IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2023

STATE OF TENNESSEE v. IESHA JONES

Appeal from the Criminal Court for Hamilton County
No. 308196 Don W. Poole, Judge

No. E2022-01287-CCA-R3-CD

The Defendant, Iesha Jones, was convicted by a Hamilton County Criminal Court jury of first degree felony murder; voluntary manslaughter, a Class C felony; especially aggravated robbery, a Class A felony; and reckless endangerment, a Class E felony. *See* T.C.A. §§ 39-13-202(a)(2) (2018) (subsequently amended) (first degree felony murder), 39-13-211 (2018) (voluntary manslaughter), 39-13-403 (2018) (especially aggravated robbery), 39-13-103 (2018 (subsequently amended) (reckless endangerment). The trial court merged the first degree felony murder and voluntary manslaughter convictions and imposed a life sentence. The court also imposed sentences of twenty years for especially aggravated robbery and two years for reckless endangerment. The court ordered concurrent service of the sentences, for an effective life sentence. On appeal, the Defendant contends that (1) the evidence is insufficient to support her convictions for first degree felony murder and especially aggravated robbery, (2) the trial court erred in admitting hearsay evidence, (3) the prosecutor engaged in prosecutorial misconduct, and (4) the court erred in denying her requested jury instructions regarding self-defense and defense of others. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, Jr., JJ., joined.

Hannah C. Stokes, Chattanooga, Tennessee, for the appellant, Iesha Jones.

Herbert Slatery III, Attorney General and Reporter; Mary Elizabeth King, Assistant Attorney General; Coty G. Wamp, District Attorney General; and Cameron Williams and AnCharlene Davis, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant's convictions relate to the robbery and fatal shooting of Norman Sullivan during a drug transaction. Domanic Gillespie was charged as a codefendant, and his and the Defendant's cases were severed for trial. The trial evidence showed that, on September 3, 2018, the Defendant and the codefendant went to the victim's brother's house. The victim, the victim's brother, the victim's girlfriend, a woman named "Kisha," and the victim's roommate were present when the Defendant and the codefendant arrived.

The victim's brother testified that he recognized the Defendant because she had been to the house to purchase drugs previously, and he stated his belief that the Defendant had engaged in sexual acts with the victim in exchange for drugs. The victim's brother said that although the Defendant had always come inside the house alone on previous occasions, the codefendant entered the house with the Defendant on September 3. The victim's brother said that the Defendant and codefendant tried to exchange a gift card for drugs and that they refused to follow the victim's instructions to go to a store to purchase cigarettes with the card to prove that the card had sufficient monetary value to pay for the drugs. The victim's brother said the victim refused to sell drugs in exchange for the card. The victim's brother said the Defendant and the codefendant went into a bathroom to continue speaking with the victim. The victim's brother described the Defendant and codefendant as "real jittery." He said the argument between the victim, the Defendant, and the codefendant became heated.

The victim's brother testified that the codefendant followed the victim into a bedroom. The victim's brother said he pushed the Defendant away to prevent her from entering the room. The victim's brother, who was in the living room with the Defendant, heard the codefendant and the victim arguing. The victim's brother sensed that the victim was becoming frustrated and said the situation was "getting heated." The victim's brother heard the victim say, "[W]e ain't got to go there, we ain't even got to go this way." The victim's brother said the codefendant and the victim broke through the bedroom door, tearing it and its frame from the wall, as they fought. The victim's brother saw the codefendant point a gun at the victim and hit the victim with the gun. The victim's brother said that the codefendant had the gun "shooting down," that the gun jammed, that the Defendant took the gun and stated, "[G]ive it here, let me do this," and that the Defendant tried to "get the gun unjammed." The victim's brother said the Defendant attempted to fire the gun at his face but that the gun did not fire, although she later fired the gun into a wall. The victim's brother said he pushed the Defendant, who was trying to enter the bedroom, and told the victim to run. The victim's brother said the codefendant shot the victim in the back of the head. The victim's brother said that after the codefendant shot the victim, the injured victim told the victim's brother to get a knife, but that the victim's brother was in too much pain from recent surgery to comply. The victim's brother said the Defendant took the gun from the codefendant and fired it at the victim. The victim's brother later

testified that the victim had run outside, that the victim and the codefendant were "tussling" outside, that the victim's brother heard someone at his front door, and that the codefendant shot the victim as the victim reentered the house.

The victim's brother testified that the victim did not have a gun during the incident. The victim's brother acknowledged that he had a knife during part of the incident but said he had dropped it before he pushed the Defendant to prevent her from entering his bedroom. The victim's brother acknowledged his previous testimony that he had seen the victim restrain the codefendant in a headlock in the bedroom. The victim's brother said he saw the victim with the codefendant pinned against the wall while the codefendant repeatedly fired the gun downward. The victim's brother said the victim's head was turned away from the gunfire. The victim's brother said that before the incident, the victim had blocked the Defendant's telephone number and that he had encouraged the victim not to communicate with the Defendant. The victim's brother said, however, that the Defendant repeatedly called the victim before the incident and that the victim had resumed communicating with her.

The victim's girlfriend testified that she was in the bedroom when the victim and the codefendant entered. She said the codefendant held a gun. She said the codefendant followed the victim into the room, pointed the gun at the victim, and attempted to rob the victim. She heard the codefendant say, "You know what this is," to the victim. She said the victim threw a cigarette box containing marijuana and crack cocaine at the codefendant. She said that the codefendant became angry about the small quantity of drugs and that he demanded money. She said the victim threw his wallet at the codefendant. She said the codefendant demanded cigarettes, that the victim "rushed" the codefendant, and that a physical altercation ensued. She said that the magazine fell from the gun, that the Defendant picked up the magazine, that the Defendant got the gun, and that the Defendant "struggled" to insert the magazine into the gun. The victim's girlfriend said she did not see how the Defendant obtained the gun because the victim's girlfriend was trying to escape through the bedroom window. The victim's girlfriend said that she saw the Defendant try unsuccessfully to fire the gun and that the codefendant told the Defendant to disengage the gun's safety. The victim's girlfriend that said she heard gunshots shortly thereafter, that the Defendant had been the last person she saw holding the gun, and that the victim's girlfriend left the house through the bedroom window. She said that she did not see the gunshots occur but that she heard them.

Tennessee Bureau of Investigation (TBI) Special Agent Forensic Scientist Carrie Schmittgen, an expert in forensic biology, testified that the red substance on a towel, which other evidence showed had been found in a laundry basket inside the home where the Defendant was apprehended after the crimes, did not contain blood. She said blood on a knife, which other evidence showed was collected from inside the victim's brother's home, contained the victim's DNA and that the identity of a second, minor contributor could not

be determined from the limited profile obtained. She said the victim's fingernail clippings contained a mixture of the victim's and the codefendant's DNA.

