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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 11, 2022 Session

STATE OF TENNESSEE v. CHARLES BRADFORD LAMPLEY

Appeal from the Circuit Court for Maury County
No. 2018-CR-26970 J. Russell Parkes, Judge

No. M2021-00636-CCA-R3-CD

Defendant, Charles Bradford Lampley, was convicted by a Maury County jury of first degree premeditated murder and aggravated assault resulting in death, for which he received an effective sentence of life. On appeal, Defendant contends that: (1) the trial court erred in not granting his motion for judgment of acquittal; (2) the evidence is insufficient as it relates to his conviction for first degree premediated murder; (3) the trial court failed to exercise its mandatory function as the thirteenth juror as to his conviction for first degree premeditated murder; (4) the trial court erred by failing to instruct the jury on the issue of voluntary intoxication; (5) the prosecutor made numerous improper references to his decision not to testify, shifted the burden of proof, and improperly offered his opinion on the truth or falsity of evidence and on Defendant's guilt during closing argument; and (7) he is entitled to relief under the cumulative error doctrine. After a thorough review of the facts and applicable case law, we affirm the judgments of the trial court.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JILL BARTEE AYERS, JJ., joined.

John P. Webb (on appeal), Brentwood, Tennessee; Eric M. Larsen (on appeal), Franklin, Tennessee; and A. Tyler Whitaker (at trial) and J. Michael Robbins (at trial), Lebanon, Tennessee, for the appellant, Charles Bradford Lampley.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; Brent A. Cooper, District Attorney General; and Kyle E. Dodd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

State's Case-in-Chief

This case arises from the shooting death of William Rummage, II, ("the victim") on July 8, 2018, for which the Maury County Grand Jury indicted Defendant on charges of first degree premeditated murder and aggravated assault resulting in death. At trial, Officer Kenyatta Cannon with the Columbia Police Department (CPD) testified that he responded to the victim's residence on Woods Drive in the early morning hours of July 8, 2018. Officer Cannon parked down the street from the residence and approached on foot. He saw a man outside the residence who was screaming that the victim was lying in the driveway and that he had been shot in the head. Officer Cannon asked for something to use to apply pressure to the victim's head, and the man brought him some towels. Officer Cannon testified that the victim did not speak and did not appear conscious. He said that, when a second officer arrived on scene, the officer began performing CPR on the victim while Officer Cannon continued to apply pressure to the victim's head. Eventually, EMS arrived, relieved Officer Cannon, and rendered aid to the victim. Officer Cannon then assisted in securing the crime scene.

Officer Cannon recalled that, when he arrived at the residence on Woods Drive, there were two other men there in addition to the victim. Officer Cannon had the two men step outside the crime scene tape. Officer Cannon said that, after the victim was transported to the hospital, the victim's ex-girlfriend "showed up" at the residence in a vehicle but that he told her she needed to leave because it was a crime scene.

Dr. Thomas Deering, a medical examiner in Nashville, testified that he performed the victim's autopsy the following day. Upon examination, Dr. Deering found that the victim sustained a gunshot wound to the head. Dr. Deering determined that there was an entrance wound behind the victim's right ear and an exit wound at the back of the victim's head. Dr. Deering said, based on the presence of soot on the victim's ear, that the barrel of the gun was only inches, "maybe even half an inch," from the victim's head at the time the gun was fired. Dr. Deering described the exit wound as a "stellate wound," meaning that there were "a lot of radiating tears that c[a]me out from the center[,]" and said that the exit wound was much larger than the entrance wound. Dr. Deering opined that a rifle "or some kind of a high velocity handgun" caused the gunshot wound based on the large exit wound and the amount of damage to the victim's skull caused by the bullet. He testified, however, that there was no testable projectile found during autopsy. When asked about other wounds to the victim, Dr. Deering stated that the victim had fresh abrasions or scrapes on the knuckles of his right hand. Dr. Deering stated, based on a toxicology report, that

the victim's blood alcohol level at the time of his death was .12 and that the victim also had cocaine, marijuana, and a "very small amount" of Xanax in his system. Dr. Deering testified that the victim's cause of death was a gunshot wound to the head and that the manner of death was homicide.

CPD Officer Ryan Langhi testified that he also responded to the crime scene on Woods Drive. On the way to the scene, Officer Langhi was looking for a black car that was reported as being seen leaving the area, but he was unable to locate the car. When he arrived at the scene, Officer Langhi spoke to the victim's two roommates—Brian "Keith" Rummage and Kameron Dudley. Officer Langhi separated the two men and asked that they each provide a written statement. Officer Langhi stated that Defendant arrived at the scene sometime later in a red truck. Defendant was shirtless and had blood "all over his face, on his hands[,]" and on his blue jeans. When questioned by Officer Langhi, Defendant stated that he and the victim "had an incident at Big Lots hours prior where a rock had [been] thrown through a window of a vehicle." Defendant then said that, immediately prior to the shooting, he and the victim were outside the residence on Woods Drive and that Defendant was punched in the face by some "unknown males." Defendant said that he "got knocked out" and did not see the victim get shot. Defendant told Officer Langhi that, after the shooting, he woke up and saw a two-door, black Pontiac G6 leaving the scene. Defendant said that he chased the Pontiac on foot. Defendant told Officer Langhi that he was unable to get the license plate number. Officer Langhi testified that, when Defendant spoke to him, Defendant's demeanor was consistent with his being intoxicated.

Officer Langhi recalled that Defendant requested that he be allowed to retrieve his cell phone, which was inside the taped-off crime scene, but that he told Defendant that they would have to wait until detectives arrived. Officer Langhi stated that Defendant was "crying" and "hysterical" and was "possibly under the influence of some type of intoxicant." Officer Langhi agreed that Defendant was yelling, "What happened to my friend?" when he got out of the truck.

Officer Thomas "Chad" Howell testified that he was a patrol officer with the CPD and that he responded to the crime scene on Woods Drive on the early morning of July 8, 2018. When he arrived, he parked down the road from the residence and approached on foot. Officer Howell recalled that other officers were already present. Officer Howell saw the victim lying on the ground outside; he said that he knew the victim because officers had "been over at his house numerous times."

Officer Howell explained that he spoke to Defendant at the scene. He said that Defendant "didn't have a shirt on, he had blue jeans on, he had blood all over him." Defendant was upset and crying, and he told Officer Howell that he was with the victim at

the time of the shooting. Officer Howell said that Defendant's behavior was consistent with his being intoxicated. He said, "[Y]ou could smell a little bit of alcohol on [Defendant], but more importantly he's stumbling around a little bit."

Regarding Defendant's statement, Officer Howell testified:

> [Defendant] said that he was there hanging out with [the victim]. He said that . . . a Pontiac G6 pulled up on scene. He said that there was a white male around 5'9["] that jumped out of the car and started arguing with him and . . . [the victim]. He said . . . [in] the passenger seat was a Hispanic male or a dark[-]complected male, he didn't know exactly. So they started yelling, arguing. They got in the car, they left.
>
> [Defendant] said about five to fifteen minutes later that same car pulled back up. The . . . white male got back out started arguing yelling again. [Defendant] said at that point this unknown male hit [him] in the face knocking him out . . . . He said that he remembered [the victim's] pullin[g] that guy off of him. And then he said he remembered that guy pulling an AR out and shooting [the victim]. At that point [the assailants] got back into the Pontiac G6 and they pulled off.

Defendant told Officer Howell that he "climbed into his truck," and then he drove off after the assailants but that he could not find them. Officer Howell continued:

> At that point, [Defendant] doesn't even know what happened. He said, he remembers at some point he went and picked up his wife and they came back to the scene. Defendant said he did not know the two individuals in the Pontiac but that the victim knew the men.

Officer Howell testified that, around an hour to an hour and a half after the shooting, he went to Defendant's residence on Bullock Street to look for a dark-colored Lincoln MKZ owned by Defendant after one of the victim's roommates provided a description of a car with distinctive headlights that was seen in the driveway before the shooting. About twenty minutes later, a dark-colored Lincoln driven by Defendant's wife pulled up in front of the house. Officer Howell said that the Lincoln had distinctive, blue LED headlights. Officer Howell looked through the car windows and saw a pot of water in the passenger seat. He also saw what appeared to be blood in the car. He said that "it appeared like somebody had tried to clean it up but . . . missed some places."

On cross-examination, Officer Howell said that he had been to the victim's address several times for "various disturbances." Officer Howell clarified that Defendant said he

got into his truck to chase after the assailants. He said that Defendant appeared to be concerned about the victim and that he was "very emotional." Officer Howell said that Defendant left the crime scene before he went to Defendant's address on Bullock Street to look for the Lincoln. He said that officers initially treated Defendant as a witness but that information they received from other witnesses caused them to view Defendant as a potential suspect. Specifically, Officer Howell explained:

> Other witnesses indicating that this is the kind of car [Defendant] drives. This is the kind of gun that [Defendant] possibly could have. The headlights, he had blue headlights on his car, the car that he was in had blue headlights. The fact that other witnesses saying there was a car with blue headlights out there.

CPD Officer Michael Brown testified that, on July 8, 2018, his sergeant requested that he meet Officer Howell and Officer Cannon on Bullock Street as they attempted to locate Defendant's black Lincoln MKZ. He explained that, when they arrived at the location, Defendant's car was not there. They noticed tire tracks in the yard of the residence that appeared to show that a vehicle had driven through the yard and behind the house to a storage shed and then left the same way. Officer Brown stated that, as they were walking back to their patrol cars, the officers saw a car approaching them that had blue-colored headlights. As it drove past him, Officer Brown saw that it was a dark Lincoln MKZ. The car parked in front of Defendant's residence, and Defendant's wife got out of the driver's seat. Officer Brown said that, as he spoke to Defendant's wife, he observed a stainless-steel pot containing water with soap or a cleaning chemical in it sitting in the passenger front seat of the car. He said that he saw bubbles in the water and that the water had a "tint" to it. Officer Brown also saw what appeared to be blood spatter inside the car on the front edge of the seat, on the dashboard, and on the console.

