IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 2, 2023

STATE OF TENNESSEE v. MARTERRIUS HITE

Appeal from the Criminal Court for Shelby County
No. 16-00714 Lee V. Coffee, Judge

No. W2022-00678-CCA-R3-CD

The Defendant, Marterrius Hite, was convicted in the Shelby County Criminal Court of two counts of first degree felony murder, aggravated child abuse, and aggravated child neglect and received an effective sentence of life plus eighty years in confinement. On appeal, the Defendant claims that (1) the evidence is insufficient to support his convictions, (2) the trial court erred by allowing the State to introduce his belt into evidence without establishing a proper chain of custody, (3) the trial court committed plain error by ruling he "opened the door" to a police officer testifying that he was arrested on prior warrants, (4) the trial court committed plain error by commenting on his expert witness's PowerPoint presentation, (5) the trial court erred by allowing the jury to deliberate late at night, and (6) his effective sentence is excessive. Upon review, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and KYLE A. HIXSON, JJ., joined.

Shae Atkinson (on appeal) and Lauren Pasley (at trial), Memphis, Tennessee, for the appellant, Marterrius Hite.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Eric Christensen and Dru Carpenter, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

In February 2016, the Shelby County Grand Jury indicted the Defendant for two counts of first degree felony murder, one count of aggravated child abuse, and one count

of aggravated child neglect. The Defendant's five-day trial, with a sequestered jury, began on February 14, 2022.

At trial, Lieutenant Allen Craft, a paramedic with the Memphis Fire Department ("MFD"), testified that on July 13, 2015, he responded to a child drowning call at an apartment located on Woodbranch street. When he arrived, a fire truck was present, and a paramedic and an EMT were "working on" the victim, a two-year-old boy. Lieutenant Craft learned the victim had been found unresponsive in the bathtub. However, he noticed that the victim's body was dry and that he did not hear any "wetness" in the victim's lungs. He also noticed bruises on the victim's abdomen, leg, and back. The victim was cold to the touch and did not have a pulse. An adult male was present and was saying that if first responders "had gotten there in time, his son would still be here." Lieutenant Craft thought the man was the victim's father. Paramedics attempted to revive the victim for about thirty minutes but never saw any signs of life. They transported him to Le Bonheur Children's Hospital.

On cross-examination, Lieutenant Craft testified that he received the call about the victim at 11:54 a.m. and that he arrived on the scene at 12:03 p.m. He stated, "I guess when people are in a situation where things are real bad, the time seems longer than what it actually is."

Lieutenant Darrell Kiner of the MFD testified that he was the first paramedic to arrive at the apartment. When he walked inside, the police were present, and the victim was lying on the living room carpet in a prone position, meaning he was on his stomach with his head turned to the side. The carpet was wet, and Lieutenant Kiner thought he heard water running in a bathtub down the hall. Lieutenant Kiner tried to get information from a man who was there, but the man was upset and said, "What took y'all so long to get here? If y'all had been here, the baby would have lived." A police officer moved the man out of the way and told Lieutenant Kiner that "the baby like[d] to take baths, and the baby crawled into the tub and turned the water on, and then he found him, and he was drowned." Based on the officer's information, Lieutenant Kiner intubated the victim so he could suction water out of the victim's lungs. When he suctioned, though, he did not obtain any water, which surprised him.

Lieutenant Kiner testified that he saw bruises on the victim's back and abdomen and that the victim was cold and dry. Lieutenant Kiner radioed Le Bonheur Children's Hospital so that medical personnel could prepare to receive the victim, and his partner performed CPR. Because the victim was a child, Lieutenant Kiner's partner used two fingers or one palm to perform the chest compressions. Lieutenant Kiner did not remember which technique his partner used, but it was not the technique used on adults.

On cross-examination, Lieutenant Kiner testified that he was dispatched to the apartment at 11:56 a.m. and that he arrived at 12:00 p.m. He did not know when the 911 call was made. When Lieutenant Kiner stepped onto the carpet to assess the victim, he could see and feel that water was soaked into the carpet. Lieutenant Kiner rode in the ambulance with the victim, and the victim arrived at the hospital at 12:31 p.m. Hospital personnel obtained a pulse for the victim, but the victim was "brain dead."

Sergeant Jonathan Harkness of the Memphis Police Department ("MPD") testified that in July 2015, he was a patrol officer and responded to the apartment. Paramedics were treating the victim, and the Defendant was present. Sergeant Harkness described the Defendant as "aggressive," "standoffish," and "super angry at us for our lack of response to the scene." The Defendant claimed it had taken first responders more than thirty minutes to arrive.

Sergeant Harkness testified that the Defendant said the victim got feces on himself, ran a bath for himself to clean off, and ended up getting into the bathtub and drowning. Sergeant Harkness wanted to get as much information as possible from the Defendant, who had been taking care of the victim. However, the Defendant "wouldn't stay in the location," "refused to get into a vehicle," and was "walking around the complex yelling, screaming, cussing, telling everybody that we'd messed up, we didn't make the scene in time." Sergeant Harkness later went to the hospital and saw bruises "all over" the victim, from his head to his abdomen. He spoke with the victim's mother briefly, and he described her as "devastated, sad." On cross-examination, Sergeant Harkness testified that he did not arrest anyone.

Aaron "A.J." Kant testified that on July 13, 2015, he was a lieutenant with the MPD's Crime Scene Investigation Unit and responded to the apartment. The victim had been transported to Le Bonheur and was in critical condition. Officers had secured the apartment, and no one was inside. The apartment was two stories with a living room, kitchen, and had a one-half bathroom downstairs and two bedrooms and a full bathroom upstairs. A bathtub was not downstairs. The Defendant was outside the apartment, and Mr. Kant kept hearing him "referring over and over about having boo-boo on him." The Defendant wanted to go into the apartment to change his clothes. He was not wearing a shirt but was wearing pants, a black belt, and shoes, and the belt had a "very distinctive" pattern of metal studs on it. The Defendant had "no care or concern" about the victim and never inquired about him.

Officer Philip Paris of the MPD testified he responded to the apartment on July 13, 2015. As he was entering the residence, a man was exiting and "was very upset that it took us so long to get there." The man identified himself as "Marvin Hite," but Officer Paris later learned that was not the man's correct name. Officer Paris identified the Defendant

in the courtroom as the man. The victim was lying in the middle of the floor, and paramedics began assessing him. The police learned from the Defendant that the victim had gone to the bathroom on himself and that the Defendant had told the victim to clean himself up. The Defendant said that the victim went upstairs to the bathtub, that the Defendant went upstairs to check on him, and that the Defendant found him unresponsive in the bathtub. The Defendant said he took the victim out of the bathtub and carried the victim downstairs. The Defendant willingly got into Officer Paris's patrol car, and Officer Paris later transported him to the Homicide Bureau to speak with investigators. On cross-examination, Officer Paris acknowledged that the Defendant said he performed CPR on the victim.

Officer Charles Cathey of the MPD testified that he photographed the first and second floor of the apartment, and he identified the photographs for the jury. The photographs of the first floor showed a brown belt behind the front door, water and feces in the hallway leading to the bathroom, and feces in and on the bathroom toilet. The photographs of the second floor showed a mattress with no bedding in the master bedroom, a cord and what appeared to be fecal stains on the mattress, what appeared to be fecal stains on the master bedroom carpet, feces in the bathroom toilet, and about five inches of dark-colored water in the bathtub. A photograph of the Defendant showed him wearing blue jeans and a black belt decorated with metal studs. Fecal matter appeared to be on his jeans.

Officer Cathey testified that he then went to the hospital and photographed the victim, who was deceased. Officer Cathey identified the photographs, which showed bruises on the victim's eyelids, nose, cheeks, neck, arms, abdomen, back, and legs, for the jury. Officer Cathey said that hair appeared to be missing from the left side the victim's head, that the victim had scarring on one of his arms, and that the victim had "a pattern" injury on his right leg. Officer Cathey saw "some type of puncture wound" on the victim's back and acknowledged that the wound looked "fresh." He also saw "patterns and more bruising" on the victim's back; "a big bruise" on the victim's abdomen, which was distended; and scratches or puncture wounds, possibly in a pattern, on the victim's abdomen.

C.D., the victim's mother, testified that in July 2015, she was living in an apartment on Woodbranch with her five children and the Defendant.[1] About 7:00 a.m. on the morning of the victim's death, C.D. checked on her children, who were sleeping, and went to work at Checkers. The Defendant recently had been fired from his job and looked after the children while C.D. was working. At some point, C.D. received a telephone call. The caller, whom she could not identify, told her, "'Come to the house. [The victim] drowned

[1] In order to protect the identity of the minor victim and his siblings, we will refer to them and their mother by their initials.

in the tub.'" C.D. drove home and saw a crowd of people around her apartment. The Defendant was there and tried to comfort her, but she "just pushed back" and asked about her other sons. The victim was still present, and C.D. wanted to ride with him to the hospital. However, she was told she could not ride in the ambulance, so the Defendant's mother drove her to Le Bonheur.

C.D. testified that she went into the emergency room and that the hospital staff was "trying to bring [the victim] back to life." C.D. later spoke with investigators, and they asked her to explain the victim's injuries. She told them that the injuries on the victim's abdomen might have been caused by hospital personnel and that the injuries on his back were "old." The Defendant had told C.D. that the injuries on the victim's back were caused by the children playing. C.D.'s sons played "rough" and liked to wrestle, so C.D. believed the Defendant. She said that she would discipline her children by "popp[ing] them on the butt or whipp[ing] them on the butt, like normal" and that she also would hit them with a belt, "like a pop," over their clothes. She never hit them with a studded belt and never saw the Defendant hit them with a belt. The victim was potty-training at the time of his death, but C.D. did not punish him for accidents.

C.D. testified that on July 4, 2015, the victim had been vomiting and "boo-booing" due to a stomach virus. The next day, she took him to Le Bonhuer and was told to keep him hydrated and "let nature take its course." By July 13, the victim had recovered from the stomach virus and was "a normal kid." C.D. told the jury that no bruises were on the victim's face or abdomen when she went to work on the morning of July 13. Moreover, no fecal matter was on the floor or toilet, and dirty water was not in the bathtub.

On cross-examination, C.D. testified that at the time of the victim's death, she and the Defendant had been in a relationship "on and off" for six years. She trusted the Defendant and left her children in his care. About one week before the victim's death, the victim was experiencing vomiting, diarrhea, dehydration, and fever, so C.D. took him to Le Bonheur. No one at the hospital said anything to her about bruises or injuries, and she did not see any bruises on him. C.D. said that she never saw the Defendant spank her children but that the police later told her the Defendant admitted to beating the victim to death.

Fifteen-year-old Q.R. testified that he was C.D.'s oldest child, that he was nine years old in July 2015, and that he remembered "bits and parts" about the day of the victim's death. On the morning of July 13, he was at home with his two younger brothers, one of whom was the victim, and the Defendant. The victim was "[p]layful," and the three boys ate breakfast corndogs. At some point, the victim got into trouble, and the Defendant "whipped" him with a black belt that had "some things on it." The Defendant also hit the victim in the stomach with the Defendant's fist, and the victim was crying. Q.R. said the

Defendant would hit the victim's stomach every time the victim got into trouble. Q.R. and his other brother took out the trash while the Defendant and the victim remained in the apartment. When Q.R. and his brother returned, the Defendant was screaming, "'Come here. Help. Help." The victim was lying on the bed, and the Defendant told Q.R., "'Go get help.'"

On cross-examination, Q.R. testified that the victim was not sick on July 13, 2015. When Q.R. and his brother returned to the apartment from taking out the trash, the victim was lying on the bed with his eyes closed, and Q.R. thought he was sleeping. Q.R. said he did not remember if the Defendant performed CPR on the victim.

Darlene Smith testified that in July 2015, she was a lieutenant with the MPD's Special Victim's Unit, which investigated child physical and sexual abuse. On July 13, 2015, she learned about a possible drowning and went to an apartment on Woodbranch. The victim had been transported to the hospital in "extremely critical" condition, and Ms. Smith spoke with the Defendant to find out what had happened. The Defendant told her as follows: He was in the apartment with the victim and two other children. One of the children made corndogs, and one of the children took out the trash. The victim had gone to the bathroom on himself, so the Defendant "asked the baby to go get on the potty." The Defendant later checked on the victim and found him in the bathtub under the water. The Defendant took the victim out of the bathtub, started performing CPR, and had one of the children call 911. The Defendant continued CPR until an ambulance arrived, and the victim had a bowel movement while the Defendant was performing CPR.

Ms. Smith testified that feces was on the Defendant's pants. At some point while Ms. Smith was at the apartment, the Defendant was in the back of a patrol car. However, he was not under arrest, and Ms. Smith could not remember if she spoke with him while he was in the patrol car.

Eric Kelly, a former lieutenant with the MPD, acknowledged that he had a case pending against him for violating MPD policy and that he retired from the MPD as a result of that violation. He said he was not expecting anything from the State in return for his testimony. On July 13, 2015, Mr. Kelly was the lead investigator in the victim's death and went to the apartment on Woodbranch. He spoke with Ms. Smith, walked through the apartment, and noticed feces on the toilet seat and "a couple of other different places." He also noticed that the bathtub water in which the victim allegedly had drowned was dirty. The dirty water was a "red flag" because "[y]ou could tell someone had been washing clothes in this tub, not giving a bath." The water also was "bone cold." Mr. Kelly learned from the hospital that the victim had "old and new bruising," that the victim had an old bite mark in his crotch area, and that doctors did not see any "traditional signs" of drowning.

Mr. Kelly viewed the photographs of the victim taken by Officer Cathey and did not think the Defendant's drowning story explained the victim's injuries.

Mr. Kelly testified that he interviewed the Defendant about 8:00 p.m. on July 13. He gave the Defendant *Miranda* warnings, and the Defendant signed an Advice of Rights form. Initially, the Defendant maintained that the victim had drowned. Mr. Kelly showed the Defendant some of the photographs of the victim taken by Officer Cathey, and the Defendant said, "'Yeah, I whipped him today after he had messed his pants.'" The Defendant said he used a belt to whip the victim and that he left "fingernail marks" on the victim "while grabbing him to go downstairs to use the bathroom." Mr. Kelly confronted the Defendant with the photographs of the victim's injuries, and the Defendant gave a statement.

According to the Defendant's statement, he told the victim "'to go get on the pot because his . . . brother had discovered that he had boo-booed on himself.'" The victim was sitting on the toilet, and a corndog was still in his mouth "'like he couldn't eat it.'" The Defendant "'popped him a couple of times'" and "'grabbed him by the back of his neck'" because he ran up the stairs. The Defendant made the victim sit on the toilet and "'popped him again and told him not to get his ass off the pot.'" Q.R. returned to the apartment, and the Defendant told him to get the victim off the toilet. Q.R. told the Defendant that the victim was not sitting on the toilet, so the Defendant looked in the bathroom and found the victim in the bathtub. The victim was on top of some clothes the Defendant had been washing. The victim's head was not under the water, so the Defendant carried him into the bedroom and "'laid him down'" on the bed. The Defendant "'was patting him on the chest, and he sat up, but then he stopped breathing.'" The Defendant started CPR on the victim, and "'boo-boo came out of his rectum, nose, and mouth.'" The Defendant told Q.R. to get help, and Q.R. returned with a neighbor. The Defendant carried the victim downstairs, and the neighbor tried to give the victim CPR, "'but boo-boo kept coming out of him.'"

Mr. Kelly asked the Defendant how many times he hit the victim, and the Defendant said he hit the victim five or six times with a brown Timberland belt. Mr. Kelly asked the Defendant to explain the victim's injuries, and the Defendant stated, "'On his left side, I popped him on his left side three times. Right side, like, once. And on his left shoulder, once.'" The Defendant acknowledged that there were "'older'" injuries on the victim but denied causing them. He said that he had spanked the victim three or four times previously, that the victim's mother also disciplined the victim, and that "'[s]he did the old injuries, the welts.'" Mr. Kelly had the Defendant read the written statement. The Defendant initialed every page and signed his statement.

Mr. Kelly testified that the Defendant's demeanor during the interview was "a little blasé." Mr. Kelly spoke with C.D., who was "clearly upset." He stated that she was "very forthcoming with stuff" and that she said one of her other children caused the bite mark near the victim's crotch. The State showed Mr. Kelly the brown belt that was found behind the front door of the apartment, and Mr. Kelly said the Defendant claimed he used that belt to whip the victim. The State also showed Mr. Kelly the black belt the Defendant had been wearing, and Mr. Kelly said the metal studs and a horseshoe emblem on the belt "match[ed] up perfectly" with some of the victim's injuries. Mr. Kelly sent the studded belt to the medical examiner's office.

On cross-examination, Mr. Kelly testified that he learned about 4:45 p.m. that the victim had been pronounced dead. He went over the Advice of Rights form with the Defendant soon after 8:00 p.m. but did not inform the Defendant that the victim was deceased. The Defendant signed his statement at 11:05 p.m. Mr. Kelly said he looked at C.D.'s other children and noticed bruises "that were consistent with some of the injuries that the victim had on his body." Nevertheless, Mr. Kelly did not think those children had been abused. C.D. told Mr. Kelly that she had spanked her children in the past and that she had never seen the Defendant discipline them.

Dr. Marco Ross, the Chief Medical Examiner at the West Tennessee Regional Forensic Center, testified as an expert in forensic pathology that Dr. Karen Chancellor performed the victim's autopsy and that he reviewed her report. The victim was two years old, weighed thirty-three pounds, and was thirty-eight inches tall. Dr. Ross read aloud the following diagnoses from Dr. Chancellor's report:

> blunt force injury of the head with scalp contusions; intracranial hemorrhage; and multiple retinal hemorrhage[s] of right and left eyes; multiple blunt force injuries of the abdomen and back, including contusions; partial rupture of the duodenum, lacerations of the portal vein and cystic duct; small bowel mesenteric hemorrhage; and massive retroperitoneal hemorrhage; and multiple scars and wounds in various stages of healing, torso, right arm, and right and left legs.

Dr. Ross identified photographs taken during the victim's autopsy and explained what was depicted in the photographs. Notably, Dr. Ross said that in addition to the various bruises and scars all over the victim's body, the victim had subarachnoid and subdural hemorrhages of the brain, scratch marks on the front of his neck, a scratch on his upper right arm that was consistent with a fingernail, loop-shaped marks on his abdomen that could have been caused by a cord, open wounds on his back that formed a pattern consistent with the studded belt, a hemorrhage on the right side of his torso that could have been caused by a punch or kick, and various subcutaneous hemorrhages that could have been

caused by being hit with a belt. About forty percent of the victim's blood volume had hemorrhaged into his abdominal cavity. Dr. Chancellor concluded that the victim's cause of death was multiple blunt force injuries and that his manner of death was homicide. Dr. Ross said that the victim's injuries showed the victim was abused and that his injuries led to his death. Dr. Ross later wrote an addendum to the autopsy report in which he stated that he found no evidence of a vascular tumor in the victim.

On cross-examination, Dr. Ross testified that the victim did not have any skull fractures and that he did not find any evidence the victim suffered from a blood disorder. Despite the blunt force injury to the victim's abdomen, the victim's liver, stomach, and spleen were "okay." Dr. Ross said that whipping the victim with a belt probably could not have caused the damage to the victim's duodenum and that CPR did not cause the bruises on the sides of the victim's chest. He acknowledged that "there was a lot of effort" to resuscitate the victim. He stated, though, "There's no question in my mind that those [bruises] are the result of blunt force inflicted on the child prior to him needing resuscitation."

Dr. Karen Lakin, an assistant professor of hospital pediatrics and the Medical Director for the Child Malpractice program at Vanderbilt University, testified as an expert in child abuse and general pediatrics that she was asked to evaluate the victim's case. Dr. Lakin saw the victim in Le Bonheur's Intensive Care Unit while he was still alive. She also spoke with the doctors who treated him and spoke with his mother, C.D. C.D. told Dr. Lakin that she left the victim in the care of his "stepfather" and that the victim had been found unconscious in the bathtub. Dr. Lakin was concerned, though, because the paramedics who treated the victim noticed that his hair and body were not wet. The victim's development appeared normal for his age, and C.D. told Dr. Lakin that he was walking, talking, and potty-training. C.D. said that the victim had gastroenteritis about one week before his death and that the illness "kind of set him back a little bit."

The State showed Dr. Lakin photographs of the victim's injuries, and she described the injuries for the jury. The victim had bruises over his left eye, abrasions and bruising to his upper lip, and bruising on his left cheek. He also had "diffuse" bruising on his forehead, on the side of his head, over his eyes, at the base of his eyes, at the base of his nose, over his lip, and on his cheek. She said he had "some type of impact on that upper lip," "some type of impact to his head," and "way significant more bruising than what you would expect just a toddler to have."

Dr. Lakin testified that the victim had pattern injuries on his leg and back that were consistent with his having been struck by the studded belt. He also had significant bruising on his back and right shoulder and a crescent-shaped injury on his neck that was consistent with a fingernail. The victim had "very dark purple bruising" on his abdomen. The

bruising was consistent with repetitive punching or kicking and correlated to his internal abdominal injuries. She said that the bruising was not caused by CPR and that the victim's distended abdomen correlated to the blood that had collected in his abdominal cavity. Large crescent-shaped marks were on the victim's abdomen, and the marks were consistent with a looped extension cord.

Dr. Lakin testified that research showed children were more likely to be abused at certain times of their lives and that potty-training "in particular was a very high risk period of time . . . because potty-training is something that can be very frustrating to the parent, to the caregiver, and particularly if children have setbacks." She stated that the "extensive, extensive bruising" on the victim's face, arms, and abdomen was consistent with "someone being beaten," and she acknowledged that his internal injuries were consistent with child abuse and consistent with the injuries seen on the outside of his body. She said that, in her opinion, the victim was "beaten to death."

On cross-examination, Dr. Lakin testified that some of the pattern abrasions on the victim's back were "older." She reviewed his medical records from July 5, 2015, and the records showed that he was diagnosed with gastroenteritis. However, no bruises or injuries were documented at that time. C.D. told Dr. Lakin that the victim "was actually doing better, was eating" prior to his death but that "he was still having some loose stools." Defense counsel asked Dr. Lakin if the victim could have suffered from a blood disorder, and Dr. Lakin responded that she was "absolutely sure he did not have a blood disorder." She said that the victim was "extremely anemic" when he came into the emergency room on July 13 but that his anemia was due to the blood in his abdomen.

On redirect-examination, Dr. Lakin testified that the victim would not have been able to run and play with the injuries he sustained on July 13. When he arrived at Le Bonheur that day, his temperature was twenty-nine degrees Celsius, which was "severely abnormal," and his liver enzymes were elevated. Dr. Lakin said that his low temperature indicated "he had not been . . . p[er]fusing for a prolonged period of time" and that his elevated liver enzymes could have been related to his trauma. At the conclusion of her testimony, the State rested its case-in-chief. After a *Momon* hearing, the Defendant waived his right to testify on his own behalf.

Dr. Jane Turner testified for the defense that she was in private practice as a medical legal consultant, that she was hired to perform private autopsies, and that she worked as an independent contractor performing autopsies for coroners. She said that she had performed more than five thousand autopsies and that she had a focus in pediatric deaths. The trial court found her qualified to testify as an expert in forensic pathology.

Dr. Turner testified that she reviewed the victim's medical records for July 5 and 13, 2015; the crime scene photographs; the victim's autopsy report and autopsy photographs; and microscopic slides of tissue collected during his autopsy. The victim's medical records from July 5 indicated that he had gastroenteritis and was dehydrated. No injuries were documented on that date. Dr. Turner said that the descriptions of the autopsy photographs in the autopsy report did not correlate with the July 13 medical records; therefore, Dr. Turner looked at the tissue slides, which the medical examiner had provided to her. She said that according to the victim's July 13 medical records, his chest x-ray was abnormal and consistent with drowning. Dr. Turner found that his chest x-ray also was consistent with pneumonia. Upon microscopic examination of the victim's lung tissue, Dr. Turner saw evidence of aspiration pneumonia, which could occur when a person vomited and then aspirated. Dr. Turner said that she also saw evidence of inflammation in the victim's lungs and that his lung abnormalities were not documented during his autopsy. Dr. Turner explained that DIC, disseminated intravascular coagulopathy, was a bleeding disorder in response to sepsis or infection and that DIC caused spontaneous bleeding and easy bruising. The victim's platelet level was low, and Dr. Turner saw evidence of DIC in his lung tissue.

Dr. Turner testified that she reviewed the photographs taken of the victim's internal injuries and that the photographs showed a vascular tumor in his abdomen. A photograph of the victim's pancreas showed that the color of the organ was pale pink, which was abnormal, and showed "some sort of tumor that is encircling those parts of the normal pancreas." Moreover, slides of his pancreas showed evidence of a hemangioendothelioma, a very rare vascular tumor that could occur in children. However, there were no tears or lacerations of the pancreas. The victim's small intestine was abnormal, and Dr. Turner saw areas of hemorrhage. A slide of the victim's vas deferens, or reproductive organ, also showed areas of hemorrhage and evidence of a vascular tumor. Dr. Turner explained that vascular tumors typically were found in the back of the abdomen, also known as the retroperitoneal space, and that the tumors could extend down to the vas deferens.

Dr. Turner testified that the victim had a FAST ultrasound of his abdomen on July 13 to look for trauma and that the ultrasound did not show any blood in his abdominal cavity. The victim also had a CT scan of his head, and doctors identified brain swelling and intracranial pressure. However, they did not identify subdural or subarachnoid hemorrhages of the brain, which Dr. Chancellor diagnosed during the victim's autopsy. Dr. Turner did not see either of those hemorrhages in the victim's autopsy photographs. She said that there was no clinical or photographic evidence of a large amount of blood in the victim's abdomen and that a bloody mass in his abdomen was the vascular tumor. She said that there also was no clinical or photographic evidence of a portal vein laceration and that it would have been difficult for someone to have punched or kicked the victim's abdomen without damaging his organs.

Dr. Turner testified that the victim's blood glucose was normal on July 5 but high on July 13 and that additional laboratory results supported a diagnosis of diabetic ketoacidosis. She viewed slides of the victim's kidneys, and the slides confirmed diabetic ketoacidosis. Dr. Turner stated that the change in the victim's blood glucose level from July 5 to July 13 occurred because his illness from the vascular tumor became more severe. She said that the injuries on the victim's face, jaw, chest, and abdomen could have occurred during treatment on July 13, particularly in a person suffering from DIC.

Dr. Turner testified that, in her opinion, the victim suffered from gastroenteritis and died of a pre-existing vascular tumor. She explained that the victim "seemed to improve" from the gastroenteritis but that he became sick again; vomited; and aspirated, which caused pneumonia. The victim then developed sepsis, which triggered diabetic ketoacidosis and "put him in a bad condition metabolically." Dr. Turner noted that sepsis, the victim's tumor, or both could cause DIC.

On cross-examination, Dr. Turner testified that she was receiving $200 per hour for her work in this case and acknowledged that she was the only doctor to diagnose the victim with a vascular tumor. She also acknowledged that children diagnosed with hemangioendothelioma were usually six months old or less and had multiple tumors whereas the victim was more than two years old with one large mass in his abdomen. The State asked Dr. Turner about her testimony in another child abuse case in which the infant victim sustained numerous skull and bone fractures and the defendant confessed to shaking and abusing the victim. Dr. Turner acknowledged testifying in that case that the victim died from a genetic disorder, not severe trauma. Dr. Turner explained, "It's important in cases like this[,] that are difficult[,] to consider differential diagnoses and to not get tunnel vision and to assume because there's trauma that the child died from trauma."

Dr. Turner testified that she "demonstrated microscopically" that a tumor was present in the victim's abdomen but acknowledged that she was not a board-certified pediatric pathologist. She said that the victim's vascular tumor was "hemorrhagic," meaning it was bleeding, and that he also had sepsis. She thought that the purple marks on his eyelids were caused by DIC, not abuse, but that some of his other injuries were consistent with being punched or kicked and being struck by the studded belt. She noted that first responders did not document any bruises on the victim's face; therefore, she concluded those bruises were caused by the medical treatment he received and DIC. The bruises on his back could have been caused by blunt trauma or spontaneous hemorrhage due to DIC. The bruises on the sides of his chest and on his abdomen were consistent with punching or kicking but also could have been caused by chest compressions during CPR. Dr. Turner said she thought the looped marks on his abdomen were caused by a fingernail, not a cord. She acknowledged that the Defendant's statement to Mr. Kelly was consistent with the victim's injuries. However, she said that the victim's injuries also were

"consistent with a very sick child who had a bleeding disorder" and that she did not see any evidence the Defendant's punching the victim caused his death.

In rebuttal for the State, Dr. Jie Zhang testified as an expert in pediatric pathology that she listened to Dr. Turner's testimony and reviewed the victim's tissue slides for evidence of a tumor or any other medical condition. She saw hemorrhages in the tissues but no vascular tumor. She said that the slides of the victim's pancreas showed normal tissue and that it was "unlikely" he had diabetes. Dr. Zhang stated that in order for a pathologist to diagnose cancer in a patient, two pathologists had to agree on the diagnosis.

On cross-examination, Dr. Zhang testified that vascular tumors in children were very common but that hemorrhages were rare. Moreover, vascular tumors were large and likely to be seen via ultrasound before birth or felt as a lump by the mother after birth.

Dr. Lakin testified in rebuttal for the State that the victim's platelet level was "flagged" as low on January 13 but that the level was not low enough for her to consider it clinically significant. The victim's blood glucose was normal on July 5 but was high on July 13. The high level was not unusual because he was under stress. Dr. Lakin said she disagreed with Dr. Turner's sepsis diagnosis because the victim would have been very ill and unable to eat and play if had been septic.

Dr. Lakin addressed Dr. Turner's testimony that the victim's FAST ultrasound did not show blood in his abdomen. She explained that FAST ultrasounds focused on small areas of trauma and, therefore, would have "miss[ed] anything" in his retroperitoneal space. She said it was not surprising that Dr. Turner diagnosed the victim with aspiration pneumonia because the victim would have aspirated vomit in response to the beating he received. Dr. Lakin said Dr. Turner's testimony did not change her opinion that the victim was beaten to death or her opinion that the victim did not have a predisposing condition that caused his death.

On cross-examination, Dr. Lakin testified that she had been a State witness more than one hundred times and a defense witness about five times. She denied being biased in favor of diagnosing child abuse and said that she based her opinions in child abuse cases on the child's medical and developmental history, presentation at the hospital, physical examination, and laboratory results. She said that because the victim came to the hospital with a ruptured duodenum and bruises on his body "head to toe," she was "completely one hundred percent" convinced that he died from physical abuse.

Dr. Ross testified in rebuttal for the State that he listened to Dr. Turner's testimony. The victim appeared to be in the very early stages of aspiration pneumonia when he was treated at Le Bonheur on July 13. Dr. Ross explained that aspiration pneumonia would not

have been unusual because the victim had been intubated, which could have introduced material into his airway. Dr. Ross identified photographs taken during the victim's autopsy and pointed out subarachnoid hemorrhages on the victim's brain for the jury. He stated that Dr. Chancellor was board-certified in neuropathology, which was the study of brain diseases, and that he agreed with her diagnosis of subarachnoid hemorrhages. Dr. Ross acknowledged that the autopsy photographs did not show blood in the victim's abdomen. He explained that the blood would have been removed when the abdominal incision was made. According to the autopsy report, Dr. Chancellor found 400 milliliters of blood in the victim's abdomen. Dr. Ross said the report was accurate proof of the amount of blood present.

Dr. Ross testified that he wrote his addendum to Dr. Chancellor's report specifically to address Dr. Turner's finding of a hemangioendothelioma. Prior to preparing his addendum, Dr. Ross reviewed the victim's tissue slides and consulted with Dr. Zhang because she was a pediatric pathologist and, therefore, was familiar with childhood tumors. Based on his review of the tissue slides and his consultation with Dr. Zhang, Dr. Ross concluded that the victim did not have a vascular tumor. He said that in his opinion, the victim's death was caused by blunt force injuries and that the manner of death was homicide.

On cross-examination, Dr. Ross testified that a pathologist who performed an autopsy usually photographed the blood in the patient's abdomen and that he did not know why Dr. Chancellor did not photograph the blood in the victim's abdomen. Dr. Zhang and Dr. Turner reviewed the same tissue slides, and Dr. Zhang concluded the victim did not have a vascular tumor.

At the conclusion of Dr. Ross's rebuttal testimony, the State rested its case. The jury convicted the Defendant as charged in the indictment of first degree felony murder committed during the perpetration of aggravated child abuse, first degree felony murder committed during the perpetration of aggravated child neglect, aggravated child abuse, and aggravated child neglect. The trial court immediately sentenced him to life for each murder conviction and later sentenced the Defendant to an additional 80 years as a Range II offender.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant claims that the evidence is insufficient to support his convictions. In support of his argument, he notes that C.D. admitted to punishing her children with a belt and that C.D. said she never saw the Defendant spank her children. The Defendant also

notes that expert testimony supports his claim that he did not cause the victim's death. The State argues that the evidence is sufficient. We agree with the State.

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

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

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

Relevant to this case, first degree felony murder is the killing of another committed in the perpetration of aggravated child abuse or aggravated child neglect. Tenn. Code Ann. § 39-13-202(a)(2). Aggravated child abuse occurs when a person knowingly, other than by accidental means, treats a child under the age of eighteen in such a manner as to inflict injury and the act of abuse results in serious bodily injury to the child. Tenn. Code Ann. §§ 39-15-401(a); -402(a)(1). As instructed to the jury, aggravated child neglect occurs when a person knowingly neglects a child under the age of eighteen so as to adversely affect the child's health and the act of neglect results in serious bodily injury to the child. Tenn. Code Ann. §§ 39-15-401(b); -402(a)(1). Our Code provides that "serious bodily injury to the child" includes, but is not limited to,

> second- or third-degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by whipping children with objects.

Tenn. Code Ann. § 39-15-402(c). When the child is eight years old or less, aggravated child abuse and aggravated child neglect are Class A felonies. Tenn. Code Ann. § 39-15-402(b).

Taken in the light most favorable to the State, the evidence shows that the victim was a healthy, playful two-year-old on July 12, 2015. The next day, the Defendant, who was caring for the victim while the victim's mother was at work, became angry when the potty-training victim got feces on himself. Q.R. testified that he saw the Defendant whipping the victim with the studded belt and punching the victim's abdomen. The Defendant told Mr. Kelly that he grabbed the victim by the back of his neck and repeatedly "popped" the victim. The Defendant claimed it took first responders thirty minutes to arrive at the apartment, but Lieutenant Craft and Lieutenant Kiner testified that they arrived within minutes of being dispatched to the scene. Moreover, although the Defendant claimed he performed CPR on the victim, Q.R. could not remember if the Defendant performed CPR, and Lieutenant Kiner, who was the first paramedic to arrive, found the victim lying on his stomach. The Defendant lied to first responders, telling them that the victim had drowned. Based on that false information, Lieutenant Kiner intubated the victim to suction water out of his lungs. However, Lieutenant Kiner did not obtain any water, and the intubation could have resulted in aspiration pneumonia. When the victim arrived at the hospital, medical personnel were able to regain a pulse for the victim, but his body temperature was abnormally low, and he was brain dead. Dr. Lakin said his low body temperature indicated he "had not been p[er]fusing for a prolonged period of time."

Dr. Chancellor, who performed the victim's autopsy, documented bruises all over his body, even his eyelids. She also documented numerous serious injuries, including intracranial hemorrhage, retinal hemorrhages, partial rupture of the duodenum, lacerations of the portal vein and cystic duct, small bowel mesenteric hemorrhage, and retroperitoneal hemorrhage. Forty percent of the victim's blood had hemorrhaged into his abdomen. The victim had been to the hospital for a stomach virus just eight days prior to his death, and no injuries were documented at that time. Dr. Chancellor concluded that the victim's cause of death was multiple blunt force injuries, and Dr. Ross, the pathologist who reviewed her report, testified that the victim was physically abused and that his injuries resulted in his death. Dr. Lakin, an expert in child abuse who saw the victim in the intensive care unit and thoroughly reviewed his case, concluded that he was "beaten to death." Although the Defendant's own expert, Dr. Turner, testified that the victim died of a vascular tumor, the

jury obviously chose to accredit the State's witnesses, as was its prerogative. Therefore, we conclude that the evidence is sufficient to support the Defendant's convictions of first degree felony murder, aggravated child abuse, and aggravated child neglect.

II. Studded Belt

The Defendant claims that the trial court erred by allowing the State to introduce the studded belt into evidence because the State failed to establish a proper chain of custody for the belt. The State argues that the trial court did not err. We agree with the State.

During Mr. Kant's testimony, the State showed him a sealed evidence bag labeled "'black belt.'" Mr. Kant cut open the bag and identified the belt as the one the Defendant was wearing on July 13, stating, "[A]s you can see, it's . . . very distinctive in the pattern. But this is definitely a clothing item that the Defendant was wearing when I came in contact with [him]." The State moved to introduce the studded belt into evidence, and defense counsel requested that Mr. Kant identify the person who sealed the evidence bag for chain of custody purposes. Mr. Kant said the evidence seal was covering up the person's name, and the State asserted that the name was not necessary due to the "uniqueness" of the belt. The trial court asked Mr. Kant if the belt in the evidence bag was the belt the Defendant was wearing on July 13, and Mr. Kant answered, "Absolutely." The trial court asked Mr. Kant to explain how he knew it was the same belt, and Mr. Kant responded, "Just the metal studs is what sticks out to me, is what I remember." The trial court ruled that the belt was admissible.

Tennessee Rule of Evidence 901 generally governs the authentication of evidence and provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." In order to admit physical evidence, the party offering the evidence must either introduce a witness who is able to identify the evidence or establish an unbroken chain of custody. *State v. Holbrooks*, 983 S.W.2d 697, 700 (Tenn. Crim. App. 1998). Whether evidence has been sufficiently authenticated is within the trial court's sound discretion, and its decision will not be overturned absent an abuse of discretion. *See State v. Mickens*, 123 S.W.3d 355, 376 (Tenn. Crim. App. 2003).

Here, Mr. Kant testified that the Defendant's black belt was unique due to the metal studs. He said that he recognized the belt in the evidence bag and that he was "absolutely" sure the belt in the bag was the same belt the Defendant was wearing on July 13. A photograph of the Defendant taken by Officer Cathey and introduced into evidence showed the Defendant wearing a black belt with rows of metal studs on the belt. Therefore, we

conclude that the belt was properly authenticated, and the trial court did not abuse its discretion by admitting the belt into evidence.

III. Prior Warrants

Next, the Defendant claims that the trial court erred by ruling he "opened the door" to Mr. Kelly's testifying on cross-examination that the Defendant was arrested on prior warrants and by denying his request for a mistrial. The State disagrees with the Defendant's characterizing the trial court's ruling as "opening the door" and argues that he is not entitled to relief because he invited Mr. Kelly's improper testimony. We agree with the State.

Before Mr. Kelly's cross-examination testimony and while the jury was out of the courtroom, defense counsel advised the trial court that the Defendant gave the police a false name, Marvin Hite, because he had outstanding warrants. Defense counsel requested that none of the State's witnesses reveal the reason the Defendant gave the false name. The State said that "we certainly know better than to elicit that testimony," and the trial court agreed that such testimony would be improper. The record reflects that Mr. Kelly entered the courtroom and took the stand and that defense counsel began questioning him.

During cross-examination, defense counsel asked Mr. Kelly about his interview with the Defendant on the night of July 13. Mr. Kelly testified that he went over an Advice of Rights form with the Defendant, that he had the Defendant read the form to himself, and that the Defendant understood his rights. Defense counsel then asked, "So, he already told [you] he understands. He's not under arrest. Right? That's what you said?" Mr. Kelly answered, "No. He is under arrest for his warrants. He had been detained." Defense counsel asked to approach the bench, and the trial court responded, "You may, but that's a question you asked[.]" The trial court instructed the jury, "Ladies and gentlemen, the question is -- and I'm going to -- the question was whether or not he was under arrest, and Mr. Kelly told you that he had, in fact, been arrested." The trial court told defense counsel that she could proceed, and defense counsel asked Mr. Kelly, "So, he's under arrest at the time, with you?" Mr. Kelly answered, "For his warrants." The trial court immediately instructed the jury,

> Ladies and gentlemen of the jury, any reference to a warrant, I'm going to order that you disregard any reference to a warrant. He was under arrest at the time of this interview. I will order that you disregard any questions or any answers about a warrant. You should strike that from your memory. Do not consider that for any purpose at all.

After the trial court's instruction, defense counsel requested to approach the bench and the following colloquy occurred:

> **[Defense counsel]:** Your Honor, I did make a specific request. I said, 'He was under arrest at the time.' That's all I said. It was -- I did not open the door to anything. I was very specific.
>
> **[The State]:** But she was asking him why he was under arrest.
>
> **THE COURT:** You asked him whether or not he was under arrest, and I tried to clear it up, and then you asked the same question again, and so he answered you why he was under arrest.
>
> **[Defense counsel]:** No. I said, "He was under arrest at the time," yes. I didn't say, "Why?"
>
> **THE COURT:** You asked if he was under arrest. He answered why, and that's why I tried to clear it up, to give you a chance to move on, but you asked the same question again.
>
> . . . .
>
> **[The State]:** If you ask him if he's under arrest, he might say why. You've got to expect that.
>
> . . . .
>
> **THE COURT:** You created that situation.
>
> **[Defense counsel]:** No, I did not, Your Honor.
>
> **THE COURT:** I cleared it up for you, and then you asked the same question again.
>
> **[Defense counsel]:** I did not, Your Honor.
>
> **THE COURT:** With due respect, [defense counsel], you did, because you asked him whether or not he was under arrest, and he was, and he told you why.

Defense counsel requested a mistrial, and the trial court responded,

> It's not a mistrial when the question that you asked, he provided an answer to you. He did not put on the record why he was under arrest or for what, and I tried to clear that up, and told them to disregard it, but you asked the very same question, and you got the very same answer.

The trial court offered to instruct the jury again to disregard any reference to warrants, but defense counsel requested that the trial court not "reinforce it" to the jury.

A mistrial should be declared in criminal cases only in the event that a manifest necessity requires such action. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). In other words, a mistrial is an appropriate remedy when a trial cannot continue or a miscarriage of justice would result if it did. *State v. McPherson*, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial lies within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion absent clear abuse appearing on the face of the record. *See State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998) (citing *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990)). The burden of establishing the necessity for mistrial lies with the party seeking it. *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

As to the Defendant's claim that the trial court erred by ruling he "opened the door" to Mr. Kelly's testimony, "'opening the door' is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence." *State v. Vance*, 596 S.W.3d 229, 250 (Tenn. 2020). Here, the trial court did not rule that the Defendant opened the door to Mr. Kelly's telling the jury that the Defendant was arrested on outstanding warrants. Instead, the trial court recognized that defense counsel unintentionally had elicited the improper testimony from the witness. The trial court tried to address defense counsel's concern about the improper testimony by sua sponte instructing the jury that defense counsel asked whether the Defendant was under arrest and that Mr. Kelly said the Defendant "had, in fact, been arrested."

For whatever reason, though, defense counsel again asked Mr. Kelly if the Defendant was under arrest, and Mr. Kelly again responded, "For his warrants." As this court has stated, "Incompetent evidence elicited on cross-examination cannot be complained of." *Taylor v. State*, 542 S.W.2d 825, 827 (Tenn. Crim. App. 1976); *see Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380, 392 (Tenn. Ct. App. 2006) (stating that "a party cannot generally be heard to complain about testimony elicited by his own cross-examination of an opposing party or a witness"); Tenn. R. App. P. 36(a).

In any event, the trial court instructed the jury to disregard Mr. Kelly's reference to the warrants. Generally, we presume that a jury has followed the trial court's instructions. *See State v. Butler*, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Additionally, Mr. Kelly

did not reveal any information related to the warrants, and the evidence against the Defendant was strong. Accordingly, the trial court did not abuse its discretion by denying the Defendant's request for a mistrial.

IV. PowerPoint Presentation

The Defendant contends that the trial court erred by making comments to the jury about a PowerPoint presentation prepared by Dr. Turner because the comments reflected negatively on his defense, Dr. Turner, and the defense's proof. The State claims that the Defendant has waived this issue for failing to challenge the trial court's comments at trial and that the Defendant is not entitled to plain error relief. The Defendant responds that he is entitled to plain error relief because the comments might have reflected on the weight or credibility of the evidence or might have swayed the jury and because the comments adversely affected his right to a fair trial. We agree with State that the Defendant is not entitled to plain error relief.

During Dr. Turner's testimony, she stated that she prepared a PowerPoint presentation to help the jury understand her written report about the victim's death. The State requested to approach the bench and asked defense counsel if the defense had turned over the PowerPoint presentation to the State. Defense counsel responded that the PowerPoint presentation was not new because the information in the presentation also was in Dr. Turner's report. The trial court ruled that the State had a right to see the presentation before Dr. Turner showed it to the jury and advised the parties that it would take a brief recess so that the State could review the PowerPoint. The trial court then stated to the jury as follows:

> Ladies and gentlemen, I want to apologize to you. I'm going to have to ask you to take a recess for a minute. Dr. Turner told [defense counsel] that there is a PowerPoint presentation that apparently may or may not have been given to the State of Tennessee, and under the rules of evidence, the State has to provide all information, all discovery, [they intend] to use at trial to the defense, and they filed a motion for reciprocal discovery that says, "We're also asking that you give us any reports of your experts that you intend to call."
>
> And, out of an abundance of caution, we're going to take a recess and take a look at exactly what it may be that Dr. Turner may or may not have provided to the State. I don't want to start showing that and then have an objection come up. So, we'll deal with that on the front end. If there's something we need to discuss, we will do so out of your presence, and, if not, we will [see you in] a few minutes.

After the recess but while the jury was still out of the courtroom, the State advised the trial court, "There's a lot of new things in there, a lot of new slides. There's new slides that purport to indicate a tumor." The trial court found that the defense failed to comply with the State's request for reciprocal discovery provided by Rule 16(b)(1), Tennessee Rules of Criminal Procedure, and decided to recess for the day to give the State and its experts an opportunity to review the PowerPoint presentation overnight. The trial court stated to the parties,

> And, if we come back tomorrow morning, and [the prosecutors] say they are prepared to go forward, that's fine. If they say, "We are not prepared to go forward with this information," I'm going to strike it. I will not allow it to be presented. It's the fair thing to do. It's the equitable thing to do.
>
> This case is almost seven years old, and there is no excuse for an expert to have in her possession conclusions that she intends to present and does not present it to the State when the State has complied with discovery, has given the defense all of its expert information, has sent slides of tissue to Dr. Turner that has -- or some six and a half years old -- has done everything they can do in order to comply with discovery. And it would not be in the best interest of justice, it would not be fair to the administration of justice.

When the jury returned to the courtroom, the trial court stated,

> Ladies and gentlemen, it's 5:30. And what my intentions [were] tonight was to work until we had all the doctors' testimony done because some of these folks are coming in from other areas of the country.
>
> We took a recess because you heard Dr. Turner indicate that she had prepared some information that she did not believe had been given to the State. And I told you, under the rules of procedure, if they call an expert and the State has complied with discovery, and if the State asks for reciprocal discovery, which they did in this case, then the defense has to provide that information to the State. If they are calling an expert as a witness, any results of examinations and tests and everything else that has been done, that report has to be given to the State. The State was not given that report. We have been talking about it in your absence, and I don't want to have you sitting back there longer.
>
> So, what I am going to do is take a recess. We will resume tomorrow at 9:00. Dr. Ross, Dr. Lakin, and any other expert that the State wants to look at that report, which they have not been given, will be given overnight

to take a look at that report to see whether or not they are ready to respond to anything that's in that report.

I don't know what's in it, because I can't investigate cases. But [the prosecutors] indicated there were some things in that report they had not been provided, had not seen, and those doctors had not looked at it. So, it would be unfair to allow those doctors not to know exactly what this expert, Dr. Turner, is saying. Dr. Turner has had all their reports. She's had everything they've looked at. And it would be unfair, and it's something I can't do, to say I'm going to allow another doctor to testify on the other side and not let the other doctors know exactly what that person is going to testify about.

So, we are going to take a recess until 9:00 in the morning. We are not going to call the docket tomorrow. We are going to start back with this trial at 9:00, and I will make a decision in the morning as to whether or not -- based on what I hear, if Dr. Ross and Dr. Lakin and others say, "Judge Coffee, we've reviewed it. We had sufficient time to review this information, and we are ready to go forward," Dr. Turner will continue to testify. If they tell me that, "Judge Coffee, we could not respond to this overnight," Dr. Turner will not be allowed to testify.

Do not guess or speculate as to what her testimony might have been unless she actually takes the stand tomorrow and continues to testify. Does everybody understand that?

Our supreme court has explained that "a trial judge has broad discretion in controlling the course and conduct of the trial, and . . . must be careful not to express any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial." *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994). Judges are prohibited from commenting on the credibility of the witnesses or on the evidence. *State v. Suttles*, 767 S.W.2d 403, 406-07 (Tenn. 1989) (citing Tenn. Const. art. VI, § 9). "In all cases the trial judge must be very careful not to give the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." *State v. Suttles*, 767 S.W.2d 403, 406-07 (Tenn. 1989).

The Defendant did not object to the trial court's statements. *See* Tenn. R. App. P. 36(a). However, Tennessee Rule of Appellate Procedure 36(b) provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time." *See also* Tenn. R. Evid. 103(d). This court may consider an issue to be plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); *see also State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the *Adkisson* test for determining plain error). Furthermore, the "'"plain error" must be of such a great magnitude that it probably changed the outcome of the trial.'" *Adkisson*, 899 S.W.2d at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)).

While we can appreciate the trial court's frustration with the defense's failure to provide the State with Dr. Turner's PowerPoint presentation before trial, the trial court should not have informed the jury that the defense violated the Tennessee Rules of Criminal Procedure or that the trial court was considering not allowing Dr. Turner to testify. We do not think, though, that the trial court's comments rise to the level of plain error. When trial resumed the next morning, the trial court simply informed the jury, "It has all been resolved." Dr. Turner continued her testimony with the aid of her PowerPoint presentation and without further incident. Moreover, as stated previously, the State's case against the Defendant was strong. Therefore, we conclude that the Defendant is not entitled to plain error relief.

V. Late Deliberations

The Defendant claims that the trial court erred by allowing the jury to deliberate late into the night because "the jury's will was overborn[e] at that point and they simply delivered a decision [of guilty] so not to have to return another day." The State again argues that the Defendant has waived this issue because he did not object at trial and that he is not entitled to plain error relief. The Defendant responds that plain error relief is warranted because the jury's returning a verdict just three minutes before the trial court's late-night deadline denied him the right to a fair trial. We agree with the State that the Defendant is not entitled to plain error relief.

At the close of all the proof, the trial court sent the jury out of the courtroom for a break. The trial court advised the parties that it was going to let the jurors "take a vote" as to whether they wanted to hear closing arguments and begin deliberations that evening or return the next morning, Saturday, to hear closing arguments and deliberate. When the jurors returned to the courtroom, the trial court read the first twenty-five pages of the final jury instructions. The trial court then advised the jury that "[i]t is 5:00" and that closing arguments could take two hours or more. The trial court said it was going to allow the jury

to decide whether to hear closing arguments and begin deliberations or return to the hotel. The trial court took a ten-minute recess, and the jury went into the jury room. When the jurors returned at 5:21 p.m., they advised the trial court that they unanimously had decided to proceed with closing arguments.

After closing arguments, the trial court finished reading the final jury charge. The trial court stated that "it is exactly 7:00 p.m." and told the jury to decide whether it wanted to eat dinner while it deliberated or whether it wanted to return to the hotel and begin deliberations the next morning. While the jury was out of the courtroom, the trial court received a note from the jury asking, "'If we began deliberating tonight, must we finish the process tonight?'" When the jury returned to the courtroom, the trial court instructed the jury as follows:

> What I told you on Monday and what I have emphasized is that, when you reach a verdict on this case totally depends on you. There is no set time limit as to when or how long you have to deliberate in order to reach a verdict.
>
> If you tell me that you want to begin deliberating tonight, you may do so. And, if you tell me that you've reached a verdict, within a reasonable -- I want to emphasize "reasonable," because I will not have you here until midnight or 1:00 or 2:00 in the morning. If you reach a verdict within a reasonable period of time, that's fine. If not, we will come back tomorrow morning whenever you want to resume trial tomorrow morning.
>
> So, no, you do not have to start and say, "We must finish this tonight." I will not give you time parameters and tell you you have to reach a verdict in an hour and a half or two hours, but I will tell you that, at some point, I will not engage in a draconian process that says you have to stay here till midnight or one or two in the morning. I would not do that. And I think reasonable time -- and, again, don't feel as if you have to reach a verdict within that time.
>
> But somewhere, probably about 9:30 or 10:00, we will send you to a hotel room. Do not feel pressured to say, "I need to reach a verdict before that time." And, if you have not reach[ed] a verdict within what the Court says is a reasonable period of time, our Tennessee Supreme Court says, "Judge Coffee, you can't [keep] jurors in court till 1:00 and 2:00 in the morning." I've never done that. And, when judges have done that, the Supreme Court was not real happy with those judges. So, we will not have you here until the wee hours of the morning.

> And, with that explanation, do you know whether or not you want to start now, or would you like to come back first thing in the morning?

The jurors verbally responded that they wanted to "[s]tart now," so the trial court dismissed the two alternates and sent the jury out of the courtroom at 7:32 p.m. to begin deliberations.

At 9:38 p.m., the jury sent out a note, asking about the definition of "intentional." After the jury entered the courtroom and the trial court answered the jury's question, the trial court advised the jury that it was 9:47 p.m. and asked if the jurors wanted to continue deliberations or retire for the night. The trial court stated that the jury did not have "any time limits" for a verdict but that it would not allow the jury to deliberate "much later than ten." One of the jurors asked, "Could we have until 10:30? Or is that too late?" The trial court answered, "No ma'am. Whatever you tell me to do. But anything after that becomes a really gray area." The trial court stated that it would give the jury until 10:30 p.m. and added, "Don't feel as if you have to reach a verdict by 10:30. Please don't feel pressure to reach a verdict. And, if you have not reached a verdict, we will give you all the time you need tomorrow morning."

The record reflects that the jury exited the courtroom at 9:50 p.m. At 10:27 p.m., the jury reported to the trial court that it had reached a unanimous verdict. The jurors returned to the courtroom, and the trial court read the verdicts, finding the Defendant guilty on all four counts as charged in the indictment. The trial court polled each juror individually, and all of them stated that they agreed with the verdicts.

Court sessions at night are not per se improper. *Hembree v. State*, 546 S.W.2d 235, 243 (Tenn. Crim. App. 1976). However, "night sessions should be terminated at a more reasonable hour, absent consent of the parties and all members of the jury." *Id.* This court has held that a jury's listening to evidence until 1:00 a.m. in a serious criminal case, without reasonable cause, was not harmless error. *Id*. Likewise, this court has stated, "Jurors must also have the out of court time for sufficient rest and relaxation to be alert, comfortable and unhurried in the course of their deliberative function." *State v. McMullin*, 801 S.W.2d 826, 827 (Tenn. Crim. App. 1990). Ordinarily, we review a trial court's decision to conduct late-night proceedings under an abuse of discretion standard. *State v. Walls*, 537 S.W.3d 892, 904-05 (Tenn. 2017). When the defendant fails to object, as the Defendant failed to do in this case, we review the issue for plain error. *Id*. at 900 (concluding that the defendant failure to object to the jury's deliberating and returning a verdict at 1:05 a.m. waived the issue for plenary review).

Initially, we note that most of the case law cited by the Defendant relates to a "dynamite" or "*Allen*" charge, which is "an impermissible, judicially mandated majority verdict" given in response to a jury's pronouncement that it is unable to reach a unanimous

verdict. *State v. Bowers*, 77 S.W.3d 776, 788 (Tenn. Crim. App. 2001); *see Allen v. United States*, 164 U.S. 492, 501 (1896). However, that was not the situation here, and the trial court did not give a dynamite charge.

Moreover, in *Walls*, our supreme court concluded that the defendant could not demonstrate plain error due to "a lack of a clear and unequivocal rule of law concerning late night court proceedings." 537 S.W.3d at 904. In any event, the trial court in this case repeatedly gave the jurors the option of returning to the hotel for the night and deliberating the next day. The trial court also repeatedly advised them that they were under no obligation to return a verdict by a certain time. Not only did the jurors unanimously agree to continue deliberating until 10:00 p.m., they specifically asked to deliberate until 10:30 p.m., which was not particularly late. The record reflects that the jurors were allowed to eat their evening meal while they deliberated, that they deliberated less than three hours before reaching their guilty verdicts, and that each juror agreed with the verdicts. Therefore, we find no error, let alone plain error.

VI. Excessive Sentence

Finally, the Defendant claims that his effective sentence of life plus eighty years is excessive because it is "roughly the equivalent of two and a half life sentences" and, therefore, is "inconsistent with the sentencing guidelines and overall sentencing purpose." The State argues that the trial court properly sentenced the Defendant. We agree with the State.

No witnesses testified at the sentencing hearing, but the State introduced the Defendant's presentence report into evidence. According to the report, the then twenty-nine-year-old Defendant was single with two daughters, ages six and seven, with C.D. He stated in the report that he dropped out of high school in the eleventh grade but obtained his GED in 2012 and that he worked at Captain D's in 2015 and Checkers in 2014. The report did not show any other employment for the Defendant. In the report, the Defendant described his mental and physical health as "'fair'" and said he was diagnosed with depression. The Defendant reported that he began consuming alcohol when he was thirteen years old, marijuana at nine years old, and cocaine at twenty-one years old.

The presentence report showed that the Defendant had four prior convictions of aggravated burglary, two prior convictions of marijuana possession, and two prior convictions of driving on a canceled, suspended, or revoked license. The Defendant's Strong-R assessment classified him as "high violent" with "high" needs relevant to "Employment," "Family," and "Residential"; "moderate" needs relevant to "Education" and "Alcohol/Drug Use"; and "low" needs relevant to "Friends," "Aggression," "Mental Health," and "Attitudes/Behaviors." The State also introduced into evidence a probation

order, showing that the Defendant was on probation for the aggravated burglary convictions when he committed the offenses in this case. The State advised the trial court that the Defendant had a pending case for aggravated burglary and was on bail for that offense when he committed the offenses in this case.

The trial court stated that it had considered the evidence at trial and sentencing, the principles of sentencing, enhancement and mitigating factors, statistical data provided by the Administrative Office of the Courts, the Defendant's presentence report and Strong-R assessment, and the Defendant's potential for rehabilitation or treatment. The trial court found that the Defendant was a Range II, multiple offender. Addressing the facts of this case, the trial court stated that "[t]his was a savage beating, an absolute brutal savage beating of a two-and-a-half-year-old baby because the child had a potty training incident" and that "[the Defendant] brutalized this child. [The Defendant] struck this child with his hands, his feet, who knows what, belts, and he beat this child to death." The trial court added, "This is as bad as I have seen in 40 years of practicing law."

The trial court noted the Defendant's "high violent" classification in the Strong-R assessment and stated, "I don't think I've ever seen that in any presentence report." The trial court found that the following enhancement factors applied to the Defendant's convictions of aggravated child abuse and aggravated child neglect: (1) "[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"; (4) the victim "was particularly vulnerable because of age or physical or mental disability"; (5) the defendant treated the victim with exceptional cruelty; (8) "[t]he defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community"; (13) at the time the felony was committed, the Defendant was released on bail and probation; (14) the defendant abused a position of private trust; and (16) "[t]he defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult." Tenn. Code Ann. § 40-35-114(1), (4), (5), (8), (13)(A) & (C), (14), (16). The trial court gave all of the factors "great," "extreme," or "significant" weight. The trial court found that no mitigating factors were applicable.

Addressing Tennessee Code Annotated section 40-35-103, the trial court found that confinement was necessary to protect society from a defendant with a long history of criminal conduct, that confinement was necessary to avoid depreciating the seriousness of the offenses and particularly suited to provide an effective deterrence to others, and that measures less restrictive than confinement frequently or recently had been applied unsuccessfully to the Defendant. The trial court found that the Defendant's potential for rehabilitation or treatment was "non-existent." The trial court merged the Defendant's murder convictions, for which he already had received life sentences, and sentenced him to forty years for aggravated child abuse and forty years for aggravated child neglect, the

maximum punishment in the range for a Class A felony. *See* Tenn. Code Ann. § 40-35-112(b)(1).

Regarding consecutive sentencing, the trial court noted that the Defendant had never maintained employment and found that he was a professional criminal who had knowingly devoted his life to criminal acts as a major source of livelihood. *See* Tenn. Code Ann. § 40-35-115(b)(1). The trial court also found that he was an offender whose record of criminal activity was extensive, that he was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, and that he was sentenced for an offense committed while on probation. *See* Tenn. Code Ann. § 40-35-115(b)(2), (4), (6). The trial court specifically addressed the "*Wilkerson* factors" for the dangerous offender classification and found that the aggregate length of the sentences reasonably related to the severity of the offenses and that consecutive sentences were necessary to protect the community from the Defendant.

This court reviews the length, range, and manner of service of a sentence imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). In determining a defendant's sentence, the trial court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the Defendant in his own behalf; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* Tenn. Code Ann. § 40-35-210(b); *see also Bise*, 380 S.W.3d at 697-98. The burden is on the Defendant to demonstrate the impropriety of his sentence. *See* Tenn. Code Ann. § 40-35-401, Sent'g Comm'n Cmts.

The trial court is granted broad discretion to impose a sentence anywhere within the applicable range and the sentencing decision of the trial court will 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." *Bise*, 380 S.W.3d at 709-10. Likewise, we review the trial court's order of consecutive sentences for abuse of discretion, with a presumption of reasonableness afforded to the trial court's decision. *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013).

A trial court may order that multiple sentences run consecutively if it finds by a preponderance of evidence that one or more of the seven factors listed in Tennessee Code

Annotated section 40-35-115(b) applies. When the trial court bases consecutive sentencing upon its classification of the defendant as a dangerous offender the court must also find that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences reasonably relate to the severity of the offense committed. *State v. Lane*, 3 S.W.3d 456, 460-61 (Tenn. 1999); *State v. Wilkerson*, 905 S.W.2d 933, 937-38 (Tenn. 1995).

In ordering that the Defendant serve an effective sentence of life plus eighty years, the trial court described his actions as "savage" and "brutal" and said this was the worst case the trial court had seen in its forty years of practicing law. The trial court found that seven enhancement, but no mitigating, factors applied to the Defendant's convictions, and the Defendant does not contest the trial court's application of any of those factors. The trial court also found that all three considerations in Tennessee Code Annotated section 40-35-103(1) applied. As to consecutive sentencing, the trial court had the discretion to impose consecutive sentencing upon finding that just one of the six factors in Tennessee Code Annotated section 40-35-115(b) applied. Here, the trial court found that four of the six factors applied, and the Defendant also does not contest the applicability of any of those factors. The record supports the length of the Defendant's sentences and the trial court's imposition of consecutive sentencing. Therefore, we conclude that the Defendant's effective sentence is not excessive. *See State v. Kevin Wayne Newson*, No. M2021-00444-CCA-R3-CD, 2022 WL 2251303, at *23 (Tenn. Crim. App. June 23, 2022) (concluding that defendant's sentence of life plus sixty years was not excessive), *perm. app. denied* (Tenn. Nov. 16, 2022).

CONCLUSION

Based upon our review, we affirm the judgments of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE