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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2023

STATE OF TENNESSEE v. RYAN MONROE ALLEN

Appeal from the Criminal Court for Knox County
No. 110400 G. Scott Green, Judge

No. E2022-00437-CCA-R3-CD

The pro se Defendant, Ryan Monroe Allen, appeals his jury convictions for second degree murder and abuse of a corpse, and his resulting effective forty-year sentence. On appeal, the Defendant argues as follows: (1) the trial court erred by denying the Defendant's motion to continue or, in the alternative, to proceed pro se that was made at the start of trial, thus, forcing the Defendant to proceed to trial with an attorney who had a conflict of interest; (2) the trial court erred by admitting evidence of the Defendant's prior bad acts in violation of Tennessee Rule of Evidence 404(b), and the prosecutor explicitly defied the trial court's pretrial 404(b) ruling during opening statements; (3) the trial court erred by failing to address pretrial the Defendant's motion to dismiss the abuse of a corpse charge due to insufficient proof of venue or, in the alternative, to sever the two offenses; (4) the evidence was insufficient to support the Defendant's convictions; (5) the trial court erred by not excusing a juror who indicated that she might have known the spouse of someone who assisted with the investigation; (6) the trial court erred by denying the Defendant's motion for a mistrial made because the State failed to disclose prior to trial that two witnesses were going to testify to having seen certain evidence in the Defendant's residence; (7) the trial court erred by denying the Defendant's motion to recuse made on the ground that the trial court was holding court proceedings without the Defendant present and was biased against the Defendant; (8) the Defendant's sentence was out-of-range and illegal because he was not provided with the State's notice of its intention to seek enhanced punishment; (9) the State's case was based on perjured and recanted testimony; and (10) the State committed prosecutorial misconduct by suppressing certain pieces of evidence. Following our review of the record and applicable authorities, we affirm the judgments of the trial court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JILL BARTEE AYERS, JJ., joined.

Ryan Monroe Allen, Clifton, Tennessee, Pro Se (on appeal and on motion for new trial); Joshua D. Hedrick (elbow counsel on motion for new trial); and Keith E. Lowe (at trial), Knoxville, Tennessee, for the appellant.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Charme P. Allen, District Attorney General; and Leslie Nassios, Molly T. Martin, and Hector I. Sanchez, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

The charges in this case arose after Kelly[1] Shae Cozart ("the victim") was bludgeoned to death in June 2015. Several days after the victim's murder, her body was discovered in Ballplay Creek in Monroe County. The body had been wrapped in bedsheets and a large trash bag, secured by electrical cords. Cell phone records showed frequent contact between the Defendant and the victim around the presumed time of her death, placed them both near the Knoxville residence where the Defendant resided, and confirmed that the victim's cell phone last connected to a cellular network near that residence. The victim's blood was later discovered in the room rented by the Defendant at that Knox County residence. On April 25, 2017, a Knox County grand jury returned a two-count presentment against the Defendant, charging him with the first degree premeditated murder of the victim and the abuse of her corpse. *See* Tenn. Code Ann. §§ 39-13-202, -17-312(a)(1).

A. Pretrial Proceedings

Counsel was appointed for the indigent Defendant. On August 4, 2017, the Defendant filed a motion to dismiss the abuse of a corpse charge for lack of venue or, in the alternative, for the murder and abuse of a corpse counts to be severed. Noting that the victim's body was found in Monroe County and that the only connection to Knox County was the presence of the victim's blood in the Defendant's room, the Defendant argued that there was "no evidence, whatsoever, that the [] victim's corpse was abused in Knox County." In the alternative, the Defendant requested for the charges to be severed, alleging that a joint trial would "likely cause significant prejudice."

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[1] Ms. Cozart's name is spelled "Kelli" in the transcripts but "Kelly" in the presentment and the autopsy report.

On August 23, 2017, the Defendant's first attorney was permitted to withdraw, and defense counsel[2] was appointed. Thereafter, on December 1, 2017, defense counsel filed a motion to continue the trial, seeking additional time to review discovery materials. That motion was granted.

On January 12, 2018, the Defendant filed a motion to proceed pro se, wherein he sought "standby" counsel and for defense counsel to be removed. In the motion, the Defendant noted that he had a 2014 associate's degree from Indiana University "with strengths in Arbitration and Ethics" and that he was "familiar with criminal procedure and courtroom conduct." According to a minute entry for that same day, the Defendant was present, with the assistance of counsel, and his motion to proceed pro se "came on for hearing." The trial court, "[h]aving heard the proof" and "arguments of counsel," held the motion in abeyance.

On January 31, 2018, the State filed its first notice seeking enhanced punishment. The notice listed an Indiana conviction in case number 45G03-0905-FB-00041 for auto theft on September 25, 2009, for which the Defendant received a three-year sentence, and an Indiana conviction in case number 45G03-0801-FC-00007 for robbery on May 29, 2018, for which he received a five-year sentence.

On March 1, 2018, defense counsel filed another motion to continue. Defense counsel requested more time to review additional, voluminous discovery that had recently been received and noted that the Tennessee Bureau of Investigation ("TBI") lab report for testing samples collected at the victim's residence at 1700 Virginia Avenue had not yet been received. A minute entry for the following day reflected that the motion to continue was granted. According to a minute entry on March 23, 2018, "the [D]efendant's oral motion to continue trial date came on for hearing[,]" and the trial court granted the motion. The minute entry continued, "Defendant's (pro-se) Motion For Defendant To Proceed 'Pro-Se' came on for hearing," and after the trial court "heard the proof" and "arguments of counsel," the motion was withdrawn.

On April 25, 2018, the trial court heard a motion for bond reduction. At the outset of that hearing, the trial court informed the Defendant that it had read his letter,[3] which the trial court noted that either the Defendant himself or defense counsel had put "on the docket." Replying to the contents of that letter, the trial court told the Defendant that it did

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[2] For purposes of this opinion, we will refer to the Defendant's lawyer at trial as defense counsel. The Defendant was later appointed elbow counsel for the motion for new trial phase, and we will refer to him as elbow counsel.

[3] This letter is not included in the record on appeal.

"not conduct proceedings in any defendant's absence" and that "[t]he only thing . . . ever done in [the] courtroom without a defendant being present [was] picking another date, and that [was] only if that person's lawyer sa[id] that they're fine to do that without their client being present." The trial court reassured the Defendant that no proceedings were "going on behind [his] back," and the Defendant, in response, thanked the trial court for its acknowledgment.

On June 7, 2018, the State filed an amended notice seeking enhanced punishment. The amended notice added an Indiana conviction in case number 45G03-0801-FC-00005 for robbery on May 29, 2018, for which the Defendant received a five-year sentence.

On June 22, 2018, the Defendant filed a motion requesting a hearing pursuant to Tennessee Rule of Evidence 404(b) to determine the admissibility of any alleged prior bad acts committed by the Defendant that the State sought to introduce at trial. The Defendant proceeded to a jury trial that was held June 25 to June 28 of 2018.

B. Trial Proceedings

1. Motions

The morning of trial, June 25, 2018, the trial court asked whether the Defendant was "dressed out."[4] Defense counsel replied that "they attempted to dress him out" but that the Defendant said he wanted to talk to defense counsel first. Defense counsel relayed that during that conversation, the Defendant made counsel aware that he wanted counsel to move for a continuance or, in the alternative, the Defendant wanted to proceed pro se. The trial court said it was "tired of playing games with" the Defendant and asked for the Defendant to be brought into the courtroom.

Once the Defendant was in the courtroom, defense counsel repeated that the Defendant desired a continuance. When the trial court asked on what grounds, defense counsel said he would let the Defendant address the court because the Defendant also desired, in the alternative, to proceed pro se. The trial court said, "No, you're his attorney of record until such time as this [c]ourt relieves you." Defense counsel then attempted to explain why the Defendant wanted a continuance: "[I]f I were to put it succinctly[,] . . . he believes that he has not seen enough of his discovery to be ready to go today. He has concerns that some of the discovery that came in later, he does not fully understand or has not fully seen." Defense counsel continued,

[4] Because the Defendant was incarcerated at the time of trial, we assume that the trial court was asking whether the Defendant had changed out of his jail clothes.

> And I think he believes that we have a conflict, . . . but I guess I'll let him speak as to whether or not he thinks we have a conflict. . . . He needs more time for him to lay eyes on more discovery to understand it and comprehend it and be ready to go.
>
> Also[,] . . . . [t]here are some people that came in through subpoenas that we know that the State subpoenaed that we have not been able to interview yet. Although, candidly I will tell you, . . . that I don't think that the State plans on calling every one of those people that was late subpoenaed.

The prosecutor then indicated that these "late-subpoenaed" witnesses were "basically" chain of custody witnesses and were "add-ons in the event [the parties] weren't able to stipulate." Defense counsel stated that the Defendant was concerned because these witnesses had not been interviewed.

Defense counsel then "formally" moved for a continuance. The prosecutor objected, noting, "I mean, . . . he has demanded a trial date." When the trial court asked about the nature of the potential conflict of interest, defense counsel responded,

> I don't know that there is one . . . . I will let him speak to that. I have had conversations with [the Defendant]. We have met several times in the past two weeks. The conversation has been generally good. I know that he is—today he is not happy, that he feels like there's a wide berth of his discovery he does not understand. . . . [S]ince there's literally 20,000 pages of it[,] I can tell you he has not laid eyes on every single page.
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> What I have done is reviewed it and my investigators reviewed it, and we have tried to convey the information that we found. . . .
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> And so[,] we have tried to convey the information and the discovery to him for what we know is going to be relevant for about the 14 to 20 witnesses we think the State is going to call.

The trial court asked defense counsel if he was prepared to proceed to trial, and defense counsel replied in the affirmative. The trial court said, "Motion denied. We are going to trial. Dress him out." The Defendant interjected, "Your Honor, I have not viewed several of the recordings and video and audio[,] . . . and I have not reviewed none of this voluminous discovery. None of it." The trial court maintained that the Defendant had "demanded a trial time and time again" and noted that defense counsel had indicated his readiness to proceed to trial. The Defendant commented, "How are you going to force me

to go to trial when I've not even looked at none of the discovery? I want that on record." The trial court commented, "Everything we say in here is on record." The Defendant's motion to continue or, in the alternative, to proceed pro se was denied, and the case proceeded.

Thereafter, the trial court, in accordance with Rule 404(b), addressed prior bad act evidence that the State sought to introduce at trial. The prosecutor noted that the victim moved in with John Russell Seymour in the weeks before her murder and that the Defendant frequented this apartment. According to the prosecutor, "the reason people went to [Mr. Seymour's] apartment [was] for the purpose of using illegal drugs," and "[a] lot of prostitutes hung out there." The prosecutor said, "There was just a lot of drug activity and a lot of sexual activity that took place in this apartment." The prosecutor noted that the cell phone records indicated that the victim and the Defendant were up very late the night of the murder and their phone activity was "kind of consistent with drug behavior[.]" The prosecutor opined,

> That's what this case is about. It's about two people who had only that in common, and something happened that night to cause [the Defendant] to beat her in the head until she died. And we believe that it is drug related and/or sexually motivated, but one can't be separated from the other.

Defense counsel replied that it was speculative that Mr. Seymour's house was "a drug den" and that there was not "going to be any evidence to show . . . the nature of the relationship between" the victim and the Defendant.

The State also sought to introduce proof that the Defendant had in three other cases used "drugs as a pretext to get prostitutes to hook up with him and would pretend like he was going to get drugs for them in return for sexual favors." According to the prosecutor, when things did not "work out" between the Defendant and these women, "there would be arguments and separations." The prosecutor stated, "And we think that that's probably what happened in this case." She continued,

> So[,] it's prejudicial to him, but the probative value of it explains why they were together, what they were doing that evening, why they would know each other, and it cuts both ways because, obviously, [the victim] had issues herself. She had a problem with drugs. She had engaged in promiscuous sexual activity.

The trial court commented that it was "not really struggling with the whole concept that [the Defendant] and [the victim] had a relationship that was premised upon drugs,"

which was “relevant proof.” However, the trial court queried, “[B]ut how do I make the leap to get to some of these other women?” The prosecutor averred that this evidence established a habit or pattern and proved identity and motive and that it was “corroborative of the State’s theory essentially.” The prosecutor noted that the phone records indicated that the Defendant used the victim’s phone to call Krista Legg that evening, presumably for sex. The prosecutor said, “I’m just offering it to show that this is the relation of the parties and why certain things happened and to explain the phone records and . . . that the evidence was relevant to show the relationship between the parties and to explain the phone records.” The trial court commented that the State “could prove that without going into the fact that he was offering to have sex with these women, or offering drugs in exchange for having sex.”

In addition, the prosecutor indicated that she did not intend on talking “about the stalking behavior in opening or voir dire[,]” only the victim’s and the Defendant’s drug use, as well as “the sex.” The trial court ruled that the information about the victim’s and the Defendant’s common drug use as a premise for their relationship was admissible. The trial court further ruled that proof of the Defendant’s interactions with these other women, soliciting sex in exchange for drugs, was inadmissible at that time, but the issue could be revisited later depending on the proof presented at trial.

2. State’s Opening Statement

During opening statements, the prosecutor noted that the victim had “a troubled life” and was “promiscuous” and addicted to drugs. The prosecutor stated that the victim “bounced around for a few months” before staying at Mr. Seymour’s apartment, where she lived until her death. According to the prosecutor, Mr. Seymour’s apartment was primarily frequented by drug users “for the purpose of using drugs and having sex” and was where the victim and the Defendant met. The prosecutor said, “Some prostitutes knew [Mr. Seymour] and hung out there, people who used drugs, sold drugs, it was a party house[.]” The prosecutor averred that the phone communications of the Defendant and the victim in the hours leading up to the victim’s murder were going to infer evidence of drug activity—that they were either seeking drugs or trying to find drugs. The prosecutor surmised, “People whose numbers and whose information comes up with respect to [the victim’s] phone and with respect to the [D]efendant’s phone, some of these people were known drug dealers, some of these people were known prostitutes. So, this case really is about drugs.”

3. State’s Proof

During the late afternoon hours of July 1, 2015, Joshua McLemore and his younger brother were “riding around and just hanging out” in the Vonore area of Monroe County;

something they did often. It was still daylight when Mr. McLemore stopped near Ballplay Creek to relieve himself. Mr. McLemore described a gravel dirt path leading down to the creek, which was "wide enough that you could back a truck down into it." Once at the creek bank, Mr. McLemore noticed a pair of shorts in the water. When he poked a stick into the water and twisted it around the pair of shorts, a body "popped to the top." According to Mr. McLemore, the body was six or seven feet from the bank and underneath some brush. Mr. McLemore said that the body was "wrapped in like a bedsheet and a garbage bag."

After discovery of the body, Mr. McLemore and his brother ran to their nearby home. Once there, Mr. McLemore told his mother, Tammy McLemore, what they had seen. Because cell phone reception was poor at the McLemore's residence, they got into the car and drove down the street, where they were able to call 911.

Brian Turpin, a lieutenant detective with the Monroe County Sheriff's Office ("MCSO"), testified that he responded to Ballplay Creek off of Sloan Road on the evening of July 1, 2015. Upon arrival, he saw "a body in a plastic bag floating in the creek" hung up on some brush. The body was found in an area of deeper water where "the creek makes a turn." Det. Turpin secured the scene and took photographs, and those photographs were entered into evidence. The photographs showed the location of the body upon arrival, pictures of a sheet that was found nearby on the opposite side of the creek bank, and pictures of the body after it was removed from the creek. Photographs depicted that the body was wrapped in a trash bag and secured by a sheet and two pieces of electrical cord—one around the torso and one around the neck. There were some tears in the large bag, and portions of the Caucasian body were visible from outside the bag. According to Det. Turpin, the sheet found on the creek bank matched the bedding on the bag with the body. Det. Turpin said that, to the best of his recollection, the electrical cord appeared "to be like a lamp cord[.]" A tank top was also found in the water, which Det. Turpin retrieved.

MCSO Officer Chris Moses also responded to the Ballplay Creek location. Officer Moses identified daytime photographs of the approximate one-mile route an individual would travel from Highway 360 down Sloan Road to that location. Officer Moses described Sloan Road as "a small back road" and noted that one had to travel over a bridge before getting to the dirt path leading to the creek, which was in a "very secluded" wooded area. He also noted that one traveling from Maryville down Highway 411 would intersect with Highway 360 in Vonore and would cross over Tellico Lake numerous times during that drive. Officer Moses confirmed that Tellico Lake was much deeper than Ballplay Creek and flowed into the Tennessee River. Though Officer Moses grew up in this area, he was not familiar with the Ballplay Creek location prior to this investigation.

Det. Turpin also described the Ballplay Creek location as rural and remote. Det. Turpin opined that it would require a four-wheel drive vehicle to drive down the "little path" to the creek. Det. Turpin agreed that, though remote, the creek area was close to the road and the dirt path was visible from the road. He acknowledged that the area was traveled by people for various purposes.

TBI Special Agent Nicholas Brown, assigned to the field division unit, testified that on July 1, 2015, he was called to assist the MCSO with "a body that had been located in a very remote part of Monroe County in a creek." Upon his arrival at the Ballplay Creek location, Agent Brown observed litter on the road next to the creek, as well as debris in the gravel section between the water and the creek bank. Agent Brown said that it appeared that the water level of the creek fluctuated a lot. Various items from along the creek bank were collected and taken for testing, including cigarette butts, beer cans, a soda can, a soup can, a men's t-shirt, and a .22 caliber shell casing.

Dr. Darinka Mileusnic-Polchan, the Chief Medical Examiner for Knox and Anderson Counties, conducted the autopsy of the body on July 2, 2015. Dr. Mileusnic-Polchan noted that the female body was "received inside a very large, industrial size, black trash bag," which measured approximately ninety-six by sixty inches. Upon observation, the body was in a moderately advanced state of decomposition. She noted that the head was severely injured and covered with a separate trash bag and a towel and that the bedding inside the bag, along with the towel, appeared to be soaked in blood. She opined within a reasonable degree of medical certainty that the cause of death was "craniocerebral injuries due to multiple blunt force head trauma" and that the manner of death was homicide. She identified at least seven separate impacts to the head and neck region and said that the skull was crushed and fragmented in multiple pieces. Based upon the toxicology report, Dr. Mileusnic-Polchan was able to opine within a reasonable degree of medical certainty that the individual did not die from an overdose—in fact, there were no opioids found in the person's system.

Given the extent of the damage, Dr. Mileusnic-Polchan opined that the killer used "a heavy object with a lot of force to crush the skull[.]" She concluded that "[e]xtensive complex calvarial and basilar skull fractures suggest[ed] application of tremendous forces[.]" The same type of force could be seen in a motor vehicle accident, according to Dr. Mileusnic-Polchan. Based upon the repeating pattern present in some of the injuries, she thought the object used had "some pattern with some of the ridges that were about a half inch apart." She observed one of the lacerations had "some really peculiar piece of wood" embedded in it.

The items that bound the body, as well as the clothing on the body, were removed at the autopsy. Autopsy photographs were entered into evidence, which included photographs of the torn bedsheet that bound the body that was knotted in two places. There was also a down comforter and human hair found in the bag with the body, which were photographed.

Photographs of the large trash bag with tape affixed to it were also presented. One photograph of the bag depicted two people holding the bag from the top and opening it to demonstrate its size. Dr. Mileusnic-Polchan said that the bag "looked like some industrial size bag that had ties around it." Det. Turpin opined that the trash bag appeared to be bigger than any normal-sized bag widely available and would be "the kind of bag that you would expect to find maybe if you worked at construction sites or industrial sites." He stated that he had never seen a bag that size before.

Dr. Mileusnic-Polchan said that there were knots in the cords secured around the body's torso and neck, which seemed to have been applied "for the purpose of transporting or maybe dragging the body[.]" She further noted that there were holes made in the trash bag from which the body's extremities were protruding, and she opined that those might have also been made for transportation purposes.

Though Dr. Mileusnic-Polchan could not provide a specific time of death, she opined that the person had been deceased for five to seven days when found in the creek, which was consistent with the body's being dumped in the creek on June 26. In addition, she noted that the unattached hair in the bag was caused by the decomposition process, explaining that as the body decomposes, the first layer of skin completely detaches, including the hair and nails.

Miranda Gaddes, a TBI forensic scientist and expert in microanalysis, stated that she analyzed the two cords found tied around the body. She said that one cord had two cut ends and the other had one cut end, which led her to conclude that the cords were once joined.

Alyssa Manfredi, a TBI forensic scientist with the forensic biology unit, testified as an expert in serology. She said that she examined shorts, a blanket, a towel, a tank top, and a sheet and that presumptive testing indicated the presence of blood on all of the items. However, upon further examination, she did not find the presence of hemoglobin, a component of human blood, on any item but the towel. Agent Manfredi explained that sunlight, heat, and water can break down hemoglobin, and because the body was found outside and had been in water for several days, she thought it was all blood despite the absence of hemoglobin. In addition, no semen was found on any of the items submitted.

The body could not be identified initially through dental records because the victim had no teeth. Agent Brown disseminated information to the media in an effort to determine her identity. According to Agent Brown, the information released included only the female's general description and the location where she was found, including that she was in water. He confirmed that no information was released about the trash bag or the nature of her injuries.

David Howell, a TBI forensic scientist in the latent print unit, testified as an expert in fingerprint identification. He said that he examined the unidentified female's hand on July 9, 2015, and was able to retrieve two prints from the hand. After consulting a fingerprint database, Agent Howell was able to identify the victim. Agent Brown thereupon spoke with the next of kin, the victim's sister, Christy Gass.

Ms. Gass testified that the victim was forty-two years old at the time of her death, that the victim had four children and three grandchildren, that the victim only dated Black men, and that the victim had lost all of her teeth due to a combination of drug issues and domestic violence. Ms. Gass relayed that the victim had a history of drinking and abusing drugs, mainly "pain medications, Xanax, Klonopin, those types of medications." This caused Ms. Gass and the victim to have a strained relationship. In May 2014, the victim was admitted to the hospital after suffering "a bad urinary tract infection which resulted in sepsis and multi-organ dysfunction." At some point, the victim also suffered from an anoxic brain injury, which left her in a "vegetable-like" state and unable to talk. The victim was admitted into a nursing home following her release from the hospital in July 2014, where she remained until January or February of 2015. According to Ms. Gass, the victim regained her ability to speak. However, the victim still had muscle issues that required the use of a walker or wheelchair, and her hands remained "contracted" and were never fully functional.

Once the victim was released from the nursing home, she began to abuse medications again. This caused Ms. Gass to decide that the victim could not live with her. According to Ms. Gass, the victim had some money when she left the nursing home and stayed in hotel rooms with Jeremy Jordan, a man with whom the victim had previously been romantically involved. After the "money ran out," the victim "bounced back and forth" among several places before moving in with a Caucasian male friend, John Russell Seymour, in May 2015.

Ms. Gass said that the last time she spoke with the victim was on June 25, 2015, when the victim sent Ms. Gass a picture of the victim's legs through Facebook with what

appeared to be bedbug bites on them. Ms. Gass told the victim that she needed to wash "everything" in an effort to get rid of the bugs.

Ms. Gass became aware of the victim's death on July 9, 2015, when Agent Brown came to speak with her. The next day, Ms. Gass gave her cell phone to the TBI so they could extract messages from the phone. The extraction showed the last text message between Ms. Gass and the victim was at 5:36 p.m. on June 25, after they had discussed the bites on the victim's arms and legs.

Ms. Gass testified that the victim frequently communicated through Facebook and that the victim had met a man named "Mook" Mack through Facebook in the spring of 2015. Ms. Gass recalled that the victim had only recently met Mr. Mack and went out of town to see him shortly before her death. Though the victim liked Mr. Mack, Ms. Gass did not think that he returned her affections.

On June 22, 2015, Ms. Gass sent the victim a text message saying that she was alarmed by one of Mr. Mack's Facebook posts. Ms. Gass explained, "[I]t was a comment or post that he had made that said something about having to be like a linebacker and blocking these wh----." This information upset the victim because she thought Mr. Mack was possibly referring to her.

On June 23, 2015, Ms. Gass asked the victim, "What boo you with today?" to which the victim said, "Defari." When Ms. Gass looked at Defari's Facebook page, she saw that he was very young. When Ms. Gass asked the victim about Defari's age, the victim indicated that she was not giving him any "play" and that the two of them were just friends. Thereafter, Ms. Gass texted the victim and asked her if she had gotten "things straightened out with" Mr. Mack. The victim said that she had not and indicated that she was still mad at Mr. Mack. The victim then indicated to Ms. Gass that she was with Mr. Taylor, and Ms. Gass joked that the victim was "stoned" because the victim was unable to keep straight whom she was with. Ms. Gass indicated that Mr. Taylor and Defari were younger friends of the victim's son, who was incarcerated for drug trafficking.

Because Agent Brown had been informed that the victim lived with Mr. Seymour at the time of her death, he went to speak with Mr. Seymour on July 11, 2015.

Mr. Seymour testified that the victim lived with him in his Western Heights apartment from May to June of 2015 and that when she moved in with him, she walked with a limp and her hands "weren't real strong." He indicated that the victim did not bring much with her other than some clothes and personal items and that the victim lived with him for free. The apartment was located at 1700 Virginia Avenue in Knoxville. According

to Mr. Seymour, he and the victim were just friends, and though he wanted to be closer, the victim was not interested in him. The victim mainly slept on the couch. Mr. Seymour said that there were frequent visitors to his apartment who were "in and out," mostly alcoholics and heroin and crack cocaine addicts. Mr. Seymour provided that the Defendant was one of those visitors who "started coming around through a friend" and that the Defendant was there during the month of June that year. Mr. Seymour said that the Defendant and the victim had been in the apartment at the same time. According to Mr. Seymour, the Defendant, to the best of his recollection, visited the apartment on June 25, 2015.

Mr. Seymour relayed that the victim had received some money from the government and that he last saw her alive on June 25th. Mr. Seymour said that he went to bed early on the evening of June 25 and that when he awoke on the morning of June 26, the apartment door was "halfway" open and no one was there. He discovered that the victim had left her wallet with her debit and food stamp cards inside, and he was unable to reach the victim by telephone. Though Mr. Seymour was in frequent contact with the victim, he did not file a missing person's report, explaining that he thought she had just gone to stay at someone else's house.

Mr. Seymour confirmed that when he spoke with Agent Brown on July 11, 2015, he had already been informed of the victim's death. He had also wiped his phone "clean" of all text messages already, which was something he did periodically. Mr. Seymour gave the officers consent to search his apartment and provided a DNA sample. When the officers arrived, there were no sheets on his bed. Mr. Seymour explained that he had recently had a bedbug problem. Mr. Seymour also said that he used bedsheets as curtains sometimes by "just tuck[ing] them over the bar and pull[ing] it down a little bit." Mr. Seymour acknowledged that there was deep fryer in his house that had some metal fixtures in the bottom of it, which Mr. Seymour described as looking like where "the plug goes in[.]"

Agent Brown noted that Mr. Seymour was "cooperative throughout" and that in addition to providing a DNA sample and consent to search, he also allowed the officers to look through his cell phone and gave an official statement to law enforcement. Agent Brown confirmed that Mr. Seymour was dealing with a bedbug problem. Agent Brown also confirmed that Mr. Seymour turned over the victim's cards to the officers and that upon further investigation, no one had been using those cards in the time after the victim's death. Agent Brown opined that the deep fryer "was very old and poorly maintained" and that it did not have any evidentiary value. Though the deep fryer did not have a cord, Agent Brown thought that small kitchen appliances of that type would not have a cord as thick and as long as the one found tied around the victim. In addition to the clothes that Mr.

Seymour indicated belonged to the victim, there was another pile of clothes, which contained the driver's license of another woman.

Stephanie Housewright, a Knoxville Police Department ("KPD") crime scene technician, testified that she was called to Mr. Seymour's residence on July 11, 2015. She performed the "Bluestar" process, which she described as utilizing a substance similar to Luminol that looked for blood that had been cleaned up or that could not be seen with the naked eye. She swabbed several spots in Mr. Seymour's apartment and sent those swabs for testing. She also found a bag of sheets next to the bed in the upstairs bedroom. She removed sections of the bedding and sent those for testing as well. Upon testing by the TBI, the only DNA profile identified from the items taken from Mr. Seymour's residence was his own. The victim's blood was not found in Mr. Seymour's apartment.

Nina Scruggs testified that she had known Mr. Seymour for many years and visited his apartment in May and June of 2015, where she met the victim. Ms. Scruggs described the victim as quiet and someone who "stayed to herself." Ms. Scruggs said that she had seen the Defendant and the victim together at Mr. Seymour's apartment engaged in casual conversation.

On July 21, 2015, Ms. Scruggs was present in Mr. Seymour's apartment along with the Defendant. On this occasion, she saw the Defendant in possession of a machete-type knife. She described it as "homemade" with "more of a square-type" blade that was six to eight inches in length and a wood handle that was approximately four inches long. She said that there was tape on it separating the blade from the handle.

According to Ms. Scruggs, the victim's death was discussed in Mr. Seymour's apartment on "quite a few occasions." She said that the Defendant would always ask for details of the police investigation but that Mr. Seymour did not want to discuss it. Ms. Scruggs testified that Mr. Seymour cared for the victim and was not a violent person.

Agent Brown said that on August 21, 2015, he received a call from Ms. Scruggs who made him aware that the Defendant frequented Mr. Seymour's apartment. After receiving Ms. Scruggs' phone call, Agent Brown subsequently obtained a police report that had been filed by Gary Mullins on June 26, 2015, in which Mr. Mullins mentioned the Defendant. On November 12, 2015, Agent Brown went to speak with Mr. Mullins at his residence on Avondale Avenue in Knoxville.

Mr. Mullins testified that he worked at Summit Medical in Farragut and that in May and June of 2015, he rented a bedroom in his house to the Defendant for $100.00 a week after posting an advertisement on Craigslist. He had an indoor cat at that time. According

to Mr. Mullins, the Defendant had a job "in warehouse kind of work" when he moved in, but he quit that job because he did not like working third shift. Mr. Mullins was unaware if the Defendant obtained a job thereafter. Mr. Mullins said that when the Defendant moved in, he drove a black GMC Chevrolet two-door truck and brought his own bedding and television with him. Mr. Mullins indicated that the Defendant sometimes entertained women in the Defendant's room, explaining that the Defendant had introduced him to three different women while the Defendant lived there.

Mr. Mullins stated that the Defendant's bedroom was on the main level of the house. Mr. Mullins' bedroom was upstairs, and he had a window air conditioning unit in his bedroom that made noise. The Defendant's bedroom was beneath the upstairs bathroom.

Mr. Mullins recalled that he had gone to sleep around 11:00 p.m. on the evening of June 25, 2015. At that time, the Defendant and the Defendant's truck were gone. Mr. Mullins stated that he was not awakened by any sounds while he slept that night and that he usually got up for work between 6:20 a.m. and 6:30 a.m. As Mr. Mullins was leaving for work around 7:15 a.m. the following morning, June 26, he noticed that the screen on the Defendant's bedroom window that faced the back porch was "bent up like from the bottom." Because it was odd, Mr. Mullins took a picture of the screen, and the photograph was admitted into evidence. He also noticed that there were markings on the pavement of his driveway that looked like metal had been dragged across it leading to the Defendant's truck. He saw that the Defendant's truck had a flat tire on the rear passenger side and said that it looked like the Defendant had been driving on the rim of the tire for a long distance. Mr. Mullins said that none of these things appeared like this the day before.

When Mr. Mullins got into his truck to go to work, he suspected that the Defendant had been inside it. Mr. Mullins said that his CDs were scattered around and that some of the Defendant's hair was in the truck. Mr. Mullins did not recall seeing any blood or mud on the truck. Believing that the Defendant had taken his truck, Mr. Mullins banged on the Defendant's window and told the Defendant that he knew the Defendant had been in his truck and that the Defendant could not stay with him any longer. Mr. Mullins left for work.

When Mr. Mullins returned home from work that afternoon, the Defendant was in the Defendant's bedroom. Mr. Mullins opened the bedroom door and asked the Defendant if he had taken Mr. Mullins' truck. According to Mr. Mullins, the Defendant prevented him from coming further into the bedroom. Mr. Mullins said that the Defendant admitted that he had taken the truck and apologized profusely, though the Defendant would not tell him why he took the truck. Mr. Mullins then went upstairs to his own bedroom and could tell that someone had been in his room that day because items had been moved around, coin books had been taken, and a box of checks was missing. When he asked the Defendant

about this, the Defendant could not offer an explanation, so, around 11:40 p.m. that evening, Mr. Mullins called 911 to report the theft.

The 911 call was played for the jury. In the 911 call, Mr. Mullins said that his "boarder," the Defendant, knew who stole the items from Mr. Mullins' bedroom, but that the Defendant would not confirm this or provide a name. According to Mr. Mullins, the Defendant was attempting to leave the residence at that time. Mr. Mullins indicated to the 911 operator that he discovered the theft when he got home that evening from work. Mr. Mullins said that "the friend" was also with the Defendant at the residence the night before and that at 4:30 a.m., Mr. Mullins discovered that they had taken his truck, though they had returned it. After the 911 call, several officers came to Mr. Mullins' house to take a report. Mr. Mullins told the police that he was concerned that one of the Defendant's "female friends had gone in and taken [his] checkbook and [his] coin collection[.]" Though Mr. Mullins was not present when any female friend was in the house, Mr. Mullins explained that he "assumed" one was there that day because the Defendant kept telling Mr. Mullins "that he was no thief."

Mr. Mullins agreed that he did not tell the police about finding a piece of the Defendant's hair in his truck, nor could he recall whether he told the police that the Defendant admitted to taking his truck. Mr. Mullins also acknowledged that he told the 911 operator that the theft occurred at 4:30 a.m.; however, he explained that he only told the police this at that time because he was upset and under duress. He thought the theft of his property from his bedroom happened while he was at work that day.

The Defendant moved out that weekend. As the Defendant was moving out, Mr. Mullins offered to help him move, but the Defendant did not want any help, explaining to Mr. Mullins that he was "real particular" about his belongings. After the Defendant left, Mr. Mullins noticed a black blanket in the carport garbage can that had "just odds and ends pieces of trash on top of it." Mr. Mullins left the blanket in the trash can, so he was unaware if it had any blood on it. Mr. Mullins also found his missing coin book in the trash can. Mr. Mullins never spoke with the Defendant again, nor did he ever rent the bedroom again.

Mr. Mullins said that on August 8, 2015, he bought a new mattress because he was having some numbness in his arms and neck. He put the new mattress in his bedroom and replaced the one in the bedroom that the Defendant had rented with the old mattress. According to Mr. Mullins, the mattress from the Defendant's room had a softball-size "brown stain up near the head of the mattress" when it was removed. Mr. Mullins placed the mattress at the street, and it was eventually taken by one of his neighbors.

Mr. Mullins confirmed that the TBI contacted him in November 2015 and came to his residence. Mr. Mullins gave them consent to search.

Mr. Mullins identified the sheet that had been wrapped around the victim as one that he had left on his back porch. He said that he had left several sheets outside that were used to cover plants the previous fall and winter. Mr. Mullins explained, "I know because it is frayed, it had been torn in half and there is a part in the sheet that has a square where I—where it got torn out, it's a perfect square with the flap that fits back into the square[.]" Mr. Mullins further noted, "There would be an L shape tear in it where it was hung on box springs when I used the sheet." He was positive of his identification, though he saw a staple in the sheet that he did not recognize.

Carmalita Adkinson testified that she lived next door to Mr. Mullins and retrieved the mattress he left at the street in 2015. She saw some dark spots on the mattress that required cleaning with bleach. Ms. Adkinson said that there was one larger stain and then "splatter marks all over the mattress." She allowed TBI agents to remove the mattress from her home in November 2015.

Keith Proctor, a forensic scientist supervisor in the TBI Crime Laboratory, testified as an expert in serology and DNA analysis. Agent Proctor stated that he went to Mr. Mullins' house on Avondale Avenue on November 12, 2015, and assisted with the examination of the room the Defendant had been renting. He photographed the scene, including the reddish-brown stains present, and those photographs were shown to the jury.

Agent Proctor indicated that he performed Bluestar testing in the bedroom and that any areas that presumptively tested positive for blood were collected and brought back to the lab. After testing, Agent Proctor was able to determine that swabs taken from the headboard in the room matched the DNA profile of two individuals—the major contributor was the victim, but results for the minor contributor were inconclusive. Swabs taken from spots on the wall on the right side of the headboard and on the floor near the headboard matched the victim's DNA profile. Agent Proctor analyzed swabs taken from a desk in the corner of the bedroom and was able to determine that there were two DNA profiles present—the victim was again the major contributor, but the results for the minor contributor were inconclusive.

According to Agent Proctor, there were several areas on the mattress found at Ms. Adkinson's residence that testing presumptively revealed the presence of blood. Cuttings taken from the mattress revealed the DNA profile of an unknown male, and testing of a separate area was inconclusive. Photographs of the mattress were entered into evidence. Referring to the area on the mattress that was inconclusive, Agent Proctor opined that if

the mattress had been cleaned with a bleaching product, it was possible that cleaning could have degraded the DNA sample. Both Mr. Mullins and Mr. Seymour were excluded as contributors to the determinable mattress sample.

Agent Proctor acknowledged that animal urine could also hinder the Bluestar process in the same way as bleach. He said that the absence of a determinable DNA sample following a Bluestar illumination did not necessarily mean that someone had washed away blood evidence. Agent Proctor conceded that a cat could have urinated on the mattress.

Agent Brown, using the number he had received from Ms. Gass, was able to obtain the victim's cell phone records. Those records did not include the content of the victim's text messages because Verizon only maintained content for three to five days. Agent Brown learned from the records, however, that the victim was primarily in the Western Heights community in the days and weeks before her death, which was the location of Mr. Seymour's apartment. Agent Brown was also able to determine that the victim was likely last alive during the early morning hours of June 26, 2015.

TBI Special Agent Andrew Vallee with the technical services unit testified as an expert in cellular data analysis. He stated that he analyzed the cell phone records for the victim's phone from Verizon and the records for the Defendant's phone from AT&T. According to the records, there were twenty-one calls between the victim and the Defendant from June 25 at 2:32 a.m. to June 26 at 3:59 p.m. There were two text messages from the victim to the Defendant on June 26 at 1:36 and 1:37 a.m.; the Defendant never responded by text message. The last time the pair spoke on the phone was at 1:38 a.m. on June 26 for fifty-nine seconds. The next call from the Defendant to the victim at 1:56 a.m. was forwarded to voicemail. Agent Vallee agreed that the majority of the calls were from the victim to the Defendant, sometimes her calling him multiple times in a row. None of the calls were longer than four minutes, and most were less than one minute.

Agent Vallee analyzed cell site data, and he was able to determine the general location of the phones during the early morning hours of June 26. At 1:17 a.m., the devices were both near the cell sites connected with their respective residences. Based upon calls at 1:35 a.m. and 1:38 a.m., the phones had moved and were in very close proximity to each other, according to Agent Vallee. A call at 1:56 a.m. showed that there was again movement from both devices. The victim's phone had a "data connection" at 3:24 a.m. to a cell site near Mr. Mullins' residence on Avondale Avenue, and from engineering records, Agent Vallee was able to determine that the victim's device was approximately 1.9 miles from the cell site at that time, placing it physically near Mr. Mullins' residence "within the margin for error." The victim's phone also had cell site connections at 3:59 a.m., 4:00 a.m., and 4:05 a.m., placing it in that same area.

The phone call from the victim's phone at 3:59 a.m. was to a number belonging to Krista Legg, which went to voicemail. There was a call from the Defendant's phone at 3:56 a.m. that connected to a cell site near Mr. Mullins' Avondale residence. The Defendant also attempted to call the victim's phone at 3:59 p.m. on the afternoon of June 26, but the call did not connect.

The victim's phone never connected to a cellular network again following the 4:05 a.m. "data connection" event on the morning of June 26, which, according to Agent Vallee, meant that the phone had been powered off, had been destroyed, or was out of cellular network connectivity range. Following the call from the Defendant's phone to the victim's phone at 3:56 a.m., there was no activity on the Defendant's phone until 12:21 p.m. that afternoon, which Agent Vallee said was longer than any other delay observed on the Defendant's device. Agent Vallee also noted that the Defendant called Ms. Legg multiple times from June 26 to July 6.

Agent Brown learned that the Defendant had previously lived in Vonore, approximately two miles from where the victim's body was found in Ballplay Creek. Ms. McLemore, the mother of the two boys who found the body, testified that she was familiar with the Defendant and recalled that he had previously lived nearby across the street from the "Ballplay boat dock" in the 1990s. Mitchell Keith Moles, who had worked with the Defendant twenty years ago painting boats, similarly testified that the Defendant had previously lived in a mobile home at 2707 Highway 360 in Vonore, which was across from a boat ramp. Mr. Moles identified photographs of the location, though no mobile home was present on the property anymore. The photographs also reflected that the property was across the street from Ballplay boat ramp. Warranty deeds were entered into evidence reflecting that the property was transferred to the Defendant on June 14, 1991, and that he transferred the property on September 3, 2004.

Tim Henley testified that he met the Defendant when Mr. Henley worked at Applebee's restaurant and the Defendant worked for a railroad, explaining that there were a group of workers who met at Applebee's to socialize after their respective shifts. Mr. Henley testified that toward the end of June 2015, the Defendant contacted him looking for a place to live and that he agreed to let the Defendant live with him at his residence on Midway Street in Knoxville. The Defendant moved in with Mr. Henley four or five days later "right at the first" of July. Mr. Henley stated that the Defendant no longer worked with the railroad at that time and was working through a "temp service" performing "industrial-type jobs."

According to Mr. Henley, when the Defendant moved in with him, the Defendant drove a '90s black Chevy truck and brought with him two duffel bags, along with some other items, including two television sets, in the back of the truck. After bringing one of the televisions inside, the Defendant asked Mr. Henley for a power cord to use with it. The Defendant left the other television in the back of the truck, which Mr. Henley observed was also missing a cord. Mr. Henley recalled that the Defendant did not bring any bedding with him and that the Defendant later brought some new bedding into the house. The Defendant had several phone numbers during this timeframe, according to Mr. Henley.

Krista Legg testified that she met the Defendant through "Backpage," a prostitution website, and that the Defendant used several different phone numbers to contact her. She stated that she had never met the victim, nor had she given the victim her phone number. Ms. Legg opined that if the victim and Defendant were calling her in the latter part of June 2015, it was for "[d]rugs or sex." Ms. Legg acknowledged that she had a drug problem and was addicted to opiates.

According to Ms. Legg, she had met with the Defendant less than twelve times in total, and at least four of those visits had taken place at Mr. Mullins' residence, where she observed the Defendant's bedroom. She was shown a photograph of the sheet found on the creek bank near the victim's body and identified it as coming from the Defendant's bedroom. At the bottom of the photograph, Ms. Legg had written, "This was the bedsheet on [the Defendant's] bed at the house on Avondale." She had signed and dated the photograph June 20, 2018. The photograph was admitted into evidence.

Ms. Legg acknowledged that she did not tell the TBI about the sheet when she spoke with them in December 2015, though she was asked about the inside of the Defendant's residence at that time. She agreed that the photograph signed just several days before trial was her first identification of the sheet.

Ms. Legg described the sheet in the photograph as being blue with yellow lines. She was then shown a close-up photograph of the same sheet, which she could not identify because it did not have any yellow lines on it, although it had the same pattern. She agreed that the sheet shown to her in the first photograph might have appeared to have yellow lines on it because it was dirty and wet. She said that she "guess[ed]" she could not identify the sheet after all. Nonetheless, Ms. Legg asserted that to the best of her recollection, the sheet on the Defendant's bed had the same pattern as the sheet in the first photograph.

Ms. Legg admitted that she had pending "legal matters," including pending misdemeanor charges for possessing a needle as drug paraphernalia. She averred that she had not been promised anything in exchange for her testimony. She indicated that she had

a court date on that pending case set for the same day she was testifying against the Defendant.

Mr. Moles testified that he came into contact again with Defendant in 2017, when he and the Defendant began "hang[ing] out" a couples of months before the Defendant was arrested for the victim's murder. Mr. Moles knew the Defendant to be living off of Morganton Road in Blount County between Maryville and Greenback. According to Mr. Moles, the Defendant, at that time, had three different cell phone numbers. The Defendant had called him from jail several times after he was arrested—one time saying that he did not know the victim and another time saying that he had met her once. The Defendant also asked Mr. Moles to delete several "dirty pictures" from his cell phone, but Mr. Moles, instead, turned the phone over to the TBI.

Agent Brown testified he learned that by November 2015, the Defendant was no longer driving the '90s black Chevy truck because it had been towed by the KPD and later auctioned. Agent Brown said that the Defendant was transient in nature and that he primarily worked through temp services in maintenance roles in factories and industrial settings. According to Agent Brown, the Defendant was working at Gerdau Ameristeel around the time of the victim's death. Agent Brown described the company as a steel mill that manufactured rebar. Because it was a "very dirty, hot atmosphere," the company would have had industrial products with which to clean the factory.

Agent Brown testified that he reviewed the Defendant's phone records from around the time of the victim's murder. According to Agent Brown, the Defendant was in contact with Ms. Legg and April Berry, both known prostitutes. The Defendant also placed several calls to phone numbers associated with Backpage ads. The Defendant spoke with Michael Bryant, Pierre Hodges, and Ben Wringle, all known drug dealers. Agent Brown said that Mr. Wringle frequented Mr. Seymour's apartment. Agent Brown noted that the Defendant called Mr. Bryant on the morning of June 26 at 12:46 a.m., then Mr. Hodges at 1:04 a.m., and Mr. Bryant again at 1:26 a.m. The Defendant made two calls to Mr. Bryant at 3:56 a.m. that morning that went to voicemail.

Agent Brown also discovered that the Defendant used at least four different cell phones from the time of the victim's murder until his eventual apprehension. The Defendant first changed phones in August 2015, according to Agent Brown. Agent Brown estimated that the Defendant also had six to eight phone numbers during that same timeframe. Agent Brown was never able to recover the cell phone used by the Defendant on June 25 and 26 of 2015.

Agent Brown also reviewed the victim's phone records. He investigated three other men that the victim had spoken to around the time of her death—these were all Black men in their twenties and thirties and included Mr. Mack. Agent Brown was able to rule out two of these men as suspects because the victim never met with them. Relative to Mr. Mack, Agent Brown said that the victim had not spoken to him in several days prior to her death. There was no proof that the victim was engaged in prostitution.

Agent Brown confirmed that when he interviewed both Mr. Mullins and Ms. Legg, he did not show them photographs from any of the scenes. According to Agent Brown, Mr. Mullins said during the interview that he would not remember anything about the Defendant's bedding. Agent Brown agreed that there were at least two metal fastenings in the sheet that Mr. Mullins identified and that a slang term for these fastenings was a "hog ring." The medical examiner's report indicated that "the cut ends of the torn strips of bedsheet from the [the victim's] torso were approximated and secured with surgical staples." However, Mr. Mullins did not know what a "hog ring" was when asked, and he gave no indication that he stapled his sheets.

Agent Brown acknowledged that Mr. Mullins did not mention during the interview that he found the Defendant's hair in the truck that morning. Agent Brown also believed that there was a typo in his report of Mr. Mullins' interview—he wrote that Mr. Mullins first observed the flat tire on June 25, when it was actually June 26.

Agent Brown opined that the victim was struck with "some sort of heavy object . . . with great force." Though Agent Brown believed that the Defendant used Mr. Mullins' truck to transport the victim, there was no blood evidence on the truck, likely because five months had elapsed. Agent Brown admitted that he did not know the victim's condition at the time she allegedly arrived at the Avondale residence in the early morning hours of June 26; she could have had open sores or wounds. However, Agent Brown did not think that the blood spatter on the wall or the blood on the corner desk was from scratching a bug bite.

Agent Brown eventually apprehended the Defendant in April 2017. He located the Defendant in a small trailer park off of Highway 411 between Maryville and Greenback. The Defendant was living alone.

As part of his investigation, Agent Brown sought to determine the approximate driving time from Mr. Mullins' residence on Avondale to the location at Ballplay Creek where the victim's body was found. To do this, he drove the "most logical route," approximately forty-eight miles, between the two locations. Agent Brown said that the drive took slightly over an hour on a Saturday afternoon and that when he drove it again

early on a Sunday morning, it took about fifty-three minutes because there was less traffic. Agent Brown acknowledged that along this route, one passed multiple areas of deep water and that Tellico Lake was considerably deeper than Ballplay Creek. The drive was recorded and played for the jury.

Agent Brown also drove the route from where the Defendant used to live on Highway 360 in Vonore to the Ballplay Creek location, which took him approximately four minutes. When Agent Brown turned from Highway 360 onto Sloan Road, he passed two cars in less than a minute. Agent Brown agreed that this area was not a remote encampment" and that there were houses on the street. This drive was also recorded and played for the jury.

Terry Wilshire testified that he was a Captain with the Knox County Sheriff's Office. He stated that he was responsible for the communication devices and maintained those records in the detention facility where the Defendant was housed pretrial. Captain Wilshire confirmed that the Defendant and Jalen Walker were housed together at the Knox County Jail for a period in July 2017.

Jalen Walker testified that he shared a cell with the Defendant in the summer of 2017. During that time, he and the Defendant were talking about drugs they had done in the past, and the Defendant told him that he had "done pills, meth, crack, and heroin" before, which led them to talk about this case. Mr. Walker estimated that the conversation lasted about twenty-five to thirty minutes. According to Mr. Walker, the Defendant told him that the Defendant and the victim had gone to get heroin; the Defendant wanted sex, but the victim did not; and the Defendant got aggressive, putting his hands around the victim's neck. The Defendant relayed to Mr. Walker that he gave the victim some more heroin, but this time, he "added to it," so she would have sex with him. Following this second dose that was "laced" with something, the victim passed out and died. The Defendant panicked and, rather than calling the police, tried to cover everything up. The Defendant told Mr. Walker that he had cut up the victim and "stuffed" her "in a big black trash bag" and had thrown the bag in the river. Mr. Walker gave a written statement to this effect on October 10, 2017, which was admitted into evidence.

Mr. Walker acknowledged that he was serving a four-year sentence at thirty percent service for drug and theft convictions. Certified copies of these convictions were entered into evidence. Mr. Walker further confirmed that he had a pending case for attempted especially aggravated robbery and attempted aggravated robbery and that these new charges had been acquired while he was on probation. Mr. Walker said that he had not been promised anything from the State in exchange for his testimony against the

Defendant, but that he hoped the State would "give [him] a break" and he did not have to go to jail for eight to twelve more years.

Recordings of the Defendant's jail phone calls were admitted into evidence and played for the jury. The first call was placed to Mr. Moles on February 16, 2018. During the call, the Defendant told Mr. Moles that he had been waiting on discovery, but then indicated that he was only waiting on the victim's cell phone records. The Defendant clarified that he had never talked to the victim by phone or text message, so he really did not care if he saw the records. In another call placed to Mr. Moles on May 6, 2017, Mr. Moles asked how the authorities came to "point the finger" at the Defendant. The Defendant indicated that the murder must have happened at his prior residence on Avondale Avenue, where he lived with "a scary man" for a little over a month. In a third call to Mr. Moles placed on July 29, 2017, the Defendant told Mr. Moles that there was no evidence tying him to anything, that he was never around the victim, and that his vehicle was broken down at the time of the murder.

On October 4, 2017, the Defendant called his mother in Indiana. His mother indicated that she was told there were "like 2,100 pages" of text messages between the Defendant and the victim. The Defendant denied those allegations and asked his mother to trust him. In a November 23, 2017 phone call with his mother, the Defendant said that the authorities did not have any evidence placing him and the victim together. He acknowledged that there were some phone calls to the victim that lasted only a few seconds, but he said that there were no text messages between the pair.

The Defendant placed a call to a Knoxville area phone number on December 9, 2017. He told the individual that there was no evidence ever placing him and the victim together, including no text messages.

4. Defense's Proof

The Defendant called Derana Johnson to testify. Ms. Johnson testified about the last conversation she had with the victim prior to her death. Ms. Johnson believed that the conversation took place during the early morning hours on the 26th, though she could not recall the specific month. Ms. Johnson relayed that after they finished speaking that morning, the victim walked up a hill on Virginia Avenue with her two bags in hand and got into a white four-door car. The victim told Ms. Johnson that "she was just leaving like for the weekend" to visit a friend, but Ms. Johnson never saw the victim again. Ms. Johnson knew the conversation occurred in the summer of 2015 and indicated that it likely happened on a "weekend in mid-June."

The Defendant also recalled Agent Brown. Agent Brown testified that he interviewed Ms. Johnson on July 11, 2015, and that Ms. Johnson advised him that she had last seen the victim "on approximately" June 26, 2015. Ms. Johnson indicated to Agent Brown that the victim had her bags and her purse with her. In addition, Agent Brown confirmed that he had received information that the victim went to Cleveland, Tennessee to visit Mr. Mack the weekend before her murder.

5. State's Rebuttal Proof

Ms. Gass was recalled and testified that the victim did not mention to her anything about going out of town on the weekend of June 25 and that the two were communicating via text messaging during that time. Ms. Gass confirmed that the victim went on a trip to Cleveland to visit Mr. Mack on June 19, 2015, and that the victim returned to Knoxville on June 22. The victim's Facebook posts verified this information. Ms. Gass described the victim as sad and depressed following the visit to Cleveland, and she said that the victim often used drugs when in that state of mind.

6. Verdict and Sentencing

Following the conclusion of proof, the jury found the Defendant guilty of the lesser included offense of second degree murder, a Class A felony, and guilty as charged of abuse of a corpse, a Class E felony. *See* Tenn. Code Ann. §§ 39-13-210, -17-312. A sentencing hearing took place on August 10, 2018, and judgment forms were entered thereafter. According to the judgment forms,[5] the trial court sentenced the Defendant as a Range II, multiple offender to forty years for second degree murder at one-hundred percent service and a concurrent term of four years for abuse of a corpse at thirty-five percent service.

C. Post-Sentencing Proceedings

On September 10, 2018, the Defendant, through defense counsel, filed a motion for new trial. In the motion, the Defendant cited as error (1) that the State had not disclosed pretrial that two witnesses would identify property recovered from the crime scene as belonging to the Defendant (Mr. Mullins' and Ms. Legg's sheet identifications) and that the delayed disclosure rendered the Defendant's trial fundamentally unfair; (2) that the trial court allowed the State to make numerous references to the Defendant's alleged prior drug use and the Defendant's alleged prior employment of prostitutes, which prejudiced the Defendant; and (3) that the State failed to establish venue for the abuse of a corpse charge. That same day, the Defendant filed an amended motion for judgment of acquittal.

[5] A transcript of the sentencing hearing is not included in the record on appeal.

Defense counsel later withdrew, and a new attorney was appointed for the Defendant on August 8, 2019. On October 18, 2019, the Defendant, with the assistance of this new attorney, filed a motion seeking entry of an order "directing that [the] Defendant receive a copy of an unredacted video from the dayroom of Pod 1-C at the Knox County Sheriff's Detention Facility on August 8, 2019[,] between 7:00 and 7:30 p.m. and again on August 9, 2019[,] between [n]oon and 2:00 p.m." The Defendant asserted, "This video contains images and audio of [the] Defendant and one or more individuals at the said [d]etention [f]acility, which [the] Defendant believes may be exculpatory in nature." On November 15, 2019, an order was filed denying, without prejudice, the Defendant's motion for a copy of the unreacted video because it appeared that said motion was "premature." In addition, the Knox County Sheriff was ordered to preserve the video "pending further direction from" the trial court.

According to the record, the Defendant received a copy of the trial transcripts on November 1, 2020. On November 18, 2020, the Defendant filed a motion to proceed pro se and a motion to continue the hearing on the motion for new trial, asking that he be given more time to review the trial transcripts. The Defendant also filed an amended motion for new trial, raising additional issues. He alleged that he was denied due process because the trial court failed to address at the outset of trial his conflict of interest with defense counsel, his motion to continue the trial in order to review additional discovery materials, and his request to proceed pro se. The Defendant also submitted that the State withheld exculpatory evidence, specifically (1) his cell phone, which contained evidence "that refuted a key" witness' testimony, Mr. Henley; and (2) the criminal records of the persons the Defendant was calling that were known drug dealers and prostitutes. In addition, the Defendant averred that Mr. Walker had fully recanted his testimony, which left "no witness saying the Defendant was with the victim at the suspected time of the murder." The Defendant also sought DNA testing "of voluminous items found where the victim was discovered."

A minute entry for November 20, 2020, reflected that a hearing was held that day and that the Defendant and his lawyer were present. According to the order, the trial court granted the Defendant's motion to continue the hearing on the motion for new trial, and the Defendant's motion to proceed pro se during the motion for new trial proceedings was held in abeyance. According to a minute entry for December 2, 2020, the trial court again addressed the Defendant's motion to proceed pro se. Said motion was granted, and counsel was relieved.

The Defendant filed another pro se amended motion for new trial on December 2, 2020, which further alleged that the evidence was insufficient to support the verdicts and

that the trial court erred by failing to grant his motion to dismiss on the grounds that venue was not established for the abuse of a corpse charge or, in the alternative, to sever the offenses.

On April 19, 2021, the Defendant filed a pro se motion to recuse the trial judge. In the motion, the Defendant alleged that the trial judge had violated his Sixth Amendment rights on several occasions, noting the exchange that occurred at the outset of trial. Also, on April 19, the Defendant filed a motion seeking the assistance of elbow counsel with the motion for new trial proceedings. He also filed another amended motion for new trial on April 19, 2021. In addition to his prior allegations, the Defendant argued that the State failed to turn over "the identity of the person the victim was in a violent relationship [with] that lived in the county where the victim[']s body was found." An April 30, 2021 minute entry reflected that the Defendant's pro se motion to recuse the trial judge was heard and that after hearing the proof and arguments, the motion was denied. A May 7, 2021 minute entry showed that elbow counsel was appointed to assist the Defendant and that the Defendant's pro se motion for recusal of the trial judge again came on for a hearing and was denied.

On February 22, 2022, the pro se Defendant filed an amended motion to recuse the trial judge, raising similar allegations as before. According to the Defendant, the trial judge had shown bias toward the Defendant and violated his Sixth Amendment rights on several occasions. That same day, the Defendant filed a motion to produce the juvenile records of Mr. Walker because they had not been turned over in discovery.

The Defendant's last amendment to his motion for new trial was filed on February 22, 2022. In this amendment, the Defendant alleged the following additional grounds for relief: (1) that trial court erred by allowing admission of certain bad act evidence, specifically, Ms. Scruggs' testimony that the Defendant carried a machete knife, Mr. Walker's statement that the Defendant had used illicit drugs, and Agent Brown's testimony that the Defendant was calling known drug dealers and prostitutes without ever offering their criminal records; (2) that the State used perjured testimony to convict the Defendant; and (3) that the Defendant was never served "notarized notice" of the State's intention to seek enhanced punishment, therefore, making his sentence out-of-range and illegal.

At the motion for new trial hearing, the Defendant had the assistance of elbow counsel. The Defendant argued his motion for recusal of the trial judge first. In support of the recusal motion, the Defendant cited the trial judge's comments at the beginning of trial regarding the denial of the Defendant's motion to continue or, in the alternative, to proceed pro se. The trial court responded, "I get very frustrated at times when I have a case set for trial, and everybody is ready for trial, and I feel like someone is trying to do

something that might delay . . . the start of that trial." The trial court denied the motion to recuse, stating that it had no personal bias toward the Defendant. The hearing proceeded, and the Defendant argued his additional issues.

An order denying the motion for new trial was entered on March 16, 2022. This timely appeal followed. Because we it find it necessary to put some of the Defendant's issues in context, we note that the Defendant filed a pro se motion for the designation and preparation of the record pursuant to Tennessee Rules of Appellate Procedure 24 and 25. The motion, signed by the Defendant, requested preparation and inclusion of the following materials:

> 1) The Trial Transcripts of case #110400 heard on the 25th day of June, 2018.
>
> 2) Discovery of Jalen Antonio Walker[']s written statement.
>
> 3) The Motion For New Trial Transcript and all proceedings on February 25th, 2022. A copy of The Motion For New Trial (AND ALL OTHER MOTIONS) that was filed by the Defendant on this day (Judicial Recusal Motion, Production of Jalen Antonio Walker[']s Juvenile Criminal Record).
>
> 4) All Documents and Exhibits filed in Motion For New Trial (to include all affidavits and written statements).
>
> 5) Copy of All Motions filed leading up to trial (Motion To Dismiss for Lack of venue, or, in The Alternative, to Sever).
>
> 6) Transcript of the first five pages from the hearing on the 25th day of April, 2018.

II. ANALYSIS

On appeal, the Defendant raises multiple issues for our review. We have reorganized the issues to provide clarity, and we will address the issues in turn. Following our review, we affirm.

A. Pretrial Discussion Regarding Continuance/Self-Representation/Conflict of Interests

The Defendant levies several challenges to the discussion that occurred at the beginning of trial regarding his motion for a continuance in order for him to have time to

review additional, voluminous discovery or, in the alternative, to proceed pro se. According to the Defendant, the denial of these requests forced him to proceed to trial with an attorney who had a conflict of interest.

First, the Defendant argues that "the trial court erred by not allowing a continuance after the court was made aware the Defendant had not reviewed any discovery." The State responds that the trial court did not abuse its discretion in denying the motion to continue because "this was a ploy to postpone the trial." The State further asserts that, regardless, the Defendant cannot meet his burden of establishing prejudice by the denial of his motion to continue.

Second, the Defendant complains that he should have been permitted to proceed pro se at trial. He contends that he was denied his right to due process when the trial court required him to proceed to trial with defense counsel, though the trial court "was made fully aware in pretrial and before voir dire that the Defendant wanted to proceed [p]ro [s]e." The Defendant notes that on the morning of trial, defense counsel informed the trial court that the Defendant wished to proceed pro se, that the Defendant had not seen all of the discovery, and that the trial court would need to address this with the Defendant. The State replies that the trial court properly denied the Defendant's request to proceed pro se because it was clear that the Defendant made the request as a tactic to delay his trial and manipulate the process.

As a related issue, the Defendant contends that the trial court "erred by not allowing the Defendant to address the issue of conflict of interest when apprised by [defense counsel] that [the Defendant] would have to address this conflict issue," which "forced the Defendant to proceed to trial with conflicted counsel." The Defendant cites the following as evidence of this conflict: "The Defendant had a viable plaus[i]ble alternative strategy and theory of the crime and directed his counsel to pursue this strategy"; and "DNA testing that would exonerate him had not been done and the Defendant wanted this addressed." According to the Defendant, he was prejudiced because he was forced to proceed to trial with counsel who was not pursuing his preferred theory of defense. The State does not separately address the conflict of interest issue.

At the motion for new trial hearing, the Defendant argued that the trial court "thrust counsel" on him by denying these motions and forced him to proceed to trial in violation of his Sixth Amendment right to self-representation. The Defendant stated that the trial court did not question him about his request to proceed pro se. The trial court stated, "But my recollection is . . . that this [c]ourt was told in your presence before we started picking a jury that you were comfortable and that you wanted [defense counsel] to represent you." The Defendant adamantly denied that such events took place. Replying to the Defendant's

continued protestations, the trial court said, "I'm very confident that I would not have forced you to trial if that representation was not made to me." When the Defendant pointed out the trial court's statement made the morning of trial—"Dress him out. We're going to trial."—the trial court responded, "I'm a human being, . . . my fuse gets shorter . . . sometimes more than others. I can acknowledge that."

Relative to the motion to continue allegation, the trial court noted that the Defendant acknowledged that defense counsel received the discovery. The trial court warned the Defendant that whether defense counsel had reviewed all of that discovery with the Defendant was an ineffective assistance of counsel issue. The Defendant said he was not trying to raise ineffective assistance of counsel as an issue but averred instead that defense counsel's refusal to review the discovery with him was part of the conflict of interest. He also averred that defense counsel became "the master of [his] defense and [he] ha[d] no say so in it."

1. Continuance

A trial court's denial of a continuance will be reversed only if it appears that the trial court abused its discretion to the prejudice of the defendant. *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004). "An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." *State v. Schmeiderer*, 319 S.W.3d 607, 617 (Tenn. 2010) (quoting *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995)). "The only test is whether the defendant has been deprived of his rights and an injustice done." *State v. Goodman*, 643 S.W.2d 375, 378 (Tenn. Crim. App. 1982). The defendant bears the burden on appeal of demonstrating that harm ensued from the denial of the requested continuance. *State v. Willis*, 496 S.W.3d 653, 745 (Tenn. 2016) (citing *State v. Vaughn*, 279 S.W.3d 584, 598 (Tenn. Crim. App. 2008)).

According to the Defendant, the trial court, before voir dire and trial, was "fully aware that [the Defendant] had never reviewed any of his [d]iscovery, but [he] was forced to trial," nonetheless. The Defendant continues, "Defense counsel admitted he reviewed the [d]iscovery, (both he and the appointed investigator had), but not the Defendant[.]" However, contrary to the Defendant's assertion, defense counsel's statements do not support the conclusion that the Defendant had not reviewed *any* of the discovery. Instead, defense counsel indicated that the Defendant's concern was with the later-filed discovery, as well as the Defendant's having a general lack of understanding of the discovery materials. In addition, defense counsel said that he had reviewed the voluminous discovery in this case, that he and his investigators had conveyed the pertinent information to the Defendant, and that he was prepared to proceed to trial.

The trial court, in denying the Defendant's request to continue, indicated that the Defendant was seeking a continuance as a further tactic to delay his trial. "Eleventh hour motions for continuances are not favored by any trial courts, since they are often ploys to prevent having a trial." *State v. Joiner*, No. 02C01-9204-CR-00093, 1993 WL 424802, at *4 (Tenn. Crim. App. Oct. 20, 1993). The record supports the trial court's determination that the Defendant was seeking a continuance to review discovery materials as merely a delay tactic. We point out that the defense had been granted several pretrial motions to continue based upon additional time being needed for review of the discovery materials and that defense counsel said at trial that he and his investigators had reviewed all of the discovery materials and conveyed the pertinent information to the Defendant. This was merely an eleventh-hour motion for a continuance being used as a ploy to further delay trial. Accordingly, we conclude that the trial court did not abuse its discretion in denying the Defendant's request to continue the trial.

Moreover, the Defendant has not provided this court with any argument relative to how the denial of his motion to continue prejudiced him. The Defendant has failed to show how his lack of review of any discovery materials hindered his trial preparation and defense. *See State v. Brown*, 836 S.W.2d 530, 548 (Tenn. 1992) ("[T]he burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial."). Accordingly, the Defendant has failed to show that he was denied a fair trial or that a different result would have followed had the continuance been granted, and he is not entitled to relief.

2. Self-Representation

The Sixth Amendment of the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant a right to counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); *State v. Holmes*, 302 S.W.3d 831, 838 (Tenn. 2010). The right to counsel is a constitutional safeguard "deemed necessary to insure fundamental human rights of life and liberty." *Holmes*, 302 S.W.3d at 838 (quoting *Johnson v. Zerbst*, 304 U.S. 45, 462 (1938)). As an alternative to that right, the accused may instead assert the right to self-representation. *Lovin v. State*, 286 S.W.3d 275, 284 (Tenn. 2009); *see also Faretta v. California*, 422 U.S. 806, 832 (1975). Clearly, both rights cannot be simultaneously asserted. *Lovin*, 286 S.W.3d at 284. The right to self-representation is guaranteed by the same constitutional provisions which provide for the right to counsel. *Id.*

Historically, courts have "assigned constitutional primacy to the right [to counsel] over the right to self-representation." *State v. Hester*, 324 S.W.3d 1, 30 (Tenn. 2010)

(citations omitted). "[I]t is clear that it is representation by counsel that is the standard, not the exception." *Id.* (citing *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161 (2000)). The exercise of the right to self-representation requires the waiver of the right to counsel. *Id*. Generally, in order to activate the right of self-representation, the defendant must: (1) timely assert the right to proceed pro se; (2) clearly and unequivocally exercise the right; and (3) knowingly and intelligently waive the right to assistance of counsel. *Id.* at 30-31 (citations omitted). Before accepting a waiver of the right to counsel, the trial court must advise the accused in open court of the right to assistance of counsel at every stage of the proceedings and must "determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters." Tenn. R. Crim. P. 44(b)(1). The defendant's waiver of the right to counsel must be in writing and must be included in the record. Tenn. R. Crim. P. 44(b)(2), (3).

"The determination of whether a defendant has exercised his or her right of self-representation and has concurrently waived his or her right to counsel is a mixed question of law and fact." *Hester*, 324 S.W.3d at 29 (Tenn. 2010) (citations omitted). Accordingly, on appeal, we apply a de novo standard of review, granting the trial court the presumption that its findings of fact are correct. *Id.* at 29-30 (citing *State v. Holmes*, 302 S.W.3d 831, 837 (Tenn. 2010)). An error in denying the right to exercise self-representation is a structural constitutional error that is not subject to harmless error review and requires automatic reversal. *Id.* at 30 (citing *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008)).

The Defendant contends, citing the trial court's decision not to address the Defendant personally on the morning of trial, that he was denied a meaningful opportunity to address his constitutional right to self-representation before being forced to trial with defense counsel. According to the Defendant, the trial court never addressed his request to proceed pro se, nor did it ever give him an opportunity to argue the motion. However, the record does not support this assertion.

The record indicates that the trial court held at least two pretrial hearings concerning the Defendant's request to proceed pro se. On January 12, 2018, the Defendant filed a motion to proceed pro se, including seeking the assistance of elbow counsel and removal of defense counsel. The corresponding minute entry showed that the Defendant was present for this hearing and that after hearing proof and arguments, the motion was held in abeyance. A minute entry from March 23, 2018, reflected that the trial court again, in the Defendant's presence, addressed the Defendant's request to proceed pro se, and following a hearing, the Defendant's motion to proceed pro se was withdrawn.

No transcripts of these two hearing are included in the record on appeal. The Defendant asserts, citing the lack of transcripts, that the record is devoid of any evidence that such hearings took place and that these minute entries were, therefore, entered in error. We disagree.

The keeping of daily minute entries is addressed by statute at Tennessee Code Annotated section 16-1-106, which provides in pertinent part at subsection (a) as follows:

> The minutes of the court for each day's work shall be signed by the judge. The minute book shall provide a place for the judge's signature after the minute entries each day; however, where the orders of the court are photocopied so that an accurate facsimile of the entire order and judge's signature appears, it shall be sufficient for the judge to sign at the end of the minute book approving all the minutes in the book.

The importance and reliability of court minutes as a record of trial proceedings has been acknowledged by our supreme court for many years. *State v. Byington*, 284 S.W.3d 220, 225 (Tenn. 2009). Our supreme court has noted that "courts speak only through their minutes" and that the court minutes are "the highest evidence of what is done in the court, and, so far as they are records of judicial proceedings, import absolute verity, and are conclusive unless attacked for fraud." *Id.* at 225-26 (quoting *Mullen v. State*, 51 S.W.2d 497, 498 (Tenn. 1932); *Dyer v. State*, 79 Tenn. 509, 514 (Tenn. 1883)). Our supreme further recognized the significance of minutes, stating that "[t]he rule in this State for generations has been, and is, that 'minutes' are indigenous to [c]ourts of record; and when they are signed by a [j]udge, they become the highest evidence of what has been done in the [c]ourt." *Id.* at 226 (quoting *Howard v. State*, 399 S.W.2d 738, 740 (Tenn. 1966)).

The minutes in this case are signed by the trial court, and because the trial court speaks through its minutes, they are prima facie evidence of what occurred in the trial court. *See Hill v. State*, 304 S.W.2d 619, 622 (Tenn. 1957) (holding that "the minutes of the court should be accepted as prima facie true" in the absence of any direct evidence to the contrary). The Defendant offers only a bare assertion that these minute entries are incorrect because the transcripts of these hearings are not included in the appellate record. However, the Defendant's pro se designation and preparation of the record document for compilation of the appellate record does not include any request for transcripts of the hearings on these dates. The Defendant bears the burden of preparing an adequate record on appeal, including transcripts of all parts of the proceedings "necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b); *see State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993).

Accordingly, the trial court's minutes provide "absolute verity" of what occurred in the trial court in this case, as there is no direct evidence of fraud. Contrary to the Defendant's assertions, we conclude that the Defendant was given a meaningful opportunity to have his motion to proceed pro se heard on the merits.

Moreover, at the April 25, 2018 hearing on the Defendant's motion for reduction in bond, the trial court informed the Defendant that it had read his "letter," which the trial court noted was put "on the docket" by either the Defendant himself or defense counsel. The trial court assured the Defendant that no proceedings were occurring in his absence, and in response, the Defendant thanked the trial court. There was no further mention by the Defendant of any desire to proceed pro se. We note that the Defendant, in his designation and preparation of the record document, only asked that the first five pages of this hearing be transcribed. Again, he has the responsibility to prepare an adequate appellate record for our review.

Finally, at the motion for new trial hearing, the trial court recalled, "[T]his [c]ourt was told in your presence before we started picking a jury that you were comfortable and that you wanted [defense counsel] to represent you." The trial court continued, "I'm very confident that I would not have forced you to trial if that representation was not made to me." While this might not have occurred prior to picking the jury as the trial court recollected, the minute entries indicate that something similar in nature did in fact take place at the hearings on the Defendant's motion to proceed pro se because the motion was ultimately withdrawn.

Now, we turn to the challenged comments made by the trial court on the morning of trial regarding the Defendant's request to proceed pro se. First, we observe the general rule that a motion to proceed pro se must be made prior to trial in order to be considered timely. *State v. Northington*, 667 S.W.2d 57, 62 (Tenn. 1984). Furthermore, we interpet the trial court's statements made on the morning of trial to be a finding that the Defendant did not genuinely want to represent himself and was simply manipulating the judicial process in order to delay his trial.

"The right of self-representation is not absolute." *Hester*, 324 S.W.3d at 31 (citation omitted). Even if a defendant's invocation of the right of self-representation meets the aforementioned waiver requirements, "the effectiveness of the defendant's invocation and waiver is not a foregone conclusion." *Id.* Notably, there is no right of self-representation when a defendant "seeks to abuse the dignity of the courtroom or to engage in serious obstructionist misconduct." *Id.* (citing *Indiana v. Edwards*, 554 U.S. 164, 171 (2008)). Stated another way, defendants are not allowed to use the right of self-representation "as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial

process." *Id.* (quoting *United States v. Mosley*, 607 F.3d 555, 558 (8th Cir. 2010); and citing *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000)). "A court may deny a manipulative request for self-representation, distinguishing between a genuine desire to invoke a right of self-representation and a manipulative effort to frustrate the judicial process." *Id.* at 33 (citations omitted).

The Defendant's request for a continuance or, in the alternative, to proceed pro se centered around the recent discovery the defense had received, and his belief that he had not been able to review discovery materials in a timely manner. He did not offer any other reason for defense counsel's removal when he interjected to speak with the trial court. As noted above, the trial court had previously held hearings on the Defendant's motion to proceed pro se, which request the Defendant ultimately withdrew, and the Defendant had been granted multiple continuances to review discovery. After our review of the record, we conclude that the evidence in the record does not preponderate against the trial court's finding that the Defendant lacked a genuine desire to represent himself and was only making this request for self-representation to manipulate the judicial process.

We, like the *Hester* court, "are wary of creating incentives for defendants to use a request for self-representation as a subterfuge when they lack a genuine desire or intent to represent themselves." 324 S.W.3d at 34. Accordingly, we hold that the trial court did not err in denying the Defendant's request to represent himself made on the morning of trial. *See, e.g., State v. Reed*, No. E2019-00771-CCA-R3-CD, 2020 WL 5588677, at *12 (Tenn. Crim. App. Sept. 18, 2020) (citing *Hester*, 324 S.W.3d at 34) (holding same under similar facts); *State v. Hood*, No. W2004-01678-CCA-R3-DD, 2005 WL 2219691, at *12 (Tenn. Crim. App. Sept. 13, 2005) (citing cases).

3. Conflict of Interests

"Clearly, the right of an accused in a criminal prosecution to conflict-free representation of counsel is inherent in the Sixth Amendment to the United States Constitution and [a]rticle I, [section] 9 of the Tennessee Constitution." *State v. Walden*, No. 37, 1988 WL 69538, at *1 (Tenn. Crim. App. July 8, 1988). The Defendant, citing *Holloway v. Arkansas*, 435 U.S. 475 (1978), argues that when "a conflict objection is made and unheeded the conviction must be reversed even if no particular prejudice is shown." However, this case is factually distinguishable from the United States Supreme Court's decision in *Holloway v. Arkansas*. In *Holloway*, counsel was representing two co-defendants. The investigation conducted by counsel revealed that the interests of the co-defendants conflicted. 435 U.S. at 477. In this case, defense counsel's representation was limited to the Defendant.

The statements by defense counsel on the morning of trial indicate that the Defendant was generally displeased with the Defendant's review and understanding of discovery materials, but they did not reference any additional issue between defense counsel and the Defendant. Defense counsel stated that he had reviewed the voluminous discovery materials in this matter, that he and his investigators had "tried to convey" the pertinent information to the Defendant, and that he was prepared to proceed to trial. The Defendant has not cited to any law, and we know of none, that his claim regarding discovery materials amounted to a conflict of interests.

The right to counsel "does not include the right to appointment of counsel of choice, or to special rapport, confidence, or even a meaningful relationship with appointed counsel." *State v. Carruthers*, 35 S.W.3d 516, 546 (Tenn. 2000); *see also Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989). As noted by the United States Court of Appeals for the Sixth Circuit, "[a]n indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel." *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990). Rather, "[t]he essential aim of the Sixth Amendment is to guarantee an effective advocate, not counsel preferred by the defendant." *Carruthers*, 35 S.W.3d at 546 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). We emphasize that "the right to counsel is a shield, not a sword. A defendant has no right to manipulate his right for the purpose of delaying and disrupting the trial." *United States v. White*, 529 F.2d 1390, 1393 (8th Cir. 1976).

As noted above, the Defendant's demands on the day of trial for a continuance and self-representation were made with the aim of further delay and to further disrupt the proceedings. The Defendant is not entitled to relief because there is no evidence that a conflict of interests existed sufficient to warrant a new trial. We also note that the Defendant's conflict of interests allegations center around the chosen defense strategy pursued at trial. However, any allegation regarding defense counsel's chosen defense strategy or the potential for further DNA testing of certain items are not properly presented for our review as they were not raised before the trial court so as to preserve the issues for appellate review.

B. 404(b) Evidence

The Defendant contends that the trial court erred by admitting evidence of his prior bad acts "that were totally unrelated to the crime" in violation of Tennessee Rule of Evidence 404(b), thus, "causing substantial prejudice" to him in this circumstantial case. Specifically, he challenges the admission of Ms. Scruggs' testimony that she had seen the Defendant carrying a machete-type knife in the days before the victim's murder. In addition, the Defendant challenges the admission of Mr. Walker's testimony that the

Defendant had told him of illicit drug use in the past. He also cites as error Agent Brown's testimony that the Defendant had been calling known drug dealers and prostitutes "without ever offering their criminal records or any statement of testimony from said persons," as well as Agent Brown's speculating that the Defendant had been looking at prostitution advertisements. The Defendant further asserts that the State violated the trial court's pretrial 404(b) ruling during opening statements by referencing that the Defendant had been calling known drug dealers and prostitutes. The State contends that the Defendant has waived review of his 404(b) claims.

At the motion for new trial hearing, the Defendant, in addressing his alleged 404(b) violations, mentioned that the prosecutor in opening statements said this case was about drugs and sex, though the trial court had already ruled that the prosecutor was not allowed to talk about such. The trial court responded that regardless of any error by the prosecutor, no contemporaneous objection was raised at trial. The Defendant also mentioned Agent Brown's testimony that the Defendant was calling known drug dealers and prostitutes and noted that the Defendant had never received any of these drug dealers' and prostitutes' criminal records. The Defendant said that he told defense counsel to object to Agent Brown's testimony as violative of the trial court's pretrial 404(b) ruling but, instead, defense counsel stipulated to the testimony. The Defendant also noted that Mr. Walker's statement included mention of the Defendant's illicit drug usage, which admission was in violation of Rule 404(b). Finally, the Defendant challenged Ms. Scruggs' testimony that she saw the Defendant with a machete-type knife in the months before the victim's death. The Defendant noted the knife was not the murder weapon and alleged that introduction of such information served only to prejudice the jury.

The admission of evidence of other bad acts by an individual[6] is governed by Tennessee Rule of Evidence 404(b). Generally speaking, "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Tenn. R. Evid. 404(a). Such evidence may, however, be admitted for other purposes if the following conditions are met prior to admission of this type of proof:

(1) The court upon request must hold a hearing outside the jury's presence;

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[6] The rules governing Rule 404(b) now apply to "any individual" following the legislature's enactment of Tennessee Code Annotated section 24-7-125. *See State v. Blackwell*, No. W2018-01233-CCA-R3-CD, 2019 WL 2486228, at *6 (Tenn. Crim. App. June 13, 2019); *State v. Buckingham*, No. W2016-02350-CCA-R3-CD, 2018 WL 4003572, at *14 (Tenn. Crim. App. Aug. 20, 2018).

> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Id. "Other purposes" include the defendant's motive, intent, guilty knowledge, identity, absence of mistake or accident, a common scheme or plan, completion of the story, opportunity, and preparation. *State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004). When the trial court substantially complies with the procedural requirements of Rule 404(b), this court will overturn the trial court's ruling only when there has been an abuse of discretion. *State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005).

1. Ms. Scruggs' Testimony

Prior to Ms. Scruggs' trial testimony, the prosecutor initiated a bench conference to discuss the substance of that testimony. The prosecutor said that she had cautioned Ms. Scruggs not to refer to acts of violence or prior bad acts by the Defendant but only to testify regarding her knowledge that the Defendant possessed a weapon. Defense counsel lodged a relevancy objection. The prosecutor replied that it was relevant based upon the victim's injuries and the medical examiner's testimony. A jury-out hearing ensued.

Outside of the jury's presence, Ms. Scruggs testified that she knew the Defendant through her relationship with Mr. Seymour and that she saw the Defendant in possession of "a machete-type knife" on July 21, 2015. Ms. Scruggs described the knife as homemade because of "the tape that was around it and the handle, it was like a little handle thing." She said that the Defendant talked about tools and weapons all the time.

Ms. Scruggs then recounted the circumstances surrounding her viewing the Defendant with the knife, which involved a prior incident between the Defendant and April Stokes on July 21, 2015. According to Ms. Scruggs, the Defendant and Ms. Stokes left Mr. Seymour's apartment to procure drugs that day. When they returned, Ms. Stokes' shirt was ripped, as well as the handle on her purse, and Ms. Stokes said that the Defendant had "threatened her and pushed her out of the car and put her back in the vehicle, [and] pulled a knife on her," before bringing her back to the apartment. Ms. Scruggs confronted the

Defendant about what Ms. Stokes had told her, and an argument ensued, during which the Defendant pulled the knife on Ms. Scruggs.

The prosecutor then said the reason the weapon was relevant was "because the medical examiner [was] going to testify that a weapon was used [and] that some of the injuries inflicted were chopping injuries." Upon questioning by the trial court, Ms. Scruggs said that she recalled the date because she had just returned from vacation. She also described the weapon once more, saying that the machete-type knife had "a square top" and handle with black tape on it.

On cross-examination, Ms. Scruggs said that the blade of the knife was approximately eight or nine inches in length. Defense counsel then stated,

> If she wants to say that on an occasion she saw him have possession of a knife with a blade that was about that long, I don't have any objection to that. The danger is . . . if she goes into how or why she saw it. I think that's clearly 404(b).

The trial court cautioned Ms. Scruggs about her mentioning additional criminal acts allegedly committed by the Defendant in front of the jury, specifically the prior episode with Ms. Stokes. Ms. Scruggs indicated her understanding that she was not to mention such acts. Thereafter, Ms. Scruggs testified at trial regarding the Defendant's carrying of a knife on July 21, 2015, without any reference to Ms. Stokes.

First, we note that Ms. Scruggs testified at trial that she saw the Defendant carrying a knife on July 21, 2015, several weeks after the victim's murder, and not in the days leading up to the victim's murder as the Defendant suggests. Moreover, we agree with the State that the Defendant has waived his 404(b) claim in this regard because defense counsel stated that he did not object to the introduction of this testimony. In response to the waiver allegation, the Defendant asserts that he "never said anything like this[,] and if it was said[,] it was by conflicted counsel[.]" As noted above, the Defendant's allegation of a conflict of interests is without merit. In addition, the actions of counsel are imputed to the Defendant; the Defendant may not overcome the presumption of waiver by alleging that he did not personally waive the ground for relief. *See House v. State*, 911 S.W.2d 705, 714 (Tenn. 1995); *State v. Smith*, 814 S.W.2d 45, 47-48 (Tenn. 1991). Any allegation regarding the propriety of defense counsel's actions is not properly presented for our review.

2. Agent Brown's Testimony

As for the Defendant's allegation as it pertains to Agent Brown's testimony that the Defendant was contacting known drug dealers and prostitutes, as well as connecting the Defendant with prostitution advertisements, we note that the Defendant did lodge an objection during Agent Brown's testimony. When the prosecutor asked about Ms. Legg's occupation, defense counsel objected, citing as the basis for his objection, "I thought [Agent Brown] was reciting what Ms. Berry told him." The prosecutor stated that this was not the case because the information to be solicited concerned Agent Brown's knowledge of these individuals' occupations based upon his review of their records: "[I]t[] just goes to the prostitution, drug thing. I'm not going to ask for specifics about behavior or . . . anything they've done with [the Defendant]." Defense counsel said, "Everything [Ms. Legg] said is fair game, but the people that have not testified today, he can't repeat what they told him." The prosecutor responded that Agent Brown did not interview these people, but instead looked at their criminal records, to which defense counsel said, "I understand." That concluded the bench conference.

The Defendant has again waived his claim because defense counsel indicated that he understood how Agent Brown obtained the information and that he no longer had any objection to the testimony. As noted above, the Defendant may not overcome the presumption of waiver by alleging that he did not personally waive the ground for relief. *House*, 911 S.W.2d at 714; *Smith*, 814 S.W.2d at 47-48.

Moreover, the Defendant has cited to no authority, and we know of none, requiring the State to provide these witnesses' criminal records in order to support Agent's Brown's conclusions regarding their occupations. *See State v. Robinson*, No. M2012-02730-CCA-R3-CD, 2014 WL 752260, at *10 (Tenn. Crim. App. Feb. 25, 2014) (citing *State v. King*, 718 S.W.2d 241, 247 (Tenn. 1986)) ("We are unaware of any rule, statute, or case law requiring the State to provide a defendant with the criminal records of all witnesses, nor does the [d]efendant cite to law in support of such a requirement."). Also, no proof regarding the criminal records of these various individuals was developed at the motion for new trial hearing.

3. Mr. Walker's Testimony and Opening Statement

Relative to the Defendant's allegations about Mr. Walker's testimony of the Defendant's illicit drug use and commentary during opening statement about the Defendant's consorting with known drug dealers and prostitutes, the State contends that plenary review of these claims is waived due to the Defendant's failure to object and failure to include the issues in his motion for new trial. First, we disagree that these issues were waived at the motion for new trial phase. Nonetheless, we agree that they are waived because no contemporaneous objection to these exchanges was lodged at trial on the basis

of Rule 404(b). As such, these issues have not been properly preserved for appeal and have been waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *see also State v. McCulloch*, No. E2021-00404-CCA-R3-CD, 2022 WL 2348568, at *14 (Tenn. Crim. App. June 29, 2022) (citation omitted) (waiving a defendant's claim for failing to make a contemporaneous objection on the basis of 404(b)), *perm. app. denied* (Tenn. Dec. 14, 2022).

C. Venue and Severance Motion

Next, the Defendant alleges that the trial court erred by failing to address his pretrial motion to dismiss the abuse of a corpse charge due to insufficient proof of venue or, in the alternative, to sever the two charges, even though "the motion was brought to the court[']s attention several times." The Defendant contends that venue for the abuse of a corpse offense was not established in Knox County. In addition, the Defendant submits that "not allowing a severance, with no evidence in existence of an abuse of corpse charge in Knox County, substantially prejudiced the Defendant." According to the Defendant, if this motion had been "properly vetted[,] then the evidence that was non-existent for three years until two days before trial would have had to [have] been vetted also." The State responds that the proof at trial established venue and that the trial court properly exercised its discretion in declining to sever the abuse of a corpse charge.

Though the Defendant's motion to dismiss or, in the alternative to sever, was filed on August 4, 2017, nothing in the record before this court indicates that this motion was ever addressed or ruled upon. We note that the motion was filed by the Defendant's first attorney, who was permitted to withdraw.

During trial, after the State rested its case, defense counsel moved for a judgment of acquittal, arguing that the act of disposal of the victim's body in the creek occurred in Monroe County and that, therefore, venue had not been established. Defense counsel requested that the abuse of a corpse count be dismissed. The trial court overruled the motion, reasoning that "the circumstantial proof establishe[d] that the crime[,] and inferentially the wrapping of the body and transportation of the body in illicit fashion[,] had its genesis in Knox County, even though it ultimately wound up in Monroe County."

At the motion for new trial hearing, the Defendant submitted that the defense had attempted to have the motion heard three times, but to no avail because the prosecutor objected. According to the Defendant, the trial court let the prosecutor dictate the course of events. The trial court responded that the law specified such a motion was properly

made at the close of the State's proof because it challenged the sufficiency of the evidence as to that count. The trial court concluded that there was evidence the crime occurred in Knox County, observing that the victim's blood was found in the Defendant's bedroom.

The Defendant also noted, at the motion for new trial hearing, that he had sought to sever the offenses and that he was prejudiced by the joint trial of both offenses. Relative to his allegation of prejudice, the Defendant again mentioned the identification of the sheets and that the defense was never aware of this information. According to the Defendant, if this motion had been properly "vetted" prior to trial, then the "evidence that was nonexistent for three years, but only came into existence two days before trial[,] would've had to have been vetted" as well. The trial court stated that the evidence of the abuse of a corpse offense was going to be admitted in the murder trial.

Tennessee Rule of Criminal Procedure 14 provides, "A defendant's motion for severance of offenses or defendants shall be made before trial, except that a motion for severance may be made before or at the close of all evidence if based on a ground not previously known. A defendant waives severance if the motion is not timely." Tenn. R. Crim. P. 14(a)(1)(A); *see also* Tenn. R. Crim. P. 12(b)(2)(E). "Unless the defendant moves to sever the offenses prior to trial or at an otherwise appropriate time, the defendant waives the right to seek separate trials of multiple offenses." *Spicer v. State*, 12 S.W.3d 438, 443 (Tenn. 2000) (citations omitted).

On appeal, the Defendant offers only his bare assertion that his motion to dismiss for lack of venue or, in the alternative, to sever the offenses was brought to the trial court's attention several times prior to trial. There is no evidence in the record before this court of this occurring; there is no transcript, order, minute entry, or any other document that supports the Defendant's contention in this regard. The issue is waived because it appears that the defense never pursued the motion. *See* Tenn. R. App. P. 36(a). We note that, if such did occur as the Defendant suggests, the Defendant has not filed any motion to supplement the record in this court with evidence of such proceedings, and he has a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal. Tenn. R. App. P. 24(b); *see Ballard*, 855 S.W.2d at 560; *State v. Garrin*, No. 02C01-9501-CR-00028, 1996 WL 275034, at *4 (Tenn. Crim. App. May 24, 1996) ("When the accused appeals the ruling on a motion, the accused must see that the record reflects the motion was brought to the attention of the trial court, and the trial court ruled on the merits of the motion." (citing *State v. Burtis*, 664 S.W.2d 305, 310 (Tenn. Crim. App. 1983))).

Accordingly, it appears from the record before us that the first time the Defendant brought the severance issue to the attention of the trial court was during his motion for new

trial proceedings. Thus, his complaint was untimely, and he has waived consideration of the issue. *See State v. Alston*, No. W2018-00550-CCA-R3-CD, 2020 WL 1972334, at *10 (Tenn. Crim. App. Apr. 24, 2020) (citing *State v. Person*, No. W2011-02682-CCA-R3-CD, 2013 WL 5883796, at *13 (Tenn. Crim. App. Oct. 31, 2013)). Accordingly, the only issue in this regard that is properly presented to this court for appellate review is the trial court's decision at the close of the State's proof denying the Defendant's motion for a judgment of acquittal, concluding that the State had established venue for the abuse of a corpse charge. Because the Defendant's venue challenge was lodged for the first time following the conclusion of the State's proof, we will address the issue in the sufficiency of the evidence section which follows.

D. Sufficiency of the Evidence

The Defendant challenges the sufficiency of the convicting evidence against him, specifically, whether his identity was adequately established, whether the State's witnesses and evidence were credible, and whether the State proved venue for the abuse of a corpse offense. The State responds that the proof presented at trial was more than sufficient to establish the Defendant's guilt.

The United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

"Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not "reweigh or reevaluate the evidence." *Id.* (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Therefore, on appellate review, "the

State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *Cabbage*, 571 S.W.2d at 835.

The identity of the perpetrator is an essential element of any crime. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). The State has the burden of proving the identity of the defendant as the perpetrator beyond a reasonable doubt. *State v. Sneed*, 908 S.W.2d 408, 410 (Tenn. Crim. App. 1995) (citing *White v. State*, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975)). Identity is a question of fact for the jury's determination upon consideration of all competent proof. *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005). As with any sufficiency analysis, the State is entitled to the strongest legitimate view of the evidence concerning identity contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *See id*. (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992); *see also State v. Miller*, 638 S.W.3d 136, 158-59 (Tenn. 2021).

1. Second Degree Murder

Relative to his second degree murder conviction, the Defendant avers that, despite the State's claim that this case was about drugs and sex, there were no drugs found in the victim's system at the time of her death and there was no evidence that the victim and the Defendant were involved in a sexual relationship; that the only testimony of motive came from Mr. Mullins, who had reason to lie given that he was a suspect; that the "minor DNA" found in the Defendant's bedroom was explainable by evidence of the victim's bedbug bites at the time of her death; that there was no eyewitness testimony placing the victim and the Defendant together prior to her death; that other potential suspects were not investigated; and that it was impossible for the Defendant to leave in Mr. Mullins' truck, dump the body in Ballplay Creek, and return home in time for Mr. Mullins to leave for work that morning.

Second degree murder is defined as "[a] knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). Second degree murder is a "result of conduct" offense. *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). Accordingly, the appropriate statutory definition of "knowing" in the context of second degree murder is as follows: "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b). In other words, "[t]he State is not required to prove that the defendant wished to cause his victim's death but only that the defendant knew that his or her actions were reasonably certain to cause the victim's death." *State v. Brown*, 311 S.W.3d 422, 432 (Tenn. 2010).

The trial court, in discussing the jury instructions, noted that the sufficiency of evidence in this case hinged upon whether the State had established the Defendant's identity as the perpetrator of these offenses. The victim was known to have a drug problem, and Ms. Gass testified that the victim had been sad and depressed in the days leading up to her murder, emotions that often made the victim seek drugs. The Defendant and the victim had been seen together in Mr. Seymour's apartment prior to the murder, which was often frequented by drug users for the purpose of using drugs and having sex. According to Mr. Seymour, the Defendant, to the best of his recollection, visited the apartment on June 25, 2015.

Cell phone records established that twenty-one calls were placed between the Defendant and the victim from 2:32 a.m. June 25, 2015, to 3:59 p.m. on June 26, 2015. Moreover, the records showed that the Defendant's and the victim's cell phones were in close proximity to each other between 1:35 a.m. and 1:38 a.m. on June 26; that following that interaction, there was again movement from both devices; and that both devices could later be placed near Mr. Mullins' residence between 3:24 a.m. and 4:05 a.m. The Defendant also called several known drug dealers during this timeframe, indicating that drugs were being sought, regardless of whether drugs were found in the victim's system upon autopsy. The last time the victim's phone connected to a cell site was at 4:05 a.m. near Mr. Mullins' residence, meaning that her cell phone was turned off, destroyed, or remained outside of cellular network coverage thereafter. There was also no activity on the Defendant's phone from 3:56 a.m. that morning until 12:21 p.m. that afternoon, which was longer than any other delay observed on the Defendant's device.

The victim's blood was found in multiple places in the bedroom the Defendant rented from Mr. Mullins. Agent Brown testified that he did not think that the blood spatter on the wall or the blood on the corner desk was from scratching a bug bite. The jury was presented with testimony supporting the Defendant's contention that the blood was from the victim's bedbug bites and chose to reject it.

In addition, the Defendant was seen carrying a "homemade" machete-type knife with a wood handle, and "some really peculiar piece of wood" was found embedded in the victim's skull. Moreover, the jury could properly infer that the Defendant traveled forty-eight miles in Mr. Mullins' truck and dumped the victim's body in Ballplay Creek—a rural area close to where he used to live in Vonore. Mr. Mullins testified that he usually got up for work between 6:20 a.m. and 6:30 a.m. and that when he left for work on the morning of June 26 around 7:15 a.m., he noticed that the Defendant had been inside his truck. Mr. Mullins noted that the Defendant's bedroom window screen was bent, and the photograph he took of the screen was entered into evidence.

The jury heard Agent Brown's testimony regarding how long it took him to drive the "most logical" forty-eight-mile route from the Mr. Mullins' residence on Avondale to the location at Ballplay Creek where the victim's body was found. Agent Brown said that it took slightly over an hour on a Saturday afternoon and that when he drove it again early on a Sunday morning, it took about fifty-three minutes because there was less traffic. Testimony established that the Ballplay Creek location was only a four-minute drive to the Defendant's previous Vonore residence. Whether the Defendant had sufficient time to leave in Mr. Mullins' truck after 4:05 a.m., dump the body in Ballplay Creek, and return home in time for Mr. Mullins to get up and leave for work that morning was a question for the jury.

Though the Defendant contends that other suspects were not investigated, Agent Brown testified that he investigated three Black men that the victim had spoken to around the time of her death, including Mr. Mack. Agent Brown stated that he was able to rule out these men as suspects.

The sheets used to wrap the victim's body were either on the Defendant's bed at an earlier point or were right outside of Mr. Mullins' house. In addition, the wrappings around the victim's body had been secured with an electrical cord, and just days after the murder, the Defendant asked a friend for an electrical cord for his television. The victim was placed in "a very large, industrial size, black trash bag," which measured approximately ninety-six by sixty inches. The Defendant was known to work in factory and industrial settings.

Moreover, the Defendant admitted his guilt to his cellmate, using details that, according to Agent Brown, were never released to the media. Mr. Walker testified that the Defendant told him that the victim was "stuffed . . . in a big black trash bag" and that bag was thrown in water. We hold that the proof is sufficient to establish the Defendant's identity as the perpetrator of these offenses.

Furthermore, the State is not required to prove motive, and the circumstantial evidence in this case supports a conclusion that the Defendant knew his conduct was reasonably certain to cause the victim's death. He used an object to strike the victim at least seven times, causing her skull to fracture in multiple pieces. Both Dr. Mileusnic-Polchan and Agent Brown described the force necessary to inflict the victim's injuries. *See, e.g., State v. Elder*, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998) (stating that "[i]ntent . . . may be deduced or inferred by the trier of fact from the character of the assault, the nature of the act and from all the circumstances of the case . . . [including] the use of a deadly weapon, the number of wounds inflicted, [and] the seriousness of the wounds").

The Defendant's legal sufficiency challenge to the convicting evidence is essentially to impugn the credibility of the State's witnesses. Defense counsel thoroughly cross-examined the State's witnesses and pointed to inconsistencies in the proof to the jury. The credibility of the State's witnesses was an issue for the jury, which the jury ultimately resolved in favor of the State. The evidence, in the light most favorable to the State, was sufficient to support the Defendant's conviction for second degree murder.

2. Abuse of a Corpse

Relative to the abuse of a corpse conviction, the Defendant notes that the photographs show that his bedroom window screen was bent inward, meaning that someone broke into the house, rather than indicating that he pushed the victim's body out of his bedroom through the window; and that the framing of the large porch and placement of bushes around the house made it impossible for him to drive a truck up to the bedroom window.

As relevant to this case, "a person commits the offense of abuse of a corpse who, "without legal privilege, knowingly[ ] . . . [p]hysically mistreats a corpse in a manner offensive to the sensibilities of an ordinary person[.]" Tenn. Code Ann. § 39-17-312(a)(1). In this context, knowingly means that a person "acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist" or a person "acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." *Id.* § 39-11-302(b). In addition, the jury was charged as follows: "In deciding whether the act was offensive to the sensibilities of an ordinary person the jury must avoid subjective personal and private use and evaluate the sensibilities of a hypothetical average adult person applying the collective view of the adult community as a whole." 7 Tenn. Prac. Pattern Jury Instr.—CRIMINAL § 30.03 (26th ed. 2022) (citing *Pinkus v. United States*, 436 U.S. 293, 298 (1978)).

The proof at trial established that the Defendant, after murdering the victim, wrapped her body in sheets and trash bags and secured those items with an electrical cord around the victim's abdomen and neck. He then pushed her body out of the bedroom through the window, placed her onto Mr. Mullins' truck, and dumped her into a creek where she was not discovered for several days. Though there was no evidence presented to support the Defendant's confession that he chopped up the body after the victim's death, Dr. Mileusnic-Polchan observed that the victim's body was in a moderately advanced state of decomposition after it was found in the creek. Dr. Mileusnic-Polchan stated that the unattached hair in the bag was because of the decomposition process, explaining that as

the body decomposes, the first layer of skin completely detaches, including the hair and nails.

This evidence, taken in the light most favorable to the State, sufficiently established that the Defendant physically mistreated the victim's body. *See, e.g., State v. Hill*, 333 S.W.3d 106, 135 (Tenn. Crim. App. 2010) (determining that the evidence was sufficient where the defendant used a dog leash and area rug to drag the victim's body from her apartment, placed her body in his car, drove toward his residence, dragged her body from his car, and dumped it into the shallow creek); *State v. Williams*, No. M2014-02049-CCA-R3-CD, 2015 WL 5032051, at *3 (Tenn. Crim. App. Aug. 26, 2015) (determining that the evidence was sufficient where visual identification of the body was not possible because the defendant had rolled the victim's body into a blanket, carried the body to the victim's car, crammed the body into the back seat, drove to a secluded area, and set the car and the body on fire). Again, the Defendant's sufficiency argument is seeking to attack the credibility of the State's witnesses and evidence, a contention that this court has rejected time and again. The Defendant is not entitled to relief.

3. Venue

Article I, section 9 of the Tennessee Constitution provides that an accused must be tried in the county in which the crime is committed. *See also* Tenn. R. Crim. P. 18(a) ("Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed."). "Proof of venue is necessary to establish the jurisdiction of the court, but it is not an element of any offense and need only be proved by a preponderance of the evidence." *State v. Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990); *see also* Tenn. Code Ann. § 39-11-201(e) ("No person may be convicted of an offense unless venue is proven by a preponderance of evidence."). Importantly, "[i]f one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either county." Tenn. R. Crim. P. 18(b); *see also* Tenn. Code Ann. § 39-11-103(d) (stating same). Venue is a question of fact to be determined by the jury, which may "draw reasonable inferences from the evidence" and may make its determination based solely upon circumstantial evidence. *State v. Young*, 196 S.W.3d 85, 101-02 (Tenn. 2006).

Regarding venue over the abuse of a corpse offense, the proof at trial established that the victim's blood was found in the Defendant's bedroom he rented from Mr. Mullins on Avondale Avenue in Knoxville. Cell phone records last placed the victim near Mr. Mullins' residence. The sheet wrapped around the victim's body and the one found near her body in the creek were identified as coming from Mr. Mullins' house. The trial court correctly determined that the abuse of a corpse offense had its origin in Knox County where

the victim was murdered. Knox County is an appropriate venue because venue is proper in any county where an element of the offense occurs. Tenn. R. Crim. P. 18(b); *see also State v. Castillo*, No. M2019-01256-CCA-R3-CD, 2020 WL 3867217, at *3 (Tenn. Crim. App. July 9, 2020). Because venue was adequately established at trial, the Defendant is not entitled to relief.

E. Juror Challenge

The Defendant maintains that the trial court erred by not excusing a juror who indicated that she might have known the wife of one of the witnesses who assisted Agent Brown with the investigation. In his appellate brief, the Defendant cites to the comments of the trial court and states that a "juror should've been excused after the court became aware of this to avoid any impartial decision being made by this juror against the Defendant."

After court reconvened following a recess, the trial court noted that a matter needed to be placed "on the record in case there's an objection." The trial court alerted the parties that one of the jurors "heard the names being called out by Agent Brown of those who m[ight] have assisted him in some capacity in the investigation" and that she believed she might have worked "with the wife of one of those names that was called out." According to the trial court, the juror indicated it would not affect her decision-making process "one way or the other." The trial court offered to designate her as the second alternate, though the trial court did not "think it was a problem." Defense counsel stated, "I don't think it is a problem unless she were to say it's someone who is really close to her and influences her[.]" The trial court averred that it did not think that was "the situation," and defense counsel replied, "I don't request that she be designated or anything like that."

First, we note that the Defendant has failed to make an argument or cite to any authority related to this issue in his brief. *See* Tenn. R. App. P. 27(a)(7)(A) (stating that an appellant's brief shall contain an argument "setting forth . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on"); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); *see also State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018) (holding that an appellate court "may decline to consider issues that a party failed to raise properly"). Next, defense counsel agreed to the trial court's taking no remedial action. *See* Tenn. R. App. P. 36(a); *see also State v. Vance*, 596 S.W.3d 229, 250 (Tenn. 2020) (quotation omitted) ("Tennessee law has long recognized that a party will not be permitted to take advantage of errors which he himself . . . invited."). Finally, the

Defendant did not raise the issue in his motion for new trial. *See* Tenn. R. App. P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in . . . [any] ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."). We agree with the State that the matter is waived, and the Defendant is not entitled to relief.

F. Motion for Mistrial

The Defendant argues that the trial court erred "by not allowing a mistrial over suppressed discovery never turned over." Specifically, the Defendant's cites to Mr. Mullins' and Ms. Legg's identification of the sheets found wrapped around the victim's body and near the victim's body as coming from Mr. Mullins' residence. The Defendant notes defense counsel's statements that defense counsel was "ambushed" by this testimony and that he could not "provide an effective defense," that receipt of this information prior to trial was material to the defense, and that there was "no way" defense counsel could provide the Defendant with a fair trial. The Defendant submits that the evidence was material under *Brady v. Maryland*, 373 U.S. 83 (1963), and that the State's failure to disclose this information justifies setting aside his conviction because there exists a reasonable probability that, had the evidence been disclosed prior to trial, the result would have been different. The Defendant claims that had this information been received pretrial, then defense counsel might have chosen to pursue the Defendant's preferred defense theory that Mr. Mullins was the actual killer. The State responds that the trial court properly exercised its discretion in denying a mistrial because there is no authority requiring the Sate to disclose pretrial a summary of a witness' testimony or their ability to identify certain pieces of evidence. The State continues that the Defendant cannot establish error, let alone one so egregious that it precluded an impartial verdict.

During the trial, when Mr. Mullins identified one of the sheets the victim's body was wrapped in as coming from his house, defense counsel objected. Defense counsel acknowledged that he had received in discovery the photograph of the sheet removed at autopsy but maintained, "What I don't have in any statement provided to me in anyway is that Mr. Mullins is going to identify the cloth that is binding the body as coming from his residence." Defense counsel averred that receipt of such information was material to the preparation of the defense. Defense counsel noted that the only identification of this sort that he was aware of prior to trial was an identification by a Ms. Katrina Lane[7] of a "blue bedsheet."

[7] Ms. Lane did not testify at trial.

When the trial court asked for authority to support defense counsel's contention that the State was required to turn over that information pretrial, defense counsel cited Rule 16 as requiring the State to produce "everything that is material in preparation of the defense, even if it is part of a witness statement." The trial court noted that it was "fertile ground for cross-examination" if Mr. Mullins had not identified this piece of evidence previously in any of his prior statements, but it knew of no rule of law obligating the State to provide the defense with "the fact that a lay witness has identified a piece of evidence[.]"

Defense counsel claimed that he was "essentially ambushed with this piece of evidence" and had "zero chance to do any investigation to canvas the area to see if anybody ever remember[ed] that out there." Defense counsel maintained that there was "no way [he could] provide an effective defense to that allegation without knowing about it beforehand." Defense counsel conceded that "Rule 16 [did not] spell it out" but averred, "[H]e has a right to a fair trial and there is absolutely no way I can be effective without knowing that beforehand." The trial court commented that it was "not aware of any Rule of Evidence or Criminal Procedure or Rule of Discovery that the State has violated here." The trial court continued, "They've given you everything including this witness's statements, which by operation of law they were not obligated to give to you until after he testified, unless obviously there was *Brady* material contained therein." It overruled the objection. Defense counsel stated that he was also arguing that the Defendant's right to a fair trial trumped any discovery rule. Later, defense counsel clarified that he "was moving for a mistrial," and the trial court said that the objection and motion were overruled.

Similarly, Ms. Legg later identified at trial a different sheet found at the scene where the victim's body was dumped as being on the Defendant's bed when she visited Mr. Mullins' residence. Defense counsel once again lodged an objection, citing that he had not been told about Ms. Legg's identification of the sheet pretrial, though he had received the photograph without her written statement and signature appended. The prosecutor said that defense counsel "was advised about it before court today." The trial court again overruled the objection.

At the motion for new trial hearing, the Defendant discussed Mr. Mullins' identification of the sheet as coming from Mr. Mullins' residence and argued that a mistrial should have been granted because this information had not been turned over pretrial and defense counsel was, therefore, unable to provide an effective defense. The trial court commented that the identification did not exculpate the Defendant and that the court was "not aware of any authority that would say that the State had to provide pretrial evidence that a witness had identified a piece of property."

The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Nash*, 294 S.W.3d 541, 546 (Tenn. 2009). A trial court should declare a mistrial "only upon a showing of manifest necessity." *State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004) (citing *State v. Saylor*, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "In other words, a mistrial is an appropriate remedy when a trial cannot continue, or a miscarriage of justice would result if it did." *Saylor*, 117 S.W.3d at 250 (quoting *State v. Land*, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." *State v. Reid*, 164 S.W.3d 286, 341-42 (Tenn. 2005) (quoting *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)). The burden of establishing a manifest necessity lies with the party seeking the mistrial. *Williams*, 929 S.W.2d at 388.

Rule 16 of the Tennessee Rules of Criminal Procedure establishes the rules for providing discovery in a criminal case. As pertinent here, Rule 16 requires the disclosure of certain information, including "books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof" within the State's possession, custody, or control, when those items are material to preparing the defense, intended to be used in the case-in-chief, or were obtained from or belong to the defendant. Tenn. R. Crim. P. 16(a)(1)(F). The rule does not authorize the discovery or inspection of, absent certain exception not relevant here, "reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses." Tenn. R. Crim. P. 16(a)(1)(G).

> If a party fails to comply with a discovery request, the court may:
>
> (A) order that party to permit the discovery or inspection; specify its time, place and manner; and prescribe other just terms or conditions;
>
> (B) grant a continuance;
>
> (C) prohibit the party from introducing the undisclosed evidence; or
>
> (D) enter such other order as it deems necessary under the circumstances.

Tenn. R. Crim. P. 16(d)(2). "[W]hether the defendant has been prejudiced by the failure to disclose is always a significant factor" in the court's determining an appropriate remedy. *State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995) (citing *State v. Baker*, 751

S.W.2d 154, 160 (Tenn. Crim. App. 1987)). "[T]he burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial." *Brown*, 836 S.W.2d at 548.

In addition, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. *See Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). As a result, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to his guilt or lack thereof or to the potential punishment faced by a defendant. *See Brady*, 373 U.S. at 87.

First, we agree with the trial court that nothing in Rule 16 requires the State to disclose this information prior to trial. Moreover, *Brady* does not apply because the identifications of the sheets by these two witnesses were inculpatory in nature. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) ("One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded[.]"). Also, this would be an issue of delayed disclosure of evidence, as opposed to a complete nondisclosure under *Brady*. *State v. Caughron*, 855 S.W.2d 526, 548 (Tenn. 1993) (Daughtrey, J., dissenting). When there has been a delayed disclosure, as opposed to a nondisclosure, the defendant must establish that the delayed disclosure prevented him from using the disclosed material effectively in preparing and presenting his case. *Id.* Furthermore, if the defendant failed to move for a continuance after receiving the information, thoroughly cross-examined the witness(es) regarding the evidence or failed to call or recall an available witness concerning the exculpatory statements, the potential *Brady* violation may be cured. *Id.*

Prior to trial, the defense had been given the photographs of the sheets found at the scene and those collected from the victim's autopsy. Further, these two witnesses were known to the Defendant. The Defendant knew he was a target of the investigation into the victim's murder and that the sheets were linked to the disposal of the victim's body based upon the photographs he had received in discovery. Though Ms. Lane did not testify at trial, the Defendant was aware that she could identify a blue bedsheet, indicating that the defense had some awareness that sheets were going to be identified in a way connecting them with the Defendant. Here, though defense counsel requested a mistrial, he did not request a continuance for time to further investigate as a result of these identifications. Moreover, the Defendant presumably knew what bedsheets he kept on his bed, as well as sheets present on Mr. Mullins' back porch, and had the opportunity to call any rebuttal witnesses in his defense who could refute these identifications. In addition, defense counsel thoroughly cross-examined the witnesses about their identifications of the sheets and their timing. The record fails to show that the Defendant was prevented from

presenting a defense, and his argument that he was denied a fair trial must fail. *See, e.g., State v. Smith,* No. E2019-00968-CCA-R3-CD, 2021 WL 714650, at *21 (Tenn. Crim. App. Feb. 24, 2021) (rejecting a defendant's argument that she was prejudiced by the mistaken belief that a witness was favorable to the defense, having presented his testimony and then having been "ambushed" by the State's impeachment of him with the second statement), *perm. app. denied* (Tenn. June 9, 2021).

For these reasons, the Defendant has not shown a manifest necessity requiring a mistrial. As such, we conclude that the trial court did not abuse its discretion, and we deny the Defendant relief on this issue. *See, e.g., State v. Houston*, No. M2007-01324-CCA-R3-CD, 2009 WL 130189, at *5 (Tenn. Crim. App. Jan. 20, 2009) (determining that the trial court did not abuse its discretion in denying a mistrial where the State was not obligated to disclose the evidence at issue pursuant to Rule 16).

G. Recusal of the Trial Judge

The Defendant contends that the trial court erred by denying his motion to recuse made on the ground that the trial judge was holding proceedings without the Defendant present and was biased against the Defendant. The Defendant notes that the issue was raised at the motion to reduce bond hearing held on April 25, 2018, at which time the trial judge assured the Defendant that no proceedings were occurring in the Defendant's absence. In an attempt to reference proceedings that occurred in his absence, the Defendant cites to the trial judge's comments that took place on the morning of trial before the Defendant was brought into the courtroom. Furthermore, according to the Defendant, the trial judge's statements made the morning of trial—that it was tired of playing games and directing court personnel to dress out the Defendant to proceed to trial—reflect the trial judge's bias, which was present in the trial judge's decisions against the Defendant. The Defendant also cites to the trial judge's comments at the motion for new trial hearing that sometimes the judge had a shorter fuse than others. The State responds that "[n]othing in the record establishes that such a motion was ever made" and that if such a motion to recuse was made, the Defendant has waived the issue by failing to present an adequate record for review.

We agree with the Defendant that the record is clear that such a motion was made; in fact, it was heard three times. However, while the motion was taken up again at the motion for new trial hearing, it appears that the original recusal motion was heard on April 30, 2021, and addressed again on May 7, 2021, and there is no transcript of these proceedings in the record on appeal. Once again, we note that when a party seeks appellate review, he has a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal. Tenn.

R. App. P. 24(b); *see Ballard*, 855 S.W.2d at 560. Regardless, the issue was addressed at the motion for new trial hearing and denied, and we believe that the record is sufficient for our review, given that the Defendant made the same arguments in both of the motions he filed.

On appeal, the Defendant argues that the trial judge's statements on the morning of trial that were made prior to his being brought into the courtroom show that he was not present for all in court proceedings. A defendant has a fundamental right under both the federal and state constitutions to be present during his trial. *State v. Muse*, 967 S.W.2d 764, 766 (Tenn. 1998) (citing U.S. Const. amends. V, VI, XIV; Tenn. Const. art. I, § 9). "Presence at 'trial' means that the defendant must be 'present in court from the beginning of the impaneling of the jury until the reception of the verdict and the discharge of the jury.'" *Id*. (quoting *Logan v. State*, 173 S.W. 443, 444 (Tenn. 1914)).

Rule 43(a) of the Tennessee Rules of Criminal Procedure also gives a defendant the right to be present at trial: "Unless excused by the court upon defendant's motion, the defendant shall be present at the arraignment, at every stage of the trial including impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." The scope of this rule is broader than the constitutional right alone because the rule "embodies the protections afforded by the Confrontation Clause of the Sixth Amendment, the right to be present derived from the Due Process Clause[s] of the Fifth and Fourteenth Amendments, and the common law privilege of presence." *Muse*, 967 S.W.2d at 767.

The trial judge had previously reviewed the Defendant's letter and assured him that no proceedings were occurring in his absence. The trial judge's statements cited by the Defendant that took place at the outset of trial were administrative in nature and prior to the beginning of any trial stage. In addition, defense counsel's statements at the beginning of the discussion—that "they attempted to dress him out," but that the Defendant said he wanted to talk to defense counsel first, and that during the ensuing discussion, the Defendant requested defense counsel to seek a continuance—indicate that the Defendant was the creator of the circumstances leading to his absence. As soon as the trial judge delved into matters of substance, the trial judge had the Defendant brought into the courtroom. Thus, the Defendant's right to be present was not violated in this case.

Relative to the Defendant's allegations of bias, "[a] judge should grant a motion to recuse when the judge has any doubt as to his or her ability to preside impartially in the case or when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Smith v. State*, 357 S.W.3d 322, 341 (Tenn. 2011) (internal quotation omitted). This is an

objective standard. *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). A trial judge's adverse rulings are not usually sufficient to establish bias. *Id.* at 821. This court reviews a trial court's denial of a motion to recuse de novo. Tenn. R. Sup. Ct. 10B § 2.01.

The Defendant's bias claims were based on adverse rulings and mere expressions of frustration by the trial judge. "Rulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification." *Alley*, 882 S.W.2d at 821. Also, the trial judge's expressions of frustration were in an effort to keep the trial moving in the face of the Defendant's delay tactics and were not indicative of overall prejudice or a denial of due process. We do not perceive the trial judge's comments as reflecting any sort of a personal bias against the Defendant or defense counsel, and they were not so pervasive as to suggest any lack of impartiality on the part of the trial court. Despite the Defendant's argument to the contrary, we cannot perceive that any person of ordinary prudence in the trial judge's position, knowing all of the facts known to the trial judge, would have found a reasonable basis for questioning the judge's impartiality based on the grounds alleged by the Defendant in his motions. *See, e.g., State v. Lowe*, No. M2013-00447-CCA-10B-CD, 2013 WL 706318, at *5 (Tenn. Crim. App. Feb. 26, 2013) (affirming the denial of recusal motion that was based upon the following argument: "The cumulative effect of apparently erroneous rulings, expressions of frustration and/or anger, mischaracterization of factual matters . . . , and the apparently combative manner utilized by the [c]ourt to castigate counsel's work and position has placed these proceedings in an atmosphere of uncertainty that a fair and impartial trial can be held."). The trial court did not abuse its discretion in denying the Defendant's request for recusal.

H. Illegal, Out-of-Range Sentence

The Defendant contends that his sentence was out-of-range and illegal because he was never provided with notice of the State's intention to seek enhanced punishment. Though the Defendant acknowledges that an enhancement notice was provided to defense counsel, he submits that because he was not shown discovery, his sentence is out-of-range and illegal. In addition, the Defendant observes that defense counsel "argued in sentencing that [the] Defendant[']s prior offenses did not equate [to] enhanced punishment." The Defendant maintains that "[w]hen [d]efense [c]ounsel tried to explain this (in the sentencing hearing)[,] the trial [j]udge . . . cut [d]efense [c]ounsel off and stated[,] 'Argue it in post-conviction.'" The State counters that the Defendant has waived this claim by failing to include the sentencing hearing transcript in the record on appeal. Replying to the State's waiver argument, the Defendant requests that "this last argument be held in [a]beyance until the transcripts from the sentencing hearing are of record because they were asked for" in the designation and preparation of the record document.

The State filed two notices of enhancement in the Defendant's case—listing two convictions for robbery and one for auto theft. The judgment forms reflect that the trial court sentenced the Defendant as a Range II, multiple offender to forty years for second degree murder, a Class A felony, and a concurrent term of four years for abuse of a corpse, a Class E felony. At the motion for new trial hearing, the Defendant argued that he was not served "a notarized statement" of the State's intention to seek enhanced punishment. The trial court noted that defense counsel likely received a notice of the State's intention and indicated that if such were not the case, defense counsel would have argued for a Range I sentence at the sentencing hearing. Also, the Defendant acknowledged that he had two previous convictions for robbery and one for theft.

As pertinent here, a Range II, multiple offender is "a defendant who has received . . . [a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes[.]" Tenn. Code Ann. § 40-35-106(a)(1). The statute further provides that "[e]xcept for convictions for which the statutory elements include serious bodily injury, bodily injury, threatened serious bodily injury, or threatened bodily injury to the victim or victims, . . . convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions[.]" *Id.* § 40-35-106(b)(4). Moreover,

> [p]rior convictions include convictions under the laws of any other state, government or country that, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.

Id. § 40-35-106(b)(5). Finally, subsection (c) states that "[a] defendant who is found by the court beyond a reasonable doubt to be a multiple offender shall receive a sentence within Range II." *Id.* § 40-35-106(c). The Sentencing Commission Comments reiterate that "[s]ubsection (c) makes clear that it is mandatory that the trial judge designate the defendant as a multiple offender when the defendant has the required number of prior convictions."

According to the Defendant, defense counsel argued at the sentencing hearing that Defendant's prior offenses did not qualify for enhanced punishment, but the trial court did not allow defense counsel to explain, instead telling defense counsel to "[a]rgue it in post-conviction." However, as the State notes, a transcript of the sentencing hearing is not included in the record on appeal. The Defendant claims that he requested a copy of the

sentencing hearing be included on appeal in his designation and preparation of the record document, but our review of that document belies his assertion. As noted above, when a party seeks appellate review, it has a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal. Tenn. R. App. P. 24(b); *see Ballard*, 855 S.W.2d at 560. Moreover, the Defendant has failed to make an argument or cite to any authority in his brief as to why his prior convictions did not qualify for range enhancement purposes. *See* Tenn. R. App. P. 27(a)(7)(A); Tenn. Ct. Crim. App. R. 10(b). Accordingly, the Defendant has waived any plenary review in this regard.

Importantly, we observe that the Defendant acknowledged at the motion for new trial hearing he did, in fact, have two convictions for robbery and one conviction for theft. Moreover, the Defendant concedes on appeal that defense counsel received the State's enhancement notice, but he simply argues that defense counsel failed to show it to him. Any claim that the Defendant was not properly advised by defense counsel is not properly presented for our review.

I. Perjured and Recanted Testimony

The Defendant contends that perjured testimony from several of the State's witnesses "was the sole purpose for [his] conviction[s]," that such testimony "was sought out by prosecution misconduct," and that a reversal of his convictions is required. Specifically, the Defendant alleges that testimony from Agent Brown, Mr. Walker, and Mr. Mullins was perjured. The Defendant also argues that Mr. Walker "recanted all testimony" and that he introduced evidence of such at the motion for new trial hearing, which was "accepted" by the trial court. According to the Defendant, a new trial is required. The State responds that there was no perjured testimony at trial. However, the State does not specifically address Mr. Walker's alleged recantation.

At the motion for new trial hearing, the Defendant contended that Mr. Walker's testimony was perjured, citing the disparity between the confession and the proof. The Defendant also asserted that Mr. Walker had recanted "his whole testimony," entering a document purportedly to that effect, and mentioning "a video" related to the alleged recantation. The trial court stated that Mr. Walker's credibility was a question for the jury.

The Defendant also asserted that Mr. Mullins lied at trial about the location of his work, stating at trial that he worked in Farragut, when Mr. Mullins actually worked in Maryville, according to the Defendant. The Defendant noted that the Maryville location would have placed Mr. Mullins closer to the area where the victim's body was discovered and supported the Defendant's proposed defense of Mr. Mullins as the perpetrator. The

trial court noted that any challenge to the defense pursued at trial went to ineffective assistance of counsel.

1. Perjured Testimony

A conviction obtained by the knowing use of perjured witness testimony violates due process, even if the testimony only bears on witness credibility. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see State v. Spurlock*, 874 S.W.2d 602, 617-18 (Tenn. Crim. App. 1993). The State has a responsibility not to present false testimony and "an affirmative duty to correct false testimony presented by State's witnesses." *State v. Watkins*, No. M2017-01600-CCA-R3-CD, 2019 WL 1370970, at *11 (Tenn. Crim. App. Mar. 26, 2019) (citing *Spurlock*, 874 S.W.2d at 617). "In order to prevail on a claim that the State failed to correct false testimony, the defendant must prove the following by a preponderance of the evidence: '(a) that false or perjured testimony was admitted at trial, (b) that the [S]tate either knowingly used such testimony or knowingly allowed it to go uncorrected, and (c) that the testimony was material and deprived him of a fair trial.'" *Id.* (quoting *Bell v. State*, No. 03C01-9210-CR-00364, 1995 WL 113420, at *8 (Tenn. Crim. App. Mar. 15, 1995)). If testimony is determined to be false, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury[.]'" *Giglio v. U.S.*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271).

Specifically, the Defendant alleges that Agent Brown committed perjury when he testified that the Defendant was calling a known drug dealer, Ben Wringle, because Mr. Wringle had no criminal drug activity on his record. The Defendant did not raise any specific challenge to Agent Brown's testimony in this context during the motion for new trial phase, and it is, accordingly, waived. *See* Tenn. R. App. P. 3(e); *see also State v. Milan*, No. E2017-01053-CCA-R3-CD, 2018 WL 5752204, at *7 (Tenn. Crim. App. Nov. 1, 2018) (waiving claim of false testimony for failing to raise it in the motion for new trial). Moreover, the Defendant has offered no evidence other than his own assertion that criminal drug activity was absent from Mr. Wringle's record. Furthermore, as discussed above, we are not aware of any law requiring the State to provide the criminal records of all witnesses.

The Defendant also submits that Mr. Walker "had voluminous perjured testimonies that contradicted [the] medical examiner[.]" Mr. Walker testified regarding the details of the victim's death that the Defendant confessed to him while they were incarcerated together. As found by the trial court, any inconsistencies between these details and the physical proof were issues for the jury in determining the reliability of the Defendant's confession as relayed by Mr. Walker.

Relative to Mr. Mullins, the Defendant notes that Mr. Mullins was another suspect in the victim's murder and that Mr. Mullins "made perjured statements to the police" and gave perjured testimony at trial. As evidence of Mr. Mullins' perjury, the Defendant cites to Mr. Mullins' police statements (1) about the presence of one of the Defendant's female friends during the theft, though Mr. Mullins conceded this was an assumption rather than a fact; and (2) about the timing of theft, Mr. Mullins' telling the 911 operator that it occurred at 4:30 a.m., when it really occurred later in the day while Mr. Mullins was at work. The Defendant also references that Mr. Mullins never told the police about finding a lock of the Defendant's hair in his truck or that the Defendant admitted to taking his truck. Finally, according to the Defendant, Mr. Mullins lied about his work location.

All of these inconsistencies or inaccuracies between Mr. Mullins' various statements and trial testimony were pointed out to the jury during Mr. Mullins' testimony. The fact that Mr. Mullins' trial testimony differed to some degree from his pretrial statements to police, by itself, does not establish that Mr. Mullins intentionally lied to the police or the jury under oath or that the State knew of any such lies. Furthermore, the Defendant has offered no evidence other than his bare assertion that Mr. Mullins was lying about the location of his work being in Farragut.

Accordingly, we conclude that the Defendant failed to prove any of the aforementioned factors by a preponderance of the evidence. He has failed to establish that there was any false or perjured testimony at trial or that the State either knowingly used such testimony or allowed it to go uncorrected. Furthermore, even if we were to conclude that the challenged testimony was false and assume that the State knew of the falsity, the Defendant has not established any reasonable likelihood that the false testimony was material and could have affected the judgment of the jury. The State's case did not rely mainly upon this testimony, and by extension, its credibility. *See, e.g., State v. Primm*, No. M2021-00976-CCA-R3-CD, 2023 WL 179345, at *42 (Tenn. Crim. App. Jan. 13, 2023) (collecting cases).

Both Mr. Walker and Mr. Mullins were thoroughly cross-examined and impeached at trial about various inconsistencies in their statements and testimony. There was other evidence besides Agent Brown's testimony that the Defendant and the victim were involved in drugs, and Agent Brown's reference to Mr. Wringle was only a small portion of his testimony about the Defendant's drug connections. Moreover, it was undisputed that the victim was bludgeoned to death and her blood was found inside the Defendant's bedroom. Her presence in the Defendant's bedroom around the time of her death was corroborated through cell phone records. The victim's body was dumped in a rural creek near an old residence of the Defendant's. Sheets from Mr. Mullins' home were found wrapped around the victim's body and on the creek bank. The Defendant was known to

carry a wooden knife, and a piece of wood was found embedded in the victim's skill. As previously determined, the evidence was more than sufficient to establish Defendant's guilt. Consequently, we conclude that the allegedly false testimony was not material. *See, e.g., id.*, 2023 WL 179345, at *42 (concluding same with similar facts).

2. Recanted Testimony

First, we must address whether the Defendant's allegation of Mr. Walker's alleged recantation was properly presented in the motion for new trial phase. The trial court told the Defendant at the hearing that his allegation regarding the recanted testimony amounted to a claim of newly discovered evidence, which could not be considered upon a motion for new trial but was, instead, the proper subject for a writ of error coram nobis petition. However, for the reasons that follow, this statement of the law by the trial court is incorrect.

When a coram nobis petitioner seeks relief on the ground of subsequently or newly discovered evidence relating to matters which were litigated at trial on merits, the procedure is almost identical in nature to a motion for a new trial predicated upon newly discovered evidence. *Teague v. State*, 772 S.W.2d 915, 920 (Tenn. Crim. App. 1988). As a practical matter, the only difference is the time in which the issue must be raised. *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995). The writ of error coram nobis remedy is limited "to matters that were not and could not be litigated on the trial of the case, *on a motion for new trial*, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding." Tenn. Code Ann. § 40-26-105(b) (emphasis added). Accordingly, we conclude that the Defendant's claim was known and properly presented during the motion for new trial phase. *See State v. Housler*, 193 S.W.3d 476, 494 (Tenn. 2006).

Turning to the merits of the Defendant's recantation claim, we observe that when seeking a new trial based on newly discovered evidence, a defendant must show that neither the defendant nor counsel had knowledge of the evidence prior to trial and that the defendant exercised reasonable diligence in attempting to discover it during the trial, that the evidence is material, and that the evidence would likely change the result of the trial. *State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994); *State v. Caldwell*, 977 S.W.2d 110, 117 (Tenn. Crim. App. 1997). The test for granting a new trial in cases involving recanted testimony as newly discovered evidence is based on the following criteria:

> A new trial may be granted because of recanted testimony when (1) the trial judge is reasonably well-satisfied that the testimony given by a material witness was false and that the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, was

> surprised by false testimony, or was unable to know of the falsity until after the trial; and (3) the jury might have reached a different conclusion had the truth been told.

Housler, 193 S.W.3d at 494 (quoting *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999)).

Allegations of recanted testimony must be supported by affidavits that are "relevant, material, and germane" and are based on the affiant's "personal knowledge." *Harris v. State*, 301 S.W.3d 141, 152 (Tenn. 2010) (Koch, J., concurring) (citing *Hart*, 911 S.W.2d at 375). "Affidavits of the witnesses through whom the newly discovered evidence is sought to be introduced must explain the materiality of the evidence and must state that the evidence was not communicated to the prisoner or his or her trial counsel prior to the original trial." *Id.* at 153.

At the motion for new trial hearing, the Defendant introduced a document that purportedly reflected Mr. Walker's recantation. The document stated,

> I, Jalen Walker, recant my full statement made against [the Defendant] on or about 6-25-18 during trial. I do this of my own free will.
>
> I, Ryan Allen, knowing this to be true ask that Jalen Walker not be punished for coming forward and that he be allowed to remain on probation.

The statement bore the Defendant's signature and was dated January 1, 2019. The statement was not signed by Mr. Walker, his name only being inserted in the underlined area. The Defendant indicated that he subpoenaed Mr. Walker to be present at the motion for new trial hearing but that Mr. Walker did not respond to the subpoena. Accordingly, we observe that the Defendant attached no affidavits from individuals with personal knowledge to support his allegations, other than an affidavit signed by himself, and provided no credible evidence to substantiate his claims of newly discovered evidence. *See, e.g., Reed v. State*, No. W2017-02419-CCA-R3-ECN, 2018 WL 4191228, at *5 (Tenn. Crim. App. Aug. 31, 2018) (holding that summary dismissal of error coram nobis petition was proper under similar facts).

In addition to the document, the Defendant, while talking about Mr. Walker's alleged recantation at the motion for new trial hearing, stated, "And there's a video and I want to table that while we're talking about this." The Defendant, on appeal, maintains that a video recording of Mr. Walker's recantation exists, which "has been protected but never turned over." We assume that the Defendant is referencing the video discussed in his motion filed, with the assistance of counsel, on October 18, 2019. Though, in that

motion, the Defendant requested that he be provided with a copy of the unredacted video for certain dates at the Knox County Sherriff's Detention Facility, that motion was subsequently dismissed without prejudice as premature. Nowhere in the record does it appear that this motion for the video was pursued further, and any issue with its production has been waived. *See* Tenn. R. App. P. 36(a). We are once again left with only the Defendant's bare assertion that the video contains exculpatory evidence. In fact, the Defendant's own motion indicated that the video "*may* be exculpatory in nature[.]" (Emphasis supplied). We also note that the Defendant avers in his motion that he participated in the requested conversations and that the motion did not refer to Mr. Walker specifically.

Most importantly, even if we were to accept the Defendant's allegation that the trial testimony given by Mr. Walker was false and that Mr. Walker's recantation was true, we cannot say that admission of such information might have led the jury to reach a different conclusion had the truth been told. *See Reed,* 2018 WL 4191228, at *5 (quoting Tenn. Code Ann. § 40-26-105(b)). Mr. Walker's testimony was thoroughly impeached at trial, and the jury was aware that Mr. Walker's recital of the Defendant's confession did not match much of the physical evidence presented. The jury was also aware of Mr. Walker's criminal background and that he had motive to lie, hoping that he might receive favorable treatment in exchange for his testimony. Moreover, Mr. Walker's testimony was only a small part of the State's substantial proof of the Defendant's guilt. The Defendant is not entitled to relief from this issue.

J. Prosecutorial Misconduct/Newly Discovered Evidence

The Defendant argues that prosecutorial misconduct occurred pursuant to *Brady v. Maryland* because the State failed to provide exculpatory material to the defense. Specifically, the Defendant argues that the State failed to disclose promises of leniency offered to certain individuals, failed to provide various police statements of certain individuals, failed to provide Mr. Walker's juvenile record, and failed to provide the Defendant's cell phone in discovery.[8] The State, referencing only the Defendant's claim of misconduct as it relates to the State's failure to disclose promises of leniency, argues for waiver because the Defendant neither contemporaneously objected nor included the issue in his motion for new trial. The Defendant's misconduct allegations on this point, however, amount to claims of newly discovered evidence, which, if true, would not have allowed him to lodge contemporaneous objections at trial. Therefore, we decline to waive his prosecutorial misconduct claims on that ground. However, as discussed more thoroughly

[8] We note that we have combined these prosecutorial misconduct claims that are dispersed throughout the pro se Defendant's brief.

below, we agree that several of the Defendant's issues are waived for his failure to include them in the motion for new trial.

At the motion for new trial hearing, the Defendant made a general allegation of prosecutorial misconduct. First, the Defendant contended that Mr. Walker was offered a plea deal in exchange for his testimony. The Defendant also entered into evidence an affidavit from Keith Kirkland. In the affidavit, Mr. Kirkland stated that the prosecutor offered him leniency in exchange for incriminating information against the Defendant, but he refused. According to Mr. Kirkland, the offer was relayed to him through his lawyer on September 27, 2017,[9] and he subsequently told the Defendant about this conversation. Mr. Kirkland further stated that he was housed with the Defendant on four different occasions and that on these occasions, they talked about many things, but the Defendant never mentioned this case. According to the Defendant, it was the State's obligation to reveal the deals offered to Mr. Walker and Mr. Kirkland.

Next, the Defendant orally requested a copy of Mr. Walker's juvenile criminal record at the motion for new trial hearing, and the trial court indicated that it had recently seen the Defendant's written motion filed on February 22, 2022, requesting such. When the Defendant asked if he would be able to obtain the record, the trial court inquired about the relevance of the juvenile record, and the Defendant replied that it was "impeachment testimony that should've been turned over" and that he had "heard" Mr. Walker had "molestation charges" as a juvenile.

The Defendant also asserted at the motion for new trial hearing that there "was vital voluminous discovery withheld from evidence that refuted a key witness['] testimony, Tim Henley." The Defendant cited Mr. Henley's trial testimony that the Defendant did not have any bedding when the Defendant moved in with him shortly after the victim's murder. The Defendant continued,

> [T]he thing of it was, I had pictures that was in my phone, that was taken on subpoena, but it was never turned over in evidence, and there was a download of the phone was turned over, but it took me a year and a half to get that downloaded. It had to go through some encryption. I sent it to my brother-in-law and he had to give it to a legal expert who had some type of special encryption on it to even get the thing to open. So, I know [defense counsel] never [saw] it.

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[9] Later in the affidavit, Mr. Kirkland states that the conversation between him and his lawyer relaying the prosecutor's offer occurred "before" September 27, 2021.

The Defendant said that "there were pictures in the phone" of the bedding he had when he lived with Mr. Mullins and that there were pictures that showed he had the same bedding at Mr. Henley's residence following the victim's murder. The Defendant further averred that there were text messages in the phone prior to the victim's murder that showed he was already moving in with Mr. Henley from Mr. Mullins' house "because of sexual harassment and other things." However, after a recess and a discussion with elbow counsel, the Defendant said that "it appear[ed] that the State did provide a phone dump to [defense] counsel" and that the matter was better left for post-conviction proceedings.

As noted above, in *Brady*, the United States Supreme Court held that any "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The duty to disclose extends to all "favorable information" regardless of whether the evidence is admissible at trial. *State v. Marshall*, 845 S.W.2d 228, 232-33 (Tenn. Crim. App. 1992). However, the State is not required to disclose information that the accused already possesses or is able to obtain or information that is not possessed by or under the control of the prosecution or another governmental agency. *Id.* at 233.

To prove a *Brady* violation, a defendant must demonstrate the following: (1) the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is obligated to release such evidence regardless of whether or not it was requested); (2) the State suppressed the information; (3) the information was favorable to the defendant; and (4) the information was material. *State v. Edgin*, 902 S.W.2d 387, 390 (Tenn. 1995), *as amended on rehearing* (Tenn. July 10, 1995). "Evidence 'favorable to an accused' includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the [S]tate's witnesses." *Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001) (citations omitted). Stated another way, evidence is favorable if it "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Id.* at 56-57 (quoting *Commonwealth v. Ellison*, 379 N.E.2d 560, 571 (Mass. 1978)). Moreover, the evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly

> shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

The defendant bears the burden of proving a *Brady* violation by a preponderance of the evidence. *Edgin*, 902 S.W.2d at 390. "The lower court's findings of fact, such as whether the defendant requested the information or whether the state withheld the information, are reviewed on appeal de novo with a presumption that the findings are correct unless the evidence preponderates otherwise." *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004). "The lower court's conclusions of law, however, such as whether the information was favorable or material, are reviewed under a purely de novo standard with no presumption of correctness." *Id.*

1. Promises of Leniency

On appeal, the Defendant alleges that the prosecutor "was offering inmates deals" in exchange for their testimony against the Defendant. These offers of leniency should have been relayed to the defense, the Defendant contends, but were not. According to the Defendant, both Mr. Walker and Mr. Kirkland would have testified that the prosecutor offered them promises of leniency in exchange for incriminating information against the Defendant. The Defendant also states that he believes Ms. Legg was offered a deal in exchange for her identification of the sheet. The State replies that nothing in the record indicates that inmates were offered deals to testify.

Initially, we note that Mr. Walker's purported affidavit makes no mention of his being offered a deal by the prosecutor in exchange for testimony against the Defendant, and as noted above, the document is not signed by Mr. Walker. Moreover, the Defendant did not make any allegation regarding Ms. Legg at the motion for new trial phase and only states on appeal his *belief* that Ms. Legg was offered a deal. *See* Tenn. R. App. P. 3(e).

Regardless, both witnesses were asked at trial about their motives for testifying against the Defendant and said that they, in fact, had not been promised any leniency on their pending charges in exchange for their testimony. Ms. Legg had only pending misdemeanor charges, and the jury was aware that she had a court date on that case the same day she testified against the Defendant. Mr. Walker testified that he hoped the State would "give [him] a break" on his pending felony charges and that he did not have to go to jail for eight to twelve more years. Furthermore, as detailed above, Mr. Walker's testimony was only a small part of the State's substantial proof of the Defendant's guilt,

and the inconsistencies in the Defendant's purported confession to Mr. Walker versus the physical proof were pointed out to the jury.

Even if we were to accept the information contained in Mr. Kirkland's affidavit as true—that the prosecutor offered him a deal on September 27, 2017, which he did not accept, and that he was housed with the Defendant on four different occasions yet they never spoke of this case—it would not entitle the Defendant to the relief he seeks. Any impeachment value to Ms. Legg's and Mr. Walker's credibility was of minimal usefulness.

The Defendant has failed to establish that there exists a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, the Defendant has not shown by a preponderance of the evidence that the State suppressed information that was material to him as required by *Brady*.

2. Witnesses' Statements

The Defendant asserts on appeal that there were "many exculpable statements (from numerous people) taken by [Agent] Brown and never turned over in [d]iscovery." The Defendant lists multiple names in this regard and claims that they were discovered after trial from a spreadsheet created by Agent Brown. According to the Defendant, "several [were] suspects with criminal ties to Monroe County where the victim was located[.]" However, this specific allegation was not raised at the motion for new trial hearing and is, accordingly, waived. *See* Tenn. R. App. P. 3(e). Moreover, neither the spreadsheet nor any of these statements were entered into evidence at the hearing in an effort to establish the Defendant's claim. The Defendant's reliance on the existence of these speculative statements is not enough to show that the State suppressed favorable information or that the outcome of his trial might have been different. Despite the waiver, the Defendant has failed to establish his *Brady* claim by a preponderance of the evidence.

3. Mr. Walker's Juvenile Record

The Defendant notes on appeal that he requested Mr. Walker's juvenile criminal record but that it was never turned over, and still has never been received. However, as noted above, the State has no duty to disclose information that the accused already possesses or is able to obtain, or information which is not possessed by or under the control of the prosecution. *Marshall*, 845 S.W.2d at 233. This court, in *Berry v. State*, observed that juvenile court files are "maintained" by the courts rather than parties to the litigation. 366 S.W.3d 160, 176 (Tenn. Crim. App. 2011). The court also noted that, pursuant to the unambiguous language of the statutes governing access to juvenile court records, they are

to remain confidential except under certain limited circumstances. *Id.* at 177-78 (citing Tenn. Code Ann. §§ 37-1-153 and -154). The court concluded that none of the witness' juvenile court records would have been open to the general public. *Id.* at 179. The court observed, however, that both parties would arguably have had the right prior to the defendant's trial to inspect the "petitions and orders" contained in the witness' juvenile court file. *Id.* Any "medical report, psychological evaluation or any other document" contained in the file, though, would have remained confidential to either party. *Id.* at 180.

Like the court in *Berry*, we conclude that the Defendant has failed to establish that the State withheld information that was in its exclusive possession or control because access to the victim's juvenile record was equally available to either party. *See* 366 S.W.3d at 179 (citations omitted). Furthermore, without any evidence of the contents of Mr. Walker's juvenile record, we are unable to assess any potential impact to the State's case at trial. This issue is without merit.

4. Defendant's Cell Phone

The Defendant also argues that his cell phone was taken and never turned over in violation of *Brady*. According to the Defendant, the contents of the phone would have impeached the testimony of Mr. Henley. Once more, we are left with nothing but the Defendant's bare assertion regarding the existence of these photographs and text messages from his cell phone and their contents. He did not introduce any of these photographs or text messages at the motion for new trial hearing in support of his claim. Moreover, at the motion for new trial hearing, the Defendant, after a recess and discussion with elbow counsel, said that "it appear[ed] that the State did provide a phone dump to [defense] counsel" and that the matter was better left for post-conviction proceedings. The Defendant has failed to establish by a preponderance of the evidence that the State suppressed favorable information. His *Brady* claim is without merit. Again, any allegation regarding the propriety of defense counsel's actions as it relates to the use of these cell phones records at trial is not properly presented for our review.

III. CONCLUSION

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

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KYLE A. HIXSON, JUDGE