Officer Brown recalled that, around forty-five minutes to an hour later, Defendant arrived at the address on Bullock Street, driving a maroon-colored Toyota truck. When Defendant got out of the truck, Officer Brown saw that Defendant had been crying. Officer Brown testified that Defendant had blood on his face and chest area and appeared to have a "busted" upper lip, which Officer Brown described as a minor wound. Officer Brown noticed some "small red dots" of blood on Defendant's chest. Officer Brown testified that Defendant had a slight odor of alcohol coming from him but that Defendant was "more upset than drunk." Officers seized the Lincoln that morning as part of the investigation.

Investigator Cheryl MacPherson with the CPD testified that she received a phone call around 4:30 a.m. on July 8, 2018, requesting that she respond to the scene on Woods Drive. When she arrived, the residence was blocked off by yellow tape, and there were evidence markers in the front yard, the driveway, and beside the house. Investigator

MacPherson photographed the scene. She noted that the awning of the carport had a single bullet strike in it. Officers were unable to locate the projectile, however. In the driveway, Investigator MacPherson located what appeared to be several "90[-]degree blood drop[s]" on the ground. She explained that this meant that the blood "dropped straight down[.]" She also collected swabs from the victim's hands for "touch DNA or any other evidence, minute evidence that could be collected." Investigator MacPherson later conducted a gunshot residue test on Defendant's Lincoln, swabbing the steering wheel and interior driver's door handle. She sent the swabs to the Tennessee Bureau of Investigation (TBI) Crime Laboratory for testing.

Special Agent Lindsey Anderson testified that she worked in the TBI crime lab Microanalysis Unit. Agent Anderson stated that she was asked to look for gunshot residue on samples from Defendant's Lincoln. She said that the swabs were from the outside driver's door handle, inside driver's door handle, steering wheel, and gear shift. She reported that her analysis did not reveal the presence of particles of gunshot primary residue. Agent Anderson testified that she did not receive for testing any swabs from Defendant's or the victim's hands.

Britney Carroll testified that, on July 2 or 3, 2018, Defendant sent her a message through Facebook. Ms. Carroll did not know Defendant previously, but she responded to his message, and they continued to send messages back and forth over the following days. Two or three days later, Ms. Carroll met Defendant in person at Cool Springs Mall after they made plans to meet for Defendant's birthday. Ms. Carroll stated that she did not know that Defendant was married at the time. She said she met Defendant at a gas station and got into Defendant's black Lincoln MKZ. Ms. Carroll testified that, while riding with Defendant, she did not look in the back seat of the Lincoln or inside the trunk. Defendant said that he needed to go to his best friend's house to pick up a birthday present. When they arrived at the residence, Ms. Carroll sat in the car while Defendant went inside. Ms. Carroll recalled that there were trucks and vehicles in the driveway, so Defendant parked on the street in front of the residence. After about ten minutes, Defendant got back into the car with her. Defendant said that "some guys . . . in that house were gonna try to jump him or they acted like they didn't know what he was there for." Ms. Carroll testified that she heard Defendant yelling as he was walking back towards the car and that, when he got in the car, he did not have anything in his hands. She stated that Defendant was "pretty upset and mad."

Ms. Carroll stated that, from there, Defendant drove them to the house of a friend of his, Nick Bruno. They went inside and sat around a table talking to some of the people inside the house. Defendant said that "his birthday was kind of messed up[,]" and he broke his phone and then "chugged [a] whole glass of vodka[.]" At one point, Defendant got into a verbal argument with a girl from Chicago who was at the house. Ms. Carroll testified

that she and Defendant left Mr. Bruno's home around midnight and that she drove Defendant's car because she had not had as much to drink as Defendant.

Ms. Carroll testified that, as she drove, Defendant directed her to a trailer park. He then sent a text message to someone and got out of the car. Defendant stood outside waiting for someone while she remained in the car. Defendant was pacing back and forth, and Defendant said, "I'm gonna 'F' this guy up. I've already fronted him money several times." Ms. Carroll said that, eventually, someone "pulled . . . really fast into the front of where [she] was parked." The man got out of his vehicle, and Defendant followed him into a trailer. About ten minutes later, Ms. Carroll saw Defendant coming from the back of the trailer towards the car. She said that Defendant no longer had on a shirt and that it looked like he had gotten into a fight. She said that Defendant was "huffing and red" and that he was "really angry." When Defendant got into the car, he said, "Okay, we can go now." Ms. Carroll estimated that they left the trailer between 12:30 and 1:00 a.m.

Ms. Carroll testified that she drove back to the gas station while Defendant was "on his phone[.]" When Ms. Carroll told Defendant that she was going to go home, Defendant began cursing at her and said that he would go home with her. When Ms. Carroll declined, Defendant got "really upset." When she was back in her car, Ms. Carroll began driving towards her house, but her child's father called her and explained that her daughter was upset. Ms. Carroll said that she decided to "turn around" and spend the night with her daughter at her child's father's house in Mount Pleasant. As she drove through town, she passed Defendant's black Lincoln pulled over, and she stopped in the Kroger parking lot to send a Facebook message to Mr. Bruno, telling Mr. Bruno that he might want to check on Defendant. Ms. Carroll testified:

> I just kind of looked out my window and I saw the car looked just like [Defendant's] so I was [going to] pull [up] and see if it was him and he had his window rolled down and he was just sittin[g] there in the driver's seat. So I like rolled my window down and . . . [Defendant] was like, are you following me. And I was like, no, I was just goin[g] somewhere else and I thought you were pulled over and I was just [going to] send your friend a message.

Defendant told Ms. Carroll not to worry about him. Defendant then complained that "[e]veryone had ruined [his] birthday." Defendant was upset and told Ms. Carroll to "lose his number." Ms. Carroll said that, after speaking to Defendant, she drove to Mount Pleasant. Ms. Carroll recalled that, as she was driving, Defendant continued to send her text messages. She said that one message read "something like I wanted to be with you more than ever and my birthday is ruined." Once she was in Mount Pleasant, she received

a message from Defendant that said, "The police are behind me." Ms. Carroll did not respond to Defendant's messages.

Ms. Carroll stated that Defendant called her a few days later. Defendant told her that the police might speak to her and that the police would ask if she had seen Defendant with a gun that night. Defendant said that Ms. Carroll "would need to . . . tell them that [she] never saw a gun or anything." When Ms. Carroll asked Defendant what happened, Defendant responded that "he saw his best friend get killed." Defendant told Ms. Carroll that the police had his cell phone. She said that she never spoke to Defendant after this call. Ms. Carroll said that she did not see Defendant with a gun. She recalled that she later spoke to a detective with the CPD. She initially told the detective that she was not with Defendant that night because she did not want her fiancé to know that she had been out with someone else.

When asked about Defendant's demeanor that night, Ms. Carroll testified that:

> as soon as I got in the car with him he was arguing with someone on the phone, and . . . his mood just went down like the rest of the night, and he was just even more upset with everybody, and just more, like, by the end of the night . . . when I just kinda just wanted to go on to my house he was just really upset and angry and just not in a good mood[.]

On cross-examination, Ms. Carroll explained that a detective came to her house a few days later. She agreed that she told the detective that she believed the birthday gift Defendant was going to pick up that night was drugs. She testified that Defendant was not intoxicated by the time she left him. She sent Defendant a text message at 1:46 a.m. telling him to be careful because he had "been in fights" that night.

Waylon Wilcox testified that he lived on Gather Street in Columbia. Mr. Wilcox described his residence as a "double wide trailer[,]" located on a dead-end street. Mr. Wilcox said that he was friends with Defendant and that he had known Defendant since they were twelve years old. He said that, on the evening of July 7, 2018, he was at home with his three children. Mr. Wilcox said that he had previously spoken to Defendant and told Defendant that he could not "hang out" because of his children but that Defendant nevertheless came to his residence that night. Mr. Wilcox explained that his youngest son woke up sick in the middle of the night. Mr. Wilcox was bathing his son and cleaning up after him when Mr. Wilcox's roommate told him that someone was knocking on the front door. Mr. Wilcox testified that he knew it was Defendant. Mr. Wilcox continued:

> And then I walked out and [saw Defendant] and I guess he acted surprised . . . that I wasn't happy to see [him], I guess. I mean, I was dealing

> with a lot all at once I guess. But I mean . . . he came in and acted like it was a Friday night, I guess when my kids weren't there.

Mr. Wilcox stated that Defendant appeared to have been drinking and that Defendant wanted to party and celebrate his birthday. Defendant asked Mr. Wilcox if he could "find him something[.]" Mr. Wilcox "laughed off" Defendant's request and reiterated that he had his children at home. He then stepped outside with Defendant. Mr. Wilcox said that Defendant did not get angry but that he did. He testified, "[I]t's 1:30 in the morning and my kids are asleep, you know, dealing with this. I wouldn't show up at [Defendant's] house like that. I mean, I was more or less angry at that point, and then we kind of just yelled at each other back and forth[.]" Defendant stated, "[M]y money is not good enough for you, I know you can find this, I know you can find this[.]" Mr. Wilcox testified that Defendant had on a shirt when he arrived at the trailer but that, during their "screaming match[,]" they both removed their shirts and began shoving each other. Mr. Wilcox said that he told Defendant to go home and sober up and call him the next day. Defendant told Mr. Wilcox that he thought they were friends and that he thought Mr. Wilcox was "better than that[.]" Defendant then left his property. Mr. Wilcox testified that Defendant was usually a "family guy" who would respect boundaries. Mr. Wilcox said, "[Defendant] obviously had been drinkin[g]. I mean, he was definitely out of character[.]" Mr. Wilcox said that he exchanged "angry" text messages with Defendant after Defendant left his home.

