stated that there could have been a third vehicle present at some point. Mr. Richards described the truck as being a black GMC extended cab and denied that it was gray in color.

Mr. Richards stated that the victim walked down the street in front of the worksite almost every day. Mr. Richards heard that the victim had stolen items from the worksite. When asked why all of the crewmembers told "the exact same lie at the exact same time," Mr. Richards responded, "Because they were threatened that morning not to say a word or else." When asked if this threat occurred "[b]efore anything happened[,]" Mr. Richards replied, "Yes. It'd already been planned out."

6. Testimony Regarding the Investigation

A caller informed Knox County 911 at 1:26 p.m. on September 24, 2017, that a man had been shot in the street outside of her home. KPD Officer Jason Boston was one of the first responding officers and arrived to find the victim unresponsive on Selma Avenue. Officer Boston established a crime scene in the immediate area around the victim's body, which, based upon the information law enforcement had at the time, did not include the renovation site or the woodline behind it. Although Officer Boston did not measure the scene, he estimated the distance between the victim's body and the woodline to be 100 to 150 feet.

Bethany Simmons was dispatched from KPD's Forensic Unit to process the scene. She collected items from the victim's clothing, including a plastic baggie and fourteen dollars in currency from his pocket. Photographs of the victim indicated that he was wearing a black t-shirt and plaid shorts at the time of his death. Ms. Simmons then focused on the carport area of the residence immediately next to the victim's body. This residence sat on the corner of Ben Hur Avenue and Selma Avenue and was located diagonally—across Selma and one lot to the south—from the renovation site. While in the carport of this residence, Ms. Simmons noticed two bullet defects in the north-facing wall adjacent to the carport, as well as another bullet defect in the HVAC unit located in the carport. Ms. Simmons collected three bullet fragments from the carport: two from the ground underneath the wall defects and one from inside the HVAC unit. After collecting the bullet fragments from the carport, Ms. Simmons moved to an area behind this house—opposite of Ben Hur Avenue but still across Selma from the renovation site—and located a spent

rifle cartridge casing.[3] The casing contained the manufacturer's markings of "F-C" and ".223 Remington." Ms. Simmons testified that "F-C" indicated that the casing was manufactured by "Federal" and that ".223 Remington" denoted the caliber of the casing.

During his trial testimony, Inv. Cook described his investigation of the victim's death, including the investigation of leads that suggested a shooter other than the Defendant. When Inv. Cook arrived on the scene the day of the shooting, the workers at the renovation site had told officers that they had seen a gray van around the time of the shooting and that the shots sounded as though they had come from across Selma Avenue. This, coupled with information that Inv. Cook would soon receive from another purported witness, described below, caused Inv. Cook initially to discount the renovation property as part of the crime scene. He instead focused his efforts at that time on the alleyway across Selma Avenue from the renovation property where the spent cartridge casing was later found.

Prior to Inv. Cook's arrival on the scene, Ms. Yon[4] approached officers and informed them that the victim was her boyfriend. Inv. Cook recounted for the jury the information that Ms. Yon provided to law enforcement, which included her suspicion that Thakelyn Tate, also known as "T.K." or "Ears," murdered the victim. Ms. Yon explained to officers that she and the victim had been buying crack cocaine and marijuana from Robert Cody, or "Ville," at a nearby apartment in Walter P. Taylor Homes for the past month and one-half. A few weeks before the shooting, Mr. Tate started selling the drugs in Mr. Cody's absence. At that time, Mr. Tate had "fronted" forty-dollars' worth of crack cocaine to Ms. Yon, which meant that he had given her the drugs on the promise that she would later repay him.

According to Inv. Cook, Ms. Yon told officers that, on the night before the shooting, she went to Mr. Tate's apartment. As soon as Mr. Tate saw Ms. Yon, he started demanding his money, which she did not have. Mr. Tate told Ms. Yon that the victim "had better not come back without his money" or Mr. Tate would kill the victim and Ms. Yon. Ms. Yon told officers that Mr. Tate chased her back to her vehicle with a baseball bat.

[3] Inv. Cook later testified that this casing was found next to a fence in the alleyway that ran between Selma and Wilson Avenues.

[4] Near the end of the State's proof, the jury was informed that the parties had stipulated that Ms. Yon, Mr. Inklebarger, Mr. Rudd, Donna Cummings, and Casey Yates "could not be located and personally served with compulsory process." The stipulation indicated that the jury "should give no consideration to the fact that these witnesses were not presented in either side's case-in-chief."

Inv. Cook testified that Ms. Yon told the officers that the last time she saw the victim was on the morning of the day of the shooting. The victim had told Ms. Yon that he had "ten or [fourteen dollars]" and that he was going to Mr. Tate's apartment to "pick something up." Ms. Yon had decided to approach the police after learning that someone had been shot on Selma Avenue.

Inv. Cook also described to the jury information that had been provided to law enforcement by Donna Cummings in early October 2017. According to Inv. Cook, Ms. Cummings had told law enforcement that, on the day of the shooting, she had seen Dexvon McDaniel, also known as Dexvon Johnson or "Lil Red," arguing with the victim on Olive Street, which was a street over from Ben Hur Avenue in Walter P. Taylor Homes. Ms. Cummings told police that Mr. McDaniel had confronted the victim over the forty dollars that Ms. Yon owed Mr. Tate. A few minutes later, as she walked back from a market that she had visited, Ms. Cummings said that she saw the victim walking away from Mr. McDaniel on Selma Avenue, while Mr. McDaniel was near the corner of Ben Hur Avenue—across from its intersection with Selma Avenue—outside a small house that had been converted into a restaurant. Ms. Cummings told the police that she saw Mr. McDaniel produce a black pistol and shoot the victim. Ms. Cummings stated that Mr. McDaniel fired the pistol about six times. Ms. Cummings said that she observed the victim "take a deep breath and fall." Ms. Cummings told the police that, after the shooting, Mr. McDaniel ran to a car that was being driven by Mr. Tate, but Mr. Tate would not allow him inside and drove away without him. Ms. Cummings identified Mr. McDaniel in a photographic lineup, which was entered as an exhibit.

