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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 18, 2023

STATE OF TENNESSEE v. MARCO LUCIANO CIANFARANI

Appeal from the Circuit Court for Rutherford County
No. F-81335 Howard W. Wilson, Chancellor

No. M2022-01200-CCA-R3-CD

The Defendant, Marco Luciano Cianfarani, was convicted by a Rutherford County Circuit Court jury of aggravated rape, a Class A felony; three counts of aggravated assault, a Class C felony; reckless endangerment with a deadly weapon, a Class E felony; and possession of a weapon by a person with a prior felony conviction, a Class B felony. *See* T.C.A. §§ 39-13-502(a)(2) (2018) (subsequently amended) (aggravated rape), 39-13-102(a)(1)(A) (2018) (subsequently amended) (aggravated assault), 39-13-103(a) (2018) (subsequently amended) (reckless endangerment), 39-17-1307(b)(1)(A) (2018) (subsequently amended) (weapon possession by a convicted felon). The Defendant was sentenced to serve an effective twenty-year sentence. On appeal, the Defendant contends that: (1) the evidence is insufficient to support his aggravated rape and aggravated assault convictions, (2) the trial court erred in permitting the testimony from a witness of whom the defense received late notice, (3) the trial court erred in allowing evidence of the Defendant's prior assault of the victim, and (4) the trial court erred in instructing the jurors to continue deliberating after being notified that one juror disagreed with the other eleven. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and TIMOTHY L. EASTER, JJ., joined.

Whitney Raque (on appeal); and Joshua T. Crain (at trial), Murfreesboro, Tennessee, for the appellant, Marco Luciano Cianfarani.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Jennings Jones, District Attorney General; Sarah Davis and Sharon L. Reddick, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant's convictions relate to incidents occurring on January 29, 2019, and which involved a woman whom he had dated and with whom he had lived previously. The evidence at the trial showed that the victim and the Defendant, who were no longer romantically involved or living together, were guests at the same party on January 28. They spoke to each other, and they later agreed to go separately to the home where the victim had formerly lived with the Defendant in order for the victim to retrieve belongings which she had not yet removed from the home. While at the home, they argued but later engaged in consensual sexual activity. They argued again, and the sexual activity became nonconsensual and involved the Defendant's use of physical force, including choking, on the victim. After the Defendant went to work on January 29, the victim left the home, taking the Defendant's Xanax with her. In response to her taking the Xanax, the Defendant chased the victim and rammed her car repeatedly with his car. The victim agreed to meet the Defendant in a public place but instead went to her aunt's home in Franklin and reported the Defendant's actions to Williamson County authorities, who declined to assist the victim because the incident occurred outside their jurisdiction. The victim and her aunt began driving to Murfreesboro to report the incident to the authorities there, and the Defendant sent the victim text messages threatening to kill himself. The victim called Rutherford County 9-1-1 and reported the suicide threat, and officers went to the home in which the Defendant was a tenant to intervene. By this time, the victim had reported some of the earlier events to the Murfreesboro Police, and eventually, the charges which underlie the present convictions were initiated. The defense at the trial was that the Defendant had committed a domestic assault but that he did not rape the victim.

At the trial, the victim testified that she and the Defendant dated from August 2018 until January 2019. She said they lived together in Nashville for an unspecified period of time and that in approximately October 2018, they moved to Murfreesboro, where they rented a room in a house together. She said the house had four bedrooms and was occupied by Christy Schmidt, who was the homeowner, and other tenants. Three bedrooms were on the first floor, one of which was the one she shared with the Defendant, and the fourth bedroom was upstairs. The victim said the room she and the Defendant shared had a common wall with the homeowner's bedroom. The victim left the house on January 22, 2019, and moved to Franklin to live with her aunt. She inadvertently left some of her belongings at the Murfreesboro house.

The victim testified that, on January 28, 2019, she went to a party at the invitation of "Bones," a man whose given name she did not know and whom she met through the Defendant. When she arrived, she saw the Defendant's car outside the party and sent Bones an electronic message stating that she did not feel safe due to the Defendant's presence. She said "he" came outside and told her she was safe with him and encouraged her to go inside to the party. She said she and the Defendant did not initially speak at the party but

that she "started becoming more civil with him throughout the night." She said she had a migraine headache and lay on the couch during the party and that other guests used cocaine and drank alcohol. She acknowledged the "possibility" that she used cocaine. She said the Defendant used liquid Xanax during the party. She said she left in the early morning hours after telling the Defendant she was going to retrieve her belongings from the house where she had lived with him. She said the Defendant drove separately and met her at the house.

The victim testified that she and the Defendant talked for a while and that he requested oral sex, which she provided voluntarily. She said the Defendant became angry because he could not become erect and blamed her for not making him feel masculine. She said that she was going to take her belongings and leave and that he "slammed" her to the ground and choked her with his hands. She said she was unable to breathe and had "splotchy vision." She said he was angry. She said he lifted her to the bed, bent her over the bed facedown, held her down, pulled down her leggings, and forced his penis into her vagina. She said she repeatedly asked him to stop and told him, "I do not want this." She said that after ten seconds of her pleading, he stopped. She said she was shocked and was confused about whether what had happened was rape. She said that she wanted to do what would be safest for her and that she sat on the bed and dozed all night in order to be able to leave in the morning. She said the Defendant was asleep in the bed. She said she was afraid to leave or to call the police and did not feel like she could leave the room.

The victim testified that when she woke on the morning of January 29, 2019, the Defendant was getting ready for work and asked her to perform oral sex but that she declined. She said he "slammed" her face-first against a wall, yelled at her that she "did not make him feel masculine," and choked her with her necklace for seven to ten seconds. She said she "was freaking out" and did not understand the situation. She described the Defendant as "very angry" but then "acted completely fine . . . like that didn't even happen." She said the Defendant damaged her necklace but stated that it could be fixed and that he loved her. She said that the Defendant never apologized for his actions and that he left for work shortly thereafter.

The victim testified that after the Defendant left, she photographed her neck and took the Defendant's bottle of liquid Xanax, and left the house to drive to her aunt's house. She threw the Xanax bottle out her car window after five or ten minutes. She said that the Defendant called her while she was still in the subdivision where the events with the Defendant had occurred and that he asked if she had stolen his Xanax. She said he saw her driving, chased her through the neighborhood at high speeds, and hit her car with his car "several times." She said she was "terrified." She said she was on her cell phone with the Defendant, who repeatedly said he was going to kill her. She said the Defendant trapped her in a cul-de-sac, got out of his car, and came to her window. She said he told her that he would break the window if she did not lower it. She said that the Defendant asked her

if she had thrown away her Xanax, that she responded she had, that he demanded she give him some of her prescribed Xanax, and that she agreed to meet him at a nearby grocery store. She said she had no intent to meet him at the grocery store and instead drove to her aunt's house.