Mr. Wilcox said that, after the victim's death, he spoke to Defendant and that Defendant told him the victim "got shot" and passed away. Mr. Wilcox stated:

> [Defendant] . . . said that he went over there and that, you know, some other guys pulled up. When he'd pulled up [the victim] was outside upset with his shirt off. And that -- he said that it happened so quick that he pulled up and as soon as he pulled up, was like, what's goin' on. And it seemed like immediately another car pulled up. I don't remember the specifics. But they pulled up and then they got out, they all got to fighting, and then [the victim] got shot.

Defendant told Mr. Wilcox that, after the victim got shot, Defendant attempted to block the assailants' car in the driveway but was unsuccessful. Defendant said that he then "chased them and lost them."

Mr. Wilcox recalled that, about two months before the victim was killed, he and the victim went to Big Lots. He explained that they were in the victim's dually truck, which was towing on an extended trailer an SUV that belonged to a local YouTube celebrity. As they were heading out of the parking lot, they saw "a group of kids just hangin[g] out on

the far side of the parking lot, [in] probably eight to ten cars." The victim pulled up parallel to the kids, and the kids, apparently recognizing the celebrity's SUV, came up to the windows of the victim's truck. The victim said to the kids, "[Y]ou kids are livin[g] off of mama and daddy's money, and just kind of went on a little rant." Then, the victim "stomped on the gas and dumped diesel smoke all over" the kids. Mr. Wilcox said that, as they were exiting the Big Lots' parking lot, one of the kids threw a rock at the victim's truck. The rock hit Mr. Wilcox's arm and caused "a pretty good[-]size[d] dent" in the door of the truck. As the victim pulled back into the parking lot, most of the kids got into their cars and started to leave, but some stayed behind and eventually told the victim the names of the kids who threw the rock. Mr. Wilcox explained that the victim called the police and made a report regarding the dent in his truck.

On cross-examination, Mr. Wilcox stated that he took the victim to an ATM on the night of July 7, 2018. He explained that the victim needed cash to pay the employees of his lawncare business. Mr. Wilcox testified that, about six months before the victim's death, he and Defendant went to shoot guns at some property off of Bear Creek Pike. He said that the man who owned the property was there with them, shooting an AR-15. Mr. Wilcox stated, "[A]s we were shooting he brought out a few guns. I know for sure one of them was an AR-15. And then he brought out a gun that belonged to his wife." Mr. Wilcox stated that they were shooting into an embankment on the property and that he recalled seeing the property owner nail shell casings to a tree. Mr. Wilcox said that he had not seen Defendant with an AR-15 since the day they went shooting at the Bear Creek Pike property. He said that he posted to social media a photograph of the guns they shot that day but that Defendant did not own any of the guns in the photograph. Mr. Wilcox agreed that he had called Defendant about an "AR[-]15 that had been put up for a long time" that needed a spring replaced. Mr. Wilcox stated that, at the time of the victim's death, Defendant was employed as a lineman, had four or five children, and was "in a good place in his life[.]"

Kameron Dudley testified that he worked for the victim's lawncare business. Mr. Dudley also lived in the victim's house on Woods Drive before the victim's death, along with Mr. Rummage and Cameron Hunter. Mr. Dudley said that the victim was "like a brother" to him and that they spent "countless hours" together outside of work. Mr. Dudley said that he met Defendant a couple of times but was not well-acquainted with him.

Mr. Dudley testified that, on July 7, 2018, he, Mr. Rummage, and Adam Stewart worked all day cutting grass. They got to the victim's house on Woods Drive around 7:30 or 8:00 p.m. and that "everybody was winding down." Not long after, Defendant arrived at the victim's house in his black Lincoln MKZ. Mr. Dudley testified, "[Defendant] wanted us to go out with him. It was his birthday week. He was wanting us to go to Drake's with him in Franklin. I wasn't going." Mr. Dudley stated that, when no one agreed to accompany Defendant to Drake's, Defendant was "down" and started "hassling a couple

of girls that were there" at the house. He said that Defendant arrived at the house in his black Lincoln MKZ.

Mr. Dudley said that, after Defendant left, he went to Taco Bell and then returned to the house and went to sleep. Around 1:00 a.m., he awoke and talked to the victim and Mr. Rummage about work the next week. Mr. Dudley then went back to sleep but woke up again after hearing a loud noise. Moments later, Mr. Rummage ran into his bedroom and told him that the victim had been shot. Mr. Dudley and Mr. Rummage immediately ran outside and saw the victim lying in the driveway. Mr. Dudley said that he did not see anyone else outside. Mr. Dudley explained that there was blood "everywhere." He lifted the victim's head up and saw how badly he was bleeding. He spoke to the victim, but the victim could not respond. He got some towels and called 911. Mr. Dudley testified that the victim's two dogs ran outside with him and Mr. Rummage and were stepping in the victim's blood. Mr. Dudley saw a cell phone in the driveway; he did not know who owned the phone, so he picked it up and set it on the bumper of a black Dodge work truck parked in the driveway.

Mr. Dudley said that Defendant showed up at the scene in his wife's maroon truck about five minutes after the police arrived. Defendant had no shirt on, and he was "bloody." Mr. Dudley said that Defendant was "inebriated," loud, and distraught. Defendant said that "two guys pulled up, and he got into a fight with one of them. The other one shot [the victim]." Defendant described the assailants as "a light skin, tall guy, and the other guy was a Mexican." Mr. Dudley said that the descriptions were not familiar to him. He said that Defendant tried to blame the shooting on the kids who threw the rock at the victim's truck at Big Lots. Mr. Dudley stated, however, "If anybody knew anything about the situation and what happened, they would know them kids had nothing to do with it." Regarding the Big Lots' incident, Mr. Dudley said that he spoke to each of the kids involved, whom he described as "older teenagers," around sixteen or seventeen years old. He said that one of the kids involved in the incident ended up working for the victim cutting grass.

Mr. Dudley stated that he rode to the hospital with the victim and that he provided police with a written statement that morning. Mr. Dudley explained that, following the victim's death, he no longer had a job, and he had to move out of the residence on Woods Drive a few days later.

On cross-examination, Mr. Dudley denied that there were any guns in the victim's home. He stated that there had been an "open-door policy" at the victim's residence and that anyone could come over at any time, including Defendant. He denied that there was any altercation between Defendant and anyone at the residence on the night of July 7 and that Defendant was yelling at anyone as he was leaving.

Mr. Dudley testified that Defendant had previously told him that he had an AR-15 with a "three-round burst[,]" but Mr. Dudley had never seen Defendant with the weapon. Mr. Dudley agreed that he did not initially suspect that Defendant shot the victim and that he told the police to investigate a man named Day Drumwright. He agreed that, when Defendant returned to the scene after the shooting, Defendant had a wound on his lip and blood on him. He said that, to his knowledge, Defendant lived in the Bel Air area and that he would be surprised if Defendant went "all the way home" before coming back to the scene on Woods Drive.

Keith Rummage testified that, about two weeks before the victim's death, the victim reached out to him over Facebook. Mr. Rummage explained, "I was going through a hard time, and I was homeless. I didn't have [any]where to go. I was pretty much asking for help from family and put it on Facebook. Only one person reached out, and it was [the victim]." He said that the victim gave him a job mowing lawns and allowed him to stay in his house on Woods Drive. He said that he and the victim got along well.

Mr. Rummage explained that, on the evening of July 7, 2018, he and the victim sat and talked for four or five hours. He said that Defendant showed up and wanted the victim to go out to celebrate Defendant's birthday but that the victim did not go with Defendant. Mr. Rummage stated that the victim was more worried about getting in touch with his girlfriend because they were fighting. Mr. Rummage stated that Defendant "stormed out [of] the house in a fury" after the victim told Defendant he would not go out with him. He testified, "When [Defendant] first got there, he had a dog barking at him. He screamed at the dogs and caused them to run over on the couch. When nobody said they were going with him, he pretty much stormed out the house." He said that he did not see anyone give Defendant a birthday present. When asked what happened after Defendant left, Mr. Rummage recalled, "Me and [the victim] started drinking. We [were] sitting up talking and had done a little powder and pretty much going over the business and what was wrong with it." He said that they came up with a plan to make the business more successful.

Mr. Rummage recalled that, later that night, the victim went outside to make a phone call. He then came back inside the residence and told Mr. Rummage that he was about to leave. Mr. Rummage stated that, after the victim exited the house, he heard the dogs barking. He testified, "When I went outside the door it was wide open and the dogs were outside. There was a car sitting out front that had high beams." He called the dogs back inside the house and saw a black Lincoln sitting in the driveway. He said that he could only see one headlight as it was pulled in behind a black Dodge work truck parked in the driveway. He saw that the "headlight was L-shaped, and it was a little bit off the ground." He said that he did not see anyone with the car. He said that, after he put the dogs away, he heard an argument that "last[ed] about 30 seconds" and then heard a gunshot. Mr. Rummage "feared the worst" and ran to wake up Mr. Dudley. By the time he and Mr.

Dudley got outside, the black Lincoln was gone, and they found the victim lying in the driveway behind the work truck. Mr. Rummage said that the victim's eyes were open but that he was unresponsive and that there was "a lot of blood." He said that Mr. Dudley called 911. He testified that he did not recall the dogs' running around the crime scene or that responding officers asked him to put them back inside the house.

Mr. Rummage said that Defendant "showed up about five or six minutes after the police" in a red truck. Defendant walked up to him, shook his hand, and said that he was sorry. Defendant told the police that two men "showed up"—a "tall white guy with a camouflage hat and a black guy"—and that they "jumped out of . . . a black G6." Defendant said that the black man "knocked him out" and that the white man shot the victim. Defendant also said that he lost consciousness. Mr. Rummage explained that an officer later showed him a photograph on a cell phone of a car, and he identified it as the black Lincoln that he saw in the driveway before the shooting. When asked how he was sure of his identification, Mr. Rummage said, "It was sitting on 22-inch rims, and it had the L-shaped headlights on it. It was a newer model." He agreed that he provided police with a written statement. He said that the victim's girlfriend, Lynda McKee, drove by in her "little blue Chrysler" and that they yelled at her to stop but that she kept going. Mr. Rummage explained that he lived at the victim's residence for about two weeks after the victim's death and that he was then arrested on an outstanding warrant. He testified that he did not inherit anything from the victim and that he did not benefit in any way from the victim's death. He agreed that he stayed at Ms. McKee's house for a few nights after the murder but denied that they had a romantic relationship; he said that he had no longer felt safe at the victim's residence.

On cross-examination, Mr. Rummage said that he looked at his phone at 2:05 a.m. when he went to bed. A few minutes later he heard the dogs barking and went outside to bring them in. When pressed further, Mr. Rummage said, "Considering I was under the influence, [']a few minutes['] could be five or six minutes or seven or eight minutes. I don't necessarily know." He stated that, when he went outside, he saw the black Lincoln in the driveway. He said he was standing outside when Defendant arrived at the victim's house the first time that night. He said that there was no physical altercation between Defendant and anyone at the residence at that time. He acknowledged that he initially told the police that he was suspicious of Ms. McKee based on her behavior of driving past the scene without stopping. He said that the dogs got back outside when he and Mr. Dudley went out and found the victim. He testified that he told Mr. Dudley that the victim had been shot because he had heard a gunshot and knew that the victim had been outside. Mr. Rummage said that he heard only one gunshot but that he was aware two shell casings were found at the scene.

Joshua Lee testified that he knew both the victim and Defendant. Mr. Lee denied owning an AR-15 rifle or any other guns, explaining that he had a prior felony conviction. He stated, however, that he allowed other people to shoot guns on his property. Mr. Lee testified that Defendant and Deonte Adams shot AR-15s at his property on two occasions. Mr. Lee identified a video he had taken of Defendant shooting three-round bursts from an AR-15 at his property about eighteen months prior to the victim's murder. Mr. Lee stated that he collected the shell casings from the AR-15s and hammered them into a tree trunk in anticipation of cutting down the tree and using that part of the tree for a lamp. He started hammering the shell casings at the bottom of the tree, working his way upward; as such, the most recently fired shell casings were at the top of the tree trunk. Mr. Lee testified that Defendant and Mr. Adams were the last people to shoot weapons at his property and that, when he heard about the victim's death, he notified police about the location of the shell casings.

Major Wells, a firearm and tool mark examiner with the Bureau of Alcohol, Tobacco, Firearms and Explosives, testified that he received a total of twenty-two fired .223 caliber cartridge casings related to this case. He said that he examined the two shell casings recovered from the crime scene and determined that they were fired from the same firearm. Mr. Wells then examined a group of fourteen shell casings and a group of four shell casings and determined that all eighteen had been fired from the same firearm as the shell casings found at the crime scene. He stated that he examined a final group of two shell casings and eliminated the shell casings as having been fired from the same firearm as the others. Mr. Wells said that, although some of the shell casings had wood stuck inside them, the wood did not diminish his ability to examine them.

On cross-examination, Mr. Wells acknowledged that there were multiple firearms capable of firing a .223 round, not just an AR-15 rifle. He also acknowledged that an AR-15 could be chambered to fire 5.56 ammunition. He said that he was not provided a firearm to examine in relation to this case.

CPD Detective Stephen Faulkner testified that Defendant's cell phone was collected at the crime scene. Detective Faulkner subsequently obtained a search warrant for the phone and performed a "phone dump" on it. Detective Faulkner identified a photograph found on Defendant's phone dated May 12, 2018, that showed an AR-15 on the front passenger seat of a car. Detective Faulkner identified another photo from Defendant's phone dated October 24, 2017, that showed what appeared to be the same AR-15 lying on some carpet. He identified a third photo from Defendant's phone of the AR-15, which was dated October 26, 2017, and depicted the weapon lying on a hardwood floor.

Detective Faulkner explained that he also obtained text messages from Defendant's phone, and he identified a series of text messages from the night of July 7 and early morning

of July 8, 2018. Detective Faulkner testified that, at 1:49 a.m. on July 8, Defendant sent a text message to Ms. Carroll that read, "Police behind me now. Don't worry about me." At 2:07 a.m., Defendant stated in another text message to Ms. Carroll, "I'm out to go to jail." Detective Faulkner testified that the first 911 call from the victim's house came in around 2:14 a.m. He said that he found no evidence on Defendant's phone of any arguments between Defendant and the victim.

On cross-examination, Detective Faulkner was asked about text messages exchanged between Defendant and Mr. Wilcox on the morning of the shooting. He testified that the last message sent from Mr. Wilcox to Defendant was received at 2:09 a.m. He agreed that there appeared to be an unsent message from Defendant to Mr. Wilcox on Defendant's phone. Detective Faulkner testified that he could not determine when the unsent message was typed but agreed that it appeared to be a response to the message received from Mr. Wilcox at 2:09 a.m.

Jennifer Lampley, Defendant's wife, testified that she owned a maroon Toyota Tacoma truck and Defendant owned a black Lincoln MKZ at the time of the shooting. Mrs. Lampley stated that Defendant's birthday was July 7, 2018, but that she did not go out with him to celebrate his birthday. She said that Defendant woke her up in the early morning hours of July 8, 2018. Mrs. Lampley noticed that Defendant was not wearing a shirt and that he had blood on him. Defendant told Mrs. Lampley that he had just come from the victim's house. Mrs. Lampley explained that Defendant thought that the victim may have been shot but that Defendant had not called 911 because he did not have his cell phone. Mrs. Lampley checked Defendant for injuries, and then she and Defendant returned to the victim's house in her maroon truck to check on the victim. Mrs. Lampley stated that, after they returned from the victim's house, Defendant took off in her truck. She said that she intended to meet him at a car wash but that she could not get Defendant's car started.

Mrs. Lampley recalled an incident in March 2018 when she asked her brother, Jarod Gilles, to put a gun in her attic. She agreed that, when police showed her a picture of a gun, she told them it looked like the one in the attic, but she was not sure it was the same one. She said that she had asked Defendant to get rid of the gun or else she would report him as a felon in possession of a weapon. She said that she never saw the gun in Defendant's car. On cross-examination, Mrs. Lampley confirmed that, when she and Defendant drove back to the victim's house, she was the one to drive because Defendant was too intoxicated.

Franklin "Adam" Stewart testified that he worked for the victim's landscaping business prior to the victim's death and that he was at the victim's house on the night of July 6, 2018. Mr. Stewart explained that the victim was out with his girlfriend when Defendant stopped by the house. Defendant told Mr. Stewart that it was his birthday, that

he had been on drugs for seven days, and that he was going to have sex with the victim's girlfriend. Mr. Stewart testified that Defendant had made the remark about having sex with the victim's girlfriend before and that the victim had brushed it off. Mr. Stewart also testified that, during his discussion with Defendant, the subject of guns came up. Defendant told Mr. Stewart that he kept a loaded AR-15 in his trunk. On cross-examination, Mr. Stewart agreed that the victim and Defendant had been friends for a long time and that Defendant often showed up unannounced at the victim's house without complaint from the victim.

Jarod Gilles, Defendant's brother-in-law, testified that he and Defendant built two AR-15s in his garage in 2017—one for him and one for Defendant. Mr. Gilles said that both firearms were chambered to fire .223 rounds. Mr. Gilles identified a photograph of the rifle he made. Mr. Gilles said Defendant "loved that rifle" and would never sell it. On cross-examination, Mr. Gilles recalled Defendant's talking about what a good friend the victim was and how Defendant always spoke positively of the victim.

CPD Detective Allan Ervin testified that he was the lead detective in the investigation into the victim's murder. Detective Ervin stated that he responded to the crime scene after the victim had been transported in an ambulance. He identified a photograph showing the two shell casings recovered at the scene. He said that Defendant and Mrs. Lampley were at the scene, walking around the yard. He described Defendant as being "loud and upset." Defendant had blood on his face and body and a wound to his mouth, and Defendant was intoxicated. Detective Ervin testified that the blood on Defendant's body appeared to be from the wound to his mouth and not from the victim. Detective Ervin testified that he spoke with Defendant at the scene and that Defendant described being an eyewitness to the shooting. Defendant told Detective Ervin that he was hanging out with the victim when a Pontiac G6 pulled up and a man got out and began arguing with the victim. Defendant said that he was drunk and started a fight with the man; then, another man got out of the Pontiac and shot the victim. Defendant attributed the shooting to a situation that involved rocks being thrown at the victim's truck at Big Lots months earlier, but Defendant provided no names of potential suspects. When Detective Ervin asked Defendant to clarify if there were one or two men in the Pontiac, Defendant said, "I don't want to talk anymore. I'm requesting an attorney." Detective Ervin said that Defendant hung around the scene and remained "loud," so he asked Defendant to leave. Detective Ervin testified that, in hindsight, he should have taken swabs of the blood on Defendant and performed a gunshot residue test on Defendant but said that he had no reason to at the time. Detective Ervin said that he followed up on the Big Lots lead but that he did not locate anyone involved that had a Pontiac G6.