Inv. Cook noted that the victim was wearing a black shirt when he was shot, while Ms. Cummings told police that he was shirtless. Ms. Cummings also told police that her son, Jordan Tolson, was with her and witnessed the shooting. Mr. Tolson, however, later spoke to police and denied being present. While Mr. Tolson did not think that his mother was lying about witnessing the shooting, he surmised that Ms. Cummings told police that he was present to add credibility to her story. The State introduced judgments related to Ms. Cummings' nine previous criminal convictions: four for theft and five for forgery. Investigators used a metal detector to search the area where Ms. Cummings said that Mr. McDaniel was standing during the shooting, but they were unable to find any spent shell casings. Inv. Cook ultimately discredited Ms. Cummings' account, based in part upon inconsistencies between her account and the evidence at the scene. Inv. Cook speculated that Ms. Cummings had obtained basic information about the shooting from a Facebook Live broadcast.[5]

[5] Mr. McDaniel had informed Inv. Cook that the shooting was broadcast on Facebook Live.

Inv. Cook also discredited Ms. Cummings' information based upon his independent investigation into the leads she provided. Inv. Cook requested to speak with Mr. Tate, Mr. McDaniel, and Mr. Cody, and all three voluntarily complied. Additionally, Inv. Cook obtained consent to search their apartment in Walter P. Taylor Homes. The three men denied involvement in the death of the victim. Mr. Cody produced a bus ticket indicating that he was out of town on the day of the shooting. Mr. Tate initially told Inv. Cook that he had been at his house until the evening of the day of the shooting. Mr. Tate later admitted, however, that he was in the area of the shooting earlier that day, sometime between 11:00 a.m. and 1:00 p.m. Inv. Cook obtained search warrants for Mr. McDaniel's and Mr. Tate's Facebook accounts, as well as the records related to Mr. Tate's two phones. Nothing in these records indicated that the men were involved in the shooting, other than confirming that Mr. Tate was in the area of the shooting on September 24, as he had previously disclosed. The affidavits supporting these search warrants were received in evidence on motion from the defense.[6] After speaking with these men and reviewing the information received from their Facebook accounts and phone records, Inv. Cook eliminated Mr. Tate, Mr. McDaniel, and Mr. Cody as suspects in the victim's murder.

Inv. Cook's testimony detailed his investigation of the adjoined restaurant and house referenced by Ms. Cummings. During the initial canvass of the neighborhood, Inv. Cook had noticed that the restaurant/house property was outfitted with surveillance cameras. When he approached the house as part of his initial investigation, Inv. Cook encountered William Martin, III. Inv. Cook knew Mr. Martin and testified that, at the time of trial, Mr. Martin was incarcerated for attempted second degree murder. As Inv. Cook spoke with Mr. Martin, William Martin, Sr., the owner of the property and the younger Mr. Martin's grandfather, arrived at the scene. The younger Mr. Martin told his grandfather not to allow the police to look at the surveillance cameras and to tell the police that "the cameras are fake." The elder Mr. Martin told Inv. Cook that the cameras were not operational because "someone had come by and gotten the box" a few weeks earlier.

In order to verify this information, Inv. Cook obtained search warrants for the Martins' home and restaurant. Inv. Cook was unable to locate any surveillance footage during his search of the property. While searching an upstairs closet, however, Inv. Cook located a Mohawk Armory AR-15 that had been stored in a golf bag. Inv. Cook testified that the gun was dirty and dusty, similar to the rest of the closet, and "appeared that it had been there a while." Police records indicated that the gun had been stolen, so Inv. Cook confiscated it and sent it to TBI for forensic testing.[7]

[6] The defense also moved into evidence at trial the affidavits supporting the search warrants for the Defendant's car, residence, and phone.

[7] The record does not include reference to the results of any forensic testing regarding this firearm.

Inv. Cook also confiscated forty-nine rounds of .223 Remington ammunition from the Martin residence. Though Inv. Cook took the ammunition, it was never forensically compared to the spent rifle casing that had been found in the alleyway next to Selma Avenue.

KPD Inv. Philip Jinks testified that he assisted in the arrest of the Defendant in January 2019. The Defendant was arrested on the presentment after Inv. Jinks saw him driving a black, older model Honda. Following the Defendant's arrest, Inv. Jinks assisted in executing the search warrant on the Defendant's residence on Upland Avenue in northeast Knoxville. Inside a black, hard-sided case on the floor of the Defendant's bedroom, Inv. Jinks located a black Smith and Wesson AR-15 rifle with a magazine of ammunition. The magazine contained thirty-one rounds of ammunition. Thirty of these rounds were marked "F-C" and "Remington [.223]." Inv. Jinks testified that AR-15s are relatively common in the Knoxville area and that Remington is a major manufacturer of ammunition.

Retired TBI Special Agent Teri Arney testified as an expert in firearms and toolmark identification. Ms. Arney had examined, among other items, the rifle confiscated from the Defendant's residence, the bullet fragments collected from the carport area, the bullet fragment from the victim's body, and the spent cartridge casing collected from the alleyway. Ms. Arney issued two official reports related to this case, both of which were entered into evidence. Ms. Arney testified that the rifle from the Defendant's residence was capable of firing .223 Remington caliber rounds. She noted that the rifle's barrel had five lands and grooves with a right-hand twist, similar to the characteristics found on the bullet fragment from the victim's body and one of the bullet fragments found in the carport.[8] Thus, the rifle and these bullet fragments had the same "class characteristics" of one another, meaning that the bullet fragments could have been fired from the Defendant's firearm. She noted, however, that these class characteristics were "very general features" and that she could not conclusively determine that these bullet fragments were fired from this firearm. Similarly, she found that these bullet fragments had "similar individual characteristics and could have been fired through the barrel of the same firearm[,]" however, "due to the damaged condition [of the bullet fragments], these similarities [were] insufficient for a more conclusive determination."

Regarding the spent casing found in the alleyway, Ms. Arney confirmed that it was a Federal brand .223 Remington caliber casing. One of Ms. Arney's reports indicates that the casing shared the same class characteristics as test fires from the Defendant's rifle but

[8] According to one of Ms. Arney's reports, the two other bullet fragments found in the carport bore "no markings of comparison value."

that no individual characteristics were found to establish a definitive link. Her other report indicated that "[r]epresentative images of this cartridge case were entered into the Regional NIBIN system[,]" but that "[n]o associations were made at this time[.]"

On cross-examination, Ms. Arney testified that the class characteristics from this firearm would be the same as every model of this weapon that was manufactured by Smith and Wesson, which would include a large number of weapons. She acknowledged that the bullet fragments contained no individual characteristics that allowed her to link them definitively to the Defendant's firearm.