The victim said that, after telling her aunt what had happened, the victim called Williamson County authorities. She reported that the Defendant had "strangled and hurt" her. She said the person with whom she spoke cut her off and told her to call Rutherford County authorities. She identified a recording of her Williamson County 9-1-1 call, which was received as an exhibit and played for the jury. The victim said she had been unable to report the rape because the 9-1-1 dispatcher cut her off before she had the opportunity to report the rape.

The victim said that she and her aunt decided to drive to Rutherford County to make an in-person report to the police and to show them her physical injuries. She said that while she and her aunt were on their way to Murfreesboro, the Defendant sent her text messages stating he was going to kill himself if she did not come to him. She said he also sent photographs and a video of the Defendant with a gun in his mouth. She called 9-1-1 to report the Defendant's statement that he intended to kill himself. She identified photographs of the text messages, which were received as an exhibit. She said the Defendant stated in one of the messages that he had found a gun belonging to the homeowner's boyfriend, Tony Sheller, and that he was going to use it to commit suicide. She said Mr. Sheller owned several guns, which the Defendant knew.

The victim testified that she told Murfreesboro Police Officer Godfrey about the Defendant's having strangled and raped her and that they called an EMT to the police station to examine her. She said she talked to another officer but remembered Officer Godfrey as the one to whom she reported the rape. She did not recall if she told an EMT about the rape and said the EMT had mostly been concerned with her neck injuries. The victim identified photographs of marks on her neck, shoulder, and ribs. She said her neck hurt afterward "for a while" and that she had a scar on her neck. The victim agreed that she had talked to Sergeant Mongold and to the prosecutor a week or two after the incident. She agreed that she reported "everything that happened" to the prosecutor and that she had testified in court previously about the events. She agreed that her court testimony on the previous occasion and at the trial had been more detailed about the events than what she told Officer Godfrey.

The victim testified that after the Defendant was arrested, he called her a couple of times from the jail. Recordings of the calls were received as an exhibit and played for the jury. In one of the calls, the Defendant professed his love for the victim and apologized. He implored the victim to "wait for" him and not to "give up" on him. He stated that he had an upcoming court date and if the victim decided she "didn't want to do anything about

it," he would be able to get out of jail. The victim told the Defendant that she was not supposed to talk to him and that he should not call her. The Defendant again referred to the court date, told the victim it was "all up to" her, and asked if the victim were seeing anyone else. The Defendant asked why the victim was not happy to hear from him, and she stated that he had hurt her, which he acknowledged was correct, and that he "wrecked into" her car. The Defendant blamed his actions on "benzos" and said he would not take them again. He again professed his love for the victim. The victim told the Defendant that her neck was injured from his strangling her. He said he had been beaten when he was taken to jail and that he "got what [he] deserved." He promised to never hurt the victim again and said he was receiving medication for his mental health in jail. He said he had her engagement ring. In another call, the victim stated that she could not talk to the Defendant, and he responded that she could and that they could "get away with it." The victim said she would "get in trouble," and the Defendant said that she would not get in trouble but that he would. The Defendant became frustrated when he asked if the victim would prefer to communicate through text messages and she continued to insist that she would get in trouble.

The victim testified that she took the Defendant's January 30, 2019 call from the jail because she planned to record it. She agreed that she did not talk to him in some of the calls. When asked why the Defendant questioned her in one of the calls about whether she was seeing someone else, she said their relationship had been "toxic." She said she still had "feelings for" the Defendant when he was in jail and acknowledged she had told him she loved him in one of the calls.

The victim identified photographs of damage to her car, and the photographs were received as an exhibit and shown to the jury. She acknowledged that she continued to exchange text messages daily with the Defendant after she moved out of the Murfreesboro house on January 22, 2019, and that she had exchanged several text messages with the Defendant on January 28.

The victim agreed that she was no longer afraid of the Defendant when they went to the Murfreesboro house in the early morning hours of January 29. She thought "Tony" had been at the house when they arrived and did not recall if the upstairs tenants were there. She said no one who may have been present came to investigate during the rape. She said that when she left on January 29, she took the Defendant's Xanax with her in order to prevent him from using it. She acknowledged that she heard the Defendant call his workplace to report he would be late and that she called his workplace to report that the Defendant was not being truthful because he was chasing her with his car. She said that she called 9-1-1 when she reached Williamson County but that there had been "no time" when she was trapped in the cul-de-sac. She said she may have told the police that she did not want to go to the hospital to be "checked out." She agreed that she did not tell an EMT that she had been raped but said she told the police. She said she did not "know who to tell

what to." She said that, at the time, she did not know if what had happened to her at the hands of "somebody you love" was considered "rape."

The victim agreed that on February 12, 2019, she told Detective Mongold about the Defendant's having called her from jail. She said she had recorded the Defendant's five calls. She acknowledged she could have blocked the Defendant's calls from the jail but said she "did not know how to deal with what was going on." She was unsure if she communicated with the Defendant after the five phone calls but said, "[H]e was messaging me from the [inmate communication] kiosk, but it was just a couple of messages." She acknowledged she had sent a message to the Defendant through the kiosk.

The victim agreed that she applied for an order of protection and that she stated in it that the Defendant "punched [her] in the face many times" on January 29, 2019. She clarified that the punching incidents did not occur on January 29, despite the application for an order of protection stating they had. She explained that she had listed all recent events on the application and said she told the police about them. She acknowledged telling Detective Mongold that she wanted "to get" the Defendant because he had hurt and raped her.

The victim acknowledged that she had been mad at the Defendant on January 28, 2019, for communicating with another woman and said she felt "betrayed." She acknowledged that she had tried to reunite with the Defendant at times and that he had tried to reunite with her at times.

Rutherford County EMT Nick Abbott testified that he and his partner evaluated the victim at the police station on January 29, 2019. He said that the victim reported neck pain and that he saw "finger marks" on her neck and ribs. He noted "raspiness in her voice," which he said might indicate tracheal injuries, and said the victim denied loss of consciousness. He said that he spent about six minutes with the victim, who reported having been assaulted the previous day. He did not ask the victim if she had been raped.

Murfreesboro Police Officer Rick Godfrey testified that he was dispatched to a home in Murfreesboro for a report of a suicidal person "who potentially had a firearm." He said that the Defendant emerged from the home without any signs of injury. He said that during his time at the home, he learned that the Defendant had been involved in a verbal altercation "with his girlfriend" and that he was notified of the girlfriend's presence at the police station. He said the Defendant made conflicting statements about whether he had been involved in a domestic assault. Officer Godfrey said the Defendant stated that the victim would say that the Defendant had "pulled her necklace on her neck."

Officer Godfrey testified that he spoke with the victim at the police station after leaving the call to the home where the Defendant lived. He said the EMTs had seen the

victim before he spoke to her. Officer Godfrey said the victim reported that she had gone to the home where she had lived previously with the Defendant to retrieve her belongings, that she and the Defendant argued, and that the Defendant "became physical," that he "began to strangle her," that he threw her on a bed and forcibly had sex with her despite her repeatedly telling him no, and that he stopped once the sex was not satisfying for him. Officer Godfrey noticed injuries he considered consistent with her account, with the injuries including bruises on her right shoulder, red marks on her neck, and "other marks on her body." He said the victim appeared to be "very scared" and was worried about the Defendant's well-being because the Defendant had sent the victim a video of himself with a gun in his mouth. Officer Godfrey identified photographs he took of the victim's injuries, and the photographs were received as an exhibit. He said he obtained an arrest warrant charging the Defendant with aggravated assault. He said that, in accord with police policy for reports of a rape, he notified Detective Mongold, a special victims' unit detective, about the alleged rape in order for Detective Mongold to investigate. Officer Godfrey said that, to his knowledge, the Defendant was not "tased" during the booking procedure.

Officer Godfrey testified that he had not been told about any consensual sexual activity between the victim and the Defendant and that he did not think he had been told about "an alleged car chase crashing into cars." He agreed that the victim described being choked with the Defendant's hands and showed him "an injury caused by the necklace." He said the victim appeared confused and to be struggling to communicate what had happened. He said most victims did not think about details and were traumatized.

Murfreesboro Police Detective Sergeant Paul Mongold testified that rape kits were typically ordered if the police received a report of a rape occurring within the past five days. He said that he had misunderstood when he spoke to Officer Godfrey that the reported rape had occurred "prior and not part of the incident in my conversation." He said no rape kit had been collected due to his misunderstanding about when the alleged rape occurred, and he apologized to the victim. He said that he became aware around the time of the preliminary hearing that the rape had occurred contemporaneously with the offenses with which the Defendant was originally charged but that by this time, it was too late to collect a rape kit. He said the information about the assault and rape had been stated in Officer Godfrey's report but that he had not read it "at the time."

Sergeant Mongold testified that he interviewed the victim about the alleged rape. He said she reported consensual oral sex, during which the Defendant became angry and began strangling her. She reported the Defendant's raping her and her telling him to stop. She reported taking and disposing of the Defendant's Xanax. She reported the car chase, the Defendant's hitting her car with his car, and the Defendant's threats to kill the victim.

Anthony Sheller testified that, in 2019, he lived in Christy Schmidt's home with the Defendant, the victim, and two other housemates. He said he was employed at the time in

a production facility and worked from 6:30 a.m. until around 2:30 to 4:00 p.m., depending on the day of the week. He said he had been home from about 8:00 p.m. on January 28, 2019, until he left for work at 5:00 a.m. on January 29. He said Ms. Schmidt was out of town for work on the night of January 28. He said that he spoke with the Defendant after Mr. Sheller got home and that the Defendant expressed his desire to reunite with the victim. Mr. Sheller said that he went to bed around 9:30 or 10:00 p.m. and that he heard yelling from the Defendant's room during the night. He said the bathroom and closet separated the room he shared with Ms. Schmidt from the Defendant's room. Mr. Sheller said that the yelling was "really quick" and that he did not understand the words. He said that no one else was "up" when he left for work the next morning.

Mr. Sheller testified that, when he arrived at home after work on January 29, 2019, two police cars were present and that the Defendant was in the Defendant's room with a police officer. Mr. Sheller agreed that the officers appeared to be looking for a firearm. Mr. Sheller said he owned several guns, which he "mostly" kept in a gun safe at the home. He said he kept a Glock with him and stored a .22-caliber revolver in his dresser in the bedroom he shared with Ms. Schmidt. He said that the gun safe was locked and that he had the keys. He recalled that while he was at work on January 29, the Glock had been in his car and the .22-caliber had been in the dresser. He described the .22-caliber as a "Heritage long rifle, .22 revolver" that looked like "a cowboy shooting gun." When shown a photograph of a gun, he identified it as a Heritage .22-caliber. He said it looked like his Heritage .22-caliber, which was a fully-functioning firearm. Mr. Sheller did not know if the Defendant knew where to find Mr. Sheller's .22-caliber. He said, "[The police] just said they had a firearm and asked me if I would look around and see if I had anything missing." Mr. Sheller said that he could not find his .22-caliber when the police were at his house but that after the police left, he found his .22-caliber in the Defendant's car. Mr. Sheller was unable to identify the Defendant in the courtroom and explained that he had not seen the Defendant in two years.

Mr. Sheller testified that he talked to the Defendant by telephone after the Defendant's arrest. Mr. Sheller said the Defendant apologized for coming into Mr. Sheller's room and taking the .22-caliber.

Murfreesboro Police Officer Derrick Buck testified that he responded to a call about a suicidal person at the home where the Defendant lived in January 2019. Officer Buck said that, as he approached the home, other officers were present and advised him that the suicidal person had a revolver and that an assault may have occurred involving the suicidal person and another individual who was no longer present. Officer Buck said that the officers approached the home together and that the Defendant emerged as the officers were getting out of their cars. Officer Buck said that the Defendant got into a white SUV and that he and other officers stopped the Defendant from leaving. Officer Buck identified the Defendant in the courtroom.

Officer Buck testified that he patted down the Defendant and did not find a firearm. Officer Buck said he interviewed the Defendant, who "made it seem like . . . he was kind of joking about being suicidal" but eventually admitted having put a revolver in his mouth. Officer Buck said the Defendant stated that he and his girlfriend had been involved in an altercation. Officer Buck said the Defendant was concerned that his girlfriend was "leaving him." Officer Buck said the Defendant repeatedly denied that the argument with the Defendant's girlfriend had been physical but later said that she would accuse him of breaking her necklace but that she still wore it. Officer Buck said that, at the time, he had not received any information from the dispatcher about the necklace and that this was the first he knew about it. Officer Buck said that when he asked the Defendant why the Defendant's girlfriend would say the Defendant had broken her necklace, the Defendant "basically said he didn't know." Officer Buck said that when the Defendant "opened" his cell phone, Officer Buck saw a video of the Defendant with a gun barrel in his mouth. Officer Buck said the Defendant claimed the video was old but later admitted he had put the gun in his mouth.

Officer Buck testified that, initially, the Defendant was cooperative and did not understand why the police were there. Officer Buck said the Defendant became angry toward the police as he interviewed the Defendant and then became sad about the prospect of going to jail and depressed about the possibility of losing his girlfriend. Officer Buck agreed that, at times, the Defendant was "combative" and exhibited "up and down" behavior. Officer Buck agreed that the Defendant called his mother and stated he had not "touched" the victim and did not have a gun. Officer Buck said that he questioned the Defendant about the location of "the gun" and that the Defendant said the gun was not real and was in the garage. Officer Buck said the gun in the video appeared to be a real, single-action revolver. Officer Buck said the Defendant took him to an airsoft rifle in the garage, which Officer Buck described as a long gun that appeared to be a replica of an AR-15 or M-16 rifle. Officer Buck said that the gun in the video was not the same gun he saw in the garage and that he did not find any other guns in the garage.

Officer Buck testified that, while he was at the house, he spoke to Mr. Sheller, the owner of the gun, who reported that his Heritage .22-caliber revolver was missing. Officer Buck said that he confronted the Defendant with this information and that the Defendant "kind of acted surprised" and continued to insist that the gun in the video was not real. When shown a photograph of a gun that Mr. Sheller had identified as his during Mr. Sheller's direct examination, Officer Buck identified the gun in the photograph as a revolver and said it "definitely could be" a Heritage .22-caliber revolver. He said the gun in the photograph looked like the gun in the video on the Defendant's cell phone and did not look like the airsoft gun in the garage.

Officer Bush testified that a police car camera video recording existed of the call involving the Defendant. An excerpt of the recording was played for the jury. The recording showed the following: Officer Bush approached the Defendant, who was in his car, and patted him down. When Officer Bush asked the Defendant what was going on, the Defendant responded that he and his girlfriend had argued while having sex. Officer Bush questioned the Defendant further, and the Defendant explained that they had argued after the girlfriend stopped performing oral sex because the Defendant was not becoming erect. The Defendant stated that the victim stormed off. The Defendant said that the victim accused him of ripping her necklace off her neck but that this was untrue because she was still wearing the necklace. The Defendant denied that he owned a revolver.

Officer Bush identified a second clip from the video recording from his patrol car, and it was played for the jury. In the recording, the Defendant stated that the police "caught him" on his way to Zaxby's. He volunteered that he "crashed" his car that day and the previous day but said neither collision had been his fault. He said that he had been depressed and that he was "losing [his] girl . . . losing [his] marriage." He denied that anything "physical" happened between him and his girlfriend and said she left. He acknowledged that he had driven around trying to find her. He said that his girlfriend had recently been abusing her prescription Xanax and that he did not "like the person she is when she abuses" her medication. He said that his girlfriend gave him her medication and that he gave it to her in the correct dosage. He agreed that he was a "mediator" of her medication but said that the girlfriend decided on that date that she "wanted to be in control" of her medication, contrary to their previous arrangement. He said that they had argued, that the girlfriend "peeled out down the street" driving in excess of 100 miles per hour, and that "she did laps around" the neighborhood "trying to stay away from" him. He said that the girlfriend agreed to meet him at Kroger but that she never appeared after he went there.

Officer Bush testified that the Defendant admitted chasing the victim to get Xanax. Officer Bush agreed that the Defendant said he "doled out" the victim's medication to her. Officer Bush said that he did not see signs that the Defendant had cut or injured himself but that he saw front-end damage to the Defendant's car that appeared to be from a "crash." Officer Bush stated that the Defendant had said the damage to the car occurred the same day or the previous day and that he and the Defendant did not discuss how the damage occurred. Officer Bush said that the Defendant asked for the victim to come to the scene to talk to him and that the Defendant claimed the victim abused her medication. Officer Bush said the Defendant wanted to know what the victim had told the police. Officer Bush said that, based upon his concerns that the Defendant was suicidal and the unaccounted-for gun, the Defendant was transported to a hospital for a psychological evaluation.

At the close of the State's proof, it elected the following relative to the two counts of aggravated assault alleging that the offense was committed by strangulation:[1]

> Count 2: Aggravated assault by strangulation "occurring in the early morning hours of January 29, 2019, wherein the defendant strangled or attempted to strangle [the victim] by placing both hands around her neck"
>
> Count 3: Aggravated assault by strangulation "occurring in the later morning hours of January 29, 2019, wherein the defendant strangled or attempted to strangle [the victim] by tightening her necklace around her neck"

The defense elected not to present evidence.

After its deliberations, the jury found the Defendant guilty of aggravated rape, three counts of aggravated assault, and reckless endangerment with a deadly weapon.

In a second phase of the trial related to the count of the indictment charging the Defendant with possession of a deadly weapon by a convicted felon, the jury found the Defendant guilty.

The trial court imposed sentences of twenty years for aggravated rape, four years for each of the aggravated assault convictions, one year for reckless endangerment with a deadly weapon, and ten years for weapon possession by a convicted felon. The court merged the reckless endangerment conviction with the aggravated assault conviction involving the use of a motor vehicle as a deadly weapon. The court imposed the aggravated assault convictions consecutively to each other but concurrently with the aggravated rape conviction, and it imposed the weapon possession sentence concurrently with the aggravated rape sentence. The aggravated rape sentence was ordered to be served consecutively to the sentence for the sentences for unspecified convictions in two other cases. The effective sentence imposed for the present case was twenty years. This appeal followed.

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[1] A third count of aggravated assault alleged that the Defendant committed the offense with a deadly weapon, specified as "an automobile."

I

Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his aggravated rape and aggravated assault convictions. 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)).

A. Aggravated Rape

"Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim [in which] [t]he defendant causes bodily injury to the victim[.]" T.C.A. § 39-13-502(a)(2) (2018) (subsequently amended). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required[.]" *Id.* § 39-13-501(7) (2018). "'Bodily injury' includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty[.]" *Id.* § 39-11-106(a)(2) (2018) (subsequently amended and renumbered).

The Defendant's argument focuses on challenges to the victim's credibility. The jury had the opportunity to observe the victim's testimony and to evaluate her credibility, along with the other evidence. As the trier of fact, the jury was entrusted with the duty of

evaluating and weighing the evidence, and this court may not revisit issues of witness credibility and the weight to be afforded to the evidence. *See Bland*, 958 S.W.2d at 659; *see also Sheffield*, 676 S.W.2d at 547.

As we are required, we view the evidence in the light most favorable to the State. Through this lens, we conclude that the evidence is sufficient to support the conviction. The Defendant and the victim initially engaged in a consensual sexual act, but the Defendant became dissatisfied and angry. The Defendant "slammed" the victim to the ground and choked her with his hands until she was unable to breathe. He lifted her to the bed, bent her over the bed facedown, held her down, and forced his penis into her vagina. The victim repeatedly protested, telling the Defendant, "I do not want this." The victim had bruising on her shoulder from the incident.

We have considered the Defendant's contention in the sufficiency-of-the-evidence argument section of his brief that he was charged with and convicted of both aggravated rape and aggravated assault by strangulation and that "the State stacked the offenses." He claims that the strangulation "did not further the rape, was prior to the rape, a separate event, did not help accomplish any rape, and is a different event." This argument is without merit. As we reviewed above, the Defendant used force to restrain the victim to accomplish the rape. The occurrence of strangulation in two of the three aggravated assault convictions has no bearing on the sufficiency of the evidence for aggravated rape.

The Defendant is not entitled to relief on this basis.

B. Aggravated Assault

"A person commits aggravated assault who . . . [i]nentionally or knowingly commits an assault as defined in § 39-13-101, and the assault . . . [i]nvolved the use or display of a deadly weapon; or . . . [i]nvolved strangulation or attempted strangulation." T.C.A. § 39-13-102(a)(1)(A) (2018) (subsequently amended).

A person commits assault who:

> (1) Intentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Id. § 39-13-101(a)(1)-(3) (2018) (subsequently amended).

The Defendant was convicted of three counts of aggravated assault for the following incidents: (1) strangling or attempting to strangle the victim by placing his hands around her neck, (2) strangling or attempting to strangle the victim with her necklace, and (3) placing the victim in fear of imminent bodily injury by use of his car, a deadly weapon.

Again, the Defendant's argument attacks the victim's credibility, which we may not reassess on appeal. *See Bland*, 958 S.W.2d at 659; *see also Sheffield*, 676 S.W.2d at 547. We are perplexed by the Defendant's position on appeal that the victim is incredible as to the aggravated assault convictions, given his theory at the trial that he assaulted but did not rape the victim. Nevertheless, viewed in the light most favorable to the State, the evidence shows that, during the course of a physical assault in the Defendant's bedroom, he placed his hands around the victim's neck and choked her until she was unable to breathe and had "splotchy vision." The victim testified that she was afraid of the Defendant during and after the incident. Second, the evidence shows that in a separate incident hours later, the visibly angry Defendant pushed the victim against a wall and tightened her necklace around her neck, causing her difficulty in breathing and leaving red marks on her neck. EMT Abbott saw finger marks on the victim's neck and noted that her voice was raspy when he spoke with her at the police station, and Officer Godfrey saw red marks on her neck. Third, the evidence shows that the Defendant aggressively pursued the victim in a car chase, repeatedly striking her car with his car and threatening during a telephone call that he would kill her. *See State v. Tate*, 912 S.W.2d 785, 788 (Tenn. Crim. App. 1995) (considering a car to be a deadly weapon for purposes of the aggravated assault statute, provided the defendant used the car to inflict injury or to cause another to reasonably fear imminent bodily injury); *see also State v. Wilson*, 211 S.W.3d 714, 719 (Tenn. 2007) ("An automobile is considered a 'deadly weapon.'") (citing *Tate*). The victim said she was "terrified." Officer Godfrey testified that when he interviewed the victim after these incidents, she appeared to be afraid of the Defendant. The Defendant acknowledged to Officer Buck that he had been involved in a physical altercation with the victim and that he had been in a car "crash" that day. The Defendant's and the victim's cars had body damage. The Defendant admitted in a jail telephone call with the victim that he had hurt her. The evidence is sufficient to support the Defendant's aggravated assault convictions.

The Defendant is not entitled to relief on this basis.

II

Testimony of Witness About Whom the Defense Received Late Notice

The Defendant contends that the trial court erred in permitting Mr. Sheller to testify as a prosecution witness because the defense did not receive timely notice that the State intended to call Mr. Sheller at the trial. The State responds that the court did not abuse its discretion in allowing the witness to testify. We agree with the State.

The record reflects that, on the day of the trial, the court addressed preliminary matters, which included the State's late notice to the defense of its intent to call Mr. Sheller to testify that the gun which the State alleged the Defendant had possessed belonged to Mr. Sheller and that the gun was a functioning weapon, contrary to the Defendant's repeated claims to the police that he had possessed a fake gun. The State acknowledged that it had not notified the defense of its intent to call this witness until "Saturday," with the date of the trial being the following Monday. The defense acknowledged that it had been aware of Mr. Sheller and the substance of his likely testimony and that the defense investigator had interviewed Mr. Sheller. The defense argued that it had prepared its trial strategy with the belief, based upon the absence of Mr. Sheller's name from State's witness list in its discovery response, that Mr. Sheller would not be called at the trial. The defense did not request a continuance in order to revise its trial strategy in light of the State's belated announcement of its intent to call Mr. Sheller.

The trial court made the following findings:

> [The Defendant] is entitled, certainly, to a fair trial which would require adequate preparation.
>
> But I find that [defense counsel] is more than a capable attorney and that his knowing the testimony of this witness, is familiar with this witness, his investigator has talked to him, that his client is not unduly prejudiced by this lack of late-filed notice. So I'm going to allow the witness to testify.

Thereafter, Mr. Sheller testified during the State's case-in-chief as described above. The record does not contain the transcript of the hearing on the motion for a new trial, and this court cannot know whether evidence was presented at the hearing relative to the prejudice the defense alleged it suffered as a result of the trial court's ruling regarding Mr. Sheller's testimony.

Tennessee Code Annotated section 40-17-106 (2018) states that the district attorney general has a "duty" to list on the indictment or presentment the names of witnesses the State intends to present at a trial. However, this duty is "directory only and does not

necessarily disqualify a witness whose name does not appear on the indictment from testifying." *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992); *see State v. Street*, 768 S.W.2d 703, 710-11 (Tenn. Crim. App. 1988). A defendant has the burden of showing that "prejudice, bad faith, or undue advantage" resulted from the State's delay in providing a witness's name. *Harris*, 839 S.W.2d at 69. In the context of prejudice, "it is not the prejudice which result[s] from the witness' testimony but the prejudice which result[s] from the defendant's lack of notice which is relevant to establish prejudice." *State v. Kendricks*, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). A trial court's decision to permit a witness to testify is within the sound discretion of the trial court. *State v. Underwood*, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984).

In the present case, the defense was aware of both the existence of Mr. Sheller as a potential witness and the substance of the facts to which he would testify. The trial court allowed Mr. Sheller to testify, and the record contains no indication that his testimony was at odds with the defense's expectation regarding Mr. Sheller's knowledge of the relevant facts. Although Mr. Sheller was not listed on the indictment or on the witness list provided during discovery, the State notified the defense of its intent to call Mr. Sheller two days before the trial. The defense did not claim surprise in the sense that the State was allowed to present a previously unknown witness or theory; rather, the defense was disgruntled by the State's being allowed to present Mr. Sheller's testimony because his testimony that the gun visible in the text message video was a real gun. This evidence was damaging to the defense strategy that the Defendant had only possessed a fake gun. In other words, the Defendant relies on alleged undue advantage and prejudice from the late notification of the State's intent to call Mr. Sheller.

We note, first, that the defense did not request a continuance in order to recalibrate its strategy once it was aware that the State intended to call Mr. Sheller. Second, the record reflects that, although the State's notification of its intent to call the witness was close to the trial, the defense still had two days before the trial to adjust its strategy and, if it had wanted, prepare an argument in support of a motion for a continuance. Turning to the trial evidence, we note that in addition to Mr. Sheller's testimony as the owner of the gun that the gun in the video was real, Officer Buck also testified for the State that the gun in the video appeared to be a real, single-action revolver and that it "definitely could be" a Heritage .22-caliber revolver, the same kind of gun that was missing from Mr. Sheller's room. Officer Buck said the gun in the video was not the same type of gun as the Airsoft gun the Defendant showed him in the garage and which the Defendant claimed had been the gun in the video. Even if the trial court had barred the State from calling Mr. Sheller, the State would still have had Officer Buck's testimony to show that the Defendant had possessed a real gun. Finally, we note that Mr. Sheller's testimony did not bring to light facts that were previously unknown to the defense. Rather, the witness with the best knowledge of the gun in question was allowed to testify to the authenticity of the gun as a

deadly weapon. The Defendant did not establish prejudice from the court's ruling. We conclude that the court did not abuse its discretion in allowing Mr. Sheller to testify.

III

Admission of Prior Bad Acts Evidence

The Defendant contends that the trial court erred in allowing the victim to testify about a prior assault inflicted upon her by the Defendant. The State responds that the defense opened the door to the victim's testimony that the Defendant previously punched her in the face. We conclude that the court did not abuse its discretion in admitting the evidence.

The record reflects the parties' pretrial agreement that they would "not . . . get into the prior assault." During cross-examination of the victim, defense counsel questioned her about the Defendant's assaultive actions on January 29, 2019. The following questioning then occurred:

> [DEFENSE COUNSEL]: But you've not testified to this jury today that Mr. Cianfarani punched you repeatedly in the face, have you?
>
> A. On a separate occasion.
>
> . . . .
>
> [DEFENSE COUNSEL]: Ms. Short, I would ask you simply to look at that document. Don't make any comments on it yet. Tell me what it is.
>
> A. It's a temporary order of protection.
>
> Q. Does it look familiar to you?
>
> A. Yes.
>
> Q. Is it one that you sought?
>
> A. Yes.
>
> . . . .
>
> [DEFENSE COUNSEL]: [A]s part of receiving or applying for an order of protection you would have been required to offer, basically, a

description of the alleged abuse for which you were seeking protection; is that accurate?

A. Yes.

Q. Under paragraph six where it says "describe abuse," can you see that?

A. Yes.

Q. Is that your handwriting?

A. Yes.

Q. It says: [The Defendant] sexually abused me, strangled me, threatened to kill me, tried to kill me, and punched me in the face many times –

A. Yes.

Q. – all happened on January 29, 2019.

A. Yes. The punching in the face didn't happen on there. I was putting that because of why I wanted it, so I put everything that had happened to me in the relationship and those things happened to me in the relationship.

Q. All happened on January 29, 2019, your handwriting?

A. Yes.

Q. Is it your testimony today before this jury that that's not really true, that all of that didn't happen on January 29, 2019?

A. I was punched in the face the week before, but the rest happened on there and I was putting everything that happened in the recent time on the order of protection. I'm not really sure why I wrote all happened on the 29th, but I can easily prove when it happened.

Q. Did you put it happened all on the 29th because as time progressed you wanted it to be more and more serious for [the Defendant]?

A. Can you rephrase that question?

> Q. Yes, ma'am. Did you put that all of those things happened on the 29th of January, 2019, because as time progressed you wanted the situation to appear more and more and more serious for [the Defendant]?
>
> A. No. I think that the night of the 29th was serious enough, but I felt compelled to tell more about our relationship in the order of protection. I'm not really sure how order of protections work with what date something happened and if anything else had happened with that person is supposed to be on there. I was unsure.

After the defense completed its cross-examination and out of the presence of the jury, the prosecutor requested the trial court's permission to inquire about the prior assault and to introduce photographs of the victim's injuries from it. The prosecutor argued that defense counsel's questioning of the victim about her statements in the order of protection application made the facts of the prior assault "highly relevant" because the defense's questioning had called into question the victim's truthfulness about the events on January 29, 2019. The prosecutor argued, "[F]or all [the jury knows,] it didn't happen because we intentionally didn't get into it [on direct examination]." The prosecutor told the court that defense counsel "knew all along . . . that [the victim] had been punched in the face a week before [January 29]." The prosecutor argued that it was unfair for the defense to have introduced evidence from which it could argue that the victim had lied in the application about the events of January 29. Defense counsel countered that it had not "opened the door" to proof of the prior assault and pointed out that the victim had said in the application that the Defendant punched her in the face on January 29, not on some earlier occasion. The State then sought permission to ask the victim if she had reported the prior assault to the police in order to show the victim's prior consistent statement. The court sustained the objection in part, ruling that the State could "briefly go into the fact" but that it could not introduce photographs of the victim's injuries. The court also ruled that the State could ask the victim if she "told the police on a previous occasion that she was punched in the face." Defense counsel offered not to make a closing argument related to the order of protection if the court would change its ruling regarding the admissibility of the prior assault evidence, but the court allowed the State to ask the limited questions outlined in the court's ruling.

On redirect examination, the prosecutor stated that the victim had said in the order of protection application that the Defendant "punched [her] in the face," that the application stated this occurred on January 29, 2019, and that she testified on cross-examination that the incident occurred on a different day. The victim agreed with the prosecutor's summary of her previous testimony. The victim agreed that she had reported the incident to the police.

The Defendant argues that the evidence about the prior assault was barred by Tennessee Rule of Evidence 404(b), which generally prohibits the admission of evidence related to other crimes, wrongs, or acts offered to show a character trait in order to establish that a defendant acted in conformity with the trait, with certain exceptions. *See* Tenn. R. Evid. 404(b). However, a party may "open the door" to otherwise inadmissible evidence by introducing evidence or by taking action which causes the previously inadmissible evidence to become admissible. *See, e.g.*, *State v. Gomez*, 367 S.W.3d 237, 246 (Tenn. 2012). Likewise, "a party may open the door to otherwise inadmissible evidence by eliciting admissible evidence, in contrast to the doctrine of curative admissibility." *State v. Vance*, 596 S.W.3d 229, 250 (Tenn. 2020) (emphasis in original) (citing 21 Fed. Prac. & Proc. Evid. § 5039.1).

Evidence is relevant and generally admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401, 402. Questions regarding the admissibility and relevance of evidence generally lie within the discretion of the trial court, and the appellate courts will not "interfere with the exercise of that discretion unless a clear abuse appears on the face of the record." *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

We begin with the Defendant's complaint that the trial court did not conduct the Rule 404(b) hearing that was required "upon request." *See* Tenn. R. Evid. 404(b)(1) ("The court upon request must hold a hearing outside the jury's presence [in order to determine whether the evidence is admissible.]") The record reflects that the Defendant did not request such a hearing. His complaint about the lack of a hearing rings hollow in view of his failure to request one.

More significantly, the defense was the first party to elicit evidence about the Defendant's prior bad acts by inquiring about the victim's having stated in the application that the Defendant punched her in the face on January 29, 2019, but not having testified on direct examination about this conduct when she described the January 29 physical assaults the Defendant inflicted on her. If the defense found this evidence objectionable, it should not have placed it before the jury. To the extent that the evidence was inadmissible as prior bad act evidence which would ordinarily be barred, absent an exception, by Rule 404(b), the defense made the evidence relevant by inquiring into the veracity of the information about the Defendant's punching the victim in the face and by suggesting that the victim added additional allegations to the events of January 29 because she "wanted the situation to appear more and more and more serious for [the Defendant]." *See id.* at 401, 402. The trial court reasoned that the State should be allowed to inquire briefly on redirect examination about whether the prior misconduct occurred and to clarify whether any inaccuracy in the order of protection application pertained to the date or the actual

occurrence of the Defendant's prior misconduct. Upon review, we conclude that the court did not abuse its discretion. Once the defense inquired about the incident in which the Defendant punched the victim in the face and impeached the victim with her prior statement in the application that this occurred on January 29, the court properly allowed the State to clarify any implication the defense created that the victim had been untruthful about the existence of the punching incident. *See, e.g.*, *Vance*, 596 S.W.3d at 250 (holding that because the defense created a misleading implication in its cross-examination of a witness, it opened the door to evidence that had previously been ruled inadmissible).

The Defendant argues, as well, that the trial court abused its discretion in allowing the State to ask the victim about her having reported the prior assault to the police. "Prior statements of witnesses, whether consistent or inconsistent with their trial testimony, constitute hearsay evidence if offered for the truth of the matter asserted[.]" *State v. Braggs*, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980) (citing *Mays v. State*, 495 S.W.2d 833 (Tenn. Crim. App. 1972); *Johnson v. State*, 596 S.W.2d 97 (Tenn. Crim. App. 1979)). As a general rule, evidence of prior consistent statements is inadmissible to rehabilitate an impeached witness. *Braggs,* 604 S.W.2d at 885. However, "prior consistent statements may be admissible . . . to rehabilitate a witness when insinuations of recent fabrication have been made, or when deliberate falsehood has been implied." *State v. Benton*, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988); *see State v. Hodge*, 989 S.W.2d 717, 725 (Tenn. Crim. App. 1998). In order to be admissible, the witness's "testimony must have been assailed or attacked to the extent that the . . . testimony needs rehabilitating." *Hodge*, 989 S.W.2d at 725. If admitted for the purpose of rehabilitating a witness, the statement is not hearsay because it is not admitted to prove the truth of the matter asserted in the statement. Neil P. Cohen et al., *Tennessee Law of Evidence* § 8.01[9] (6th ed. 2011). Additionally, a trial court must instruct the jury that the prior consistent statement cannot be used for the truth of the matters contained therein. *State v. Meeks*, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993); *see Braggs*, 604 S.W.2d at 885.

In the present case, defense counsel's cross-examination of the victim suggested that she may have fabricated the face-punching incident in order to exaggerate the extent of the physical assault the Defendant inflicted upon her on January 29, 2019, because she "wanted the situation to appear more and more and more serious" for the Defendant. The trial court determined that the State was entitled to rehabilitate the victim's testimony and fashioned a limited remedy, allowing the State to inquire whether the victim reported the face-punching incident to the police, thereby showing a prior consistent statement about this incident that defense counsel suggested the victim may have fabricated. The record reflects that the court gave a limiting instruction about the limited use of prior inconsistent statements to impeach a witness's credibility, but it does not reflect that the court gave a limiting instruction that prior consistent statements were relevant to witness credibility but were not to be considered for their truth. *See Meeks*, 867 S.W.2d at 374; *see also Braggs*, 604 S.W.2d at 885. We note, however, that the Defendant did not request such an

instruction when the court failed to give it. *See* T.R.A.P. 36(a). Further, the Defendant's theory acknowledged that he had assaulted the victim on January 29 but contested her account of a rape. In these circumstances, we fail to see how the probative value of the evidence of a prior assault was substantially outweighed by the danger of unfair prejudice, even if the jury considered the evidence of the prior assault for its truth. *See* Tenn. R. Evid. 403. We conclude that the court did not abuse its discretion in allowing the State to inquire about the victim's prior consistent statement. *See Hodge*, 989 S.W.2d at 725.

The Defendant is not entitled to relief on this basis.

V

Supplemental Jury Instruction

Finally, the Defendant contends that the trial court erred in instructing the jurors to continue deliberating after being notified that they were deadlocked. He argues that the court's supplemental instructions were "coercive and intimidating," particularly to one juror who did not agree with the others. The State responds that the note and question indicated only that the jury might be deadlocked and that the court did not err in its additional instructions regarding continued deliberations. We agree with the State.

The record reflects that the jury retired to deliberate at 3:00 p.m. and that they returned later with a written question and a written statement from one of the jurors. The record reflects that the jury's question was, "What happens if we have conclusively determined that a unanimous decision cannot and will not be reached. Is that a viable final judgment?" The trial court stated that it was not going to disclose the contents of the statement from the juror at that time. The record reflects, however, that the statement's contents became known to the parties at a later time and that the statement read: "We have one juror who says he don't [sic] see any physical evidence of rape. Does not believe everything [the] victim says!" The written statement also contained a name of a person with the same surname as the jury foreperson.

Before adjourning court for the day, the trial court addressed the jury. We have italicized the portions of this address about which the Defendant complains on appeal:

> Ladies and gentlemen of the jury, I understand that you have a question. I'll say upfront I received two pieces of paper, one had a question and one basically had a statement. I can't entertain statements by the jury, only questions and only questions about the law.

But the question that I can talk about is: What happens if we conclusively determine that a unanimous decision cannot and will not be reached, is that a viable judgment?

So really the law requires that I just really go over the jury instructions that you already have that answers that question, that is the verdict must represent the considered judgment of each juror in order to return a verdict[, it] is necessary that each juror agrees thereto.

Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight and effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

So your verdict has to be unanimous. If a verdict can't be reached unanimously, then I have to declare a mistrial; but we are not at that point. You-all have had this case for an hour and a half. There are numerous counts. So I find it helpful in these type cases – it's been a long three days.

We're at the end of the day. I told you this trial was going to go for four days. We're only in day three. So what we're going to do is we're going to adjourn for the day. We're going to come back tomorrow. I want everybody to come and meet just like you have every morning, report to the jury room.

We'll let you get started again at 9:00 in the morning. If Count 1 is bothering you go to counts two, three, four, and five and then come back to one. But we need to – we've spent a lot of time and a lot of energy, quite frankly a lot of money getting us here to this point; so we're going to have to work a little harder and see if we can't reach a verdict in this case.

So what I'm going to do is let you-all go, see you again early in the morning. Thank you.

The jury returned to court the next day and, after further deliberations, returned its verdicts.

In *State v. Kersey*, 525 S.W.2d 139, 144-45 (Tenn. 1975), our supreme court addressed a trial court's obligations when a jury has reached an impasse in its deliberations. The court adopted Section 5.4 of the ABA Standards Relating to Trial by Jury, which provides:

> **5.4 Length of deliberations; deadlocked jury.**
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

Kersey, 525 S.W.2d 144-45. The *Kersey* court also provided a pattern instruction to be given to jurors when they have reached an impasse in their deliberations.[2] The record reflects that the trial court instructed the jury in accord with *Kersey*, a point with which the Defendant does not quibble on appeal. The question, then, is whether the court's italicized comments above were improper to an extent that they infringed upon the Defendant's right to a trial by jury.

A criminal defendant has a constitutional right to trial by jury. U.S. Const. amend. VI; Tenn. Const. art. 1, § 6. The right to a trial by jury includes the right to have the facts tried and determined by twelve jurors. *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991) (citing *Willard v. State*, 130 S.W.2d 99 (Tenn. 1939)).

The record reflects that the jury reached an impasse after one and one-half hours and inquired of the trial court as to what would happen if they were ultimately unable to agree unanimously. The court received additional, unsolicited information about the jurors' split of opinion but did not disclose this to the parties or mention it in its comments and additional instructions to the jury. The court repeated the *Kersey* instruction, which it had also given during its final instructions before the jury retired to being deliberating. *See State v. Caruthers*, 676 S.W.2d 935, 942 (Tenn. 1984) (holding that the trial court did not err in giving the *Kersey* instruction after the jury sent a note to the court stating that it was divided 11-1 on the question of whether the defendant should receive a death sentence). The court's additional comments highlighted that the case involved several counts, that the jury had only been deliberating for one and one-half hours, and that various resources had been expended to reach this point of the trial. We infer from these observations and from the tenor of the jury's question about what would happen if they could not agree unanimously that the court believed the jury was not hopelessly deadlocked and that further

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[2] The instruction provides as follows:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Kersey, 525 S.W.2d at 145. This instruction may be given, as well, during the main jury charge. *See id.* The record in the present case reflects that the *Kersey* instruction was given during the trial court's main charge.

deliberations might result in the jurors reaching a unanimous verdict. To that end, the court advised the jury that they would need to "work a little harder" to try to reach a verdict and that it would adjourn for the evening and allow them to resume deliberations the next morning. The court answered the jury's question about what would happen if they could not reach a unanimous verdict, explaining that it would be required to grant a mistrial, thereby indicating that the court would accept this outcome if further deliberations proved unfruitful in reaching a unanimous verdict. Notably, the court did not require the jury to deliberate for an undue amount of time or demand that any one of them surrender their honestly-held convictions in order to reach a unanimous verdict. *See Kersey*, 525 S.W.2d at 144-45. Contrary to the Defendant's assertion, the court did not direct its comments and instructions to a particular juror. *See State v. Baxter*, 938 S.W.2d 697, 704 (Tenn. Crim. App. 1996) (holding that the trial court did not err by giving the *Kersey* instruction and noting that the court did not single out jurors in the minority with its comments, which included remarks about the relatively short amount of time the jurors had deliberated and the time and effort which had been expended on the trial). The court's comments about the resources expended was brief and not pointed. *See State v. Richard William Phillips*, No. E2021-01070-CCA-R3-CD, 2022 WL 17694167, at *2 (Tenn. Crim. App. Dec. 15, 2022) (cautioning that "courts should be careful to avoid referencing the time, effort, and money spent on a trial" but concluding that the trial court's minimal remarks had no coercive effect on the jury in returning its verdict), *perm. app. denied* (Tenn. Apr. 17, 2023).

The Defendant's claim that the trial court's comments and instructions were "coercive and intimidating" and that they singled out a lone juror is not supported by the record. The Defendant was not denied his right to a jury trial, and he 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.

____
ROBERT H. MONTGOMERY, JR., JUDGE