TBI Special Agent Forensic Scientist Russell Davis, an expert in gunshot microanalysis, testified that he examined gunshot residue kits collected from the Defendant and the codefendant. The samples were collected two days after the shooting. He said that the best chance of finding gunshot residue existed when samples were collected within eight hours of a person's having handled or fired a weapon and that residue would be washed or worn away as additional time passed. Upon analysis, he identified a single particle of gunshot primer residue on the sample collected from the Defendant. He did not identify any gunshot primer residue on the sample collected from the codefendant. Agent Davis said he would be surprised to find gunshot residue from a sample collected two days after a person handled or fired a gun. Agent Davis said that, based upon the result of the analysis of the Defendant's sample, he could not determine whether or not she had been "around a weapon or fired a weapon" two days earlier. Agent Davis acknowledged that a person might have gunshot residue on their person if the person were in close proximity when a gun was fired and that gunshot residue might be transferred from one person to another by contact between two people, such as a "firm handshake."

Chattanooga Police Sergeant Victor Miller testified that he and Investigator Hamilton interviewed the Defendant after her arrest on September 5, 2018. He identified a video recording of the interview, which was received as an exhibit and played for the jury. The recording reflects the following: The Defendant and the codefendant, whom she identified as her husband, went to the house where the victim was to get crack cocaine. She said she had her "little plasma card" with a value of "a couple of dollars" to pay for the drugs. She said the negotiations about the transaction had been between the codefendant and the victim. She acknowledged that she and the victim had a prior sexual relationship, about which the codefendant had recently learned. She said she knew the codefendant had a gun when they went to meet the victim. She said the codefendant and the victim went into a bedroom together and that although she had not seen what occurred inside, the codefendant told her they had scuffled. She said she heard a gunshot and saw the codefendant and the victim as they "came through the door" wrestling. She said that she tried to get the victim "off of" the codefendant and that she tried to take the gun from the codefendant. She said that the magazine fell from the gun, that she picked it up, and that she took the gun from the codefendant. She said she put the magazine in the gun. She said that the three of them scuffled and that the gun "went off again." She said that it happened quickly and that the gun "went off" once when it was in her hand. She denied that the gun went off more than once while she had it. She said that she had not pulled the trigger and that the gun fired during the scuffle. She said the victim was trying to escape to the back door. She said the victim had been injured after the first shot and "couldn't make it too . . . far." She said she and the codefendant had the victim's blood on them. She said she and the codefendant fled. She said she later met "Kilo" at a gas station, where

she gave him the gun. She said Kilo was going to dispose of the gun in order to prevent a child from getting it.

Sergeant Miller testified that a small amount of crack cocaine had a street value of $20 to $40. He said he did not know of a drug dealer who would sell crack cocaine for $2.

Sergeant Miller testified that the police had been unable to corroborate the Defendant's claim she had given the gun to Kilo at a gas station after the police obtained the gas station's security video footage for the relevant time period.

James Metcalfe, M.D., an expert in forensic pathology who performed the victim's autopsy, testified that the victim sustained a gunshot wound to the left neck. He said the gunshot had been fired from less than one foot. He said the victim sustained a "loose contact" gunshot wound to the left back of the head. He said the victim's scalp sustained blunt force injuries which were consistent with injuries inflicted with the butt of a gun. He noted bruises and abrasions elsewhere on the victim's body. Dr. Metcalfe's report was received as an exhibit and reflected that the manner of death as gunshot wounds to the head and that the cause of death as homicide.

The Defendant elected not to offer proof. The jury acquitted the Defendant of first degree premeditated murder but found her guilty of the lesser included offense of voluntary manslaughter. The jury also found the Defendant guilty of the charged offenses of first degree felony murder in the perpetration of robbery and of especially aggravated robbery. The jury acquitted the Defendant of attempted first degree premeditated murder of the victim's brother and convicted her of the lesser included offense of reckless endangerment. The trial court merged the two homicide convictions and imposed an effective life sentence. This appeal followed.

I

Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support her convictions of first degree felony murder and especially aggravated robbery. The State responds that the evidence is sufficient. We agree with the State.

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate

courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The 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)).

"The identity of the perpetrator is an essential element of any crime." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Circumstantial evidence alone may be sufficient to establish the perpetrator's identity. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The identity of the perpetrator is a question of fact for the jury to determine. *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt[.]'" *Rice*, 184 S.W.3d at 662 (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)).

A. First Degree Felony Murder

The Defendant argues that the evidence is insufficient to support her first degree felony murder conviction because the State failed to prove her guilt of robbery, the predicate felony. She claims that the State's evidence failed to show she took or intended to take any property from the victim and that it failed to show she knew of any intent the codefendant had to take the victim's property.

As relevant to this appeal, first degree felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery[.]" T.C.A. § 39-13-202(a)(2) (2018) (subsequently amended). "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." *Id*. § 39-13-401(a) (2018). "Criminal responsibility, while not a separate crime, is an alternative theory under which the State may establish guilt based upon the conduct of another." *State v. Dorantes*, 331 S.W.3d 370, 386 (Tenn. 2011) (quoting *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999)). A person is criminally responsible for an offense committed by the conduct of another, if:

> Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]

T.C.A. § 39-11-402(2) (2018). For a defendant to be convicted of a crime under the theory of criminal responsibility, the "evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission." *Dorantes*, 331 S.W.3d at 386; *see State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994).

Viewed in the light most favorable to the State, the evidence shows that the Defendant had obtained drugs from the victim previously, having gone inside the victim's brother's house alone on those occasions. By her own admission, the Defendant knew the codefendant had a gun when they entered the house on the date of the incident. The Defendant was present when the codefendant attempted to purchase drugs with a gift card which had insufficient value to pay for the drugs. When the victim told the Defendant and the codefendant to purchase cigarettes with the gift card in order to prove the card had sufficient value, the Defendant and the codefendant refused. The Defendant and the codefendant were insistent about receiving the drugs, and the victim resisted. The Defendant and the codefendant followed the victim into a bathroom and argued with him. The codefendant entered a bedroom with a gun and said, "You know what this is," and the Defendant attempted to enter the bedroom with the victim and the Defendant. The Defendant was not able to enter, but she heard a gunshot from inside the room. She saw the codefendant and the victim crash through the bedroom door. When the codefendant attempted unsuccessfully to fire the gun at the victim, the Defendant took the gun and inserted the magazine which had fallen from it. She joined the scuffle with the codefendant and the victim, the latter of whom had been injured by the first gunshot, and she discharged the gun. With the victim's blood on her person, she and the codefendant fled the scene, demonstrating her flight from the crime with the knowledge that the victim had been injured. The victim died from his injuries. From this evidence, a rational jury could find beyond a reasonable doubt that the Defendant intended to commit a robbery or to promote or assist in the commission of a robbery of the victim or to benefit in the proceeds of the robbery and that the victim was killed during the robbery. The evidence is sufficient to support the first degree felony murder conviction. [1]