Dr. Darinka Mileusnic-Polchan conducted the victim's autopsy and testified as an expert in forensic pathology. Dr. Mileusnic-Polchan testified that the victim's death was caused by a single, distant gunshot wound to his upper left back. The bullet traveled back to front, left to right, and slightly upward through the victim's body. The upward trajectory of the bullet could have been affected by the orientation of the victim's body when the bullet struck him. The wound was not survivable, would have immediately paralyzed the victim's lower body, and would have caused his death within minutes. The victim's injury would have been consistent with a witness's account of him immediately falling to the ground. According to toxicology reports, the victim's bloodstream contained cocaine and marijuana at the time of his death.

Following Dr. Mileusnic-Polchan's testimony, the State introduced redacted recordings of the October 2018 statements of Mr. Daugherty, Mr. Equitani, and Mr. Richards, summarized above, as prior consistent statements. The trial court instructed the jury that they could not consider the statements as substantive evidence but could use the statements only to assess the credibility of the witnesses' testimony at trial.

Thereupon, the State rested. The Defendant elected not to testify at trial but admitted into evidence the judgments of two of Mr. McDaniel's prior felony drug convictions.

On this proof, the jury convicted the Defendant of first degree murder, and he was sentenced to life imprisonment. The Defendant filed a motion for new trial, which was denied. This timely appeal followed.

II. ANALYSIS

A. Recusal of the Trial Judge

The Defendant argues that the trial judge erred in denying the Defendant's motion to recuse the trial judge from this case. The Defendant argues that recusal was appropriate because the trial judge was familiar with the Defendant from the trial judge's tenure as an assistant district attorney general. The State contends that the trial judge appropriately denied recusal because the trial judge's limited knowledge of the Defendant would not cause an ordinarily prudent person in the judge's position to question the judge's impartiality. We agree with the State.

"No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested . . . ." Tenn. Const. art. VI, § 11. "Litigants in Tennessee have a fundamental right to a 'fair trial before an impartial tribunal.'" *Holsclaw v. Ivy Hall Nursing Home, Inc.*, 530 S.W.3d 65, 69 (Tenn. 2017) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)). Tennessee judges are required to perform the duties of judicial office "fairly and impartially." Tenn. Sup. Ct. R. 10, § 2.2. The Supreme Court Rules define "impartial" and "impartially" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Tenn. Sup. Ct. R. 10, Terminology.

Tennessee Supreme Court Rule 10, section 2.11(A) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" Circumstances requiring recusal include situations where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding"; the judge "served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association"; or the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding[.]" Tenn. Sup. Ct. R. 10, § 2.11(A)(1), (6)(a), (b).

The test for recusal requires a judge to disqualify himself or herself in any proceeding in which "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001)). The test is an objective one "because the appearance of bias is just as injurious to the integrity of the courts as actual bias." *State v. Griffin*, 610 S.W.3d 752, 758 (Tenn. 2020) (quoting *Cannon*, 254 S.W.3d at 307). This court reviews a trial court's denial of a motion to recuse de novo. Tenn. Sup. Ct. R. 10B, § 2.01.

The victim's murder occurred approximately fifteen years after the trial judge had left employment at the district attorney's office. Thus, the Supreme Court Rules referencing "the matter in controversy" and "the proceeding" are inapplicable here. *See* Tenn. Sup. Ct. R. 10, § 2.11(A)(6)(a), (b); *see also State v. Smith*, 906 S.W.2d 6, 12 (Tenn. Crim. App. 1995) (quoting *State v. Warner*, 649 S.W.2d 580, 581 (Tenn. 1983), for the proposition that the disqualifying provision in article 6, section 11 of the Tennessee Constitution is limited to "the cause on trial . . . and not . . . prior concluded trials").

The record shows that the trial judge did not prosecute the Defendant for previous crimes during the trial judge's tenure as a prosecutor. While the trial judge conceded that he had "been involved in several investigations" in which the Defendant was a suspect, the trial judge could remember no details about the Defendant other than his nickname and that the investigations concerned activity in Austin Homes. The question is whether, under these circumstances, a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality, including whether the trial judge had "a personal bias or prejudice concerning" the Defendant. *See* Tenn. Sup. Ct. R. 10, § 2.11(A)(1).

Our courts have had numerous opportunities to review recusal decisions based upon a trial judge's prior employment as a prosecutor. In *Moultrie v. State*, for example, this court held that recusal was not required where "the trial judge had at some time in the past been an assistant attorney general who had issued a subpoena in an unrelated trial of [the defendant]." 584 S.W.2d 217, 219 (Tenn. Crim. App. 1978). The *Moultrie* court noted, "It would have been almost an impossibility for the trial judge, who had served in one capacity or another in [the criminal courts of Shelby County], to have not come into contact with the defendant in some matter or other." *Id*. Recusal was not required because the defendant had "failed to show in any manner whatsoever that he was prejudiced in any way by the fact that the judge presiding at his trial had been involved with some of his previous cases." *Id*.

In *State v. Warner*, our supreme court held that a judge who served as the district attorney general for a judicial district during the time a defendant was indicted and convicted on other charges need not recuse himself in a later, unrelated criminal matter involving the same defendant. 649 S.W.2d at 581. In *State v. Conway*, this court held that recusal of the trial judge was not required for a defendant's DUI trial, even though the trial judge previously prosecuted the defendant and obtained a conviction that was used to enhance his sentence in the subsequent case. 77 S.W.3d 213, 224-25 (Tenn. Crim. App. 2001). Finally, in *State v. Byington*, the trial judge "was not precluded from presiding over the [d]efendant's case merely because she had prosecuted him in the past[,]" where the defendant did not otherwise show that the trial judge "had a personal prejudice or bias

against him." No. E2008-01762-CCA-R3-CD, 2009 WL 5173773, at *4 (Tenn. Crim. App. Dec. 30, 2009).

The case at bar is a further step removed from the cases outlined above in that the trial judge here never personally prosecuted the Defendant. While the trial judge had previously investigated the Defendant during the trial judge's tenure as a prosecutor, the investigations occurred approximately twenty years before the Defendant's trial, and the trial judge could remember nothing about those investigations other than the Defendant's nickname and the location of the suspected offenses. The trial judge explicitly stated that his prior knowledge of the Defendant would not affect his impartiality, and like *Moultrie* and *Byington*, the Defendant cannot otherwise show that the trial judge harbored a personal bias or prejudice against him. Under these circumstances, a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would not find a reasonable basis for questioning the judge's impartiality. *See Cannon*, 254 S.W.3d at 307. The trial court did not err in denying the recusal motion.

B. Suppression

The Defendant argues on appeal that the trial court erred by denying the Defendant's motion to suppress evidence obtained from the execution of the search warrant on his residence. Specifically, the Defendant contends that the search warrant was invalid because it was not supported by probable cause at the time it was issued. The Defendant also argues that the search warrant was invalid because Inv. Cook recklessly included false statements and recklessly omitted other relevant facts in his affidavit supporting the issuance of the warrant. Finally, the Defendant argues that the search warrant was invalid because it was overly broad and thus constituted a general warrant.

In response, the State argues that the affidavit established probable cause at the time of its issuance. The State also argues that Inv. Cook did not recklessly include false statements, nor did he recklessly omit other relevant facts in the search warrant affidavit. The State further contends that the search warrant did not constitute a general warrant. Alternatively, the State avers that the Defendant's AR-15 rifle was the only piece of evidence admitted at trial that was seized pursuant to the warrant; because this rifle was "a relatively minor piece of evidence in this case[,]" the State argues, any error in its admission was harmless beyond a reasonable doubt.

At a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Therefore, we will uphold the trial court's findings of fact at a suppression hearing unless

the evidence preponderates against them. *State v. Bell*, 429 S.W.3d 524, 528 (Tenn. 2014) (citations omitted). The party prevailing in the trial court "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from [the] evidence." *Id*. at 529 (citations omitted). The lower court's application of law to the facts is reviewed de novo with no presumption of correctness. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted). Moreover, an appellate court on review may consider the evidence presented at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. *State v. Henning*, 975 S.W.2d 290, 297-99 (Tenn. 1998).

The Defendant's suppression issues implicate the protections against unreasonable searches and seizures found in our federal and state constitutions. The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment applies to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Additionally, the Tennessee Constitution guarantees

> [t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Tenn. Const. art. I, § 7. Article I, section 7 "is identical in intent and purpose with the Fourth Amendment." *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968). Therefore, our courts generally interpret article I, section 7 consistently with the Fourth Amendment. *See State v. Reynolds*, 504 S.W.3d 283, 303 n.16 (Tenn. 2016).

"Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *Henning*, 975 S.W.2d at 294 (citation omitted). "A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to

be searched." Tenn. Code Ann. § 40-6-103; *see* Tenn. R. Crim. P. 41(c). Thus, "[a] sworn and written affidavit containing allegations from which a magistrate may determine whether probable cause exists is an 'indispensable prerequisite' to the issuance of a search warrant." *State v. Saine*, 297 S.W.3d 199, 205 (Tenn. 2009) (quoting *Henning*, 975 S.W.2d at 294). To establish probable cause, the affidavit must show a nexus among the criminal activity, the place to be searched, and the items to be seized. *State v. Reid*, 91 S.W.3d 247, 273 (Tenn. 2002); *State v. Smith*, 868 S.W.2d 561, 572 (Tenn. 1993). A defendant seeking to suppress evidence obtained pursuant to a search warrant bears the burden of establishing by a preponderance of the evidence "the existence of a constitutional or statutory defect in the search warrant or the search conducted pursuant to the warrant." *Henning*, 975 S.W.2d at 298. Determining the existence of probable cause is a mixed question of law and fact that we review de novo. *Reynolds*, 504 S.W.3d at 298.

1. Probable Cause Supporting the Search Warrant

Relative to the establishment of probable cause, the Defendant generally states, "The search warrant executed at . . . Upland Avenue is invalid because the search warrant was not supported by probable cause at the time it was issued." The subsequent argument portion of his brief deals mainly with the *Franks* issue discussed below but also seems to indicate that the Defendant is more broadly challenging the probable cause supporting the issuance of the search warrant. The next section of the Defendant's brief pertains mostly to his overbreadth argument but also contains argument challenging the validity of the warrant in toto due to a lack of probable cause. There, the Defendant argues,

> [T]he search warrant was not executed until nearly one-and-a-half years after the incident took place. Absent facts to the contrary, there exists no reasonable connection between the Upland Avenue residence and the shooting of [the victim]. Without such a connection, there is no meaningful connection between [the Defendant] and the offense, much less the Upland Avenue residence and the offense for which he was charged and convicted.

For its part, the State acknowledges that the Defendant raises on appeal a facial challenge to the sufficiency of the probable cause in the affidavit and submits that such an argument does not merit the Defendant relief. However, before we address this challenge on the merits, we must first determine if it has been properly preserved for appeal.

Motions to suppress evidence must be filed pretrial, and the failure to do so results in waiver of the issue. *See* Tenn. R. Crim. P. 12(b)(2)(C), (f)(1). "A motion to suppress, like any other motion, is required to state the grounds upon which it is predicated with particularity," and the motion "must be sufficiently definite, specific, detailed and non-

conjectural, to enable the court to conclude a substantial claim . . . [is] presented." *State v. Burton*, 751 S.W.2d 440, 445 (Tenn. Crim. App. 1988) (citing Tenn. R. Crim. P. 47). An appellant cannot raise an issue for the first time on appeal nor can they change their arguments on appeal. *See Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983); *see also* Tenn. R. App. P. 36(a). In other words, "a party may not take one position regarding an issue in the trial court, change his strategy or position in mid-stream, and advocate a different ground or reason" on appeal. *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988).

In the Defendant's motion to suppress filed in the trial court, he averred generally that the search warrant for his residence "was not supported by probable cause and was invalid." A close reading of the argument that follows in the motion, however, indicates that the Defendant was referencing the overbreadth of the items authorized for seizure, not the probable cause supporting the warrant in general. The Defendant conceded in his motion that the affidavit "describe[d] the allegations with specificity[,]" and continued,

> Despite the apparent focus on *evidence related to the shooting, specifically an AR-15 or other firearm that could be described as a "long gun" and .223 caliber boat tail bullets*, the [s]earch [w]arrant was authorized for a significantly more expansive search and authorized law enforcement to search for items despite an absence of probable cause.

(Emphasis added). The Defendant then listed the thirty items authorized for search and seizure and contended that probable cause did not exist to support the seizure of a "majority" of these items. In arguing that a search for handguns was improperly authorized in the warrant because handguns were not mentioned in the affidavit, the Defendant acknowledged that the "affidavit specifically references a 'long gun[,]'" thus implying that the search warrant appropriately authorized the search and seizure of a "long gun." The suppression motion contained no reference to the lapse of time between the shooting and the issuance of the search warrant, nor did it contain any other argument regarding the nexus between the shooting and the Defendant's residence.

At the suppression hearing, the Defendant similarly focused on the two specific issues raised in his suppression motion: the *Franks* issue and the overbreadth argument. Again, the Defendant made no argument, temporal or otherwise, regarding the probable cause nexus between the shooting and his residence. The trial court's ruling was thus limited to the two issues argued in the Defendant's motion and presented by the Defendant at the suppression hearing. At the motion for new trial hearing, the trial court reiterated its understanding, without objection or clarification by the Defendant, that the Defendant had only raised two suppression issues: the *Franks* issue and the "general warrant" issue.

After a careful review of the record, we conclude that the Defendant has waived for appellate purposes any general attack on the validity of the search warrant due to a lack of probable cause or a nexus between the shooting and his residence. The Defendant did not properly raise or argue this issue before the trial court. To the contrary, the Defendant implicitly conceded in his suppression motion that some items were properly authorized for search and seizure in the search warrant, specifically the "long gun." At the motion for new trial hearing, the trial court stated its understanding, without objection by the Defendant, that the suppression motion was limited to two issues: the *Franks* issue and the "general warrant" issue. We agree and now turn to analyze the two issues that are properly preserved for appellate review.

2. The *Franks* Issue

The Defendant argues that the search warrant for his residence was invalid due to "the reckless inclusion [of] some statements and the reckless exclusion of other relevant facts" in the supporting affidavit. The Defendant contends that the affiant placed a reckless falsehood in the affidavit by stating that four witnesses implicated the Defendant in the shooting when, in fact, only three witnesses had done so. The Defendant also argues that the affiant recklessly omitted (1) the fact that one witness had informed law enforcement that he did not see anyone fire a gun; and (2) the fact that Mr. Equitani told law enforcement that the shooter placed the gun in a truck rather than a car. The State counters that the affidavit did not contain reckless falsehoods and that any omissions of fact in the affidavit do not rise to the level of invalidating the warrant. We agree with the State.

The fruits of a search warrant should be excluded when the affidavit in support of the search warrant includes deliberately or recklessly false statements by the affiant, which are material to the establishment of probable cause. *Franks*, 438 U.S. at 155-56. An affidavit, sufficient on its face, may be impeached only by showing "(1) a false statement made with intent to deceive the [c]ourt, whether material or immaterial to the issue of probable cause," or "(2) a false statement, essential to the establishment of probable cause, recklessly made." *Little*, 560 S.W.2d at 407. In the context of recklessly false statements, a defendant must show that the reckless statements were necessary to the finding of probable cause in order to be entitled to relief. *Franks*, 438 U.S. at 155-56; *see State v. Smith*, 867 S.W.2d 343, 350 (Tenn. Crim. App. 1993). Allegations of negligence or innocent mistakes are insufficient to invalidate a search warrant. *Franks*, 438 U.S. at 171. While some courts have recognized that the rationale of *Franks* and *Little* should extend to material omissions in the affidavit, "an affidavit omitting potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information." *State v. Yeomans*, 10 S.W.3d 293, 297

(Tenn. Crim. App. 1999) (citing 2 LaFave, *Search and Seizure* § 4.4(b) (3d ed. 1996), and *United States v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997)). The burden is on the defendant to establish the allegation of an intentionally or recklessly false statement by a preponderance of the evidence. *Yeomans*, 10 S.W.3d at 297 (citing *Franks*, 438 U.S. at 156).

In the affidavit, Inv. Cook described his October 2018 interviews of the four witnesses from the scene. After indicating that he spoke with four witnesses, Inv. Cook went on to state that "witnesses," without specifying a number, implicated the Defendant in the shooting. The proof at the suppression hearing demonstrated that only three of the witnesses actually implicated the Defendant and that a fourth, Mr. Rudd, maintained his original account that he had not seen anything. When read strictly, it can be said that the affidavit does not necessarily include a falsehood on this point; Inv. Cook did not swear that all of the witnesses that he interviewed implicated the Defendant, only that "witnesses"—*i.e.*, more than one—did. However, to the extent that the affidavit created the impression that all four witnesses implicated the Defendant, this was at most the result of negligent drafting and not a reckless misstatement of fact. In any event, the statement was not necessary to the finding of probable cause regarding the Defendant's involvement in the shooting. *See Franks*, 438 U.S. at 155-56; *Smith*, 867 S.W.2d at 350. The affidavit sufficiently established probable cause as to the Defendant's identity as the shooter, regardless of whether three or four witnesses implicated him. *See State v. Willis*, 496 S.W.3d 653, 721 (Tenn. 2016) (quoting *State v. Norris*, 47 S.W.3d 457, 469 n.4 (Tenn. Crim. App. 2000), for the proposition that "[i]n order to be 'essential to the establishment of probable cause,' the false or reckless statement must be the only basis for probable cause or if not, the other bases, standing alone, must not be sufficient to establish probable cause"); *see also State v. Tidmore*, 604 S.W.2d 879, 882 (Tenn. Crim. App. 1980).

The Defendant also claims that the search warrant is fatally flawed because Inv. Cook recklessly omitted from the affidavit the fact that Mr. Rudd did not see the shooting. We fail to see how Mr. Rudd's stated lack of knowledge detracts in any way from the statements of three other individuals who implicated the Defendant. Mr. Rudd's lack of knowledge was not necessary to a finding of probable cause, nor did it affect the credibility of the three witnesses who had knowledge of the crime. As such, the omission of this fact from the affidavit is not of constitutional moment.

Finally, the Defendant contends Inv. Cook recklessly omitted the fact that Mr. Equitani saw the shooter place the gun in a truck rather than a car, contrary to the accounts of two other witnesses. We note that the description of this vehicle is a relatively minor point when viewing the totality of the witnesses' statements. Regardless of whether the Defendant placed the gun in a car or a truck after the fact, the three witnesses provided a

generally consistent account identifying the Defendant as the victim's shooter. This truck/car discrepancy would have been only marginally relevant to assess the credibility of the witness-informants, but as the trial court noted, their credibility had already been placed into question in the affidavit by the inclusion of their initial accounts where they disclaimed any knowledge of the shooter's identity. We conclude that the omission of this relatively minor detail does not meet the standard of a reckless omission as contemplated by *Franks* and *Little* and their progenies.

The Defendant has failed to demonstrate that the affidavit supporting the search warrant of his residence contained reckless falsehoods or reckless omissions of potentially exculpatory information. His *Franks* argument does not entitle him to relief.

3. The Overbreadth of the Search Warrant

The Defendant argues on appeal that the search warrant for his residence was invalid because it "was overbroad, constituting a general warrant." The State counters that the search warrant was not general. Alternatively, the State argues that any error in the admission of the Defendant's AR-15 at trial was harmless beyond a reasonable doubt.

The Fourth Amendment requires a search warrant to contain a particular description of the items to be seized. U.S. Const. amend. IV; *Henning*, 975 S.W.2d at 296 (citing *Marron v. United States*, 275 U.S. 192, 196 (1927)). Further, article I, section 7 of the Tennessee Constitution specifically prohibits general warrants, and Tennessee Code Annotated section 40-6-103 requires search warrants to describe particularly the place and property to be searched. *See State v. Bostic*, 898 S.W.2d 242, 245 (Tenn. Crim. App. 1994). To satisfy the particularity requirement, a warrant "must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *Henning*, 975 S.W.2d at 296 (internal quotations and citations omitted). The particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another." *Marron*, 275 U.S. at 196. In other words, "where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other." *Lea v. State*, 181 S.W.2d 351, 352-53 (Tenn. 1944). In a search warrant that complies with the particularity requirement, "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196.

With these particularity tenets in mind, we observe that constitutional law thus provides two distinct requirements for search warrants that are relevant to this case: (1) that probable cause supports the issuance of the warrant; and (2) that the items authorized for seizure are particularly described in the warrant. The United States Supreme Court has

highlighted the separate nature of these analyses by outlining "the two distinct constitutional protections served by the warrant requirement":

> First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. . . . The second distinct objective is that *those searches deemed necessary* should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (emphasis added and internal citations omitted). Viewed in this way, a particularity analysis sets aside the question of probable cause and focuses instead on whether the items authorized for seizure have been described so as to leave "nothing . . . to the discretion of the officer executing the warrant." *See Marron*, 275 U.S. at 196.

Clarification is required at this point to identify which of these distinct constitutional questions is before this court. We must determine whether the Defendant is raising a probable cause claim—that the warrant was overbroad in the sense that it authorized the seizure of items not supported by probable cause in the affidavit—or whether he is raising a particular description claim—that the warrant was overbroad in the sense that items were authorized for seizure but not particularly described in the warrant so as to "prevent[] the seizure of one thing under a warrant describing another." *Marron*, 275 U.S. at 196.

As we have stated, in his motion to suppress, the Defendant argued that, despite specific references in the affidavit to an "AR-15 or other firearm that could be described as a 'long gun' and .223 caliber boat tail bullets, the [s]earch [w]arrant was authorized for a significantly more expansive search and authorized law enforcement to search for items despite an absence of probable cause." The Defendant's argument in the trial court—that the search warrant was "overbroad" and "tantamount to an invalid general warrant"—centered on the warrant's authorization to seize items that were not supported by probable cause in the affidavit.

On appeal, however, the Defendant argues, at least in part, that the overbreadth of the warrant is due to a violation of the constitutional and statutory particularity requirement. Notably, the Defendant did not mention the particularity requirement—"a distinct constitutional protection[,]" *Coolidge*, 403 U.S. at 467—in his motion to suppress or at the suppression hearing before the trial court. As stated, his argument below focused on overbreadth due to the inclusion of items in the warrant not supported by probable cause, not a failure to particularly describe the items in the warrant so as to "prevent[] the seizure

of one thing under a warrant describing another." *Marron*, 275 U.S. at 196. Given the distinct nature of these constitutional provisions, we determine that the Defendant has waived any argument regarding the particularity requirement on appeal. *See Dobbins*, 754 S.W.2d at 641; *Lawrence*, 655 S.W.2d at 929; Tenn. R. App. P. 36(a).

The Defendant's argument on appeal, however, is broad enough in our view to encompass the suppression theory that he advanced in the trial court—*i.e.*, that the search warrant authorized the search and seizure of certain items that were not supported by probable cause in the affidavit. We will therefore address this argument on the merits.

The search warrant in this case undoubtedly authorized the search and seizure of numerous items that were not supported by probable cause in the affidavit. To name a few, the warrant authorized the search and seizure of "blood, seminal fluid, soiled bed clothes, soiled sheets, prophylactics, . . . hair, fibers, cleaning supplies, . . . edged weapons or items that can be used as a weapon, [and] hand guns[.]" None of these items were mentioned in the affidavit, nor did the affidavit establish any nexus between these items and the suspected criminal activity.

In implicitly reaching this conclusion, the trial court suggested to the parties at the suppression hearing that the remedy would be suppression of those items not supported by probable cause in the affidavit. Defense counsel resisted this suggestion and asked for the suppression of all fruits of the search warrant, arguing, "[T]he search warrant is overly broad, and the remedy would be to exclude [all evidence]."

It is important to note here that defense counsel's argument in the trial court cannot be read as calling for complete suppression of the fruits of the search because it was *entirely* unsupported by probable cause; the Defendant had previously pled that only a "majority" of the items were unsupported by probable cause and had implicitly conceded that probable cause had been established in the affidavit for the "long gun" and the ammunition. Rather, the record dictates that the Defendant's argument before the trial court must be read as calling for the suppression of *all* evidence as a remedy for the lack of probable cause to seize *some* evidence.

This position, however, is not supported by decisional law. "Once it is established that a search warrant is partially valid, the reasonableness of the search and seizure which takes place should be measured by the scope provided in the warrant's valid portion." *State v. Meeks*, 867 S.W.2d 361, 373 (Tenn. Crim. App. 1993). "The reasoning is that if a warrant is partially valid and the invalid portion may be severed, the executing officers still have lawful access to the property to be searched." *Id.* While *Meeks* involved a particularity challenge—an issue that we have determined not to be properly before the

court in this case—we see no reason why the severance principle it enunciated should not also be extended to search warrants that are partially invalid due to a lack of probable cause in the affidavit. *See State v. Partin*, No. E2004-02998-CCA-R3-CD, 2006 WL 709200, at *12 (Tenn. Crim. App. Mar. 21, 2006) (noting in dicta that, where the search warrant authorized the seizure of items that were not supported by probable cause in the affidavit, officers were legally on the defendant's property to search for items that were supported by probable cause), *vacated on other grounds by Partin v. Tennessee*, 549 U.S. 1196 (Feb. 20, 2007); *see also United States v. Riggs*, 690 F.2d 298, 300-01 (1st Cir. 1982) (accepting partial suppression as a remedy for items not supported by probable cause); *United States v. Christine*, 687 F.2d 749, 759-60 (3rd Cir. 1982) (adopting severance and holding that only the portions of the warrant unsupported by probable cause should be invalidated); *United States v. Cardwell*, 680 F.2d 75, 78-79 (9th Cir. 1982) (accepting partial suppression but finding that no portion of the warrant could withstand particularity and probable cause challenges). We agree that "'it would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and the magistrate erred in seeking and permitting a search for other items as well.'" *United States v. Cook*, 657 F.2d 730, 735 (5th Cir. 1981) (quoting 2 LaFave, *Search and Seizure* § 4.6(f) (1978)).

Once it became clear that the trial court was rejecting the Defendant's all-or-nothing remedy to the probable cause violation in favor of a severance approach, defense counsel allowed that "anything other than a long gun or ammunition should be excluded."[9] In light of this concession, the trial court ruled that the long gun and ammunition would be admissible at trial but suppressed a black face mask that had been seized from the Defendant's residence because it was not included in the affidavit. We conclude that the trial court, viewing the issue as it was presented, appropriately severed and suppressed the evidence that was not supported by probable cause in the affidavit and admitted the evidence that was unchallenged by the Defendant on a probable cause basis. The Defendant is not entitled to relief.

C. The Cross-Examination of Jody Richards

The Defendant argues that the trial court erred by limiting his cross-examination of Mr. Richards in contravention of the Defendant's rights to cross-examination and a fair trial. The Defendant contends that he should have been able to ask Mr. Richards about his pending criminal charges in order to have Mr. Richards invoke his Fifth Amendment rights in the jury's presence. The Defendant also argues that he should have been able to cross-examine Mr. Richards regarding Inv. Cook's offer to "help him out" with his pending

[9] This bolsters our previous determination that the Defendant did not argue in the trial court that all items authorized for search and seizure in the warrant were unsupported by probable cause.

charges. The State counters that the trial court properly limited the Defendant's cross-examination of Mr. Richards or, alternatively, that any error was harmless beyond a reasonable doubt.

A defendant's constitutional right to confront witnesses includes the right to conduct meaningful cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *State v. Brown*, 29 S.W.3d 427, 430-31 (Tenn. 2000). The denial of a defendant's right to effective cross-examination is "constitutional error of the first magnitude" and may violate the defendant's right to a fair trial. *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). However, "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Davis*, 466 S.W.3d 49, 68 (Tenn. 2015) (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988)). Thus, a defendant's right to confront witnesses does not preclude a trial court from imposing limits upon the cross-examination of witnesses, taking into account such factors as "harassment, prejudice, issue confusion, witness safety, or merely repetitive or marginally relevant interrogation." *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994); *see also* Tenn. R. Evid. 611(a) (stating that the trial court has authority to "exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel").

The propriety, scope, manner, and control of the cross-examination of witnesses rests within the sound discretion of the trial court. *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995) (citing *Coffee v. State*, 216 S.W.2d 702, 703 (Tenn. 1948), and *Davis v. State*, 212 S.W.2d 374, 375 (Tenn. 1948)). Absent a clear abuse of discretion that results in manifest prejudice to the defendant, this court will not interfere with the trial court's exercise of its discretion on matters pertaining to the examination of witnesses. *State v. Johnson*, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984) (citing *Monts v. State*, 379 S.W.2d 34 (Tenn. 1964)).

In *State v. Dicks*, our supreme court ruled that a trial court did not err by refusing to force a codefendant witness to testify only to assert his Fifth Amendment privilege in the presence of the jury. 615 S.W.2d 126, 129 (Tenn. 1981). The court noted that "a jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege against self-incrimination, whether those inferences be favorable to the prosecution or the defense." *Id*. (citations omitted). "'If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand.'" *Id*. (quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)); *see State v. Rollins*, 188 S.W.3d 553, 567-71 (Tenn. 2006)

(reaffirming *Dicks* and applying it in the context of an incarcerated witness whom the defendant sought to implicate in his case).

In *State v. Dunn*, this court applied the rule of *Dicks* and held that a trial court properly prevented a defendant from cross-examining a victim, who had asserted her right against self-incrimination, regarding pending criminal charges that could have reflected upon her character for untruthfulness. No. E2021-00343-CCA-R3-CD, 2022 WL 2433687, at *13 (Tenn. Crim. App. July 5, 2022), *perm. app. denied* (Tenn. Dec. 14, 2022). If a witness can offer other, non-incriminating testimony, however, a defendant is not prohibited from eliciting that testimony on cross-examination. *See, e.g., State v. Lakins*, No. 03C01-9703-CR-00085, 1998 WL 128842, at *4 (Tenn. Crim. App. Mar. 24, 1998) (affirming a trial court's limiting the examination of a witness on issues where the witness would assert his Fifth Amendment privilege but permitting examination on other issues).

Prior to Mr. Richards' testimony in this case, the trial court ruled that the Defendant could properly cross-examine Mr. Richards on "what he's got pending on the table . . . ; the fact that he[] hasn't been prosecuted yet, he's not been held to account, [and] the State's not pushed [his] cases to trial." The trial court also ruled that the Defendant would not be permitted to ask about the underlying facts of Mr. Richards' pending cases if Mr. Richards invoked his right against self-incrimination, which he subsequently did through counsel prior to his testimony. The trial court correctly applied the rule of *Dicks* in limiting Mr. Richards' cross-examination in this regard.

Despite the trial court's ruling, defense counsel nevertheless asked Mr. Richards to "tell the [j]ury how that happened[,]" referring to his pending charge for introduction of contraband into a penal facility. When the trial court stopped this line of questioning, defense counsel elicited from Mr. Richards that he had been charged with this offense, along with other offenses, and that these offenses were still pending prosecution. The trial court did not prevent defense counsel from asking these questions, nor did the trial court prevent defense counsel from engaging in a subsequent line of questioning regarding Mr. Richards' potential jail time or Inv. Cook's offer of assistance related to Mr. Richards' pending charge in Humphreys County.

The Defendant asks us to rely on *State v. Washington* and hold that the trial court should have forced the Defendant to invoke his Fifth Amendment right in the presence of the jury. No. 01-C-01-9301-CC00012, 1993 WL 393428 (Tenn. Crim. App. Oct. 7, 1993). In *Washington*, this court held that a trial court erred by not forcing a victim to assert her Fifth Amendment privilege in the presence of the jury where the defendant was attempting to impeach her with two pending theft charges pursuant to Tennessee Rule of Evidence 608(b). *Id*. at *2. The Defendant's reliance on *Washington* is misplaced. First, the ruling

in *Washington* was based in large part upon the language of Rule 608(b), which is not implicated in this case. Second, this case is factually distinguishable from *Washington* in that the witness in *Washington* was also the victim and the only witness to testify for the State as to the event in question. *See id*. at *1. In this case, Mr. Richards was not the victim but was one of numerous eyewitnesses to testify on behalf of the State. Finally, even if *Washington* was not factually and legally distinguishable, we are bound by the controlling precedent of *Dicks*. *See Dunn*, 2022 WL 2433687 at *13 (declining to extend *Washington*).

Our review of the record indicates that the trial court appropriately prevented cross-examination that would infringe upon Mr. Richards' right against self-incrimination but freely allowed cross-examination into areas that would not elicit incriminating evidence against him. Even though the trial court had to repeatedly stop defense counsel from asking about the underlying facts of Mr. Richards' charges, the trial court allowed defense counsel to ask subsequent questions that were within the bounds of the court's prior ruling. The trial court did not err.

D. The Defendant's Motion to Exclude the TBI Firearms Report

The Defendant argues that the trial court improperly admitted the expert testimony of TBI Special Agent Teri Arney. Specifically, the Defendant contends that Ms. Arney's testimony did not substantially assist the trier of fact because she could not conclusively link the Defendant's firearm with the bullet that killed the victim. The Defendant posits that her testimony did not meet the general relevancy requirements of Tennessee Rules of Evidence 401 and 403, nor did it meet the requirements for the admission of expert testimony found in Rules 702 and 703. The State counters that Ms. Arney's testimony was relevant and that it substantially assisted the jury because it confirmed that it was possible that the Defendant's firearm could have fired the fatal bullet. We agree with the State.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. In general, relevant evidence is admissible, and irrelevant evidence is inadmissible. Tenn. R. Evid. 402. The court may, however, exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

The admission of expert testimony is governed by Tennessee Rules of Evidence 702 and 703. *State v. Copeland*, 226 S.W.3d 287, 301 (Tenn. 2007) (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005)). Rule 702 provides, "If scientific,

technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702. Rule 703 provides,

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703. Determinations regarding the qualifications, admissibility, relevance, and competence of expert testimony fall within the broad discretion of the trial court and will be overturned only for an arbitrary exercise or abuse of that discretion. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-64 (Tenn. 1997).

In *State v. Davidson*, our supreme court addressed a similar challenge to the admission of expert ballistics testimony. 509 S.W.3d 156, 204-09 (Tenn. 2016). In *Davidson*, the ballistics expert could not state with certainty that the defendant's revolver was the murder weapon, but she testified that it shared common class characteristics with the bullets found in the victim's body and therefore could have been used to fire the bullets. *Id*. at 207. The court explained,

> [The expert's] testimony, while not highly probative, was sufficiently probative on whether the bullets found in [the victim's] body were fired from Mr. Davidson's High Standard revolver and thus material to the issue of Mr. Davidson's guilt or innocence. The jury could infer from [the expert's] testimony that the High Standard revolver was the weapon used to shoot [the victim] because test bullets and the bullets from [the victim's] body shared class characteristics and that the cartridge cases found in Mr. Davidson's house were associated with the murder. It was up to the jury to decide how much weight to give this testimony. Mr. Davidson's counsel effectively cross-examined [the expert] and had the option of calling his own expert ballistics witness.

Id. Under these circumstances, the court held that the trial court did not abuse its discretion by admitting the evidence. *Id*.

The instant case falls squarely within the precedent of *Davidson*. While Ms. Arney's testimony was not "highly probative," it was sufficiently probative to allow the jury to infer that the Defendant's weapon fired the bullet that killed the victim and was thus material to the Defendant's guilt or innocence. The Defendant vigorously cross-examined Ms. Arney, eliciting an admission that the class characteristics of the Defendant's firearm would be the same as every model of that gun made by the same manufacturer, which would include a large number of rifles. *See McDaniel*, 955 S.W.2d at 265 (noting that once expert testimony is properly admitted, "it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof"). The Defendant highlighted this point in both his opening statement and closing argument and urged the jury to attach little weight to Ms. Arney's testimony. Ultimately, the question here is one of weight and not admissibility. The trial court properly admitted Ms. Arney's testimony. The Defendant is not entitled to relief.

E. The Sufficiency of the Evidence Establishing the Defendant's Identity

The Defendant argues that the evidence is insufficient to establish his identity as the shooter. The State contends the opposite. We agree with the State.

The United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

"Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not "reweigh

or reevaluate the evidence." *Id*. (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The law provides this deference to the jury's verdict because

> [t]he jury and the [t]rial [j]udge saw the witnesses face to face, heard them testify, and observed their demeanor on the stand, and were in much better position than we are, to determine the weight to be given their testimony. The human atmosphere of the trial and the totality of the evidence before the court below cannot be reproduced in an appellate court, which sees only the written record.

Carroll v. State, 370 S.W.2d 523, 527 (Tenn. 1963) (internal quotations and citations omitted). Therefore, on appellate review, "the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *Cabbage*, 571 S.W.2d at 835.

The identity of the perpetrator is an essential element of any crime. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). The State has the burden of proving the identity of the defendant as the perpetrator beyond a reasonable doubt. *State v. Sneed*, 908 S.W.2d 408, 410 (Tenn. Crim. App. 1995) (citing *White v. State*, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975)). Identity is a question of fact for the jury's determination upon consideration of all competent proof. *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005). As with any sufficiency analysis, the State is entitled to the strongest legitimate view of the evidence concerning identity contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *See id*. (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992)); *see also State v. Miller*, 638 S.W.3d 136, 158-59 (Tenn. 2021).

The proof at trial established that the Defendant believed the victim had stolen lumber from the Defendant's renovation site. Three of the workers at the renovation site testified that they heard gunfire and saw the Defendant, with whom they were all familiar, immediately emerge from a wooded area with a firearm before placing the firearm in a vehicle and leaving the scene. It is true, as the Defendant contends, that no witness actually saw the Defendant pull the trigger, but the jury could properly infer his identity as the shooter from the witnesses' testimony. While there were certainly inconsistencies in the witnesses' accounts, these inconsistencies bore on the credibility of the witnesses, and the resolution of their credibility is solely the prerogative of the jury. *See Bland*, 958 S.W.2d at 659. After the shooting, the Defendant threatened Mr. Daugherty by warning him that

"the same f---ing thing could happen to [Mr. Daugherty] that just happened to [the victim]." Months after the shooting, authorities recovered a firearm from the Defendant's residence that was similar to one described by the witnesses at the scene and that was at least ballistically consistent with having fired the bullet that killed the victim. The jury heard proof regarding purported gaps in the investigation and the possibility of other suspects but nevertheless resolved all factual issues in favor of the State and convicted the Defendant. When viewing the evidence at trial in the light most favorable to the State, the evidence was abundantly sufficient to establish the Defendant's identity as the perpetrator. The Defendant is not entitled to relief.

III. CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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KYLE A. HIXSON, JUDGE