IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2023 Session

STATE OF TENNESSEE v. JOSEPH Z. KIBODEAUX

Appeal from the Criminal Court for McMinn County
No. 20-CR-227 Andrew Mark Freiberg, Judge

No. E2022-01445-CCA-R9-CD

We granted this interlocutory appeal to review the trial court's order denying the State's motion to admit the preliminary hearing testimony of one of the victims who had subsequently, and unrelatedly, been killed, and granting the Defendant's motion to exclude said testimony. The Defendant argued that the trial court should exclude the victim's former testimony because the State withheld exculpatory information prior to the preliminary hearing in violation of the Defendant's rights to confrontation, due process, and a fair trial. The trial court agreed with the Defendant, and the State appeals. Following our review, we reverse the trial court's order and remand the case for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Order of the Criminal Court Reversed; Case Remanded

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

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Stephen D. Crump, District Attorney General; and Matthew L. Dunn, Assistant District Attorney General, for the appellant, State of Tennessee.

Derek T. Green, Madisonville, Tennessee, for the appellee, Joseph Z. Kibodeaux.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

A. Affidavit of Complaint

On May 7, 2020, Athens Police Department ("APD") Detective Blake Witt filed an affidavit of complaint seeking the Defendant's arrest for the first degree murder of Layla Long and the attempted first degree murder of Tremon Hall. The affidavit of complaint reflected that on May 5, 2020, at approximately 12:17 a.m., APD officers were dispatched to a "shots fired" call at an apartment on Walker Street in Athens. Upon arrival, officers were led into the apartment by Mr. Frank Jeffreys, who advised that the two individuals inside had been shot. Mr. Hall, who was responsive, was found lying in the living room floor suffering from a gunshot wound to his lower extremities. Ms. Long, Mr. Hall's girlfriend, was observed lying in the hallway of the apartment and appeared to be deceased from an apparent gunshot wound to the chest.

While rendering aid and securing the scene, Corporal Justin Weir spoke with both Messrs. Hall and Jeffreys. They advised Corporal Weir that a man named "Johnny" came to the door and fired a weapon inside the apartment. Both men mentioned the name Johnathan Clayton as a possible shooting suspect. When Corporal Weir asked Mr. Hall if Mr. Clayton was the one who shot him, Mr. Hall replied "yeah." Mr. Hall advised that he had a history with Mr. Clayton but thought that the issues had been resolved. Mr. Hall could not describe the type of firearm that was used.

According to Det. Witt, Lieutenant Fred Schultz further spoke with Mr. Jeffreys on the scene. Mr. Jeffreys indicated to Lt. Schultz that he was sitting on the couch with Ms. Long and that Mr. Hall was in the kitchen cooking when someone knocked on the door. According to Mr. Jeffreys, when Mr. Hall asked who was at the door, someone on the other side of the door said "Johnny." After Mr. Hall opened the door, Mr. Jeffreys heard two gunshots and saw the victims fall to the ground. Mr. Jeffreys jumped up, closed and locked the door, and called 911. Mr. Jeffreys also could not describe the gun that was used.

Officers collected statements from neighbors, and a number of those neighbors described hearing two gunshots and noticing a dark, possibly black, pickup truck drive away from the scene. Officers also recovered video footage from one of the neighbor's surveillance cameras. The neighbor advised that the time on the camera was off by ten minutes or so. According to Det. Witt, the footage showed that at around 12:18 a.m., a black-colored Dodge pickup truck appeared and parked in a parking spot near the corner of a next-door neighbor's apartment. The truck lights "black[ed]-out" before two subjects wearing hoodies and dark-colored clothing exited and walked toward Mr. Hall's apartment. After thirty to forty seconds passed, the two subjects ran back toward the truck and sped away.

The following day, on May 6, 2020, Det. Witt, along with Detective Nick Purkey, spoke with the victim, Mr. Hall, at the police station. According to Det. Witt, Mr. Hall relayed the following information:

> Tremon stated he was in the kitchen cooking when he heard one knock on the door but didn't pay it any mind, he advised he then heard a second knock and asked who it was and the person replied Johnny. Tremon advised he opened the door and when he did, he saw a gun and heard the shot. He stated the first shot must have hit Layla because she screamed and then the second one hit him and he fell to the side.
>
> I asked Tremon if he recognized the voice and he stated yes that it was Johnny Clayton, he stated Joseph Kibodeaux was the other shooter. I asked how he knew that and he stated he [had] seen Joseph standing behind Johnny before the shots started. He described Johnny Clayton as having glasses and that they both had on dark colored hoodies.
>
> I asked what would be the motive behind this and Tremon stated a month and a half ago he "whooped" Johnny Clayton outside of his apartment over claims of his dope being short. Tremon stated that Joseph Kibodeaux is Johnny's cousin and during that altercation Joseph kept reaching in his waist band then threatening him.

That same day, Det. Witt received information that Mr. Clayton was staying at the residence of Savannah Epps in Sweetwater. Upon observing the same truck from the surveillance footage parked at Ms. Epps' home, Det. Witt obtained a search warrant for the truck and residence. When the warrant was executed, Mr. Clayton was present inside the home. The residence was searched, and the truck was impounded. Mr. Clayton invoked his right to remain silent and did not give a statement.

Based upon the information in the affidavit of complaint, a magistrate determined that probable cause existed and issued an arrest warrant. The Defendant was subsequently arrested on May 10, 2020.

B. Preliminary Hearings

Mr. Hall testified at Mr. Clayton's preliminary hearing on May 20, 2020.[1] Seven days later, on May 27, 2020, Mr. Hall testified at the Defendant's preliminary hearing in McMinn County general sessions court. At the outset of the preliminary hearing, the general sessions court stated, "I know you gentlemen were here last week. So, this is going to be basically a recitation of the same thing."

Mr. Hall testified that on the night of the offenses, he was in his apartment with Ms. Long and Mr. Jeffreys.[2] While Mr. Hall was in the kitchen of his apartment cooking, he heard a knock on the door. He went to the door and asked for the person(s) to identify themselves, and someone on the other side of the door said his name was "Johnny." As soon as he opened the door, "the shooting started." Mr. Hall only heard two shots, but he thought that there actually could have been as many as five. The second shot struck him in the buttocks and exited the front side of his body. As he tried to close the door, he fell to the ground. He heard Ms. Long scream and "mak[e] a sound like she couldn't breathe" before she fell to the ground.

Mr. Hall said that he saw both the Defendant and Mr. Clayton at the door, that they were both wearing hoodies, and that they were both armed. Mr. Hall testified that the next-door neighbor's light was on and that he could see "pretty well." Ms. Long had been shot, and she died from her injuries. Mr. Hall was treated for his injuries at Erlanger Hospital in Chattanooga.

Mr. Hall explained that about a month prior to May 5, 2020, he had been involved in a physical altercation with Mr. Clayton after Mr. Clayton had demanded money relative to a drug transaction. Mr. Hall further stated that on the day after this fight with Mr. Clayton, he "had some words" with the Defendant. According to Mr. Hall, the Defendant and Mr. Clayton were cousins, and the Defendant was mad that Mr. Hall had beaten up Mr. Clayton. Following this exchange, the Defendant went to his truck and, before driving away, said to Mr. Hall that he would "be back."

The Defendant was present at the preliminary hearing and represented by counsel, who cross-examined Mr. Hall. On cross-examination, Mr. Hall admitted to smoking marijuana on the night of the shooting. Mr. Hall indicated that the door was not open "all

[1] The trial judge stated this fact at the hearing that occurred on June 10, 2022.

[2] Sometimes in these proceedings, Mr. Jeffreys last name is spelled Jeffries. For consistency, we will spell his name as spelled in the affidavit of complaint.

the way" when the shooting started, being open approximately eighteen inches in his estimation. He described that he saw the two armed individuals standing side-by-side when he opened the door and that he thought one of the guns was a .40 caliber. He explained that after hearing the first shot, he turned to close the door but was then hit by the second shot.

Regarding his statement to the police officers on the night of the shooting, Mr. Hall said that he told "Officer Jamie" that "Johnny" was the shooter, and he confirmed that he did not mention the Defendant at that time. When asked why he did not mention the Defendant, Mr. Hall explained, "Man, I just watched someone – my girlfriend pass away. I was so – I don't know. It was just crazy. I was – there was so much going on. I was just glad to be alive." When Mr. Hall was asked if he told anyone else about the shooting, Mr. Hall indicated that he had spoken with his mother the next day following his release from the hospital and that he told her he "got shot by two n------." Mr. Hall also recalled later speaking with a detective about the incident.

Defense counsel indicated that "last week," Mr. Hall had testified about "a bag of dope" and asked Mr. Hall about his prior altercation with Mr. Clayton in relation to the drugs. Mr. Hall said that Mr. Clayton had claimed he sent a friend with money to obtain "a bag of dope" from Mr. Hall but that Mr. Clayton believed "something wasn't right." Mr. Hall denied being involved in any sort of drug transaction.

In determining that there was sufficient proof to bind the case over to the grand jury, the general sessions court commented,

> There's been some probative questions asked which are similar . . . to the ones that were asked last week. So that may be part of the strategy that's being developed. But as far as what we've got today quite frankly even if there was some issue of retribution involved, it still wouldn't necessarily be a defense.

C. Subsequent Trial Court Proceedings

On September 15, 2020, the McMinn County grand jury indicted the Defendant, along with Johnathan Clayton, for conspiracy to commit first degree murder, premeditated first degree murder, attempted first degree murder, and possession of a firearm by a convicted felon. *See* Tenn. Code Ann. §§ 39-12-101, -12-103, -13-202, -17-1307.

On August 13, 2021, the Defendant filed a discovery request, and subsequently, on August 23, 2021, the State provided discovery to the Defendant, to wit: Corporal Weir's body camera footage from the scene, and police statements from Mr. Hall and Mr. Jeffreys.[3] Mr. Hall was killed in an unrelated homicide on September 25, 2021. Thereafter, the State provided Mr. Hall's hospital records from Erlanger pertaining to his May 2020 treatment for his gunshot wound in this case that indicated Mr. Hall reported being shot by "someone . . . through the door" and that he did not see the type of gun used.

On February 24, 2022, the State filed a motion to declare Mr. Hall an unavailable witness and to introduce his preliminary hearing testimony at trial pursuant to Tennessee Rule of Evidence 804. The State argued that the preliminary hearing testimony was admissible under Rule 804(b)(1), which explicitly authorizes the introduction of former testimony by an unavailable witness "at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." The State cited *State v. Bowman*, 327 S.W.3d 69, 88-89 (Tenn. Crim. App. 2009) (quotation and alteration omitted), for the proposition that "[a] preliminary hearing transcript is precisely the type of former testimony contemplated under Rule 804(b)(1)." Citing *State v. Clayton*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *12 (Tenn. Crim. App. July 31, 2019), the State further noted, "Courts of this state have consistently upheld the admission of testimony from a preliminary hearing when the defendant had an opportunity to cross-examine a witness who was subsequently deemed unavailable."

In response, the Defendant filed a motion to exclude the preliminary hearing testimony of Mr. Hall under Tennessee Rules of Evidence 403 and 804 and the confrontation clauses of both the United States and Tennessee Constitutions. The Defendant agreed that Mr. Hall was now unavailable, but he noted that Mr. Hall's unavailability was through "no fault of the defendant or codefendant." In the motion, the Defendant asserted that Mr. Hall's preliminary hearing testimony was inadmissible because he did not have an opportunity and similar motive to develop the testimony at that hearing, which was limited to a probable cause finding and did not require proof beyond a reasonable doubt. The Defendant noted that he was not provided with any discovery prior to the preliminary hearing other than the affidavit of complaint and that he was not provided with a written statement of the proof to be presented at the preliminary hearing, nor notice of which witnesses were to be called. According to the Defendant, he was not given enough time to prepare for cross-examination or develop witnesses of his own. The Defendant also noted that additional charges were added by the indictment. He concluded that the

[3] We glean this information regarding discovery from the facts provided in the trial court's order excluding the preliminary hearing testimony. There is no discovery motion in the record on appeal.

admission of Mr. Hall's preliminary hearing testimony would violate his confrontation rights, would be misleading to the jury and produce unfair prejudice under Tennessee Rule of Evidence 403, and would not satisfy the requirements of Tennessee Rule of Evidence 804.

On June 9, 2022, codefendant Clayton filed a motion to exclude Mr. Hall's preliminary hearing testimony under Tennessee Rules of Evidence 403 and 804, the Confrontation Clause, and *State v. Allen*, No. M2019-00667-CCA-R3-CD, 2020 WL 7252538, at *1 (Tenn. Crim. App. Dec. 10, 2020), *no perm. app. filed*.[4] Codefendant Clayton asserted that under *Allen*, the admission of Mr. Hall's preliminary hearing testimony would deprive him of his due process rights because Mr. Hall gave statements to Corporal Weir, hospital staff, and the police that were inconsistent with his preliminary hearing testimony, were exculpatory, and were not disclosed by the State until after the preliminary hearing. Codefendant Clayton also claimed that the State failed to disclose Mr. Jeffreys' interview prior to the preliminary hearing and that this interview was consistent with Mr. Hall's statements from the body camera footage and inconsistent with Mr. Hall's preliminary hearing testimony. Codefendant Clayton asserted that he could have better cross-examined Mr. Hall had he received Mr. Hall's previous statements prior to the preliminary hearing. Codefendant Clayton also contended that under *Allen*, preliminary hearing testimony should not be admitted at a trial where *Brady*[5] material was withheld prior to the preliminary hearing.

A hearing on the motion was held on June 10, 2022, at which time the Defendant adopted codefendant Clayton's motion. The Defendant's preliminary hearing transcript, recordings of the Defendant's and Mr. Jeffrey's police interviews, and a recording of Corporal Weir's body camera footage were entered as exhibits to this hearing. The trial court granted the State additional time to review and respond to the recently filed supplemental pleading. Also, at this hearing, the trial court, by agreement of the parties, severed the codefendants' cases for trial.

On July 7, 2022, the State filed a response arguing that the Defendant was not entitled to relief, reasoning that the Defendant had a sufficient opportunity to cross-examine Mr. Hall regarding his inconsistent statements on the scene and during the subsequent police interview. The State noted that defense counsel's questions at the preliminary hearing indicated actual knowledge of Mr. Hall's prior statements; that the

[4] Again, we are forced to compile this information from the trial court's order excluding the preliminary hearing testimony. Codefendant Clayton's motion is not included in the record on appeal.

[5] *See Brady v. Maryland*, 373 U.S. 83 (1963).

primary issue was the Defendant's identity, which would be the same issue at trial; and that the later-disclosed discovery did not substantially change that issue. The State contended that the Defendant's right to confrontation was satisfied because he had a similar motive and a prior opportunity to confront Mr. Hall at the preliminary hearing; that Mr. Hall's former testimony was admissible under the hearsay exception of Tennessee Rule of Evidence 804(b)(1); that Mr. Hall's former testimony was not unfairly prejudicial under Tennessee Rule of Evidence 403 because the Defendant would still be permitted at trial to attack the inconsistencies in Mr. Hall's statements; that *Brady* was historically inapplicable at preliminary hearings and that, regardless, no violation occurred because the exculpatory information was not suppressed and no prejudice resulted from the delayed disclosure; and that *Allen* was distinguishable on its facts.

A second hearing was held on July 11, 2022, where the trial court heard arguments from the parties. Corporal Weir also testified. He stated that when he arrived on the scene of the Walker Street apartment, Mr. Hall seemed to be in extreme pain from his gunshot wound. According to Corporal Weir, the Defendant was likely in "shock," and though he was able to "hit some highlights," he could not provide specifics. Corporal Weir noted that Mr. Hall only identified codefendant Clayton on the scene and that, at that time, Mr. Hall indicated codefendant Clayton was by himself. Corporal Weir then advised that the neighbor's video surveillance footage indicated two individuals approached Mr. Hall's apartment, which was inconsistent with Mr. Hall's singular identification. Corporal Weir did not place any "great significance" on Mr. Hall's omission of the presence of this second individual given Mr. Hall's state at the time. The surveillance footage that Corporal Weir obtained from the neighbor's apartment was admitted as an exhibit. Based on the footage, Corporal Weir proceeded with the investigation looking for two individuals.

Thereafter, the trial court entered a written order on October 3, 2022, denying the State's motion to introduce the preliminary hearing testimony of Mr. Hall and granting the Defendant's motion to exclude the testimony.[6] The trial court determined that Mr. Hall, because of his death, was an unavailable witness under Tennessee Rule of Evidence 804(a)(4). The trial court further found that Corporal Weir's body camera footage, Mr. Hall's statement to hospital staff, Mr. Hall's police interview, and Mr. Jeffreys' police interview constituted exculpatory evidence because these pieces of evidence "indicate only a singular perpetrator of the shootings," codefendant Clayton. The trial court noted, however, that the medical records were not yet in possession of the State at the time of the preliminary hearing.

[6] At the July 11, 2022 hearing, the trial court ruled orally that Mr. Hall's preliminary hearing testimony was admissible in codefendant Clayton's case.

According to the trial court, the Defendant did not know about these exculpatory statements prior to the preliminary hearing and, therefore, did not have the same motive and opportunity to question Mr. Hall at the preliminary hearing. The trial court determined that the State's failure to disclose this evidence, coupled with Mr. Hall's death, deprived the Defendant of "a meaningful opportunity to impeach Mr. Hall with patently exculpatory evidence in an effort to potentially negate the presence of probable cause of his alleged involvement in this case." The trial court concluded that pursuant to *Allen*, the State violated *Brady* because the exculpatory evidence was known to the State prior to the preliminary hearing, but not disclosed, and the Defendant was prejudiced by the delayed disclosure. The trial court reasoned that it could not "speculate as to what Mr. Hall's testimony would have been in response to significant impeaching and exculpatory evidence in this case." In addition, the trial court also noted that there was "a cornucopia of other impeaching and exculpatory statements known to police" given Mr. Hall's differing accounts in his statements and preliminary hearing testimony—how far the apartment door was open, if Mr. Hall saw a gun and whether he could describe the gun, and the level of Mr. Hall's involvement in the prior illegal drug sale. Ultimately, the trial court concluded that the Defendant's constitutional rights to confrontation, due process, and a fair trial were violated under the facts of this case.

The State sought an interlocutory appeal, which the trial court granted based upon the need to prevent irreparable injury and the need to develop a uniform body of law. The State filed a timely application for interlocutory appeal to this court, which we likewise granted. After receiving the parties' briefs and oral arguments, the case is now before us for review.

II. ANALYSIS

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 generally not admissible. Tenn. R. Evid. 802. However, under Tennessee Rule of Evidence 804, former testimony of an unavailable witness may be admissible under some circumstances. A witness is unavailable when, as pertinent here, the witness "is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity." Tenn. R. Evid. 804(a)(4). When the declarant is unavailable, the Rule against hearsay does not exclude former testimony, which is "[t]estimony given as a witness at another hearing of the same or a different proceeding . . . , if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect

examination." Tenn. R. Evid. 804(b)(1). Subsection (b)(1) of Rule 804 applies to preliminary hearing transcripts. Tenn. R. Evid. 804, Advisory Comm'n Cmt.

Trial courts must conduct layered inquiries when determining the admissibility of evidence objected to on the grounds of hearsay, and our standard of review varies accordingly. *State v. Jones*, 568 S.W.3d 101, 128 (Tenn. 2019). A trial court's factual findings and credibility determinations regarding a ruling on hearsay are binding on the appellate court unless the evidence preponderates against them. *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015) (citation omitted). Because a witness's unavailability pursuant to Rule 804(a) involves questions of fact, a trial court's determination regarding whether that witness is unavailable is reviewed for abuse of discretion. *Jones*, 568 S.W.3d at 129 (citation omitted). "Once the trial court has made its factual findings, the next questions—whether the facts prove that the statement (1) was hearsay and (2) fits under one [of] the exceptions to the hearsay rule—are questions of law subject to de novo review." *Kendrick*, 454 S.W.3d at 479 (citations omitted).

"Intertwined with the rules on the admissibility of hearsay is the constitutional right to confront witnesses." *Jones*, 568 S.W.3d at 128. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause essentially ensures the right to physically face witnesses and the right to cross-examine witnesses. *State v. Lewis*, 235 S.W.3d 136, 142 (Tenn. 2007) (citation omitted). The Tennessee Constitution likewise guarantees the accused the opportunity "to meet the witnesses face to face." Tenn. Const. art. I, § 9.

The Confrontation Clause governs only testimonial hearsay, and it applies only to testimonial statements offered for the truth of the matter asserted. *State v. Dotson*, 450 S.W.3d 1, 63-64 (Tenn. 2014). Statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 64 (quotation omitted). The primary purpose is evaluated not from the subjective or actual intent of the persons involved but from the purpose reasonable participants would have had. *Id.* Whether the admission of hearsay statements violated a defendant's confrontation rights is a question of law subject to de novo review. *State v. Davis*, 466 S.W.3d 49, 68 (Tenn. 2015) (citation omitted).

In order to protect a defendant's right to confrontation, before the prior testimony of a witness will be admitted pursuant to the hearsay exception of Rule 804(b)(1), the State must establish two prerequisites. First, the State must show that the declarant is truly unavailable after good faith efforts to obtain his presence and, second, that the evidence

carries its own indicia of reliability. *State v. Summers*, 159 S.W.3d 586, 597 (Tenn. Crim. App. 2004) (citation omitted). With respect to the latter requirement, the United States Supreme Court has mandated that the reliability of a prior testimonial statement is established exclusively through cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 54-56 (2004). However, "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish[.]" *United States v. Owens*, 484 U.S. 554, 559-60 (1988)).

A preliminary hearing, while not constitutionally required, is a critical stage in a criminal prosecution. *State v. Willoughby*, 594 S.W.2d 388, 390 (Tenn. 1980). A preliminary hearing is of an "adversarial nature," a "safeguard for the defendant, protecting him from unfounded charges," thereby serving a "screening function." *Waugh v. State*, 564 S.W.2d 654, 658 (Tenn. 1978). A preliminary hearing is intended "to determine whether there exists probable cause to believe that a crime has been committed and that the accused committed the crime." *State v. Lee*, 693 S.W.2d 361, 363 (Tenn. Crim. App. 1985). "The primary responsibility of the magistrate at a preliminary hearing is to determine whether the accused should be bound over to the grand jury," or phrasing it another way, "whether there is evidence sufficient to justify the continued detention of the defendant[.]" *Waugh*, 564 S.W.2d at 659. Testimony from a preliminary hearing is testimonial for the purposes of the Confrontation Clause. *State v. McGowen*, No. M2004-00109-CCA-R3-CD, 2005 WL 2008183, at *12 (Tenn. Crim. App. Aug. 18, 2005) (citing *Crawford*, 541 U.S. at 68).

While a preliminary hearing is not intended to be a discovery device, "there are inevitable discovery aspects to every preliminary hearing." *Willoughby*, 594 S.W.2d at 390. The aim of a defendant's right to cross-examination at the preliminary hearing stage is to rebut the government's assertion that it has probable cause to bring charges, not to compel discovery of elements of the prosecution's case on the merits. *See id.* ("To our knowledge no court has ever held that a preliminary hearing is a discovery device."); *see also United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997) (stating that a probable cause hearing is not a mini-trial); *Madrid v. State*, 910 P.2d 1340, 1343 (Wyo. 1996) ("[A]lthough some discovery is the inevitable by-product of a preliminary hearing, discovery is not the purpose of the hearing."). The State is not required to produce all of its witnesses, or even its best witnesses, at a preliminary hearing. *Willoughby*, 594 S.W.2d at 390. In this vein, the Tennessee Supreme Court has specifically held that Rule 16 of the Tennessee Rules of Criminal Procedure, the rule governing discovery, does not apply in general sessions court. *Id.*

Numerous Tennessee cases have addressed issues similar to the one at bar. These cases have consistently analyzed the hearsay and confrontation principles set forth above to uphold the admission of testimony from a preliminary hearing when the defendant had a similar motive and opportunity to cross-examine a witness who was subsequently deemed unavailable. *See Davis*, 466 S.W.3d at 69 (affirming the admission of preliminary hearing testimony and a prior statement of a testifying witness as substantive evidence where that witness testified at trial that he could not remember giving the statement or testifying at the preliminary hearing, so he was declared to be "unavailable," and the defendant had the opportunity to cross-examine the witness on the subject); *State v. Howell*, 868 S.W.2d 238, 252 (Tenn. 1993) (concluding that because previous counsel at an out-of-state preliminary hearing had "similar motive" to cross-examine a witness, the admission of the testimony did not violate the defendant's right to confront witnesses); *Bowman*, 327 S.W.3d at 89 (concluding that "preliminary hearing testimony was admissible under the 'former testimony' hearsay exception of Rule 804(b)(1) and . . . did not violate the defendant's rights under the Confrontation Clause"); *see also State v. Jackson*, No. M2020-01098-CCA-R3-CD, 2022 WL 1836930, at *17-18 (Tenn. Crim. App. June 3, 2022); *State v. Sorrell*, No. E2018-00831-CCA-R3-CD, 2019 WL 3974098, at *11-12 (Tenn. Crim. App. Aug. 22, 2019); *Clayton*, 2019 WL 3453288, at *12; *State v. Warner*, No. M2016-02075-CCA-R3-CD, 2018 WL 2129509, at *16-18 (Tenn. Crim. App. Oct. 18, 2017); *State v. Roberson*, No. E2013-00376-CCA-R3-CD, 2014 WL 1017143, at *7 (Tenn. Crim. App. Mar. 14, 2014); *State v. Wise*, No. M2012-02129-CCA-R3-CD, 2013 WL 4007787, at *6 (Tenn. Crim. App. Aug. 6, 2013); *State v. Chapman*, No. W2004-02404-CCA-R3-CD, 2005 WL 2878162, at *5 (Tenn. Crim. App. Nov. 2, 2005); *McGowen*, 2005 WL 2008183, at *12.

Likewise, Tennessee courts have rejected the claim that cross-examination at the preliminary hearing was insufficient due to differences in the nature of the proceedings, including the burden of proof. *See Howell*, 868 S.W.2d at 251 (holding that a preliminary hearing testimony of a declarant could be introduced at trial under the former testimony exception based primarily on a finding that "at both the [preliminary] hearing and the subsequent trial, the testimony was addressed to the same issue of '[w]hether or not the defendant[] had committed the offense' charged"); *State v. Grubb*, No. E2005-01555-CCA-R3-CD, 2006 WL 1005136, at *5-7 (Tenn. Crim. App. Apr. 18, 2006) (rejecting a claim that "the type of cross-examination conducted at a preliminary hearing is different from that conducted at trial" and concluding that the defendant had the opportunity to cross-examine the witness "at the preliminary hearing with the same motives that would have guided his cross-examination of the declarant had he been available at trial").

In *State v. Echols*, the defendant asserted that because discovery was not mandated and identification standards were more "lax" at the preliminary hearing, admission of the victim's testimony at trial violated his right to confront witnesses. No. W2013-02044-CCA-R3-CD, 2014 WL 6680669, at *13 (Tenn. Crim. App. Nov. 26, 2014). This court rejected the defendant's argument under a plain error analysis, concluding that the defendant's motive for cross-examining the victim at the preliminary hearing was "similar" to the motive for cross-examining him at trial, i.e., "to negate the [d]efendant's culpability for the offense charged," and that the defendant's counsel in fact effectively challenged the victim's identification in various ways on cross-examination. *Id.* at *15; *see also Roberson*, 2014 WL 1017143, at *7 (rejecting an argument that cross-examination at the preliminary hearing was insufficient to meet the requirements of the Confrontation Clause). Similarly, in *State v. Shipp*, this court rejected the defendant's argument that he did not have a similar motive or adequate opportunity to cross-examine the witness because he did not have access to her prior statement—wherein she stated that the perpetrator had a facial tattoo when, in fact, he did not—at the time of the preliminary hearing. No. M2016-01397-CCA-R3-CD, 2017 WL 4457595, *5-7 (Tenn. Crim. App. Oct. 5, 2017).

However, in *State v. Allen*, 2020 WL 7252538, the case relied upon by the trial court here to exclude Mr. Hall's preliminary hearing testimony, this court applied due process principles to reverse the defendant's conviction which was based, in large part, upon admission of the transcript of the victim's testimony at the preliminary hearing. In *Allen*, the defendant was arrested on June 18, 2015, for aggravated rape and domestic assault of his wife based primarily upon her allegations to the investigating detective. 2020 WL 7252538, at *1. Approximately nine months later, at the defendant's preliminary hearing on March 18, 2016, the defendant's wife again identified the defendant as the perpetrator of her rape and assault. *Id.* A few days after the hearing, the defendant's wife was murdered in an event unrelated to the Defendant or the case. *Id.* When the State provided discovery materials on December 21, 2017, it included two emails sent on June 22, 2015, which was before the preliminary hearing, from the defendant's wife to the investigating detective. *Id.* In one of the emails, the defendant's wife stated that the defendant did not rape her, and she claimed that she had a consensual sexual encounter with an unknown man in his vehicle outside a bar in Nashville during the early morning hours of June 18, 2015. *Id.* Both the defendant's wife and the investigating detective testified at the preliminary hearing and were cross-examined by defense counsel, but neither witness mentioned the defendant's wife's emails nor her recantation of the allegations. *Id.*

On appeal, the defendant in *Allen* claimed that the State "violated his due process rights pursuant to *Brady* by failing to disclose the existence of exculpatory emails prior to the preliminary hearing and that the trial court violated his due process rights by improperly

admitting Ms. Allen's preliminary hearing testimony." *Allen*, 2020 WL 7252538, at *9. The *Allen* court noted that "[t]he denial or significant diminution of the right to cross-examine a witness calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Id.* at *11 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)) (internal quotation omitted). The *Allen* court observed that the rights guaranteed by the Confrontation Clause and the Due Process Clause are sometimes interlaced, and the right of confrontation is sometimes subsumed by the right to due process. *Id.* (citing *Chambers*, 410 U.S. at 294) ("The rights to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process.")). Drawing on these statements from *Chambers*, the *Allen* court went on to apply due process principles and analyze *Brady* in the preliminary hearing context. *Id.* at *11-17.

The *Allen* court first determined that the recantation email was "obviously exculpatory" and that the State was "bound to release the information whether requested or not." *Allen*, 2020 WL 7252538, at *12. Next, addressing whether the State suppressed the evidence, the *Allen* court concluded that the State's duty to disclose exculpable information is governed by *Brady* and its progeny, not by Tennessee Rule of Criminal Procedure 16. *Id*. at *13. The *Allen* court, noting that it was dealing with the delayed disclosure of the defendant's wife's first email, observed that "the government's delayed disclosure of obviously exculpatory information in its possession can result in a *Brady* violation requiring a reversal of a conviction if the delay itself causes prejudice to the defendant by putting 'the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at *14 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Concluding that the second *Brady* factor—whether the State suppressed the information—was satisfied, the *Allen* court reasoned that, "[a]lthough the State provided the emails in discovery before trial, it suppressed the emails for over two years during which time Ms. Allen died." *Id.* at *15. Addressing the favorability of the evidence, the third *Brady* factor, the *Allen* Court found that "[a]n alleged victim recanting and saying that the person accused of an offense did not commit the offense and that another person did is certainly favorable." *Id.* In determining that the fourth *Brady* factor was satisfied, i.e., whether the information was material, the *Allen* court stated that the evidence was "obviously exculpatory" and reasoned that the jury was deprived of the defendant's wife's testimony concerning the emails because the State delayed disclosure of the emails until after her death, that the defendant's wife was the key witness for the State, and that her testimony was essential to the State's case. *Id.* at *16. The *Allen* court held that the State's failure to disclose an obviously exculpatory email before the witness testified at the preliminary hearing, coupled with her death before trial, deprived the defendant of the opportunity to cross-examine the

witness about the veracity of the emails, violated *Brady*, and deprived the defendant of his constitutional rights to due process of law and a fair trial. *Id.* at *17.

The *Allen* court in reaching its ultimate conclusion, distinguished two cases from this court that addressed similar facts utilizing a confrontation analysis: *State v. Shipp*, 2017 WL 4457595, and *State v. Chapman*, 2005 WL 2878162. *See Allen*, 2020 WL 7252538, at *13-14. In *State v. Chapman*, after the preliminary hearing but before trial, the State disclosed that the defendant's five-year-old-son made a statement to the police "indicating that the shooting of the victim was accidental." 2005 WL 2878162, at *5. The defendant sought dismissal of the indictment, arguing that he did not have his son's "statement at the preliminary hearing in order to refute the State's presentation of probable cause evidence; therefore, he was denied the right to have a meaningful preliminary hearing." *Id.* The trial court ruled that the defendant was not prejudiced by the State's failure to disclose the statement prior to the preliminary hearing. *Id.* The court further determined that the defendant had received the statement approximately two months before trial and was, thus, able to utilize the statement as part of his defense. *Id.* Ultimately, the State called the defendant's son to testify at trial; the prior statement was admitted as an excited utterance; and defense counsel was allowed to cross-examine the defendant's son about his statement. *Id.* at *19-20.

On appeal to this court, the defendant in *Chapman* framed the issue as

> whether the prosecution may withhold and conceal highly material, exculpatory evidence, which directly refutes probable cause to believe the offense of murder in the second degree is established, for eight months during which time it obtains a bindover by the general sessions court, a prohibitive bond of one million dollars, and an indictment charging murder in the second degree.

Chapman, 2005 WL 2878162, at *5. The *Chapman* court, after discussing the purpose of a preliminary hearing—stating similar principles to those cited above—and observing that Rule 16 of the Tennessee Rules of Criminal Procedure does not apply in general sessions court, held that the defendant was not entitled to receive the five-year-old's statement prior to the preliminary hearing or the convening of the grand jury and that, therefore, the trial court did not err by failing to dismiss the indictment. *Id.* The *Chapman* court did not discuss *Brady*, and the *Allen* court distinguished *Chapman* for confrontation purposes, reasoning that the facts there were distinguishable because the defendant's son, unlike the defendant's wife in *Allen*, was available to testify and be cross-examined at the trial about his prior statement. *Allen*, 2020 WL 7252538, at *13. However, the holding of *Chapman*

regarding the general rules of discovery, including the production of exculpatory evidence at the preliminary hearing phase, was not conditioned upon the availability or unavailability of the witness for admission of the preliminary hearing testimony under Rule 804.

State v. Shipp, the other case distinguished by the *Allen* court, involved the State's failure to disclose the statement of a victim that contained exculpable information prior to the victim's testifying at the preliminary hearing; the State was permitted to introduce the preliminary hearing testimony at trial because this victim had died after the hearing. *Shipp*, 2017 WL 4457595, at *1. In *Shipp*, the surviving victim, in both a photographic lineup, and at the preliminary hearing, identified the defendant as the perpetrator of a robbery during which she was wounded and her boyfriend killed. *Id*. Included in the discovery provided to the defendant after the preliminary hearing was a police report which stated that the victim had described the defendant as having "a facial tattoo." *Id.* The defendant objected to the use of the victim's preliminary hearing testimony on the basis that the surviving victim had made a statement to a law enforcement officer that the defendant had a facial tattoo, though he did not have such a tattoo, and that this information had not been available to defense counsel at the preliminary hearing. *Id.* The defendant argued that he did not have an adequate opportunity at the preliminary hearing to cross-examine the victim about her statement regarding the tattoo. *Id.* The trial court denied the defendant's motion. *Id.*

On appeal to this court, the defendant in *Shipp* argued that the victim's preliminary hearing testimony "should have been excluded under Tennessee Rule of Evidence 804 and the Confrontation Clause of the United States and Tennessee Constitutions" because he did not have an adequate opportunity to cross-examine the victim about her statement regarding the tattoo. *Shipp*, 2017 WL 4457595, at *5. This court noted that "the primary issue at the preliminary hearing was the same as the primary issue at trial: the identity of the [d]efendant as the perpetrator" and that the defendant's counsel extensively cross-examined the victim at the preliminary hearing. *Id.* at *7. This court concluded that the defendant "had a similar motive and a prior opportunity to confront the witness" and "that his right to confrontation was not violated." *Id.* This court reasoned,

> However, "[c]omplete identity of the issues is not necessary" in order for a statement to be admissible under Rule 804. [*Howell*, 868 S.W.2d at 251]. As long as the issues at the previous hearing are "sufficiently similar," the statement may be admissible. *Id.* Although a party may decide not to engage in rigorous or even any cross-examination, "'there is no unfairness in requiring the party against whom the testimony is now offered to accept [a] prior decision to develop or not develop the testimony fully.'" *Id.* at 252

> (quoting *United States v. Salerno*, 505 U.S. 317, 329, n.6 (1992) (Stevens, J., dissenting)) (emphasis omitted).

Id. at *5.

The *Allen* court stated that the confrontation analysis of *Shipp* still had precedential value to the due process issue presented in *Allen* because "[t]he right[] to confront and cross-examine witnesses [has] long been recognized as essential to due process." *Allen*, 2020 WL 7252538, at *14 (citing *Chambers*, 410 U.S. at 294). The *Allen* court then distinguished the facts of *Shipp*, stating that the exculpatory information concerning the defendant's facial tattoo was one detail in the identification of the defendant as the perpetrator. *Id*. The *Allen* court further observed that the jury could consider the victim's statement concerning the facial tattoo and the detective's testimony that the defendant did not have a facial tattoo in determining whether the victim was lying or simply mistaken; thus, the jury had evidence it could use in determining the credibility of the victim. *Id.* The *Allen* court, citing this factual difference from *Shipp*, determined that, because the prosecution in *Allen* suppressed the obviously exculpatory first email until after the defendant's wife's death, the defendant was never able to question his wife about its veracity. *Id.*

In this case, the State asks us to depart from *Allen* and its application of *Brady* in the context of a preliminary hearing. The State argues,

> There is no clearly established United States Supreme Court law which requires the State to provide exculpatory evidence to a defendant prior to or at a preliminary examination. Indeed, the language from *Brady* and other Supreme Court decisions indicates that the right to exculpatory evidence is a trial right.

The State, as it did in *Allen*, cites two federal cases in support of his argument: *Gov't of Virgin Islands in Interest of N.G.*, 34 F. App'x 417, 419 (3d Cir. 2002) (stating that "*Brady* itself was never intended to apply to pre-trial proceedings"); and *Jaffe v. Brown*, 473 F. App'x 557, 559 (9th Cir. 2012) (stating that, while there was some merit to the petitioner's *Brady* claim, "existing Supreme Court case law does not clearly establish that the prosecution was required to disclose the impeachment information about [a witness who testified at the preliminary hearing] before, rather than after, [the] preliminary hearing"). The *Allen* court discounted the State's reliance on *Gov't of Virgin Islands in Interest of N.G.* and *Jaffe*, noting that they were not selected for publication in the Federal Reporter and concluding that "[n]either of these federal cases h[e]ld that *Brady* can never apply to

pretrial proceedings or a preliminary hearing." *Allen*, 2020 WL 7252538, at *13. We respectfully disagree and conclude that these cases, while unpublished, accurately state the law as it relates to *Brady*'s application to preliminary hearings.

The Defendant cites no federal or Tennessee authority, other than *Allen*, which would indicate that the *Brady* requirement extends to a preliminary hearing. A reading of *Brady* and the leading cases in its progeny demonstrates that the right it enunciated was intended to protect a defendant's due process rights by requiring the disclosure of exculpatory evidence for the defendant's use *at trial*. *See Brady*, 373 U.S. at 90-91 (ordering a retrial of the punishment phase only of a bifurcated trial); *United States v. Agurs*, 427 U.S. 97, 99 (1976) (involving a defendant's post-trial discovery of evidence which would have tended to support her argument that she acted in self-defense); *United States v. Bagley*, 473 U.S. 667, 669 (1985) (applying *Brady* where a prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses at trial); *Kyles*, 514 U.S. at 434 (noting that the question in a *Brady* analysis is whether, given the nondisclosure of materially exculpatory evidence, a defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence"); *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (noting that a defendant's right to receive from prosecutors exculpatory impeachment material is "a right that the Constitution provides as part of its basic 'fair trial' guarantee"). In this vein, the United States Supreme Court has declined to extend the *Brady* requirement to grand jury proceedings, *see United States v. Williams*, 504 U.S. at 51, 55 (1992), and to material impeachment information in pre-plea proceedings, *see Ruiz*, 536 U.S. at 629. *See also In re Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163*, 582 S.W.3d 200, 210-11 (Tenn. 2019) (relying on *Ruiz* to vacate an ethics opinion that would have required *Brady* disclosures to occur "as soon as reasonably practicable" as opposed to "timely"). With these principles in mind, we do not read *Gov't of Virgin Islands in Interest of N.G.* and *Jaffe* to imply that *Brady* could ostensibly apply to preliminary hearings. Instead, we read these cases to accurately state the true scope of *Brady*'s applicability—i.e., as the Third Circuit succinctly put it, that "*Brady* itself was never intended to apply to pre-trial proceedings." *Gov't of Virgin Islands in Interest of N.G.*, 34 F. App'x at 419.

We are mindful that the panel in *Allen* attempted to limit its holding by clarifying that it was not *requiring* the State to disclose obviously exculpatory information prior to a preliminary hearing:

> To be clear, we are not holding that obviously exculpatory information *must* be provided before the preliminary hearing or before trial. However, when the State delays disclosure of obviously exculpatory

> information in its possession, the State risks violating *Brady* when the delay itself causes prejudice by preventing the defense from using the disclosed material effectively in preparing and presenting the defendant's case.

Allen, 2020 WL 7252538, at *17 (quotation omitted). Despite this attempt to limit its holding, the *Allen* court, in all practical effect, held that obviously exculpatory information must be disclosed prior to the preliminary hearing if the requirements of *Brady* are satisfied. The United States District Court for the Middle District of Tennessee has made such an acknowledgment. *See Ward v. Reynolds*, No. 3:20-cv-00981, 2021 WL 3912803, at *8 n.8 (M.D. Tenn. Sept. 1, 2021) (memorandum opinion).

The District Court, in discussing the training required of police officers, stated,

> Probable cause is a concept that can (not to say must or even should) be considered (and likewise discussed) without reference to the existence of exculpatory evidence; for example, a federal grand jury can return a true bill in the event it finds probable cause, and yet there is no requirement that the grand jury be presented with available exculpatory evidence before making its probable cause determination. *See* [*Williams*, 504 U.S. at 55] (holding that there is no "require[ement] for [a federal] prosecutor to disclose exculpatory evidence to the grand jury").

Ward, 2021 WL 3912803, at *8. The District Court, then, in a footnote citing *Allen*, observed,

> The [c]ourt is aware that the Tennessee rule may be different, and that exculpatory evidence may need to be provided to a grand jury prior to its deliberations, and indeed to a defendant even prior to the preliminary hearing. [*Allen*, 2020 WL 7252538, at *21] (holding that "[t]he State's failure to furnish obviously exculpatory information before the preliminary hearing, coupled with the death of . . . the State's key witness, before [d]efendant had an opportunity to cross-examine . . . violated [d]efendant's right to a fair trial."). . . . [I]t is not to say that probable cause cannot be conceptualized—and discussed in training or a manual—without reference to exculpatory evidence.

Id. n.8.

Under *Allen*'s guidance, prosecutors would be well-advised to fully comply with *Brady* prior to every preliminary hearing, lest they risk committing a *Brady* violation should one of their witnesses subsequently become unavailable for trial. While laudable in theory, this approach is unworkable in reality.

Unless arrested pursuant to an indictment or a presentment, Tennessee criminal defendants are entitled to a preliminary hearing within fourteen days of their initial appearance if they are in custody and within thirty days if they are released. Tenn. R. Crim. P. 5(c)(2)(A). Prosecutors, in the context of *Brady*, are responsible for exculpatory evidence in their possession as well as any exculpatory evidence in the possession of other governmental agencies. *See Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). While it *might* be feasible in some cases for prosecutors to review and disclose exculpatory evidence in their own possession prior to a preliminary hearing, it would be an onerous burden to expect them to gather, review, identify, and disclose exculpatory evidence in the possession of any of the governmental agencies involved in the case prior to a preliminary hearing like the one at bar, which took place a mere twenty-two days after the alleged offense. Imposing such a burden on the prosecution would undoubtedly have the effect of delaying preliminary hearings, a consequence that would defeat the hearing's purpose as a "screening function," designed to quickly determine "whether there is evidence sufficient to justify the continued detention of the defendant." *See Waugh*, 564 S.W.2d at 658-59; *see also Ruiz*, 536 U.S. at 633 (in the pre-plea context, noting that the "added burden imposed upon the Government by requiring [the provision of 'affirmative defense' information] well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process").

We note that even if *Brady* were to apply, this case is factually distinguishable from *Allen*. The affidavit of complaint here included all of the essential information that the Defendant claims he did not receive until the post-indictment discovery provision. For instance, the affidavit included information that both Messrs. Hall and Jeffreys, in speaking with Corporal Weir on the scene, only indicated that a man named "Johnny" knocked on the door and fired some sort of firearm inside the apartment and that both men mentioned Johnathan Clayton, but neither referred to the Defendant; it included information that the Defendant told Corporal Weir that he could not identify the weapon used; and it included portions of Mr. Hall's police statement made the following day wherein he identified the Defendant as a second perpetrator. Importantly, the Defendant, armed with this information, was able to cross-examine Mr. Hall at the preliminary hearing about these inconsistencies. Mr. Hall's medical records were not in the State's possession at the time

of the preliminary hearing and were therefore not subject to *Brady* disclosure. Finally, none of this information was "obviously exculpatory" as was the defendant's wife's recantation in *Allen*. The potentially exculpatory evidence here simply confirmed what the Defendant already knew, i.e., that Mr. Hall and Mr. Jeffreys only identified the codefendant on the scene. It was, therefore, corroborative, but its deprivation at the preliminary hearing phase was certainly not of a similar character as the complete recantation by the defendant's wife in *Allen*.

For the reasons stated, however, we hold that *Brady* does not apply to preliminary hearings and that a *Brady* analysis is, therefore, not the appropriate vehicle to address a situation such as the one at bar. Where the prosecution seeks to admit at trial the preliminary hearing testimony of an unavailable witness, and the defense did not possess the full plethora of exculpatory information at the preliminary hearing that it would have had at trial, the admission of that witness's prior testimony should be governed by the well-established principles concerning confrontation and hearsay. In these cases, the question will be whether the defendant had a similar motive and opportunity to cross-examine the witness at the preliminary hearing given the lack of the exculpatory information.

Here, the Defendant had a similar motive and opportunity at the preliminary hearing to develop Mr. Hall's testimony through cross-examination. *See Summers*, 159 S.W.3d at 598. As noted above, "[c]omplete identity of the issues is not necessary," so long as the issues are sufficiently similar to give a similar motive for cross-examination. *Howell*, 868 S.W.2d at 251. Though gun charges were added after the preliminary hearing, there was no dispute that a gun was used to commit these crimes. The primary issues at the preliminary hearing were the same as they will be at trial: whether there was a single shooter and the identity of the Defendant as one of the perpetrators. *See Shipp*, 2017 WL 4457595, at *7. The Defendant had all of the relevant information from the affidavit of complaint to provide him a sufficient opportunity to cross-examine Mr. Hall at the preliminary hearing. In fact, the record showed that defense counsel did just that by questioning Mr. Hall about his on-the-scene identification of only one perpetrator and inquiring about the inconsistency of his later police statement identifying a second perpetrator, the Defendant. The Defendant was aware from the affidavit of complaint that Mr. Hall was previously unable to identify the gun used, though Mr. Hall stated at the preliminary hearing that the gun was likely a .40 caliber. Furthermore, on cross-examination, Mr. Hall admitted to smoking marijuana on the night of the shooting and testified that the door was not open "all the way" when the shooting started. It also appeared from questioning at the Defendant's preliminary hearing that defense counsel had knowledge of the contents of Mr. Hall's testimony given the week prior at codefendant Clayton's preliminary hearing. As noted above, "the Confrontation Clause guarantees only

an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish[.]" *Owens*, 484 U.S. at 559-60.

We conclude that the lack of discovery materials in this case did not significantly impede the Defendant's motive and opportunity to cross-examine Mr. Hall at the preliminary hearing. *See Jackson*, 2022 WL 1836930, at *18 (rejecting the argument that preliminary hearing testimony was improperly admitted because the defendant did not have access to certain discovery materials and was not able to impeach the witness with her prior statements to law enforcement, her failure to identify the defendant from a photographic lineup, her statement that she believed the defendant was running after her trying to shoot her, or her failure to call 911 in the hotel lobby); *Warner*, 2018 WL 2129509, at *17 (rejecting the argument that lack of discovery at the preliminary hearing violated the defendant's right to confrontation because he could not meaningfully cross-examine the witness); *Shipp*, 2017 WL 4457595, at *5-7 (rejecting the argument that the defendant did not have a similar motive or adequate opportunity to cross-examine the witness because he did not have access to her prior statement regarding the facial tattoo at the time of the preliminary hearing); *Echols*, 2014 WL 6680669, at *13 (rejecting the argument, under a plain error analysis, that testimony from the preliminary hearing was not admissible due in part to lack of discovery and concluding that the defendant had an opportunity and similar motive to cross-examine the witness); *Chapman*, 2005 WL 2878162, at *5 (rejecting the argument that the defendant was entitled to receive the witness's statement prior to the preliminary or the convening of the grand jury). We reiterate that both this court and the Tennessee Supreme Court have rejected the claim that cross-examination at the preliminary hearing was insufficient for Confrontation purposes due to differences in the nature of the proceedings, including the burden of proof. *See Howell,* 868 S.W.2d at 251; *Grubb*, 2006 WL 1005136, at *5-7. Accordingly, we conclude that the requirements of confrontation were satisfied in this case and that the trial court erred by refusing to admit Mr. Hall's preliminary hearing testimony.

III. CONCLUSION

In consideration of the foregoing, the order of the trial court excluding Mr. Hall's preliminary hearing testimony is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

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KYLE A. HIXSON, JUDGE