IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 22, 2023 Session

STATE OF TENNESSEE v. JANET ELAINE HINDS

Appeal from the Criminal Court for Hamilton County
No. 307487 Don W. Poole, Judge

No. E2022-00544-CCA-R3-CD

The defendant, Janet Elaine Hinds, appeals her Hamilton County Criminal Court jury convictions of vehicular homicide by intoxication, driving under the influence ("DUI"), leaving the scene of an accident, and other driving-related offenses, for which she received an effective sentence of 11 years' incarceration. On appeal, the defendant challenges the sufficiency of the evidence supporting her convictions for vehicular homicide by intoxication and DUI, the denial of her motions to suppress evidence obtained from the searches of her home and vehicle, the admission of a life photograph of the victim and videos of the crime scene, the limitation of cross-examination and exclusion of evidence related to the defense's calculation of blood alcohol levels, the jury instructions on flight and proximate cause, and comments made by the prosecution during closing arguments. The defendant also argues that her sentence is excessive and that the cumulative effect of the errors entitles her to a new trial. Discerning no error, we affirm.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JOHN W. CAMPBELL, SR., JJ., joined.

Benjamin McGowan and Marya Schalk, Chattanooga, Tennessee, for the appellant, Janet Elaine Hinds.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Neal Pinkston, District Attorney General; and Cameron Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Hamilton County Grand Jury charged the defendant with vehicular homicide by intoxication as a result of striking and killing Nicholas Galinger, a police officer with the Chattanooga Police Department ("CPD"), with her vehicle on the night of February 23, 2019. The Grand Jury also charged the defendant with reckless driving, leaving the scene of an accident resulting in the death of another, failure to report an accident, failure to render aid, violation of a traffic control device, speeding, failure to exercise due care, failure to maintain the appropriate lane, and DUI.

According to the evidence presented during the September 2021 trial, the defendant spent several hours prior to the crash drinking alcohol at Farm to Fork, a restaurant in Ringgold, Georgia. Between 6:30 and 7:00 p.m., the defendant met her son, Jerod Hinds, and her daughter-in-law, Melissa Hinds, at the restaurant to watch a performance by a band in which Mrs. Hinds's father was a member. Mrs. Hinds testified that the restaurant was crowded and that she, her husband, and the defendant waited at the bar for a short time before any tables were free. Mr. Hinds ordered an Angry Orchard for Mrs. Hinds, a beer for himself, and a "larger size" Blue Moon beer for the defendant. Shortly thereafter, Mrs. Hinds and her husband sat at a table with some of Mrs. Hinds's co-workers, while the defendant sat with a group at a table located on the other side of the restaurant. During the course of the evening, Mrs. Hinds's interactions with the defendant were "few and far between," and Mrs. Hinds saw the defendant drink only the Blue Moon beer.

Mrs. Hinds and her husband left the restaurant between 10:30 and 11:00 p.m. Mrs. Hinds, who drank one alcoholic drink that evening, offered to drive the defendant to her home. Mrs. Hinds explained that the weather was "horrible" and that they were planning to return to the area the next day during which they could retrieve the defendant's vehicle. Mrs. Hinds acknowledged that she also offered to drive the defendant home because the defendant had been drinking alcohol. Mrs. Hinds extended the offer to the defendant two or three times, but the defendant declined, stating, "I'm fine." Mrs. Hinds testified that the defendant "was totally fine," but Mrs. Hinds was unaware that the defendant had consumed multiple beers and a Lemon Drop shot while at the restaurant.

While Mrs. Hinds was driving home, she came to an area where a number of police officers were present due to an accident. She sent the defendant a text message about the accident and the police presence, and the defendant replied that she had "[g]ot[ten] past it." Mrs. Hinds and her husband arrived at their home between 11:15 and 11:30 p.m. At approximately 11:30 or 11:45 p.m., the defendant called Mrs. Hinds and stated that she had struck a road sign while driving home. The defendant said that the sign had a "blinky light," which "wasn't working," and that although she was uninjured, the vehicle had a "cracked" windshield and a "scraped up" hood. The defendant told Mrs.

Hinds that she intended to rent a vehicle the next day. Mrs. Hinds testified that the defendant sounded "totally fine" during the conversation.

Mrs. Hinds testified that the next morning, her husband sent her a news report, stating that a police officer had been struck on Hamill Road, the same road where the defendant reported that she had struck a road sign. The defendant lived approximately four miles from Hamill Road, and Mrs. Hinds acknowledged that the defendant was familiar with the road. Mrs. Hinds called the defendant, who maintained that she struck a road sign and not a police officer. Between 10:30 and 11:30 a.m., Mrs. Hinds met the defendant's parents and other family members at the defendant's home where the defendant's vehicle was parked in the driveway. The windshield was "shattered;" the hood was "scraped up;" and Mrs. Hinds saw strands of hair in the windshield. The defendant was distraught, and her two sons and Mrs. Hinds urged her to call the police. Mrs. Hinds stated that at that point, they were unaware that the victim had died.

Mrs. Hinds left the defendant's home around 11:30 or 11:45 a.m., during which time no one at the home had called the police. Mrs. Hinds believed the defendant was planning to contact an attorney and turn herself in to the police. Mrs. Hinds testified that she did not see the defendant for the rest of the day, that she did not know where the defendant was, and that the defendant did not answer any of her calls. At approximately 2:30 p.m., police officers came to Mrs. Hinds's home searching for the defendant. Officers interviewed Mrs. Hinds and her husband, both of whom cooperated with the officers.

During cross-examination, Mrs. Hinds testified that the defendant was a "regular drinker" in that she drank a few beers or a few glasses of wine daily, but Mrs. Hinds did not regard the defendant's drinking as problematic. The defendant had a prescription for Ambien, but Mrs. Hinds had never seen the defendant take Ambien while drinking alcohol. Mrs. Hinds had no reason to believe that the defendant consumed any alcohol before arriving at the restaurant and observed no change in the defendant's demeanor throughout the evening. Mrs. Hinds had observed the defendant in an impaired state previously and stated that she did not observe the defendant's exhibiting any signs of impairment while at the restaurant. Mrs. Hinds maintained that had she observed any signs of impairment, she would not have allowed the defendant to drive. Mrs. Hinds noted that the defendant walked with a limp due to a prior foot surgery.

Mrs. Hinds testified that when the defendant learned that she had struck the victim, she was "distraught," "completely uncontrollable," and crying. The defendant's parents planned to take her to meet with an attorney, and everyone at the defendant's home agreed that the defendant would turn herself in to the police. While at the defendant's home, Mrs. Hinds sent text messages to her husband that the defendant was speaking to an

attorney on her telephone and that she was scheduled to meet with an attorney at noon on the same day.

Jarrod Justice, a former CPD officer, testified that in February 2019, he was a patrol officer and the victim's field training officer. The victim had recently graduated from the police academy and was preparing to complete his first phase of training. Officer Justice identified a photograph of the victim in his police uniform.

Officer Justice testified that on the night of February 23, 2019, shortly after his shift began at 10:00 p.m., he was dispatched to Hamill Road where a manhole cover had been dislodged as a result of heavy rain earlier in the day. Officer Justice and the victim went to the scene in a police-assigned Ford Explorer. Officer Justice observed water "gushing" out from underneath the manhole cover, and an "A-frame or saw horse type reflective barricade" was in the road over the manhole cover. The barricade had orange and white stripes that were reflective when his headlights shown on it. He parked his vehicle in a nearby driveway and noted that a street light next to the driveway illuminated the area around the manhole cover. He did not activate the blue lights on his vehicle, explaining that the street light "clearly" illuminated the barricade and that he determined that the blue lights could distract drivers and prevent them from seeing the barricade.

Officer Justice testified that he and the victim stood on the side of the road and observed how traffic was reacting to the barricade and the manhole cover. Officer Justice stated that multiple vehicles slowed and drove around the barricade. He believed the speed limit was 35 miles per hour. He stated that neither he nor the victim wore a reflective vest and explained that based on the nature of the call, he did not believe they would be required to direct traffic or block a lane of traffic. Officer Justice said that they were at the scene to observe the condition of the manhole cover and to determine if additional work was necessary to secure the manhole cover in place. He affirmed that the decision against wearing a reflective vest was consistent with CPD's policy manual. The victim was wearing a body camera, which was recording.

Officer Justice and the victim walked into the roadway and observed the manhole cover. Officer Justice stepped out of the roadway, but he did not believe the victim followed him. Officer Justice testified that he saw a vehicle traveling east at a higher rate of speed than other vehicles had been traveling and down the center of the roadway, straddling the center line. He began yelling the victim's name in an effort to get his attention. The vehicle struck the victim and the barricade, stopped briefly, and then fled the scene, traveling east toward Cassandra Smith Road. After the victim was struck, Officer Justice activated his body camera and began recording.

Officer Justice testified that the victim's body landed in the middle of the roadway and in a darker area outside the clear illumination of the street light. Officer Justice moved his car to the roadway and activated its blue lights in an effort to block the roadway from oncoming traffic. He announced "brake" over the radio which meant that he had an emergency and needed priority over the radio. He stated that the victim did not have a pulse and that after he ensured that approaching traffic would stop, he began administering CPR on the victim. Officer Justice said that a vehicle passed him as he was running toward his patrol car and that because his flashlight had fallen from his belt, he was unable to use the flashlight to illuminate himself or the vehicle to get the driver's attention. He heard the vehicle strike something in the roadway, and he initially believed that the vehicle struck the victim as he was lying out in the roadway. The vehicle stopped, and the driver remained on the scene for a period of time. Officer Justice later learned that the second vehicle did not strike the victim. He explained that he was upset and disoriented, and he agreed that because the victim's death was so traumatic, he was unable to recall some of the details and had to review the footage from his and the victim's body cameras.

The footage from the victim's body camera, which was played for the jury, showed a manhole cover near the middle of the roadway and an A-frame barricade over the manhole cover. Water was pouring out of the manhole cover and onto the roadway. The barricade had a light near the top of its frame, but the light was not working. As the officers were standing on the side of the road, multiple vehicles slowed down and drove past the barricade. The officers walked into the roadway, and the victim shined his flashlight down toward the road. Officer Justice walked out of view of the victim's body camera. The victim bent over the manhole cover during which the faint sound of yelling could be heard in the background. However, most of the yelling was drowned out by the sound of water rushing out of the manhole cover. The recording then showed a headlight from the vehicle and the vehicle's striking the victim. A still shot from the footage depicted the vehicle straddling the center line of the roadway before striking the barricade and the victim.

During cross-examination, Officer Justice testified that on the night of the crash, it had rained for a period of time and that water was still on the road. Upon inspecting the manhole cover, Officer Justice did not believe the situation was dangerous because vehicles were slowing down and driving around the barricade. He noted that before the defendant drove through the area, two other vehicles traveled through from the same direction in which the defendant came and that the vehicles slowed down and traveled through the area without incident. He also noted that the public works department would have been responsible for the necessary repairs.

Officer Justice testified that he was aware that the victim's family had brought a civil lawsuit alleging that he should have activated the blue lights on his vehicle

when he and the victim arrived at the scene. He agreed that the CPD's policy manual provided that "[b]lue lights may be used on stopped police vehicles when such use will assist in minimizing a traffic hazard." However, he believed the use of blue lights upon their arrival could have distracted the drivers and affected their vision, thus amplifying the hazard. He agreed that other lights on the patrol vehicle were available to illuminate the barricade but stated that the use of such lights could have directed the attention of the drivers to the side of the roadway and away from the barricade. Officer Justice did not back his patrol vehicle into the driveway but drove straight into the driveway. He acknowledged that as a result, he was unable to use the headlights on the vehicle to illuminate that area but explained that the use of headlights could have created the same issue with distracting the drivers. Officer Justice stated that he determined that the street light was adequate to illuminate that area around the barricade and to enable the drivers to see the barricade in order to slow down and drive around it. Officer Justice explained that he and the victim did not wear reflective vests because they only intended to briefly step into the roadway when the roadway was clear from traffic. He acknowledged that he and the victim were wearing dark clothing.

Officer Justice agreed that the victim was leaning over the manhole cover and looking at a sign that was on the ground shortly before the vehicle struck him. Officer Justice stated that as soon as he saw the headlights of the defendant's vehicle, he began shouting at the victim to leave the roadway. He agreed that the victim was looking down at the road with a sign in his hand and did not indicate that he heard Officer Justice's shouts. Officer Justice stated that the victim potentially could have avoided the vehicle had he heard Officer Justice's shouting. The defendant's vehicle was traveling at a "high rate of speed," and Officer Justice did not observe any indication by the victim that he saw the vehicle before it struck him.

During redirect examination, Officer Justice acknowledged that even though he was not wearing a reflective vest and the lights from his patrol vehicle were not illuminating the area, other drivers were able to slow down before passing the barricade. He stated that the left lane would have been the defendant's proper lane of travel but that the defendant's vehicle was across the center line. He agreed that the defendant was not situationally aware of what was occurring around her.

CPD Officer Jennifer Lockhart testified that she had just completed her shift and returned to her home on Hamill Road when she heard Officer Justice's call for help over the radio shortly after 11:00 p.m. While responding to the scene, she activated her emergency lights, which also activated her video cameras, including her dash camera. The recording from her dash camera of her route to the scene was entered into evidence. Officer Lockhart stated that Hamill Road typically flooded when it rained and that anyone who traveled down Hamill Road on a consistent basis should have been aware of the flooding

issue. She believed that the area had been barricaded for several days prior to the incident due to the long period of rain. She identified multiple areas between the scene and along the route to the defendant's home where a driver could stop a vehicle and assess any damage following an accident.

CPD Lieutenant Justin Kilgore, a supervisor of the traffic unit in February 2019, testified that at that time, the traffic unit investigated any crash involving a CPD officer and that his investigation of the case would not have differed if the victim had not been a police officer. Lieutenant Kilgore stated that the crash occurred around 11:04 p.m. and that he arrived at the scene after the victim had been transported. He observed the victim's duty belt, radio, and other items lying on the ground. An officer found a bumper grill from a vehicle in the middle of the street near the area where the victim's body had been. An internet search of the number written on the grill revealed that the grill belonged to a 2016 through 2019 model Honda CR-V, and a search of those models registered in Hamilton County revealed "thousands" of possible vehicles. Officers began going to the addresses listed in the registrations in an effort to locate the vehicle. Lieutenant Kilgore subsequently learned that a still photograph from the victim's body camera revealed that the vehicle appeared to be white.

During cross-examination, Lieutenant Kilgore testified that he received a screen shot of a text message exchange between defense counsel and another detective that occurred on Sunday, February 24, 2019. At 3:56 p.m., defense counsel sent a text message to the detective stating, "We represent a woman named Janet Hinds who may be involved. She wants to turn herself in. Can we meet you in the morning?" The detective responded that Lieutenant Kilgore was the lead investigator and was trying to call defense counsel. Defense counsel responded, "Ok. Thx. Just talked to Neal." Lieutenant Kilgore testified that officers continued searching for the defendant.