Detective Ervin explained that, about two hours later, he went to Defendant's residence on Bullock Street to seize Defendant's black Lincoln MKZ. Detective Ervin saw

both the maroon truck and the Lincoln there, and he photographed the front half of the Lincoln and sent the photo to another detective at the crime scene. He then told Defendant that he was seizing the Lincoln as part of the investigation. According to Detective Ervin, Defendant was "very polite" and said, "[G]o ahead and do what you got to do. But that vehicle definitely was not present." Detective Ervin observed a pot with water and spots of blood inside the Lincoln. Detective Ervin explained that Defendant later told him that his car was parked on the street on Woods Drive.

On cross-examination, Detective Ervin confirmed that the call to 911 came in around 2:14 a.m. He agreed that phone records showed that Defendant's last text message to Ms. Carroll was sent at 2:07 a.m., which read, "Well I'm out to go to jail." Detective Ervin agreed that Defendant was charged with premeditated murder, in part, based on this last text message. He said that he believed Defendant had made up his mind to shoot the victim at this point. He acknowledged that, based on phone and text logs, the victim was engaged in an argument with his girlfriend, Ms. McKee, up until 2:09 a.m. but that nothing in the phone logs indicated that the victim and Defendant were involved in a dispute prior to the murder. Detective Ervin further acknowledged that Defendant was exchanging argumentative text messages with Mr. Wilcox at 2:06 a.m. and 2:09 a.m.

Regarding the identification of Defendant's car as the suspect car, Detective Ervin agreed that Mr. Rummage identified the suspect car as a black car but that he did not say it was a Lincoln. Detective Ervin said that Mr. Rummage told him he only saw half of the car and that it had its headlights "on bright." Detective Ervin explained that Mr. Rummage identified Defendant's car from a photograph that was taken of the car after it was seized by police.

Detective Ervin testified, based on his military experience, that an AR-15 set to fire a three-round burst could, on occasion, fire less than that. He said that a weapon failure on an AR-15 was not common but that there were "variables," such as a dirty weapon or holding the rifle loosely, that could cause it. Detective Ervin agreed that no DNA was found on the shell casings collected at the scene, that a wound on the victim's knuckle was swabbed for DNA but no link to Defendant was found, and that not all the blood spots in the driveway at the crime scene were swabbed for DNA.

TBI Special Agent Douglas Williams testified that he was a forensic scientist in the Technical Services Unit and that his specialty was in vehicle infotainment systems. Agent Williams was contacted by CPD Detective Joshua Garner, who asked for his assistance with examining the infotainment system from Defendant's black Lincoln MKZ. Agent Williams explained that a computer, called an electronic control unit or ECU, ran the infotainment system and that the information the ECU preserved fell into two broad

categories: event logs and track logs. He stated that the event log recorded when an action occurred with the car and that the track log contained GPS data.

Agent Williams testified, based upon his review of the GPS data from Defendant's car, that Defendant's car arrived at the victim's house on July 8, 2018, and shifted into park at 2:11:06 a.m. The driver's door opened at 2:11:40 a.m. and closed at 2:11:54 a.m. The driver's door opened again at 2:12:01 a.m. and closed again at 2:12:09 a.m. The driver's door opened for a third time at 2:12:10 a.m. and closed at 2:12:22 a.m. Defendant's car then shifted into reverse at 2:12:23 a.m. and into drive at 2:12:27 a.m. Agent Williams testified that Defendant's car shifted into park at Defendant's residence on Bullock Street at 2:16:12 a.m. and that the driver's door opened at 2:16:13 a.m. Agent Williams further testified that, according to the ECU data, Defendant's car was located at a car wash on Nashville Highway at 4:16:10 a.m. and arrived back at Defendant's residence at 4:22:47 a.m.

At the close of the State's proof, Defendant moved for a judgment of acquittal, arguing that the State failed to offer sufficient proof of premeditation. The trial court, however, denied the motion.

Defense Proof

Alec Hickman testified that she had been with Defendant for about an hour on the evening of July 7, 2018. She said that she had been inside Defendant's car during this time; she recalled that the car was clean and that the back seats were folded down so that she could see inside the trunk. Ms. Hickman testified that she had a clear view of the trunk and the backseat of the car and could not see a gun anywhere. Ms. Hickman admitted, however, that she could not see under the folded-down seat.

Richard Thurman testified that he lived directly across the street from the victim's house. He said that, in the early morning of July 8, 2018, he was asleep when he heard one gunshot. He stated that things were always a "little rowdy" at the victim's house and that police were frequently there. Mr. Thurman said that, following the shooting, he stood outside watching while police processed the crime scene, and he described seeing people who were not law enforcement loitering inside the taped off area. Mr. Thurman also said that Mr. Rummage was talking to other individuals at the scene and was not isolated by police as a potential eyewitness.

Bristol Surprise, who knew both Defendant and the victim, testified that she initially thought Defendant was guilty but that she changed her mind after looking at some posts on Facebook. She said that she sent screenshots of messages involving Day Drumwright to police because she thought the messages were relevant to the murder investigation. Ms.

Surprise admitted on cross-examination, however, that she had no personal knowledge of Defendant's actions leading up to and at the time of the victim's murder.

Lynda McKee testified that she was the former girlfriend of the victim. Ms. McKee stated that she had not wanted to continue her relationship with the victim because he was abusive towards her. She testified that, on July 6, 2018, the victim came to her home, yelled at her, and threw a drink in her face. She said that she was at a party in Lewisburg the evening of July 7, until about 1:00 a.m. on July 8, and that the victim called her approximately thirty-seven times that night. Ms. McKee testified that she was on Hampshire Pike near her residence in Columbia at the time the victim was shot. She said that she learned about the shooting after receiving a phone call from the victim's neighbor. Ms. McKee stated that she did not remember telling police that she thought about shooting the victim when he assaulted her, but she acknowledged telling police that the victim had disrespected her. On cross-examination, Ms. McKee testified that she had no knowledge of who killed the victim and that she did not have anything to do with his murder.

State's Rebuttal Proof

In rebuttal, the State called Detective Joshua Garner. Detective Garner testified that police put an AR-15 on the back seat of Defendant's car and then folded down the back seat on top of the rifle. He stated that, when he did so, the rifle could not be seen, and he identified a photograph of the back seat he had taken during this test. On cross-examination, Detective Garner acknowledged that he did not know whether the murder weapon was an AR-15.

Defendant renewed his motion for judgment of acquittal at the close of all proof, and the trial court denied the motion. Following deliberations, the jury convicted Defendant as charged. The trial court sentenced Defendant to life for first degree premeditated murder. The court also imposed an eight-year sentence for aggravated assault resulting in death but merged this conviction into the first degree murder conviction.

After trial, new counsel was appointed. Defendant filed a timely motion for new trial and an amended motion for new trial, which the trial court denied in a written order after a hearing. This timely appeal follows.

II. Analysis

A. Sufficiency of the Evidence

Defendant contends that the trial court erred in not granting his motion for judgment of acquittal and in submitting the case to the jury "as to the allegation of First-Degree

Murder[,]" and he asserts that the evidence is insufficient to support his conviction for the offense. Defendant argues that there were "no eyewitness or any other form of direct evidence to demonstrate to the jury exactly what happened that led up to the victim's death" and that the State failed to establish a motive for the murder. Defendant asserts that witness testimony regarding his intoxication "suggests premeditation may not have even been possible" and that the jury's verdict was "based on nothing more than speculation." The State responds that the evidence is sufficient to support Defendant's conviction for first degree premeditated murder.

Under Tennessee Rule of Criminal Procedure 29, a trial court "shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." Tenn. R. Crim. P. 29(b). Whether to grant a motion for judgment of acquittal is a question of law, and the trial court must look at the State's evidence in the light most favorable to the State and must "allow all reasonable inferences from it in the State's favor; to discard all countervailing evidence, and if then, there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the evidence of the State," the trial court must deny the defendant's motion for judgment of acquittal. *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). In ruling on a motion for judgment of acquittal, the trial court looks at the legal sufficiency of the evidence and does not weigh the evidence. *Id*. "The standard by which the trial court determines a motion for a judgment of acquittal is, in essence, the same standard that applies on appeal in determining the sufficiency of the evidence after a conviction." *State v. Little*, 402 S.W.3d 202, 211 (Tenn. 2013) (citing *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Anderson*, 880 S.W.2d 720, 726 (Tenn. Crim. App. 1994)). Because "[t]he standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof, is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction," we will resolve both Defendant's challenge to the denial of the motion for judgment of acquittal and sufficiency of the evidence together. *State v. Thompson*, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000).

Our standard of review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id*. Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d

370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the "State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007).

It is well established that the identity of the perpetrator is an essential element of any crime. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). Identity may be established by circumstantial evidence alone. *See State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

As charged in the indictment, premeditated first degree murder is "[a] premeditated and intentional killing of another[.]" Tenn. Code Ann. § 39-13-202(a)(1) (2018). A person acts intentionally "when it is the person's conscious objective or desire to engage in the conduct or cause the result." *Id*. § 39-11-302(a) (2018). Premeditation "is an act done after the exercise of reflection and judgment. 'Premeditation' means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time." *Id*. § 39-13-202(d) (2018). Additionally, "[t]he mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation." *Id*.

Premeditation "may be established by proof of the circumstances surrounding the killing." *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000). These circumstances include, but are not limited to, "the use of a deadly weapon upon an unarmed victim; the particular cruelty of a killing; the defendant's threats or declarations of intent to kill; the defendant's procurement of a weapon; any preparations to conceal the crime undertaken before the crime is committed; destruction or secretion of evidence of the killing; and a defendant's calmness immediately after a killing." *State v. Davidson*, 121 S.W.3d 600, 615 (Tenn. 2003) (citing *Bland*, 958 S.W.2d at 660; *State v. Pike*, 978 S.W.2d 904, 914-15 (Tenn. 1998)). This court has also noted that the jury may infer premeditation from any planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995) (citation omitted). In addition, a jury may infer premeditation from a lack of provocation by the victim and the defendant's failure to render aid to the victim. *State v. Lewis*, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000). Whether premeditation is present in a

given case is a question of fact to be determined by the jury from all of the circumstances surrounding the killing. *Davidson*, 121 S.W.3d at 614 (citing *Suttles*, 30 S.W.3d at 261; *Pike*, 978 S.W.2d at 914).

When viewed in the light most favorable to the State, the evidence established Defendant's identity as the perpetrator of the offense and that he acted with premeditation. The evidence showed that, on the night of July 7, 2018, Defendant became upset with the victim after the victim refused to go out with Defendant to celebrate Defendant's birthday. Ms. Carroll testified that Defendant stopped at the victim's residence to get a "birthday present" but returned to his car empty-handed and "upset and mad," and he complained that his birthday was "messed up." Mr. Rummage testified that, after the victim told Defendant he would not go out with him, Defendant "stormed out [of] the [the victim's] house in a fury." Defendant spent the next several hours with Ms. Carroll, but then she refused to let Defendant come home with her. Defendant got upset, told Ms. Carroll to "lose his number," and said that "[e]veryone had ruined [his] birthday." Defendant later sent Ms. Carroll a text message, at 2:07 a.m., telling her that he was "out to go to jail." The GPS data from Defendant's car showed that Defendant then drove to the victim's residence, arriving at 2:11 a.m.

Mr. Rummage testified that the victim told him he was leaving the residence and then went outside. Mr. Rummage heard the dogs barking outside, and when he opened the door to call in the dogs, he saw Defendant's car in the driveway. Mr. Rummage heard the victim arguing with someone for about thirty seconds, and then he heard a gunshot. Mr. Rummage woke up Mr. Dudley, and the two men ran outside and found the victim lying in the driveway bleeding from his head. They called 911 at 2:14 a.m. Defendant's car was gone, but his cell phone was in the driveway, where it was later collected by investigators.

The GPS data from Defendant's car showed that Defendant fled the scene at 2:12 a.m. Rather than rendering aid to the victim after the shooting, Defendant drove home and woke up Mrs. Lampley. Defendant was covered in blood, and he told Mrs. Lampley that the victim had been shot and that he had left his cell phone at the scene. Mrs. Lampley then drove Defendant back to the victim's residence, but they took her maroon truck instead of Defendant's car.

At the scene, Defendant told officers a story that was inconsistent with the GPS data later recovered from his car. Defendant told Officer Howell that he had been at the scene at the time of the shooting but indicated that he had been there in his truck. When officers later came to his house to seize his car, Defendant said that it was not at the victim's residence that morning; he then acknowledged that the car had been at the scene but said that it had been parked on the street. Defendant also claimed that he was outside with the victim for some fifteen minutes when the assailants pulled up in a black Pontiac, but the

GPS data from Defendant's car that showed Defendant was at the victim's residence for only seventy-two seconds. After Detective Ervin asked Defendant to leave the scene, Defendant and Mrs. Lampley returned to their home, where Defendant and/or his wife attempted to clean blood from the inside of his car and then took the car to a car wash at four o'clock in the morning. *See e.g., Hackney v. State*, 551 S.W.2d 335, 339 (Tenn. Crim. App. 1977) (concluding that the defendant's flight from the scene and his inconsistent statements following the event indicated a consciousness of guilt from which the jury could infer unlawful conduct on his part toward the victim); *Tillery v. State*, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978) (concluding that guilt may be inferred from the defendant's attempts to conceal or destroy evidence).

Defendant also told an officer that the assailant shot the victim using an AR-15, and the State offered proof that Defendant owned an AR-15. Investigators found numerous photographs of an AR-15 on Defendant's cell phone, and Mr. Stewart testified that, on the night of July 6, 2018, Defendant told him that he kept a loaded AR-15 in the trunk of his car. After hearing about the murder, Mr. Lee alerted police that Defendant had fired an AR-15 on his property, provided investigators with a video showing Defendant's shooting the AR-15, and led investigators to the tree where he had nailed the shell casings fired from Defendant's AR-15. Those shell casings were examined by Mr. Wells, who testified that they were fired through the same weapon as the two shell casings found at the crime scene. Thus, there was sufficient evidence to establish Defendant's identity as the perpetrator of the offense.

Additionally, the jury could conclude that Defendant acted with premeditation based on the circumstances surrounding the killing. *See Suttles*, 30 S.W.3d 252. The jury could reasonably infer from the proof that Defendant procured his AR-15 from his car before using the deadly weapon to shoot the unarmed victim in the back of the head at close range. This court has previously determined, under similar facts, that the evidence was sufficient to support a finding of premeditation. In *State v. Hollis*, 342 S.W.3d 43, 53 (Tenn. Crim. App. 2011), this court concluded:

> [The defendant] . . . went to his car, retrieved his gun, returned to the scene of the fight, and then fired multiple gunshots at the prone victim, including at least one at point blank range. There was no evidence that the victim was armed, and the pathologist who performed the autopsy of his body determined that one of the gunshots he sustained was fired at close range to his back. This evidence was sufficient to support a finding of premeditation.

Id.

Additionally, Defendant did not render aid to the victim following the shooting. *See Lewis*, 36 S.W.3d at 96. Instead, Defendant returned home, where he attempted to destroy and/or secrete evidence of the killing. *See Davidson*, 121 S.W.3d at 615. Officers found evidence that Defendant attempted to clean blood from the inside of his car and then took the car to a car wash. Defendant's AR-15 was never recovered, and Defendant later called Ms. Carroll and instructed her to tell police that she never saw a gun that night. The proof also established that Defendant had a motive to shoot the victim. It showed that the victim had refused to go out with Defendant to celebrate Defendant's birthday and that Defendant had been angry with the victim and had argued with him that night. Ms. Carroll testified that Defendant was complaining that "[e]veryone had ruined [his] birthday" when he dropped her off hours later. The jury could reasonably find that Defendant was still angry with the victim when he returned to the victim's residence, retrieved his AR-15 from his car, and shot the victim.

Given this proof, the evidence is sufficient to support Defendant's conviction for first degree premeditated murder. Defendant is not entitled to relief on this claim.

B. Thirteenth Juror

Defendant asserts that the trial court failed to exercise its mandatory function as the thirteenth juror as to his conviction for first degree premeditated murder and argues that the weight of the evidence does not support the conviction. The State responds that the trial court properly acted as thirteenth juror.

Rule 33(d) of the Tennessee Rules of Criminal Procedure states, "The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." This rule is the modern equivalent of the "thirteenth juror rule" and requires the trial court to weigh the evidence and grant a new trial "if the evidence preponderates against the weight of the verdict." *State v. Blanton*, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). Our supreme court has stated that this rule "imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case[ ] and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment." *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). When a trial judge overrules a motion for new trial, absent any evidence that the trial court expressed dissatisfaction or disagreement with the weight of the evidence or the verdict, this court presumes that the trial judge has served as the thirteenth juror and approved the jury's verdict. *Id*. Once the trial court fulfills its duty as the thirteenth juror and imposes a judgment, appellate review is limited to determining the sufficiency of the evidence. *State v. Moats*, 906 S.W.2d 431, 435 (Tenn. 1995) (citing *State v. Burlison*, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993)).

At the motion for a new trial hearing, the trial court found that the evidence was sufficient to support Defendant's conviction and made clear that it fulfilled its obligation as the thirteenth juror. The trial court stated:

> . . . the Court is aware of its obligation as the [thirteenth] juror. The Court is aware of its obligation to address at the close of the State's proof a Rule 29 motion and then again at the close of all of the proof, which the Court has done. The Court finds that the proof was certainly sufficient to support the [first degree murder] conviction in this case.

Further, the court expressed no disagreement with the jury's verdict before overruling Defendant's motion for new trial. *See Carter*, 896 S.W.2d at 122. Because the trial court fulfilled its duty as the thirteenth juror, our review is limited to the sufficiency of the evidence. *Moats*, 906 S.W.2d at 435. As previously discussed, the evidence is sufficient to support Defendant's first degree murder conviction. Defendant is, therefore, not entitled to relief.

C. Voluntary Intoxication Instruction

Defendant asserts that the trial court erred in failing to instruct the jury on the issue of voluntary intoxication. Defendant acknowledges that he did not request a voluntary intoxication instruction at trial but contends that the instruction was fundamental to his defense and essential to a fair trial. The State responds that Defendant failed to establish that he is entitled to plain error relief based on the lack of a voluntary intoxication instruction.

When a defendant does not object to an allegedly incomplete jury charge, this court will review the issue for plain error only. *State v. Hatcher*, 310 S.W.3d 788, 815 n.15 (Tenn. 2010). Plain error relief is "limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). In order to be granted relief under plain error, five criteria must be met: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Id*. at 640-41; *see also State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (Tennessee Supreme Court formally adopting the *Adkisson* standard for plain error relief). When it is clear from the record that at least one of the factors cannot be established, this court need not consider the remaining factors. *Smith*, 24 S.W.3d at 283. The defendant bears the burden of persuasion to show that he is entitled to plain error relief. *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

In this case, we are not persuaded that Defendant is entitled to plain error relief. First, as noted by the trial court at the motion for new trial hearing, defense counsel may have opted not to request the intoxication charge in hopes that the jury would "give credence to the statements that were given [by Defendant] to the police officers." Thus, Defendant may have waived this issue for tactical reasons. *See Adkisson*, 899 S.W.2d at 641.

Moreover, Defendant has not shown that a clear and unequivocal rule of law was breached. Voluntary intoxication is not in itself a defense to prosecution, but it "is admissible if it is relevant to negate a culpable mental state." Tenn. Code Ann. § 39-11-503(a) (2019). However, mere proof of intoxication does not "entitle an accused to jury instructions . . . ; there must be evidence that the intoxication deprived the accused of the mental capacity to form specific intent." *Hatcher*, 310 S.W.3d at 815 (quoting *Harrell v. State*, 593 S.W.2d 664, 672 (Tenn. Crim. App. 1979)). The inquiry focuses on the defendant's mental capacity at the time of the offense and not whether a defendant was intoxicated. *Id.* Here, there is no evidence that Defendant's intoxication deprived him of the mental capacity to form the culpable mental state required for an intentional and premeditated killing. He is not entitled to plain error relief.

D. Improper Prosecutorial Argument

1. Voicing Personal Opinion on Truth or Falsity of Evidence and on Defendant's Guilt

Defendant argues that, during closing argument, the prosecutor improperly offered his opinion on the truth or falsity of evidence and on Defendant's guilt. He contends that because "every aspect of the prosecution's evidence was circumstantial in nature, the repeated infusion of the prosecutor's opinions of that evidence and of whether [Defendant] was guilty was so improper as to almost certainly affect the jury's verdict to [Defendant's] detriment." The State responds that Defendant waived this issue by failing to raise contemporaneous objections to the prosecutor's argument and that Defendant has not shown that he is entitled to plain error relief.

A trial court has wide discretion in controlling the course of arguments and will not be reversed absent an abuse of discretion. *Terry v. State*, 46 S.W.3d 147, 156 (Tenn. 2001). Closing argument by a prosecutor "is a valuable privilege that should not be unduly restricted." *State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001). That said, Tennessee courts have recognized numerous prosecutorial arguments as improper. It is improper for a prosecutor to engage in derogatory remarks, appeal to the prejudice of the jury, misstate the evidence, or make arguments not reasonably based on the evidence. *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008). "A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *Id.* Rather, "[a]n improper

closing argument will not constitute reversible error unless it is so inflammatory or improper that i[t] affected the outcome of the trial to the defendant's prejudice." *Id.*

In *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003), this court listed five general areas of improper prosecutorial argument during closing: (1) intentionally misstating the evidence or misleading the jury as to the inferences it may draw; (2) expressing a personal belief or opinion as to the truth or falsity of the evidence or defendant's guilt; (3) making statements calculated to inflame the passions or prejudices of the jury; (4) injecting broader issues than the guilt or innocence of the accused; and (5) intentionally referring to or arguing facts outside the record that are not matters of common public knowledge.

"In determining whether statements made in closing argument constitute reversible error, it is necessary to determine whether the statements were improper and, if so, whether the impropriety affected the verdict." *State v. Pulliam*, 950 S.W.2d 360, 367 (Tenn. Crim. App. 1996). In *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court listed the following factors to be considered when determining whether the improper argument of a prosecutor affected the verdict to the prejudice of the defendant:

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

Id.

Here, Defendant failed to raise a contemporaneous objection to the alleged improper arguments. The Tennessee Supreme Court has previously stated that "[i]t is incumbent upon defense counsel to object contemporaneously whenever it deems the prosecution to be making improper argument[,]" explaining that a timely objection gives the trial court the opportunity to assess the State's argument and to take appropriate curative action. *State v. Jordan*, 325 S.W.3d 1, 57-58 (Tenn. 2010). A defendant's failure to object contemporaneously will constitute a waiver of the issue on appeal. *Id.* at 58 (citing Tenn. R. App. P. 36(a)). "[P]lain error review is the appropriate standard of review to apply to

claims of alleged prosecutorial misconduct during closing argument when no contemporaneous objection was lodged at the time of the alleged misconduct but the claim is raised in the motion for a new trial." *State v. Enix*, 653 S.W.3d 692, 700-01 (Tenn. 2022).

Here, Defendant is not entitled to plain error relief because he has failed to show that he did not waive the issue for tactical reasons. *See Adkisson*, 899 S.W.2d at 641. Defendant has not explained why he failed to object to the prosecutor's alleged improper argument. As noted by the State, Defendant was represented by new counsel at the motion for new trial hearing and could have called trial counsel to testify regarding the lack of objections to the prosecutor's comments, but he did not do so. "This [c]ourt can contemplate multiple tactical reasons that would explain why defense counsel may have consciously chosen not to object to the prosecutor's closing argument, and none of those reasons were dispelled in Defendant's brief. Therefore, Defendant has not carried his burden of persuasion." *State v. Darius Alexander Cox*, No. M2017-02178-CCA-R3-CD, 2019 WL 1057381, at *10 (Tenn. Crim. App. Mar. 6, 2019), *no perm. app. filed*. Furthermore, from our review of the State's closing argument, it does not appear that the prosecutor expressed personal opinions about Defendant's guilt; rather, the prosecutor reviewed the evidence presented at trial and argued how it allowed the jury to reach a conclusion that Defendant committed the offense. Thus, no clear and unequivocal rule of law was breached by the prosecutor. *See Adkisson*, 899 S.W.2d at 641. Defendant is not entitled to relief on this claim.

2. Comment on Defendant's Right Not to Testify

Defendant also contends that, in numerous comments during the State's closing argument, the prosecutor made improper references to his decision not to testify. Defendant contends that the State cannot show that the error was harmless beyond a reasonable doubt. The State responds that the issue is waived because Defendant failed to raise contemporaneous objections to the prosecutor's alleged improper comments and that Defendant is not entitled to plain error relief.

Both the United States Constitution and the Tennessee Constitution "guarantee criminal defendants the right to remain silent and the right not to testify at trial." *State v. Jackson*, 444 S.W.3d 554, 585 (Tenn. 2014). The Tennessee Supreme Court has previously cautioned that "[t]he subject of a defendant's right not to testify should be considered off limits to any conscientious prosecutor." *Id*. at 586 (quoting *State v. Hale*, 672 S.W.2d 201, 203 (Tenn. 1984)) (internal quotation marks omitted). In addition to direct comments on a defendant's decision not to testify, "indirect references on the failure to testify also can violate the Fifth Amendment privilege." *Id*. at 587 (quoting *Byrd v. Collins*, 209 F.3d 486, 533 (6th Cir.2000)) (internal quotation marks omitted). In *Jackson*, our supreme court

adopted a two-part test for determining whether a prosecutor's remark amounts to an improper comment on a defendant's constitutional right to remain silent and not testify. *Id*. at 587-88. The two-part test analyzes: "(1) whether the prosecutor's manifest intent was to comment on the defendant's right not to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify." *Id*. at 588. "'[T]he question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury *necessarily* would have done so.'" *State v. Ladarius Lockhart*, No. W2018-00051-CCA-R3-CD, 2019 WL 1753056, at *6 (Tenn. Crim. App. Apr. 17, 2019) (quoting *U.S. v. Sandstrom*, 594 F.3d 634, 662 (8th Cir. 2010)), *perm. app. denied* (Tenn. Oct. 20, 2019). This court reviews a defendant's claim of impermissible prosecutorial comment on the right not to testify de novo. *Jackson*, 444 S.W.3d at 588.

Initially, as acknowledged by Defendant, he waived our consideration of this issue by failing to raise a contemporaneous objection to any of the alleged improper comments made during the State's closing argument. *See Jordan*, 325 S.W.3d at 58. Because Defendant has waived plenary review, we will address whether he has shown he is entitled to plain error relief regarding the alleged improper comments on his right not to testify. *See Adkisson*, 899 S.W.2d at 641-42.

<u>a. Comments Relating to Lesser-Included Offenses</u>

In the State's initial closing argument, the prosecutor reviewed the jury instructions as they related to the elements of the charged and lesser-included offenses. While discussing the elements of and distinctions between second degree murder and voluntary manslaughter, the prosecutor stated:

> "The distinction between voluntary manslaughter" – [which] is the next one below second-degree murder -- "and second-degree murder is that manslaughter requires that the killing resulted from a state of passion produced by adequate provocation from the alleged victim sufficient to lead a reasonable person to act in an irrational manner." What proof have you heard that? What proof have you heard that? They've spent the whole week trying to tell you that [the victim] did not punch [D]efendant. That's not an element of the crime I have to prove. You saw the mouth wound; you saw [the victim's] knuckles. At the end of the day, we don't know what happened.
>
> They were right and pointed out we don't have [D]efendant's DNA on the decedent's knuckles. That's true. They've spent all week trying to convince you [that the victim] didn't punch him in the mouth. It would be

> disingenuous to now argue that he was acting under provocation, provocation no one can prove even happened.
>
> Sufficient provocation from the alleged victim, not provocation from the bad night that you're having. Not provocation that [Mr. Wilcox] wouldn't hook you up with some cocaine. Not provocation from the fact that [Ms.] Carroll wouldn't sleep with you in the car. Not provocation from any of that.
>
> *Provocation from the victim, and what proof have you heard about that? The only person who is still on this side of the ground that knows precisely what happened in the driveway of 401 Woods Drive on July 8th is that defendant right there (indicating.) You haven't heard any proof to support that at all. This adequate provocation, you've not heard an iota of proof of that.* (Emphasis added).

The prosecutor later reiterated, "We just talked about the fact that there's no proof of any provocation. You didn't hear a word to support that. Maybe [the victim] punched [Defendant] in the mouth; maybe he didn't. You never heard any proof of that."

Then, when reviewing the charge for reckless homicide, the prosecutor questioned, "[D]id you hear any proof about this being an accident? Did you hear any proof about that? I didn't hear any proof about that." The prosecutor then directed the jury to consider the charge for criminally negligent homicide and stated, "Did you hear any proof about negligence? Did you hear any proof about accident? I didn't hear any proof about that."

No objections were raised to any of the prosecutor's comments, and no curative instructions were given by the trial court.

Upon review, we conclude that Defendant has failed to establish plain error based on these comments. First, it is entirely conceivable that defense counsel did not object to these comments because—as Defendant acknowledges in his brief—provocation, accident, and negligence were not issues at trial. Defendant's theory throughout trial was that someone else shot and killed the victim and that Defendant was "a victim of wrong place, wrong time to the highest extent." Defendant maintained that an unknown assailant, and not the victim, hit him in the face prior to the shooting, and he argued that the physical evidence supported his claim as his DNA was not found on the victim's scraped knuckles. Accordingly, it is possible that defense counsel waived the issue for tactical reasons. *See Adkisson*, 899 S.W.2d at 641. Defendant has not shown plain error.

b. Comments Regarding Other Suspects

Defendant also points to the following argument from the prosecutor as being an improper comment on his right not to testify:

> *You didn't hear anything -- other than from us -- about the only suspect [D]efendant ever suggested on the scene, which were the Big Lots rock-throwing kids.* He named no other suspects, and he spoke with authority according to Detective Ervin. (Emphasis added).
>
> It was such that Detective Ervin thought he had personal knowledge and thought, this is who did it. This is who I should pursue. The person who claimed to be an eyewitness gave him a suspect. He gave him two -- well, pretty much one incident to look into, and that was it.
>
> Nothing was said about anybody else, so wouldn't have Detective Ervin had been negligent if he had not at least considered that for a moment? The only suspect the eyewitness was giving him were the Big Lots rock throwers. That's what it was about.
>
> You heard testimony from Kameron Dudley and Waylon Wilcox that these were 16- 17-year-old kids who threw a rock at [the victim's] truck months before. They threw a rock at [the victim], so they go shoot him? That doesn't make walking around sense. More than once he described the Pontiac G6 and said it was related to the Big Lots rock-throwing incident.
>
> *That's all he said that night. He didn't mention anybody else. Now, why haven't you heard anything more about that? Because it's absurd, implausible and unreasonable.* (Emphasis added).
>
> Remember that reasonable doubt is our standard here. Nobody is gonna believe that high school kids rolled up at 2:00 in the morning and challenged [the victim] and this defendant -- looking the way he looked that night -- to throw down and get in a fist fight, and one of them went to get the AR and shot [the victim] in the head. These kids who threw these rocks might not be old enough to hold an AR. It's absurd and unreasonable, and that is why you have not heard anything more about that.

Once again, it is not clear why defense counsel did not raise a contemporaneous objection to the prosecutor's argument. Further, it is clear from the larger context that the prosecutor was referencing defense counsel's opening statement and theme that "[p]eople

don't always do their own dirty work," in which defense counsel asserted that there would be proof other suspects had the motive and means to have committed the murder. The prosecutor was pointing out that those assertions by defense counsel had not been borne out by the proof.

In his brief, Defendant cites to *State v. Adam Wayne Robinson*, No. M2013-02703-CCA-R3-CD, 2015 WL 3877705, at *11 (Tenn. Crim. App. June 23, 2015), *no perm. app. filed*, in support of his argument. In *Adam Wayne Robinson*, the defendant did not make a statement to police, and the State argued in closing that the defendant had failed to offer any explanation "through his witnesses" for the young victim's allegations that he sexually abused her. *Id.* This court found reversible error, citing *Jackson* for the holding that "a prosecutor's comments on the absence of any contradicting evidence may be viewed as an improper comment on a defendant's exercise of the right not to testify when the defendant is the only person who could offer the contradictory proof." *Id.* (citing *Jackson*, 444 S.W.3d at 586 n.45). However, the instant case is distinguishable from *Adam Wayne Robinson*. We agree with the State that, in this case, the prosecutor's argument concerning the lack of proof regarding the Big Lots incident did not implicate Defendant's right not to testify "because such proof would necessarily encompass those involved in the Big Lots episode." Individuals other than Defendant could have offered proof to support the theory that the shooting was related to the encounter the victim had in the Big Lots parking lot prior to his death.

Defendant has failed to show that a clear and unequivocal rule of law was breached by the prosecutor's comments and that he did not waive the issue for tactical reasons. *Adkisson*, 899 S.W.2d at 641. Defendant is not entitled to plain error relief.

<u>c. Comments Regarding Defendant's Statements to Police</u>

In the final passage that Defendant highlights as an improper comment on his right not to testify, the prosecutor stated:

> [Mr.] Rummage ID'd [Defendant's] Lincoln as being in the driveway with the headlights on. The ECU data tells us his Lincoln was there. *No proof at all no proof at all other than [D]efendant['s] claiming kids in a Pontiac that anyone else -- that anyone else was ever there.*
>
> *No proof that a Pontiac was in that driveway at all on July 8th or July 7th.* Now, speaking of that driveway, what -- what did [D]efendant tell the police? (Emphasis added).

Following this comment, the prosecutor reviewed, in depth, Defendant's various statements to police about what vehicle he had driven to the victim's residence prior to the shooting and about where his vehicle had been parked and contrasted those statements with the statement of Mr. Rummage and the information police obtained from the ECU data from Defendant's Lincoln.

At the motion for new trial hearing, the State argued that the prosecutor's comments were related to Defendant's statements to police and noted that defense counsel may have withheld his objection for that reason. The trial court agreed, noting that the prosecutor had to address Defendant's statement to police during closing argument and point out the "physical impossibilities" of the statement when compared to the other proof and found that the prosecutor did not make an improper comment on Defendant's right not to testify.

Upon review, we conclude that Defendant has not established that he is entitled to relief under a plain error analysis. As noted previously, Defendant has offered no explanation as to why he failed to object to the prosecutor's alleged improper comments during closing argument. Additionally, when viewed in context, the prosecutor's comments merely pointed out that police could not corroborate any of Defendant's statement and was not "of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify." *Jackson*, 444 S.W.3d at 588. Moreover, unlike the comment in *Jackson*, the comments at issue here came during the State's initial closing argument, giving Defendant the "opportunity to respond to the argument." *Id.* at 592. Defendant has not shown that a clear and unequivocal rule of law was breached or that he did not waive the issue for tactical reasons. *See Adkisson*, 899 S.W.2d at 641. He is not entitled to relief.

3. Shifting the Burden of Proof

Defendant also contends that the prosecutor impermissibly shifted the burden of proof during his initial closing argument. He asserts that the prosecutor "called the jury's attention to the lack of proof submitted by the defense regarding [Defendant's] statements to law enforcement about the Big Lots kids as possible suspects" but contends that, "[a]t no time[,] . . . did the defense ever propose the Big Lots kids as potential suspects for the murder." Defendant argues that the prosecutor's statements "suggested to the jury that [D]efendant should have proved these matters to them[,]" thereby shifting of the burden of proof.

By failing to raise a contemporaneous objection to any of the prosecutor's alleged improper remarks, Defendant waived our consideration of this claim. *See Jordan*, 325 S.W.3d at 58. Moreover, Defendant is not entitled to plain error relief. First, Defendant failed to establish that he did not waive the issue for tactical reasons. *See Adkisson*, 899

S.W.2d at 641. "The decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions. Trial counsel could decide not to object for several valid tactical reasons, including not wanting to emphasize unfavorable evidence." *Gregory Paul Lance v. State*, No. M2005-01675-CCA-R3-PC, 2006 WL 2380619, at *6 (Tenn. Crim. App. Aug. 16, 2006), *perm. app. denied* (Tenn. Dec. 18, 2006).

Defendant also failed to demonstrate that a clear and unequivocal rule of law was violated. We agree with the State that, in his initial closing argument, the prosecutor "did no more than preemptively point out the inconsistencies and holes in [D]efendant's statement to police . . . and challenge [D]efendant's theory that those involved in the Big Lots episode were the possible culprits." *See e.g., State v. David Duggan*, No. E2010-00128-CCA-R3-CD, 2011 WL 4910368, at *17 (Tenn. Crim. App. Oct. 17, 2011) (concluding that "the prosecutor's statements did not shift the burden of proof, but merely recognized the untenable conflicts in the evidence that the jury had to resolve" and that "[t]he State's argument pointing out these inconsistencies did not improperly shift the burden of proof to the [d]efendant"), *no perm. app. filed*.

Furthermore, no substantial right of Defendant was adversely affected. The trial court instructed the jury that Defendant was presumed innocent, that the State had the burden of proving guilt, and that Defendant was not required to testify. "The presumption is that a jury follows the instructions of the court." *State v. Vanzant*, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983). "In order to overcome this presumption, an accused must show by clear and convincing evidence that such instruction was not followed[,]" which Defendant has not done. *Id*. For all these reasons, Defendant is not entitled to plain error relief based on this claim.

E. Cumulative Error

Finally, Defendant asserts that he is entitled to relief under the cumulative error doctrine. He contends that, when considered together, the multiple errors at trial more probably than not affected the jury's verdict to his detriment. 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, Defendant has failed to establish any error entitling him to relief when considered either individually or cumulatively.

III. Conclusion

Based on the foregoing, we affirm the judgments of conviction.

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ROBERT L. HOLLOWAY, JR., JUDGE