IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 20, 2022

STATE OF TENNESSEE v. MONTREAL PORTIS ROBINSON

Appeal from the Circuit Court for Madison County
No. 17-242 Kyle C. Atkins, Judge

No. W2022-00459-CCA-R3-CD

A Madison County jury found the Defendant, Montreal Portis Robinson, guilty of felony murder in the perpetration of a theft, especially aggravated kidnapping, robbery, and theft of property. On appeal, the Defendant argues that the evidence is insufficient to sustain his convictions. We conclude that the evidence is sufficient to support the Defendant's convictions for especially aggravated kidnapping and robbery. However, we also conclude that the evidence is insufficient to support the Defendant's convictions for theft and felony murder in the perpetration of a theft. Accordingly, we dismiss the theft charge, and we modify the Defendant's conviction for felony murder to that of second degree murder as a lesser-included offense. We respectfully remand the case for further proceedings consistent with this opinion, including the entry of a modified judgment and a sentencing hearing on the conviction for second degree murder.

Tenn. R. App. P. 3 Appeal as of Right;
Judgments of the Circuit Court Affirmed in Part,
Modified in Part, and Dismissed in Part; Case Remanded

TOM GREENHOLTZ, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Alexander D. Camp (on appeal) and Joshua B. Dougan (at trial), Jackson, Tennessee, for the appellant, Montreal Portis Robinson.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Jerry Woodall, District Attorney General; and Nina W. Seiler and Bradley F. Champine, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On May 1, 2017, the Madison County Grand Jury returned a seven-count indictment against the Defendant, Mr. Montreal Portis Robinson, and co-defendant, Mr. Corinthians Darnez Person. The grand jury charged them with committing the following offenses against the victim, Mr. Louis Martez Jones:

- Count 1: first degree premeditated murder
- Count 2: first degree felony murder during the attempt to perpetrate a theft;
- Count 3: first degree felony murder during the attempt to perpetrate a robbery;
- Count 4: first degree felony murder during the attempt to perpetrate a kidnapping;
- Count 5: especially aggravated kidnapping;
- Count 6: especially aggravated robbery; and
- Count 7: theft of property valued at $10,000 or more but less than $60,000.

Generally, the State alleged that the Defendant, co-defendant Mr. Person, and two other people kidnapped and killed the victim after Mr. Person stole the victim's car. The State argued that Mr. Person and the Defendant then traveled to Oklahoma City, where Mr. Person planned to use the victim's car to pay off a drug debt. Before trial, Mr. Person agreed to plead guilty to the offense of second degree murder, and the trial began against the Defendant alone on April 2, 2018.[1]

A. DISCOVERY OF MR. JONES

Between 10:00 and 10:30 a.m. on June 4, 2015, Ms. Sheila Deberry was driving slowly on Betty Manley Road near Jackson, Tennessee. She noticed something in a nearby field, parked, and got out of her car. Although she did not go into the field, she believed

[1] To help facilitate the organization of the extensive factual background, we do not include testimony that is not directly relevant to the issues raised in this appeal.

she saw a dead body. She called 911 and stayed at the scene until law enforcement arrived fifteen or twenty minutes later.

Anthony Heavner, the Chief of Police for the City of Portland Police Department, testified that on June 4, 2015, he was a patrol commander for the Madison County Sheriff's Office. He responded to Betty Manley Road around 10:00 a.m. and was the first officer at the scene. Upon his arrival, two bystanders directed him to the body lying in the field. Chief Heavner checked the body for signs of life but detected none.

The victim was born in 1991 and was twenty-three or twenty-four years old at the time of his death. At the time of his death, the victim lived with his parents and brother on Roxy Cove in Jackson. The victim was a supervisor for Goodwill Industries, and as a "side job," he purchased and resold shoes.

B. THE CRIMES

1. Co-Defendant Mr. Corinthians Person

The events giving rise to this case started with Mr. Corinthians Person, whose nickname was "Low Rent." Mr. Person testified at trial that he was twenty-two years old and was the victim's cousin. Mr. Person acknowledged that at the time of trial, he was serving a six-year sentence for two counts of robbery. He further admitted that he had been indicted for the same charges as the Defendant and that the State had offered him a plea bargain of thirty years with potential release eligibility after serving eighty-five percent of his sentence in exchange for his truthful testimony at the Defendant's trial.

In June 2015, Mr. Person usually lived with his girlfriend, Ms. Kenya Roberts, in Ripley, but he occasionally stayed at his mother's house on Old Denmark Road in Madison County. Mr. Person said that he and the Defendant were "[a]cquaintances" and that in June 2015, they had known each other for less than a year. Mr. Person did not know where the Defendant lived and had never tried to visit him.

Mr. Person said that he, Mr. Greg Bond, and Mr. Toodie Wilson owed a $40,000 drug debt to someone named Diego. Mr. Person wanted the victim to call his cousin, Mr. Greg Bond, because Mr. Greg Bond "didn't really want to be involved" and "was really trying to sideline and frame" Mr. Person.

2. Initial Contact with Mr. Jones

On June 3, 2015, Mr. Person called the victim, and they agreed to meet at a motel in Jackson. Mr. Person and Mr. Tiquarius Cole went to the motel around 10:00 a.m., and Mr. Cole had a nine-millimeter pistol. The victim arrived around 12:30 p.m. in a Chevrolet Caprice, and when he entered the room, Mr. Cole patted him down. The three then discussed Mr. Greg Bond, but when the victim declined to help—he wanted to stay out of the situation—the situation "went south."

Mr. Person went to the bathroom, and while there, he heard Mr. Cole ask the victim, "Are you ready to go to sleep?" The victim responded, "No," and Mr. Person heard "tussling." Exiting the bathroom, he saw the men fighting over Mr. Cole's gun. Mr. Cole hit the victim with the gun on the right side of the head, causing a gash in his head.

3. Theft of the Camaro

The victim owned two cars: a white 1994 Chevrolet Caprice and a 2012 Chevrolet Camaro with an orange or red stripe on the hood. At some point during the encounter at the motel, the victim called his father at home. The victim told his father that he was leaving for work, and he asked his father to leave the keys to his other car, the Camaro, outside. The father left the keys underneath a grill on the carport before he went to work that afternoon.

Mr. Person then drove the three men to the victim's house in the victim's Caprice. The victim sat in the front passenger's seat, and Mr. Cole, who still had his pistol, sat in the back seat. At the victim's house, Mr. Cole retrieved the keys to the victim's Camaro from under the grill, and they all returned to the motel in the Camaro, with Mr. Person driving and leaving the Caprice at the victim's house. At trial, Mr. Person explained that he took the victim's Camaro to pay his debt to Diego.

4. Encounter with the Defendant

Mr. Cole and the victim stayed at the motel. Mr. Person left, picked up Mr. Demetrius Moore, and stopped at a Royal Street convenience store. While there, Mr. Person saw the Defendant. Mr. Person then drove the Camaro to a McDonald's restaurant, followed by the Defendant and Mr. Moore in a white Jeep Cherokee owned by the Defendant's girlfriend, Ms. Shaterica Billingsley. At the restaurant, the three men discussed the victim.

Mr. Moore and the Defendant left the restaurant in the Jeep. Mr. Person returned to the motel with food for the victim and Mr. Cole. Mr. Person left the food in the room and stepped outside to make a telephone call. He saw a Jackson Police Department police cruiser and left in the Camaro. Mr. Person called Mr. Cole and instructed him to bring the victim to the gas station across the street from the motel.

After they rendezvoused at the gas station, Mr. Person drove them "to the country," meaning Reid Road in rural Madison County. There, they met the Defendant, who was alone in the Jeep. The victim sat alone in the Camaro while the other three men stood outside the vehicles and talked. The Defendant said, "[W]e got to kill [the victim]." Mr. Person could not recall why the Defendant wanted to kill the victim. At that point, Mr. Person had not seen the Defendant with a weapon. Mr. Person said they did not need to kill the victim because Mr. Person had the victim's car.

5. The Robbery

While the victim was in the car, Mr. Person, Mr. Cole, and the Defendant opened the car door to speak with the victim. The victim told them that he had $10,000 he could pay toward Mr. Greg Bond's debt. Although the Defendant and Mr. Cole wanted the money, Mr. Person said he did not need the money because he had the victim's Camaro.

The group then drove to the victim's house, for the second time that day, to get the victim's money; Mr. Person drove the Camaro, and the Defendant drove the Jeep. During the drive, the Defendant talked to the victim by telephone and told him, "If you don't go in there and act right, I'm going to come up there and f*ck up your whole family." The victim responded, "You don't need to worry about it."

After they arrived, the victim and Mr. Cole, who still had his gun, entered the victim's house, and the Defendant and Mr. Person waited in the vehicles. When Mr. Cole and the victim exited the house, Mr. Cole was holding a pair of shoes, and he had the victim's money. Mr. Cole, Mr. Person, and the Defendant split the money evenly, and each man received approximately $1,000 or $1,100. Then, the victim got into the Camaro with Mr. Person, and Mr. Cole got into the Jeep with the Defendant.

6. The Homicide

Leaving the victim's house, the group traveled to a field across the street "from the old Walmart." While at the field, Mr. Cole bound the victim's wrists with packaging tape Mr. Cole had found in the Caprice. Then, Mr. Cole got back inside the Camaro with the victim and Mr. Person, and everyone drove toward Cerra Gordo, Tennessee. They stopped

at a spot by the Turner Dairy, and the Defendant, Mr. Person, and Mr. Cole got out of the car. The Defendant said, "We got to kill [the victim]." The Defendant did not explain, but Mr. Person surmised it was "[b]ecause once it's a kidnapping charge, it's a[n] aggravated robbery charge and it's [an] attempted murder charge." Mr. Cole agreed with the Defendant, but Mr. Person did not.

At that point, the group drove to Mr. Person's mother's house and parked in the driveway. They smoked marijuana while Mr. Cole and the Defendant further discussed killing the victim. They then drove to another field off Betty Manley Road, approximately one mile away.

The Defendant "pull[ed] in the field and back[ed] up." Mr. Person drove the Camaro into the entrance of the field "nose first" and stayed there. Everyone got out of the vehicles. The Defendant had a black pistol grip Mossberg shotgun. The Defendant told the victim, "Look up at the sky." Mr. Person said that the victim "didn't want to be dragged into . . . what his family or . . . his cousin had going on." The Defendant, who was five or six feet away from the victim, shot the victim in the back. The victim ran into the field. The Defendant shot the victim twice more, and the victim fell. After the victim fell, the Defendant shot the victim in the face.

Mr. Person said that he was not standing close to the other men during the shooting. When the Defendant shot the victim in the face, Mr. Cole walked up to the victim. The Defendant handed Mr. Cole the shotgun and said they "all had to shoot" the victim. Mr. Cole struck the victim in the leg with the shotgun, which caused the shotgun's stock to break off from the rest of the gun. Mr. Cole handed the broken stock to Mr. Person, and Mr. Person threw the stock near a tree. Afterward, Mr. Cole shot the victim in the face with the shotgun. Mr. Cole gave his nine-millimeter pistol to Mr. Person. Mr. Person "rack[ed]" the gun, some bullets fell out of it, and he shot toward the victim.

C. TRIP TO OKLAHOMA CITY

After the murder, Mr. Person and Mr. Cole went to a truck stop, and the Defendant followed them in the Jeep. The Defendant had the shotgun, and Mr. Person and Mr. Cole had the pistol. After getting gas, Mr. Person and Mr. Cole drove to Mr. Cole's house, where they stayed briefly while Mr. Cole attempted to wipe the fingerprints off the Camaro.

Subsequently, the Defendant called Mr. Person and instructed him to find the broken stock of the shotgun. Four or five minutes after leaving Mr. Cole's house, Mr. Person and Mr. Cole returned to the field but could not find the shotgun stock. Mr. Person took Mr. Cole home and then met with the Defendant in front of a cemetery on Hollywood Drive.

The Defendant arrived in the Jeep with Ms. Billingsley. The trio returned to the field, and the Defendant and Mr. Person unsuccessfully searched for the broken stock of the shotgun while Ms. Billingsley waited in the Jeep.

Mr. Person went to Ripley and picked up Ms. Roberts. The group then traveled to Memphis and spent the night. The following day, Mr. Person and the Defendant stopped at a Walmart in Memphis, and Mr. Person bought a global positioning system so he could go to Oklahoma to give Diego the Camaro. Mr. Person, Ms. Roberts, the Defendant, and Ms. Billingsley drove to Oklahoma in the Camaro and the Jeep.

Upon arriving in Oklahoma City, they rented a motel room. After receiving directions from Diego, Mr. Person parked the Camaro near a house in a residential neighborhood. The next day, Mr. Person's cousin, Willie Brown, who lived in Oklahoma City, called Mr. Person and told him that the police were looking at the Camaro. This information prompted Mr. Person, Ms. Roberts, the Defendant, and Ms. Billingsley to return to Tennessee in the Jeep.

D. RETURN TO TENNESSEE

When the group arrived back in Tennessee, Mr. Person and Ms. Roberts went to Ms. Roberts's house in Ripley, while Ms. Billingsley took the Defendant back to his apartment in Jackson. Mr. Person was later arrested at Ms. Roberts's home.

After his return to Tennessee, the Defendant met with his cousin, Mr. Dontavious Bond. The Defendant told Mr. Dontavious Bond that "he had killed – he told me he had killed that man, [the victim] . . . . He pretty much told me everything that he – the whole situation." The Defendant said that "Rent" shot the victim two or three times but that the victim got up and ran. The Defendant said that he then shot the victim in the head. The Defendant also said that Mr. Person beat the victim in the head with the gun's stock, that they left the broken stock in the field, and that they went back to try to find it. The Defendant told Mr. Dontavious Bond that the Defendant, the Defendant's girlfriend, and Mr. Person took a Camaro "to Oklahoma. They were supposed to trade it to some Mexicans for some weed."

Mr. Dontavious Bond said that when he spoke with the Defendant, the Defendant asked him to go where Mr. Person "was at that time." The Defendant "said he wanted to kill [Mr. Person] because he felt like [Mr. Person] was going to talk."

The Defendant had the shotgun used in the victim's murder and additional ammunition, and he asked Mr. Dontavious Bond to hide them. Mr. Dontavious Bond

initially put these items in his girlfriend's attic but later put them in a duffle bag and took them to his sister's apartment. About thirty minutes after moving the items to his sister's apartment, Mr. Dontavious Bond was arrested, and he told the police where he hid the items.

E. SUPPORTING FORENSIC EVIDENCE

The State called several witnesses to testify about other aspects of the investigation linking the various parties, including the Defendant, to the murder of the victim. For example, Special Agent Cervinia Braswell testified that she was a forensic scientist with the Tennessee Bureau of Investigation's (TBI's) Firearms Identification Unit. She confirmed that she found four holes in the victim's shirt, specifically on the left back shoulder, the left lower back, the right mid back, and the right side. She determined from the hole on the mid-back that the shotgun was fired when the muzzle of the gun was more than six feet away but less than twenty-five feet away from the victim. The remaining bullets were fired when the muzzle was less than six feet away.

Special Agent Miranda Gaddes testified that she was a special agent in the TBI's Trace Evidence Unit of the Forensic Services Division. She stated that she cast the tire treads found during the search of the field off Betty Manley Road on June 5, 2015. She determined the casts were consistent with tires from the Camaro and the Jeep.

Dr. David Zimmerman testified that he was the medical examiner who performed the autopsy on the victim. Dr. Zimmerman said that the victim had two shotgun wounds on the head, a shotgun wound on the right side of the torso, a shotgun wound on the left shoulder, and two shotgun wounds on the back. Dr. Zimmerman found no firearm wounds other than shotgun wounds. Dr. Zimmerman said that "[t]he cause of death was multiple shotgun wounds and the manner of death was homicide." On cross-examination, Dr. Zimmerman confirmed that he could not determine the order in which the gunshot wounds occurred, though he assumed all of the shots were fired within a few minutes of each other.

In addition, law enforcement witnesses testified that they recovered the shotgun from the apartment of Mr. Dontavious Bond's sister. The stock was broken off the shotgun. Six shotgun shell casings found in the field off Betty Manley Road were forensically tested, and TBI Special Agent Braswell determined that they were each fired from the recovered shotgun.

F. STATE'S ELECTION AND VERDICT

When the State rested its case, the trial court required the State to elect the theft—the Camaro or the money—that would serve as the predicate felony to the felony murder charge in Count 2. The State elected the theft of the Camaro as the predicate felony for that charge. After the Defendant rested his case without further proof, the trial court submitted the case to the jury.

The jury found the Defendant guilty of theft and felony murder in the perpetration of a theft as charged in Counts 7 and 2, respectively. The jury also found the Defendant guilty of especially aggravated kidnapping and the lesser-included offense of robbery, as charged in Counts 5 and 6, respectively.

However, the jury could not reach a unanimous verdict regarding the remaining counts of the indictment. These charges included first degree premeditated murder; felony murder during the attempt to perpetrate a robbery; and felony murder during the attempt to perpetrate a kidnapping. The State ultimately dismissed these three charges in Counts 1, 3, and 4 of the indictment.

G. SENTENCING AND APPEAL

The jury imposed a life sentence without the possibility of parole for the felony murder conviction. In addition, the trial court sentenced the Defendant as a Range II, multiple offender to concurrent sentences of eight years for the robbery conviction and eight years for the theft conviction. The trial court also sentenced the Defendant to twenty-five years for the especially aggravated kidnapping conviction and ordered the sentence to be served consecutively to the other sentences for a total effective sentence of life plus thirty-two years.

The trial court denied the Defendant's motion for a new trial on March 11, 2022, and the Defendant filed an untimely notice of appeal on April 18, 2022. By separate order, though, this Court waived the timely filing in the interests of justice and permitted this appeal to proceed. *See State v. Robinson*, No. 2022-00459-CCA-R3-CD (Tenn. Crim. App. Apr. 18, 2022) (order); *see also* Tenn. R. App. P. 4(a).

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). In this appeal, the Defendant challenges only the legal sufficiency of the evidence supporting each of his convictions.

In reviewing a challenge to the sufficiency of the evidence, "a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt." *State v. Reynolds*, 635 S.W.3d 893, 914 (Tenn. 2021) (internal quotation marks and citations omitted). As such, "the defendant has the burden on appeal of demonstrating why the evidence was insufficient to support the jury's verdict." *State v. Jones*, 589 S.W.3d 747, 760 (Tenn. 2019) (citing *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982)).

"The standard for appellate review of a claim challenging the sufficiency of the State's evidence 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.'" *State v. Miller*, 638 S.W.3d 136, 157 (Tenn. 2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When "'making this determination, we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)). The trier of fact, not this Court, resolves "all questions as to the credibility of trial witnesses, the weight and value of the evidence, and issues of fact raised by the evidence," and this Court "may not re-weigh or re-evaluate the evidence." *State v. Lewter*, 313 S.W.3d 745, 747 (Tenn. 2010). "The standard of review is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (internal quotations and citations omitted).

ANALYSIS

A. THEFT OF PROPERTY

We first address whether the evidence is sufficient to sustain the Defendant's conviction for the theft of the victim's Camaro. Essentially, the parties dispute when the theft of the Camaro occurred or was completed. The Defendant argues, for example, that Mr. Person completed the theft before the Defendant first became involved in the events leading to the victim's death. He also asserts that no proof shows that he obtained or exercised control over the Camaro at any time or that he had any motive to do so. For its

part, the State responds that the theft was not completed until the victim lost constructive possession of his car following his death. We agree with the Defendant.

1. When did the Theft of the Camaro Occur?

Generally, "[n]on-continuing offenses are consummated when the last element of the offense is satisfied." *State v. Legg*, 9 S.W.3d 111, 116 n.3 (Tenn. 1999); *see* Model Penal Code § 1.06(4) ("An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated."). The elements constituting the offense of theft are found in Tennessee Code Annotated section 39-14-103(a) (2018). This statute provides that "[a] person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent."

As such, "three elements must be proven to establish theft under our statute: '(1) the defendant knowingly obtained or exercised control over property; (2) the defendant did not have the owner's effective consent; and (3) the defendant intended to deprive the owner of the property.'" *State v. Gentry*, 538 S.W.3d 413, 422 (Tenn. 2017) (quoting *State v. Amanns*, 2 S.W.3d 241, 244-45 (Tenn. Crim. App. 1999)). As this Court has recognized, "from the plain language of the theft offenses, theft by obtaining and theft by exercising control are the 'same offense.'" *State v. Kennedy*, 7 S.W.3d 58, 70 (Tenn. Crim. App. 1999); *see State v. Sweet*, No. E2010-00729-CCA-R3-CD, 2011 WL 6813180, at *25 (Tenn. Crim. App. Dec. 22, 2011).

In this case, the theft of the victim's Camaro by Mr. Person and Mr. Cole was complete as soon as Mr. Cole drove the car out of the victim's driveway. First, the record shows that Mr. Person "obtained" the Camaro and exercised control over it when, after Mr. Cole took the keys to the car, Mr. Person drove it away. The car then remained in Mr. Person's actual possession at all times until its delivery to Oklahoma City. Tenn. Code Ann. § 39-11-106(a)(27)(B) (2018) ("'Obtain' includes, but is not limited to, the taking, carrying away or the sale, conveyance or transfer of title to or interest in or possession of property[.]").

Second, the record shows that the victim did not consent to Mr. Person taking his car. Interestingly, the State did not ask Mr. Person whether the victim consented to, or agreed with, the taking of his car to satisfy a drug debt. Nevertheless, viewing the proof in a light most favorable to the State, a reasonable jury certainly could have found that no such consent was present. The trip to get the Camaro occurred after the victim declined to help with the drug debt and after Mr. Cole threatened and assaulted him with a nine-millimeter pistol. Notably, even when the group arrived at the victim's house, the victim

was not permitted to get the keys to his car. Instead, Mr. Cole obtained the keys from under the grill, drove the car out of the driveway, and gave the car to Mr. Person. The victim was not involved in the process at all. The jury could have inferred from the prior acts of violence, from Mr. Cole's possession of a deadly weapon, and from the circumstances of the taking that Mr. Cole and Mr. Person did not have the victim's effective consent to take the Camaro. *See State v. Tynes*, No. W2010-02511-CCA-R3-CD, 2013 WL 1043202, at *24 (Tenn. Crim. App. Mar. 13, 2013) (stating that the evidence showed defendant took actual possession of car, and victim gave car keys to robbers "because he was being held at gunpoint . . . . This proof permits the reasonable inference that [victim] did not consent to having his car taken . . . .").

Finally, the record shows that Mr. Person had the intention to deprive the victim of the car at the time it was taken from the driveway. Under our theft statute, the term "deprive" means to "[w]ithhold property from the owner permanently or for such a period of time as to substantially diminish the value or enjoyment of the property to the owner[.]" Tenn. Code Ann. § 39-11-106(b). However, the term also includes actions to "[d]ispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely[.]" *Id.* § 39-11-106(c). Here, Mr. Person was asked specifically why he took the Camaro, and he testified that he took the victim's Camaro so that he could "clear [his] debt up" with Diego. This testimony is evidence that Mr. Person intended both to withhold the car from the victim and to dispose of it under circumstances in which the victim would not get it back.

We conclude that all the elements of a theft offense occurred when the Camaro was taken from the victim's driveway because all of the elements necessary to constitute the offense had occurred at this time. The State disagrees with this conclusion. The State argues that the taking was not completed until the victim's murder because the victim was in constructive possession of his Camaro until that time. We respectfully disagree.

The conclusion is untenable that no taking occurred simply because the victim was present in his own car as a hostage. The focus of any constructive possession inquiry is on one's "power and intention at a given time to exercise dominion and control" over the object alleged to be possessed. *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001); *State v. Fayne*, 451 S.W.3d 362, 370 (Tenn. 2014). While "[c]onstructive possession depends on the totality of the circumstances in each case," *State v. Robinson*, 400 S.W.3d 529, 534 (Tenn. 2013), constructive possession must include "the ability to reduce an object to actual possession." *State v. Ross*, 49 S.W.3d 833, 845-46 (Tenn. 2001) (citation and internal quotation marks omitted). Without more, a person's mere presence near an object is insufficient to support a finding of constructive possession. *State v. Transou*, 928 S.W.2d 949, 956 (Tenn. Crim. App. 1996).

In this case, nothing apart from the victim's presence as a hostage in the backseat of the Camaro suggests that he had constructive possession of his car after Mr. Person took it. In fact, all the proof introduced at the trial compels the contrary conclusion. After the initial taking of the Camaro by Mr. Person and Mr. Cole, the victim never again had the power "to exercise dominion and control" over the vehicle. Immediately after he took the Camaro, Mr. Person took Mr. Cole and the victim back to the motel room and then left again with the car. When Mr. Person returned to the motel a second time to pick up Mr. Cole and the victim, Mr. Person drove the car, and Mr. Cole was always armed. The victim never had access to the keys, and he could not, and did not, drive his Camaro at any time. Immediately after the later robbery, but some time before the victim's murder, Mr. Cole bound the victim with packing tape. The record simply does not support a conclusion that the victim somehow remained in "constructive possession" of his Camaro because he never had the power to take back his car or regain its actual possession from Mr. Person. Accordingly, we conclude that all the elements of a theft offense were completed when the Camaro was taken from the victim's driveway.

2. Defendant's Liability for His Own Conduct

Because the proof shows that the theft of the Camaro was completed when Mr. Person and Mr. Cole first took possession of the car, we now examine the Defendant's responsibility for that theft. As an initial matter, the record does not contain evidence that would permit a reasonable jury to find that the Defendant either took or exercised control over the victim's Camaro. Indeed, at all times after Mr. Person took the Camaro from the victim's driveway on the afternoon of June 3, through its delivery to Diego in Oklahoma City sometime later, Mr. Person was in possession of the car. Moreover, no evidence shows that the Defendant ever drove the Camaro, was a passenger in the car, or exercised control over the car. As such, the record does not support a conclusion that the Defendant may be held criminally liable for the theft of the Camaro "by [his] own conduct." Tenn. Code Ann. § 39-11-401(a) (2018).

3. Defendant's Liability for Mr. Person's Conduct

Even if the Defendant did not steal the Camaro through his own actions, the law nevertheless recognizes that he could be held criminally responsible for Mr. Person's conduct under some circumstances. Tennessee Code Annotated section 39-11-402(2) (2018) provides:

> A person is criminally responsible for an offense committed by the conduct of another, if:
>
> . . . .

> (2) Acting 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[.]

"Criminal responsibility is not a separate crime but instead a theory by which the [S]tate 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). "Criminal responsibility represents a legislative codification of the common law theories of aiding and abetting and accessories before the fact." *State v. Dickson*, 413 S.W.3d 735, 744 (Tenn. 2013). "[A]n accessory before the fact was defined as 'one who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime.'" *State v. Hawk*, 170 S.W.3d 547, 550 (Tenn. 2005) (quoting 4 William Blackstone, *Commentaries* at 36).

"[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). "No particular act need be shown, and the defendant need not have taken a physical part in the crime. Mere encouragement of the principal will suffice." *Id.* (citations omitted). To be found criminally responsible for the actions of another, the defendant must "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting *Hembree v. State,* 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). "Under the theory of criminal responsibility, the evidence must establish that a defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted or assisted its commission." *State v. Pope*, 427 S.W.3d 363, 369 (Tenn. 2013).

Viewing the evidence in a light most favorable to the State, the evidence does not support a determination that the Defendant is criminally responsible for Mr. Person's theft of the victim's Camaro. For example, no evidence in the record establishes any of the following facts or circumstances:

- that the Defendant knew or was aware that Mr. Person would take the victim's Camaro before Mr. Person took the car;

- that the Defendant participated in any part in the planning for the theft of the Camaro;

- that the Defendant encouraged Mr. Person to commit the theft;

- that the Defendant solicited or directed Mr. Person to commit the theft;
- that the Defendant was present during the commission of the theft;
- that the Defendant aided, or attempted to aid, Mr. Person in taking the Camaro;
- that the Defendant was ever in possession of the Camaro at any time before or after the theft; or
- that the Defendant shared in the proceeds of the theft or that any debt belonging to the Defendant was satisfied by delivery of the car to Diego.

Indeed, even with respect to the later killing of the victim, no proof shows that the Defendant participated in the killing of the victim to cover up the theft of the Camaro. When Mr. Person was asked why the Defendant wanted to kill the victim after the robbery of the victim's money, Mr. Person replied that "[b]ecause once it's a kidnapping charge, it's a[n] aggravated robbery charge and it's attempted murder charge." He did not mention the theft of the Camaro as a motive, and he noted that the Defendant did not need to kill the victim to obtain the Camaro "[b]ecause I already have his car. . . . [T]hat's what I needed."

On the record as it stands, the Defendant could not have "promoted or assisted" in the commission of the theft or shared in the intent to commit the theft because that crime was completed before the Defendant aligned himself with Mr. Person and Mr. Cole. Accordingly, we conclude that the proof is legally insufficient to sustain the Defendant's conviction for the theft of the Camaro. Because no other lesser-included offenses exist that are supported by the evidence, we reverse the trial court's judgment, vacate the conviction, and dismiss the charge. *See State v. Parker*, 350 S.W.3d 883, 909 (Tenn. 2011) ("[A] court reviewing the sufficiency of the evidence must determine whether each element of the conviction offense is supported by sufficient proof. If the proof does not adequately support each and every element, the defendant is entitled to a reversal of the conviction.").

B. FELONY MURDER IN THE PERPETRATION OF A THEFT

The Defendant next argues that the proof is insufficient to support his conviction for felony murder in the perpetration of the theft of the Camaro. As with the underlying felony, the Defendant asserts that the theft of the Camaro had already been committed and completed at the time he was alleged to have begun any activity relating to the murder of the victim. The State responds that "the theft occurred once the victim lost and the defendant gained constructive possession of the Camaro." We respectfully disagree.

1. Intent to Commit Underlying Felony of Theft of Camaro

First degree felony murder is defined as "[the] killing of another committed in the perpetration of or attempt to perpetrate any . . . theft[.]" Tenn. Code Ann. § 39-13-202(a)(2) (2018). No culpable mental state is required for a conviction of felony murder except the intent to commit the underlying felony, *id.* § 39-13-202(b), and the defendant "must intend to commit the underlying felony at the time the killing occurs," *State v. Buggs*, 995 S.W.2d 102, 107 (Tenn. 1999). Importantly, our supreme court has held that "in determining whether the evidence is sufficient to support a conviction of first degree murder in the perpetration of theft, a court must determine whether the killing is closely connected to the *initial taking* of the property in time, place, causation, and continuity of action." *State v. Pierce*, 23 S.W.3d 289, 295 (Tenn. 2000) (emphasis added). This is because "'[t]he killing must have had an intimate relation and close connection with the felony . . . and not be separate, distinct, and independent from it.'" *State v. Thacker*, 164 S.W.3d 208, 223 (Tenn. 2005) (quoting *Wharton on Homicide*, § 126 (3d ed.) (omission in original)).

In this case, the State elected that the underlying felony for this felony murder charge was the theft of the Camaro. As such, before the Defendant could have been convicted of felony murder in this context, the State must have proven beyond a reasonable doubt that the Defendant intended to commit a theft of the victim's Camaro at the time the victim was killed. In this case, the record unequivocally shows that Mr. Person and Mr. Cole had completed the theft of the Camaro before the Defendant's involvement. The Defendant could not have had any intent to commit a theft that was already long completed by others at the time of the killing. Indeed, as we recognized earlier, the Defendant could not be held directly or criminally responsible for Mr. Person's theft of the vehicle because the theft was completed before the Defendant joined his co-defendants.

It is true that the "killing may precede, coincide with, or follow the felony and still be considered as occurring 'in the perpetration of' the felony offense, so long as there is a connection in time, place, and continuity of action." *State v. Buggs*, 995 S.W.2d 102, 106

(Tenn. 1999). However, our supreme court has specifically cautioned against extending the definition of theft beyond the initial taking in a felony murder context. As the supreme court observed, extending the felony murder rule beyond the initial taking would be "illogical," as

> "[o]ne of the original purposes of the felony-murder rule was to deter the commission of certain felonies in a dangerous or violent way." If the rule is to have any deterrent effect, it must not be extended to killings which are collateral to and separate from the underlying felony. Moreover, requiring a close nexus between the initial taking and the killing is particularly appropriate given that the felony murder rule is "a legal fiction in which the intent and the malice to commit the underlying felony is 'transferred' to elevate an unintentional killing to first-degree murder[.]"

Pierce, 23 S.W.3d at 296 (quoting *Buggs*, 995 S.W.2d at 107 (internal citations and quotations omitted)). With this admonition in mind, we conclude that the victim's killing was separate from the underlying felony involving the completed theft of the Camaro.

2. Covering Up the Felony

In reaching this conclusion, we are mindful that a defendant's participation in covering up an underlying felony may be considered, along with other circumstances, in determining whether a defendant is legally responsible for felony murder. For example, in *State v. Wingate*, the defendant and his co-defendants stole and cashed their employer's checks, killed their employer, and burned the employer's body. *State v. Wingate*, No. M1999-00624-CCA-R3-CD, 2000 WL 680388, at *1-2 (Tenn. Crim. App. May 25, 2000). This Court concluded that one could infer "that the victim was killed because he could expose the theft, thwart the theft, or interfere with the commission of the theft." *Id.* at *8. We recognized that "by the undisputed evidence of the checks forged prior to and following the murder, the murder was a part of the [defendant's] continuing scheme to steal checks and ultimately the victim's funds by means of forgery." *Id.*

However, this case is not *Wingate*. Here, there is no proof that the Defendant was part of the scheme to steal the victim's Camaro or that he received any benefit or proceeds from the car's theft. More importantly, there is no proof that the Defendant participated in killing the victim to cover up the theft of the Camaro by Mr. Person and Mr. Cole. For example, when the Defendant first proposed killing the victim, Mr. Person did not understand why the Defendant made the proposal because the Camaro had already been stolen. However, when the Defendant again proposed to kill the victim after the later robbery of the victim's money, Mr. Person understood that the Defendant wanted to kill

the victim "[b]ecause once it's a kidnapping charge, it's a[n] aggravated robbery charge and it's [an] attempted murder charge." As such, in addition to there being no evidence that the Defendant intended to steal the Camaro at the time he participated in killing the victim, there is also no evidence that the Defendant, either before the killing or after, was acting to cover up a theft that had been completed before he became involved. As such, we cannot conclude that the Defendant's actions after the completed theft are sufficient to form a nexus between the underlying felony and the killing.

3. Remedy

Viewing the evidence in a light most favorable to the State, we conclude that the evidence is not sufficient to sustain the Defendant's conviction for felony murder in the perpetration of the theft of the Camaro. However, this conclusion does not automatically compel the dismissal of this charge. Instead, we must examine whether the proof supports a conviction on any lesser-included offenses.

a. Possible Reduction in Grade of Offense

Our supreme court long ago made clear that when a greater conviction is vacated because of insufficient evidence, this court must further examine whether the evidence would be sufficient to sustain a conviction on any lesser-included offense as well. The reasons behind this principle have been summarized as follows:

> [W]here the indictment embraced several offenses of different grades and the accused was convicted of the greater, the jury by its verdict has also convicted him of all lesser offenses.
>
> Upon appeal we not only look to the record to determine if the evidence preponderates in favor of his innocence of the greater crime, but also if it preponderates against the verdict as to the lesser offenses. Under the judgment of conviction he is presumed to be guilty of each and every crime embraced in the indictment.

Forsha v. State, 194 S.W.2d 463, 467 (Tenn. 1946).

Thus, where the evidence is insufficient to support a conviction of a greater offense, but the evidence *is* sufficient to support a conviction of a lesser-included offense, this court has the "authority to order a reduction in [the] degree of the offense for which defendants were convicted[.]" *Bandy v. State*, 575 S.W.2d 278, 281 (Tenn. 1979) (citations omitted); *see State v. Parker*, 350 S.W.3d 883, 910 (Tenn. 2011). We have often applied these

principles as well. *See, e.g.*, *State v. Winters*, 137 S.W.3d 641, 656 (Tenn. Crim. App. 2003) ("Often this court will modify a conviction of a greater offense of which the evidence is insufficient to a conviction of a lesser-offense of which the evidence is sufficient."); *State v. Long*, 45 S.W.3d 611, 622 (Tenn. Crim. App. 2000) ("When the proof at trial is not sufficient to support the greater offense, but is sufficient to support a lesser included offense, this Court has the authority to order a reduction in the degree of the offense for which Defendant could be convicted."). Accordingly, we look to the lesser-included offenses of felony murder to determine whether the proof is legally sufficient to support a conviction on any of those offenses beyond a reasonable doubt.

b. Facilitation of Felony Murder

The trial court instructed the jury that the first lesser-included offense of felony murder is facilitation of felony murder. *See State v. Ely*, 48 S.W.3d 710, 720 (Tenn. 2001) (holding that facilitation of felony murder is a lesser-included offense of felony murder). "'A person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony,' but without intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense, 'the person knowingly furnishes substantial assistance in the commission of the felony.'" *State v. Jones*, No. E2019-01737-CCA-R3-CD, 2021 WL 1289851, at *12 (Tenn. Crim. App. Apr. 7, 2021) (quoting Tenn. Code Ann. § 39-11-403(a) and citing Tenn. Code Ann. § 39-11-402(2)), *perm. app. denied* (Tenn. Aug. 4, 2021).

In general, where the defendant does not know that another person intends to commit a specific felony, the defendant cannot be guilty of facilitating that felony. *Id.* In the particular context of facilitation of felony murder, however, we have recognized that

> knowledge of the specific felony required under Tennessee Code Annotated section 39-11-403 is met in a felony murder prosecution not by knowledge of the felony murder, but *by the knowledge that the other person was going to commit the underlying felony*. In the case sub judice, the Defendant could be guilty of facilitation of felony murder because he knew his co-defendant was planning on committing a robbery, which is the underlying felony of the felony murder.

State v. Lewis, 919 S.W.2d 62, 68 (Tenn. Crim. App. 1995) (emphasis added), *overruled on other grounds by State v. Williams*, 977 S.W.2d 101 (Tenn. 1998)); *see Ely*, 48 S.W.3d at 719-20 ("[T]he offense of facilitation of felony murder requires proof that . . . the defendant knew that another person intended to commit the underlying felony[.]"). As such, before a defendant may be convicted of facilitation of felony murder, "[t]he state

need only show that the defendant knew his or her co-defendant was planning to commit the underlying felony, and the person knowingly furnished substantial assistance in the commission of that felony." *State v. Johnson*, No. E1999-02468-CCA-R3-CD, 2000 WL 1278158, at *3 (Tenn. Crim. App. Sept. 11, 2000).

As we have recognized, the underlying felony for the charge of felony murder was the theft of the Camaro. However, by the time the Defendant became involved in this case, Mr. Person and Mr. Cole had already completed the car theft. No proof shows that the Defendant knew that Mr. Person or Mr. Cole intended to steal the victim's car when the offense was committed, and no proof shows that the Defendant furnished substantial assistance in the commission of that completed theft offense. Viewing the evidence in a light most favorable to the State, we conclude that the proof is not sufficient to sustain a conviction for facilitation of felony murder in the perpetration of the Camaro's theft.

c. Second Degree Murder

The trial court instructed the jury that second degree murder was the next lesser-included offense of felony murder. *See Ely*, 48 S.W.3d at 721-22 (recognizing that second degree murder is a lesser-included offense of felony murder). As our supreme court reasoned in *Ely*,

> When comparing the offense of felony murder to the lesser homicide offenses, it is immediately apparent that one accused of felony murder is held to a higher level of culpability, as felony murder is considered the more serious offense and merits a more severe punishment than either second degree murder, reckless homicide, or criminally negligent homicide. In other words, when a death results from the commission of, or the attempt to commit, a felony, the mental state required for the commission of the felony is deemed a more culpable mental state than knowledge, recklessness, or negligence.
>
> After comparing the respective elements of felony murder, second degree murder, reckless homicide, and criminally negligent homicide, it appears that the elements of the lesser offenses are a subset of the elements of the greater and otherwise differ only in the mental state required. We hold that because the mental states required for the lesser offenses differ only in the level of culpability attached to each in terms of seriousness and punishment, the offenses of second degree murder, reckless homicide, and criminally negligent homicide are lesser-included offenses of felony murder under part (b) of the *Burns* test.

Ely, 48 S.W.3d at 721-22 (citing *State v. Burns*, 6 S.W.3d 453, 466-67 (Tenn. 1999) and footnote omitted). The supreme court has reaffirmed that part (b) of the *Burns* test still applies to an analysis of what constitutes a lesser-included offense. *See State v. Howard*, 504 S.W.3d 260, 283 (Tenn. 2016) (holding that "analysis of whether an offense constitutes a lesser-included offense of a charged offense is still proper under part (b) unless it is specifically encompassed by [Tenn. Code Ann. § 40-18-110]"); *State v. McDaniel*, No. E2019-01862-CCA-R3-CD, 2022 WL 558283, at *6 (Tenn. Crim. App. Feb. 24, 2022) ("In *Howard*, our supreme court determined that subsections (f) and (g) did not abrogate part (b) of the *Burns* test and that part (b) continues to be applicable to determining whether an offense is a lesser-included offense."), *no perm. app.*

Second degree murder is "[a] knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1) (2018). This offense "is strictly a 'result-of-conduct' offense," *State v. Page*, 81 S.W.3d 781, 787 (Tenn. Crim. App. 2002), meaning that "[t]he statute focuses purely on the result and punishes an actor who knowingly causes another's death," *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). As such, "the State is not required to prove that the defendant wished to cause his victim's death but only that the defendant knew that his or her actions were reasonably certain to cause the victim's death." *State v. Brown*, 311 S.W.3d 422, 432 (Tenn. 2010).

In this case, the proof established that after the Defendant joined Mr. Person and Mr. Cole, the Defendant repeatedly insisted that they needed to kill the victim. When the men arrived at the field off Betty Manley Road, the Defendant exited his vehicle holding a shotgun. He told the victim to "[l]ook up at the sky" and shot the victim in the back from a distance of five or six feet. Somehow, the victim attempted to run away, but the Defendant followed him and shot him twice more. When the victim fell, the Defendant shot him yet again, this time in the face.

The Defendant then insisted that Mr. Cole and Mr. Person also shoot the victim. Mr. Cole shot the victim in the face with the shotgun. Mr. Cole gave Mr. Person his handgun, and Mr. Person fired at the victim. During the autopsy of the victim's body, the medical examiner found two shotgun wounds on the head, a shotgun wound on the right side of the torso, a shotgun wound on the left shoulder, and two shotgun wounds on the back. Four of the gunshot wounds were from an indeterminate range. The medical examiner said the victim's cause of death was multiple gunshot wounds.

This Court has recognized that the "act of shooting someone in the head at [an] intermediate range is reasonably certain to cause the result of death." *State v. Watkins*, 648 S.W.3d 235, 256 (Tenn. Crim. App. 2021). We have also "consistently stated that the

'deliberate firing of shots at a person constitutes "knowing" conduct for the purpose of establishing second degree murder.'" *State v. Baker*, No. W2021-00085-CCA-R3-CD, 2022 WL 6257471, at *18 (Tenn. Crim. App. Oct. 10, 2022) (quoting *State v. Hendrix*, No. W2015-01671-CCA-R3-CD, 2016 WL 3922939, at *5 (Tenn. Crim. App. July 15, 2016) and citing cases), *perm. app. denied* (Tenn. Feb. 8, 2023); *State v. Dodd*, No. W2018-01961-CCA-R3-CD, 2019 WL 7161345, at *12 (Tenn. Crim. App. Dec. 23, 2019) (stating that "a rational jury could have concluded that the Defendant knew his conduct in shooting his pistol at the victim's face was reasonably certain to cause the victim's death"); *State v. Wallace*, No. W2003-01967-CCA-R3-CD, 2005 WL 195086, at *9 (Tenn. Crim. App. Jan. 28, 2005) (upholding attempted second degree murder conviction for second degree murder when proof showed defendant instructed shooter to shoot the victim).

Viewing the evidence in a light most favorable to the State, the proof is legally sufficient to support a conviction for second degree murder beyond a reasonable doubt. The evidence establishes that the Defendant knowingly shot the victim multiple times with the shotgun, gave the shotgun to Mr. Cole, and told Mr. Cole to shoot the victim as well. The multiple shotgun wounds resulted in the victim's death. Accordingly, the evidence plainly supports a conviction of second degree murder under a theory that the Defendant is criminally responsible for his own conduct, criminally responsible for the conduct of others, or under a combination of the two. As such, although we reverse and vacate the Defendant's conviction for felony murder, we remand the case to the trial court to modify the judgment to reflect a conviction of second degree murder and for a sentencing hearing on this conviction. *See Parker*, 350 S.W.3d at 910 (remanding for sentencing after judgment was modified to reflect a conviction on a lesser-included offense); *State v. Cunningham*, No. 02C01-9210-CR-00231, 1993 WL 312696, at *2 (Tenn. Crim. App. Aug. 18, 1993) ("Where a defendant has received a fair and impartial trial which clearly establishes his guilt of a lesser offense, his conviction of that offense may be affirmed and the case may be remanded for sentencing if necessary.").

C. ROBBERY

The Defendant next challenges his conviction for robbery. In so doing, he argues only that the evidence failed to show that the Defendant placed the victim in fear. The State responds that the evidence was sufficient to establish that the victim was in fear, and we agree.

Robbery is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a) (2018). As noted above, a person commits theft of property when, "with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without

the owner's effective consent." *Id.* § 39-14-103(a) (2018). "The fear constituting an element of [robbery] is fear of present personal peril from violence offered or impending. It must be a fear of bodily danger or impending peril to the person, which intimidates and promotes submission to the theft of the property." *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001) (internal quotation marks and citations omitted) (alteration in original). "Either the existence of 'violence' or 'fear' will heighten the offense to a robbery." *Id.* Our supreme court has recognized that "[f]ear [can be] inferred from the circumstances." *State v. Dotson*, 254 S.W.3d 378, 396 (Tenn. 2008). A "jury's task is to determine from all of the evidence whether the victim was placed in fear by the conduct of a defendant or should have been under the circumstances." *Id.*

In this case, the Defendant, Mr. Cole, and Mr. Person drove the victim to his home to take the victim's money. The Defendant threatened the victim's family if the victim did not "act right," and the victim went inside while accompanied by an armed Mr. Cole. The victim obtained $3,000 or $3,300, and he and Mr. Cole left the house. The Defendant, Mr. Cole, and Mr. Person later split the money taken from the victim. As this Court has recognized,

> The fear of bodily injury sufficient to support a robbery charge may be aroused by a word, or gesture, as where the victim is threatened with a gun or knife. Even a slight cause of fear or indirect language of a threatening character may be sufficient to constitute intimidation, and the victim may be deemed to have been put in fear if the transaction is attended with such circumstances of terror as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of

Sloan v. State, 491 S.W.2d 858, 861 (Tenn. Crim. App. 1972); *State v. Ketchum*, No. M2016-00685-CCA-R3-CD, 2017 WL 2261763, at *6 (Tenn. Crim. App. May 23, 2017). In this case, a reasonable jury could certainly have inferred that the victim was placed in fear from the Defendant's threats to harm the victim's family, the earlier threats to kill the victim himself, and the constant presence of Mr. Cole, who was armed with a nine-millimeter handgun. Accordingly, we affirm the Defendant's conviction for robbery.

D. ESPECIALLY AGGRAVATED KIDNAPPING

Finally, the Defendant contends that the State failed to prove that he was actively involved in a kidnapping; that the proof adduced at trial established that Mr. Person, Mr. Cole, "and/or someone else had completed the actual kidnapping," and that the Defendant "had no involvement and therefore would distance himself from any theory of criminal

responsibility for their actions." The State responds that the victim was kidnapped when he was held at the motel, physically restrained with tape, and confined in his stolen car as they drove throughout town before being driven to a field and killed. The State also argues that the Defendant was criminally responsible for the actions of Mr. Cole and Mr. Person. We agree with the State.

Our General Assembly has defined especially aggravated kidnapping as false imprisonment "[w]here the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-305(4) (2018). "A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." *Id.* § 39-13-302(a) (2018). A serious bodily injury includes a bodily injury involving "[a] substantial risk of death[.]" *Id.* § 39-11-106(a)(34).

As this Court previously has stated:

> A defendant may be convicted of especially aggravated kidnapping under a criminal responsibility theory, regardless of whether there is evidence that he directly participated in the criminal act itself. As noted in the preceding section[s], evidence that the defendant voluntarily attached himself to a group bent on illegal acts, with knowledge of its design, also supports an inference that he intended to aid in or encourage its commission and will sustain his conviction for the offense committed by others.

State v. Phillips, 76 S.W.3d 1, 12 (Tenn. Crim. App. 2001). In our view, the proof clearly establishes that the Defendant aided Mr. Cole and Mr. Person in kidnapping the victim. The Defendant was present when Mr. Cole bound the victim's wrists with tape. While the victim was confined, the Defendant argued multiple times that the victim should be killed. In so doing, the Defendant encouraged Mr. Cole and Mr. Person to keep the victim unlawfully confined until that objective could be achieved. Additionally, "the victim here suffered the ultimate serious bodily injury, death." *State v. Perry*, No. W1999-01370-CCA-R3CD, 2001 WL 792627, at *6 (Tenn. Crim. App. July 13, 2001). Therefore, the proof was sufficient to sustain the Defendant's conviction of especially aggravated kidnapping.

In response, the Defendant argues that, when he first became involved in the events leading to the victim's death, Mr. Person and Mr. Cole "had completed the actual kidnapping" of the victim. This argument is similar to the argument regarding the theft of the Camaro. However, unlike theft offenses, the crime of kidnapping is defined by "a continued state of being restrained." *State v. Legg*, 9 S.W.3d 111, 117 (Tenn. 1999). In other words, the act of removal or confinement of the victim "does not end merely upon

the initial restraint, and a defendant continues to commit the crime at every moment the victim's liberty is taken." *Id.* As such, irrespective of when the victim's kidnapping began, it continued at every moment until the Defendant and others shot him in the field. Respectfully, the Defendant's argument that the victim's kidnapping had been previously completed is wholly without merit.

In addition, the Defendant argues that the kidnapping was incidental to other felonies and was not an independently significant act. The Defendant neither develops the argument nor identifies the felonies he believes he also committed in connection with the kidnapping. But, citing *State v. White*, 362 S.W.3d 559, 578 (Tenn. 2012), he argues that the State "never alleged that [the Defendant] utilized the removal or confinement to reduce his risk of detection" and that "there was no heightened danger or harm created that was independent of the separate offense." He also argues that the victim's return home shows that no kidnapping existed. We respectfully disagree.

In *White*, our supreme court stated that "trial courts must ensure that juries return kidnapping convictions only in those instances in which the victim's removal or confinement exceeds that which is necessary to accomplish the accompanying felony." 362 S.W.3d at 578. When a jury must determine whether the State has proven beyond a reasonable doubt that a defendant committed an especially aggravated kidnapping, "trial courts should specifically require a determination of whether the removal or confinement is, in essence, incidental to the accompanying felony or, in the alternative, is significant enough, standing alone, to support a conviction." *Id.* Our supreme court held that a trial court should instruct a jury on the "substantial interference" element of kidnapping as follows:

> To establish whether the defendant's removal or confinement of the victim constituted a substantial interference with his or her liberty, the State must prove that the removal or confinement was to a greater degree than that necessary to commit the offense of [insert offense], which is the other offense charged in this case. In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors:
>
> - the nature and duration of the victim's removal or confinement by the defendant;
>
> - whether the removal or confinement occurred during the commission of the separate offense;

- whether the interference with the victim's liberty was inherent in the nature of the separate offense;

- whether the removal or confinement prevented the victim from summoning assistance, although the defendant need not have succeeded in preventing the victim from doing so;

- whether the removal or confinement reduced the defendant's risk of detection, although the defendant need not have succeeded in this objective; and

- whether the removal or confinement created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense.

Id. at 580-81 (footnote omitted). The *White* instruction was given in the instant case. Our supreme court has "identified certain crimes—such as robbery, rape, and assault—that, when charged along with kidnapping," warrant consideration of the *White* factors. *State v. Alston*, 465 S.W.3d 555, 562 (Tenn. 2015).

In this case, Mr. Person and Mr. Cole initially confined the victim at the motel to persuade him to contact Mr. Bond. After the persuasion was unsuccessful, Mr. Person took the victim's cellular telephone, which kept the victim from getting help. Mr. Person and Mr. Cole continued to confine the victim as they drove to the victim's house to steal his Camaro. Although the victim could have been released when the Camaro was taken, Mr. Person and Mr. Cole took the victim back to the motel and continued to confine him.

At this point, the Defendant joined the men in their criminal pursuits. In so doing, the Defendant accompanied the group when they took the victim to his home to take money from him. Although the victim was allowed to enter his home, he was allowed to do so only to obtain money to give the Defendant, Mr. Cole, and Mr. Person. In addition, the Defendant threatened to hurt the victim's family if he failed to "act right." The victim was accompanied by Mr. Cole, who, armed with a handgun, effectively prevented the victim from seeking help.

After the robbery, Mr. Cole bound the victim's hands with tape, and the victim's confinement continued without a way to defend himself or escape from confinement. This restraint was not required to accomplish any other act; it was plainly an independently significant act. We conclude that the proof supports the Defendant's conviction for especially aggravated kidnapping and that the victim's confinement was independent of,

and not merely incidental to, the other charged felonies. *See State v. Abdelnabi*, No. E2017-00237-CCA-R3-CD, 2018 WL 3148003, at *26 (Tenn. Crim. App. June 26, 2018); *State v. Echols*, No. W2013-01758-CCA-R3-CD, 2015 WL 151047, at *9 (Tenn. Crim. App. Jan. 12, 2015). Accordingly, we affirm the Defendant's conviction for especially aggravated kidnapping.

CONCLUSION

In summary, we hold that the evidence is sufficient to support the Defendant's convictions for especially aggravated kidnapping and robbery. We affirm these two convictions.

We also hold that the evidence is not sufficient to support the Defendant's convictions for theft and felony murder in the perpetration of a theft. Accordingly, we dismiss the theft charge, and we modify the Defendant's conviction for felony murder to that of second degree murder as a lesser-included offense.

We respectfully remand the case for further proceedings consistent with this opinion, including for entry of a modified judgment and for a sentencing hearing on the Defendant's conviction for second degree murder.

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TOM GREENHOLTZ, JUDGE