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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 10, 2023

STATE OF TENNESSEE v. MICHAEL DEWAYNE FISHER

Appeal from the Circuit Court for Lawrence County
No. 35673 Stella L. Hargrove, Judge

No. M2022-00225-CCA-R3-CD

Defendant, Michael Dewayne Fisher, appeals his Lawrence County conviction for attempted first degree premeditated murder, for which he received a sentence of twenty-five years' incarceration. Defendant asserts that the evidence presented at trial is insufficient to support his conviction and that the trial court committed structural constitutional error when it denied his motion for recusal. Following a thorough review, we affirm the judgment of the trial court.

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

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

Brandon E. White (on appeal), Columbia, Tennessee; Travis Jones (at trial), District Public Defender; and William M. Harris and Robert Stovall (at trial), Assistant District Public Defenders, for the appellant, Michael Dewayne Fisher.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Brent A. Cooper, District Attorney General; and Gary Howell, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural History

On January 26, 2019, Defendant and Brook Tidwell brought their eleven-week-old daughter ("the victim") to the Crocket Hospital emergency room in Lawrenceburg. At intake, Defendant told nurses that he had fallen while holding the victim. Due to the severity of the victim's injuries, she was transferred to Vanderbilt Children's Hospital

("Vanderbilt"), and Crockett Hospital staff contacted law enforcement and the Department of Children's Services ("DCS"). Following an investigation, Defendant was arrested on a charge of aggravated child abuse.[1] Thereafter, the Lawrence County Grand Jury issued an indictment charging Defendant with attempted first degree premeditated murder and aggravated child abuse.

Defendant was arraigned in the Lawrence County Circuit Court by Honorable Judge Stella L. Hargrove on June 3, 2019. He subsequently voluntarily surrendered his parental rights to the victim in a separate proceeding and Judge Hargrove signed the order of surrender. On September 20, 2019, Judge Hargrove presided over a familial adoption, in which the victim's great aunt formally adopted the victim.

Prior to trial, Defendant filed a motion for change of venue based on the publicity the case had received in Lawrence County. In December 2019, the trial court granted a change of venue. Defendant's trial was conducted in Lincoln County.

Motion to Recuse

In March 2020, Defendant filed a motion for recusal, requesting that Judge Hargrove recuse herself from presiding over his criminal charges and transfer his case to another circuit court judge. Defendant alleged that, following the victim's adoption, photographs of the adoption proceeding were posted on Facebook "with certain of said photographs containing pictures of the adopting family posing with Judge Hargrove, including one picture of Judge Hargrove holding the minor child." Canon 1, Rule 1.2 of the Tennessee Supreme Court Code of Judicial Conduct, states that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Defendant argued that, although Judge Hargrove's presiding over the adoption was fully within her duties and responsibilities, reasonable minds could perceive that, by her participation, Judge Hargrove violated the Canon "as it relates to promoting public confidence in the impartiality of the judiciary[.]"

Judge Hargrove denied Defendant's motion for recusal in a written order. Judge Hargrove explained the reasons for her denial, stating:

> While Defendant is not contesting my involvement in his surrender, it is important to note that Defendant simply executed a surrender of his parental rights. The case did not involve a termination of his parental rights over which this Court, nor any other Court, presided. Forms furnished by

[1] The record reflects that Ms. Tidwell was charged with aggravated child neglect.

> the Department of Child[ren] Services are provided to the judge accepting the surrender. The surrender takes approximately fifteen minutes, and nothing is discussed about any criminal charges that might be pending against a surrendering parent. Counsel for the parent is present during the surrender.

Judge Hargrove further explained that she had been responsible for all termination of parental rights cases in the district for two years and that, after parents surrender their rights, the same trial court usually presided over the adoptions that followed. Judge Hargrove explained that adoption proceedings were very brief, lasting approximately five to ten minutes. Judge Hargrove noted that adoptive families requested photographs with the judge "in each and every case" and that the victim's case was no different. She stated:

> I did not request to hold [the victim]. Some family member requested that I pose with [the victim] and family members for a quick picture. In no way did I bond with [the victim] over those few seconds. Pictures were posted by someone on Facebook. I simply followed my routine in every adoption. It never dawned on me to request that pictures not be placed on social media.

Judge Hargrove stated that she had no personal bias against Defendant and maintained that she could be fair and impartial. Judge Hargrove affirmed that a person of ordinary prudence in her position would not find a reasonable basis for questioning her impartiality and averred that there was no potential appearance of impropriety under these facts.

Trial

At the start of Defendant's trial, Defendant pled guilty to the charge of aggravated child abuse. Regarding the remaining charge of attempted first degree premeditated murder, Nurse Sherry Ray testified that she was working in the Crockett Hospital emergency room the evening that Defendant brought in the victim. Nurse Ray began talking to Defendant to find out what had happened to the victim, and Defendant stated that "he had [fallen] with the child." Defendant said that the fall had occurred approximately three hours prior to their arrival at the hospital. When asked about Defendant's demeanor, Nurse Ray said that Defendant "seemed pretty nervous and he kept repeating, showing me, demonstrating to me how he fell."

Nurse Ray testified that, when another nurse removed the victim's clothing, she saw that the victim had "very severe injuries." Nurse Ray stated, "[It] [d]id not appear that just a simple fall could have caused these injuries. So I asked him if he had [fallen] on top of

the child. And he answered, no, he did not." Regarding the victim's injuries, Nurse Ray testified:

> She had an eye . . . gaze that is consistent with a head injury. It's sort of like when you see a baby doll, their eyes are sort of just fixed and glaring off. And her chest movement, your chest should move together, it was moving -- each side was moving opposite, which is consistent with multiple broken ribs.

Nurse Ray said that, when she picked up the victim to move her to a trauma room, she could feel "crepitus" in the victim's ribs, "which would be consistent with bone end[s] . . . rubbing together." Nurse Ray noted that the victim had a black eye and was "making a grunting noise." The victim also appeared to have a broken arm.

Nurse Ray testified that she immediately called for the doctor, placed an IV, and gave the victim oxygen to help her breathe. She also obtained x-rays of the victim, placed a splint on the victim's arm, and contacted Vanderbilt. She noted that the victim did not respond to pain when the IV was placed and that her condition appeared to be deteriorating.

Captain Brent Hunter of the Lawrenceburg Police Department ("LPD") testified that on January 27, 2019, he and Lieutenant Blake Grooms went to Vanderbilt after receiving information about the victim from a DCS caseworker. Captain Hunter recalled that, when they arrived, they were escorted to a private room where they observed the victim. Captain Hunter noted that the victim had a black eye, which "didn't match what [he] would be looking for in a fall victim[,]" and a broken arm. He identified several photographs that he took of the victim at the hospital and explained that, in one photograph, "You can see what appears to be bruising on the left side back. I guess you would call it the back of the rib bones of the child." Captain Hunter explained to Defendant and Ms. Tidwell that he and Lieutenant Grooms were investigating the cause of the victim's injuries. He asked both parents to consent to a blood draw to determine if they had alcohol or drugs in their system, but Defendant refused to consent.

Captain Hunter testified that he spoke to the doctor in charge of the victim's care "to get a rundown of what injuries the baby had trying to figure out what might have caused these injuries, . . . whether it fit [Defendant's] story of what had happened." A few hours later, they interviewed Defendant and Ms. Tidwell separately at the Vanderbilt's campus police department. Captain Hunter provided Defendant with a *Miranda* warning, and Defendant voluntarily signed a rights waiver in his presence and agreed to speak with him. During the interview, Defendant claimed, in part, that he had slipped and fallen with the victim and that she screamed until he soothed her, after which she fell asleep. After the

interview, Captain Hunter advised Defendant that neither Defendant nor Ms. Tidwell could have any further contact with the victim until authorities concluded their investigation.

Captain Hunter stated that, on January 28, he obtained a warrant for Defendant's arrest. He attempted to locate Defendant at home but later learned that Defendant was in the hospital. Defendant was arrested at the hospital.

Captain Hunter testified that he spoke to Defendant's mother on February 22, 2019, after he learned that Defendant's mother had received a letter from Defendant while he was incarcerated in the Lawrence County Jail. Captain Hunter explained that Defendant's correspondence "was somewhat of a confession about what had happened to [the victim]." He said that there were two letters, dated February 8, contained in the envelope—one for Defendant's mother and one for Ms. Tidwell. In the letter addressed to his mother, Defendant stated:

> Everyone hates me for what I done (sic). If I could take it back, I would, but I can't. I didn't mean to hurt [the victim], I promise. I'm going to tell you what happened. I hope you will forgive me and still love me.
>
> I had just got through changing [the victim's] diaper and went to the kitchen to throw it away when I fell on top of her in the floor. I jumped up and went to the couch with her. She was crying really bad so I tried to calm her down but it didn't work. I got really frustrated because all [Ms. Tidwell] wanted to do or would do is sleep all the time and didn't want to help watch [the victim] very much.
>
> So I got mad and I slammed [the victim] against my chest a couple of times to make her quit crying and then I thr[e]w her on the couch.
>
> That is when I realized what I was doing. So I picked [the victim] back up and tr[ied] to soothe her again. And . . . I realized her breathing wasn't right so I ran into the bedroom and told [Ms. Tidwell] to wake up. And when she did, I finally told [Ms. Tidwell] the truth when we was (sic) going to the hospital with [the victim.]

In the letter to his mother, Defendant explained that he was not allowed to talk to Ms. Tidwell because she was also in jail. He asked his mother to copy the letter to Ms. Tidwell in her handwriting, mail it to Ms. Tidwell, and "[a]ct like you wrote her, not me." In the letter to Ms. Tidwell, Defendant repeated his description of what had happened to the victim and said, "I told the investigator my story to try to get you out of it." He continued, "I told them I never told you the truth. I said I lied about it all together." Captain

Hunter testified that Defendant did not disclose in his first interview that he slammed the victim against his chest or that he threw the victim onto the couch. He said that, as part of the investigation, he obtained the victim's medical records from Crockett Hospital and Vanderbilt. He noted that the only history provided to doctors by Defendant was that he slipped and fell—"at first not on the baby and later on the baby[.]"

Lieutenant Blake Grooms of the LPD testified that he responded to Vanderbilt with Captain Hunter on January 27, 2019. He recalled that he and Captain Hunter spoke to Defendant and Ms. Tidwell twice that day and that they also talked with the medical staff at Vanderbilt and a caseworker with DCS. He said that it took him and Captain Hunter several hours to locate Defendant on January 28, after they obtained a warrant for his arrest. While looking for Defendant, Lieutenant Grooms spoke to Ms. Tidwell, who informed him that Defendant was at the emergency room of Crockett Hospital.

Lieutenant Grooms testified that he and Captain Hunter located Defendant at the hospital, placed him under arrest, and transported him to the Lawrence County Jail. During the booking process at the jail, Defendant asked to speak to Lieutenant Grooms and Captain Hunter. Lieutenant Grooms recalled that they took Defendant to a break room at the sheriff's department and conducted an audio-recorded interview. Lieutenant Grooms stated that Defendant had been provided his *Miranda* warnings again at the time of his arrest.

During the interview, Defendant admitted that he slammed the victim into his chest repeatedly. He also said that he "squeezed her pretty hard." Defendant demonstrated with his hands how he put one hand underneath the victim's bottom and the other around her rib cage and squeezed. When asked about the cause of the victim's black eye, Defendant said that her eye had hit his collarbone. Defendant described how he slammed the victim as she faced him and said that he then turned her so that she faced away from him and slammed her again. Defendant said that the victim became quiet and that her breathing became labored. He said that the victim was not "fidgeting or whimpering anymore." Defendant said, "That's all I done" but then stated that he may have hit the victim's head on the arm of the couch.

Lieutenant Grooms said that Defendant did not take responsibility for the victim's broken arm and, instead, told investigators that the victim had been with Ms. Tidwell's mother, whom he described as "aggressive." Lieutenant Grooms testified that, after the interview, Defendant provided a written statement. He agreed that Defendant was crying while writing out the statement. Lieutenant Grooms stated, based on his conversations with medical personnel at Vanderbilt and his training and experience as a detective, he did not believe Defendant was providing "the entire story" of what he did to the victim. Lieutenant Grooms agreed that, when he and Captain Hunter spoke to Defendant at

Vanderbilt the previous day, Defendant told them only that he "slipped and fell and fell on the baby."

Dr. Jessica Turnbull, a physician in the pediatric intensive care unit at Vanderbilt, testified that she was one of the doctors caring for the victim while she was at the hospital. Dr. Turnbull stated that x-rays taken at Crockett Hospital showed that the victim had a brain injury, as well as a left arm fracture. After arriving at the emergency room at Vanderbilt, the victim had additional scans that indicated she had a low blood glucose and a "dangerously elevated heart rate[.]" Dr. Turnbull stated that, in her initial examination of the victim, she "found a number of injuries and diagnoses." Dr. Turnbull said that the victim had "three skull fractures, one in the left frontal bone of her skull, one in the occipital bone of her skull, and then she had a fracture across the frontal sinus of her skull." The victim also had "two different kinds of head bleeds"—a subdural hematoma and a subarachnoid hematoma. Dr. Turnbull explained that the victim's skull fractures were of the thickest parts of her skull, suggesting that "it was a significant amount of force" that caused the skull fractures. She said that had not seen "a baby with a frontal sinus fracture outside of a car crash." She said that the bleeding in the victim's brain "compressed her brain." Dr. Turnbull opined, based on the locations of the injuries, that the victim had received multiple blows to her head.

Dr. Turnbull further testified that the victim suffered a contusion to the right side of her brain, ligamentous injuries to her cervical and thoracic spine, bilateral retina hemorrhages, and bilateral rib fractures on the back side of her rib cage. Dr. Turnbull explained that the victim also had "a collection of blood in between the inside of the ribs and the surface of the left lung." She said that retina hemorrhages occur when a person is "subject to high-force, repeated acceleration/deceleration injuries," which cause blood vessels in the retina to tear. She testified that such injuries were "pathognomic for child abuse and shaking injury. There is no way to get those injuries unless the child had been shaken." Dr. Turnbull stated that the victim had a total of nine fractures to her ribs.

Regarding the victim's spine injuries, Dr. Turnbull stated:

> And the way that those get injured is by shaking with severe force and what we call acceleration/deceleration forces, which are a high force fast back and forth injury.
>
> And so we see acceleration/deceleration forces in high speed car crashes when a car is carrying along at 70 miles an hour and then hits something that's not moving.

Dr. Turnbull continued:

> [The victim] then had a grade three liver laceration as well as a grade two splenic laceration. The scale for both goes from one to five, with one being the least severe and five being the most severe. So grade three of her liver and grade two of her spleen.
>
> She then had a hematoma of her left adrenal gland, which is kind of a triangle-shaped gland that sits on top of the kidney.
>
> She had fractures of both of her bones in her forearm on the left side and then she had fractures of both of the bones on her wrist on the right side.
>
> And she had bruising over her eye as well as her forehead that we were able to appreciate on her initial physical exam.

Dr. Turnbull opined that the lacerations to the victim's spleen and liver were caused by blunt force trauma. She explained that lab tests showed that the victim had significant blood loss due to bleeding in her brain, spleen, and liver. She stated that the victim's black eye suggested "a direct blow to the eye[.]"

Dr. Turnbull testified that, within the first thirty-six hours of her admission to Vanderbilt, the victim's level of seizures was so severe that she had to be placed on a breathing machine. A neurosurgeon also put an external ventricular drain into the victim's skull to drain fluid and relieve pressure that was building up in her head. Dr. Turnbull explained that doctors had worked hard to stop the victim's seizures but that, eventually, the victim had to be placed in a medically-induced coma with the hope that the "salvageable" portions of the victim's brain could recover.

Regarding the victim's current condition, Dr. Turnbull explained that the victim was taking multiple seizure medications because she continued to have multiple seizures per day. Dr. Turnbull said that the seizures were getting stronger and more frequent as the victim grew. She also explained that the victim's "swallow function" had been damaged, necessitating a gastrostomy tube being placed in the victim's stomach. Additionally, the victim's brain injury caused her to suffer "autonomic dysregulation," wherein she was unable to control the tone of her muscles. Dr. Turnbull stated that, when the victim left the hospital, her muscles were "inappropriately tight," and she was given medication to help loosen up her muscles "because it can be very painful."

Dr. Turnbull said that, in the years following the victim's initial admission at Vanderbilt, "[T]he coordination of her swallowing and secretion management and breathing as she has grown has gotten worse. And so in an effort to try to keep her airway open so that she can breathe adequately, she has undergone two separate surgeries[.]" The

surgeries did not fix the victim's breathing problems, however. According to Dr. Turnbull, the victim now needed oxygen at home. Dr. Turnbull stated that it was "only a matter of time if she is unable to coordinate her oral secretions getting down into her stomach as opposed to lungs before her lungs get so sick that she will need continuous breathing support."

Dr. Turnbull stated that, prior to the offense, the victim had been a "developmentally normal" baby. She said that the victim's injuries could have been fatal. Dr. Turnbull explained:

> The traumatic brain injury with the blood on the outside of the brain, the -- that would be one way that she could have died. The seizures leading to her inability to breathe, which if you can't breathe for long enough, then your heart stops. Those . . . would be the two most acute.

Dr. Turnbull testified that the brain injury left the victim blind and dependent upon a wheelchair for the rest of her life. She said that the victim would never be able eat or drink by mouth "in any sort of meaningful way[.]" She said that the victim, who was three years old at the time of trial, did not speak. Dr. Turnbull explained that the victim's brain was "so injured that she will not be able to speak words" and that the victim would not be able to learn "any sort of sign language." Dr. Turnbull said that she was "deeply concerned" that the victim would "succumb to one of her injuries and end up dying" within the next year because the victim was "so fragile."

Terra Woodard testified that the victim was her great niece and that she had adopted the victim after her hospitalization in January 2019. Ms. Woodard said that she regularly saw the victim prior to January 26, 2019, explaining that she began keeping the victim for two or three days at a time when the victim was about a week old. Ms. Woodard said that she had seen the victim at Christmas in 2018 but that she had been unable to keep the victim in the week or two before her injury because Ms. Woodard's family had been sick. She said that the victim was small when she was born but was a healthy child.

Ms. Woodard testified that the victim spent forty-six days in Vanderbilt following her admission on January 26, 2019. She said that the victim had lived with her since the victim's release from the hospital. Ms. Woodard testified that the victim had required additional medical treatment. She said, "Counting the [forty-six] days that we stayed, between doctor's appointments, therapy up there, hospital, surgeries, staying over, [there] has been 236 trips [to Vanderbilt]." She explained that the victim had three "airway surgeries" in the past year "[b]ecause the muscle tone in her airway is so low that her tongue falls back and it closes her airway and she gasps for breath." When asked about the victim's day-to-day life, Ms. Woodard said, "[The victim] struggles every day. She has ten to

[fifteen] seizures a day." Ms. Woodard described the victim's seizures stating, "She used to just jump, you know, and kind of space out a little bit. Now they are . . . worse. She is locking her jaws, her mouth. She goes to the right and she jerks really bad." She said that the victim aspirates or "chokes" often, that she takes twelve medications, plus breathing treatments, and that she is fed through a feeding tube. Ms. Woodard testified that the victim "cannot talk. She cannot sit up. She cannot roll over. She cannot walk. [She] is almost three and she . . . [doesn't] have that normal life of a three year old." Ms. Woodard said that, if the victim's ability to breathe continued to decline, the victim would need a tracheotomy. Doctors advised Ms. Woodard that, if a tracheotomy was not successful, the victim would not survive.

Defendant testified that he was thirty-two years old, that he worked construction, and that he was the victim's father. Defendant said that the victim was born a month early. He said that, following the victim's birth, he and Ms. Tidwell "tried to take care of [the victim] as much as we could. The only times we didn't have her is when she was with Ms. Woodard." He said that Ms. Woodard kept the victim "[f]or a few days every once in a while to kind of give us a little break[.]"

Defendant testified that January 26, 2019, was a weekend and that he and Ms. Tidwell were home with the victim watching movies. He explained that Ms. Tidwell took a nap that afternoon because she was sick. Defendant testified:

> And so me and [the victim] [were] watching a movie. I'm, you know, feeding her and changing her butt and doing everything normal, like always.
>
> And about 9:30 or so, somewhere around in there, she's whining real bad. And so I, you know, tried to figure out everything to do to sooth[e] her to make her quit whining, and, you know, quit crying. I tried to give her a bottle. She didn't eat real good before that so she wasn't taking the bottle. She didn't want that no more. I looked at her butt again. She had a little bit of pee in the diaper so I changed her butt again, maybe thinking it was wet, you know, bothering her, but that wasn't it, either. She was still whining. I just couldn't figure it out. Couldn't figure out what it was. And I was just getting upset.

Defendant said that, after walking into the kitchen and throwing away the dirty diaper, he "slipped and fell in the floor" with the victim. He stated that he slipped on water in the floor near the dogs' water bowl and landed on the victim. Defendant said that he was angry and frustrated after falling because he did not like the dogs. He testified that he took the victim over to the couch and that she "just wouldn't quit crying." He continued:

> I just lost it. I lost my cool and I slammed [the victim] against my chest hard several times and squeezed her and shook her.
>
> . . . .
>
> After I shook her, I shook her quite a bit, and I threw her down on the couch with the armchair that was on the edge of the couch. I just got so frustrated and I started hitting the couch and I hit her.

Defendant said that his slamming, squeezing, and hitting the victim lasted about fifteen seconds. He testified that, when he was done, the victim was "just staring" at him. He stated that he picked up the victim and told her that he "didn't mean to do that." Defendant explained:

> She's just still looking at me, looking up at me like what the hell, man.
>
> I started crying. Just laid down with her on the edge of the couch and I was holding her. . . . And she's still just kind of looking at me. And she wasn't crying anymore. So I thought, well, hell, I didn't hurt her, I just scared the sh[**] out of her.

Defendant said that he was "really tired and really wor[n] out" so he went to sleep on the couch for around thirty minutes. He said that he woke up hearing the victim making a strange noise. He continued:

> So I got up and I clicked the light on . . . and that's when I noticed the bruise on her eye where I had hit her.
>
> And so I got up and I went in there to [Ms. Tidwell]. She was in the bedroom asleep. She heard the door open. And I said, ["]Brook, wake up. There's something wrong with [the victim."] And I went straight for the bed. I told her I slipped and fell in the floor because I was too ashamed to tell her what had happened.
>
> And so I give her to [Ms. Tidwell] and she – she takes her. And she's trying to figure out what's wrong and she can't figure it out neither. She said, ["]Michael, did you get too rough with her? Something is wrong with her eyes.["] And [the victim] was looking over to the right.

Defendant stated that he and Ms. Tidwell then took the victim to Crockett Hospital and that the victim was flown to Vanderbilt. Defendant said that detectives spoke to him

at Crockett Hospital. When asked what had happened to the victim, Defendant repeatedly told the detectives only that he fell on the victim. He said that detectives escorted him back to his residence where he showed them the place in the kitchen that he slipped and fell.

Defendant said that he later joined Ms. Tidwell and the victim at Vanderbilt and that detectives asked him additional questions there. Defendant testified that he continued "lying about it." Defendant recalled that, after detectives spoke to doctors, they interviewed him at Vanderbilt Police Department.

Defendant said the next day he and Ms. Tidwell were in their car when he "started getting tore up crying." Ms. Tidwell asked Defendant why he was crying, and he told her that he needed "to tell [her] what really happened." Defendant testified, "I told her what happened, the truth. And . . . well, part of it, the truth." Defendant said that he did not tell Ms. Tidwell about his hitting the victim with his fist.

Defendant testified that he began having chest pain. When he told Ms. Tidwell that his chest was "killing" him, she drove him to the hospital. Detectives later arrested him at the hospital and took him to the Lawrence County Jail. Defendant agreed that, after his arrest, he asked to speak to the detectives, resulting in the second recorded interview.

Defendant stated:

> I can honestly say that I did not try to murder my daughter. There was no intention of doing that. I have owned up to the aggravated child abuse because that's what I've done and that's what you're suppose[d] to do is be a man about it. That's exactly what I have done. But in no way did I try to murder my daughter.

Defendant said that he had been hitting the couch in frustration and that he accidentally hit the victim. He said that he "realized [he] hit her afterwards."

On cross-examination, Defendant testified that he punched the victim with his fist about three times. He claimed, however, that he had intended to hit the couch. When asked where he punched the victim, Defendant testified, "One of them hit her in the head and the other one hit her in her body, that I know of." When asked to explain how the victim got three skull fractures, Defendant testified, "My theory is that from me hitting her on the front is the ones in the front. And then one on the back is from the arm . . . of the couch. When I threw her on the couch, I threw her on the couch really hard." Regarding the cause of the two broken bones in the victim's arm, Defendant said, "My theory is because she was in a swaddle. When she's in a swaddle, she's like this. And so me pounding on her -- on my chest I'm sure pushed her arms back like that and broke them."

Defendant agreed that he told Nurse Ray that he fell with the victim and that he denied falling on top of the victim when asked by Nurse Ray. He agreed that, although detectives repeatedly asked him to give them more information to help the doctors treat the victim, he lied to them and did not tell them what he did to the victim.

Following deliberations, the jury found guilty of attempted first degree premediated murder with the victim suffering serious bodily injury. At a subsequent sentencing hearing, the trial court sentenced Defendant to twenty-five years for attempted first degree premediated murder and to twenty-five years for aggravated child abuse, which the court ordered to run consecutively.

Defendant filed a timely motion for new trial and amended motion for new trial, which the trial court denied in a written order following a hearing. This timely appeal follows.

II. Analysis

Motion to Recuse

Defendant argues that the trial judge committed structural constitutional error when she refused to recuse herself from presiding over Defendant's trial after she presided over the victim's adoption. Defendant argues that a person of ordinary prudence in the trial judge's position, knowing all the facts known to the trial judge, would find a reasonable basis for questioning her impartiality. The State responds that this issue is without merit because the trial judge's involvement in the adoption proceeding neither affected her impartiality nor created an appearance of impropriety. We agree with the State.

Article VI, section 11 of the Tennessee Constitution provides that "[n]o Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested . . . ." Tenn. Const. art. VI, § 11. The Tennessee Supreme Court has explained that "[t]he purpose of Article 6, § 11 of our Constitution is to insure every litigant the cold neutrality of an impartial court." *Leighton v. Henderson*, 414 S.W.2d 419, 421 (Tenn. 1967); *see also Holsclaw v. Ivy Hall Nursing Home, Inc.*, 530 S.W.3d 65, 69 (Tenn. 2017) (stating that "[l]itigants in Tennessee have a fundamental right to a 'fair trial before an impartial tribunal'"). This provision is intended "to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor." *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (citation omitted).

"[P]reservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial."

Kinard v. Kinard, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998); *see Offutt v. United States*, 348 U.S. 11, 14 (1954) (holding that "justice must satisfy the appearance of justice"). As such, Tennessee's Rules of Judicial Conduct require judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary," Tenn. Sup. Ct. R. 10, RJC 1.2, and to "uphold and apply the law, and . . . perform all duties of judicial office fairly and impartially." Tenn. Sup. Ct. R. 10, RJC 2.2. Tennessee Supreme Court Rule 10, Code of Judicial Conduct, Canon 2, Rule 2.11, states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." One such circumstance described by the Code is when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." *Id.*, 2.11(A)(1).

The test for recusal requires a judge to disqualify herself in any proceeding in which "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." *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001)) (internal quotation marks omitted); *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). "[T]he test for recusal is an objective one because the appearance of bias is just as injurious to the integrity of the courts as actual bias." *State v. Griffin*, 610 S.W.3d 752, 758 (Tenn. 2020) (quoting *Cannon*, 254 S.W.3d at 307) (internal quotation marks omitted). Appellate courts review a trial court's ruling on a motion for recusal under a de novo standard of review with no presumption of correctness. *State v. Mark Dewayne McMurry*, No. M2021-00223-CCA-R3-CD, 2022 WL 1087087, at *4 (Tenn. Crim. App. Apr. 12, 2022) (citing Tenn. Sup. Ct. R. 10B, § 2.01).

On appeal, Defendant does not contend that Judge Hargrove's involvement in the victim's adoption caused her to form a partiality for the victim or a prejudice against him, and in the order denying Defendant's motion to recuse, Judge Hargrove made clear that "[i]n no way did [she] bond with [the victim]" during the short adoption proceeding or over the few seconds it took to take pictures with the victim. Likewise, Judge Hargrove stated that she "had no personal bias against Defendant" and maintained that she could be fair and impartial during his trial. Defendant contends, however, that Judge Hargrove's involvement in the victim's adoption and the fact that photographs of the adopting family posing with Judge Hargrove—including one picture of Judge Hargrove holding the victim—were posted on Facebook by the victim's adoptive mother, created an appearance of impropriety that necessitated Judge Hargrove's recusal.

As explained in the order denying the motion to recuse, Judge Hargrove's actions during the victim's adoption were completely in line with what typically occurs during adoption proceedings. A reasonable person would understand that a trial judge assigned

to a judicial district is responsible for a wide variety of proceedings that may involve overlapping litigants and that the same trial judge might even preside over several criminal cases involving the same defendant. The simple fact that Judge Hargrove presided over other cases—one involving the surrender of Defendant's parental rights and another involving the adoption of the victim—is insufficient to support recusal. *See State v. Reid*, 213 S.W.3d 792, 815 (Tenn. 2006) ("A trial judge is not disqualified because that judge has previously presided over legal proceedings involving the same defendant."), *abrogated on other grounds by State v. Miller*, 638 S.W.3d 136 (Tenn. 2021). Additionally, "[p]rior knowledge of the facts about the case is not sufficient in and of itself to require disqualification." *Alley*, 882 S.W.2d at 822. In the order denying recusal, Judge Hargrove explained that she had been responsible for all termination of parental rights cases in the judicial district for two years and that, when an adoption occurred after a surrender of parental rights, the same trial judge usually presided over the adoption proceedings that followed. Judge Hargrove noted that adoption proceedings were very brief, lasting five to ten minutes, and that adoptive families requested photographs with the judge "in each and every case." Judge Hargrove explained that the victim's adoption proceeding had been no different.

Defendant presents no proof that Judge Hargrove's involvement in the victim's adoption made his trial unfair. Regarding the fact that the victim's adoptive mother posted photographs of the victim with Judge Hargrove on Facebook, there was no proof that Judge Hargrove was Facebook "friends" with the victim's adoptive mother or that Judge Hargrove had visited, "liked," or otherwise interacted with the Facebook post regarding the adoption. *See, e.g., State v. Jeffrey M. Forguson*, No. M2013-00257-CCA-R3-CD, 2014 WL 631246, at *13 (Tenn. Crim. App. Feb. 18, 2014) (concluding that the fact that the trial judge was "friends" on Facebook with a witness was not sufficient proof to question the trial judge's impartiality). Under these circumstances, we agree with the trial judge that a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would not find a reasonable basis for questioning its impartiality. Defendant has not shown that the trial court erred when it denied his motion for recusal.

Sufficiency of the Evidence

Defendant contends that the State did not present sufficient evidence to prove beyond a reasonable doubt that he committed the offense of attempted first degree premeditated murder involving serious bodily injury. He asserts that the State failed to prove that he acted with premeditation and that he intended to murder the victim. The State responds that, viewing the evidence in the light most favorable to the State, a reasonable juror could have concluded that the State proved all essential elements of the charged offense beyond a reasonable doubt. We agree with the State.

Our standard of review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id*. Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

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

A person commits criminal attempt when, acting with the kind of culpability otherwise required for the offense, he "[a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part[.]" Tenn. Code Ann. § 39-12-101(a)(2) (2019). First degree murder is the premeditated and intentional killing of another person. Tenn. Code Ann. § 39-13-202(a)(1) (2019). A person acts intentionally "when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a) (2019). Premeditation "is an act done after the exercise of reflection and judgment. 'Premeditation' means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time." Tenn. Code Ann. § 39-13-202(d) (2019). Additionally, "[t]he mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation." *Id*.

Premeditation "may be established by proof of the circumstances surrounding the killing." *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000). These circumstances include, but are not limited to, "the use of a deadly weapon upon an unarmed victim; the particular cruelty of a killing; the defendant's threats or declarations of intent to kill; the defendant's procurement of a weapon; any preparations to conceal the crime undertaken before the crime is committed; destruction or secretion of evidence of the killing; and a defendant's calmness immediately after a killing." *State v. Davidson*, 121 S.W.3d 600, 615 (Tenn.

2003) (citing *Bland*, 958 S.W.2d at 660; *State v. Pike*, 978 S.W.2d 904, 914-15 (Tenn. 1998)). This court has also noted that the jury may infer premeditation from any planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995) (citation omitted). In addition, a jury may infer premeditation from a lack of provocation by the victim and the defendant's failure to render aid to the victim. *State v. Lewis*, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000). Whether premeditation is present in a given case is a question of fact to be determined by the jury from all of the circumstances surrounding the killing. *Davidson*, 121 S.W.3d at 614 (citing *Suttles*, 30 S.W.3d at 261; *Pike*, 978 S.W.2d at 914).

When examined in the light most favorable to the State, the evidence was sufficient for a reasonable juror to infer that Defendant acted with premeditation and the intent to cause the victim's death and that Defendant believed his actions would cause the victim's death without further conduct on his part. The evidence showed that Defendant, a grown man, delivered repeated forceful blows to the eleven-week-old victim's head and abdomen, repeatedly shook the victim, slammed the victim against his chest multiple times, threw her down onto a couch "really hard," squeezed the victim's ribcage "hard," hit the victim's head on the arm of a couch, and delivered a direct blow to the victim's eye. The victim's resulting injuries were obvious and severe. The emergency room nurse at Crockett Hospital testified that it was apparent the victim had "very severe injuries" when she arrived at the hospital. The victim's eyes were "fixed and glaring off"; the victim's chest moved in opposite directions when she breathed; she had a black eye, and her arm appeared to be broken. Additionally, the emergency room nurse testified that, when she picked up the victim to move her to a trauma room, she could feel "crepitus" in the victim's ribs, "which would be consistent with bone end[s] . . . rubbing together."

Regarding the extent and severity of the injuries caused to the victim, Dr. Turnbull said that the victim had three skull fractures and "two different kinds of head bleeds." She noted that one of the victim's skull fractures were of the thickest part of her skull, and she stated that it would have required "a significant amount of force" to cause that fracture. Dr. Turnbull said that she had not seen "a baby with a frontal sinus fracture outside of a car crash." Dr. Turnbull testified that the victim received ligamentous injuries to her cervical and thoracic spine and bilateral retina hemorrhages—both caused by Defendant's shaking of the victim which Dr. Turnbull likened to "acceleration/deceleration forces in high speed car crashes when a car is carrying along at 70 miles an hour and then hits something that's not moving." The victim also suffered nine rib fractures on the back side of her rib cage, a grade three liver laceration, a grade two splenic laceration, and a hematoma of her left adrenal gland. Dr. Turnbull opined that the lacerations of the spleen and liver were caused by blunt force trauma. Dr. Turnbull also testified that the victim suffered fractures to bones in her forearm and wrist. She explained that lab tests showed

that the victim had significant blood loss due to bleeding in her brain, spleen, and liver. Additionally, the victim suffered repeated seizures that were so severe and frequent that the victim had to be placed in a medically-induced coma with the hope that the "salvageable" portions of her brain could recover. Dr. Turnbull said that several of the victim's injuries could have been fatal on their own.

Several circumstances support the jury's finding that Defendant acted with premeditation: the nature and particular cruelty of Defendant's actions against the helpless victim; the lack of provocation from the victim; evidence concerning Defendant's motive; and Defendant's failure to render aid to the victim. Defendant violently abused his eleven-week-old daughter, who was completely dependent on Defendant and incapable of defending herself. Dr. Turnbull's descriptions of the victim's injuries made clear the severity of the injuries and the amount of force Defendant used in causing the injuries. Defendant testified that, on the day of the offense, he was angry and "really frustrated because all [Ms. Tidwell] wanted to do or would do [was] sleep all the time," leaving him to take care of the victim by himself. Defendant also admitted that he had been upset and frustrated with the victim because he could not get the victim to stop whining and crying.

The jury could also infer Defendant's intention to kill the victim from Defendant's actions following his abuse of the victim. Defendant claimed that he had intended to hit the couch; however, he did not call 911 or request an ambulance after he "realized" that he had been punching the victim. Instead, he lay down on the couch and took a nap. Defendant and Ms. Tidwell later drove the victim to the hospital, but Defendant lied to the emergency room nurse and told her that he had merely fallen while holding the victim. Defendant's failure to give a complete account of what he had done to the victim would have hampered the victim's ability to receive thorough, appropriate, and immediate medical care, and many of the injuries that Defendant inflicted could have been fatal, independent of the others.

Based upon this evidence, a reasonable juror could have concluded that the State proved all essential elements of the charged offense beyond a reasonable doubt. Defendant is not entitled to relief on this claim.

III. Conclusion

Based on the foregoing, we affirm the judgment of the trial court.

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ROBERT L. HOLLOWAY, JR., JUDGE