CPD Investigator Giuseppe Troncone testified that upon learning of the victim's death the next morning, he reported to a command post located near the scene where he spoke to investigators and later drove around different areas in an effort to locate the vehicle. At approximately 2:00 p.m., he located a newer model Honda CR-V that matched the description of the vehicle parked in the driveway of a home in Hamilton County. From the street, Investigator Troncone observed that the front end of the vehicle was damaged and that the front windshield was "completely spider-webbed and shattered." He reported the vehicle and waited for other officers to arrive. Once additional officers arrived, Investigator Troncone and other officers knocked on the front door of the home, but no one came to the door.

CPD Investigator Tim Pickard, a fugitive investigator and a member of the task force with the United States Marshals Service, responded to the address where the

vehicle was located. He learned that no one was at the home. He testified that he spoke to a neighbor, who stated that the defendant and possibly her son lived at the home. Investigator Pickard went to the home of Mr. and Mrs. Hinds, both of whom were "very nice and very cooperative" and who provided the address of the defendant's parents. At approximately 5:00 p.m., officers went to the address, but no one was there. An officer spoke to a neighbor and requested that the neighbor contact him when the occupants returned. Shortly thereafter, the neighbor contacted officers and reported that the occupants had returned. When the officers returned to the home of the defendant's parents, the defendant was not there, and her parents did not provide any information regarding the defendant's location. After the officers left her parents' home, defense counsel contacted someone regarding the defendant, but officers continued searching for her. An arrest warrant for the defendant was issued at approximately 7:00 or 8:00 p.m., and the defendant was added to the Top Ten Most Wanted list of the Tennessee Bureau of Investigation ("TBI") prior to the 11:00 p.m. newscasts. Officers searched for the defendant at the homes of her friends, the post office where she worked, and various hotels, but they were unable to locate her. On the following morning at approximately 8:00 a.m., the defendant turned herself in at the police service center.

Investigators with CPD's crime scene unit assisted in executing search warrants for the defendant's house and vehicle. Investigator Kristin Booker documented and collected evidence from the exterior of the vehicle while the vehicle was parked in the defendant's driveway, and she searched the interior of the vehicle after it was transported to the crime scene unit's garage. Investigator Booker testified that the hood had a large dent and what appeared to be scuff marks, that the grill was missing, and that the windshield had a large hole. She collected several hairs from the broken glass in the windshield, as well as the entire windshield and the windshield wiper blades. She observed shattered glass along the top of the dashboard, on the seats, and in the area of the center console. An investigator collected a green shirt that appeared to have a piece of glass on it from the laundry room of the defendant's residence. Investigator Booker collected a fairly large piece of what appeared to be human tissue near the steering column of the vehicle and took swabs from the vehicle's interior and exterior. The parties stipulated that officers located three empty prescription bottles of Ambien in the center console of the defendant's vehicle. The parties later stipulated that two additional empty prescription bottles were found in her vehicle.

The evidence was sent to the TBI's crime laboratory for testing. Testing revealed that the small fragments of glass from the green shirt seized from the defendant's home was consistent with the optical properties of the windshield from the defendant's vehicle. DNA testing was conducted to determine the identity of the person who wore the shirt, and the DNA found on the shirt was consistent with the defendant's DNA. The victim's DNA was found on the exterior windshield on both the driver's side and the

passenger's side of the defendant's vehicle and on the human tissue found in the interior of the vehicle near the steering wheel. DNA obtained from the swabs of the vehicle's hood and windshield wiper on the driver's side was consistent with the victim's DNA.

Officer Jeffrey Buckner with the CPD's traffic and DUI unit was on duty on the night of February 23, 2019, and responded to the scene of the crash. He collected the body cameras of the victim and Officer Justice and reviewed the videos from the cameras. He obtained a still shot from the victim's body camera showing a white vehicle "straddling both sides of the roadway" before striking the victim. On the afternoon of February 24, Officer Buckner went to the defendant's home after an officer located the vehicle. He subsequently learned that the defendant had been to Farm to Fork on the night of the crash, and Officer Buckner went to the restaurant to determine whether there was any evidence that the defendant had consumed alcohol prior to the crash.

Officer Buckner met with the manager at the restaurant and obtained copies of the itemized receipts for the defendant and Mr. Hinds, as well as examples of the 22-ounce, 16-ounce, and shot glasses in which drinks typically were served. He also obtained almost four hours of surveillance footage from the restaurant. He testified that according to the recordings, the defendant arrived at the restaurant at 6:43 p.m. and entered her vehicle to leave at 10:33 p.m. The defendant began drinking a 22-ounce Blue Moon beer that Mr. Hinds had purchased for her at 7:00 p.m., and she drank the beer for one hour and 13 minutes. Officer Buckner stated that the defendant was never "empty-handed" and that "[p]rior to finishing one drink, she's ordered a second drink and starts the next drink." The defendant's second drink was a 22-ounce Michelob Ultra beer, which she drank in 42 minutes. Her third drink was a Lemon Drop shot, which she drank at 9:07 p.m. Her fourth drink was a 16-ounce Michelob Ultra beer, which she began drinking at 9:15 p.m. and finished at 10:08 p.m. Her final drink was another 16-ounce Michelob Ultra beer, which she drank in 18 minutes. Officer Buckner stated that four minutes elapsed between the defendant's finishing her last drink and leaving. He noted that the defendant paid her bill, tilted her head back to drink the last bit of beer left in the glass, retrieved her keys, spoke to others who were sitting at the same table, and left the restaurant.

Officer Buckner testified that the defendant drank a total of 76 ounces of beer, which was in excess of the usual six-pack of 12-ounce beers, and a shot of alcohol that contained vodka and lemon juice. He stated that according to the surveillance videos, the defendant ate one taco, which was an appetizer, and approximately five "morsels" of "finger food style" French fries or nachos. The defendant did not order any of the food that she ate. The defendant drove out of the restaurant's parking lot at 10:35 p.m., and Officer Justice made the distress call over the radio at 11:04 p.m. Officer Buckner estimated that the distance between the restaurant and the scene of the crash was a 20 to 30-minute drive "by normal speed."

During cross-examination, Officer Buckner testified that he observed indications that the defendant was impaired in the surveillance videos, explaining that from "when she first arrived and watching her individually, her persona seems to change." He noted that after 9:00 p.m., the defendant's personality began to change in that she was not as "standoffish," was "talking more in a group," and, at times, was "kind of raising her voice to where it looks like across the table." Although the band had been playing for a time at that point, the defendant began dancing, "getting in the groove," and clapping. At times, she was the only patron clapping, and she clapped with her arms high above her head on a continuous basis. Although the surveillance videos did not have sound, Officer Buckner determined that the defendant was "off beat" by watching band members and other patrons as they clapped. Officer Buckner observed the defendant's clapping in comparison with the clapping by the middle guitarist, which he stated he trusted as being more "on beat" than the defendant's clapping. Officer Buckner agreed that he did not know whether the defendant, generally, had rhythm.

Officer Buckner testified that after the defendant had consumed 44 ounces of beer by 9:00 p.m., she went to the table where Mr. Hinds was sitting and showed more affection toward him than she had shown when she first arrived at the restaurant. Officer Buckner stated that the defendant was "more touchy," and rubbed Mr. Hinds for a period of time while leaning on his chair. Officer Buckner said that the increased affection was consistent with the disinhibiting effects of alcohol. He also said that although food slows the absorption rate of alcohol, the small amount of food that the defendant ate at the restaurant may not have affected her absorption rate. He did not know whether the defendant ate any food prior to arriving at the restaurant. Unlike others who were sitting with the defendant, she never drank any water.

Officer Buckner stated that although the defendant had a noticeable limp when she first arrived at the restaurant, the limp seemed to dissipate as she consumed more alcohol. He explained that alcohol can alleviate minor pain to some degree. At one point, the defendant also seemed "a little more crooked or curved" as she walked. When the defendant left the restaurant, she did not just turn around and walk to the nearest exit but walked around the restaurant "in an odd fashion," which he described as a "zigzag formation." The defendant also continued to press the unlock button on the keys to her vehicle while "being very animated in moving her hands."

Officer Buckner identified signs of intoxication in the defendant's driving. He noted that according to the recording from the victim's body camera, the defendant weaved into the other lane and continued driving while straddling the center line. Although other drivers slowed upon seeing the barricade and were able to avoid it, the defendant failed to do so.

Christy Hill, the general manager at Farm to Fork, testified that she was working on the night of February 23, 2019. She identified a receipt and activity report showing that Mr. Hinds ordered a 22-ounce Voodoo Ranger beer, a Blue Moon beer, and an Angry Orchard. During cross-examination, Ms. Hill testified that no one complained to her about the defendant on the night of February 23 and that she had no issues with refusing to serve those who she believed had consumed too much alcohol.

Jessica Powell, a former server at Farm to Fork who was working on the night of February 23, 2019, testified that she served the defendant two 16-ounce glasses of Michelob Ultra beer, one 22-ounce glass of Michelob Ultra beer, and one Lemon Drop shot during the course of the evening. According to the defendant's credit card receipt, she began ordering at 7:09 p.m. and paid her bill at 10:39 p.m. Ms. Powell stated that the defendant never ordered food but that "an abundance of food" was at the table where the defendant was sitting. Ms. Powell did not observe the defendant exhibiting unusual behavior, and the defendant never became rambunctious or loud. During cross-examination, she testified that during her limited interaction with the defendant, the defendant was friendly, was not animated, did not have glassy or blood shot eyes, and did not stumble, fall, or spill her drink.

Assistant TBI Director Mark Lyttle, who supervised the TBI's forensic services division, was admitted by the trial court as an expert in toxicology. He testified that he used the "Widmark equation" to calculate the defendant's potential alcohol level based upon her size and the amount of alcohol that she consumed and that he used retrograde extrapolation to estimate her blood alcohol level at the time of the crash. He received information regarding the amount of alcohol that the defendant had consumed, her time of arrival and departure from the restaurant, and the time of the crash. He estimated the defendant's weight at 150 pounds. He stated that the Widmark equation utilizes a "rho value," which relates to the distribution of alcohol in the blood and that the value is "a constant" based on the gender of the individual. He explained that rho value was dependent upon the gender of the individual because alcohol travels to the area of the body where water is maintained and the bodies of men and women generally differ in water content and fat concentration. Assistant Director Lyttle said that the metabolism of alcohol is limited by the availability of an enzyme in the liver, which can become overwhelmed by the amount of alcohol in a person's body, and that, as a result, the average person metabolizes alcohol at a rate of .01 to .02 grams percent per hour.

According to Assistant Director Lyttle's report, he calculated the defendant's blood alcohol level to be .224 grams percent prior to subtracting the metabolism rate. He applied the metabolism rate of .01 to .02 grams percent per hour for four hours, noting that the defendant began drinking at the restaurant at 7:05 p.m. and that the crash occurred at

11:04 p.m. Thus, he estimated that the defendant's blood alcohol content was between .14 and .18 grams percent at 11:04 p.m. He stated that the combined use of Ambien and alcohol could amplify the effects of both substances.

During cross-examination, Assistant Director Lyttle testified that when conducting reverse extrapolation, he typically received a blood sample taken within two or three hours after a DUI arrest or a motor vehicle accident and that he uses the results of the testing of the blood sample to determine the individual's blood alcohol concentration level at the time of the arrest or accident. He stated that in the present case, no blood sample was taken, and he had to calculate "both ends of it." He agreed that he had not previously been required to make such calculations.

Assistant Director Lyttle was not provided with any information regarding any food that the defendant consumed prior to arriving at the restaurant or while at the restaurant. He acknowledged that food serves as a barrier in preventing alcohol from reaching the small intestine where it can be absorbed and that the consumption of food could change his calculations.

Following a demonstration, Assistant Director Lyttle agreed that the 22-ounce glass used by the restaurant "slightly overflowed" when filled with 22 ounces of water from a separate container. He could not verify the accuracy of the measurement of water in the separate container, and he stated that the demonstration was conducted with a "high measure of uncertainty."

Assistant Director Lyttle was not provided any information regarding the defendant's body weight and estimated her weight to be 150 pounds. He acknowledged that the booking records following the defendant's arrest listed her weight as 168.6 pounds and that difference of almost 20 pounds would change his calculations, resulting in a decrease in the defendant's estimated blood alcohol level. Assistant Director Lyttle was provided with a chart of calculations performed by the defendant based upon the defendant's correct weight of 168.6 pounds, which chart indicated that when only the defendant's weight was changed in the formula, her blood alcohol level was calculated to be .199 grams percent prior to applying the metabolism rate. Assistant Director Lyttle agreed that the total metabolism rate of 0.04 and 0.08 for four hours would need to be subtracted to obtain the defendant's estimated blood alcohol level at the time of the accident, resulting in a blood alcohol level of .159 to .119 grams percent at the time of the crash.

Assistant Director Lyttle acknowledged that according to an article, the use of "total body water" was the preferred method for determining the distribution of alcohol rather than the rho value used in the Widmark formula. He also acknowledged that the

book on which he relied in applying the rho values of .55 for women and .68 for men later described the rho values as "[b]eing approximately .7 for men and .6 for women." However, he stated that he utilized the specific values provided rather than the approximate values. He agreed that the rho value was an average value and that he did not know the defendant's specific rho value. The defendant provided Assistant Director Lyttle with calculations using the defendant's weight of 168.6 pounds and different rho values. Assistant Director Lyttle did not agree that the rho values should be changed but testified to the calculations as hypotheticals. He acknowledged that based on the defense's calculations, a rho value of .6 would result in a blood alcohol level of .183 grams percent prior to the application of the metabolism rates. He also acknowledged that based upon a metabolism rate of .04 to .08 grams percent for four hours, the defendant's estimated blood alcohol level at the time of the crash would have been .129 to .089 grams percent using a rho value of .6, .117 grams percent and a rate below of the legal limit using a rho value of .7, and .106 to .066 grams percent using a rho value of .75.

Assistant Director Lyttle testified that the metabolism rate of .01 to .02 grams percent per hour applied to 95 percent of the population. He was provided an article, which included a chart stating that 35 to 40 percent of the population had a metabolism rate of .02 to .03 grams percent per hour, and he stated that even if the article was correct, the metabolism rate that he employed still applied to a majority of the population. He explained that the 95 percent statistic "is what I've used in the past and that is what seems to be true in the studies that we have performed with those individuals." He stated that genetics was the primary contributor to the availability of the liver enzymes that metabolize alcohol and that he was unaware of the defendant's genetic background. He said that he "would assume" that the average range of metabolism rates encompassed those with different sizes of livers and that he did not know the size of the defendant's liver. The defendant provided Assistant Director Lyttle with calculations based upon the defendant's weight, different rho values, and different metabolism rates, which Assistant Director Lyttle described as "outside the average, outside the norm." He acknowledged that according to the defense's calculations, the defendant's estimated blood alcohol level at the time of the crash was .099 grams percent when applying a rho value of .55 and an hourly metabolism rate of .025 grams percent, was .083 grams percent when applying a rho value of .6 with the same hourly metabolism rate, and was less than .08 grams percent in the remaining columns. Assistant Director Lyttle stated, "I think on both ends of the spectrum, we're discussing outliers, and my testimony is geared more towards averages."

Angela Carr, with the Electric Power Board, an electrical distribution company that maintained street lights for the City of Chattanooga, testified regarding the street light on Hamill Road near the scene of the crash. She stated that the light illuminated 70 feet in front of the pole, 50 feet behind the pole, and 110 feet on each side of the pole. She could not determine whether the light was working on the night of the crash.

CPD Officer Joe Warren of the traffic division was accepted by the trial court as an expert in accident reconstruction. He described Hamill Road as a two-lane, "surface street" where the speed limit was 35 miles per hour. The area where the crash occurred was in a straightaway. A few weeks prior to trial, he recorded himself driving down Hamill Road, once while traveling 35 miles per hour and the second time while traveling 50 miles per hour. Unlike the night of the accident, Officer Warren drove through the area during the daytime and while the weather was dry, no barricade was in the roadway, and no water was pouring out from underneath the manhole cover.

Officer Warren responded to the scene on the night of the crash and was tasked with attempting to reconstruct the events. He noted that a street light was in the area but that additional lighting was added because the scene continued beyond the reach of the street light. He examined the grill that was located in the roadway and viewed the recordings from the body cameras of the victim and Officer Justice. He stated that still photographs from the victim's body camera showed the vehicle straddling or on top of the double yellow center line, taking up both lanes, and traveling "straight toward this obviously-visible barrier that's right there in that vehicle's path." The vehicle had traveled out of a curve before striking the victim, and Officer Warren said that in such situations, a driver may drift over toward the left if the driver is going too fast or not paying attention.

Officer Warren acknowledged that the victim and Officer Justice were not wearing reflective vests and explained that CPD's policy required officers to wear reflective vests only when they will be in the roadway for a period of time, such as when they are directing traffic or investigating a collision. Officer Warren also acknowledged that Officer Justice did not activate his blue lights when he pulled into the driveway. Officer Warren explained that in some situations, the blue lights can distract drivers, lead to collisions or "traffic backups," and "do more harm than good" and that occasions may arise in which officers do not activate their blue lights to avoid negatively affecting traffic.

Officer Warren determined that the victim was standing four feet from the manhole cover when he was struck by the defendant's vehicle and that he was thrown approximately 160 feet. Officer Warren testified that the distance in which the victim was thrown "was really unexpected for being a surface street, for that roadway that's 35 miles per hour" and that he typically would see such a distance on an interstate where speed limits are higher. He used the "Searle minimum formula" to determine the minimum velocity required by the defendant's vehicle to propel the victim that distance, but he noted that the formula undercalculates speed "quite a bit." He noted that the formula could be utilized in two different ways, one which required a vault angle and one which did not, and that he used both calculations to determine the range of the victim's speed. He estimated that the defendant's vehicle was traveling between 47 and 53 miles per hour when it struck the

victim but later testified that the speed was between 49 and 53 miles per hour. He noted the victim's left boot was collected at the scene and that the right boot remained on the victim's foot.

After officers located the defendant's vehicle, Officer Warren went to her home to examine it. He testified that it was "obvious" to him that the vehicle was involved in a "pedestrian strike." He noted that the damage to the windshield was indicative of the amount of force applied. He also noted "dimpling" on the vehicle's roof, which indicated "roof vault" where the vehicle was traveling at such a high rate of speed that the victim did not just land on the hood but was "vaulted up over the roof." Officer Warren observed markings along the hood, which could have been created by the belt and gear that the victim was wearing. Initially, the defendant was charged with vehicular homicide by recklessness due to excessive speeding, traveling on the wrong side of the roadway, and "totally disregarding a barricade, let alone a person in the roadway." At the time of the initial charge, Officer Warren was not yet aware of the evidence of the defendant's intoxication.

During cross-examination, Officer Warren agreed that the conditions of the road on the night of the incident were more accurately represented in Officer Lockhart's video from her patrol camera than the recordings made by Officer Warren a few weeks prior to trial. Officer Warren explained that he did not recreate the accident scene to determine what the defendant would have been able to see because he had access to video recordings and photographs of the scene, including Officer Lockhart's video, which "show[ed] the road pretty clearly." Officer Warren noted that the victim was "almost on the center line" and "towards the left side" when he was struck. Officer Warren did not conduct a formal interview with Officer Justice, explaining that he did not want to further affect the emotional trauma that Officer Justice had suffered from the crash. Officer Warren stated that he was able to obtain most of the necessary information about the crash from the recordings. Officer Warren recalled speaking to Christopher Dahl over the telephone and obtaining photographs that Mr. Dahl had taken of the barricade approximately three minutes prior to the incident.

Officer Warren acknowledged that no signs were placed along the roadway providing an advanced warning of the barricade. He noted that the signs could have further impeded traffic or blocked driveways to homes. He was unaware of any temporary signs that could easily and quickly be placed on any of the light poles leading up to the scene. He stated that the victim picked up a sign shortly before he was struck that explained the purpose of the barricade. He agreed that had the sign been in its proper place, the barricade would have been more visible, but said that bolting the sign to the barricade could have resulted in the barricade falling during a storm. He stated that although the light on the barricade was not working, the colors on the barricade were reflective, that the area around the barricade was illuminated by a street light, and that other drivers were able to see the

barricade and slow their vehicles to avoid it. Officer Warren clarified that the defendant's estimated speed when her vehicle struck the victim was 47 or 49 to 59 miles per hour.

During redirect examination, Officer Warren affirmed that the defendant's vehicle drove out of a curve and into a straightway that was approximately 550 feet or 183 yards long to the manhole where the victim was struck. The lanes of travel on Hamill Road were 11 feet wide and almost 12 feet wide in some areas, and the defendant's vehicle was approximately six feet wide.

Doctor Steven Cogswell, a forensic pathologist, performed the victim's autopsy. Doctor Cogswell concluded that the 38-year-old victim's cause of death was multiple blunt-force injuries resulting from a collision with a motor vehicle. He listed the victim's manner of death as accidental, explaining that deaths resulting from motor vehicle collisions, generally, are listed as accidental and that the determination as to the manner of death is required for "vital records keeping" and does not serve as a judgment of criminal culpability. He determined that the victim sustained vertical incised wounds and irregular lacerations and abrasions on his face, a crushing injury and fractures on the back of his head, fractures of the thin layers of bone above his eye sockets, a fracture of the cervical spine at levels C4 and C5 located halfway down his neck, a fracture subluxation of the lower thoracic part of the spine where the chest and the lower back meet, a laceration of the aorta, a dislocated left shoulder, abrasions and contusions on his hands, two fractures of the right femur, a fracture of both the tibia and fibula of the left leg, and multiple irregular abrasions on his knees, lower legs, and feet.

Doctor Cogswell testified that the victim's legs were fractured when struck by the vehicle's bumper. He stated that the bumper struck both legs "almost simultaneous[ly]" and that based upon the location of the fractures, the victim had his weight on his right leg with his left leg off the ground. The victim's right side was toward the vehicle, and he was "facing inward" and "sort of at an angle." Doctor Cogswell determined that at the time that the victim was struck, he was not kneeling down or lying on the road but was upright. Doctor Cogswell explained that the fractures on the victim's legs were "transverse fractures" where the fracture lines follow the lines of force and that because the fractures on the victim's lower legs were vertical, his upper body also was likely vertical. He stated that based upon the location of the victim's leg fractures, the vehicle's front bumper was at or slightly above the normal height when the victim was struck. He said that although he could not determine the extent of any braking that was applied, he noted that the front bumper generally "nose dives" when the brakes are applied.

Doctor Cogswell testified that the aorta injury occurred at the moment of the initial impact and that the force necessary to cause such an injury generally requires an impact speed of 45 to 55 miles per hour. He affirmed that evidence that the victim was

knocked out of one of his boots was consistent with his testimony about the vehicle's potential speed.

Doctor Cogswell stated that after the bumper struck the victim's legs, the victim's upper body struck the hood of the vehicle, causing dents on the hood, and that his face struck the windshield. The victim's head was thrust forward as he stuck the hood and then backward as he struck the windshield, resulting in the neck fractures. Doctor Cogswell observed a large area of vertical incised wounds and a piece of skin missing around the victim's right eyebrow, and he confirmed that the presence of hair affixed to the windshield was consistent with his findings. The victim then rotated off the vehicle and struck the ground, resulting in the skull fracture and the spine fracture around the torso.

During cross-examination, Doctor Cogswell testified that the victim was positioned at about a 45-degree angle toward the vehicle when it struck him. Doctor Cogswell agreed that although the victim appeared to be in a vertical position when he was struck, he could not make the determination based upon the victim's injuries and explained that "[t]he injuries don't help us with that, we have to rely on other evidence."

The State rested. After a *Momon* colloquy, the defendant elected not to testify. The defendant presented multiple witnesses to testify in her defense.

James Shearouse, Jr. testified that he regularly drove on Hamill Road, which he described as a "lousy road" with no wide shoulders. He stated that the accident occurred in a straightaway where the manhole cover rises out of the hole whenever flooding occurs and that "you learn to avoid those manhole covers in wet weather." He agreed that those who do not typically travel down Hamill Road may not be aware of the issue and that lack of familiarity with the issue may have been the reason that some drivers were unable to avoid the manhole cover. During cross-examination, he agreed that anyone who was familiar with Hamill Road also should have been familiar with the issues of flooding and the manhole cover.

George Conway, who lived near Hamill Road, testified that at approximately 7:00 p.m. on February 23, 2019, he and his wife were traveling near the scene of the crash where he saw a manhole that was overflowing with sewage. He stated that the issue occurred often and that although a barricade, typically, was placed over the manhole whenever the issue occurred, he did not see a barricade when he and his wife traveled through the area that evening. He also stated that the speed limit on Hamill Road was 35 miles per hour but that many people would speed on the road. During cross-examination, he agreed that speeding on Hamill Road was unwise due to the heavy rain, the narrow roadway, and the deterioration of the road in some places. He stated that whenever he saw a barricade over the manhole, he used caution and slowly drove around it.

Christopher Dahl testified that he had been documenting sewer breaches around the city for a number of years and photographed the manhole cover and barricade on Hamill Road shortly before the crash occurred. He noted that the light on the barricade was not blinking and that a sign was on the ground. He explained that he did not go into the roadway to pick up the sign because traffic was coming from both directions and he did not wish to be in the sewage water. He further explained that he photographed the area because he believed that the location of the barricade in the middle of the roadway and the lack of a sign would result in a traffic accident. Initially, he testified that he took the photographs at 10:00 or 10:30 p.m. on the night of the incident, but when he was shown data regarding the photographs, he agreed that 11:01 p.m. "seems more correct."

Mr. Dahl testified that he was preparing to leave when he saw Officer Justice and the victim arrive at the scene. He stated that neither the blue lights nor the headlights on the patrol vehicle were activated and that the only lights that he could see were the officers' flashlights. Mr. Dahl drove away from the scene and toward the direction from which the defendant's vehicle came. He stated that he passed a gray Honda Civic, which he believed was speeding and a white sports utility vehicle ("SUV"), which did not appear to be speeding. Following the incident, Mr. Dahl contacted the police about the photographs, and although an officer reviewed the photographs, Mr. Dahl did not believe the officers were "taking [his] photos seriously." He tried to follow up with other officers, and Officer Warren sent him an e-mail thanking him for the photographs. Mr. Dahl stated that Officer Warren called him but was "just real short about it and told me that he received the photos."

During cross-examination, Mr. Dahl testified that he did not see the crash but that it occurred "split seconds" after he passed by the white SUV. He recalled a light pole in the area but "nothing approaching the scene" and stated that the light was not illuminating the officers.

Mr. Dahl acknowledged that during the course of the trial, he received a message from a man on Facebook, who informed him that that his name had been mentioned and asked him whether the officer called him to conduct an interview. Mr. Dahl responded that he called the police and that "[t]hey wanted to cover it up." Mr. Dahl explained at trial that the city wanted to "cover up" the failure to properly barricade the area of the sewer overflow in accordance with the city's protocols. Mr. Dahl acknowledged that the man informed him of the officer's testimony regarding his conversation with Mr. Dahl and that Mr. Dahl responded that he had been subpoenaed to testify and that once he testified, "it will blow the case." Mr. Dahl maintained that he did not believe his messages with the man were improper discussions regarding the trial.

During redirect examination, Mr. Dahl acknowledged that defense counsel's office instructed him to avoid watching or following the trial. When pressed on the time frame he provided, Mr. Dahl acknowledged that his memory of the events at trial was not as fresh as his memory at the time of the crash. He stated that he made multiple efforts to communicate with the police about the case but that the officers did not communicate with him.

During recross-examination, when asked whether he believed his testimony placed the focus on his concerns regarding the sewer issues, Mr. Dahl responded, "I think I brought them up, and that's what I wanted to do, is show that this issue has been ongoing at that spot and that it should have been corrected and it has not." When asked whether he believed he had "blown up the case," he testified, "I'm not sure. I think it might put some evidence in . . .or some conjecture in, that hasn't been brought up before, or something to think about."

Traci Phillips, Mrs. Hinds's mother, testified that she was with the defendant, Mr. Hinds, and Mrs. Hinds at Farm to Fork prior to the crash. Ms. Phillips stated that when the defendant arrived at the restaurant, she seemed "fine" and did not appear to have consumed any alcohol prior to arrival or to otherwise be impaired. Ms. Phillips sat near the defendant and stated that the defendant did not appear to be impaired or exhibit the behavior that Ms. Phillips had witnessed the defendant previously exhibit when intoxicated. Ms. Phillips acknowledged that she did not interact often with the defendant throughout the evening because the music was too loud. Ms. Phillips stated that if she had any concerns that the defendant had consumed too much alcohol, she would have offered to drive the defendant home.

During cross-examination, Ms. Phillips testified that she did not know how much alcohol the defendant drank that evening and was unaware of the defendant's drinking a shot of alcohol. Ms. Phillips agreed that the defendant ate "[m]orsels of food," including a "huge" taco. She acknowledged that the defendant sat behind her for most of the evening, and Ms. Phillips often walked around the restaurant to speak to others. She agreed that several people who could have driven the defendant home were at the restaurant but that the defendant never requested that they do so.

Joyce Allen, the court administrator who processed property bonds in the Hamilton County Criminal Court Clerk's Office, testified that property bonds were processed on Monday through Friday from 8:00 a.m. until 3:00 p.m. and that property bonds were not processed on the weekends.

On this evidence, the jury convicted the defendant of vehicular homicide by intoxication, reckless driving, leaving the scene of an accident as a Class A misdemeanor

rather than as a Class E felony as charged in the indictment, failure to report an accident, speeding, failure to exercise due care, failure to maintain the appropriate lane, and DUI. The jury acquitted the defendant of the charges of failure to render aid and the violation of a traffic control device. Following a sentencing hearing, the trial court merged the DUI conviction into the conviction of vehicular homicide by intoxication and imposed an effective sentence of 11 years' incarceration.

After a timely but unsuccessful motion for new trial, the defendant filed a timely notice of appeal. In this appeal, the defendant challenges the sufficiency of the evidence supporting her convictions of vehicular homicide by intoxication and DUI, the denial of her motions to suppress evidence obtained from the searches of her home and vehicle, the admission of a life photograph of the victim and videos of the crime scene, the limitation of cross-examination and exclusion of evidence related to the defense's calculation of blood alcohol levels, the jury instructions on flight and proximate cause, and the prosecutor's comments during closing arguments. The defendant also asserts that her sentence is excessive and that the cumulative effect of the errors entitles her to a new trial.

I. Sufficiency of the Evidence

The defendant challenges her convictions of vehicular homicide by intoxication and DUI, arguing that the evidence is insufficient to establish that she was intoxicated. She further challenges her conviction for vehicular homicide by intoxication by asserting that the State failed to establish that her intoxication was a proximate cause of the victim's death. The State responds that the evidence presented at trial is sufficient to support her convictions. We agree with the State.

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(c); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

As applicable to the present case, vehicular homicide is "the reckless killing of another by the operation of an automobile, . . .as the proximate result of . . .[t]he driver's

intoxication, as set forth in § 55-10-401." T.C.A. § 39-13-213(a)(2). Code section 55-10-401 prohibits a person from driving or being in physical control of an automobile on any public road or highway, while:

> Under the influence of any intoxicant, marijuana, controlled substance, controlled substance analogue, drug, substance affecting the central nervous system, or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess[.]

T.C.A. § 55-10-401(1).

The evidence presented at trial, when viewed in the light most favorable to the State, established that the defendant drank approximately 76 ounces of beer and one shot of alcohol during the four hours prior to the crash. When Officer Buckner reviewed the surveillance videos from the restaurant, he observed signs that the defendant was impaired. He noted that as the defendant continued to drink alcohol over the course of the evening, her personality changed in that she was not "standoffish," was "talking more in a group," and was "kind of raising her voice" at times. She began dancing, "getting in the groove," and clapping "off beat" from band members and other patrons. She showed increased affection toward her son, which Officer Buckner stated was consistent with the disinhibiting effects of alcohol. Although the defendant had a noticeable limp when she first arrived at the restaurant, her limp seemed to dissipate as she consumed more alcohol, which was consistent with alcohol's ability to alleviate minor pain. She exited the restaurant in a "zigzag formation" and pressed the unlock button on the keys to her vehicle multiple times while "being very animated in moving her hands."

The defendant's driving, which included excessive speeding, failing to maintain her lane, and straddling the center lane, demonstrated impairment. The defendant did not appear to brake before she struck the victim. She struck the victim with such force that the victim rolled on top of her hood and his head struck the windshield, causing webbing and shattering of areas of the windshield. Although shattered glass was on the defendant's shirt and throughout the front interior of her vehicle and some of the victim's body tissue was near the steering wheel, the defendant did not stop but continued driving home. She claimed that she was unaware that she struck the victim and maintained that she believed she struck a road sign. Her inability to recognize that she struck a person also was indicative of impairment.

According to Assistant Director Lyttle's testimony, alcohol was present in the defendant's system when she struck the victim. The defendant notes that Assistant

Director Lyttle did not use her correct weight in his calculations. However, some of the defendant's alternative calculations about which Assistant Director Lyttle was questioned on cross-examination also indicated the presence of alcohol in the defendant's system at the time of the crash and showed alcohol levels of 0.08 grams percent or greater. Furthermore, unlike the statute for a DUI per se violation, the statutes at issue do not require the State to establish the quantity of alcohol in the defendant's system, "only that [she] was under the influence of an intoxicant which impaired [her] ability to safely operate a motor vehicle by depriving [her] of the clearness of mind and control of [herself] that [she] would otherwise possess." *State v. James Morgan Dye*, No. M2018-01191-CCA-R3-CD, 2019 WL 5172275, at *7 (Tenn. Crim. App., Nashville, Oct. 15, 2019). "This court has previously upheld a finding of intoxication where there was evidence of the use of an intoxicant and impairment but no evidence of the quantity of the intoxicant." *Id.* (holding that the evidence was sufficient to support a conviction for vehicular homicide by intoxication where the defendant consumed various drugs, attempted to conceal his use of the drugs, drove erratically, and caused a collision by swerving into oncoming traffic and testing of his blood sample revealed drugs in his system but did not reveal the quantity); *see State v. Michael James Amble*, No. E2016-02495-CCA-R3-CD, 2018 WL 1989632, at *4 (Tenn. Crim. App., Knoxville, Apr. 27, 2018) (upholding the defendant's DUI conviction based on the officer's testimony that the defendant smelled of alcohol, had slurred speech and bloodshot eyes, and performed poorly on field sobriety tests); *State v. Johnathan Christopher Carey*, No. M2014-02373-CCA-R3-CD, 2015 WL 8482746, at *11 (Tenn. Crim. App., Nashville, Dec. 10, 2015) (holding that the odor of alcohol and the defendant's erratic driving, slurred speech, and confusion was sufficient to support the DUI conviction when the defendant intentionally blew improperly into a breathalyzer).

In challenging the sufficiency of the evidence of intoxication, the defendant argues that the State chose "minute details of a 3.5-hour video to argue that certain actions indicated impairment" and that other witnesses testified that the defendant did not exhibit the behavior indicative of impairment. The defendant's arguments, however, relate to issues of credibility of witnesses and the weight to be afforded to their testimony, which were resolved by the jury as the finder of fact. *See Cabbage*, 571 S.W.2d at 835. Upon viewing the evidence in the light most favorable to the State, we conclude that a reasonable jury could have found that the defendant was intoxicated at the time of the crash.

The defendant next argues that the evidence failed to establish that her intoxication was the proximate cause of the victim's death. She maintains that the actions of the victim, Officer Justice, and the City of Chattanooga constitute intervening and superseding causes of the victim's death. The defendant asserts that

> there was an officer wearing dark clothing, without blue lights on his car, standing in the middle of a dark road at night, bent

> over behind a traffic barrier where no one would expect a person to be, with no oncoming traffic to help illuminate the road or cause a driver not to drive toward the center of the road, and with no prior warning of a barrier in the road.

"Proximate cause is that which, in a natural and continual sequence, unbroken by any new, independent cause produces the injury, and without which the injury would not have occurred." *State v. Pack*, 421 S.W.3d 629, 639 (Tenn. Crim. App. 2013) (quoting *Gray v. Brown*, 217 S.W.2d 769, 771 (Tenn. 1948)). The proximate cause of a victim's death "is generally established in Tennessee by showing that the victim's death was the natural and probable result of the defendant's unlawful conduct." *State v. Farner*, 66 S.W.3d 188, 203 (Tenn. 2001) (citations omitted); *see State v. Thomas McClaughlin*, No. E2020-01434-CCA-R3-CD, 2021 WL 3869514, at *10 (Tenn. Crim. App., Knoxville, Aug. 31, 2021) (applying the standard set forth in *Farner* to vehicular homicide); *State v. Ralpheal Cameron Coffey*, No. E2019-01764-CCA-R3-CD, 2021 WL 2834620, at *11 (Tenn. Crim. App, Knoxville, July 8, 2021) (same). However, the defendant's actions "need not be the sole or immediate cause of the victim's death." *Farner*, 66 S.W.3d at 203 (citing *Letner v. State*, 299 S.W. 1049, 1051 (Tenn. 1927)). "[O]ne whose wrongdoing is a concurrent proximate cause of an injury may be criminally liable the same way as if his wrongdoing [was] the sole proximate cause of the injury." *State v. Baggett*, 836 S.W.2d 593, 595 (Tenn. Crim. App. 1992).

A victim's contributory negligence is not a complete defense but may be considered in determining whether the defendant's conduct was a proximate cause of the victim's death or whether the victim's actions were "an independent, intervening cause of death." *Farner*, 66 S.W.3d at 203-04 (quoting *Fine v. State*, 246 S.W.2d 70, 73 (Tenn. 1952)). "[I]t is a defense to homicide if the proof shows that the death was caused by an independent intervening act [or omission] of the deceased or another which the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen." *Id.* at 206 n. 18. "[I]f, in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original conduct, and the defendant's conduct is considered the proximate cause of death." *Id.* The sequence of events or the particular injury need not be foreseeable, and the victim's death need only "fall within the general field of danger which the defendant should have reasonably anticipated." *Id.* Proximate cause is a question of fact to be determined by the jury based on the evidence presented at trial. *Id*. at 204.

At trial, the defendant argued that the actions of the victim, Officer Justice, and the City of Chattanooga were negligent and constituted intervening causes of the victim's death. The jury, by its verdict, rejected the defendant's argument and concluded that the defendant's driving while intoxicated was the proximate cause of the victim's

death. We note that driving while intoxicated on a public highway creates a "significant risk of serious bodily injury or death, not only to the intoxicated driver, but to unsuspecting motorists and pedestrians." *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994) (citations omitted). Furthermore, the evidence presented at trial, when viewed in the light most favorable to the State, established that the barricade and the victim were avoidable. The barricade and the victim were located in a straightaway and were in an area illuminated by a street light, and the barricade was comprised of reflective material. Other drivers were able to recognize the barricade, slow down, and safely drive around it. The lanes of travel were 11 to 12 feet wide, and the defendant's vehicle was approximately six feet wide. Thus, the defendant would have had sufficient room to drive around the barricade and avoid striking the victim had the defendant slowed down and remained in her lane. Instead, the defendant became intoxicated and drove at an excessive speed while straddling the center line, thus, striking and killing the victim. We conclude that this evidence is sufficient to support the jury's finding that the defendant's intoxication was the proximate cause of the victim's death.

Accordingly, the evidence is sufficient to support the defendant's convictions for vehicular homicide and DUI, and the defendant is not entitled to relief regarding this issue.

II. Denial of Motion to Suppress

The defendant contends that the trial court erred in denying her motions to suppress evidence seized from her home and vehicle pursuant to search warrants. She asserts that the search warrant for her home, which also authorized the seizure of her vehicle, failed to state with particularity the place to be searched and was not supported by probable cause. She further asserts that because the seizure of her vehicle pursuant to the warrant was unconstitutional, the search of her car was also unconstitutional. The State responds that the search warrant for the defendant's home satisfied the particularity requirement and was supported by probable cause, that the evidence seized from the car was not the fruit of a prior unlawful seizure, and that any error was harmless beyond a reasonable doubt.

Prior to trial, the defendant filed multiple motions to suppress evidence seized from the searches of her home and her vehicle pursuant to search warrants. The search warrants were both signed by the same trial judge who presided over the trial proceedings. The search warrants were issued on February 24, 2019, with the search

warrant for the defendant's home issued at 5:30 p.m. and the search warrant for the defendant's vehicle issued at 5:40 p.m.[1]

The heading of the search warrant for the defendant's residence included the words, "State of Tennessee" and "Hamilton County," and the search warrant was signed by a judge of the Criminal Court for Hamilton County. The search warrant listed the address to be searched as "209 Port Drive" and provided that there was probable cause to believe that evidence of a vehicular homicide was at the residence. The search warrant listed evidence that officers were authorized to search for and seize, including a "2017 Honda CR-V that is located on the property of 209 Port Drive." The affidavit in support of the search warrant was completed by Officer Warren and provided:

> I, Joseph Warren #882 am a Police Officer with the Chattanooga Police Department and have been so employed for twenty-three years (23). I have extensive training and experience investigating serious and fatal collisions and as a crash reconstructionist. I am currently investigating a collision involving a pedestrian, Officer Nicholas Galinger[,] that occurred on 2900 Hamill Road that resulted in the fatal injuries to Officer Nicholas Galinger. The Chattanooga Police Traffic Division[,] including myself[,] examined the roadway and the body of Officer Nicholas Galinger for evidence that would identify the vehicle. We located a grill that was discovered through part number identified that went to a 2017-2019 Honda CRV LX compact SUV. After reviewing the body camera footage from Officer Nicholas Galinger that confirmed that the suspect vehicle appeared to be a compact SUV and the color of the vehicle was white or light colored. Investigator G. Troncone, while searching areas nearby, located a 2017 Honda CRV at 207 Port Drive in Hamilton County with extensive damage that based on my training and experience investigating collisions involving pedestrians is consistent with the injuries received by Officer Nicholas Galinger. Chattanooga Police along with Hamilton County Sheriffs Deputies attempted to

[1] The search warrant and affidavit for the defendant's home was entered as an exhibit during the suppression hearing. The trial court noted in its order that the search warrant and affidavit for the defendant's vehicle was admitted as a late-filed exhibit, but the filed exhibit is not included in the appellate record. However, the search warrant and affidavit for the defendant's vehicle is included in the technical record and, therefore, the absence of the filed exhibit does not preclude our review of the suppression issues raised on appeal. *See State v. Bobadilla*, 181 S.W.3d 641, 643 (Tenn. 2005); *State v. Siliski*, 238 S.W.3d 338, 365 n.3 (Tenn. Crim. App. 2007).

> make contact at the residence where the suspect vehicle was parked. After several attempts, no contact was made with anyone in the residence. A neighbor[,] Eric Scruggs[,] . . . stated that he believed the only two vehicles at the residen[ce] are the vehicles we have in our sight, the above described 2017 Honda CRV with TN Tag 2C60K9, and an older Scout SUV that is also registered to this address. Based on this information, a search warrant for 207 Port Drive's residence is requested for the assistance in collecting any evidence from the crime involving Officer Nicholas Galinger that may[be] located within the domicile, to include the vehicle as well located on the property.
>
> WHEREFORE, based on the facts detailed above together with my training and experience in investigation of fatal collisions, I believe and submit there is probable cause to believe that the premises herein described will contain property which constitutes evidence of the commission of a criminal offense, contraband, the fruits of crime and/or property designated or intended for use of which is or has been used as a means of committing violations of Tennessee State laws. Particularly, Vehicular Homicide.

Officer Warren's affidavit in support of the search warrant of the defendant's vehicle listed the date of the crash as February 23, 2019.

During the suppression hearing, Officer Warren offered testimony similar to his trial testimony regarding his responding to the scene, his going to the defendant's residence the following day, and his observing the defendant's vehicle. He stated that he prepared the affidavits and search warrants on a laptop while in his patrol car parked in front of the defendant's home. He acknowledged that the defendant's correct address was 207 Port Drive and that the search warrant listed the address as 209 Port Drive. He explained that the address in the search warrant was the result of a typographical error and that his intent was to search the residence "with the white car, with pedestrian damage, in the driveway, which would have been 207."

During cross-examination, Officer Warren identified a photograph taken during the execution of the search warrant showing the mailbox listing the address as 207 Port Drive next to the search warrant listing the address as 209 Port Drive. He acknowledged that the search warrant listed the address as 209 Port Drive in two places and did not include the correct address of 207 Port Drive, the city, the county, or the state.

He agreed that the search warrant did not include any directions to the residence or any details describing the residence. He believed that the inclusion of the description of the defendant's vehicle parked in the driveway provided sufficient detail in the search warrant for the defendant's residence to ensure that the officers executing the search warrant for the residence would not mistakenly search the wrong residence. He noted that while he was obtaining the search warrants, the officers remained at the defendant's property and waited for him to return with the search warrants to execute them.

At the conclusion of the suppression hearing, the trial court took the matter under advisement and subsequently entered an order denying the defendant's motions. The trial court rejected the defendant's claim that the affidavit for the search warrant for her residence failed to establish probable cause due to the absence of the date or time of the crash from the affidavit. The trial court found that based on other information in the affidavit, including the fatal nature of the crash, the victim's status as a police officer, the description of the investigation as "current[ ]," the recovery of the vehicle's grill at the scene, the attempts to locate the vehicle and the motorist, and the success in locating a vehicle with front-end damage consistent with the crash at a residence in the vicinity of the crash, "it is reasonable to infer that the application was fresh enough with respect to stable evidence such as the front-end damage on the vehicle and the identity of the motorist at the time of the damage." The trial court found that even if the affidavit in support of the search warrant for the defendant's residence was insufficient, the "contemporaneous application" for the search warrant for the defendant's vehicle, which was presented to the same judge, provided that the crash occurred on the day before the search warrant was sought.

The trial court also rejected the defendant's claim that the search warrant for her residence was invalid because the search warrant included the incorrect address; did not include the city, county, or state in which the residence was located; and did not otherwise describe the residence. The trial court found that although the search warrant included a typographical error in the house number, the description of the residence as located on Port Drive with a 2017 Honda CR-V parked on the property was sufficient to satisfy the particularity requirements. Although the search warrant did not include the city, county, or state in which the residence was located, the trial court found that at the time of the issuance of the search warrant in 2019, the court was without jurisdiction to issue search warrants for property located outside the judicial district and that, therefore, "the executing officers did not have discretion to execute the warrant in another judicial district." The trial court stated that there was no evidence of another Port Drive in the county. The trial court acknowledged that the vehicle could be moved to another location but disagreed with the defendant's argument that "reliance on a changeable identifier necessarily renders a warrant insufficiently particular." The trial court stated that there was no evidence that a 2017 Honda CR-V was absent from 207 Port Drive or present on 209 Port Drive at the time of the execution of the search warrant. The trial court concluded that because probable

cause for the search warrant for the defendant's residence depended upon the presence on the premises of a vehicle with front-end damage consistent with evidence at the scene, "the reliance in the warrant on the description of the vehicle as on the premises and its identification as an object of the search sufficiently limits the discretion of the executing officers with respect to the location of the search, despite the typographical error in the house number." The trial court further concluded that even if the search warrant for the residence was invalid, officers could have seized and searched the defendant's vehicle without a warrant "under the automobile exception" once the officers observed front-end damage on the vehicle consistent with the evidence at the scene of the crash.

To be valid, a "search warrant must comply with provisions of the United States Constitution, the Tennessee Constitution, and Tennessee statutory requirements." *State v. Davidson*, 509 S.W.3d 156, 182 (Tenn. 2016). To pass constitutional muster, a search warrant must be issued by a neutral and detached magistrate "upon probable cause," which, in the case of the federal constitution, must be "supported by Oath or affirmation," and must "particularly describe[e] the place to be searched[ ] and the persons or things to be seized." U.S. Const. amend. IV; *see also Davidson*, 509 S.W.3d at 182. In addition to the constitutional requirements, Code section 40-6-103 provides that "[a] search warrant can only be issued on probable cause, supported by affidavit, naming or describing the property, and the place to be searched." T.C.A. § 40-6-103. Additionally, Tennessee Rule of Criminal Procedure 41 provides that "[a] warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish the grounds for issuing the warrant" and that the warrant must "identify the property or place to be searched" and "name or describe the property or person to be seized." Tenn. R. Crim. P. 41(c)(1); (3)(A).

A. Particularity

The particularity requirement serves two purposes, it "protects the accused from being subjected to an unreasonable search and/or seizure" and "prevent[s] the officer from searching the premises of one person under a warrant directed against those of another." *State v. Vanderford*, 980 S.W.2d 390, 404 (Tenn. Crim. App. 1997) (quoting *Squires v. State*, 525 S.W.2d 686, 690 (Tenn. Crim. App. 1975), and citing *Williams v. State*, 270 S.W.2d 184, 185 (Tenn. 1954)). The particularity requirement will be satisfied when the description "particularly points to a definitely ascertainable place so as to exclude all others and enables the officer to locate the place to be searched with reasonable certainty without leaving it to his discretion." *State v. Smith*, 868 S.W.2d 561, 572 (Tenn. 1993) (citing *Hatchett v. State*, 346 S.W.2d 258, 259 (Tenn. 1961); *State v. Cannon*, 634 S.W.2d 648, 650 (Tenn. Crim. App. 1982)). Inaccuracies in the address or directions provided will not "invalidate the warrant [when] the overall description of the premises contained in the warrant enabled the police to locate the place to be searched with reasonable certainty." *Id*. (citing *State v. Wright*, 618 S.W.2d 310, 318 (Tenn. Crim. App. 1981)); *see State v.*

Bostic, 898 S.W.2d 242, 245 (Tenn. Crim. App. 1994) ("Discrepancies between the warrant's description with regard to distances to the place to be searched and the actual distance to the building searched do not invalidate the warrant if this test is satisfied." (citing *Hatchett*, 346 S.W.2d 259; *Wright*, 618 S.W.2d at 310; *Feagins v. State*, 596 S.W.2d 108 (Tenn. Crim. App. 1979)).

The defendant argues that the search warrant failed to describe the place to be searched with particularity. She maintains that the search warrant included the wrong house number and did not include the city, the county, or the state in which the residence was located, a description of the residence, directions to the residence, or the owner's name. The State responds that the information in the search warrant and the executing officer's knowledge of the residence was sufficient to meet the particularity requirements.

The defendant contends that this court is limited to the four corners of the search warrant in determining whether the particularity requirements have been met. The defendant correctly states that we may not consider the description of the premises provided in the affidavit supporting the search warrant because the affidavit was not expressly incorporated into the search warrant. *See State v. Mack*, 188 S.W.3d 164, 171 (Tenn. Crim. App. 2004) (declining to consider the supporting affidavit in determining whether the search warrant described the place to be searched with particularity when the search warrant did not include any language incorporating the affidavit into it). However, this court has recognized that consideration of evidence presented during the suppression hearing may be appropriate in examining whether the particularity requirement was satisfied. *See e.g. State v. Calvin Cathey*, No. W2009-01624-CCA-R3-CD, 2011 WL 3903393, at *3 (Tenn. Crim. App., Jackson, Sept. 1, 2011) (addressing an issue regarding the particularity requirement and concluding that "[t]he better practice would have been for the parties to present evidence concerning the validity of the warrant"); *Bostic*, 898 S.W.2d at 246 (concluding that any ambiguity in the location of the defendant's residence which might have arisen during the execution of the search warrant was "negated" by the actual knowledge of the location of the property by the officer, who was both the affiant and the executing officer).

The warrant required a search of "the residence of 209 Port Drive" but did not follow the description with the city, county, or state in which the residence was located. In *Armstrong v. State*, the Tennessee Supreme Court addressed a similar search warrant, which listed the owner of the premises, the house number, and the street but did not follow the description with the city, county, or state. *Armstrong v. State*, 265 S.W. 672, 673 (Tenn. 1924). The court viewed "the warrant as a whole" and concluded that "there can be no mistake about what city, county, or state was intended." *Id.* The court noted that the heading of the warrant stated, "State of Tennessee, County of Knox, City of Knoxville,"

and that the warrant was issued by a municipal judge, whose jurisdiction did not extend beyond the city. *Id.*

The heading in the search warrant in the instant case included the words, "State of Tennessee" and "Hamilton County," and the warrant was issued by a judge of the Criminal Court for Hamilton County. The search warrant was issued in February 2019 after the Tennessee Supreme Court held in September 2018 that "in the absence of interchange, designation, appointment, or other lawful means, a circuit court judge in Tennessee lacks jurisdiction to issue search warrants for property located outside the judge's statutorily assigned judicial district," *see State v. Frazier*, 558 S.W.3d 145, 146 (Tenn. 2018), and prior to the July 1, 2019 effective date of an amendment to Tennessee Code Annotated section 40-1-106, granting chancery and circuit court judges "statewide jurisdiction to issue search warrants," *see* 2019 Pub. Acts, c. 486, § 14, eff. July 1, 2019. Thus, viewing the warrant "as a whole," we conclude that the search warrant provided that the property was located in Hamilton County, Tennessee. *See Armstrong*, 265 S.W. at 673.

Although the search warrant did not include the city in which the residence was located, the warrant stated that the residence was on Port Drive, and the trial court found that there was no evidence of another Port Drive in Hamilton County. The defendant challenges the trial court's finding, asserting that evidence was presented during the suppression hearing regarding a "Port Royal Drive" located in Hamilton County. Officer Warren initially testified that the defendant's residence was located on "Port Royal Drive" but then clarified that it was located on "Port Drive." During cross-examination, he testified that he did not believe he was aware of "Port Royal Drive" and that his reference to "Port Royal Drive" was inadvertent. The defendant cites in her appellate brief to a map purportedly showing "Port Royal Drive" located approximately 2.9 miles from Port Drive that she attached to her supplemental motion to suppress filed in the trial court, but the proposed map was never entered as an exhibit at the suppression hearing. Regardless, evidence of the existence of a "Port Royal Drive" in Hamilton County does not contradict the trial court's finding that there was not another "Port Drive" in the county.

The house number in the search warrant included a typographical error. Such an inaccuracy, however, does not necessarily invalidate the search warrant. *See Smith*, 868 S.W.2d at 572; *Bostic*, 898 S.W.2d at 245. The trial court found that the search warrant's listing a 2017 Honda CR-V at the residence assisted in identifying the residence subject to the search warrant. "[D]escribing unique features can render warrants valid even when they list the wrong address." *United States v. Abdalla*, 972 F.3d 838, 846 (6th Cir. 2020) (citing *United States v. Durk*, 149 F.3d 464, 466 (6th Cir. 1998)). The defendant asserts that reliance upon the listing of the vehicle in the search warrant to describe the residence to be searched was improper because the vehicle was not mentioned in the section of the warrant describing the residence to be searched but, instead, was included in the list of

items to be seized. The defendant does not cite to any authority to support her claim. Furthermore, the search warrant may be viewed "as a whole" in determining whether the particularity requirements have been met. *See Armstrong*, 265 S.W. at 673; *see also United States v. Siumans*, 278 F. App'x. 171, 172 (3d Cir. 2008) (noting that "phrases in a search warrant must be read in context and not in isolation" (citations omitted)); *United States v. Lora-Solano*, 330 F.3d 1288, 1294 (10th Cir. 2003) (examining "the warrant as a whole" to determine whether the particularity requirements have been met when the address listed in the warrant was "off by one digit").

The defendant contends that consideration of the vehicle was improper because it easily could have been moved from the property and that the search warrant did not include a detailed description of the vehicle, such as its vehicle identification number, its license plate information, and its condition. A 2017 Honda CR-V was parked at the defendant's home at 207 Port Drive before the officers obtained the search warrant and when the warrant was executed. However, given the limited description of the vehicle included in the search warrant, we cannot conclude that the listing of a "2017 Honda CR-V," alone, negated the ambiguity created by the typographical error in the warrant. Rather, we conclude that the listing of the vehicle in the warrant, along with other information in the warrant and the officers' knowledge of the place to be searched was sufficient to negate the ambiguity.

This court has recognized that a police officer's actual knowledge of the location to be searched may negate any ambiguity in the location of the defendant's residence that may have arisen in the execution of the warrant. *See Bostic*, 898 S.W.2d at 246 (concluding that the officer's knowledge of the location of the property to be searched negated any ambiguity that may have arisen as a result of discrepancies between the warrant's description regarding the distance to the place to be searched and the actual distance of the building searched); *cf. Mack*, 188 S.W.3d at 173 (holding that the omission from the warrant of the street upon which the residence was located did not create an ambiguous description susceptible to multiple interpretations but was an "omission of important details in the description," which may not be cured by the executing officer's prior knowledge of the location of the residence).

Federal courts have upheld search warrants that included inaccurate information regarding the place to be searched where the warrants included "some accurate identifier" and "the executing officer is the affiant and just came from the home in question." *United States v. Wagoner*, 836 F. App'x. 374, 379-80 (6th Cir. 2020) (citing cases). An officer's prior knowledge of the location of the property subject to the warrant is a factor that may be considered in determining the validity of a search warrant that includes inaccurate information in describing the place to be searched. *See, e.g. Abdalla*, 972 F.3d at 846-47 (considering the agent's role as both the affiant and the executing officer

as a factor in concluding that the inclusion of the wrong address in the warrant did not invalidate the warrant); *United States v. McMillian*, 786 F.3d 630, 640 (7th Cir. 2015) (considering the officers' personal knowledge of the house as a factor in upholding a warrant that listed the incorrect street number); *Durk*, 149 F.3d at 466 (considering the fact that the executing officer was also the affiant who had just returned from the home and that other officers remained at the home while the warrant was being procured in upholding a warrant that listed the incorrect house number and inaccurate directions). Courts have reasoned that an inaccurate warrant is less likely to result in a mistaken search if "'the executing officer…was also the affiant' and was familiar with the property to be searched." *Abdalla*, 972 F.3d at 847 (quoting *Durk*, 149 F.3d at 466). However, the officer's knowledge may not be "the *sole* source of information identifying the physical location" of the premises subject to the search warrant. *United States v. Williamson*, 1 F.3d 1134, 1136 (10th Cir. 1993) (emphasis in original).

The search warrant for the defendant's residence provided that the residence was located on Port Drive in Hamilton County, Tennessee, and that a 2017 Honda CR-V was located on the property. The trial court found that only one Port Drive was located in Hamilton County. Officer Warren prepared the search warrant and supporting affidavit while in a patrol car parked outside the residence, and officers remained at the residence until Officer Warren returned with the search warrant that was signed by the judge. We conclude that this information, when considered in its totality, was sufficient to cure the ambiguity created by the inaccurate house number in the warrant and enabled the police to locate the residence "with reasonable certainty." *See Smith*, 868 S.W.2d at 572. Accordingly, the trial court correctly held that the particularity requirements were met.

B. Probable Cause

The defendant asserts that the affidavit supporting the search warrant for her residence failed to provide probable cause for the issuance of the warrant because the affidavit failed to include the date and time of the crash. She also asserts that the trial court erred in considering the affidavit supporting the search warrant for her vehicle, which included the date of the crash, because the warrant for her vehicle was issued after the warrant for her residence. The State responds that the affidavit supporting the search warrant for the defendant's residence included facts demonstrating that the information was sufficiently recent to establish probable cause and that, regardless, the date of the crash was included in the affidavit supporting the search warrant for the defendant's vehicle.

"Probable cause for the issuance of a search warrant exists when, 'given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. Aguilar*, 437 S.W.3d 889, 899 (Tenn. Crim. App. 2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "The

nexus between the place to be searched and the items to be seized may be established by the type of crime, the nature of the items, and the normal inferences where a criminal would hide the evidence." *Smith*, 868 S.W.2d at 572. Because the probabilities involved in making the probable cause determination "are not technical" but are, instead, "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *State v. Tuttle*, 515 S.W.3d 282, 300 (Tenn. 2017) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)), the determinations "are extremely fact-dependent," *Tuttle*, 515 S.W.3d at 300 (quoting *State v. Bell*, 429 S.W.3d 524, 534 (Tenn. 2014)). Given the fact-driven nature of the probable cause determination, a reviewing court must "afford 'great deference' to a magistrate's determination that probable cause exists." *Id.* (citations omitted). Additionally, the reviewing court "may consider only the affidavit and may not consider other evidence provided to or known by the issuing magistrate or possessed by the affiant." *Id.* at 299 (citation omitted).

"The time of the occurrence of the facts relied upon by the affiant is [also] a prime element in establishing probable cause for the issuance of a search warrant." *Id.* (quoting W. Mark Ward, *Tennessee Criminal Trial Practice*, § 4.11 (2016-2017 ed.)). "To this end, the affidavit must contain information which will allow a magistrate to determine whether the facts are too stale to establish probable cause at the time issuance of the warrant is sought." *State v. Norris*, 47 S.W.3d 457, 470 (Tenn. Crim. App. 2011) (citing *State v. Vann*, 976 S.W.2d 93, 105 (Tenn. 1998); *State v. Longstreet*, 619 S.W.2d 97, 99 (Tenn. 1981)). In determining staleness, "there is no rigid rule or specific language required to establish the time element." *State v. McCormick*, 584 S.W.2d 821, 824 (Tenn. Crim. App. 1979). Although the absence of a specific date is not controlling, "[i]t is necessary for a finding of probable cause that the time interval between the alleged criminal activity and the issuance of a warrant not be too great." *State v. Baron*, 659 S.W.2d 811, 814 (Tenn. Crim. App. 1983). The issuing magistrate must consider "whether the criminal activity under investigation was an isolated event or of a protracted and continuous nature, the nature of the property sought, and the opportunity those involved would have had to dispose of incriminating evidence." *State v. Meeks*, 876 S.W.2d 121, 124 (Tenn. Crim. App. 1993).

Although the affidavit supporting the search warrant for the defendant's residence did not include the date of the crash, the affidavit supporting the search warrant for the defendant's vehicle stated that the crash occurred on February 23, 2019. The trial court found that the issuance of the search warrant for the defendant's residence was supported by probable cause because the "contemporaneous application" for the search warrant for the defendant's vehicle, which was presented to the same judge, provided that the crash occurred on the day before the search warrant was sought.

In *State v. Smith*, the officer prepared two affidavits and sought two search warrants, one for the defendant's residence and the second for the defendant's blood, and the magistrate issued the search warrant for the defendant's blood two minutes after he issued the search warrant for the defendant's residence. *State v. Smith*, 836 S.W.2d 137, 139 (Tenn. Crim. App. 1992). On appeal, the defendant challenged the search warrant for his blood sample, arguing that the supporting affidavit failed to establish probable cause. *Id.* This court held that consideration of both affidavits to determine probable cause to issue the search warrant for the blood sample did not violate the Fourth Amendment to the United States Constitution or article I, section 7 of the Tennessee Constitution. *Id.* at 140-41. This court noted that the two affidavits were submitted "simultaneous[ly] by the same officer to the same magistrate and related to the same investigation and the same defendant." *Id.* at 142. This court concluded that "it would defy reason and the evidence presented at the suppression hearing in this case if we were to conclude that the magistrate issued the second warrant without consideration of the affidavit submitted in support of the house warrant." *Id.* at 140.

The defendant asserts that because the judge issued the warrant for the residence approximately 10 minutes before issuing the warrant for the vehicle, the judge did not consider the affidavit supporting the warrant for the vehicle in determining probable cause for the issuance of the warrant for the residence. Cases upholding the consideration of multiple affidavits relating to separate warrants to determine probable cause for the issuance of one of the warrants have focused on the timing in which the affidavits were filed or submitted to the magistrate and not the order in which the warrants were signed. *See id.* at 142 (noting the "simultaneous submission" of the two affidavits); *see also United States v. Nolan*, 413 F.2d 850, 853 (6th Cir. 1969); *State v. White*, 272 S.E.2d 800, 801 (S.C. 1980) (holding that "it is permissible to construe separate affidavits, obtained simultaneously in order to determine the existence of probable cause"); *State v. Keener*, 191 P.3d 835, 838 (Utah 2008) (considering two affidavits submitted "simultaneously" to the magistrate for two warrants in concluding that the challenged search warrant was supported by probable cause); *Derr v. Commonwealth*, 410 S.E.2d 662, 666 (Va. 1991) (holding that "an 'affidavit may be supplemented or rehabilitated' with additional affidavits which contain collective facts relevant to the same offenses when those affidavits are presented, simultaneously, to the issuing magistrate by the same officer").

The trial court in the instant case found that the two affidavits were submitted contemporaneously to the judge who issued the search warrants. Thus, consideration of the affidavit supporting the search warrant for the defendant's vehicle in determining probable cause for the issuance of the search warrant for the residence was proper. Because the affidavit established that the crash occurred the day before the search warrant was sought, the information in the affidavits was not stale, and the search warrant for the defendant's residence was supported by probable cause.

The defendant does not challenge the validity of the search warrant for her vehicle. Rather, her challenge to the evidence obtained from the search of her vehicle was based upon her challenges to the search warrant for her residence, which also authorized the seizure of her vehicle. Because we have upheld the validity of the search warrant of her residence, the seizure of her vehicle was proper, and the defendant is not otherwise entitled to relief regarding this issue.

III. Evidentiary Issues

The defendant asserts that the trial court erred in admitting a life photograph of the victim and videos of Officer Warren's driving the roadway where the crash occurred a few weeks prior to the trial, during daylight hours, and in favorable weather. The defendant also asserts that the trial court erred in excluding exhibits of the defendant's calculations of her possible alcohol levels and in restricting her cross-examination of Assistant Director Lyttle. The State responds that the trial court's rulings were proper.

Questions concerning evidentiary relevance rest within the sound discretion of the trial court, and this court will not interfere with the exercise of this discretion in the absence of a clear abuse appearing on the face of the record. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Van Tran*, 864 S.W.2d 465, 477 (Tenn. 1993); *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is "illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006) (citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006)).

Relevant evidence is 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. "Evidence which is not relevant is not admissible," Tenn. R. Evid. 402, and even if evidence is deemed relevant, it may still be excluded "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.

A. Life Photograph

Prior to trial, the defendant filed a motion seeking to exclude a life photograph of the victim and arguing in part that the photograph was not relevant and was unfairly prejudicial. During a pretrial hearing on the motion, the defendant argued that a photograph of the victim in his uniform would evoke sympathy. The State responded that

the photograph was relevant for the purposes set forth in Tennessee Code Annotated section 40-38-103(c). The State also argued that the photograph showing the victim's size and how he appeared in his uniform was relevant to the defendant's claim that she did not see the victim when she struck him with her vehicle. The defendant noted that the victim was wearing a rain jacket on the night of the crash and that "the State should probably come up with one that is not quite so manifestly and overtly an attempt to lionize the officer in the eyes of the jury." Although the trial court questioned whether the State had a photograph of the victim without his uniform, the trial court recognized that the proof would establish that the victim was a police officer and found that the photograph was not prejudicial. The trial court also found that the photograph, as an exhibit, would go back with the jury during deliberations.

Code section 40-38-103(c) provides: "In a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney general to show the general appearance and condition of the victim while alive." T.C.A. § 40-38-103(c). Although the statute mandates the admission of "an appropriate photograph of the victim while alive," the admission of the photograph is limited to certain cases and for certain purposes. *See id.; State v. Glen Allen Donaldson*, No. E2019-00543-CCA-R3-CD, 2020 WL 2494478, at *10 (Tenn. Crim. App., Knoxville, May 14, 2020). By the plain language of the statute, the trial court retains the discretion to determine whether a life photograph of a homicide victim is appropriate for admission. *See* T.C.A. § 40-38-103(c). Despite the statute's mandatory language, a trial court may nevertheless exclude a photograph, even if relevant to show the victim's "general appearance and condition . . . while alive," *see id.*, if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice," *see* Tenn. R. Evid. 403. Such a photograph would be inappropriate and, consequently, excludable under the statute. *See* T.C.A. § 40-38-103(c).

The photograph at issue shows the victim standing alone while wearing his police uniform. The photograph is relevant to show the victim's general appearance while alive and his approximate height and weight. Although the defendant claims that the photograph is prejudicial because the victim was wearing his uniform, the evidence at trial clearly established that the victim was a police officer and was on duty when he was killed. The photograph is not unfairly prejudicial to the defendant. *See State v. Adams*, 405 S.W.3d 641, 658 (Tenn. 2013) ("Generally, photographs taken during the life of a victim are not so prejudicial as to warrant a new trial."). The trial court did not err by admitting the life photograph of the victim. The trial court also did not err by allowing the jury to take the life photograph, as an exhibit, into the jury room for examination during deliberations. *See* Tenn. R. Crim. P. 30.1 ("Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all

exhibits and writings, except depositions, that have been received in evidence."). The defendant is not entitled to relief regarding this issue.

B. Crime Scene Videos

The defendant maintains that the trial court erred in admitting two videos showing Officer Warren driving 35 and 50 miles per hour on Hamill Road toward the site of the crash. She asserts that the recordings were made a few weeks prior to trial, during the daytime, and in sunny and warm weather and that a barricade was not over the manhole. She argues that the videos were not relevant, especially in light of the admission of the recording from Officer Lockhart's dash camera of her traveling to the scene following the crash, and that the videos were unfairly prejudicial. The trial court allowed the State to present the videos as long as the State specified to the jury the conditions under which the videos were recorded.

The trial court did not specify the relevance of the videos in overruling the defendant's objection. However, the record reflects that the videos were relevant to demonstrate the layout of the road and the effect of speeding on visibility and reaction time, especially in light of the defendant's argument at trial regarding the dangers of the particular roadway and suggestion of negligence in the placement of the barricade and the lack of signage warning of the barricade. The videos also corroborated and illustrated Officer Warren's testimony regarding the distance of the straightaway after rounding the curve and leading to the crash site. *See* Tenn. R. Evid. 401. Officer Warren repeatedly acknowledged that the recordings were made under different weather conditions and at a different time of the day than when the crash occurred. Although the video from Officer Lockhart's dash camera provided a perspective of driving down Hamill Road shortly after the crash, Officer Warren's videos illustrated the effect of speeding at the approximate speed at which the defendant was determined to be going on reaction time. Accordingly, the defendant failed to establish that the videos were unfairly prejudicial, *see* Tenn. R. Evid. 403, and, thus, the trial court did not err in admitting the videos.

C. Exclusion of the Defendant's Blood Alcohol Calculations

The defendant maintains that the trial court erred in excluding exhibits depicting her alternative calculations of her blood alcohol level at the time of the crash and at noon on the following day. She also maintains that the trial court erred in limiting her cross-examination of Assistant Director Lyttle regarding the calculations. The defendant asserts that the evidence was admissible pursuant to Tennessee Rule of Evidence 703 and that the trial court's exclusion of the evidence and limitation of cross-examination violated her constitutional rights to present a defense, cross-examine witnesses, due process, and a fair trial. The State responds that the trial court acted within its discretion in excluding the

exhibits and limiting the cross-examination of Assistant Director Lyttle. The State further responds that any error was harmless.

During direct examination at trial, Assistant Director Lyttle, an expert in toxicology, testified regarding his calculations of the defendant's blood alcohol levels at the time of the crash, and his report of his calculations was admitted as an exhibit. The defendant did not object to the admissibility of the testimony or the report. During cross-examination, the defendant provided Assistant Director Lyttle with documents, which Assistant Director Lyttle identified as "recalculations of what I did, based upon changing some variables." The defendant sought to admit the documents into evidence, and the State objected.

During a bench conference and a hearing outside the jury's presence, defense counsel announced that he was seeking to introduce a document reflecting his calculations using the Widmark formula to establish that the defendant's blood alcohol level was zero at the time of the defendant's scheduled meeting with defense counsel at noon on the day after the crash. Defense counsel argued that evidence of the zero blood alcohol level was relevant to counter the State's suggestion that the defendant hid to prevent officers from obtaining a blood sample and that the evidence was "highly relevant to whether she had a reason to flee." The State argued that only the defendant's blood alcohol level at the time of the crash was relevant.

During a jury-out hearing, defense counsel questioned Assistant Director Lyttle regarding the defense's calculations, which utilized the defendant's weight reflected in the jail records at the time of her arrest and provided the results when different variables were utilized. Assistant Director Lyttle testified, "I've not had the chance to do the math, but I'm trusting that you did the calculations correctly." He also expressed disagreement with some of the values used, describing them as "outliers." He agreed that "based upon 17 hours of metabolism," the defendant's blood alcohol level "will go to zero."

The trial court excluded the exhibit reflecting defense counsel's calculations of the defendant's alcohol level on the day after the crash, concluding that the evidence was irrelevant and "very confusing." The trial court also did not allow defense counsel to ask Assistant Director Lyttle whether the defendant would have had any alcohol in her system at noon on the day following the crash.

The defendant also sought to admit as an exhibit calculations under the Widmark formula of the defendant's blood alcohol level at the time of the crash using the defendant's weight reflected in the jail records and alternative figures for the variables in the formula. The State objected, arguing that the document had not been properly authenticated. The trial court stated that it would allow the defendant to question Assistant

Director Lyttle regarding the calculations on cross-examination after which the court would determine whether the document should be admitted as an exhibit.

Defense counsel thoroughly questioned Assistant Director Lyttle during cross-examination regarding the alternative calculations of the defendant's blood alcohol level at the time of the crash. Defense counsel again requested that he be allowed to question Assistant Director Lyttle regarding the defendant's blood alcohol level at noon on the day after the crash. The trial court found that the evidence was not relevant. Following the trial court's ruling, defense counsel announced that he had no additional questions of Assistant Director Lyttle and requested that "the slides used be placed as an offer of proof in the record." The trial court asked defense counsel, "You're sure you don't have anything further?" Defense counsel replied, "No." The trial court excused the jury for a break after which the following exchange occurred outside the jury's presence:

> THE COURT: . . . [Defense counsel], you've asked everything you want to ask, right?
>
> [DEFENSE COUNSEL]: That's correct, Judge.
>
> THE COURT: You may want to try to introduce other exhibits and so forth, but you don't need [Assistant Director] Lyttle for that?
>
> [DEFENSE COUNSEL]: No, no, I don't think so. I just ask that this be marked for identification.
>
> THE COURT: All right. You can do that. All right. I'm going to let [Assistant Director] Lyttle go then, okay?
>
> [DEFENSE COUNSEL]: Yes.

The trial court entered the document reflecting the defendant's alternative calculations of her blood alcohol level at the time of the crash as an exhibit for identification purposes.

On appeal, the defendant argues that Assistant Director Lyttle's report "should not have been sent back with the jury" and that "[t]he State abused the trial process by using evidence that they themselves did not understand." The defendant did not raise these arguments at trial or otherwise object to the admission of Assistant Director Lyttle's report or his testimony based on the report. The defendant, therefore, has waived these arguments on appeal. *See* Tenn. R. App. 36(a) ("Nothing in this rule shall be construed as requiring relief to be granted to a party responsible for an error or who failed to take

whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *see also State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016) ("[A] defendant may not advocate a different or novel position on appeal."). The defendant also did not claim at trial that the exclusion of the defendant's calculations and the trial court's ruling limiting the cross-examination of Assistant Director Lyttle violated the defendant's right to present a defense, cross-examine witnesses, due process, and a fair trial. Thus, these arguments likewise are waived on appeal. *See* Tenn. R. App. 36(a); *Howard*, 504 S.W.3d at 277; *see also State v. Rodney Darnell Robinson*, No. M2019-00303-CCA-R3-CD, 2020 WL 1923152, at *45 (Tenn. Crim. App., Nashville, Apr. 21, 2020) (holding that the defendant's claim that the exclusion of evidence violated his constitutional right to present a defense and to confront witnesses was waived when the defendant did not raise the constitutional claims in the trial court).

The defendant asserts that proof that she had a zero blood alcohol level at noon on the day after the crash was relevant to establish that she did not delay in turning herself in to the police to avoid a blood test. She argues that the proof was important because the State requested a flight instruction and "had been arguing during the trial that [the defendant] fled and was trying to avoid having her blood tested." The defendant does not cite to any portions of the record where the State claimed that the defendant eluded the police on the day following the crash to avoid a blood test. Rather, Lieutenant Kilgore testified to the importance of locating the perpetrator quickly after the crash due in part to the need to test the perpetrator's blood, and the State argued that the defendant fled the scene of the crash to avoid a blood draw and field sobriety tests. The State's argument did not relate to the defendant's continued efforts to elude the police on the following day. The trial court correctly found that the evidence of the defendant's blood alcohol level at noon on the day following the crash was irrelevant. *See* Tenn. R. Evid. 401. The trial court also found that the evidence was "confusing," and the trial court's findings reflect its agreement with the State that the pertinent issue was the defendant's level of impairment at the time of the crash. Thus, what little probative value of the evidence that the defendant sought to introduce was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Tenn. R. Evid. 403. We conclude that the trial court did not abuse its discretion in excluding the evidence and limiting defense counsel's cross-examination of Assistant Direct Lyttle on the issue.

At trial, the State challenged the admission of the document reflecting the defendant's alternative calculations of her blood alcohol level at the time of the crash, arguing that the document could not be authenticated. The trial court ruled that the defendant could cross-examine Assistant Director Lyttle regarding the alternative calculations and that the court would rule on the admissibility of the document reflecting the alternative calculations at the conclusion of the cross-examination. However, after concluding the cross-examination of Assistant Director Lyttle, the defendant did not seek

to enter the document into evidence as a trial exhibit or otherwise argue its admissibility. Rather, the defendant entered the document as an exhibit for identification purposes. Accordingly, we question whether the defendant has waived plenary review of the issue on appeal. *See* Tenn. R. App. P. 36(a); *see also* Tenn. R. App. P. 36, Advisory Comm'n Comments. (providing that Rule 36(a) "is a statement of the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error").

Regardless of waiver, we conclude that any error in the exclusion of the document was harmless. *See* Tenn. R. App. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."); *see also State v. Clark*, 452 S.W.3d 268, 287 (Tenn. 2014) (noting that non-constitutional, evidentiary errors are addressed using the harmless error analysis in Rule 36(b)). The defendant thoroughly questioned Assistant Director Lyttle on cross-examination regarding the alternative calculations. Some of the defendant's own calculations showed a blood alcohol level at 0.08 grams percent or higher, and, thus, the jury could have rejected Assistant Director Lyttle's calculations and still concluded that the defendant had a significant blood alcohol level at the time of the crash. Furthermore, to obtain convictions for vehicular homicide by intoxication and DUI as charged in the indictment, the State was not required to establish the defendant's blood alcohol level at the time of the crash but was required to establish that the defendant was under the influence of an intoxicant that impaired her "ability to safely operate a motor vehicle by depriving [her] of the clearness of mind and control of oneself that [she] would otherwise possess[.]" T.C.A. § 55-10-401(1); *see id.* § 39-13-213(a)(2). The other evidence presented at trial establishing this element of the offenses was strong. Therefore, we cannot conclude that any error in the exclusion of the document "more probably than not affected the judgment" or resulted "in prejudice to the judicial process." Tenn. R. App. 36(b).

IV. Jury Instructions

In criminal cases, a defendant has the right to a correct and complete charge of the law. *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). Thus, it follows that the trial court has a duty to give a complete charge of the law applicable to the facts of a case. *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975). The failure to do so deprives the defendant of the constitutional right to a jury trial. *Garrison*, 40 S.W.3d at 432. In evaluating claims of error in the jury charge, this court must review the charge in its entirety and read it as a whole. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). A jury instruction is considered "prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn.

1997). Notably, when jury instructions fully and fairly state the applicable law, a trial court is not required to provide special instructions. *State v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1997); *State v. Kelley*, 683 S.W.2d 1, 6 (Tenn. Crim. App. 1984).

The legal accuracy of the trial court's instructions is a question of law subject to de novo review. *See Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 149 (Tenn. 2007). The propriety of a given instruction is a mixed question of law and fact to be reviewed de novo with a presumption of correctness. *Carpenter v. State*, 126 S.W.3d 879, 892 (Tenn. 2004); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001).

A. Flight Instruction

The defendant challenges the trial court's decision to instruct the jury on flight. She maintains that sufficient proof was not presented of "any hiding out, evasion, or concealment in the community," that she had no duty to turn herself in to the police until the arrest warrant was issued, and that "the fact that [she] was charged with leaving the scene of an accident does not warrant a flight instruction." The State responds that the trial court properly issued a flight instruction because the evidence presented at trial fairly raised the issue of flight.

To properly charge the jury on flight as an inference of guilt, there must be sufficient evidence to support such instruction. *State v. Berry*, 141 S.W.3d 549, 588 (Tenn. 2004) (appendix). Sufficient evidence supporting such instruction requires "both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community." *State v. Payton*, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989) (quoting *Rogers v. State*, 455 S.W.2d 182, 187 (Tenn. Crim. App. 1970)). "The law makes no precise distinction as to the manner or method of flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction." *State v. Dorantes*, 331 S.W.3d 370, 388 n.16 (Tenn. 2011) (quoting *Rogers v. State*, 455 S.W.2d 182, 186 (Tenn. Crim. App. 1970)). Even a brief evasion of authorities can support the giving of the flight instruction. *Payton*, 782 S.W.2d at 498. "A flight instruction is not prohibited when there are multiple motives for flight," and "[a] defendant's specific intent for fleeing a scene is a jury question." *Berry*, 141 S.W.3d at 589. "Evidence of flight to avoid arrest may be rebutted by a credible explanation of some other motive other than guilt, but the conclusion to be drawn from such evidence is for the jury upon proper instructions from the trial court." *Hall v. State*, 584 S.W.2d 819, 821 (Tenn. Crim. App. 1979).

The State presented evidence that after the defendant struck the victim with her vehicle, the defendant drove away from the scene. On the following day, when the defendant's family members learned that the defendant struck the victim, they attempted

to persuade her to contact the police, but the defendant refused and contacted an attorney instead. Once police officers discovered the defendant's vehicle later that afternoon, they went to great lengths to locate her, but they were unsuccessful. An arrest warrant was issued, and the defendant was placed on the TBI's Most Wanted List. The defendant turned herself in to the police the next morning.

This court has upheld the issuance of a flight instruction even when the defendant eventually turned himself in to law enforcement officers. *See State v. Richardson*, 995 S.W.2d 119, 129 (Tenn. Crim. App. 1998) (upholding the flight instruction and rejecting the defendant's assertion that "public policy should not penalize those that voluntarily turn themselves in to the police"); *see also State v. Quincy Lamont Collins*, No. W2020-01566-CCA-R3-CD, 2022 WL 1183803, at *10-11 (Tenn. Crim. App., Jackson, Apr. 21, 2022), *no perm. app. filed* (upholding a flight instruction where the defendant fled the scene, remained hidden for two days, and turned himself in to the police once an arrest warrant was issued); *State v. Roshaun Cole*, No. E2018-02062-CCA-R3-CD, 2019 WL 4635590, at *6 (Tenn. Crim. App., Knoxville, Sept. 24, 2019) (upholding a flight instruction where the defendant fled the scene and delayed turning himself in for one to two weeks until he had sufficient funds to post bond); *State v. Wayne L. Holt*, No. M2001-00945-CCA-MR3-CD, 2002 WL 31465263, at *9 (Tenn. Crim. App., Nashville, Nov. 5, 2002) (upholding the flight instruction when the defendant fled the scene, remained at the home of another for three days, and turned himself in to the police once he learned that an arrest warrant had been issued).

The defendant maintains that the issuance of an arrest warrant is required before a defendant can be found to have evaded arrest or prosecution and that she had no duty to turn herself in to the police until the arrest warrant was issued. However, a warrant was not necessarily required to arrest the defendant. An officer may arrest a person without a warrant "[w]hen the person has committed a felony, though not in the officer's presence" or "[w]hen a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested has committed the felony." T.C.A. § 40-7-103(a)(2), (3). Additionally, this court has upheld a flight instruction when the defendant remained concealed and then turned himself in to the police following the issuance of an arrest warrant. *See Quincy Lamont Collins*, 2022 WL 1183803, at *10-11; *Wayne L. Holt*, 2002 WL 31465263, at *9.

The defendant asserts that she did not have a motive to flee after the crash because she did not realize that she struck the victim until the next morning. She also asserts that her motive for leaving home the next day was not to evade arrest but to meet with an attorney, who then contacted an officer to arrange for the defendant to turn herself in the next morning, which fell on a Monday, rather than immediately because the clerk's office did not accept property bonds on weekends. This proof of alternative motives did

not preclude a flight instruction but created factual disputes to be resolved by the jury upon proper instruction from the trial court. *See Hall*, 584 S.W.2d at 821. We conclude that the State presented evidence of the defendant's leaving the scene of the crash and "a subsequent hiding out, evasion, or concealment in the community." *Payton*, 782 S.W.2d at 498 (quoting *Rogers*, 455 S.W.2d at 187). The trial court did not err in instructing the jury on flight.

Finally, the defendant contends that her charge of leaving the scene of an accident "does not warrant a flight instruction" and that "[a] charged offense, other than leaving the scene, must necessitate a charge of flight for the instruction to be warranted." The defendant cites to *State v. Smith*, in which our supreme court held that a flight instruction does not apply to an evading arrest charge and that when a defendant is charged with multiple offenses including evading arrest, the flight instruction must specify that the instruction does not apply to the evading arrest charge. *State v. Smith*, 492 S.W.3d 224, 246-47 (Tenn. 2016). In the instant case, the trial court instructed the jury that the issue of flight was not applicable to the defendant's charge of leaving the scene of an accident. We, therefore, conclude that the trial court properly instructed the jury regarding flight.

B. Proximate Cause

The defendant challenges the trial court's rejection of her proposed special jury instruction defining intervening cause and superseding cause. The defendant requested that the trial court instruct the jury on the following definitions in Black's Law Dictionary, 2d Pocket Ed. (2001):

> Intervening Cause is an event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury. If the intervening cause is strong enough to relieve the wrongdoer of any liability, it becomes a *superseding cause*.
>
> Superseding Cause is an intervening act that the law considers sufficient to override the cause for which the original tortfeasor [defendant] was responsible, thereby exonerating that tortfeasor [defendant] from liability [criminal responsibility].

The trial court denied the defendant's request, finding that the instruction set forth in the pattern jury instructions was sufficient. The trial court instructed the jury as follows:

> Cause of death. Before the defendant can be convicted of any degree of homicide, the State must have proven beyond a reasonable doubt that the death of the deceased was proximately caused by the criminal conduct of the defendant.
>
> The proximate cause of a death is that death which, in natural and continuous consequence, unbroken by any independent intervening cause, produces the death, and without which, the death would not have occurred.
>
> The defendant's conduct need not be the sole or immediate cause of death. The acts or omissions of two or more persons may work concurrently to proximately cause the death, and in such a case, each of the participating acts or omission is regarded as a proximate cause. It is not a defense that the negligent conduct of the deceased may also have been a proximate cause of the death.
>
> However, it is a defense to homicide if the proof shows that the death was caused by an independent intervening act or omission of the deceased or another, which the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen. However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not super[s]ede the defendant's original conduct and the defendant's conduct is considered the proximate cause of death. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.
>
> If you find that the defendant's act, if any, did not unlawfully cause or contribute to the death of the deceased, or if you have a reasonable doubt as to this proposition, then you must find her not guilty of homicide.

The jury instruction was consistent with the instruction proposed by the Tennessee Supreme Court and later adopted as a pattern jury instruction. *See Farner*, 66 S.W.3d at 206 n.18; T.P.I.—Crim. 42.14. The jury instruction provided that an "intervening cause" breaks a natural and continuous sequence of events and that a

superseding cause is a defense to homicide, which "the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen." The instruction also provided that the foreseeability analysis focuses on "the general field of danger" rather than "the sequence of events or particular injury." This jury instruction fully and fairly stated the applicable law, and, therefore, the trial court did not err in declining to provide the defendant's proposed jury instructions. *See Mann*, 959 S.W.2d at 521; *Kelley*, 683 S.W.2d at 6.

V. Closing Arguments

The defendant asserts that the prosecutor made inappropriate comments during closing argument regarding the jury's duty to convict and made disparaging remarks about defense counsel. She contends that the trial court erred in failing to issue curative instructions regarding the comments.

"While the scope and depth of closing argument is generally a matter within the trial court's discretion, the State is not free to do what they wish," *State v. Jones*, 568 S.W.3d 101, 145 (Tenn. 2019) (citation omitted), and judges must take care to restrict improper argument, *see State v. Hill*, 333 S.W.3d 106, 130-31 (Tenn. Crim. App. 2010) (citation omitted). Because of the State's unique role in a criminal case, the State, in particular, "must refrain from argument designed to inflame the jury and should restrict its commentary to matters in evidence or issues at trial." *Hill*, 333 S.W.3d at 131. Our supreme court

> has recognized five general areas of potential prosecutorial misconduct during closing arguments: (1) intentionally misstating the evidence or misleading the jury as to the inferences it may draw; (2) expressing personal beliefs or opinions as to the truth or falsity of any testimony or the guilt of the defendant; (3) inflaming or attempting to inflame the passions or prejudices of the jury; (4) injecting issues broader than the guilt or innocence of the accused; and (5) arguing or referring to facts outside the record unless the facts are matters of common knowledge.

Jones, 568 S.W.3d at 145 (citing *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003)).

Even inappropriate closing argument, however, will not warrant a new trial unless it was so inflammatory or improper as to affect the verdict. *See Hill*, 333 S.W.2d at 131 (citation omitted); *see also Jones*, 568 S.W.3d at 145 ("In other words, [improper argument] will be reversible error if the improper comments of the prosecutor were so

improper or the argument so inflammatory that it affected the verdict."). An appellate court considering the harmful effect of improper closing argument examines the following factors:

> (1) The conduct complained of viewed in the context and in light of the facts and circumstances of the case[;]
>
> (2) [t]he curative measures undertaken by the court and the prosecution[;]
>
> (3) [t]he intent of the prosecutor in making the improper statements[;]
>
> (4) [t]he cumulative effect of the improper conduct and any other errors in the record[; and]
>
> (5) [t]he relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

At the conclusion of the State's initial closing argument, the prosecutor told the jury to "go back there, look at the evidence, look at the law and do your duty and find her guilty of vehicular homicide by intoxication, leaving the scene of the accident, and the other charges that she has been indicted for." Defense counsel did not contemporaneously object before giving his closing argument.

Defense counsel informed the jury of a religious ceremony in ancient Israel where the community would select two animals, one of which was slaughtered and sacrificed to God and the other which was symbolically invested with all the community's sins for the year and then tossed off the highest cliff in the area. Defense counsel said, "That's where we get the term scapegoat from, the one who is sacrificed for the sins of others." Defense counsel accused the State of prosecuting a case that was otherwise "weak" and "tenuous" because the victim was a police officer. He accused Officer Warren of having "trouble being truthful," covering up and failing to pursue evidence because he was "worried about what [he] might find," and using a "voodoo mathematical formula" to calculate speed. Defense counsel challenged Doctor Cogswell's testimony regarding speed, stating that Doctor Cogswell seemed "willing to go outside his expertise to try to help the State." Defense counsel challenged the accuracy of Officer Justice's testimony and accused him of "insult[ing] the intelligence of this jury" when testifying that he did not activate his blue lights because he believed that they would be distracting. Defense counsel

argued that "they don't want their brother officer to have died for nothing, in their minds, that means, as police officers, we need to get a conviction." He continued,

> [a]nd sadly, for us, that means that Janet Hinds will be the sacrificial lamb, she will be the scapegoat. She will be the scapegoat for the sins of the Public Works department, she will be the scapegoat for the sins of the police department. And I am asking you to look at this evidence, this very weak evidence that has been put before you, and to come back and to not throw this woman into the abyss.

At the conclusion of defense counsel's closing argument, the following exchange occurred:

> [PROSECUTOR]: I must say, that's quite melodramatic even for a criminal defense lawyer to make.
>
> [DEFENSE COUNSEL]: Judge, I'm going to object.
>
> [THE COURT]: I will sustain that term. Move on, [prosecutor].
>
> [PROSECUTOR]: Judge, he's been given free liberty to accuse people of everything for the entire week, and you've allowed him to do that.
>
> THE COURT: Just argue your case. That's fine.

During the State's rebuttal closing argument, the prosecutor argued, "When you are provided proof beyond a reasonable doubt, of someone, as we have with Ms. Hinds, then under the law, it is your duty to convict her. And that's what we are asking you to do, is to convict her, as charged, of all these counts[.]"

During a bench conference after closing argument had concluded, defense counsel objected to the prosecutor's statements during the initial closing argument regarding the jury's duty to convict, but defense counsel recognized that during rebuttal closing arguments, the prosecutor "modified that by indicating that there was a duty if there was proof beyond a reasonable doubt." The trial court stated that it would instruct the jury on the law and that the court believed the jury would follow that law. The trial court instructed the jury and then adjourned court for the day. On the following morning before deliberations began, the trial court instructed the jury as follows:

> At the close of arguments, there w[ere] some objections made by various lawyers about various things, generally about possibly going beyond what the evidence showed, possibly talking about evidence that was not in the record, but specifically talking about the duty of the jurors. Let me refer back to the instructions that I gave you, which you will take back into the jury room in regard to making your decision. Read all those instructions, specifically I'll tell you about closing arguments in that. And I told you before we started, and it's in the instructions, that closing argument is important, but it's not evidence. It's your job to determine from the evidence what the facts are and apply the law to the facts in reaching your verdict. That's in those instructions. And I'll repeat that again because those objections were made. It's not your duty to do anything other than that. So that's your duty, that's your job, and that's what you've sworn to do. So look at the evidence that was presented in the courtroom. From that, you determine the facts, and from those facts, you arrive at your verdict. And we'll be waiting for that.

The State acknowledges that the prosecutor's statement during the initial closing argument regarding the jury's duty to convict was improper. However, both the State and the trial court took curative measures. The prosecutor corrected the statement during the rebuttal closing argument, and the trial court provided a curative instruction, informing the jurors of their duty under the law. The defendant contends that the trial court's curative instruction was insufficient because the trial court did not provide the instruction shortly after the improper statement was made. The defendant did not object to the comment until after closing arguments had concluded, and the defendant's objection did not include a specific request for relief. We conclude that the trial court's curative instruction reminding the jurors of their duty under the law, which was given shortly before the jury began deliberations was sufficient to remedy the improper comment. *See State v. Jordan*, 325 S.W.3d 1, 55 n.12 (Tenn. 2010) (noting that a jury is generally presumed to follow the trial court's instructions). In light of the trial court's curative instruction and the strong evidence of the defendant's guilt presented at trial, we cannot conclude that the prosecutor's improper comment was so inflammatory that it affected the verdict.

The State asserts that the prosecutor's comment describing defense counsel's closing argument as "melodramatic" was not an attack of defense counsel's credibility, as claimed by the defendant, but was a comment "on the style of his presentation." The State also asserts that the defendant waived plenary review of the prosecutor's statement that

defense counsel had "been given free liberty to accuse people of everything the entire week" for failing to object to the comment at trial. However, the prosecutor made the comment in response to defense counsel's objection to the prosecutor's description of defense counsel's closing argument as "melodramatic." Under these circumstances, we conclude that a separate objection was not required. *See State v. Enix*, 653 S.W.3d 692, 700-01 (Tenn. 2002) (holding that trial counsel's failure to contemporaneously object to alleged prosecutorial misconduct during closing arguments results in waiver of the issue).

"The prosecution is not permitted to reflect unfavorably upon defense counsel or the trial tactics employed during the course of trial." *State v. Gann*, 251 S.W.3d 446, 460 (Tenn. Crim. App. 2007) (citations omitted). Although the prosecutor was frustrated with defense counsel, the prosecutor was prohibited from making disparaging remarks about him in front of the jury, regardless of whether those frustrations were justified as claimed by the State on appeal. We note that the trial court sustained the defendant's objection and instructed the prosecutor to "[m]ove on." The trial court later instructed the jury that the statements and arguments of counsel did not constitute evidence. In light of the trial court's curative measures, the length and complexity of the trial, and the strength of the evidence of the defendant's guilt presented at trial, we cannot conclude that the prosecutor's improper comments were so inflammatory that they affected the verdict.

VI. Sentencing

The defendant asserts that her 11-year sentence for vehicular homicide by intoxication is excessive. She maintains that the trial court misapplied an enhancement factor, failed to apply mitigating factors, and failed to give appropriate weight to mitigating factors.

During the sentencing hearing, the State called Mr. Hinds, the defendant's son, who offered testimony similar to other evidence presented at trial. During cross-examination, Mr. Hinds testified regarding the defendant's role in raising her two sons as a single mother and her role as a grandmother. He stated that at the time of the crash, the defendant was employed with the United States Postal Service and that her employment spanned several years. He also stated that the crash "changed her completely" and that the defendant has expressed feelings of pain and remorse for the loss of the victim's life.

The State also presented the testimony of CPD Interim Chief Eric Turner, the victim's sister, and his father regarding the impact of the victim's death on the police department and the victim's family, including his two children. The defense submitted several letters written by others on the defendant's behalf and the testimony of two friends regarding the change in the defendant since the crash and her remorse. The defendant also

provided an allocution during which she apologized to the defendant's family and her family. She maintained that had she known that she struck someone on the night of the crash, she would have remained at the scene.

In sentencing the defendant, the trial court considered the evidence presented at trial, the facts and circumstances of the case, the defendant's sentencing memorandum, the statements and testimony from the victim's family, the statements presented on the defendant's behalf, the applicable statistics, the defendant's allocution, and the presentence report. The trial court found that the defendant "drank excessively" on the night of the crash, that evidence was presented that the defendant's blood alcohol level would have been "well in excess of .08" grams percent, and that the video recording at the restaurant showed some indications that the victim became impaired as the night progressed. The trial court noted that the defendant drove past other officers before reaching the officers on Hamill Road, recklessly drove her vehicle down the middle of a narrow road, striking and killing the victim, fled the scene, drove home and parked her vehicle, and turned herself in to the police one and one-half days after the crash. The trial court stated that although the defendant did not intentionally kill the victim, she "intentionally drank" and then "got into a vehicle and drove recklessly," striking and killing the victim. The trial court found that the defendant's allocution was "sincere."

The trial court found that the defendant was a Range I offender, who was subject to a sentence of eight to 12 years for vehicular homicide by intoxication. The trial court found that the defendant "has absolutely no record at all" and gave no weight to a prior DUI case from approximately 20 years ago or her "slight marijuana use" when she was younger. The trial court rejected the State's request to apply enhancement factor (8), "[t]he defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community[.]" T.C.A. § 40-35-114(8). The trial court applied enhancement factor (10), "[t]he defendant had no hesitation about committing a crime when the risk to human life was high[,]" stating, "I think there's a lot of weight to be given to the fact that other people were present when this happened." *Id.* at § 40-35-114(10). The trial court noted that although the victim's death could not be considered in applying this enhancement factor, Officer Justice also was present, that "two cars passed that area at very slow speeds in order to see the danger that was there," and that "I think they were in danger." The trial court noted that Melissa Hinds contacted the defendant and warned her to exercise caution because there was an accident and police officers in another area. The trial court stated that although the victim was able to drive past that area without incident, "[t]hey were in danger. They were in danger because she had too much to drink when she started to drive her vehicle. So I think that is a very, very important enhancing factor, and I do apply . . . that."

The trial court found that the consideration of the circumstances of the offenses was important in determining the sentence. Although the trial court believed it could consider the fact that the defendant was on bond and violated the conditions of her bond, the trial court did not find "that to be an enhancing factor per se."

The trial court applied mitigating factor (13), the catchall provision, based on the defendant's supportive family and employment history. *See id.* § 40-35-113(13). The trial court considered the results of the defendant's risk and needs assessment, finding that the defendant was a "very, very low risk" to reoffend. The trial court noted that the defendant had been on house arrest pending trial and that the court "consider[s] all of those factors when punishment is decided." After weighing the enhancing and mitigating circumstances, the trial court imposed an 11-year sentence for the conviction for vehicular homicide by intoxication.

Our supreme court has adopted an abuse of discretion standard of review for sentencing and has prescribed "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The application of the purposes and principles of sentencing involves a consideration of "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant . . . in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5). Trial courts are "required under the 2005 amendments to 'place on the record, either orally or in writing, what enhancement or mitigating factors were consider, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.'" *Bise*, 380 S.W.3d 698-99 (quoting T.C.A. § 40-35-210(e)). Under the holding in *Bise*, "[a] sentence should be upheld so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709.

The defendant was sentenced as a Range I offender, and the applicable sentencing range for vehicular homicide by intoxication, a Class B felony, is eight to 12 years. *See* T.C.A. §§ 39-13-213(a)(2), (b)(2)(A); 40-35-112(a)(2). The trial court imposed a within-range sentence after articulating its reasons in accordance with the purposes and principles of sentencing, considering the presence and absence of enhancement and mitigating factors, and weighing those factors. Thus, we will review the within-range sentences imposed by the trial court under an "abuse of discretion standard with a presumption of reasonableness." *Bise*, 380 S.W.3d at 708.

The defendant challenges the trial court's application of enhancement factor (10) that she "had no hesitation about committing a crime when the risk to human life was high." T.C.A. § 40-35-114(10). She argues that the proof failed to establish that her conduct created a high risk of death to someone other than the victim. "[T]his enhancement

factor is applicable only when there is proof that the defendant's conduct in committing the offense created a high risk to the life of someone other than the victim." *State v. Trent*, 533 S.W.3d 282, 294 (Tenn. 2017) (citations omitted); *see State v. Noah Cassidy Higgins*, No. M2020-00281-CCA-R3-CD, 2022 WL 1207759, at *8 (Tenn. Crim. App., Nashville, Apr. 25, 2022), *no perm. app. filed* (holding that enhancement factor (10) was properly applied when the defendant drove at an excessive speed in a residential neighborhood and near a large park where people were walking and riding bicycles); *State v. Cindy B. Hinton*, No. M2020-00812-CCA-R3-CD, 2021 WL 3076959, at *9, 13 (Tenn. Crim. App., Nashville, July 21, 2021), *perm. app. denied* (Tenn. Nov. 19, 2021) (upholding the application of the enhancement factor when the crash occurred during rush hour and the recording from the trooper's dashboard camera showed many vehicles stopped on the road); *State v. Samuel Huffine*, No. E2016-02267-CCA-R3-CD, 2018 WL 1611591, at *5 (Tenn. Crim. App., Knoxville, Apr. 3, 2018) (upholding the application of enhancement factor (10) when the video recordings of the crash showed headlights of other vehicles on the roadway nearby at the time of the crash). Enhancement factor (10) "looks to the circumstances of the offense for which a defendant is being sentenced." *Trent*, 533 S.W.3d at 295 n.8 (concluding that evidence that the defendant almost struck a canopy pole at least three hours prior to the accident was insufficient to support the application of the enhancement factor). The evidence presented at trial established that Officer Justice was standing on the side of the road near the victim when the crash occurred. Another vehicle was in the vicinity and reached the site of the crash shortly after the crash occurred. We conclude that this evidence is sufficient to support the application of enhancement factor (10).

The defendant maintains that the trial court erred in failing to apply mitigating factor (11), "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct[.]" T.C.A. § 40-35-113(11). Although the trial court did not specifically reference this mitigating factor, the trial court made thorough findings regarding the facts and circumstances of the offenses, indicating the trial court's rejection of this mitigating factor. During the sentencing hearing, the defendant argued that the circumstances of the crash were "highly unusual" and that "the risk of the outcome was, statistically speaking, relatively small." The defendant cited statistics comparing the number of DUIs committed with the numbers of deaths resulting from DUIs and argued that less than one percent of incidents of drunk driving resulted in death. The trial court found that the defendant "drank excessively" while at the restaurant, drove "recklessly" by "speeding down the middle of that narrow roadway," and left the scene after striking and killing the victim and that other vehicles on the road were able to avoid striking the barricade. The trial court specifically rejected the defendant's statistical argument, finding that "too many" people are arrested for DUI, that "too many" people are killed due to intoxicated drivers, and that "although the percentage may be low when that happens, I

think that's not something that I would indicate is a mitigating factor." The record supports the trial court's findings, and we cannot conclude that the trial court erred in not applying this mitigating factor. Furthermore, contrary to the defendant's claim on appeal, the trial court stated that it considered the defendant's pretrial house arrest in imposing the sentence.

"[A] trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Bise*, 380 S.W.3d at 706. Although the defendant maintains that the trial court failed to give appropriate weight to the circumstances upon which it relied in applying mitigating factor (13), "[a] trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion," *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008), and this court is not free to reevaluate the weight and value assigned to the factors found by the trial court.

The record reflects that the trial court considered all the relevant principles associated with sentencing, including the enhancement and mitigating factors, when imposing the sentence in this case. In our view, the trial court did not abuse its discretion by imposing this within-range sentence after thorough consideration of the purposes and principles of sentencing.

VII. Cumulative Error

The defendant argues that the cumulative effect of errors committed by the trial court entitles her to relief. The cumulative error doctrine applies to circumstances in which there have been "multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). However, the defendant has failed to establish any error entitling her to relief when considered either individually or cumulatively.

Conclusion

Based on the foregoing analysis, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE