IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 9, 2022 Session

STATE OF TENNESSEE v. ISIAH J. PRIMM

Appeal from the Circuit Court for Dickson County
No. 22CC-2016-CR-174 Larry J. Wallace, Judge

No. M2021-00976-CCA-R3-CD

Defendant, Isiah J. Primm, was convicted after a jury trial of two counts of first degree felony murder; two counts of conspiracy to commit first degree murder, a Class A felony; and one count of conspiracy to commit voluntary manslaughter, a Class D felony; and sentenced to an effective life plus forty years in confinement. On appeal, Defendant argues that (1) the evidence was insufficient to support his convictions; (2) the jury should have been instructed on self-defense, facilitation, and attempt as lesser-included offenses of first degree murder; (3) the jury should have been instructed on the State's duty to gather and preserve evidence; (4) the State committed a *Brady* violation by waiting until the morning of trial to provide Defendant with a copy of Mr. Tidwell's cell phone report; (5) the State knew or should have known that one of the victims introduced false testimony; (6) the trial court should have excluded evidence of drugs found in the apartment where Defendant was staying; (7) Defendant's Fourteenth Amendment right was violated because the jury venire contained no African American jurors; and (8) the trial court erred by imposing partial consecutive sentencing. After a thorough review of the record, we affirm the judgments of the trial court; however, because the trial court did not sign three of the judgments, we remand the case for entry of amended judgments.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and JOHN W. CAMPBELL, SR., JJ., joined.

Jacob W. Fendley (at trial and on appeal) and Mart G. Fendley (at trial), Clarksville, Tennessee, for the appellant, Isiah J. Primm.

Herbert H. Slatery III, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; W. Ray Crouch, Jr., District Attorney General; and Carey Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural History

This case arises from an April 12, 2016 shooting incident that took place in an area of Charlotte known as the "picnic grounds," during which Quintin Tidwell[1] and Marcedez Bell were killed and Montae Springer was shot multiple times. The May 2016 term of the Dickson County Grand Jury issued a presentment charging Defendant, his cousin Kurtis Primm, and Jonathan Hughes, Jr., with two counts of first degree premeditated murder relative to Mr. Tidwell and Mr. Bell and one count of attempted first degree murder[2] relative to Mr. Springer. A July 2016 superseding indictment added one count of conspiracy to commit first degree premeditated murder for each victim.

The trial court severed the respective co-defendants' cases for trial. The record reflects that Defendant's trial occurred after co-defendant Primm's trial[3] and before co-defendant Hughes' trial.

State's Evidence

At Defendant's trial, Renita Thompson, Mr. Tidwell's mother, testified that he was twenty-nine years old at the time of his death and that he had four children. Troy Edmondson, Mr. Bell's father, testified that Mr. Bell was twenty-three years old at the time of his death, that Mr. Bell drove a Dodge Charger, and that Mr. Bell's relatives lived near the picnic grounds.

Multiple witnesses described the picnic grounds as a community gathering place that hosted an annual picnic. The picnic grounds were surrounded by a residential area, in which many of the co-defendants' and victims' relatives lived.

Kenneth Flanagan stated that, in the early morning hours of April 12, 2016, he was driving around with Defendant smoking marijuana when Defendant received a telephone call that "changed the mood drastically," and Defendant became "agitated" and angry. Mr. Flanagan did not know the caller's identity, but the person told Defendant that Mr. Tidwell was in Charlotte. Mr. Flanagan knew of a disagreement between Defendant and Mr. Tidwell related to a "prior drug deal" in which Mr. Tidwell owed Defendant money. Mr.

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[1] The superseding presentment and portions of the trial transcript spell Mr. Tidwell's first name as "Quinton"; however, the record as a whole reflects that the correct spelling is "Quintin."

[2] At some point before Defendant's trial, the State declined to prosecute the attempted first degree murder of Mr. Springer.

[3] The record reflects that, after the close of evidence, co-defendant Primm entered a guilty plea to attempted first degree murder and conspiracy to commit first degree murder with agreed concurrent sentences of fifteen years at 100% service and twenty-five years at 30% service.

Flanagan stated that Defendant was "going to go meet [Mr. Tidwell] and handle this" because Defendant was "tired of all this bulls--t . . . and people talking about him[.]" Mr. Flanagan said that they went to co-defendant Primm's apartment, where Defendant had stayed "on and off" for a couple of months before the shooting. Mr. Flanagan noted that Defendant used the apartment's second bedroom and that other people, including himself, would "crash" at the apartment after going out. Mr. Flanagan said that co-defendant Hughes was present at the apartment and that Addison Wilson, who had a business with co-defendant Primm buying and selling cars, also arrived and left while Mr. Flanagan was there. Mr. Flanagan stood outside and smoked a cigarette for about fifteen minutes; he did not go inside.

Mr. Flanagan testified that, when Defendant, co-defendant Hughes, and co-defendant Primm left the apartment, co-defendant Primm drove toward Charlotte on a motorcycle, and Defendant drove a blue Chevrolet Impala accompanied by co-defendant Hughes and Mr. Flanagan. Mr. Flanagan stated that, to his understanding, Defendant was going to fight Mr. Tidwell. Mr. Flanagan saw that Defendant had a black and chrome 9mm handgun in his waistband and that co-defendant Hughes had a black 9mm handgun in his waistband. Mr. Flanagan stated that co-defendant Primm was carrying a backpack large enough to hold a gun but that he never saw co-defendant Primm with a gun.

At some point on the way to Charlotte, co-defendant Primm's motorcycle ran off the road and into a field. Defendant circled back to co-defendant Primm's location and picked him up. After they stopped, co-defendant Primm told Mr. Flanagan to drive because he did not have a gun. Mr. Flanagan explained that because he had no conflict with Mr. Tidwell, he was not needed, and that they wanted someone to stay with the car because "something could happen" on the way back from the fight and they might need to leave quickly.

During the drive, Mr. Flanagan heard Defendant say, "He's going to get what's his," that he was tired of "bulls--t," that nobody was "gonna play him," that "[h]e was going to catch a body over it," and that he would "whoop his a--[.]" Mr. Flanagan opined that the statements meant Mr. Tidwell's actions would result in "some sort of physical impact" and harm to Mr. Tidwell; Mr. Flanagan noted, though, that he did not anticipate the extent to which Mr. Tidwell would be harmed.

Mr. Flanagan testified that co-defendant Primm instructed him to park beside a market, which connected to the picnic grounds by a foot trail through some woods. He acknowledged that taking the "secluded" trail allowed the group to have the "[e]lement of surprise" and that the group said they were taking the trail to "be able to sneak up on them." Mr. Flanagan stated that "[t]here was definitely a plan of ill intent" involving physical violence, although he denied that the plan was "to go shoot somebody[.]" After Mr. Flanagan parked, co-defendant Primm told Mr. Flanagan to drive to a location near the

picnic grounds and wait for them there. Mr. Flanagan could not see the picnic grounds from the location, but between four and five minutes after he arrived, he heard multiple gunshots from the direction of the picnic grounds.

Mr. Flanagan testified that co-defendant Primm, who was still carrying his backpack, returned to the car first and was "frantic" and "panicked." Co-defendant Hughes returned second and no longer had his gun. Defendant returned about thirty second later; Mr. Flanagan described Defendant as "distraught," shaken, disheveled, dirty, and missing a shoe and a vest he had been wearing. Defendant also no longer had his gun, and someone indicated that Defendant had dropped it. Defendant told Mr. Flanagan to drive toward White Bluff, where they stopped at a house and exited the Impala. Mr. Flanagan stated that Paige Worley, co-defendant Primm's girlfriend, picked them up there and drove them to East Nashville.

Mr. Flanagan testified that, during the drive, co-defendant Hughes mentioned "needing to trim the fat," meaning to kill Mr. Flanagan because he was a witness. Mr. Flanagan averred that the only reason he was alive was because co-defendant Primm vouched for him. Mr. Flanagan stated that it was a quiet drive and that everyone turned their cell phones off. After arriving at another house occupied by "Big Homey," whose legal name Mr. Flanagan did not know, the three co-defendants exited the car, and Ms. Worley and Mr. Flanagan went back to Dickson. Mr. Flanagan later met Mr. Wilson at a pizza shop, and they retrieved the Impala from the house in White Bluff and took it to Mr. Wilson's house. According to Mr. Flanagan, co-defendant Primm instructed him to sell it. Mr. Flanagan listed the car on Craigslist with Mr. Wilson's help; two days after the shooting, a man from Kentucky bought the car with cash.

Mr. Flanagan testified that he did not realize the extent of the shooting until he returned to Dickson and saw information on social media. He agreed that he knew "something serious" had happened when he drove away from the picnic grounds and acknowledged that he could have been charged as "an accessory after the fact." Mr. Flanagan testified that he was not charged in exchange for his testimony and information he gave the State and the Tennessee Bureau of Investigation (TBI). Mr. Flanagan acknowledged that, at the time of the shooting, he had pending charges for DUI, to which he later pled guilty, and failure to appear, which was dismissed as part of the DUI plea agreement. Mr. Flanagan averred that his trial testimony was truthful.

On cross-examination, Mr. Flanagan acknowledged his preliminary hearing testimony that "someone" mentioned catching a body before the shooting; he explained that, upon further reflection, he recalled that Defendant made that statement. Mr. Flanagan agreed that Defendant's trial was his third time testifying in court and that he gave four interviews to law enforcement or attorneys. He further agreed that, in each interview, he denied that a plan existed to kill anyone. Mr. Flanagan reiterated that what was discussed

among the co-defendants was a one-on-one fight between Defendant and Mr. Tidwell. He explained that the other men were there to protect Defendant if Mr. Tidwell gained an advantage during the fight. Mr. Flanagan stated that he assumed the co-defendants' guns were a precaution; he noted that, when one lived "a nefarious lifestyle," guns were often present, although they were not used on most occasions.

Mr. Flanagan testified that co-defendant Primm was a mentor or "big brother" to Defendant. Relative to the failed drug transaction, Mr. Flanagan stated that Defendant tried to buy drugs from Mr. Tidwell but never received them. Mr. Flanagan did not know whether Defendant's distress immediately after the shooting resulted from a plan going "very wrong" or because "someone just got shot."

Mr. Flanagan testified that he knew Mr. Springer and Mr. Tidwell in passing because they grew up in the same town, although he did not know Mr. Bell. Mr. Flanagan stated that Mr. Tidwell and his brothers, including Mr. Springer, had a reputation for being "capable of extreme violence," that they were not "somebody you [would] want to be on the wrong side of," and that Mr. Tidwell was known to carry a gun. Mr. Flanagan agreed that Mr. Tidwell went to prison for armed robbery and had been released shortly before the shooting. Mr. Flanagan said that the co-defendants anticipated the possibility that Mr. Tidwell's brothers would be present at the picnic grounds; however, he maintained that he only knew Mr. Tidwell would be there. He maintained that he stayed in the car because co-defendant Primm instructed him accordingly.

When asked whether it was foolish to plan a murder with an untrusted driver, Mr. Flanagan testified that he would not be alive if Defendant and co-defendant Primm distrusted him. When shown a photograph of a black handgun found on the ground at the crime scene, which was later identified as a Kel-Tec pistol, Mr. Flanagan stated that it was "along the lines" of Defendant's gun. Mr. Flanagan stated that "if you pull the slide back . . . it has a chrome barrel along with . . . chrome accents on the weapon as well." Mr. Flanagan denied that a pile of clothing inside co-defendant Primm's second bedroom was his or that he lived with co-defendant Primm for months. Mr. Flanagan testified that he stayed with his mother.

Addison Wilson testified that he was currently serving a three-year sentence for selling cocaine. Mr. Wilson said that he grew up with co-defendant Primm, Defendant, Mr. Tidwell, and Mr. Springer. In 2016, co-defendant Primm and he were trying to start a business selling cars. On the morning of April 12, 2016, Mr. Wilson visited co-defendant Primm's apartment because they had an appointment to sell a vehicle to a third party. Mr. Wilson drove to the apartment in a blue Impala, which he and co-defendant Primm jointly purchased to resell. He stated that he also saw Mr. Flanagan and "Little John"[4] there.

[4] It was unclear whether Mr. Wilson referred to co-defendant Hughes here.

Mr. Wilson testified that he overheard Defendant and co-defendant Primm's discussing that Mr. Tidwell owed Defendant money for a "drug debt." Defendant said the debt "made him feel like a punk." Mr. Wilson noted that, if someone failed to repay him a debt, he would feel disrespected and would be upset enough to fight the person. He agreed that Defendant was upset that morning; he denied that he heard Defendant and co-defendant Primm discuss "what they were going to do about that[.]" Mr. Wilson stated, though, that he understood that they were going to fight Mr. Tidwell.

Mr. Wilson denied that co-defendant Primm and Defendant argued at this point, characterizing the tenor of the conversation as "kind of hyper[.]" He stated that Defendant was upset because he believed Mr. Tidwell was going to Defendant's mother's house in Charlotte. Mr. Wilson opined that he would also be upset "if someone c[a]me to [his] mom's house or [was] threatening to come to [his] mom's house[.]" Mr. Wilson testified that he was a little angry and frustrated when he left the apartment because co-defendant Primm was talking to Defendant when they were supposed to be leaving to sell the car. He said that he left in co-defendant Primm's white Chevrolet Tahoe and that, a little before noon, co-defendant Primm's sister flagged him down and told him that he needed to exit the truck because "some stuff happened in Charlotte" and someone was looking for the Tahoe. He tried unsuccessfully to call co-defendant Primm and left the Tahoe in a Walmart parking lot near his home. Mr. Wilson denied having had anything to do with the shooting.

Mr. Wilson testified that, later in the afternoon, he picked up Mr. Flanagan and a woman in Hickman County. In the next day or so, Mr. Wilson went with Mr. Flanagan to a location in White Bluff to pick up the Impala, and they sold it to a man at a Walmart parking lot. Mr. Wilson stated that he saw Defendant later in the day after selling the Impala and gave Defendant a little less than $1,000 for co-defendant Primm.

On cross-examination, Mr. Wilson testified that Mr. Tidwell and Mr. Springer had a reputation for being dangerous and violent. He stated that, when he arrived at co-defendant Primm's apartment on April 12, Defendant, co-defendant Hughes, and co-defendant Primm were standing outside; he noted that Mr. Flanagan was the only one inside. Mr. Wilson denied that the men discussed planning to kill anyone.

Mr. Wilson testified that he and co-defendant Primm were friends as well as business partners and that he visited co-defendant Primm's apartment frequently. He stated that Mr. Flanagan stayed in the spare bedroom "all the time" and was at the apartment more than Defendant. Mr. Wilson stated that, to his knowledge, Mr. Tidwell and Mr. Springer did not visit the picnic grounds regularly.

Paige Worley testified that she and Defendant were friendly and that she used to "talk to" co-defendant Primm. She stated that, on April 12, 2016, she was with co-defendant Primm at his apartment before he left with Defendant. Ms. Worley was

supposed to meet co-defendant Primm at his grandmother's house near the picnic grounds and pick him up after he parked his motorcycle there. Ms. Worley left the apartment around 9:00 a.m. and arrived in Charlotte at about 10:00 a.m. No one was present at the house. After attempting unsuccessfully to contact co-defendant Primm, Ms. Worley went back to Dickson. Later that afternoon, co-defendant Primm called and asked Ms. Worley to meet him at a house in White Bluff. There, co-defendant Primm, Defendant, co-defendant Hughes, and Mr. Flanagan entered her car, and she drove them to Nashville. Ms. Worley dropped off Defendant, co-defendant Hughes, and co-defendant Primm, and she and Mr. Flanagan drove to a pizza restaurant in Hickman County. Ms. Worley did not hear from any of the men again.

Ms. Worley testified that no one mentioned the shooting and that she thought it odd that no one was talking during the drive. She did not see any of the men with weapons, and they did not talk about weapons. Ms. Worley acknowledged that, in her police statement, she initially omitted that she drove the co-defendants to Nashville. She noted that she did not know what was happening, that she was afraid, and that she had no involvement in the shooting. Ms. Worley testified that she signed an immunity agreement with the State in exchange for her testimony but that she had committed no crime.

On cross-examination, Ms. Worley testified that she had spent the night before the shooting at co-defendant Primm's apartment and that she thought Mr. Flanagan had also spent the night there. She stated that, when she left, Defendant and Mr. Flanagan were inside. Ms. Worley denied that Defendant seemed nervous or upset. Ms. Worley did not hear the men make plans to hurt anyone.

Montae Springer testified that he was thirty-one years old and that he was shot nine times at the picnic grounds on April 12, 2016. Mr. Springer stated that he grew up with Defendant and co-defendant Primm and considered them family until the shooting; he noted that co-defendant Hughes was his cousin. Mr. Tidwell was Mr. Springer's brother, and Mr. Bell was their younger cousin. Mr. Springer did not know what caused the shooting. Mr. Springer stated that everyone in the vicinity of the picnic grounds was related to Defendant, co-defendant Primm, and Mr. Springer.

Mr. Springer testified that, on the morning of April 12, 2016, Mr. Tidwell picked him up from their grandmother's house and drove to the picnic grounds. They had planned to meet their father for breakfast after he finished with child support court nearby. Mr. Springer sat on a picnic table and was looking down while whittling with a pocket knife, and Mr. Tidwell stood in the sun in the "field." After five to ten minutes, Mr. Bell drove past. Mr. Bell stopped and greeted Mr. Tidwell and Mr. Springer, and the pair greeted Mr. Bell and hugged him before Mr. Springer returned to sitting at the picnic table. Mr. Springer noted that another man, later identified as Steve Greer, was sitting in a chair

between ten and twenty feet away from him; Mr. Springer did not know Mr. Greer at the time. Mr. Springer stated that Mr. Greer left the area when the shooting started.

Mr. Springer denied that Mr. Tidwell, Mr. Bell, or he had weapons apart from his pocket knife. Mr. Springer noted that Mr. Tidwell did not typically carry a gun.

Mr. Springer testified that he heard someone say, "N---a, do you wanna die?" When he looked up, he saw Defendant standing between ten and twenty feet away and pointing a gun at him. Mr. Springer thought that the gun was "black and chrome"; he identified the Kel-Tec pistol as the one Defendant used. Mr. Springer did not see Defendant approach. Defendant "threw a shot into the air" at an angle, and Mr. Springer opined that he did so "to let us know it was a real gun." Mr. Springer testified that co-defendant Primm, who had walked around the side of the picnic table behind Mr. Springer, told Defendant, "Don't play with him; burn him." Mr. Springer stated that co-defendant Primm and Defendant had approached him from different directions and that they surrounded him. Mr. Springer did not see co-defendant Hughes until after he had been shot; however, Mr. Springer surmised that the three co-defendants had been standing in a semicircle around him.

Mr. Springer testified that, when Defendant pointed his gun at him, Mr. Tidwell hit Defendant, and Defendant stumbled. Mr. Springer saw Mr. Tidwell approach Defendant, and as soon as Mr. Tidwell reached him, the gun "went off." Mr. Tidwell and Defendant began "tussling" and fell to the ground. Mr. Springer jumped off the picnic table, ran toward them, and heard additional gunshots. Mr. Springer stated that he moved around the men, searching for Defendant's gun. He saw co-defendant Primm's feet standing across the fight from him, and when he looked up, co-defendant Primm shot him. Mr. Springer tried to grab co-defendant Primm's gun, and co-defendant Primm shot him in the leg.

Mr. Springer testified that he turned around and ran down the hill toward the wood line with co-defendant Primm in pursuit. Mr. Springer passed co-defendant Hughes, who was standing in the road. Co-defendant Primm continued firing as Mr. Springer jumped over a bench and fell to the ground, and he fired a shot at Mr. Springer's head, which grazed his scalp near his eye. He said that he was shot in both shoulders, the left thigh, the stomach, the rectum and right buttock, the face, and in the back near his spine.

Mr. Springer testified that, when the gunfire started, Mr. Bell got into his car. After Mr. Springer fell behind the bench, he saw Mr. Bell's car roll backward, and co-defendant Primm ran to the car and fired one shot into it. Mr. Springer denied that Defendant mentioned Mr. Bell during the shooting. Mr. Springer said that Mr. Bell was not involved in the fighting and was an "innocent bystander."

Mr. Springer testified that co-defendant Primm walked back toward him, making him believe that co-defendant Primm was going to kill him. He stated that co-defendant

Primm ran past him, and he heard two more gunshots and saw people running in the corner of his eye. Mr. Springer noted that no one else was at the picnic grounds.

Mr. Springer testified that an older woman who lived nearby came out and began to pray over him, as he called 911 on his cell phone. He told the operator that he had been shot six times and was dying and that Mr. Tidwell was with him. Mr. Springer acknowledged that he did not identify the shooter; he explained that he "didn't want to accept that" Mr. Tidwell and Mr. Bell might be dead.

Mr. Springer testified that he was in the hospital for months after the shooting and underwent several surgeries, including a fasciectomy on his left leg and a colostomy. He noted that one of the bullets broke his right shoulder and went through the rotator cuff and that he was scheduled to have a shoulder replacement the following day. Mr. Springer had not had direct interaction with Defendant since the shooting, and he stated that he was afraid for his family's safety due to unspecified "threats."

On cross-examination, Mr. Springer acknowledged that, in his previous testimony, he stated that Defendant shot Mr. Tidwell in the chest. He said, though, that he now knew Defendant did not shoot Mr. Tidwell in the chest. Mr. Springer agreed that he did not see how the co-defendants approached him, although he noted that they would have all been standing in front of him if they had walked up together. Mr. Springer stated that Mr. Tidwell was closer to Defendant than Mr. Springer and that Mr. Tidwell stood "off to the side."

Mr. Springer testified that almost all of Defendant's family lived on a street near the picnic grounds. Mr. Springer stated that he, Mr. Bell, Defendant, and co-defendant Primm were cousins and loved one another. He denied having any problem with Defendant. Mr. Springer denied that Mr. Tidwell was looking for Defendant on the day of the shooting, and he noted that Mr. Tidwell would have gone to Defendant's mother's house if that were the case. Mr. Springer stated that, although Defendant sent Mr. Tidwell unspecified text messages on the day of the shooting, Mr. Tidwell was not concerned about them. Mr. Springer noted that everyone with whom he grew up went to the picnic grounds to relax and see people they knew. Mr. Springer stated that Mr. Tidwell, their two other brothers, co-defendant Primm, Defendant, Mr. Springer's sister, and a person named Makali often spent time together. He added that Mr. Tidwell, Defendant, and co-defendant Primm watched sports together every weekend. Mr. Springer stated that he still loved the three co-defendants because they were family but that he had "no use for them."

Mr. Springer denied that, on the morning of the shooting, he told an acquaintance that he had to go "handle some business." He disagreed that Defendant fired a warning shot to get them to leave, explaining that Defendant "wouldn't have proceeded to carry on

with his actions" if that were the case. Mr. Springer agreed that the scene was chaotic and that it was difficult to notice every detail of what happened.

Mr. Springer acknowledged that, when he initially spoke to the police, he said that he thought the gun was "on the ground going off" and that he did not know he was being shot. Mr. Springer stated that he was unsure whether Defendant's gun on the ground was firing or co-defendant Primm was firing, but he knew more than one gun was firing simultaneously. Mr. Springer acknowledged a rumor in the community that his brother, DeAnthony Vaughn, shot him, but he denied that he told anyone that Mr. Vaughn shot him. Mr. Springer agreed, though, that he told many people that he did not know who shot him, including the EMTs, people on the LifeFlight to the hospital, and staff at the hospital. Mr. Springer did not recall telling a TBI agent that he did not know the shooter's identity; he explained that he had "a lot of cloudy spots" in his memory and that he had been placed in medication-induced comas during his initial hospital stay. He denied telling TBI agent Joey Boyd that unspecified people had told him that a man killed Mr. Tidwell. Mr. Springer denied that his mother or anyone at the hospital told him rumors about the shooting. He stated that his mother only confirmed that Mr. Tidwell was dead.

Mr. Springer testified that Detective Bausell and TBI Agent Shawn Adkins[5] interviewed him after his release from the hospital. He denied that the officers told him how to explain certain things or "to be alert" about what lawyers might ask him. Mr. Springer averred that they told him to tell the truth about what he saw. Mr. Springer agreed that he told Detective Bausell that he was not "looking for [trouble], but if it came to [him], [he] would handle it." Mr. Springer denied that he referred to killing Defendant or co-defendant Primm, and he stated that he was talking about protecting his family.

When asked whether it was fair to say that Defendant came to the picnic grounds because Mr. Tidwell was "calling him out" and threatening Defendant's family, Mr. Springer responded that Mr. Tidwell was a "happy-go-lucky . . . gentle giant" who kept others in a good mood and was always smiling. Mr. Springer reiterated that Mr. Tidwell was not concerned by Defendant's text messages. He stated that Defendant "came for an issue. He came to do what he did." Mr. Springer said that, to his knowledge, Defendant did not know that he or Mr. Bell would be at the picnic grounds; he noted that Defendant had no contact with either of them.

Mr. Springer denied that Mr. Tidwell was "scary" or violent, and he similarly denied that Mr. Tidwell had a "fierce" reputation. He explained that, if someone "jumped on" Mr. Tidwell, he would defend himself and that because he was a big man, he would cause "some damage." Mr. Springer acknowledged Mr. Tidwell's recent release from prison for

[5] The trial transcript refers to Agent Shawn "Atkins." However, the record reflects that the correct surname is Adkins.

aggravated robbery, but he denied that Mr. Tidwell "[b]eat down a pizza man." Mr. Springer stated that Mr. Tidwell did not look for trouble, that Mr. Tidwell had "paid his dues" after making a mistake, and that he came home from prison and was not bothering anyone.

Mr. Springer opined that co-defendant Primm pressured Defendant into shooting in order for Defendant to prove himself. Mr. Springer agreed that, in his subsequent police interviews, he stated that he could not identify the shooter at the crime scene because the majority of the people near the picnic grounds were closer relatives to Defendant, and he did not know who was surrounding him or if Defendant would return. Mr. Springer affirmed, though, that he told Detective Bausell that he called 911 because the co-defendants had left and no one was around.

Mr. Springer testified that Matthew Cathey was one of the first people to reach him after the 911 call and that Mr. Cathey took his phone, called a cousin, and retrieved a sweatshirt from Defendant's mother's house for him to use as a pillow. Mr. Springer did not know if Defendant shot Mr. Bell, and he did not know if Mr. Tidwell ever gained control of Defendant's gun. Mr. Springer stated that, to his knowledge, Defendant did not shoot him. He explained that he was shot in the back as he ran and that he did not know if co-defendant Primm chased him or if Defendant also shot at him.

Mr. Springer agreed that he had pending charges or prior convictions for assault, domestic assault, and aggravated assault causing serious injury; he denied, though, ever having committed assault with a weapon and stated that he only ever used his fists. He opined that Defendant pointed the gun at him because although Mr. Springer fought and got into trouble, he never took a life or used weapons. When asked whether he was "the biggest threat" of the people present, Mr. Springer said that it was impossible to say that "one person [was] worse than another" and that they all grew up "taking up for each other, fight[ing] with each other . . . . [They were] all together[.]" Mr. Springer opined that it made no sense for anyone to have had a gun.

The State then read Steve Greer's October 18, 2018, testimony into the record.[6] Mr. Greer testified that, around 9:00 a.m. on April 12, 2016, he was at the picnic grounds drinking, as was his custom. Mr. Tidwell arrived about ten minutes later and asked Mr. Greer if he had seen Defendant. Mr. Greer stated that Mr. Tidwell was looking for Defendant, that Mr. Tidwell left, and that he returned with Mr. Springer. Mr. Greer noted that a man named Gregory Nelson had been "dropped off to get a ride to work" but had left.

[6] Mr. Greer passed away before Defendant's trial. Although the portion of the transcript entered as an exhibit does not identify the court proceeding, defense counsel indicated at oral argument that Mr. Greer's testimony was from co-defendant Primm's trial.

Mr. Greer testified that he was sitting with his back to Mr. Tidwell and that he heard Mr. Tidwell, Mr. Springer, and Mr. Bell laughing. Mr. Greer said that he felt "something wasn't right" and that he heard a "commotion," turned around, and saw two men walk up, one of whom was Defendant. He stated that the second man, whom he did not know, was holding a gun. Mr. Greer said that he saw the man shoot above Mr. Tidwell's head; however, Mr. Greer later stated that he did not see who fired the shot into the air. Mr. Greer hid behind a tree to avoid being shot.

Mr. Greer testified that, when he peeked out from behind the tree, he saw Mr. Tidwell and Defendant on the ground fighting. He stated that, after hearing "a lot more shooting," he saw Mr. Springer run across the picnic grounds and jump over a bench while the second man "unloaded that gun in" Mr. Springer's rear end. Mr. Greer did not see Mr. Tidwell or Mr. Bell get shot; he noted that, "when it was over," Mr. Bell's car traveled up the road, stopped, backed up, then "took off," went through a yard, and hit some trailers before wrecking. Mr. Greer estimated that the incident lasted fifteen to twenty minutes and that he heard twenty or thirty gunshots. Mr. Greer stated that Defendant and the other man did not run away after the shooting.

On cross-examination, Mr. Greer testified that, at the time of the shooting, he had consumed one beer and was partially through a second. Mr. Greer estimated that the shooting lasted about five minutes, although he later stated that he did not know. When asked at what time he stopped drinking the night before, Mr. Greer responded, "I don't really . . . ever stop." Mr. Greer stated that, before court that morning, he drank one twenty-four-ounce beer "[b]ecause [the State] told [him] not to drink."

Mr. Greer testified that Mr. Vaughn had threatened him regarding his testimony; he denied that Mr. Vaughn told him, "Don't say . . . it was me." Mr. Greer stated that Mr. Vaughn told him, "[Y]ou need to tell everything you know." Mr. Greer commented that he had told "them" everything he knew. On redirect examination, Mr. Greer stated that Mr. Vaughn told him that he "was going to kick [Mr. Greer's] a—[.]" Mr. Greer began to explain under what circumstances the threat would be carried out but then stated that he could not answer the question.

Robert Corlew testified that he owned property beside the picnic grounds and that his sister and brother lived on the property. He stated that, on April 12, 2016, he drove past the picnic grounds and saw Mr. Greer sitting under a gazebo, as well as two men talking to a third man in a grey car. Mr. Corlew stated that, from his property's front yard, he could see part of the picnic grounds but not the gazebo. Mr. Corlew was standing near a barbeque stand close to his property talking to William Gilbert when three young black men walked around the edge of the yard toward some woods and the picnic grounds. Mr. Corlew did not know any of them. Sometime after, Mr. Corlew heard gunshots that continued for three to four minutes. He did not hear anything unusual before or after the

shooting. Mr. Corlew saw the three young men run down the street, and Mr. Corlew and Mr. Gilbert ducked behind a car to hide. Mr. Corlew did not see the men enter a car. Mr. Corlew noted that the man in the grey car tried to drive away toward some trailers, ran over a swimming pool, and hit a tree.

William Gilbert testified that, on the day of the shooting, he was talking to Mr. Corlew in front of a barbeque stand when he saw three men walk from behind Mr. Corlew's brother's house toward the picnic grounds. Mr. Gilbert recognized Defendant and briefly greeted him; he noted that the path the men took was unusual. Mr. Gilbert stated that he had seen a couple people at the picnic grounds that morning but that he did not know them or pay attention to them. Mr. Gilbert heard five or six gunshots, which were not preceded or followed by any yelling. Mr. Gilbert saw a grey car drive up an embankment behind a trailer and heard the car hitting something before colliding with a tree. He did not see the driver.

Mr. Gilbert testified that the three men came back up the street after the shooting and stood at a nearby street corner. Mr. Gilbert did not recall seeing a car's driving past that corner before the men walked past, and he did not see where the men went after standing at the corner. Mr. Gilbert denied that he heard the men say anything, although he noted that two of the men went to the intersection and waited for the third man, who walked past later.

Dickson County Sheriff Jeffrey Bledsoe testified that he arrived at the picnic grounds two minutes after police dispatch communicated the shooting call. Sheriff Bledsoe was first on the scene, and he encountered two men in the road motioning for him to drive forward. Sheriff Bledsoe stated that he saw a vehicle with tinted windows, which had crashed and was blocking the roadway. Upon opening the car's doors, one of the officers with Sheriff Bledsoe saw a man, later identified as Mr. Bell, in the driver's seat "laying across the console" with his head against the front passenger-side door. Sheriff Bledsoe stated that Mr. Bell had multiple gunshot wounds to the head and neck and that he showed no signs of life. The officers removed Mr. Bell from the car and began CPR; Sheriff Bledsoe noted that EMS arrived some time later and was unable to resuscitate Mr. Bell. Later, Sheriff Bledsoe noticed seven bullet holes in the driver's window and door area. He denied that any weapons were found in the car. Sheriff Bledsoe stated that Mr. Tidwell was located one "city block" away from the car crash.

On cross-examination, Sheriff Bledsoe testified that he did not see Mr. Bell's car crash and that he did not see Mr. Tidwell or Mr. Springer when he first arrived at the scene; he explained that he drove past their location because of the men waving him forward. Sheriff Bledsoe did not know if Mr. Tidwell's body was moved before the crime scene technicians photographed him. Sheriff Bledsoe did not interact with or see Mr. Springer before he was taken to the hospital.

Dickson County EMT Steven Wallace testified that, on April 12, 2016, he responded to a shooting call at the picnic grounds and that Mr. Springer was alert, oriented, anxious, and in pain. The only thing Mr. Springer said was that he could not breathe. Mr. Wallace said that Mr. Springer did not identify the shooter, which he opined was "understandable" given his injuries.

Dickson County Sheriff's Chief Deputy Jerone Holt testified that he was riding with Sheriff Bledsoe when he responded to the shooting call. Chief Deputy Holt stated that Mr. Bell's Dodge Charger had crashed into a tree, and he testified consistently with Sheriff Bledsoe about Mr. Bell's condition when they arrived. He stated that an unidentified person told him that two other men had been shot, and he walked to Mr. Springer's location. Chief Deputy Holt saw several gunshot wounds to Mr. Springer's back, and Mr. Springer reported that he had been shot in the groin.

Chief Deputy Holt described the crime scene as consisting of the site of Mr. Bell's wreck, a set of mobile homes, and the open grassy area where Mr. Tidwell and Mr. Springer were found. Chief Deputy Holt recalled that two women who lived nearby, Roxanne Santana and Elaine Haggins,[7] walked up to him; he noted that the scene was not secured when he arrived. Chief Deputy Holt did not see Defendant at the scene.

On cross-examination, Chief Deputy Holt testified that he knew Mr. Springer and that, when he asked Mr. Springer who shot him, Mr. Springer stated that he did not know. He agreed that Mr. Springer was surrounded by "concerned and friendly faces."

TBI Special Agent Shawn Adkins testified that he responded to the crime scene because the Dickson County Sheriff's Office requested assistance with the investigation. The TBI Violent Crime Response Team (VCRT) also arrived and took over for the crime scene technicians. Agent Adkins identified photographs showing the crime scene and surrounding area, and he identified the path Mr. Bell's car traveled before it crashed and Mr. Tidwell's location beside a picnic table.

The photographs also reflected that Mr. Springer's clothing, which was cut off by EMTs, and a closed pocket knife lay behind a bench. The bench contained a bullet hole, which Agent Adkins noted had entered from the direction of the picnic grounds. Agent Adkins identified a photograph of the gazebo where Mr. Greer sat. Additional photographs showed the damage to Mr. Bell's car and the position of his body when officers opened the car door. The car's air bags had deployed, and eight bullet holes were visible in the front driver's side window. Agent Adkins noted that the front passenger-side door contained a bullet hole that came from inside the car. The photographs showed numerous cartridge

[7] Chief Deputy Holt referred to Elaine Higgins; however, the record reflects that her surname is Haggins.

casings, a bullet fragment, bullets, a black shoe on the ground near Mr. Tidwell, and a cell phone on the picnic table. Additional photographs showed the black Kel-Tec pistol on the ground and the wounds to Mr. Tidwell's body.

Agent Adkins testified that the police recovered twenty-two or twenty-three shell casings at the crime scene and that at least six of the corresponding bullets went into Mr. Springer's body. He stated that the Kel-Tec pistol was the only gun found on the scene; he agreed that none of the victims had guns and that no guns were present in Mr. Bell's car. He agreed that the gun and the black shoe were found close to one another. He stated that co-defendant Primm's white Chevrolet Tahoe was later found in a Walmart parking lot and tested for fingerprints and DNA.

Agent Adkins testified that no arrests were made at the crime scene, that co-defendant Primm was arrested on April 13, 2016, that Defendant was arrested the next day, and that co-defendant Hughes was arrested at a later date. Agent Adkins agreed that Mr. Springer would not have known the co-defendants' whereabouts and that it made sense for Mr. Springer to have been afraid at the crime scene.

On cross-examination, Agent Adkins testified that the black shoe was also tested for DNA. He stated that generally, a semi-automatic gun would eject cartridges five to six feet away and that the nearest cartridge casing was found about twenty feet from the gun.

Agent Adkins testified that several members of the Primm family lived on a street bordering the picnic grounds. He stated that, to his knowledge, law enforcement did not interview Cynthia Primm, Defendant's mother, or Vernecia Primm, Defendant's sister, and he denied that one of the women drove up to the crime scene while he was there. Agent Adkins said that it was against TBI policy to swab gunshot victims for gunshot residue; he noted that, if someone had been shot, that person would necessarily have been in contact with gunshot residue.

Agent Adkins testified that he interviewed Mr. Flanagan twice and that Mr. Flanagan "never said [there was] a conspiracy, using that word[.]" Agent Adkins acknowledged his preliminary hearing testimony, which occurred about one and a half months into the investigation, that one of the TBI's "working theories" was that the incident may have been a fight gone wrong. Agent Adkins agreed that he also testified that, to his knowledge, the shooting "did initiate as a fistfight."

Agent Adkins testified that a shell casing could fail to eject for several reasons. Agent Adkins stated that the Kel-Tec could have become jammed if the user engaged in "limp wristing" or the slide was blocked when the gun fired, perhaps from "somebody pushing the gun . . . or the barrel back a little bit[.]"

Agent Adkins testified that, after a bond hearing, he interviewed Mr. Springer and told him that he had been "hammered" on the witness stand regarding Mr. Springer's 911 call and statements that he did not know who shot him. Agent Adkins agreed that, at the hearing, he testified that Mr. Springer was afraid and had just been shot when he called 911. Agent Adkins explained that Agent Boyd had interviewed Mr. Springer and that Agent Boyd had not asked Mr. Springer about his failure to identify the shooter. Agent Adkins tried to interview Mr. Springer after his release from the hospital, but when he arrived, it became apparent that Mr. Springer had an infection and had to be taken to the hospital.

Relative to the interview after the bond hearing, Agent Adkins stated that he was not "putting words in [Mr. Springer's] mouth" or preparing him to testify but rather wanted to know the reason for himself and document it. Agent Adkins agreed that Mr. Springer volunteered that he did not identify the shooter because he was afraid.

Agent Adkins acknowledged that, during a second interview with Mr. Springer, Mr. Springer commented that he "thought somebody was around" during the 911 call, and Detective Bausell responded, "And you know what . . . . That's exactly how you explain it too[.]" Detective Bausell continued, "Ain't no police or anybody out there yet. You're right. You don't know if they're still standing on the other side of the park bench or anything. That's exactly how you explain that." Agent Adkins further acknowledged that Mr. Springer expressed concern for his grandmother's safety and stated that he was not looking for trouble but that if "they c[a]me to [Mr. Springer,] [he was] gonna take care of it[.]" Agent Adkins agreed that he told Mr. Springer, "You gotta do what you gotta do" and that Detective Bausell said, "You gotta defend yourself . . . . You're not going to lay down and let them do something to your family[.]" Agent Adkins noted that they were discussing self-defense "if somebody came at him in retaliation." On redirect examination, Agent Adkins testified that, based on the totality of the investigation, "it look[ed] like [the shooting] was a planned event" rather than a fight gone awry.

Dr. Bradley Dennis, an expert in trauma surgery, testified that he worked at Vanderbilt Medical Center and became an attending physician on Mr. Springer's case the day after he was admitted. Based upon his review of Mr. Springer's medical records, Dr. Dennis stated that Mr. Springer presented with multiple gunshot wounds causing injury to the small and large intestine and superficial injury to the femoral artery; Dr. Dennis noted that injuries to the femoral artery were commonly fatal.

Dr. Dennis testified that he performed exploratory surgery on Mr. Springer's abdomen and leg, that he removed a portion of the small intestine and colon, and that he performed a colostomy because the rectum was also injured. Mr. Springer stayed in the hospital for two weeks and later returned to reverse the colostomy. His leg later became infected, which was common, and he was treated in the emergency department. Dr. Dennis

stated that Mr. Springer would possibly require future treatment, that he was fortunate to have survived because he was in shock when he arrived at the hospital, and that he might have died without immediate medical treatment.

On cross-examination, Dr. Dennis testified that he had no independent recollection of Mr. Springer and had based his testimony on Mr. Springer's medical records. He agreed that, in previous testimony, he stated that Mr. Springer reported no memory of being shot or who shot him. Mr. Springer had also reported that it was a drive-by shooting. Dr. Dennis stated that it was unusual to have memories "implanted," but he acknowledged the possibility. He agreed that Mr. Springer received propofol and fentanyl in the hospital. Dr. Dennis noted that Mr. Springer would not have received propofol in the emergency room but rather as part of his subsequent treatment.

On redirect examination, Dr. Dennis testified that Mr. Springer's treatment required pain management using narcotics, pain medications, and sedation, which would have affected his lucidity. Dr. Dennis stated that he treated fifteen to twenty gunshot wounds per week and that the victims of violent crime were often untruthful about who shot them.

Nashville Assistant Medical Examiner Dr. Emily Dennison, an expert in forensic medicine, testified that she performed Mr. Tidwell's and Mr. Bell's autopsies. She stated that Mr. Tidwell suffered four perforating gunshot wounds. The first bullet entered the left upper flank near the armpit and exited on the front of the left shoulder. The second bullet entered the left upper side near the first entry wound, fractured an unspecified number of ribs, traveled through the left pleural cavity and lung, the pericardial sac, the heart, the aorta, the right pleural cavity and lung, and exited on the right side. Dr. Dennison noted that both bullets' trajectories were "left to right, back to front and upwards[.]" The third bullet entered the right upper back near the shoulder blade, traveled through the right pleural cavity and lung, the diaphragm, the liver, and the left pleural cavity, and exited the front right abdomen. Dr. Dennison stated that the bullet's trajectory was left to right, back to front, and downward. The fourth bullet entered at the top of the penis and exited the bottom of the scrotum. Dr. Dennison stated that only the second and third gunshot wounds were fatal, although the first and fourth gunshot wounds contributed to blood loss. She noted that because she did not retrieve any projectiles from Mr. Tidwell, she could not determine what caliber of bullet was used.

Dr. Dennison testified that soot or stippling was not present near any of the entrance wounds. Dr. Dennison examined Mr. Tidwell's outer shirt, which was entered as an exhibit, and stated that she could not see any soot or stippling around the holes corresponding to the entrance wounds; she noted that some of the holes were difficult to find "just because it's dried blood." The autopsy report reflected that Mr. Tidwell was six feet tall and weighed 229 pounds. Dr. Dennison's report reflected that the cause of death was multiple gunshot wounds and that the manner of death was homicide.

Relative to Mr. Bell, Dr. Dennison testified that he suffered two perforating gunshot wounds, as well as four gunshot wounds in which the bullet remained lodged in the body. The first bullet entered the left side of the neck behind the ear, traveled through the soft tissues of the face and back of the mouth, and exited at the right side of the jaw. The second bullet entered at the upper left back, exited near the base of the neck, and reentered at the center left of the back, where it was later recovered. The third bullet entered the left side of the chest, traveled through the left pleural cavity and lung, the pericardial sac and heart, and stopped in the right pleural cavity, where the bullet was recovered. The fourth bullet entered the left side of the back, fractured a rib and unspecified vertebrae, and stopped in the left pleural cavity, where the bullet was recovered. The fifth bullet entered at the back of the left forearm and exited the front of the left forearm. The sixth bullet entered the back of the left wrist, fracturing the hand and wrist, and was recovered there. The autopsy report reflected that Mr. Bell was five feet, nine inches tall and weighed 212 pounds. The cause of death was multiple gunshot wounds, and the manner of death was homicide.

Dr. Dennison testified that no soot or stippling was present around the wounds, and no foreign debris was found in or around the wounds. She stated that, for both Mr. Bell and Mr. Tidwell, the absence of stippling or soot meant that she could not determine the distance from which the shots were fired.

TBI Special Agent Laura Hodge, an expert in firearms analysis, testified that she responded to the crime scene and collected evidence. She stated that the following items were collected at the crime scene: an iced tea bottle, a bag of peanuts, Mr. Tidwell's undershirt and shirt, glass from Mr. Bell's Dodge Charger, a white piece of paper, a Swisher sweets wrapper, a bag of pills found in a sunglasses holder in the Charger, a DNA swab from a picnic bench, the cell phone on the picnic table, cartridge casings, a cartridge casing found in the chamber of the Kel-Tec, bullet fragments, and a pocket knife. Agent Hodge stated that the following items were collected at a later time: four bullets from Mr. Bell's autopsy, Mr. Tidwell's pants and belt, "blood spot" samples from Mr. Tidwell and Mr. Bell, buccal swabs from Mr. Springer, co-defendant Primm, co-defendant Hughes, and Defendant.

The firearms examination report reflected that the following items were submitted for testing: fourteen Winchester 9mm Luger shell casings, one bullet fragment, two bullets, a Kel-Tec 9mm Luger pistol and magazine, five unfired 9mm bullets from the Kel-Tec magazine, eight Perfecta 9mm Luger shell casings, and four bullets collected from Mr. Bell at autopsy. The report concluded that two of the shell casings were fired by the Kel-Tec pistol, including the shell casing found inside the pistol's chamber; the other casings at the scene did not match the Kel-Tec. Five rounds remained inside the Kel-Tec's magazine. Twelve of the Winchester 9mm shell casings were fired by the same unknown 9mm pistol, and some of the markings were common to Smith & Wesson firearms. Eight of the shell casings were fired by a second unknown 9mm pistol, and six of the shell casings had

markings common to an SCCY brand firearm. Agent Hodge noted that the bullets from the crime scene and Mr. Bell's autopsy were of the "same type and design that are loaded in Perfecta ammunition."

Agent Hodge testified that, as a result of her testing, she believed that at least three weapons were at the crime scene—the Kel-Tec, a Smith & Wesson, and an SCCY. The Kel-Tec was fired twice, the Smith & Wesson was fired twelve times, and the SCCY was fired eight times.

On cross-examination, Agent Hodge testified that her team used a metal detector to search the crime scene and that, although she could not discount the possibility that they missed evidence, she believed they did "a very good job." She stated that few people "top off" a gun by loading the gun, chambering a round, then reloading an extra bullet into the magazine. Agent Hodge said that none of the bullets or bullet fragments at the scene were matched to the Kel-Tec.

Agent Hodge testified that the Kel-Tec was dirty on both sides when it was recovered. Agent Hodge said that the cartridge casing in the Kel-Tec's chamber was not partially ejected. She explained that, when she found the Kel-Tec, its slide was in the forward position; when she moved the slide back to check if it was loaded, the casing ejected. Agent Hodge acknowledged the possibility that a defective bullet could have caused the situation, but she noted that a "very low" percentage of ammunition was defective. She affirmed that the Kel-Tec had no mechanical issues. Agent Hodge agreed that "limp wristing," something's obstructing the slide, or an "accidental discharge" could also have caused the failure to eject the cartridge casing. She stated that guns did not jam every time limp wristing occurred and that she could not determine what caused the Kel-Tec to jam. She similarly could not determine whether the Kel-Tec's condition was consistent with its having discharged during a struggle, although she could not rule out the possibility.

Agent Hodge testified that she did not test the Kel-Tec for the distance at which stippling/soot was deposited on a target. She noted that a 9mm gun typically left stippling and soot up to twenty-four inches away and gunpowder particles between three and five feet away. Agent Hodge stated that she did not conduct a muzzle to garment test on the Kel-Tec and Mr. Tidwell's clothing because one was not requested. She added that she did not conduct a muzzle to garment test on Mr. Bell's clothing because the pistol that fired the bullets taken from his body, which was required for the test, was never submitted to her. She stated that a gunshot residue test would have been conducted by the TBI Microanalysis Unit.

Agent Hodge testified that the bullets recovered at the crime scene were "full metal jacket," as opposed to hollow-point bullets, and that full metal jacket bullets were the most

common type of ammunition sold at retail establishments. When asked whether someone who "really intended to kill someone" would be "smarter" to use a hollow-point bullet, Agent Hodge responded, "I believe a bullet from a firearm, no matter if it's a hollow-point or full metal jacket, can kill someone."

TBI Special Agent Lisa Burgee, an expert in forensic biology, testified that she collected DNA swabs at the crime scene and compared them to DNA samples from the co-defendants, Mr. Springer, Mr. Bell, and Mr. Tidwell. The DNA testing reflected that the mouth of the iced tea bottle on the picnic table contained Mr. Tidwell's DNA. Testing of the cell phone from the picnic table reflected a mixture of two DNA profiles, one of which was male, and the testing was inconclusive due to a limited profile. The Kel-Tec pistol and its magazine contained a mixture of three peoples' DNA, one of which was male, and the testing was also inconclusive. Stains on the blade and handle of the pocket knife found near Mr. Springer tested positive for Mr. Springer's DNA. An additional swab from the handle contained a mixture of two peoples' DNA; comparison to Mr. Springer's DNA was inconclusive, and Mr. Tidwell, Mr. Bell, co-defendant Primm, Defendant, and co-defendant Hughes were excluded as contributors. A blood stain on the park bench near Mr. Springer matched his DNA. A swab taken from a black tennis shoe tested negative for blood and contained a mixture of four peoples' DNA, one of which was male, and was inconclusive. Agent Burgee stated that no other items contained a DNA match or identification. She noted that it was not necessarily unusual to have few DNA matches in a large crime scene.

Agent Burgee testified that two cell phones taken from co-defendant Primm's Tahoe contained three peoples' DNA, one of which was male, and were inconclusive. A swab collected from a cola bottle in the car contained two peoples' DNA, and the major contributor was co-defendant Primm. She noted that many unknown DNA profiles were present and that she did not have standard samples with which to compare them. On cross-examination, Agent Burgee stated that she never received a standard for Mr. Flanagan and that, accordingly, she was unsure if he was a contributor on the items in the Tahoe.

TBI Special Agent David Hoover, an expert in latent fingerprints, testified that he also responded to the crime scene. He collected fingerprints from the iced tea bottle, which matched Mr. Tidwell. He found no latent fingerprints on a swisher sweets wrapper, the cell phone on the picnic table, the peanut bag, a piece of white paper, or the pocket knife. He stated that he also found no fingerprints on the Kel-Tec pistol or magazine. Special Agent Hoover noted that many pistol grips were textured and that it was uncommon to find a usable fingerprint on a gun. In co-defendant Primm's Tahoe, a fingerprint on the inside of the rear passenger-side interior door handle matched Defendant. No fingerprints were recovered on the cartridge casings.

On cross-examination, Agent Hoover acknowledged that the American Association for Advancement of Sciences had questioned the scientific validity of fingerprint testing. He stated that several fingerprints inside the Tahoe matched Mr. Flanagan and Mr. Wilson.

TBI Special Agent Kyle Osborne, an expert in microanalysis, testified that the eight "penetrating impacts" on the driver's-side window on Mr. Bell's Charger came from outside the car.

During a recess, Defendant requested a jury-out hearing regarding Dickson Police Lieutenant Jimmy Mann's anticipated testimony about a search of co-defendant Primm's apartment. Defendant argued that items discovered at co-defendant Primm's apartment were not related to Defendant and did not belong to him. The State responded that Lieutenant Mann was expected to testify that 9mm ammunition and drugs were found in the spare bedroom, where Mr. Flanagan had testified that Defendant lived. The State also asserted that Mr. Flanagan's and Ms. Worley's testimony established that Defendant was at co-defendant Primm's apartment before the shooting, which was the location of the conspiracy and preparation for the murders. Defendant responded that the search warrant was obtained "on an independent basis," that Mr. Flanagan had described the apartment as a "flop house" where different individuals slept, that the only relevant item was the ammunition, and that because all gun owners kept ammunition in their houses, the evidence was duplicative and a waste of time.

The State described the items found in the apartment as unidentified pills and pill fragments, cocaine, ammunition, and a paycheck made out to a third party. Defendant argued that the State could not tie the prejudicial evidence to him, making the probative value very low.

The trial court applied Tennessee Rule of Evidence 404(b) and found that the evidence could possibly reflect on Defendant's character. The court noted that Defendant was at the apartment "on and off" and was present on the morning of the shooting. The court found that the evidence was relevant to Defendant's intent, motive, or plan, stating that the drugs were related to the drug debt underlying the shooting. The court also found that the ammunition related to completion of the story, opportunity, and preparation. The court concluded that the probative value of the evidence was very high and outweighed the risk of unfair prejudice. The court further concluded that the State had presented clear and convincing evidence that the items were found during the execution of a search warrant at the residence where Defendant stayed.

When the jury returned, Dickson Police Lieutenant Jimmy Mann testified that, on April 12, 2016, he was the assistant director of the drug task force and that he executed an unrelated search warrant at co-defendant Primm's apartment. He stated that the apartment had two bedrooms and that the master bedroom contained a set of furniture, including

storage under the bed and in the headboard. In that bedroom, officers found a set of digital scales, three loose 9mm bullets on the master headboard, a plastic bag containing twenty-four 9mm Winchester bullets, a ".32 revolver Airweight H&R . . . Magnum Smith and Wesson," a plastic bag containing a "small amount" of cocaine, and a paycheck made out to a third party. The second bedroom contained a bed, a dresser, and some clothing, and officers found a box of "assorted" 9mm ammunition and a marijuana pipe in the closet, as well as four grams of cocaine on the windowsill. In the kitchen, the officers found a 9mm bullet, a tin containing a marijuana "roach," a set of digital scales, a plastic bag containing a dollar bill and marijuana, a plastic bag containing 9.4 grams of cocaine, a plastic bag containing pills, a dish with two straws, and a loose pill. The officers also found a jar of marijuana roaches and a plastic bag missing a corner in the living room and "a Marlboro pack with [a] plastic baggie missing the corner" in the dining room. When discussing the baggie, Lieutenant Mann noted, "That's one of the clear baggies probably that . . . they package the dope in."

Lieutenant Mann testified that no one was home during the search, which occurred in the evening. He stated that it appeared both bedrooms were being used, that items of interest were found in both bedrooms and the kitchen, and that he could not tell to whom the items belonged.

On cross-examination, Lieutenant Mann testified that the search warrant was based upon information from the property owner; Lieutenant Mann noted that he was also friendly with the property manager. Lieutenant Mann stated that the property manager sent him photographs of an "eight ball" of cocaine on a bedroom windowsill. He asserted that the particular date of the search was coincidence. Lieutenant Mann agreed that the apartment lease was in co-defendant Primm's name only and that he filed charges against co-defendant Primm related to the drugs and ammunition. He did not recall finding anything linking Defendant to the items recovered in the search.

TBI Special Agent Cassandra Franklin-Beavers, an expert in forensic chemistry, testified that she tested the substances seized from co-defendant Primm's apartment. Three samples tested as an unidentified controlled substance; two tablets tested as hydrocodone and methamphetamine, respectively; an additional tablet was a medication for bipolar disorder; and white powder in a baggie tested positive for "heavily cut" cocaine.

Defendant's proof

Elaine Haggins testified that she lived across the street from the picnic grounds and that she was related to Defendant and co-defendant Primm. Ms. Haggins noted that she would share "the truth as to what [she saw]" notwithstanding her relationship to the Primms. She stated that, although she was not related to Mr. Springer and Mr. Tidwell, she knew their parents.

Ms. Haggins testified that, on the morning of April 12, 2016, she was sitting on her porch drinking coffee and saw two young men she did not know at the picnic grounds laughing, "cutting up," and not bothering anyone. She stated that the men went to a store and sat in the "field" upon returning. Ms. Haggins said that she went inside to get more coffee and that she heard three gunshots. Ms. Haggins ran to the door and saw a tall, thin man with a gun who was dressed in black and wearing a black baseball cap with "a white ball right in the center of it[.]" She did not know the man's race. Ms. Haggins denied that the man was co-defendant Primm or Defendant. Ms. Haggins did not know co-defendant Hughes, but she noted that, based upon a photograph she saw of him on television, he was "big" and not thin. Ms. Haggins maintained that she only saw one person shooting.

Ms. Haggins testified that she saw Mr. Springer, who had been shot in the leg, run across the road, try to jump over a bench, and fall. She stated that the shooter ran after Mr. Springer and shot him repeatedly. Ms. Haggins said that Mr. Springer could not get up, that she ran to Mr. Springer to try to help him, and that she calmed Mr. Springer and called 911. Ms. Haggins noted that, although she did not know Mr. Springer before this incident, she generally did not know who young people were unless they told her their mother's name.

Ms. Haggins testified that she was generally unfamiliar with firearms. She stated that, due to the way the shooter held the gun, she could not see whether the magazine protruded below the body of the gun. Ms. Haggins agreed that Mr. Greer had a better view of the gun than she did.

Ms. Haggins testified that she and Deputy Holt asked Mr. Springer who shot him and that he said he did not know. Ms. Haggins stated that she visited Mr. Springer when he was released from the hospital. Ms. Haggins asked Mr. Springer if he remembered the shooting, and he responded that "DeAnthony" shot him. Mr. Springer also recounted to Ms. Haggins that Defendant and Mr. Tidwell were fighting, that Mr. Tidwell was "beating [Defendant] up" on the ground, and that co-defendant Primm said, "[O]h, no, it ain't going down like this," and began shooting. Ms. Haggins testified that she knew who Mr. Vaughn was, and she described him as "tall, dark, and skinny." She acknowledged that he fit the description of the shooter, but she cautioned that she "couldn't swear" it was him.

On cross-examination, Ms. Haggins testified that co-defendant Primm and Mr. Springer were both shorter than six feet tall and that the shooter was taller than them. She did not know that co-defendant Hughes was six feet, four inches tall. She stated that the shooter wore gloves.

Ms. Haggins explained that she did not see Defendant or co-defendant Primm because the shooting began while she was in her kitchen, and by the time she reached the door, only one person was shooting. Before she reached her porch, she did not know how

many people were shooting. Ms. Haggins testified that she reached her porch after hearing two gunshots. She opined that, if other shooters were "over there and they got away, they got away mighty fast." She disagreed with the possibility that she had not seen everything, and she noted that she could see the entire picnic grounds from her house.

Ms. Haggins testified that she did not see Mr. Bell get shot, although she "heard the shot." She stated that, before the shooting began, she saw Mr. Bell sitting in his car "on the right-hand side of the picnic grounds by the street light" without anyone around him. After the shooting began, Ms. Haggins saw Mr. Bell drive "backwards down off into the picnic ground[.]" Ms. Haggins stated that Mr. Bell subsequently "took off" and "instead of going straight up the hill, [his car] went behind the trailer." Ms. Haggins testified that the tall, thin shooter ran away when she ran toward Mr. Springer; she did not see which direction he ran. She acknowledged that the shooter could have been hiding in the woods; however, she stated that she was more concerned about Mr. Springer than the shooter's location.

Ms. Haggins identified a photograph of the picnic grounds taken from her front porch; she could not tell how many people were in the photograph. She noted that, although she had difficulty seeing up close without glasses, she could see clearly at a distance. Ms. Haggins estimated that the bench over which Mr. Springer jumped was less than fifty feet from her porch.

Ms. Haggins acknowledged that, in her previous testimony, she was asked whether the gun was an Uzi and responded that it could have been. She explained that the gun fired more quickly than a pistol and that its barrel was longer than a pistol but shorter than a rifle. Ms. Haggins stated that the gun "was a repeated action" and that the shooter shot Mr. Springer nine times. When asked whether, before the shooting, Mr. Tidwell and Mr. Springer looked as though they were getting ready to fight, Ms. Haggins responded negatively. She added that they were on the telephone "quite a bit."

Circuit Court Clerk Pamela Lewis testified that Mr. Tidwell had previous convictions for simple assault, robbery, attempted aggravated burglary, two counts of aggravated assault causing fear and using a weapon, and aggravated assault involving "injury with hands." The judgment forms reflected that Mr. Tidwell entered guilty pleas in each of the cases. Ms. Lewis added that a March 29, 2010 plea agreement involved dismissal of three additional counts of assault with injury. She stated that she also found a judgment form for a violation of probation, in which the court reinstated Mr. Tidwell's sentence.[8]

[8] No violation of probation order is present in the record, but the judgment in Count 1 in case number 2009-CR-472 reflects that the sentence was ordered to be served concurrently with a "Dickson County Violation of Probation he is currently serving."

Robert Estes, a corrections officer, testified that he had a July 15, 2009 "altercation" with Mr. Tidwell during Mr. Tidwell's incarceration. Mr. Estes stated that he and another officer went to bring Mr. Tidwell back to his cell after his allotted telephone time. Mr. Estes said that Mr. Tidwell "was very adamant" about staying on the phone to talk to his mother. Mr. Estes hung up the telephone, and Mr. Tidwell "squared up ready to fight." Mr. Estes said that he sprayed mace on Mr. Tidwell's face and that Mr. Tidwell "started just swinging blindly and he caught [Mr. Estes] in the right eye." Mr. Estes acknowledged that being sprayed with mace was painful and would anger a person.

Mr. Estes testified that he had a black eye and partially lost his vision for several weeks due to the retina's separating from the back of the eye, although he eventually fully recovered. Mr. Estes said that, after Mr. Tidwell struck him, it took three officers to get Mr. Tidwell "under control." He stated that a female officer received several scratches and bruised ribs, a second officer was scraped and scratched, and Mr. Tidwell bit their captain, although he did not break the skin. Mr. Estes described the injuries as relatively minor.

Matthew Cathey testified that he and Vernecia Primm were in a romantic relationship and had a child together, that the Primms were like family to him, that he was close to Mr. Springer, and that he knew co-defendant Hughes and Mr. Tidwell. Mr. Cathey stated that Mr. Tidwell's reputation was "a little violent." He said that Mr. Tidwell was about six feet, three inches tall and that he weighed between 230 and 250 pounds.

Mr. Cathey testified that, on April 12, 2016, he, Vernecia,[9] and Defendant's two daughters, who were an infant and two years old at the time, drove to Cynthia's home near the picnic grounds. Mr. Cathey stated that, as he removed the baby's car seat to go inside, he heard "a little argument going on" and saw Mr. Tidwell and Defendant standing close to one another. Mr. Cathey stated that Mr. Tidwell "rush[ed]" Defendant, that Defendant and Mr. Tidwell fell to the ground fighting, and that he heard a gunshot followed by several more gunshots. Mr. Cathey estimated that he was 150 feet away from Defendant at the time. Mr. Cathey testified that he saw Mr. Springer run across the street followed by a tall, thin, dark-skinned man. Although Mr. Cathey was uncertain whether the man was co-defendant Hughes, he noted that co-defendant Hughes was not thin. As Mr. Cathey took the baby inside, he heard Vernecia say, "[N]o, Isiah[.]" Mr. Cathey returned outside about one minute later.

Mr. Cathey stated that Cynthia exited the house at about the same time as he did, and he ran alongside her car as she drove up the road toward Mr. Bell's car. Vernecia remained in the front yard. The police directed Cynthia to drive back toward "the picnic street," and Mr. Cathey saw Mr. Springer on the ground and went to aid him. Mr. Cathey

[9] Because Cynthia, Vernecia, and Malik Primm share a surname, we will refer to them by their first names for clarity. We intend no disrespect.

asked Mr. Springer what happened, and Mr. Springer asked him to call paramedics. Mr. Cathey stated that he and Mr. Springer were alone; he did not recall Ms. Haggins or Ms. Santana's being in the area until later. He said that, while he helped Mr. Springer, Mr. Wilson also came to the scene. Mr. Cathey stated that the police arrived, drew their guns, and told him to leave the crime scene. Mr. Cathey said that, after leaving Mr. Springer, he returned to Cynthia's front yard, where Vernecia was still standing. Mr. Cathey testified that, to his knowledge, Defendant never possessed or owned a gun. He denied that he saw Defendant shoot during the incident.

Mr. Cathey testified that, in his police interview the next day, he told them that he saw between four and six people run away from the shooting. He acknowledged that he was upset at the officers during the interview because they accused him of "being there at the scene." Mr. Cathey affirmed that he signed a statement composed by the police thirty to forty-five minutes after he spoke to them; he noted that he did not read it carefully.

Mr. Cathey testified that, sometime after the shooting, he was visiting his mother's house and encountered Mr. Springer, who was visiting with a neighbor. Mr. Springer told him that Mr. Vaughn shot him; Mr. Cathey described Mr. Springer's demeanor as "kind of hurt, need[ing] to get something out."

On cross-examination, Mr. Cathey testified that he frequented the picnic grounds because Vernecia and Cynthia lived there. He acknowledged that his police statement made no mention of seeing Defendant and Mr. Tidwell when he exited the car. He maintained that he did see them. Mr. Cathey denied seeing anyone shoot anyone else. Mr. Cathey agreed that he heard someone say, "[Y]ou want it?" He stated, though, that the voice was unfamiliar to him. He acknowledged telling the police that he saw Malik Primm, who was Cynthia's son, run behind a neighbor's house during the shooting. Mr. Cathey described Malik as short and dark-skinned.

Mr. Cathey denied that he turned to look in the direction of the gunshots; he maintained that he was focused on getting the baby inside. He stated that, by the time he came back outside, the shooting was over. Mr. Cathey agreed that he did not describe for the police any of the three to five people he saw fleeing the scene. He acknowledged that, after his initial statement, a detective returned to ask detailed questions about the people Mr. Cathey saw, and that he never mentioned seeing Defendant. Mr. Cathey affirmed that Defendant was present, although he did not see him leave the scene.

Mr. Cathey estimated that, about three or four months before the "last trial," Mr. Springer told him Mr. Vaughn shot him. Mr. Cathey acknowledged that he did not mention the disclosure to the prosecutor's office. He also acknowledged that the "first time [he] testified," he did not mention the disclosure. Mr. Cathey agreed that this information would have been important to know before co-defendant Primm's trial.

Malik Primm testified that he was Defendant's younger brother and that he was nineteen years old in April 2016. He stated that, on April 12, he was at Cynthia's house in the driveway using his cell phone. Malik noticed Mr. Tidwell and Mr. Springer at the picnic grounds, which he thought was strange. He stated that, about forty-five minutes later, Mr. Cathey and Vernecia pulled up in the driveway. Malik noted that he did not approach Mr. Tidwell and Mr. Springer because he had always "known and heard about them," that they were "real tough guys," and that he was "really terrified of them" and tried to stay out of their way. Malik agreed, though, that he had not had personal dealings with either man.

Malik testified that Vernecia and Mr. Cathey were taking Defendant's children out of the car when Vernecia yelled at Defendant. Malik noted that he did not know Defendant was at the picnic grounds. Malik began running toward the picnic grounds and saw Mr. Tidwell "getting the best of" Defendant. Malik stated that he "got to hearing gunshots" and ran behind Ms. Haggins' house because he did not want to be hit by a stray bullet. Malik saw Cynthia and Mr. Cathey drive past, and he went home.

On cross-examination, Malik testified that on April 12, 2016, he lived with Cynthia and his brothers, including Defendant. He affirmed that Defendant did not live anywhere else.

Vernecia testified that Defendant was her younger brother and that, on April 12, 2016, she was babysitting Defendant's daughters with Mr. Cathey. She stated that she drove past the picnic grounds on her way to Cynthia's house and noticed Mr. Tidwell and Mr. Springer standing alone; she noted that, usually, more people would have been at the picnic grounds because the weather was nice. Vernecia said that Mr. Tidwell had never been at the picnic grounds and that Mr. Springer was seldom there. Vernecia stated that the police never interviewed her about the shooting.

Vernecia testified that she frequently babysat for Defendant and visited Cynthia. She was aware that Mr. Tidwell and Defendant had a conflict because she heard someone discussing it with Cynthia. Vernecia stated that Mr. Tidwell's being at the picnic grounds made her "figure[] something was going on" because he had never been there before. She said that Mr. Springer had been to Cynthia's home once or twice but that Mr. Tidwell had not.

Vernecia testified that, as she and Mr. Cathey were getting the children out of the car, she saw Malik, who told her, "I think something is about to go on" because Mr. Tidwell and Mr. Springer were at the picnic grounds. Vernecia stated that, as she was unbuckling the two-year-old's seatbelt, she heard Defendant yell, "[W]hat do you want? What do you want?" Vernecia said that Defendant fired a shot into the air and that she yelled, "Isiah, no." She stated that Defendant looked at her, that Mr. Tidwell "rushed" him, and that they

fell to the ground fighting. Vernecia said that Mr. Tidwell got up and ran "with a gun in his hand . . . toward the benches of the picnic grounds, and he disappeared out of [her] eyesight[.]" She estimated that Defendant was 150 feet away from her.

Vernecia did not recall any gunshots occurring between the first gunshot in the air and when Mr. Tidwell got up off the ground. Vernecia stated that, when Defendant and Mr. Tidwell were fighting, she put Defendant's daughter on the porch, turned around, and continued watching the fight. Vernecia stated that, after Mr. Tidwell left her eyesight, she heard additional gunshots and that she went inside and asked Cynthia if she heard them. Cynthia asked Vernecia who it was, and she replied that she did not know, after which Cynthia rushed outside. Vernecia noted that she "came out way before [Cynthia] did and . . . could still see what was going on." Vernecia said that Defendant was still on the ground and that she thought he was unconscious or dead. Vernecia heard two or three more gunshots, after which Defendant got up, looked around, and "took off running."

Vernecia testified that, after Defendant ran away, Cynthia drove to the picnic grounds with Mr. Cathey walking alongside her. Vernecia put the children inside the house and waited for people to tell her what was going on. She noted that she was five months pregnant at that time and that she began vomiting due to stress.

On cross-examination, Vernecia testified that, in April 2016, she did not live with her mother. She said that, when she initially saw Mr. Tidwell and Mr. Springer, Mr. Springer was sitting down in the gazebo and Mr. Tidwell was standing. Vernecia averred that they were the only people she saw at the picnic grounds.

Vernecia testified that Defendant did not shoot Mr. Tidwell. She reiterated that Mr. Tidwell got up from fighting Defendant with a gun in his hand and ran toward the benches. She clarified that she could not tell if he was running after someone or just running in that direction. Vernecia thought that Mr. Tidwell ran as far as "across the street from the benches" by a tree, where his body was recovered. Vernecia did not see Mr. Tidwell fall down because it occurred out of her eyesight. Vernecia testified that she saw Mr. Bell's Charger pull away, although she did not see who was shooting at him. She noted that "his car did some kind of back thing and then went really fast." Vernecia stated that she never saw co-defendant Hughes.

Dustin Amos testified that he was friendly with Mr. Springer and Defendant and that Mr. Springer called him upset one night and told him that Mr. Vaughn shot him. Mr. Amos acknowledged that he was not present at the shooting. Mr. Amos agreed that he had previous criminal charges in 2007 and 2008 for drug-related offenses, aggravated burglaries, and assault, as well as legal trouble related to child support payments six months prior to his testimony. He stated that he had moved on from that period of his life. He averred that he had no reason to lie to the jury.

On cross-examination, Mr. Amos testified that the conversation occurred a few months after the shooting. He denied that Mr. Springer expressed fear of retaliation. Mr. Amos stated that he had heard rumors in the community related to the shooting and that he testified "in the last trial" but did not stay until its conclusion.

Rebuttal proof

Michelle Hooper, Defendant's girlfriend, testified that she and Defendant had been in a relationship for five years and shared two children. Ms. Hooper stated that, on April 12, 2016, she lived with her parents in Charlotte, and Defendant lived with his mother. She said that Defendant briefly lived with co-defendant Primm from December 2015 until early March 2016, when he moved back in with his mother for job-related reasons. Ms. Hooper clarified that Defendant was "in and out of [co-defendant Primm's] house" and that he lived "between there and his mother" for that period of time.

Ms. Hooper did not recall any specific text messages she sent to Defendant in late March 2016. She acknowledged that her cell phone was "downloaded" by the Dickson County Sheriff's Office. After reviewing a copy of a March 23, 2016 text message she sent Defendant, Ms. Hooper acknowledged that her message referred to Defendant's still living with co-defendant Primm. She noted that Defendant moved back to his mother's house after he started a new job and that she was uncertain of his start date. Ms. Hooper added, however, that at the time of the shooting, Defendant had been living with his mother for at least two weeks. When pressed, Ms. Hooper admitted that Defendant may have been living with co-defendant Primm "part of that time and part [time with] his mother."

Agent Adkins was recalled as a rebuttal witness and testified that he took the crime scene photograph showing the view from Ms. Haggins' porch. The photograph showed a chain-link fence facing a dirt road; to the right of the road was the picnic grounds, and to the left were the benches over which Mr. Springer jumped. Agent Adkins acknowledged Ms. Haggins' testimony that the distance between her porch and the benches was fifty feet or less; however, he stated that he and Agent Boyd separately "paced" the same distance and that both estimated it to be 100 yards. Agent Adkins identified Agent Boyd's location in the photograph, which was on the left side behind a yellow support wire for a light pole. Agent Adkins agreed that he had a hard time seeing Agent Boyd from that distance, and he noted that it was especially difficult to see "over there in the trees and the shade." He further agreed that Agent Boyd's location was in the same area where Mr. Springer was lying.

Agent Adkins testified that, contrary to Ms. Haggins' assertion that law enforcement took fifteen minutes to respond, a "CAD report" from 911 indicated that Sheriff Bledsoe arrived within two minutes and that EMS arrived within five minutes.

On cross-examination, Agent Adkins testified that the "closest corner" of the picnic grounds, which was across the street from Ms. Haggins' porch, was not where the shooting occurred. Agent Adkins stated that the photograph was meant to capture "exactly what [his] eyeball was seeing" when he stood on the porch. When asked whether the human eye captured surroundings better than a camera, Agent Adkins said that the photographs he took usually provided an accurate representation of what he saw.

DeAnthony Vaughn testified that he was Mr. Tidwell and Mr. Springer's brother. He denied shooting Mr. Springer. Mr. Vaughn agreed that he had heard a rumor that he was involved in the shooting, and it made him feel badly. Mr. Vaughn testified that, on April 12, 2016, he was living with his parents and girlfriend in Cumberland Furnace. He stated that, sometime after 9:00 a.m., he and his girlfriend gave his cousin, Gregory Nelson, a ride to the picnic grounds. Mr. Vaughn stated that no one else was there and that, after dropping off Mr. Nelson, he and his girlfriend returned home so she could get ready for work.

Mr. Vaughn testified that Mr. Tidwell called him and asked him "about giving those guys that money back," referring to Defendant and co-defendant Primm. Mr. Vaughn stated that the conflict "was just over some money" but that he had given co-defendant Primm and Defendant their money back two days before the shooting. Mr. Vaughn said that he gave each of them $100 on Mr. Tidwell's behalf; Mr. Vaughn did not know why the shooting occurred.

Mr. Vaughn testified that he was at his mother's house at the time of the shooting and that, when he learned of the shooting, he immediately drove to Charlotte. He noted that many people were present, including police. Mr. Vaughn stated that Mr. Tidwell's body was covered with a sheet in an area cordoned off by police tape. He said that, after he left the picnic grounds, he went to the hospital, although Mr. Springer was not allowed visitors. Mr. Vaughn maintained that he loved Mr. Springer and did not shoot him.

On cross-examination, Mr. Vaughn testified that Mr. Tidwell called him about a text message Defendant sent Mr. Tidwell. He agreed that, when he saw co-defendant Primm and Defendant to give them the money, they hugged and said they loved each other. Mr. Vaughn further agreed that everyone "thought everything was cool"; he noted that they were all family. When asked whether his family had disagreements previously, Mr. Vaughn responded negatively and stated that they were all "tight" and loved one another. He said, "I cannot explain what happened that day. It should not have happened."

Conference on Jury Instructions

During the initial conference on jury instructions, defense counsel requested that the jury be instructed on self-defense or defense of a third party, arguing that a factual question

was raised by Vernecia's testimony of whether someone else shot Mr. Tidwell in defense of Defendant. Defense counsel noted, "And the same would apply, I think, to the shooting of [Mr.] Springer." In a comment we interpret as addressing the State's criminal responsibility theory, defense counsel also argued that, if Mr. Tidwell arose from the fight with a gun in his hand, an unspecified second shooter could have been defending himself or Defendant from Mr. Tidwell.

The State responded that Defendant was engaged in unlawful activity when he approached Mr. Tidwell and Mr. Springer and fired a gun and that Mr. Tidwell had no duty to retreat. Upon questioning by the trial court, defense counsel asserted "that even if [Defendant] did discharge a weapon, I'm not sure if . . . [that] necessarily constitutes unlawful conduct" in light of Mr. Tidwell's "reputation for violence." Defense counsel added that Defendant's theory was that his behavior "was designed not to be assaultive but to be, hey, let's not fight."

The trial court noted Mr. Flanagan's testimony that the three co-defendants were going to "at least commit an assault" and that Defendant and co-defendant Hughes had guns when they left co-defendant Primm's apartment. The court further noted Mr. Springer's testimony that Defendant fired his gun into the air, which was arguably disturbing the peace or disorderly conduct. The court found that clear and convincing evidence established that Defendant was engaged in unlawful activity "from the get-go and . . . therefore, these defenses [self-defense, necessity, and duress] would not apply." The court stated that it believed the same rationale would apply to defense of a third party.

Defense counsel further requested that the trial court instruct the jury on the State's duty to preserve evidence based upon the failure to conduct muzzle to garment testing of the Kel-Tec pistol and Mr. Tidwell's clothing. Counsel directed the court's attention to a portion of Agent Hodge's firearms report, which stated, "Upon submission of a suspect firearm a muzzle to garment distance determination can be performed on [Mr. Tidwell's clothing]." When asked by the trial court whether the defense could have requested the testing, defense counsel stated, "[W]e didn't have access to the weapon. I suppose hypothetically it's possible we could have asked you to appoint us an expert to do it, but we don't think that would alleviate the [State's] obligation." Defense counsel emphasized that it was the State's duty to gather, preserve, and produce exculpatory evidence. Defense counsel noted Agent Hodge's surprise that the Kel-Tec pistol had not been tested, and he argued that no good explanation existed for the failure to test it. Defense counsel stated that the testing would have been relevant to the State's theory that Defendant shot Mr. Tidwell at close range during the scuffle and that the evidence might have disproven that theory and been exculpatory to Defendant.

The State responded that the items of clothing had been preserved, that Dr. Dennison and Agent Hodge testified that, due to the large amount of blood at the scene, it was

"impossible to do certain tests," and that neither of them found any soot. The prosecutor noted that Agent Hodge's surprise or confusion during her testimony arose from her misunderstanding of which victim was being discussed. The State further noted that Agent Adkins "did request this but testing was not done because of how the witness testified yesterday." The State argued that the defense could have requested testing.

The trial court stated that it had considered the pattern jury instruction, the evidence at trial, and the firearms examination report, as well as *State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013), and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). The court noted that there "could have possibly been a hearing about this previously in the months leading up to this trial, but . . . the [c]ourt doesn't find there's sufficient proof to warrant this instruction on this particular issue[.]" The trial court ultimately determined that the State did not lose or destroy evidence that it had a duty to preserve.

During the discussion of lesser-included offenses, defense counsel did not address attempt or facilitation as lesser-included offenses of first degree murder. After the trial court issued the jury instructions, defense counsel requested a bench conference and requested that attempted first degree murder and facilitation of first degree murder be charged. The court denied the request, noting that it had researched the appropriate lesser-included offenses and charged them. The record reflects that, in Counts 1 and 2, the court instructed the jury on second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide as lesser-included offenses.

Verdict, Sentencing, and Motion for New Trial

Upon this evidence, the jury convicted Defendant of two counts of first degree murder, two counts of conspiracy to commit first degree murder relative to Mr. Tidwell and Mr. Springer, and the lesser-included offense of conspiracy to commit voluntary manslaughter of Mr. Bell.

The trial court imposed mandatory life sentences in Counts 1 and 2, and the judgments were stamp filed on July 9, 2019. In addition, the trial court filed signed judgments with the same stamp filed dates but without a sentence in Counts 4, 5, and 6, pending a sentencing hearing.

On July 23, 2019, before the sentencing hearing occurred, Defendant filed a "motion for extension of time to file motion for new trial," in which defense counsel stated that he had not received the trial transcript to finish the motion for new trial, that a misunderstanding occurred regarding when the judgments would be filed, and that the State did not oppose the extension. On July 30, 2019, the trial court entered an agreed order extending the deadline for filing the motion for new trial by 120 days. Defendant

subsequently filed a motion for new trial on September 6, 2019, which he amended twice on May 24 and 26, 2021.

At the February 12, 2020 sentencing hearing, Mr. Edmondson, Mr. Bell's father, testified that Mr. Bell's death "took a lot out of [him]." He noted that everyone involved in the shooting was family and that it was "devastating" to the Dickson County community. Mr. Edmondson addressed Defendant directly, stating that Defendant was raised "better than that." Mr. Edmondson stated that, in the victim impact statement he mailed to the court, he had requested that Defendant receive the death penalty. Mr. Edmondson averred that he was struggling to forgive Defendant, although he no longer hated him and still loved him. He articulated his belief that Defendant did not kill anyone, although he stated that Defendant "brought that crap to Charlotte" and had to pay for what he did.

Ms. Thompson[10] testified that the police did not allow her to see Mr. Tidwell's body because "no mother deserves to see their son like that." Ms. Thompson said that her mother and Defendant's grandmother were best friends and that Defendant's mother and uncle were not responsible for his behavior. She stated that she still did not know what precipitated the shooting and that it was not worth taking a life. Ms. Thompson noted that Mr. Tidwell's children would never see their father again.

Ms. Thompson testified that, the first day she saw Defendant in court, she was angered by his laughing, and she stated, "You took someone's life, and you act like it was a joke." She said that Mr. Tidwell was imperfect, but a good man, and she noted that she did not "know who [the defense was] describing. It wasn't my son." Ms. Thompson testified that Mr. Tidwell loved Defendant and co-defendant Primm as cousins. Ms. Thompson said that she did not hate Defendant but that he needed to face the consequences of his choices. Ms. Thompson added that she had also requested that Defendant receive the death penalty.

Defendant gave an allocution, in which he apologized to Mr. Edmondson and Ms. Thompson and asked for their forgiveness. Defendant stated that he was glad they knew he did not personally kill the victims. He said that his mother had not raised him to behave in that way. Defendant stated that he was "not taking away from [his] actions that day," that he had to "pay for [his]," and that he was not innocent, but he stated that it was incorrect that "everyone [was] innocent on both sides." He noted that he loved Mr. Bell, that they had gone to a club together the night before the shooting, and that Mr. Bell and Defendant had spent the night at co-defendant Primm's apartment.

[10] Ms. Thompson married and changed her surname to Holden after the trial. For consistency, we will continue to use her previous surname.

The presentence report reflected that Defendant was twenty-seven years old. Defendant's version of events was that he and Mr. Tidwell had a conflict over $200 worth of cocaine Defendant bought from him. Defendant stated,

> The situation escalated threats were made to me[.] He called and told me he was in my neighborhood 317 feet from my mom, brothers, sister, kids and niece[.] I took [it] as a threat to my family so I left . . . picked up my cousin armed myself because I was dealing with known violent criminals [and] went to my house[.] He was up the street[;] I approached shot in the air told him to leave[.] He rushed me we fought he got the gun and my cousin shot and killed him to stop from shooting me . . . but I was criminally responsible for the murders even thought I didn't sho[o]t or kill anyone.

Defendant had no criminal history; however, he had several disciplinary infractions in jail: refusal of a direct order and possession of tobacco in 2016; indecent exposure and fighting in 2017; "horseplay" in 2018; and fighting in 2019. Defendant reported having anxiety and depression, and he took antidepressant medication. He told the presentence report officer that he only occasionally drank alcohol but that he started using marijuana daily at age sixteen to help with anxiety. Defendant started using cocaine "occasionally" in 2015, and he admitted that he was high during the shooting. Defendant stated that he spent $400 per month on cocaine and that his job paid for his drug use. Defendant reported being employed at the time of the shooting. In 2018, Defendant completed an anger management course and an Alcoholics Anonymous and Narcotics Anonymous program in jail. The Strong-R assessment rated Defendant a high risk to reoffend "for violent with high target risk factors in friends and aggression."

The trial court noted the difficulty of the case for the victims' and Defendant's families and stated that it had considered the evidence at trial and sentencing, the presentence report, the principles of sentencing and arguments as to sentencing alternatives, the nature and characteristics of the offenses, mitigating and enhancement factors, statistical information, and Defendant's statement. The court found that Defendant was a Range I, standard offender.

The trial court stated that Counts 4 and 6 had a sentencing range of fifteen to twenty-five years and that Count 5 had a sentencing range of two to four years. Relative to mitigating factors, the court stated that it had considered Defendant's young age at the time of the shooting. Relative to enhancement factors, the court applied enhancement factors that Defendant had a history of criminal behavior in excess of that necessary to establish his sentencing range, that Defendant was a leader in the offenses, and that Defendant possessed or employed a firearm during commission of the offenses, to Counts 4, 5, and 6. The court noted that Defendant admitted to the presentence report officer having used

cocaine and that Defendant had some "behavioral things going on" in jail; however, the court stated that it "[did]n't put much weight on that."

The trial court also applied the enhancement factor that Defendant treated or allowed a victim to be treated with exceptional cruelty, only to Count 4 regarding Mr. Tidwell. The court noted Mr. Springer's testimony that Defendant shot Mr. Tidwell once. The trial court ordered Defendant to serve twenty years in Counts 4 and 6, respectively, and three years in count 5.

The trial court noted the "overwhelming evidence" that the debt at issue was drug-related, that drugs were found in co-defendant Primm's apartment, where Defendant either stayed or frequented, and that Defendant was "obviously heavily involved in the situation here."

Relative to consecutive sentencing, the trial court found that Defendant was a professional criminal who had knowingly devoted his life to criminal acts as a major source of livelihood. The court stated that "there were several exhibits admitted regarding the ammunition, the guns, and . . . the drugs. Cocaine, predominantly was the more egregious one[.]" The court again noted the evidence that a drug debt existed and found that Defendant was "making a major source of his livelihood off of dealing in drugs of some kind."

The trial court also found that Defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. The court stated that the co-defendants went to the picnic grounds with guns and that "all the circumstantial evidence indicated that . . . it was not going to be a good situation." The court noted that people did not usually take guns to a fistfight. The court found that the circumstances of the offenses were aggravated, that confinement for an extended period of time was necessary to protect society, and that consecutive sentences reasonably related to the seriousness of the offenses. The court recounted the trial testimony that Defendant was "a leader, if not the leader, in causing all this to happen," that Defendant's conduct resulted in two deaths and Mr. Springer's near death, that Defendant was the first one to shoot into the air, and that Defendant asked Mr. Springer if he wanted to die.

The trial court found that Counts 4 and 6 should run consecutively to each other and consecutively to Counts 1 and 2.[11] The court ordered that Count 5 run concurrently to all other counts. In total, Defendant's effective sentence was life plus forty years.

[11] The trial court did not address consecutive sentencing with respect to Counts 1 and 2, and the judgments in Counts 1 and 2 do not reflect any notations relative to consecutive service. The trial transcript

After a motion for new trial hearing, the trial court denied Defendant's motion by written order, finding that the weight of the evidence was sufficient to support Defendant's convictions; that the parties were satisfied with the jury instructions after the charge conference; that the court was satisfied with the propriety of the jury instructions; and that the evidence from co-defendant Primm's apartment was properly admitted. The court stated relative to Mr. Tidwell's cell phone record that Defendant made no discovery objections prior to trial and that it was satisfied by its previous rulings on any discovery issues raised during trial. The court found that Defendant made no objections regarding the composition of the jury venire and that Defendant received a fair trial. Defendant timely appealed.

Analysis

As a preliminary matter, we note that the time for filing a motion for new trial is jurisdictional and that the trial court was without authority to extend the filing window, regardless of any agreement by the parties. *See* Tenn. R. Crim. P. 33(b); *State v. Hatcher*, 310 S.W.3d 788, 799-800 (Tenn. 2010). However, no timeliness issue exists relative to the motion for new trial. In a single trial for felony murder and the underlying felony, a motion for new trial must be filed "within thirty days of the day the last sentence is entered." *Id.* at 801 (quoting *State v. Bough*, 152 S.W.3d 453, 460-61 (Tenn. 2004)). The filing window commenced when the judgments in Counts 4, 5, and 6 were entered, not on the last day of trial when the judgments in Counts 1 and 2 were entered. Therefore, Defendant's motion for new trial was filed prematurely. "[I]ssues raised within a prematurely filed motion for new trial are properly preserved where: (1) the State does not object to the premature filing either at trial or on appeal; and (2) no prejudice accrued to the State from the trial court's consideration of the issues raised in the premature motion." *State v. Julio Ramirez*, No. M2009-01617-CCA-R3-CD, 2011 WL 2348464, at *6 (Tenn. Crim. App. June 8, 2011) (citing *Hatcher*, 310 S.W.3d at 800).

In addition, as the State notes, Defendant's argument section of his appellate brief contains no citations to the trial record. *See* Tenn. R. App. P. 27(a)(7) (requiring that an appellate brief contain an argument with "the contentions of the appellant with respect to the issues presented, and the reasons therefor . . . , with citations to the authorities and appropriate references to the record[.]"). "Issues unsupported by . . . appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b). However, due to the seriousness of Defendant's convictions, we choose to review Defendant's issues notwithstanding his inadequate brief.

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concludes before the jury announced its verdict, after which, presumably, the trial court would have imposed the mandatory life sentences in those counts. However, Defendant and the State agree that Defendant's effective sentence was life plus forty years, which indicates that Counts 1 and 2 were ordered to be run concurrently.

I. Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to support his convictions, arguing relative to first degree murder that Defendant could not have shot Mr. Tidwell at close range and that no evidence indicated that he personally shot Mr. Bell or Mr. Springer; relative to criminal responsibility, Defendant argues that he did not aid, direct, or solicit "any co-[d]efendants or any other party . . . to murder anyone," and that he declined to follow co-defendant Primm's instruction to shoot Mr. Springer.

Relative to conspiracy,[12] Defendant argues that no evidence established that Defendant "entered into an agreement with one (1) or more people to commit the offense of First[]Degree Murder," that each party had the intent to commit first degree murder, that they agreed one or more of them would engage in conduct constituting first degree murder, and that one of the parties "committed an overt act in furtherance of the conspiracy." Defendant notes Mr. Flanagan's testimony that he was unaware of any plan and that "a limited . . . window" of ten to fifteen minutes existed in which a plan could have been made. Defendant asserts that the jury "was left to make assumptions about when and where a conspiracy or plan was devised" by the co-defendants.

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

[12] We note that although Defendant generally asserts that "the convictions on all counts should be vacated," this section of his brief does not raise any issue related to conspiracy to commit voluntary manslaughter, and he has not included any law or facts pertaining to this conviction. His discussion of conspiracy specifically contests the proof of a collective intent to commit first degree murder. The State's brief similarly only discusses conspiracy to commit first degree murder. We interpret Defendant's argument as contesting only the sufficiency of the evidence supporting his conspiracy to commit first degree murder convictions.

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).

Premeditated first degree murder is "[a] premeditated and intentional killing of another[.]" Tenn. Code Ann. § 39-13-202(a)(1) (2016). 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) (2016). 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) (2016). 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). Moreover, there are several factors which tend to support the existence of premeditation, including the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, declarations of an intent to kill by the defendant, evidence of procurement of a weapon, the making of preparations before the killing for the purpose of concealing the crime, and calmness immediately after the killing. *Id.* 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. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003) (citing *Suttles*, 30 S.W.3d at 261; *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998)).

Conspiracy is committed when "two (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense." Tenn. Code Ann. § 39-12-103(a) (2016). "No person may be convicted of conspiracy to commit an offense, unless an overt act in pursuance of the conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired." Tenn. Code Ann. § 39-12-103(d) (2016).

> Conspiracy is a continuing course of conduct that terminates when the objectives of the conspiracy are completed or the agreement that they be completed is abandoned by the person and by those with whom the person conspired. The objectives of the conspiracy include, but are not limited to, escape from the crime, distribution of the proceeds of the crime, and measures, other than silence, for concealing the crime or obstructing justice in relation to it.

Tenn. Code Ann. § 39-12-103(e)(1) (2016). "While the essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act, . . . the agreement need not be formal or expressed, and it may be proven by circumstantial evidence." *Pike*, 978 S.W.2d at 915 (internal citation omitted).

The jury in this case was instructed on criminal responsibility. "A person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." Tenn. Code Ann. § 39-11-401(a) (2016). As pertinent here, a person is criminally responsible for the conduct of another when, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2) (2016). Criminal responsibility is not a separate crime but instead a theory by which the State may prove the defendant's guilt based upon another person's conduct. *State v. Osborne*, 251 S.W.3d 1, 16 (Tenn. Crim. App. 2007) (citing *State v. Mickens*, 123 S.W.3d 355, 389-90 (Tenn. Crim. App. 2003)). "[U]nder the theory of criminal responsibility, presence and companionship with the perpetrator of a felony before and after the commission of the crime are circumstances from which an individual's participation may be inferred." *State v. Phillips*, 76 S.W.3d 1, 9 (Tenn. Crim. App. 2001). In order to be convicted of the crime, the evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission. *See State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994); *see also State v. Foster*, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988).

In the light most favorable to the State, the evidence at trial reflected that Defendant was upset with Mr. Tidwell over an unpaid debt. Defendant told Mr. Flanagan that he was going to Charlotte to "handle this," and they drove to co-defendant Primm's apartment, discussed the matter with co-defendant Primm, and decided to go to the picnic grounds to confront Mr. Tidwell. Mr. Flanagan and Mr. Wilson testified that they understood Defendant was going to fight Mr. Tidwell.

Defendant, co-defendant Primm, and co-defendant Hughes armed themselves with 9mm pistols, and Defendant drove the first leg of the trip to Charlotte. Defendant discussed that nobody was "gonna play him," that he would "catch a body over it," and that he was tired of "bullsh-t." Co-defendant Primm had Mr. Flanagan take over driving before they reached the picnic grounds because Mr. Flanagan did not have a gun, and they wanted someone to stay with the car in case they had to leave quickly. Mr. Flanagan dropped the co-defendants off near the picnic grounds so that they could use a trail and take Mr. Tidwell by surprise. Defendant approached Mr. Tidwell and Mr. Springer, fired a shot into the air, asked Mr. Springer if he wanted to die, and aimed his gun at Mr. Springer after co-defendant Primm told Defendant to "burn him." After Mr. Tidwell knocked Defendant to the ground in defense of Mr. Springer, they struggled over the gun. Co-defendant Primm

approached and shot Mr. Springer, chased him, and continued shooting him repeatedly. Mr. Tidwell and Mr. Bell were shot multiple times in the chest and back. All three of the victims were unarmed.

Mr. Springer and Mr. Flanagan identified the Kel-Tec as the pistol Defendant used. The evidence at the crime scene indicated that three guns were present during the shooting and that the Kel-Tec was fired twice. A total of twenty-two cartridge casings were recovered from the scene. Two of the three guns discharged at the scene were never located.

After the shooting, the co-defendants met Mr. Flanagan at a nearby location, drove to White Bluff, dropped off the Impala, and had Ms. Worley drive them to Nashville. Mr. Flanagan and Mr. Wilson retrieved and sold the Impala shortly thereafter on co-defendant Primm's instructions.

Whether Defendant personally fired the fatal shots is immaterial because the jury was instructed on criminal responsibility. The evidence is sufficient for the jury to have concluded that Defendant committed premeditated first degree murder relative to Mr. Tidwell and Mr. Bell under a theory of criminal responsibility. Defendant's "presence and companionship with" co-defendants Primm and Hughes before and after the shooting, as well as his own participation in the shooting—being the first person to shoot, asking Mr. Springer if he wanted to die, and aiming at Mr. Springer—were circumstances from which the jury could have found that Defendant intended to aid in the commission of the offenses. *Phillips*, 76 S.W.3d at 9.

Similarly, Defendant's argument that no direct evidence of a conspiracy existed is not well-taken; as stated above, a conspiracy may be proven by circumstantial evidence. *Pike*, 978 S.W.2d at 915. In this case, the evidence circumstantially established that Defendant was part of a conspiracy to commit first degree murder and voluntary manslaughter. Mr. Flanagan and Mr. Wilson testified that Defendant was upset, and he discussed the debt with co-defendant Primm before he and the co-defendants armed themselves, in spite of the fact that Mr. Flanagan and Mr. Wilson both anticipated the meeting with Mr. Tidwell to be a fistfight. Defendant's comments on the way to the picnic grounds indicated his understanding of what would happen there. Defendant fired the first shot into the air and asked Mr. Springer if he wanted to die; when co-defendant Primm told him not to "play with him; burn him," Defendant aimed his gun at Mr. Springer. The physical evidence indicated that Defendant's gun fired a second time and that two other guns fired multiple times. Defendant traveled to the scene with the co-defendants, met them at a separate pickup location after the shooting, and fled to Nashville with them. The evidence supporting the conspiracy convictions is sufficient, and Defendant is not entitled to relief on this basis.

II. Jury Instructions

Defendant contends that the trial court erred by declining to instruct the jury on self-defense, the State's duty to preserve evidence, and facilitation of first degree murder and attempted first degree murder as lesser-included offenses of first degree murder in Counts 1 and 2. Defendant acknowledges that he did not request the instructions in writing and requests plain error relief. The State responds that the jury was properly instructed.

"It is well-established in Tennessee that the trial court has the duty of giving a correct and complete charge of the law applicable to the facts of the case and that the defendant has the right to have every issue of fact raised by the evidence and material to the defense submitted to the jury upon proper instructions by the trial court." *State v. Green*, 995 S.W.2d 591, 604-05 (Tenn. Crim. App. 1998) (citations omitted). "In determining whether a defense instruction is raised by the evidence, the court must examine the evidence in the light most favorable to the defendant to determine whether there is evidence that reasonable minds could accept as to that defense." *State v. Sims*, 45 S.W.3d 1, 9 (Tenn. 2001). Whether jury instructions are sufficient is a question of law, which we review de novo with no presumption of correctness. *State v. Clark*, 452 S.W.3d 268, 295 (Tenn. 2014). "The omission of an essential element from the jury charge is subject to harmless error analysis." *State v. Majors*, 318 S.W.3d 850, 864 (Tenn. 2010) (citing *State v. Garrison*, 40 S.W.3d 426, 434 (Tenn. 2000)). "'An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.'" *Id.* (quoting *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005)).

A. Self-defense/defense of a third party

Defendant contends that the trial court erred by declining to instruct the jury on self-defense, arguing that his having engaged in unlawful conduct did not make self-defense inapplicable. The State responds that no reasonable juror could have found that Defendant acted in self-defense because he did not retreat and his use of force was unjustified.

"Once a general defense is fairly raised, it is incumbent upon the State to negate, beyond a reasonable doubt, the application of a general defense." *State v. Cole-Pugh*, 588 S.W.3d 254, 264 (Tenn. 2019). As noted by the State, when a jury instruction issue involves a "fundamental defense" like self-defense, this court may exercise plenary review notwithstanding the lack of a written request. *State v. Ethan Alexander Self*, No. E2014-02466-CCA-R3-CD, 2016 WL 4542412, at *58 (Tenn. Crim. App. Aug. 29, 2016). As a result, we will exercise plenary review of the self-defense issue notwithstanding Defendant's failure to make a written request.

Tennessee's self-defense statute provides, in relevant part:

> (b)(1) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity[13] and is in a place where the person has a right to be has no duty to retreat before threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.
>
> (2) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:
>
> (A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;
>
> (B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and
>
> (C) The belief of danger is founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611(b)(1)-(2) (2016). Acts committed in self-defense are justified, and self-defense is a complete defense to crimes of violence. *See* Tenn. Code Ann. § 39-11-601 (2019); *State v. Ivy*, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993).

In *State v. Perrier*, 536 S.W.3d 388, 402-03 (Tenn. 2017), our supreme court concluded that relative to self-defense, the trial court "is tasked with the threshold determination of whether a defendant was engaged in criminal activity such that the 'no duty to retreat' instruction would not apply." Our supreme court stated the following:

> As this Court explained in *State v. Hawkins*, self-defense is a general defense and as such it need not be submitted to the jury unless it is "fairly raised by the proof." Tenn. Code Ann. § 39-11-203(c) [2018]. The quantum of proof necessary to fairly raise a general defense is less than that required to establish a proposition by a preponderance of the evidence. To determine whether a general defense has been fairly raised by the proof, a court must consider the evidence in the light most favorable to the defendant and draw all reasonable inferences in the defendant's favor. Whenever admissible

[13] We note that, in 2021, our legislature amended the self-defense statute to replace the phrase "not engaged in unlawful activity" with the phrase "not engaged in conduct that would constitute a felony or Class A misdemeanor." We will refer to the statutory language in effect at the time of Defendant's trial in this opinion.

> evidence fairly raises a general defense, the trial court is required to submit the general defense to the jury. From that point, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defense does not apply.
>
> *Hawkins*, 406 S.W.3d at 129 (citation omitted).
>
> Within this structure, the trial court makes the threshold determination whether to charge the jury with self-defense, and we conclude that the trial court, as part of that threshold determination, should decide whether to charge the jury that a defendant did not have a duty to retreat. As part of that decision, the trial court should consider whether the State has produced clear and convincing evidence that the defendant was engaged in unlawful activity such that the "no duty to retreat" instruction would not apply.

Id. at 403. The supreme court noted, however, that a duty to retreat does not mean that a person cannot defend himself; "[a] defendant may still defend himself even to the point of using deadly force[] and . . . may be acquitted of a weapons offense if a jury finds that his self-defense was justifiable." *Id.* (citing Tenn. Code Ann. §§ 39-11-611; 39-17-1322).

If the trial court determines that the defendant was engaged in unlawful activity, the court must omit the portion of the jury instruction that states: "[t]he defendant would also have no duty to retreat before [threatening][using] force." *Id.*

In this case, the trial court determined that self-defense was inapplicable based solely upon its finding that Defendant had been engaged in unlawful activity, rather than first considering whether self-defense had been fairly raised by the proof. However, the trial court did not err by declining to instruct on self-defense because it was not fairly raised by the proof.

In the light most favorable to Defendant, several witnesses acknowledged that Mr. Tidwell had a reputation for violence. Mr. Tidwell and Defendant had a conflict over a failed drug deal, and Mr. Tidwell owed Defendant money. Mr. Wilson noted that Defendant was upset the morning before the shooting because he believed Mr. Tidwell was going to Defendant's mother's house. Mr. Greer testified that, at the picnic grounds, Mr. Tidwell asked him if he had seen Defendant. Vernecia stated that she heard Defendant ask Mr. Tidwell what he wanted and that Defendant shot into the air before Mr. Tidwell rushed him. Vernecia saw Mr. Tidwell get up and walk away holding Defendant's gun. Mr. Cathey testified that he heard an argument, saw Mr. Tidwell and Defendant standing close to one another before Mr. Tidwell tackled Defendant, and heard a gunshot, followed by several gunshots. Malik testified that after he saw Mr. Tidwell "getting the best of" Defendant, Malik heard shooting.

Although Mr. Wilson testified that Defendant was upset because he believed Mr. Tidwell was going to Cynthia's house, no evidence suggested that Defendant believed he or his family were in *imminent* danger of death or serious bodily injury at the time he displayed and fired the gun. Aside from Mr. Tidwell's general reputation for violence, no evidence established that such a fear was reasonable. We note that the co-defendants and the victims were part of the same closely-knit community and that there was no indication Mr. Tidwell had expressed an intent to harm Defendant or his family members.

Likewise, no evidence existed that Mr. Tidwell actually posed an imminent danger of death or serious bodily injury to Defendant or his family. Although Mr. Tidwell inquired about Defendant with Mr. Greer, Mr. Tidwell remained in the picnic grounds. Notably, Vernecia, Malik, and Mr. Cathey were in Cynthia's driveway during the shooting, and none of them indicated that Mr. Tidwell approached them or Cynthia's house. Mr. Tidwell and Mr. Springer were unarmed, and Mr. Tidwell only knocked Defendant down after he displayed a gun, fired in the air, and pointed it at Mr. Springer.

Moreover, the trial court correctly found that Defendant, who at the very least brandished a gun in a public place, was engaging in unlawful conduct and had a duty to retreat. No evidence was presented to suggest Defendant attempted to retreat before firing the gun.

Accordingly, we conclude that any error in failing to instruct the jury regarding self-defense was harmless beyond a reasonable doubt. *See Perrier*, 536 S.W.3d at 404-05 (concluding that the trial court's error in instructing the jury regarding self-defense was harmless beyond a reasonable doubt "because no reasonable jury would have accepted the defendant's self-defense theory"). Defendant is not entitled to relief on this basis.

B. State's duty to preserve and gather evidence

Defendant argues that the trial court should have instructed the jury on the State's duty to gather and preserve evidence, arguing that the State should have conducted muzzle to garment testing of the Kel-Tec pistol and Mr. Tidwell's clothing. The State responds that it was not obligated to perform any testing and that the court properly denied Defendant's request. Defendant acknowledges that he did not submit a written request for the instruction and that this court may only review the issue for plain error.

Rule 36(a) of the Tennessee Rules of Appellate Procedure states that "[n]othing 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." "The failure to make a contemporaneous objection constitutes waiver of the issue on appeal." *State v. Gilley*, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008). However, "when necessary to do substantial justice," this court may "consider an

error that has affected the substantial rights of a party" even if the issue was waived. Tenn. R. App. P. 36(b). Such issues are reviewed under plain error analysis. *Hatcher*, 310 S.W.3d at 808.

Plain error relief is "limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). In order to be granted relief under plain error relief, five criteria must be met: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Adkisson*, 899 S.W.2d at 640-41; *see State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (formally adopting the *Adkisson* standard for plain error relief). When it is clear from the record that at least one of the factors cannot be established, this court need not consider the remaining factors. *Smith*, 24 S.W.3d at 283. Defendant bears the burden of persuasion to show that he is entitled to plain error relief. *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

In *Ferguson*, our supreme court "explained that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *State v. Ferguson*, 2 S.W.3d 912, 915-16 (Tenn. 1999)). The court determined that the due process required under the Tennessee Constitution was broader than that required under the United States Constitution and rejected the "bad faith" analysis adopted by the United States Supreme Court. *Id.* at 784-85 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). Instead, the court in *Ferguson* adopted a balancing approach in which a trial court must determine "[w]hether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair." *Id.* at 785 (quoting *Ferguson*, 2 S.W.3d at 914).

When a defendant raises a *Ferguson* claim, a trial court must first "determine whether the State had a duty to preserve the evidence." *Merriman*, 410 S.W.3d at 785. "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense.'" *Id.* (quoting *Ferguson*, 2 S.W.3d at 917). To meet this constitutional materiality standard, "the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (footnote omitted).

If the proof demonstrates the existence of a duty to preserve evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

1. The degree of negligence involved;

2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and

3. The sufficiency of the other evidence used at trial to support the conviction.

Ferguson, 2 S.W.3d at 917 (footnote omitted). The trial court is required to balance these factors to determine whether conducting a trial without the missing evidence would be fundamentally fair. *Merriman*, 410 S.W.3d at 785. "If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction." *Id.*

Tennessee Pattern Jury Instruction 42.23 provides as follows:

The State has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of such a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The State has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value, so that an as yet unknown defendant may later examine the evidence.

If, after considering all of the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are at issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

See id.

In his argument, Defendant acknowledges that *Ferguson* "deals with the issue of lost or destroyed evidence[;] here we deal with evidence that was simply not sought after." However, as this court has previously concluded, the State has no duty to investigate in a certain way, including conducting scientific testing. *See State v. Donald Terry Moore*, No. 01C01-9702-CR-00061, 1998 WL 209046, at *9 (Tenn. Crim. App. Apr. 9, 1998), *aff'd*, 6 S.W.3d 235 (Tenn. 1999); *see also State v. Brock*, 327 S.W.3d 645, 698-99 (Tenn. Crim. App. 2009). We note that "the failure to perform a material test may be shown through the cross-examination of the appropriate [S]tate witness since it reflects upon the quality of the

[S]tate's case," that Defendant cross-examined Agent Hodge about the lack of muzzle to garment testing, and that Defendant utilized the lack of testing in his closing argument. *Donald Terry Moore*, 1998 WL 209046, at *10 (quoting *State v. Greg Lamont Turner,* No. 01C01-9503-CR-00078, 1995 WL 504801, at *3 (Tenn. Crim. App. Aug. 25, 1995)), *no perm. app. filed*.

The record supports the trial court's determination that a *Ferguson* instruction was inappropriate because no evidence was lost or destroyed. Defendant has not proven that a clear and equivocal rule of law was violated, and he is not entitled to plain error relief.

C. Lesser-included offenses

Defendant contends that the trial court erred by not instructing the jury on attempted first degree murder, facilitation of first degree murder, attempted second degree murder, and facilitation of second degree murder on those counts. The State responds that the jury was correctly instructed. As stated above, Defendant acknowledges that he made no written request for the instructions; we will review his issue for plain error. *See Hatcher*, 310 S.W.3d at 808.

Whether the trial court should have instructed the jury on a lesser-included offense is a mixed question of law and fact, which we review de novo with no presumption of correctness. *State v. Banks*, 271 S.W.3d 90, 124 (Tenn. 2008) (citing *State v. Hatfield*, 130 S.W.3d 40, 41 (Tenn. 2004); *Carpenter v. State*, 126 S.W.3d 879, 892 (Tenn. 2004)). When addressing issues related to failure to charge lesser-included offenses, appellate courts consider three questions: "(1) whether the offense is a lesser[-]included offense; (2) whether the evidence supports a lesser[-]included offense instruction; and (3) whether the failure to give the instruction is harmless error." *Id.* (citing *State v. Allen*, 69 S.W.3d 181, 187 (Tenn. 2002)).

Pursuant to Tennessee Code Annotated section 40-18-110(f), an offense is a lesser-included offense if:

> (1) All of its statutory elements are included within the statutory elements of the offense charged;
>
> (2) The offense is facilitation of the offense charged or of an offense that otherwise meets the definition of lesser[-]included offense in subdivision (f)(1);
>
> (3) The offense is an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser[-]included offense in subdivision (f)(1); or

> (4) The offense is solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser[-]included offense in subdivision (f)(1).

Tenn. Code Ann. § 40-18-110(f).

In this case, the parties do not dispute that attempted first and second degree murder and facilitation of first and second degree murder are lesser-included offenses of premeditated first degree murder. If "a lesser offense is included in the charged offense, the question remains whether the evidence justifies a jury instruction on such lesser offense." *State v. Burns*, 6 S.W.3d 453, 467 (Tenn. 1999). Tennessee Code Annotated section 40-18-110(a) provides:

> When requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser[-]included offense of the offense charged in the indictment or presentment. However, the trial judge shall not instruct the jury as to any lesser[-]included offense unless the judge determines that the record contains any evidence which reasonable minds could accept as to the lesser[-]included offense. In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser[-]included offense without making any judgment on the credibility of evidence. The trial judge shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser[-]included offense.

Generally, evidence that is sufficient to support an instruction on the greater offense will also support an instruction on the lesser-included offense under Tennessee Code Annotated section 40-18-110(f)(1). *Banks*, 271 S.W.3d at 125. However, instructions on the lesser-included offenses of attempt, solicitation, or facilitation are unnecessary "where the evidence clearly establishes completion of the criminal act or simply does not involve proof of solicitation or facilitation." *Id.* (citing *State v. Wilson*, 211 S.W.3d 714, 721 n.2 (Tenn. 2007); *State v. Robinson*, 146 S.W.3d 469, 487 n.7 (Tenn. 2004)).

Relative to attempted first degree and second degree murder, the evidence at trial clearly established that Mr. Tidwell and Mr. Bell's murders were complete. As a result, the trial court correctly determined that it was unnecessary to charge these offenses. *See Banks*, 271 S.W.3d at 127.

Relative to facilitation of first or second degree murder, "[a] person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-

402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403. In this case, we conclude that no reasonable juror could have believed that Defendant was present, knew that co-defendant Primm or co-defendant Hughes intended to kill Mr. Tidwell and Mr. Bell, and "furnishe[d] substantial assistance" in the commission of the murders but did not intend "to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense." *See State v. Ely*, 48 S.W.3d 710, 724 (Tenn. 2001). The evidence at trial supports only two interpretations: that (1) Defendant participated in the shooting with knowledge that he or one of the co-defendants intended to kill Mr. Tidwell (and once they arrived, Mr. Bell) and assisted them by arming himself, traveling to the crime scene together, beginning the confrontation by firing the first shot into the air, as well as firing a second shot, and fleeing to Nashville with the co-defendants and Mr. Flanagan; or (2) as Defendant argued at trial, Defendant had no intent to kill Mr. Tidwell, and he had no knowledge that co-defendant Primm and co-defendant Hughes intended to kill Mr. Tidwell or Mr. Bell. As a result, no reasonable jury could have found that Defendant was guilty of facilitation of first or second degree murder, and the trial court correctly excluded the facilitation instruction. No clear and unequivocal rule of law was violated, and Defendant is not entitled to plain error relief.

III. 404(b) Evidence

Defendant contends that the trial court erred by admitting evidence of the gun, drugs, drug paraphernalia, and ammunition recovered at co-defendant Primm's apartment, arguing that the drugs specifically had no probative value and that no material issue related to the presence of drugs at the apartment. The State responds that the evidence was properly admitted.

Rule 404(b) of the Tennessee Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (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.

Tenn. R. Evid. 404(b); *see also State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005); *State v. Parton*, 694 S.W.2d 299, 302 (Tenn. 1985). Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when the evidence of the otherwise inadmissible conduct is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or a common scheme or plan. *State v. Toliver*, 117 S.W.3d 216, 230 (Tenn. 2003); *State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003).

If the trial court substantially complies with the procedural requirements of Rule 404(b), we will review the trial court's determination for an abuse of discretion. *Thacker*, 164 S.W.3d at 240 (citing *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)); *State v. Baker*, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1990)). However, if the trial court fails to substantially comply with the requirements of the rule, then the trial court's decision should be afforded no deference by the reviewing court. *DuBose*, 953 S.W.2d at 652.

Here, the trial court complied with the procedural requirements of Rule 404(b). It held a hearing outside the presence of the jury, found that the State proved the bad act by clear and convincing evidence, and determined that the bad act was relevant to motive, intent, planning and preparation, opportunity, and completion of the story. The court concluded that the probative value of the evidence outweighed any prejudice to Defendant. Thus, we will review the trial court's decision for an abuse of discretion. *Thacker*, 164 S.W.3d at 240 (citing *DuBose*, 953 S.W.2d at 652); *Baker*, 785 S.W.2d at 134.

The State's theory at trial was that the shooting occurred as a result of a drug-related dispute between Defendant and Mr. Tidwell. Multiple witnesses placed Defendant at co-defendant Primm's apartment the morning before the shooting, and he was known to spend time there. The record supports the trial court's conclusion that the drugs, guns, and ammunition in the apartment were relevant to motive, as well as the co-defendants' intent, planning, preparation, and opportunity when arming themselves. Other bad act evidence is admissible under Rule 404(b) to establish these non-propensity facts; therefore, the trial court did not abuse its discretion when it admitted the evidence. *See Toliver*, 117 S.W.3d at 230; *McCary*, 119 S.W.3d at 243. Defendant is not entitled to relief.

IV. Disclosure of Exculpatory Evidence

Defendant claims that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide him with Mr. Tidwell's cell phone report until the first day of trial. The record does not reflect that Defendant filed any pretrial motions related to the cell phone report.

After jury selection, but before opening arguments, defense counsel addressed the trial court before the jury entered the courtroom:

> There was a Kyocera cell phone . . . purportedly belonged to a Mr. Quinton Tidwell, one of the deceased in this case. There was a download on this after [co-defendant] Primm's trial, I think, sometime in December. I think [the prosecutor] indicated he had forgotten he had it. It just slipped his mind, I suppose, and he called me Friday at 3 o'clock to inform me he had this. We got it Monday morning. We haven't been able to look through it. The State's indicated they don't intend to use it. I just wanted to make sure we had an agreement on the record that this information wouldn't be allowed in trial.

The prosecutor indicated his assent. Defendant first raised a *Brady* issue relative to the contents of the cell phone report in his motion for new trial, alleging that the cell phone report proved that Mr. Tidwell "was in fact waiting for [Defendant] to arrive for the purposes of engaging in a fight." In his appellate brief, Defendant stated that two text messages from Mr. Tidwell to Defendant read, "I be on dat hill today my n---a," and "I'm out here big baby." Defendant also claims that other text messages indicate that Mr. Tidwell had stolen money from or robbed other individuals around the time of the shooting.

The cell phone report was exhibited to the motion for new trial hearing; although it was not included in the appellate record, this court ordered supplementation of the record to review it.

The United States Supreme Court stated in *Brady* that "the 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." *Id.* at 87. The State is responsible to disclose "any favorable evidence known to the others acting on the government's behalf in the case, including police." *Strickler v. Greene*, 527 U.S. 263, 307 n.12 (1999).

Four prerequisites must be satisfied to establish a *Brady* violation:

1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
2. The State must have suppressed the information;
3. The information must have been favorable to the accused; and
4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995), *as amended on reh'g* (July 10, 1995). Even if the defendant does not specifically request evidence, favorable evidence is material, and its suppression is a constitutional violation, "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). "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

"Generally, if there is only a delayed disclosure of information, in contrast to a complete failure to disclose exculpatory information, *Brady* normally does not apply, unless the delay itself causes prejudice." *Larry McKay v. State*, No. W2008-02274-CCA-R3-PD, 2010 WL 2384831, at *8 (Tenn. Crim. App. June 15, 2010) (quoting *State v. Caughron*, 855 S.W.2d 526, 548 (Tenn. 1993) (Daughtrey, J., dissenting)), *perm. app. denied* (Tenn. Jan. 13, 2011). "Delayed disclosure results in prejudice to the defendant and may deny the defendant due process when it is too late for the defendant to make use of any benefits of the evidence." *State v. Sidney M. Ewing*, No. 01C01-9612-CR-00531, 1998 WL 321932, at *8 (Tenn. Crim. App. June 19, 1998), *opinion vacated and reentered*, No. 01C01-9612-CR-00531, 1998 WL 485614 (Tenn. Crim. App. Aug. 18, 1998) (internal citation omitted). "If the defense fails to request a continuance after receipt of the evidence, fails to call or recall a witness to testify regarding the evidence, or fails to extensively cross-examine a witness regarding the evidence, the *Brady* violation may be cured." *State v. Baldomero Galindo*, No. E2020-00556-CCA-R3-CD, 2021 WL 270021, at *9 (Tenn. Crim. App. Jan. 27, 2021), *perm. app. denied* (Tenn. May 12, 2021) (citing *Ewing*, 1998 WL 321932, at *9).

In this case, defense counsel received the cell phone report on the first day of trial and did not request a continuance during the multiple days of trial. As a result, any *Brady* violation was cured. *See id.* Defendant is not entitled to relief on this basis.

V. Introduction of False Testimony

Defendant contends that the State knowingly introduced false testimony by allowing Mr. Springer to testify that he and Mr. Tidwell were at the picnic grounds for the sole purpose of meeting their father for breakfast. In the section of Defendant's brief dealing with his *Brady* claim, he asserts that the cell phone report from Mr. Tidwell's phone

"indicated that Mr. Tidwell was in fact waiting for [Defendant] for the purposes of engaging in a fight," undermining the State's theory that Mr. Tidwell and Mr. Springer "had no idea what was going to happen[,] that they were just sitting there enjoying some tea before being shot down." Defendant also noted that the cell phone report "had other indications that Mr. Tidwell had robbed or stolen from other individuals since his release from prison." Defendant acknowledges that the text messages do not exonerate him, but he argues that they would have been used to impeach Mr. Springer, a key witness for the State who testified that "this was not a planned meeting" between Defendant and Mr. Tidwell. Defendant notes that, although he does not know whether the State knew of the report's contents, the State should have known the details of the report.

The State responded in its brief that Defendant inadequately proved his claim by failing to exhibit the cell phone report from Mr. Tidwell's phone to the motion for new trial hearing; however, at oral argument, the State corrected itself and noted for this court that the cell phone report had, in fact, been exhibited to the motion for new trial hearing. The State never amended its argument in this regard. The cell phone report was not part of the original appellate record, and this court sua sponte ordered supplementation of the record to include it.

The record reflects that Defendant raised this issue for the first time in his motion for new trial. Accordingly, we will review it for plain error. *Hatcher*, 310 S.W.3d at 808.

A. Cell phone report contents

The cell phone report contains many text messages that Mr. Tidwell received and sent in the days before the shooting. Some telephone numbers corresponded to labeled contacts, but some only included the telephone number. We glean from Defendant's brief, which includes the content of two text messages Mr. Tidwell allegedly sent Defendant, that Defendant asserts that his telephone number was one ending in 8259. The report reflects that, on April 9, 2016, a telephone number ending in 8259 sent the following text messages to Mr. Tidwell:

Time	Message
8:17 a.m.	Fam u close been hour
8:22 a.m.	Gotta get the kids at nine homie lemme know something
8:30 a.m.	Cuz hit me I just gave 250 now. U won't answer what's going on
8:55 a.m.	Homie hit me real s--t
9:52 a.m.	Bout to hit the slab homie where can we meet it was cuz money that's y I was tripin
11:38 a.m.	Hit me cuz
1:18 p.m.	I'm dc I need my bread where u at homie

1:18 p.m.	Imma pull up on u
1:19 p.m.	F--k ya
7:43 p.m.	U a b--ch a-- n---a if u feel any different I'm on the way to town get wit me and I'm beat u like one this is zay n---a not p

Mr. Tidwell responded, "Funny I be out catch me in traffic I stay ready onsite wit whoeva[.]" The person replied, "Where u at tough guy[?]" Mr. Tidwell did not respond.

On April 12, 2016, the telephone number ending in 8259 and Mr. Tidwell exchanged the following messages:

Author	Time	Message
8259	5:14 a.m.	Look if u any kind of man come see me I'm come to you. This zay I love you yo bro covered yo debt abd beg to spare you u still gotta see me if you ain't hoe real s--t I'm up hit me.
Mr. Tidwell	7:50 a.m.	I be on dat hill today my n---a
8259	7:51 a.m.	On route
Mr. Tidwell	9:28 a.m.	I'm out here big baby
8259	9:33 a.m.	Sit tight
8259	10:03 a.m.	Omw sit tight
Mr. Tidwell	10:03 p.m.	Wya
8259	10:04 p.m.	Stretch N---a I promise u in no rush for this
Mr. Tidwell	10:21 p.m.	Sit tight I'm 48
8259	10:22 p.m.	Pull in up
Mr. Tidwell	10:31 p.m.	Out here

B. Mr. Springer's trial testimony

At trial, the following exchange occurred during Mr. Springer's direct examination:

Q. And what did you do when you got to the picnic grounds?

A. I just relaxed, waiting on my dad to get out of court to go to Shoney's to eat breakfast.

. . . .

Q. So you and . . . [Mr.] Tidwell were at the picnic grounds waiting for your father to get out of court?

A. Yes, sir.

On cross-examination, the following exchange occurred:

Q. Okay. Now, [Mr.] Tidwell was looking for [Defendant] that morning; is that right?

A. No, sir. If he was looking for him, he would have went to his mom's house. My brother wasn't concerned about the situation that was going on. They[14] continued to send text messages to my brother's phone and he wasn't even concerned about it.

Q. Okay. Y'all were just hanging out at the picnic grounds waiting for your dad to get out of child support court?

A. Yes, sir.

. . . .

Q. Okay. Now, if your father would have arrived, y'all were just going to go to Shoney's. Y'all weren't going to stand there and wait for [Defendant] any further; is that what you're saying?

A. We weren't concerned about waiting on nobody. That wasn't our goal. Like, the picnic ground is a community ground, you know.

Q. I'm sorry?

A. The picnic ground is a community ground. That's where all of us done grew up. . . . It's just a common spot for everybody to relax.

Q. And Mr. Tidwell would go there frequently, you're saying?

A. Yes, sir. We all did.

. . . .

[14] It was unclear to whom Mr. Springer referred here.

Q. Now, would it be fair to say that [Defendant] was just going up to the picnic grounds because Mr. Tidwell was there calling him out?

A. If that's the case why did this man have a gun?

. . . .

Q. Mr. Tidwell was threatening his family?

A. Y'all . . . don't know my brother, so I guess I'm gonna have to break it down and explain it to you: My brother was . . . . a gentle giant . . . . This boy was continuously sending text messages to his phone and he was still smiling like, "I'm not even worried about this stuff," you know . . . . This young man came for an issue. He came to do what he did . . . .

. . . .

Q. And you're denying that the reason you and [Mr.] Tidwell were up there is because [Mr. Tidwell] was looking for him to settle this problem?

A. That's what -- yes, sir. My brother was not up there looking for nobody.

On redirect examination, the following exchange occurred:

Q. [Mr.] Tidwell was not in court that morning, or was he?

A. Yes, sir. He was earlier that morning.

Q. Okay. So [Mr.] Tidwell had been in Charlotte earlier in the morning for court?

A. Yes, sir.

Q. Along with your father?

A. Yes, sir.

Q. All right. I just want to clarify that detail. You've already testified that [Mr.] Tidwell was receiving -- or received numerous text messages from [D]efendant.

A. Yes, sir.

Q. Was [D]efendant . . . trying to find [Mr.] Tidwell?

A. Yes, sir.

Q. Do you know that? I mean, is . . .

A. He was just like sending taunting text messages like trying to call him out and, like I said, once again, my brother didn't pay no attention to it. He laughed it off. He looked at him as a kid.

Q. So when you went to the picnic grounds with . . . [Mr.] Tidwell, were you there waiting for [Defendant] to arrive?

A. No, sir.

Q. Did you have any idea that three men would be approaching you with weapons?

A. No, sir.

C. The State's presentation of or failure to correct false 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. Ahmon 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 state 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 *Roger Morris Bell v. State*, No. 03C01-9210-CR-00364, 1995 WL 113420, at *8 (Tenn. Crim. App. Mar. 15, 1995), *perm. app. denied* (Tenn. Aug. 28, 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).

Relative to Defendant's argument that some text messages indicated that Mr. Tidwell had robbed or stolen from third parties after his release from prison, Defendant has not referenced any message in particular; we note that the cell phone report is voluminous,

and we will not comb through it to make Defendant's argument for him. Further, Defendant has not supported his argument with citations to the relevant authorities or articulated how the unspecified messages would have impeached Mr. Springer's testimony. Defendant's contention has been waived. S*ee* Tenn. R. App. P. 27(a)(7), Tenn. Ct. Crim. App. R. 10(b).

Relative to the messages in which Mr. Tidwell allegedly informed Defendant of his location, Defendant has not proven that Mr. Springer offered false testimony. Although Defendant asserts in his appellate brief that Mr. Tidwell sent Defendant the two text messages, no proof in the record establishes that the telephone number ending in 8259 belonged to Defendant. We note that some of the text messages sent by the 8259 number were identical to other text messages Mr. Tidwell received from distinct telephone numbers.

Even if the 8259 number were established as Defendant's, no proof in the record exists that Mr. Springer saw the contents of the text message exchange. Mr. Springer testified that he knew Defendant was sending "taunting" text messages to Mr. Tidwell, but Mr. Springer was under the impression that Mr. Tidwell did not take Defendant seriously. We note that some room for interpretation exists as to whether Mr. Springer's testimony that, to his knowledge, they were waiting for their father and not Defendant, was incompatible with Mr. Tidwell's messaging Defendant his location.

Moreover, even if we assumed that the State knew of the contents of the cell phone report and concluded that Mr. Springer's testimony was false, Defendant has not established any reasonable likelihood that the false testimony was material and could have affected the judgment of the jury.

Significantly, unlike other cases involving a due process violation as a result of perjured testimony, the State's case did not rely mainly upon Mr. Springer's testimony, and by extension, his credibility. *Cf. Napue*, 360 U.S. at 265-66 (noting that the credibility of the "principle witness" for the state, who had falsely testified that he was promised no consideration for his testimony, was especially important because "the passage of time and the dim light in [the location of the shooting] made eyewitness identification very difficult and uncertain, and because some pertinent witnesses had left the state"); *Giglio*, 405 U.S. at 151, 154-55 (noting that "the Government's case depended almost entirely on" an unindicted coconspirator, who was the only person who linked the defendant with the crime, and who falsely testified that the prosecutor's office offered him no leniency in exchange for his testimony); *Spurlock*, 874 S.W.2d at 619 (concluding that when a witness' testimony comprised the "the sole, exclusive evidence" linking defendant to the victim's murder, and the witness and a police officer testified that he was offered no consideration in exchange for his testimony, audio tapes documenting the witness' repeated demands to be released from jail and the State's promises to obtain his release were material). We note

that Mr. Springer was thoroughly cross-examined and impeached about various inconsistencies in his statements and testimony, including multiple witnesses who claimed he identified Mr. Vaughn as his shooter and extensive discussion of his not identifying the shooter at the crime scene or the hospital.

Discounting Mr. Springer's testimony entirely, it was undisputed that Mr. Tidwell and Mr. Bell were shot to death and that Mr. Springer was shot multiple times. Defendant's presence at the crime scene was corroborated by Mr. Flanagan, Mr. Greer, Mr. Gilbert, Mr. Cathey, Vernecia, and Malik. Mr. Flanagan identified the Kel-Tec as the pistol Defendant had in his waistband when he exited the car and walked toward the picnic grounds. Vernecia corroborated that Defendant shot into the air before Mr. Tidwell tackled him. The Kel-Tec was recovered on the ground at the crime scene, and Agent Hodge's examination indicated that it was fired twice at the crime scene before it jammed. Defendant's presence with the co-defendants before and after the shooting was corroborated by Mr. Flanagan, Mr. Wilson, and Ms. Worley. As previously determined, the evidence is more than sufficient to establish Defendant's guilt. Consequently, we conclude that the allegedly false testimony from Mr. Springer was not material under the standard set forth in *Napue* and *Giglio*.

We acknowledge that, in closing and rebuttal argument, the State emphasized the victims' innocent purpose in visiting the picnic grounds. However, the jury was instructed that closing arguments are not evidence, and they are presumed to have followed the court's instructions in this regard. *State v. Cannon*, 642 S.W.3d 401, 444 (Tenn. Crim. App. 2021) (citing *State v. Jordan*, 325 S.W.3d 1, 55 n.12 (Tenn. 2010)).

Defendant has failed to prove that a clear and unequivocal rule of law was violated or that his substantial rights were adversely affected. *Adkisson*, 899 S.W.2d at 640-41. Defendant is not entitled to plain error relief.

VI. Jury Composition

Defendant contends that he was deprived of a trial by a jury of his peers because no African American prospective jurors were in the jury venire. His entire argument in this regard is the following:

> The Jury Venire was in excess of 100 and there was not an African American amongst them. While *Batson v. Kentucky*, 476 U.S. 79 (1986) establishes that Defendants are not entitled to a jury completely or partially composed of the Defendant's race, perhaps it is time that particular decision be revisited.

We note that, again, this argument was inadequately briefed. S*ee* Tenn. R. App. P. 27(a)(7), Tenn. Ct. Crim. App. R. 10(b). Moreover, Defendant raised no *Batson* challenge during jury selection. This issue has been waived.

Even if we were to exercise plain error review, Defendant's argument only requests that this court "revisit[]" federal precedent. It is not within the purview or authority of this court to change long-established federal constitutional jurisprudence. Defendant is not entitled to relief on this basis.

VII. Sentencing

Defendant contends that the trial court erred by imposing partial consecutive sentencing, arguing that the court erroneously found that Defendant was a professional criminal who had devoted his life to criminal acts as a major source of his livelihood. In addition, Defendant argues that his shooting into the air "negates the notion" that Defendant is a dangerous offender whose behavior indicated little to no regard for human life and no hesitation about committing a crime in which the risk to human life was high. The State responds that the court acted within its discretion in ordering partial consecutive sentences.

To facilitate meaningful appellate review of sentencing, the trial court must state on the record the factors it considered and the reasons for imposing the sentence chosen. Tenn. Code Ann. § 40-35-210(e) (2020); *State v. Bise*, 380 S.W.3d at 682, 706 (Tenn. 2012). When the record clearly establishes that the trial court imposed a sentence within the appropriate range after a "proper application of the purposes and principles of our Sentencing Act," this court reviews the trial court's sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *Bise*, 380 S.W.3d at 707. The party challenging the sentence on appeal bears the burden of establishing that the sentence was improper. Tenn. Code Ann. § 40-35-401 (2020), Sentencing Comm'n Cmts.

In *State v. Pollard*, the Tennessee Supreme Court expanded its holding in *Bise* to trial courts' decisions regarding consecutive sentencing. 432 S.W.3d 851, 859 (Tenn. 2013). "So long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal." *Id.* at 862 (citing Tenn. R. Crim. P. 32(c)(1)). In this case, the trial court detailed its findings on the record, and its decision is presumptively reasonable. *Id.*

The statutory factors governing alignment of sentences for a defendant convicted of multiple offenses is codified at Tennessee Code Annotated section 40-35-115(b), which provides, in pertinent part:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood; [or]
>
> . . . .
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high[.]

Tenn. Code Ann. § 40-35-115(b)(1), (4) (2021). Any one ground set out in Tennessee Code Annotated section 40-35-115(b) is "a sufficient basis for the imposition of consecutive sentences." *Pollard*, 432 S.W.3d at 862 (citing *State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013)).

Before a trial court may impose consecutive sentences on the basis that a defendant is a dangerous offender, the trial court must also find "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences . . . reasonably relate to the severity of the offenses committed." *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). In order to limit the use of the "dangerous offender" category to cases where it is warranted, our supreme court has stated that the trial court must make specific findings about "particular facts" which show that the *Wilkerson* factors apply to the defendant. *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

In this case, the trial court made the appropriate *Wilkerson* findings and articulated its reasoning on the record. The court stated that the co-defendants went to the picnic grounds with guns, anticipating a fistfight, and that "all the circumstantial evidence indicated that . . . it was not going to be a good situation." The court found that the circumstances of the offenses were aggravated, that confinement for an extended period of time was necessary to protect society, and that consecutive sentences reasonably related to the seriousness of the offenses. The court recounted that Defendant was "a leader, if not the leader, in causing all this to happen," that Defendant's conduct resulted in two deaths and Mr. Springer's near death, that Defendant was the first one to shoot into the air, and that Defendant asked Mr. Springer if he wanted to die. The record supports the court's conclusion, and it did not abuse its discretion in ordering partial consecutive sentences.

Because the trial court properly found one applicable factor supporting consecutive sentencing, even if any error occurred in the court's determination that Defendant was a professional criminal, the court did not abuse its discretion in ordering partial consecutive sentences. *See Pollard*, 432 S.W.3d at 862. Defendant is not entitled to relief on this basis.

VIII. Clerical Error

Our review of the record reflects that the completed judgment forms in Counts 4, 5, and 6 were signed by counsel for the parties but not the trial court. *See* Tenn. R. Crim. P.32(e)(1) (stating that "[a] judgment of conviction shall be signed by the judge and entered by the clerk."). We remand the case for the entry of amended, signed judgment forms.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed, and the case is remanded for the entry of signed judgment forms in Counts 4, 5, and 6.

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ROBERT L. HOLLOWAY, JR., JUDGE