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[1] The State's argument in its brief regarding the sufficiency of the evidence cites, in part, to a transcript of the Defendant's pretrial statement, which is in the technical record as an attachment to a pleading. At the trial, a DVD recording of the Defendant's statement was received as an exhibit and played for the jury. We take this opportunity to remind counsel that a review of the sufficiency of the evidence focuses on the evidence offered at the trial. Documents in the technical record, unless also offered as an exhibit at the trial, are not evidence. In this vein, when a transcript is provided to aid the trier of fact in understanding a recording, the recording, not the transcript, is the evidence. *See, e.g.*, *State v. Mosher*, 755 S.W.2d 464, 469 (Tenn. 1988). In the present case, the record does not reflect that the jury was provided with a transcript to aid in its understanding of the recording. Without regard to whether a transcript is provided to the jury, the appropriate citation in an appellate brief is to the recording as the trial exhibit and to the location on the recording where the relevant information is found. *See* T.R.A.P. 27(a)(6).

B. Especially Aggravated Robbery

Especially aggravated robbery is defined as robbery "[a]ccomplished with a deadly weapon; and . . . [w]here the victim suffers serious bodily injury." T.C.A. § 39-13-403 (2018). As relevant to this appeal, "'[d]eadly weapon' means . . . [a] firearm[.]" *Id.* § 39-11-106(5)(A) (2018) (subsequently amended, renumbered). Also relevant to this appeal, "'[s]erious bodily injury means bodily injury that involves . . . [a] substantial risk of death[.]" *Id.* at (34)(D) (subsequently amended, renumbered).

As we have stated, the evidence is sufficient to show that the Defendant robbed the victim, acted with the intent to promote or assist in the commission of the robbery, or acted to benefit in the proceeds of the robbery. The evidence also demonstrates that the Defendant employed a gun during the commission of the robbery and that the victim suffered serious bodily injury as a result of the Defendant's actions. The evidence is sufficient to support the especially aggravated robbery conviction. The Defendant is not entitled to relief on this basis.

II

Admission of Evidence

The Defendant contends that the trial court erred in permitting the victim's girlfriend to testify about the codefendant's statements during the crimes. The Defendant argues that these statements were inadmissible hearsay. She also argues that the evidence did not establish a conspiracy to rob the victim and that the victim's girlfriend's testimony about the codefendant's statement was the only evidence that a robbery had been attempted or had taken place. The State responds that the Defendant waived consideration of this issue on appeal by failing to renew her objection to this evidence at the trial. The State also responds that plain error relief is not appropriate because the statements were not hearsay, and alternatively, that the statements were admissible as statements of a co-conspirator. We conclude that the court did not err in admitting the evidence.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is inadmissible unless it qualifies as an exception. *Id.* at 802.

A trial court's factual findings and credibility determinations relative to a hearsay issue are binding upon an appellate court unless the evidence preponderates against them. *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015). The determination of whether the statement in question is hearsay and whether a hearsay exception applies are questions of law that are reviewed de novo. *Id.*

The following trial evidence is relevant to this issue: The victim's girlfriend testified the codefendant came into the bedroom and "just basically tried to rob" the victim. She agreed the codefendant had a gun and that he had it "out" when he entered the room. She said the codefendant stated, "You know what this is," which she interpreted to mean that the codefendant "tried to rob" the victim. At this point, the trial court sustained the defense objection that the testimony was speculative as to the codefendant's meaning. The victim's girlfriend testified that after the victim gave the codefendant marijuana and crack cocaine, the codefendant asked, "Man, this is it?" She said that the codefendant asked, "Well, where's your money at?" and that the victim surrendered his wallet. She said the codefendant demanded the victim's cigarettes, at which point the victim became angry and "rushed" the codefendant, precipitating an altercation.

Before the trial, the State filed a motion in limine seeking a ruling that the victim's girlfriend's testimony about the codefendant's statements were admissible pursuant to Tennessee Rule of Evidence, 803(1.2)(E), the hearsay exception for "a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy." The Defendant argued that the evidence failed to establish a conspiracy and that, therefore, the evidence was inadmissible. The State recited the evidence it contended would establish a conspiracy between the Defendant and the codefendant to rob the victim, and it argued that the codefendant's statements showed the understanding between the Defendant and the codefendant to rob the victim. The court found that it would consider the evidence as it was developed at the trial but that statements consisting of "commands" typically were not hearsay.

At the trial, the victim's girlfriend testified on direct examination that the codefendant came into the bedroom with a gun displayed and said, "You know what this is." The Defendant did not object. However, when the prosecutor asked the witness what she thought the codefendant meant by the statement, the Defendant objected on the basis that the question called for speculation. The trial court sought clarification of the basis for the objection, stating, "Well, I think the objection concerned what somebody said, is that what you said?" Defense counsel responded, "The objection was speculation to what it meant when [the witness] claims [the codefendant] said, 'You know what this is.' [The witness] said, 'Well, in our town,' that's speculation to what [the codefendant] may-" The court sustained the objection "so far as speculation." The prosecutor continued to question the witness about the events which transpired between the codefendant and the victim and the additional statements that the codefendant and the victim made, and the Defendant did not object.

The Defendant resurrected her hearsay objection in the motion for a new trial, and the trial court found that the State had established that the Defendant and the codefendant

were at the scene for a robbery and that, "based upon the fact that both were there," no error occurred in its admission of the evidence.

We begin our analysis with the State's waiver argument, based upon the Defendant's failure to renew her objection to the evidence during the trial after having objected during a pretrial motion in limine hearing. The defense has declined the opportunity to address this issue in a reply brief. *See* T.R.A.P. 27(c) (reply briefs). Although the better practice would be to make the objection contemporaneously when the evidence is offered during the trial, the record reflects that, in the pretrial proceedings, the Defendant stated a clear and specific objection to the evidence on the basis that it was inadmissible hearsay which failed to qualify for admission under the exception for the statements of a co-conspirator. Her objection to testimony as speculative pertained to the victim's girlfriend's trial testimony about the meaning of the codefendant's statement to the victim, and the trial court sustained this objection. The Defendant made an objection on a specific basis which informed the court of the issue before the contested evidence was admitted. *See* Tenn. R. Evid. 103(a)(1) (requiring that a timely objection or motion to strike be made which states the specific ground for the requested relief, unless the context is apparent). Our Court of Appeals has recognized that objections will be considered contemporaneous when they were promptly brought to a trial court's attention and the court has an opportunity to take any appropriate curative measures. *Buckley v. Elephant Sanctuary in Tenn.*, 639 S.W.3d 38, 52 (Tenn. Ct. App. 2021); *perm. app. denied* (Tenn. 2021). As relevant to this case, this court has said, "An objection is contemporaneous if counsel makes the objection in a motion in limine or at the time the objectionable evidence is about to be introduced." *State v. Halake*, 102 S.W.3d 661, 669 (Tenn. Crim. App. 2001) (citing *Grindstaff v. Hawks*, 36 S.W.3d 482 (Tenn. Ct. App. 2000)). In the present case, the Defendant's hearsay objection was raised contemporaneously because counsel raised it during the court's initial consideration of the motion in limine, and appellate review is not waived on this basis.

That said, the Defendant's brief cites to caselaw for an incorrect standard of review[2] and to the conspiracy statute. The Defendant has failed to cite any authority to support her argument that the evidence in the present case was inadmissible hearsay. A party who fails to cite authority to support an argument neglects an opportunity to advance its position on appeal and is in peril of waiving this court's consideration of the issue. *See* T.R.A.P. 27(a)(6)(A); Tenn. R. Ct. Crim. App. 10(b). Because the State has provided authority to support its position and because the record reflects the parties' respective positions in the trial court, we elect to consider the issue on the merits. We caution counsel that compliance with the Rules of Appellate Procedure and the rules of this court is expected.

[2] The Defendant cites authority for the general proposition that the admission or exclusion of evidence is subject to review for abuse of discretion. In the case of questions of admission or exclusion of hearsay evidence, such is a question of law which is reviewed de novo. *See Kendrick*, 454 S.W.3d at 479.

The Defendant has not identified the specific "statements" which she alleges were erroneously admitted. She merely complains that the court's ruling allowed the victim's girlfriend "to say whatever she thought [the codefendant] had said, and furthermore to testify as to what she thought he meant by the statements." The focus at the pretrial hearing and the trial was on the statement, "You know what this is," and we will consider whether admission of this statement was error. To the extent that the Defendant complains about the victim's girlfriend having been permitted to testify about what she thought the statement meant, the record reflects that the trial court sustained the Defendant's objection to the victim's girlfriend's testimony about her interpretation of the statement's meaning.

The trial court found that the codefendant's statement, "You know what this is," as recounted in the victim's girlfriend's testimony, was not hearsay. The statement was not offered for the truth of the matter asserted. Rather, it was evidence that the codefendant's state of mind was an intent to rob the victim. *See State. v. Caughron*, 855 S.W.2d 526, 537 (Tenn. 1993) (holding that the co-conspirator's testimony about statements made by the victim was not hearsay because it was offered not for its truth, but to show the victim's state of mind and the reason she was "provoked" to commit the murder); *State v. Julius L. Jones*, No. W2002-02336-CCA-R3-CD, 2003 WL 23100729, at *2 (Tenn. Crim. App. Dec. 30, 2003) (holding that evidence of statements the defendant made to a witness about his belief that the victim had been involved in a robbery were not hearsay and were admissible "to show what provoked [the defendant] to harm the victim"), *perm. app. denied* (Tenn. June 1, 2004). The statement was also relevant because when viewed in conjunction with the victim's response, throwing a box containing marijuana and crack cocaine at the codefendant, was evidence of the effect the statement had on the victim. *See State v. Venable*, 606 S.W.2d 298, 301 (Tenn. Crim. App. 1980) (holding that evidence which is offered to show its effect on the person who heard it, not to show its truth, is not hearsay); *State v. Corey Young*, No. W2020-01173-CCA-R3-CD, 2022 WL 2733689, at *7 (Tenn. Crim. App. July 14, 2022) (stating that evidence which is not offered for its truth and instead is offered to show its effect on the listener is not hearsay).

Because the parties have argued the issue of whether the evidence, assuming it was hearsay, was nevertheless admissible as a statement of a co-conspirator, we will address the issue due to the possibility of further review. *Cf. Jacobs v. State*, 450 S.W.2d 581 (Tenn. 1970) (mem.) (stating that the intermediate court erred by pretermitting its consideration of remaining issues after concluding that error existed as to one issue); *State v. Pendergrass*, 13 S.W.3d 389, 395 (Tenn. Crim. App. 1999) (concluding that, despite insufficiency of the evidence to support the Defendant's convictions, an intermediate court must, nevertheless, address the merits of the remaining issues).

> The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense that is the object of

> the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense.

T.C.A. § 39-12-103 (2018). The trial court found that the Defendant and the codefendant were engaged in a conspiracy. The record supports, as well, that the statement was made "during the course of and in furtherance of the conspiracy." *See* Tenn. R. Evid. 803(1.2)(E). Even if the Defendant's argument that the evidence was hearsay were correct, the evidence was nevertheless admissible as a statement of a co-conspirator. *See id.*

The trial court did not err in admitting the evidence. The Defendant is not entitled to relief on this basis.

III

The Defendant contends that she is entitled to a new trial due to multiple instances of prosecutorial misconduct. She argues that the prosecutor intentionally misled the jury by presenting evidence about a towel with red stains which were not blood, by engaging in "unprofessional and frequent outbursts directed at" defense counsel during the trial, and in making improper closing argument attacking defense counsel. The State responds that the Defendant is not entitled to relief. We agree with the State.

Although an exhaustive list of the bounds of prosecutorial impropriety cannot be defined, five general areas of prosecutorial misconduct have been recognized:

> 1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
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> 2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *See State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); *Lackey v. State*, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978); Tenn. Code of Prof'l Responsibility DR 7-106(c)(4).
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> 3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. *See Cauthern*, 967 S.W.2d at 737; *State v. Stephenson*, 878 S.W.2d 530, 541 (Tenn. 1994).
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> 4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by

making predictions of the consequences of the jury's verdict. *See Cauthern*, 967 S.W.2d at 737; *State v. Keen*, 926 S.W.2d 727, 736 (Tenn. 1994).

5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971).

Goltz, 111 S.W.3d at 6.

If improper argument occurs, a new trial is required only if the argument affected the outcome of the trial to a defendant's prejudice. *Bane*, 57 S.W.3d at 425. In determining whether prosecutorial misconduct affected the jury verdict to prejudice a defendant, this court has stated a court should consider the conduct in light and in context of the facts and circumstances of the case, any curative measures taken by the trial court and the prosecutor, the prosecutor's intent in making the comment, the cumulative effect of the improper comment and any additional errors, the strength or weakness of the case, whether the prosecutor's comments were lengthy and repeated or isolated, and whether the comments were in response to defense counsel's closing argument. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); *see Goltz*, 111 S.W.3d at 5-6.

The relevant trial evidence for the Defendant's argument regarding the red-stained towel is as follows: A former CPD investigator testified on direct examination about items of evidence, including a towel stained with a red substance found in a laundry basket at the house where the Defendant was apprehended on September 3, 2018. The defense did not object to the testimony. On cross-examination, the witness testified that she collected the towel with the red stain because the stain might be blood or red paint and that she wanted to preserve it for testing. The witness acknowledged that she did not know the identity of the substance. Later in the State's case-in-chief, a forensic expert testified that, based upon her analysis, the red substance was not blood. On cross-examination of the forensic expert, defense counsel again elicited the witness's testimony that the substance was not blood.

The Defendant argues that the prosecutor who examined this witness improperly misled the jury by offering as an exhibit a photograph of the red-stained towel despite the prosecutor's knowledge that the red substance was not blood, by referring to the "'white towel with red substance on it' at least five times" during examination of the CPD investigator and by mentioning the laundry basket in which the towel was found "at least

4 times."[3] The Defendant argues that the prosecutor "boisterously objected" when defense counsel "tried to let the jury know that there was no blood on the towel at all . . . and clearly wanted the truth about the towel to stay a mystery until the next day [when the forensic expert testified that the red substance was not blood]." The Defendant argues that the State's manner of presenting this evidence was "an impermissible misstating of the evidence and intentional misleading of the jury." She notes that the witness who testified about the towel's discovery testified near the end of the day and that the forensic expert who said the towel did not contain blood testified the next day. The State responds that this issue is waived because the Defendant failed to object contemporaneously. The Defendant did not file a reply brief in order to respond to the State's waiver argument. *See* T.R.A.P. 27(c).

The Defendant did not object contemporaneously to the conduct of the prosecutor on the basis that the elicited evidence was barred by the Rules of Evidence. The Defendant has not raised an evidentiary basis for exclusion of the evidence on appeal. Thus, we need not consider further whether waiver prevents consideration of an evidentiary basis for exclusion of evidence because no such issue has been presented for review.

Instead, the Defendant's argument is concerned with the conduct of the prosecutor. The Defendant did not move for a mistrial as soon as the conduct occurred. To this extent, we must consider whether the issue of prosecutorial misconduct is waived. Court minutes reflect that, on the last day of the three-day trial, defense counsel made an oral motion for a mistrial outside the presence of the jury, which the trial court denied. The motion was made before the verdict was returned, and we view it as timely. *See Buckley*, 639 S.W.3d at 51-52 (recognizing that in order to be timely, an objection does not necessarily need to be made as "an immediate 'jump up' objection"), *perm. app. denied* (Tenn. 2021); *cf. State v. Christopher Scott Montella*, No. M2020-00016-CCA-R3-CD, 2022 WL 1040126, at *11 (Tenn. Crim. App. Apr. 7, 2022) ("[A] mistrial cannot be granted after the jury verdict has been accepted by the trial court."); *State v. Justin Antonio McDowell*, No. E2020-01641-CCA-R3-CD, 2022 WL 1115577, at *17 (Tenn. Crim. App. Apr. 14, 2022) (stating that when a claim that a mistrial should have been granted is first raised in the motion for a new trial, the issue is waived, and review is limited to one for plain error).

That said, the record is silent as to the basis upon which the Defendant sought a mistrial. Indeed, the Defendant has not asked for review of the prosecutorial misconduct

[3] The record reflects that the State was represented by two prosecutors at the trial and that both were present at the hearing on the motion for a new trial. The Defendant's prosecutorial misconduct allegations pertain to both prosecutors. For purposes of resolving the prosecutorial misconduct claims raised on appeal, it is not necessary to identify which prosecutor was involved in each instance of alleged misconduct. The significance of prosecutorial misconduct is the effect it had on the Defendant's right to a fair trial, which does not require parsing in isolation the separate actions of each prosecutor.

issue on its merits and instead urges this court to take notice of it as a matter of plain error. We will review for plain error.

Plain error relief is limited to errors which are "clear, conspicuous, or obvious" and which affect the defendant's substantial rights. *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016). Five factors are relevant

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

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); *see also State v. Minor*, 546 S.W.3d 59, 70 (Tenn. 2018). All five factors must exist in order for plain error to be recognized. *Smith*, 24 S.W.3d at 283. "[C]omplete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the trial." *Id.*; *Adkisson*, 899 S.W.2d at 642.

In the Defendant's additional arguments regarding alleged prosecutorial misconduct, she alleges that the prosecutor "exhibited unprofessional and frequent outbursts directed at opposing counsel personally instead of focusing on the facts of the case." She makes allegations in her brief about the alleged loud volume and angry tone of the prosecutor's voice during the incidents. She also alleges that the prosecutor spoke in a "yelling voice" with "'jumping up out of your chair' behavior" and that at one point, he "storm[ed] up to the bench." We note defense counsel's animation in her brief, reflected by liberal use of bold, all capital letters, underlining, and exclamation points in quoting from the record, with none of this emphasis appearing in the transcript from which the quotations were taken.

The Defendant complains about limits on the defense's ability to cross-examine the victim's girlfriend about the victim's criminal history. The record reflects that evidence related to the victim's criminal history had been the subject of a motion in limine filed by the State. Specifically, the State sought "an order preventing the Defendant from introducing or mentioning the victim's prior convictions and bad acts involving violence unless or until self defense has been fairly raised by the proof" and requested "a hearing

outside the presence of the jury to determine the admissibility of the . . . evidence." The record does not reflect, however, that the court ruled on the motion in limine before the trial.

The following occurred during the defense's cross-examination of the victim's girlfriend:

> [DEFENSE COUNSEL QUESTIONING THE VICTIM'S GIRLFRIEND]: Do you remember telling the police that [the victim] had just gotten out of 20 years in the penitentiary?
>
> [PROSECUTOR]: Hey, objection.
>
> THE COURT: Sustain. Approach the bench.
>
> (Thereupon, the following bench conference was had of [sic] hearing of the jury:)
>
> MR. WILLIAMS: Can you excuse the jury?
>
> THE COURT: Members of the jury, step out with the court officers for just a second, okay?
>
> [PROSECUTOR]: This is completely unethical. Completely. Pathetic.
>
> THE COURT: Wait just a second.
>
> [PROSECUTOR]: Do you have any idea what you're doing?
>
> THE COURT: Okay. Wait just a second, let the jury be excused. We can probably do that from the podium now.

During the bench conference, the court permitted voir dire of the victim's girlfriend about the contested evidence and ruled that defense counsel could question the witness about her prior statement to the police but that "the questions need to be tailored to stay away from the 20 years in the penitentiary."

Defense counsel resumed cross-examination of the victim's girlfriend, repeatedly inquiring about the witness's memory of her prior statement to the police. During this exchange, the following occurred:

[DEFENSE COUNSEL]: What did you tell police?

[PROSECUTOR]: Objection.

THE COURT: I'll sustain the objection. You may move on with that. I think it's been covered.

Defense counsel continued with cross-examination of the witness. Twice the witness stated that she did not understand the questions she had been asked. The following then occurred:

[DEFENSE COUNSEL]: You said [the victim] was rushing [the codefendant]. I just want to be clear.

[PROSECUTOR]: That's been asked over and over.

THE COURT: Well, I'm going to let her ask the question.

[THE WITNESS]: I mean [I] feel like I'm being badgered at this point.

[PROSECUTOR]: I do too.

[THE WITNESS]: I really do feel like I'm being badgered at this point.

Defense counsel did not object, move to strike the comments, or move for a mistrial, and she continued cross-examining the witness. The first time the Defendant raised the prosecutorial misconduct issue was in the motion for a new trial.

At the hearing on the motion for a new trial, defense counsel made allegations about the prosecutor's "yelling," having "his finger in my face," and "would jump out of his chair and yell, 'Objection,' very loudly." The prosecutor who argued on behalf of the State at the motion for a new trial was not the same prosecutor whom defense counsel alleged was guilty of prosecutorial misconduct relative to the objections, but the record reflects that both prosecutors who participated in the trial were present at the motion for a new trial.[4] The prosecutor who argued at the hearing contested defense counsel's characterization of the conduct which occurred relative to the objections. The prosecutor stated:

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[4] As we stated in footnote 3 above, it is not necessary for purposes of this appeal to analyze the prosecutors' conduct individually.

[I]t's very important for the Court to understand the context of this. Prior to the trial, a motion in limine was filed, a motion in limine that addressed the victim that was testifying, his prior criminal history, any other convictions that he might have had. That was particularly laid out in that in the pretrial discussions about this case, that any convictions of the victim will be addressed in a jury-out hearing, outside of the presence of a jury, in order for that to be addressed as to whether or not it was relevant for those prior convictions to come in.

At that time, throughout the course of the trial, when we had a particular, I think it was [the victim's girlfriend] that was testifying at that time, [defense counsel] went against that order, went against that motion to not address that outside the presence of the jury, and proceeded to ask questions of . . . that witness, regarding those prior convictions.

At that time, [the other prosecutor] did object. I think the issue here that has been – [defense counsel] has alleged throughout the course of her motion, that's been presented to the Court today, is that there was an exaggeration, there was, you know, outbursts, by [the other prosecutor]. Your Honor, I think the issue is the exaggeration of what the record shows. [defense counsel] is trying to fill in the gaps of what the transcripts of the trial actually presented, the manner in which it happened and the manner in which it occurred.

[The other prosecutor] did object to the fact that she inappropriately addressed issues that were supposed to be addressed outside the presence and the hearing of the jury, as he should have. He objected, he approached with Your Honor and with [defense counsel] to deal with those issues and that inappropriate behavior that happened throughout the course of that trial.

In addition to that, those objections that [the other prosecutor] made are necessary to preserve a record for when actions such as [defense counsel] did at that time, that's necessary for that to occur. There was no jumping up, there was no finger-pointing. There was a discussion at the bench regarding [defense counsel's] behavior at the time that she made those statements and those comments. And then even after the Court heard the objection at the bench, after the jury had been removed from the courtroom and after the Court ruled that reference to the victim's prior criminal record has to have a foundation to be laid, [defense counsel] still violated that Court order, still violated the agreement that was made prior to the trial,[5] and continued and

[5] The State has not cited to the record regarding the terms of this alleged agreement, and we have not

proceeded to ask that same witness additional questions about the victim's prior criminal history.

The Defendant's final allegation of prosecutorial misconduct concerns the State's closing argument. She alleges that the prosecutor attacked her personally, called the Defendant "a liar," and called defense counsel "a liar." She has identified the following italicized portions of the State's closing argument:

> *So . . . the defense . . . refers to awful things that [the victim] has done:* Drugs, sexual favors, things of that nature, is that how you're to measure the victim]?
>
> I mean maybe you should measure a man or woman by what they do when they face imminent danger. . . .
>
> . . . .
>
> *And [defense counsel] says there is no proof of taking, there is no proof anything was taken. Well, that's not true,* [the victim] gives him the drugs. [The victim] gives him the cigarette box with the drugs. [The victim] gives them the cigarette pack with the crack cocaine and the marijuana. And he takes it. The robbery is complete at that point there in the bedroom.
>
> . . . .
>
> *Let me talk about a few things [defense counsel] told you in opening statement that were not true* and that you never saw. You will not get an instruction on self-defense. Remember, that was the defense, that's what she told you would come out through the proof. You will not get an instruction on self-defense, you will not consider self-defense as a defense. No.
>
> What else has she said. She said in her opening statement that [the victim's brother] got the defendant in a chokehold and put a knife to her throat. Did we ever hear that? That's just not true. That's just not true. That's not a fact that was borne out through the proof.
>
> *What else, what other misrepresentations.* There was this idea that Detective Miller said that there is no proof in the statement that she intended to commit a robbery. Well, that's not exactly what he said. [Defense

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found the details of it upon review of the record.

counsel] asked him, "Did she ever say she had an intent to rob?" And he said, "No, she never said that." Not that there's no evidence in her statement that she intended to commit a robbery. *But see, the defense doesn't care about that. They don't care about the truth, they don't care about accuracy. They don't care about that. They want to do anything they can do to get one of you to go down a rabbit hole, that's all it takes.* That's all it takes.

What else. That [the victim] didn't remember any details. That is just not true. He had difficulty with the time of day. . . .

. . . .

What else does the defendant exaggerate. Five different angles of photos of where the towel was found. That's just not true. Look at the photos. Two or three photos. We've got to submit that evidence. We can't just, we can't just not present it to you. Remember, she accuses [a crime scene investigator] of being on that topic of the bloody towel for 20 minutes. That's just not true. *That's just completely false. It's a complete exaggeration.* In fact, what [the investigator] said about it was, "That's not my job. My job is to collect what may have evidence or that might be of evidentiary value." She said, "I didn't know if it was blood or paint." And that's why she sent it off to the TBI for analysis. That's just not true. *[Defense counsel] exaggerates and misrepresents.*

. . . .

Remember we discussed in voir dire that people don't always tell you what their intent is. People involved in crimes and murder and they give statements to police don't always tell you what their intent is. *Sometimes they lie to you.* And remember this, remember the testimony about the disposing of the gun. Remember she told Detective Miller and Detective Hamilton that she had disposed of the gun and had given it to her good friend Kilo and had given it to her at the Raceway. And remember what Victor Miller testified to, that they attempted to confirm that. They attempted to determine where she had given this gun away, because it was important to them. Remember why they said it was important to them? Because they didn't want it in the hands of a kid. They didn't want someone else to get the gun. And what did she do? *She lied to them.* She says, "I gave it to Kilo at the Raceway." They looked at the video at the Raceway, for the whole day, and she's not in it. *That's a lie.*

(Emphasis added.)

Although the record reflects that the defense made and the trial court denied a motion for a mistrial on an unknown basis, the record does not reflect that the Defendant moved the court to strike the argument about which she now complains or that she requested a curative instruction relative to the argument. Our supreme court has said that plain error review is appropriate when no objection is made at the time of alleged misconduct but the issue is raised in the motion for a new trial. *See State v. Enix*, 652 S.W.3d 692, 700-01 (Tenn. 2022).

In denying the Defendant's motion for a new trial, the trial court made the following relevant findings:

> In regard to the towel, I don't know that. . . [the issue] would [rise] to the level of reversible error. It did come out, it was made clear later, that there was not blood on that towel. As to whether the State should have gone into that or not, they certainly picked up items of evidence that could have had evidentiary value, it ended up that it didn't. I think it was very clear that that item did not have any evidentiary relevance in regard to the case.
>
> In regard to [the prosecutor's conduct when making objections], I do think that the prosecutor in this case was somewhat a little bit different than I think I would normally see as far as objections and things of this nature. I do think they were directed inappropriately at counsel. I don't think that would rise to the level of a reversible error, but I don't think, in the many cases that this prosecutor has tried, that has ever been shown before with that vehemence, but I don't think that was – I do think it was inappropriate, but I don't think it's reversible error.
>
> And I do think there were some comments made in closing arguments that were not objected to, and quite frankly, the Court sometimes is hesitant to rule on things in closing argument that are not objected to, but my recollection was that the defense lawyer was called a liar.[6] [Defense counsel] characterized it differently. But I thought when the prosecution said the defense indicates that this is self-defense and that's not, true, it's a lie, I think certainly [defense counsel] amply argued that it was. The Court found that the proof did not show that it was self-defense, but to say that that was a lie was, I think, inappropriate and improper. And also to bring in a lot of personal things, some of these things the courts have found are inappropriate, it's inappropriate to talk about personal things in your life.

[6] The transcript of the closing arguments does not reflect that either prosecutor used the word "liar" when referring to the Defendant or defense counsel.

> Now, as [the prosecutor who argued at the hearing] says, the Court made it very, very clear, before the closing arguments, that it's not evidence, it should not be considered as such. In the closing that the Court gave, once again amplified that point that it was not evidence. And there's recent law that sometimes, clearly, when the Court gives that, that unless something is really off the pale, or way outside the bounds, then that's not reversible error.
>
> I do think that some of the statements made by counsel in closing were inappropriate, improper; at that point, once again, not objected to. There's certainly reasons why the defense does not object sometimes, but I did not think that I should interfere, but I do think the instructions the Court gave before and the instructions after, the jury was well aware that the closing of the State and/or the defense was not evidence. So I don't think that rises to the level that this defendant did not receive a fair trial.

With regard to the controversy regarding the prosecutor's actions related to the red-stained towel evidence, we note that a trial is a dynamic proceeding in which evidence is often necessarily presented in piecemeal fashion as witnesses provide various bits of relevant information. The jurors in a criminal trial are instructed to disregard statements of counsel that are not supported by the evidence and not to deliberate until after all of the evidence has been received. *See* T.P.I. – Crim. 1.07, 1.09. In the present case, the jury was informed during the State's case-in-chief that the red stain on the towel was not blood. The jury was not misled about whether the towel contained blood. The Defendant has failed to establish the breach of a clear and unequivocal rule of law, that a substantial right was adversely affected, that she did not waive objection to the issue for tactical reasons, and that we must consider the alleged error in order for her to receive substantial justice. Plain error relief is not required relative to the red towel evidence. *See Smith*, 24 S.W.3d at 282.

The remaining allegations bear more scrutiny. The trial court found the prosecutor's conduct problematic, and the record supports its finding. The record likewise demonstrates that defense counsel and one of the prosecutors were less than professional at times, suggesting that personal animus may have colored their obligations to comport themselves professionally with each other and before the trial court and the jury. *See* Tenn. Sup. Ct. R. 8, Preamble [2] ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."), [6] ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.").

We are troubled by defense counsel's disregard of the State's motion in limine regarding the victim's prior criminal history. The motion specifically requested a jury-out hearing before the introduction of the evidence, and defense counsel's questioning of the

victim's girlfriend was in direct contravention of the State's motion, which the record does not reflect had been ruled upon. Notwithstanding defense counsel's conduct, the prosecutor's comments while the trial court was still attempting to have the jury adjourned were improper and should not have occurred. Whether or not the prosecutor yelled, pointed his finger, or jumped up to object are disputed factual issues that were not resolved by the trial court. The trial transcript is silent as to the prosecutor's volume, tone, or non-verbal actions. We note that no contemporaneous objection to such alleged non-verbal conduct was made in order to preserve on the record relative to the occurrence of any such alleged actions. The Defendant had the burden of demonstrating that she was entitled to a new trial, and this court is limited to review of matters which appear in the record. The statements of counsel at a hearing or in an appellate brief are not evidence. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988).

Turning to closing argument, the trial court found that the prosecutor had engaged in improper argument, characterizing components of the defense and statements of the Defendant and defense counsel as "lies." *See Goltz*, 111 S.W.3d at 6 (stating that a prosecutor who expresses personal belief or opinion about the truth or falsity of the testimony or the evidence engages in unprofessional conduct); *see also* Tenn. Sup. Ct. R. 8, R.P.C. 3.4(e)(3) (stating that a lawyer shall not, during a trial, "state a personal opinion as to the justness of a cause, the credibility of witnesses, . . . or the guilt or innocence of an accused"); *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008) ("[P]rosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices."). "An 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." *Banks*, 271 S.W.3d at 131. The trial court agreed with the Defendant's argument that the prosecutor had engaged in inappropriate personal attacks. The court noted, however, that defense counsel had not objected and that the court had been hesitant to intervene in the absence of conduct which rose to the level of depriving the Defendant of a fair trial.

We have reviewed the record in its entirety. We have given particular attention to the conduct of the prosecutors and of defense counsel during the trial, the context in which the alleged instances of prosecutorial misconduct occurred, and the strength of the convicting evidence. Upon consideration of the record, the findings and the ruling of the trial court at the hearing on the motion for a new trial, and the arguments of the parties on appeal, we conclude that plain error relief is not required. The evidence of the Defendant's guilt of the conviction offenses was overwhelming, and the record does not reflect that the Defendant objected or sought curative instructions at the time of the prosecutor's alleged animated objections or when the improper closing argument was made. We note that for one of the counts, the jury acquitted the Defendant of the charged offense of first degree premeditated murder and, instead, convicted her of the lesser included offense of voluntary

manslaughter. The Defendant has failed to establish that she did not waive objection to the actions and arguments of the prosecutor for tactical reasons and that we must consider the alleged errors in order for her to receive substantial justice. Plain error relief is not required for the remaining allegations of prosecutorial misconduct. *See Smith*, 24 S.W.3d at 282.

The Defendant is not entitled to relief on this basis.

IV

Denial of Self-Defense and Defense of Others Instructions

In her last issue, the Defendant contends that the trial court erred in denying her requested jury instructions regarding self-defense and defense of others. The State responds that the court properly denied the request. We agree with the State.

A criminal defendant has "a right to a correct and complete charge of the law." *State v. Hanson*, 279 S.W.3d 265, 280 (Tenn. 2009) (citing *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000)). As a result, a trial court has a duty "to give proper jury instructions as to the law governing the issues raised by the nature of the proceeding and the evidence introduced at trial." *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013) (citing *State v. Dorantes*, 331 S.W.3d 370, 390 (Tenn. 2011)); *see State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975). A jury instruction related to general defenses, including self-defense, is not required to be submitted to the jury "unless it is fairly raised by the proof." T.C.A. § 39-11-203(c) (2018). An erroneous jury instruction, though, may deprive the defendant of the constitutional right to a jury trial. *See Garrison*, 40 S.W.3d at 433-34.

Our supreme court has concluded that sufficient evidence to fairly raise a general defense "is less than that required to establish a proposition by a preponderance of the evidence." *Hawkins*, 406 S.W.3d at 129. A trial court's determination in this regard "must consider the evidence in the light most favorable to the defendant and draw all reasonable inferences in the defendant's favor." *Id.*; *see State v. Sims*, 45 S.W.3d 1, 9 (Tenn. 2001); *Johnson v. State*, 531 S.W.2d 558, 559 (Tenn. 1975); *State v. Bult*, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998); *see also State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993). If evidence has been presented which reasonable minds could accept as a defense, "the accused is entitled to appropriate instructions." *Johnson*, 531 S.W.2d at 559.

When the evidence presented at the trial fairly raises a general defense, the trial court is required to provide the jury with the appropriate instruction. *Hawkins*, 406 S.W.3d at 129. A jury instruction, though, is "prejudicially erroneous only if the . . . charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law." *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). Because a decision regarding the grant or denial of jury instructions involves a mixed question of law and fact,

our review is de novo with no presumption of correctness. *State v. Benson*, 600 S.W.3d 896, 902 (Tenn. 2020).

> In Tennessee a person acts in self-defense when he or she,
>
> is not engaged in conduct that would constitute a felony or Class A misdemeanor and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if: (A) The person has a reasonable belief that there is an imminent danger of death, serious bodily injury, or grave sexual abuse; (B) The danger creating the belief of imminent death, serious bodily injury, or grave sexual abuse is real, or honestly believed to be real at the time; and (C) The belief of danger is founded upon reasonable grounds.

T.C.A. § 39-11-611(b)(2)(A)-(C) (2018) (subsequently amended). Likewise,

> A person is justified in threatening or using force against another to protect a third person, if:
>
> (1) Under the circumstances as the person reasonably believes them to be, the person would be justified under § 39-11-611 in threatening or using force to protect against the use or attempted use of unlawful force reasonably believed to be threatening the third person sought to be protected; and
>
> (2) The person reasonably believes that the intervention is immediately necessary to protect the third person.

Id. § 39-11-612 (2018).

In denying the Defendant's requested jury instructions on self-defense and defense of others, the trial court noted that the "self-defense instruction does in fact include the thought about who was the original aggressor, or the provoker, and I think the jury could find, at this point in time, that these two defendants were initially the primary aggressors." The court also noted that the Defendant's statement did not contain any indication that the Defendant was in fear for herself or the codefendant during the incident. Noting the evidence of the Defendant's criminal responsibility for the codefendant's actions, the court viewed the codefendant's having confronted the victim with a gun in order to commit a robbery as the provocation which initiated the altercation in which the victim was shot. The court noted *State v. Perrier*, 536 S.W.3d 388 (Tenn. 2017), in which our supreme court held that a defendant engaged in unlawful activity had a duty to retreat before acting in

self-defense as that term is contemplated by the self-defense statute. The court made these additional findings:

> [U]nder the law, anything fairly raised by the proof, the Court has a duty to charge. And I understand [defense counsel] has at least argued that, but the decision that I make is based upon the proof that I've heard, and I'll cite some cases I think do say this.
>
> The one thing that I have already made a decision on is this: The proof that's been presented to the Court and jury is that these parties, . . . entered the premises with a gun. There was an altercation in the bedroom, where [the Defendant] was not present, that resulted in a gunshot, or gunshots, and a hitting about the head of [the victim]. I think that's very clear that that happened, all the proof that's been presented.
>
> So I did find that [the codefendant], accompanied by [the Defendant], was the primary aggressor, and then there's proof that an assault, aggravated assault, was committed at that time, who was the first aggressor. So the reason I go into that, after *Perrier*, the law says that the Court has to make a determination, by clear and convincing evidence, as to whether or not the unlawful act or illegal act was committed. I find that by clear and convincing evidence, that there was. So I think at that point, that the parties had a right to retreat.
>
> One of the charges that I looked at and gave great consideration was a person's right to defend a third party is no greater than the third party's right to defend himself or herself. So the old law that we learned way back in law school or whatever is [the Defendant] stepped into the shoes of [the codefendant], so what were his rights at that time. And I would submit based upon what he had done and based upon what was happening, that [the Defendant] does not have a right to defend him or herself.

We have reviewed the trial transcript, including the Defendant's pretrial statement, the arguments of the parties at the charge conference, and arguments in the parties' appellate briefs. The record reflects that the trial court engaged in a thoughtful and deliberate consideration of the evidence and the parties' respective positions. Our de novo review of the evidence leads us to conclude that the general defenses of self-defense and defense of another were not fairly raised by the proof. *See Benson*, 600 S.W.3d at 902 (standard of review); *Perrier*, 536 S.W.3d 388 (regarding a defendant engaged in illegal activity with a duty to retreat before resorting to the use of deadly force); *Hawkins*, 406 S.W.3d at 129 ("A person's right to defend a third party is no greater than the third party's

right to defend himself or herself.”). The court did not err in denying the requested instructions. The Defendant is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE