IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 5, 2023 Session

STATE OF TENNESSEE v. LATOSHA STARKS-TWILLEY

Appeal from the Criminal Court for Shelby County
No. C1705886 James M. Lammey, Judge

No. W2022-00020-CCA-R3-CD

A Shelby County Criminal Court jury convicted the Defendant, Latosha Starks-Twilley, of first degree premeditated murder, and the trial court imposed a sentence of life imprisonment. On appeal, the Defendant argues: (1) the trial court erred in allowing the State to ask the defense expert prejudicial questions; (2) the trial court erred in allowing the State to ask the defense expert whether the Defendant met the criteria for antisocial personality disorder; (3) the trial court erred in prohibiting the defense from asking its own expert about whether the Defendant lacked the capacity to form the mens rea required for the offense; (4) the trial court erred in denying the Defendant's request for the pattern jury instruction on reckless homicide; (5) the trial court erred in admitting certain photographs of the deceased victim into evidence; and (6) the evidence is insufficient to sustain her conviction. After review, we affirm the judgment of the trial court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which J. ROSS DYER and JOHN W. CAMPBELL, SR., JJ., joined.

Janet H. Goode (on appeal) and Blake D. Ballin (at trial), Memphis, Tennessee, for the Defendant-Appellant, Latosha Starks-Twilley.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Greg Gilbert and Nicole Germain, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Trial. The following is a summary of the evidence presented at trial that is relevant to the issues raised on appeal. Wanda Mack testified that at around 7:25 p.m. on June 18, 2016, she received a call from her sister, who informed her that the Defendant had killed

their brother, Waddell Bernard Twilley, Sr.[1] Mack said that at the time of his death her brother, the victim in this case, was married to the Defendant, and they had three sons.

Geneva Crutcher, the Defendant's mother, testified that on June 17, 2016, the day before the victim's body was found, her three grandsons spent the night with her, and the Defendant picked them up the following day after Crutcher informed the Defendant that she had a hair appointment. Later that day, Crutcher received a call from her children telling her that something had happened to the victim. Crutcher confirmed that the Defendant received mental health treatment for the first time at St. Francis Hospital as an adult.

Waddell Twilley, Jr., the Defendant and the victim's son who was sixteen years old at the time of trial, testified that on June 18, 2016, he lived with his two brothers, his mother, and his father. Waddell said that he and his brothers spent the night with his grandmother on June 17, 2016, and that his mother picked them up the next morning. When they arrived home, Waddell and his brothers went to the backyard and helped their mother dig a hole "in front of the . . . satellite dish." At the time, they did not know why they were digging the hole, but their mother told them she wanted it, so he and his brothers complied with her request.

Waddell did not see his father when they returned home from their grandmother's house. He originally believed his father was at home because his father's truck, keys, and wallet were there. Waddell asked his mother where his father was, but he did not recall her answer. He looked for his father upstairs and called his father's cell phone from his father's bedroom. Waddell went to his own bedroom across the hall and when he tried to call his father again, he heard his father's "ring tone in the wall." He eventually discovered that the ring tone was coming from the attic, which was adjacent to his room, and he went to get his mother's key because "she had a lock for the attic." Waddell found the key for the attic lock in his mother's bedroom, and as he was attempting to open the attic door, his mother walked inside the house. Waddell ran to his bedroom and "cried" because he did not want his mother to know that he was trying to see if his father was in the attic and "didn't want her to get . . . mad at [him][.]" Waddell admitted he was afraid of his mother and "didn't want her to hurt [him]." At the time, Waddell believed that his mother had hurt his father. He said his mother came into his room and told him to go take a nap in her bedroom. A short time later, his mother allowed him to go outside with his brothers, and Waddell immediately went next door and borrowed his neighbor's phone to call 9-1-1.

[1] Because the victim and his son share the same first and last name, we will refer to the victim in this case as "victim" and will refer to his son by his first name of "Waddell" in order to distinguish them. We intend no disrespect in doing so.

When the police arrived, Waddell went inside his home with one of the officers to show him where he had heard his father's cell phone ringing.

Officer Alvin Gary with the Memphis Police Department (MPD) testified that he responded to a 9-1-1 call for Cottonwood Street in Memphis on June 18, 2016. When he knocked on the door to this address, an eleven- or twelve-year-old boy came outside to talk to him and told him that he had heard his father's cell phone ringing in the wall. Shortly thereafter, the Defendant exited the house and began talking to the other officers present. Officer Gary took the boy next door to "separate him from his mom," and the boy told him that his father's cell phone was ringing in the wall because his father was in the wall, which caused Officer Gary to have "some chills[.]" Officer Gary then informed the other officers that he believed the boy was telling the truth about hearing his father's cell phone ringing in the wall and convinced them to check the wall in question. Officer Gary said the other officers began calling the victim's cell phone and also heard it inside the wall. The officers later discovered the deceased victim's body in the attic.

Officer Matthew Davidson with the MPD testified that he also responded to this 9-1-1 call. When he and Officer Morrow arrived at the scene, they knocked on the side door and observed two small children playing around a large hole that had been dug in the backyard. As they were walking back to their patrol car, the Defendant exited her home. Officer Davidson noted that before the Defendant approached the officers, "she made sure the door was closed and then she key locked the door back[.]" He noted that he "had never seen somebody do that when they came to talk to us on any other calls."

The Defendant asked why the officers were there; she then claimed that "her husband had left about [six] o'clock that morning[,] and she had no idea where he had gone[.]" Officer Davison said the Defendant "didn't seem confused" and actively participated in the conversation with them. When the officers asked the Defendant for "permission to go inside the residence and do a welfare check just to make sure that everything was as she said," the Defendant gave her permission, unlocked the door, and let the officers inside her home. He noted that the Defendant "stayed outside, and . . . locked the door . . . behind [the officers] once [they] entered the residence."

Once inside, the officers did not see any signs of a disturbance or a struggle. As they were about to exit the home, they received a call from Officer Gary telling them they needed to detain the Defendant for "further investigative purposes." Officer Davidson recounted the conversation he then had with the Defendant:

> I explained to her that I needed to detain her while we were still looking into this[,] at which point [the Defendant] spontaneously uttered to me that, I don't know what you're looking for, he's not here[,] and she repeated that

> several times. I assured her I understand, but again, we need to make sure everything is safe and secure before we go further, and we just needed her to wait in the car while we did that.

After Officer Gary informed him that Waddell said he could hear his father's cell phone ringing in the wall, Officer Davidson and Officer Morrow asked Waddell to come back inside the home and show them where he was when he heard the phone ringing. The officers went to the boy's bedroom, asked Waddell to go with another officer downstairs, and then dialed the victim's cell phone and "heard a phone ringing just on the other side of that wall" as Waddell had said. The officers followed the ringing to the end of the hallway where there were closed doors to a closet with "a set of locked double doors" inside that lead to the attic. Although the outer closet doors were not locked, there was a "key padlock" on the inner doors.

Officer Davidson said Officer Morrow retrieved the key for this padlock from the Defendant and then opened the lock. As Officer Davidson continued to call the victim's cell phone, Officer Morrow crawled into the space behind the doors, which contained some storage bins. A few minutes later, Officer Morrow said he had found something. Officer Davidson said he was present when the medical examiner's office removed the storage bin containing the victim's deceased body from the attic.

Officer Davidson said that when the storage bin containing the victim's body arrived at the "crime scene tunnel," the medical examiner and a crime scene officer began removing items from the bin, including "several blankets[,]" "a Bible," and pieces of "what appeared to be concrete type material." He described what was depicted in one of the photographs taken at the crime scene tunnel:

> Obviously, this is [the victim's] head. It was wrapped in a black plastic type material. There were blankets and other cloth type items, a ripped pair of jeans. This is a Styrofoam or paper type plate, and then there w[ere] some cigarette butts here and some . . . garbage type material that was kind of in the middle here and then some of this gray material right here would be some of the dried concrete type material that was in there as well. I don't see it, it may be on the end of the picture, but there was a Bible . . . at the end of this . . . tub right about here.

Officer Davidson also noted that there "appeared to be metal shackles around [the victim's] ankles[,]" and the victim's cell phone was on top of the victim's body in the bin.

Officer Davidson said that the Defendant's act of locking the officers inside her home was strange and had never happened with other individuals. He noted that because

the Defendant's front door was not locked with a key, the officers were able to open the dead bolt from the inside to get out of the home. He stated that even after the Defendant was detained, she never told the officers to get out of her house or to stop looking around.

Officer Charles Morrow with the MPD testified that when he arrived at the scene with Officer Davidson and knocked on the door, they saw kids talking in the backyard and observed one of the kids using a water hose to spray the ground while the other kid was "digging a rather large hole." Officer Morrow said the Defendant was "very cooperative[,]" and when the officers asked about the whereabouts of the victim, "[s]he said she hadn't seen him." During their conversation, Officer Morrow noticed nothing unusual about the Defendant's behavior and said the Defendant did not appear to be hearing voices. He said the Defendant was "very polite, coherent [and] well spoken."

Officer Morrow stated that when he and Officer Davidson went inside, the Defendant "stayed out in the front yard." When Officer Gary asked the other officers to detain the Defendant by putting her in the back of their patrol car, they went back inside the home with Waddell, the Defendant and victim's son. Waddell showed them where he heard his father's cell phone ringing, which was "through the wall next to his bed." When the officers called the victim's cell phone, they heard the ringing and realized it was coming from an attic area with "a lock on it."

Officer Morrow obtained the key to this lock from the Defendant, opened the doors, and crawled into the attic space. He worked his way around the space, but "nothing looked out of order." At the time, the victim's cell phone was still ringing, but Officer Morrow could not determine its location. He stated that there were several storage bins that he was able to move easily but when he tried to move a storage bin behind them, he knew "something was strange" because he was unable to move it. He shined his light on this storage bin, and when he began removing things from it to see why it was so heavy, he observed the victim's legs. After uncovering the rest of the victim's body, he saw that the victim's head was "covered in plastic or tape" and the body had concrete on top of it.

Officer Morrow said that prior to the officers' discovery of the victim's body, the Defendant was not nervous and did not appear to be hiding anything. He noted that the Defendant just handed the keys over to the attic area where her deceased husband's body was found. When Officer Morrow obtained the keys from the Defendant, she never said that he was going to find something in the attic and never told him where her husband's body was located. Officer Morrow said that on June 18, 2016, the Defendant's behavior did not indicate that she was a danger to herself or to others. He acknowledged that he did not know how the Defendant was acting at the time she killed her husband and that he only could state that the Defendant was calm when he encountered her on June 18, 2016.

Officer Marlon Wright of the Homicide Bureau of the MPD testified that the day after the victim's body was found, he executed a search warrant at the Defendant's home. During their search, officers found some dry "concrete or cement" on the Defendant's bedroom floor that looked "out of place." They also found a key to handcuffs "tucked down in between the seat and the actual armrest" of a chair in the Defendant's bedroom. Officer Wright said that officers also collected the handcuffs and leg irons that were on the victim as well as the blue boxers worn by the victim at the time of his death.

Investigator Ruben Ramirez with the Shelby County Sheriff's Office testified that he reviewed a compact disk containing approximately 148 recorded calls that were placed by the Defendant while she was housed at the Shelby County Jail. Three of these recorded conversations were played to the jury.[2]

Officer David Smith with the Crime Scene Investigation Unit of the MPD testified that he processed the scene at Cottonwood Road in Memphis. In his report, he documented a freshly dug hole and a shovel in the home's backyard. He said a smaller hole was found close to a basketball goal in the backyard. Officer Smith also noted that an empty concrete bag was found in the backyard. In addition, the victim's wallet, which contained his identification, was found on a table in his bedroom.

Officer Smith asserted that the blue storage bin containing the victim's body was transported to the "CSI tunnel" where the body was removed and the contents examined. He noted that in addition to the body, the bin contained "a lot of trash" as well as "cement[,]" "a cellphone[,]" "cigarette butts[,]" "torn pieces of clothing[,]" and an empty bag of concrete." He also said the victim's head had been "covered with plastic" and the victim was wearing nothing but a pair of blue boxer shorts. The victim also had cuffs on his ankles and wrists, which were consistent with law enforcement handcuffs. Officer Smith observed that these cuffs "appeared to be very tight" based on the victim's "blood surrounding the handcuffs." He said that the cigarette butts found on top of the victim's body were sent to the Tennessee Bureau of Investigation (TBI) for DNA analysis.

Officer Tristan Brown with the Crime Scene Investigation Unit of the MPD testified that he collected a padlock, a handcuff key, some clear tape, and a roll of duct tape from a trash can in the Defendant's bedroom.

Lieutenant Julius Beasley with the Homicide Bureau of the MPD testified that he was the primary case officer in this case, which meant that he was responsible for the entire

[2] Although the Defendant's recorded phone conversations from jail were admitted into evidence, these calls were not included in the record on appeal. The State characterized these phone calls, which occurred on February 13, 14, and 19 of 2018, as the following: "The first one she denied [killing the victim]. The second one she said she did it. The third one she said I'm going to have to do some jail time."

investigation. When he arrived at the scene, the Defendant was still present and the Defendant and victim's three sons were in the back of squad cars. Officers took the oldest son, Waddell, for a forensic interview at the Child Advocacy Center. Lieutenant Beasley said photographs were taken of the Defendant to document whether she had any injuries and to determine "if there had been a struggle" given that her deceased husband had been found in the house. He said the Defendant only "had some small scratches on her arm."

Lieutenant Beasley said that after he advised the Defendant of her Miranda rights and had her sign an Advice of Rights form, the Defendant agreed to talk to the police. The Defendant claimed that her husband had been at the house the night before, that he had brought her something to eat, and that she last saw him around 5:00 p.m. Following this interview, Lieutenant Beasley asked Detective Frias to take a more formal written statement from the Defendant, and Detective Frias advised the Defendant of her Miranda rights a second time. Lieutenant Beasley noted that in light of the cigarette butts that were found in the storage bin with the victim, a DNA sample was taken from the Defendant for analysis.

Sergeant Fausto Frias with the Homicide Unit of the MPD testified that he interviewed the Defendant after she had been taken into custody on June 19, 2016. He said the Defendant "appeared calm" and "was not nervous at all[,]" even though most people who sit in the interview room "have some type of nervousness." Sergeant Frias asked the Defendant some questions about "where she went to school, where she lived, phone number, who the President was at the time[,] and what day of the week it was, and she answered all the questions that we asked her[.]" The Defendant asserted that she was not under the influence of any alcohol, drugs, or medications. She also did not mention any kind of mental illness and did not say that she had received any mental health treatment in the past. Sergeant Frias said that there was nothing about the Defendant that indicated that she was suffering from a mental break. He noted that the Defendant answered his questions coherently.

When Sergeant Frias asked the Defendant if she knew what happened to her husband, she replied, "I'll listen to what you have to say." He then confronted her with some of the evidence the police had, including that her husband's deceased body had been found in a blue storage bin in the locked attic of her home and that the Defendant had the key to this lock. She acknowledged that no one else had a key to the attic but claimed that she "didn't know" how her husband came to be in the storage bin. He said the Defendant maintained that the last time she saw her husband was at 5:00 a.m. the morning of June 18, 2016, which contradicted what one of her sons had said. When Sergeant Frias asked her if someone had picked up her husband that morning, the Defendant replied that "she didn't know where he was." He then questioned her about the holes in her backyard, and the

Defendant claimed "she was thinking about planting a flower bed." She said she had her sons digging in the backyard because she "wanted them to stay . . . busy."

Over the course of his investigation, Sergeant Frias learned that the Defendant and the victim had a court date in juvenile court concerning a custody battle over their children. He stated that the victim's body was found on Saturday, and their court date was on the following Monday or Tuesday. When he confronted her with this information, the Defendant did not respond.

Sergeant Frias also said that the police found a letter written by the Defendant about how angry she was with her husband. He said this letter was undated and appeared to be sent from the Defendant to herself based on the address and return address written on the envelope. When he confronted her with this letter, the Defendant stated that he could not prove she killed her husband. He then asked why she wrote the letter, and the Defendant said, "I wrote the letter, but I didn't kill him." When he was asked about whether the Defendant seemed confused during her interview, Sergeant Frias said, "I've done thousands of interviews . . . , and I've never seen anyone so calm." He said the Defendant did not appear to be in the middle of a mental health crisis during the interview. He recalled the Defendant asking why there was so much yellow tape on her house, and when he told her it was because her husband had been found dead there, she said, 'Like for real," and when he again confirmed that her husband was dead and asked her who did it, the Defendant said, "I really don't know." He acknowledged that the Defendant's calm demeanor was unusual enough that he made note of it. He also acknowledged that the Defendant's question about the yellow tape around her house was strange because the reason for the police tape was obvious.

Sergeant Frias acknowledged that there was a point during the interview when the Defendant became angry, stating:

> I think she got upset when I told her that—the body had cigarette butts in the Tupperware [storage bin], and I told her . . . you know, when we get your DNA, that's going to be . . . your DNA in that Tupperware where the body's sitting. So, . . . there's no need to keep lying, and I believe that's when [the Defendant] did get upset.

Sergeant Frias said that when he asked the Defendant to put her statement in writing, the Defendant said that she had gotten "the business card of an investigator" and was going to call him the next day so she could write down her statement.

Lieutenant J.D. Sewell with the Homicide Unit of the MPD testified that he obtained a search warrant for the Defendant's residence and of a vehicle at that residence. He said

that inside the vehicle, officers found a summons to the victim for a hearing scheduled for Monday, June 20, 2016, two days after the deceased victim was found, regarding a child support petition. Officers also found a stamped letter the Defendant wrote to herself inside the vehicle, which stated the following:

> I want love, unconditional love. I love jazz music, gospel music. When I was young, I never would have imagined the manipulation of life. I need to get out of this marriage. I have four children. My oldest is in college. My three young ones are with my husband. I am the second wife, and I had no clue what I was getting into. Six years into the marriage I started reading horoscopes and compatible signs, and that's why I hate him so much. He has a terrible [ex] that I never paid attention to. I'm a Pisces, February 24th. I want to be with a white man or a Caucasian man. I like Aries men and your Chinese sign has to be excellent with 1978 year, and you have to be very wealthy. You have to be romantic by nature, willing to take sensitive risks, and [I'm] looking for someone as special as me. If this letter has reached you, call me at [number]. My name is Tosha. Love you.

Special Agent Mark Dunlap, a forensic scientist with the TBI crime lab, was tendered as an expert in serology and DNA. He analyzed a cigarette butt and a saliva sample from the Defendant and was able to generate complete DNA profiles from both. He determined that the DNA on the cigarette butt matched the Defendant's DNA from her sample.

Dr. Marco Ross, a medical examiner with the West Tennessee Regional Forensic Center, was tendered an expert in forensic pathology. He testified that when the victim's body was delivered to his facility, the victim's head was covered with a large plastic bag, which was wrapped with tape. As he cut and unwrapped this tape, he found a second plastic bag wrapped around the victim's head with some concrete on it. After removing the concrete and that second layer of plastic, they found a layer of duct tape that completely wrapped the victim's head. After removing this duct tape, they found another layer of plastic wrapped around the victim's head. Under that layer, they found a fifth layer of plastic and duct tape. Underneath that layer, he found one more layer of plastic and one more layer of duct tape wrapped directly around the victim's face and head, which fully obscured the victim's nose and mouth. Dr. Ross observed that the victim appeared to have "sucked some of that duct tape" into his mouth. He said that this layer of duct tape was wrapped tightly enough to "sort of force it . . . inside [the victim's] mouth."

Dr. Ross confirmed that the victim's hands were cuffed behind his back and his ankles were cuffed. He noted a "large indentation" on the victim's left wrist that corresponded to the victim pushing against the handcuffs and potentially indicated a

struggle on the victim's part. He also said the victim's body "had a number of bruises and scrapes on his extremities and on his torso" and the absence of these types of injuries on the victim's head indicated that the injuries to the victim's torso and extremities occurred around the time of the victim's death or just after the victim's death. He said the victim also had some bruising and impression marks where the ankle cuffs were, which indicated that the victim had struggled against them. Dr. Ross opined that the victim's cause of death was suffocation and that the victim's manner of death was homicide. He concluded that the victim had suffocated because the victim's nose and mouth were completely obstructed by multiple layers of plastic and tape, which prevented him from getting any air into his lungs. He asserted that there was nothing else he could find that would have caused the victim's death. Dr. Ross was unable to tell whether the victim was conscious at the time his head was wrapped in plastic and tape.

Dr. Megan Avery, a clinical and forensic psychologist, was tendered as an expert in the field of forensic psychology. She testified that she was asked by the defense to evaluate the Defendant. To prepare for her interview, she reviewed the Defendant's criminal history records, the Defendant's evaluation by West Tennessee Regional Forensic Center; the Defendant's Walgreens prescription records; the Defendant's medical records from psychiatrist Dr. Robert Buchalter; the Defendant's records from St. Francis Hospital, Baptist Hospital, and Delta Medical Center; juvenile court records; the Defendant's Cricket cellphone records; the Defendant's criminal indictment; MPD records, Memphis Child Advocacy Center records; Shelby County records, including court records, the medical examiner's records; a few phone calls; and some letters written by the Defendant. Dr. Avery then conducted an evaluation of the Defendant, which also included psychological testing. She also conducted phone interviews of some of the Defendant's family members, requested some records that she was never able to obtain, and reviewed the discovery in this case.

Dr. Avery said that the records she received showed that the Defendant had "a history of mental illness." She noted that the Defendant had a "psychiatric hospitalization" for four days at St. Francis Hospital from the end of 2008 to the beginning of 2009. During this hospitalization, the Defendant was "diagnosed with schizophrenia, undifferentiated," which meant that the doctors "didn't specify what sort of schizophrenia[.]" The St. Francis records also showed that the Defendant was having "auditory hallucinations[,]" which meant that she was "hearing voices or hearing sounds that other people [were] not hearing."

Dr. Avery stated that there were records showing the Defendant had received outpatient treatment from Dr. Buchalter from 2010 to 2016. Dr. Buchalter diagnosed the Defendant with "major depression with psychosis," which meant that the Defendant had "psychotic symptoms [causing] a disconnection from reality" that could have included "auditory hallucinations, visual hallucinations." Dr. Buchalter also did not rule-out the

possibility that the Defendant had a "schizoaffective disorder," which is a "combination of schizophrenia and depression," although he did not formally diagnose the Defendant with this disorder. Dr. Buchalter prescribed the Defendant several antidepressants and antipsychotics, a mood stabilizer, and an anxiolytic for anxiety. Dr. Avery said the Defendant also received outpatient treatment from Case Management Incorporated, but she was unable to obtain any records pertaining to that treatment. She said the Defendant's pharmacy records showed that the Defendant had been prescribed antianxiety medicines, antipsychotics, and antidepressants.

Dr. Avery explained that the term "malingering" meant that an individual was "making up symptoms, exaggerating symptoms" in order to "gain something." She said it was important in a forensic case, such as the Defendant's case, to determine whether an individual is malingering. She added that it was also important to determine whether an individual is malingering when treating that person clinically because you would not want to medicate someone if the person did not need medicine. She said it was particularly important not to medicate someone who was malingering with antipsychotics because these medications had more "intense side effects than . . . antidepressants." She said that after reviewing all of the Defendant's medical records, there was no evidence of and no diagnosis that the Defendant was malingering.

Dr. Avery stated that "psychosis" is "a descriptor of severe mental illness[,]" with "a disconnect from reality" and with symptoms including "hallucinations . . . hearing things and seeing things that really aren't there[.]" She added that a person with psychosis might also have "delusions" and "emotion problems, like a very . . . flat affect or blunted affect so not a lot of emotional expression, disorganized thoughts, disorganized behaviors . . . talking nonsense or just engaging in strange behavior, doing things that don't quite make sense." Dr. Avery said that although some people have psychotic symptoms "pretty continuously," most people have psychotic symptoms that "come and go throughout the course of the day or a week or even a year."

In conducting her forensic evaluation of the Defendant, Dr. Avery reviewed the aforementioned records to determine if the Defendant had a history of mental illness. She also conducted an interview where she asked the Defendant about her medical history and symptoms and documented her own clinical observations of the Defendant. She said she specifically observed how the Defendant was "behaving," was "showing emotion," and was "talking." She also conducted "psychological testing" and "talk[ed] with family members to see what [the Defendant] was like throughout the course of her life."

When Dr. Avery administered the Minnesota Multiphasic Personality Inventory Two Restructured Format test (MMPI) to the Defendant, the test results were invalid because the Defendant kept responding "true" to the questions rather than false "regardless

of whatever the question said, regardless of what the content was, if it was symptomatic or not, [whether it was] contradictory to what she had reported in the previous test or not[.]" She said that the Defendant could have been routinely marking "true" responses because "she wasn't cooperating" or "was confused" or because she might "have a tendency to say yes to things." She noted the Defendant also claimed she was having "rare symptoms that you don't usually see in the general population . . . even in rare severe psychopathology questions," which could have been because the Defendant was marking "true" so often in response to the questions or because the Defendant was "over[-]reporting" her psychopathology symptoms. When asked whether she believed the Defendant was malingering on the testing she conducted, Dr. Avery opined that the Defendant was "not malingering" based on the Defendant's "clear documented history of mental illness from hospitals, from outpatient clinics." Dr. Avery opined that the Defendant was "mentally ill based on the symptoms she was telling me, based on how she looked when I talked to her and also based on what she said." She noted that "when people malinger, they don't tend to do a very good job of it" because they "tend to report ridiculous symptoms, absurd symptoms, things that just don't make sense." Dr. Avery said that the Defendant did not "do any fake reporting or silly symptoms that sometimes [she saw] from people [who] are malingering." She also noted that the Defendant's family said that the Defendant was "mentally ill." She said that although the testing indicated that the Defendant "could have been faking" or "could have been confused," she ultimately concluded that the Defendant was not malingering.

Dr. Avery diagnosed the Defendant with "schizoaffective disorder, depressive type" with symptoms of "hallucinations, disorganized behavior, [and] negative symptoms," including "flat affect, the flat face without showing a lot of emotion, depressions [with] sadness, loss of interest in activities, trouble sleeping, weight and appetite fluctuations, fatigue, trouble concentrating[,] and suicidality." She said the Defendant's family also observed the Defendant having "hallucinations, disorganized behavior, and depressions." Dr. Avery said that although she diagnosed the Defendant with "alcohol use disorder" and "[c]annabis use disorder," both of these disorders were in remission because the Defendant had stopped using alcohol and cannabis in 2010. Dr. Avery also "coded a descriptor of adult antisocial behavior" for the Defendant, explaining that

> any time you have a criminal evaluation you might look at antisocial personality disorder and that's—especially the criminal personalities [where] someone . . . hurts others, might be aggressive, doesn't show remorse, might lie[,] so you always look at that when you have a case like this, and I didn't think that [the Defendant] met criteria for that disorder, but I noted that there had been some antisocial behavior. Antisocial meaning that just things that violate norms of the law in her past.

Dr. Avery stated that the definition of legal insanity in Tennessee was "at the time of the commission of the acts constituting the offense, the defendant as a result of . . . severe mental disease or defect was unable to appreciate the nature or wrongfulness of [his or her] acts." She noted that a person could have an adult antisocial behavior disorder and also be legally insane. She also stated that a person could be severely mentally ill and still be competent to stand trial, meaning that you could participate fully in your defense, because the person could have a mental illness that was not aggravated at that time, or the person was successfully medicated, or the person was able to comprehend what was happening at trial. Dr. Avery said that she had no reason to believe that the Defendant was not competent to stand trial. She acknowledged that the reason the Defendant was currently on trial was because she had killed her husband.

Dr. Avery observed that the letter the Defendant wrote to herself expressing her displeasure with her relationship with her husband was "odd" because the Defendant had mailed this letter to herself, even though it appeared that she was intending to write the letter to someone else. She said this letter showed that the Defendant was "disorganized in her thinking." She stated that while the letter could have been "a product of [the Defendant's] mental illness," it also could mean that the Defendant wanted out of her marriage.

Dr. Avery said that when she asked the Defendant about digging the hole in her backyard, the Defendant replied that she was planning to use concrete for several different projects, including a bird stand, basketball court, and stepping stones. However, the Defendant also told her that "she was considering burying her husband" and that "her neighbors had been watching her dig this hole." She said that while one interpretation of the Defendant's statements was that she had a "criminal motive . . . to hide what she had done" to her husband, another interpretation was that the Defendant, because of her disorganized thinking, may not have understood "what she was doing and why she was doing it."

When asked about the Defendant's taping of her husband's head, Dr. Avery conceded that one interpretation was that the Defendant had "a criminal motive to do this and to do it very specifically." Although the Defendant told her the handcuffs were for "sexual activities," Dr. Avery acknowledged that the handcuffs could be used for "criminal purposes."

When Dr. Avery was asked whether the Defendant told her anything about being directed by voices to commit this offense, she replied:

> [The Defendant] said that the voices had told her what to do at each step of her actions. So the voices had told her to wrap the things around [the

> victim's] head, to—where to put him, where to place him. So, for example, putting him in the attic, she had said that there was an angel by the door and that's how she knew where to put the bin that he was in. So, she was saying that the voices were telling her what to do at each step, and that if she didn't comply with them, the voices would harm her. And she thought the voices would harm her by hurting her bones with needles or giving her headaches.

Dr. Avery said that although the Defendant told the police that she did not kill her husband, the Defendant did not deny killing her husband when she spoke to Dr. Avery. The Defendant asserted that "she didn't know it was wrong what she was doing[.]" At times, the Defendant told Dr. Avery that "the voices [had] wanted her to kill her husband." At other times, the Defendant said the voices "didn't ever tell her to kill him" and that while the voices "told her what to do . . . [at] each step[,]" she "didn't know that [her actions] would result in [her husband's] death." She said that while one interpretation of the Defendant's denial to police was that she was attempting to evade responsibility and avoid detection for her husband's death, another interpretation was that the Defendant "didn't think she had killed him" or "was confused at that time."

Regarding the Defendant's calm demeanor during her interactions with police, Dr. Avery stated that "[i]t could be that [the Defendant] was actually calm[.]" However, she "wonder[ed] if officers were picking up on [the Defendant's] flat affect" that she had previously described in her testimony. When asked about the Defendant's odd behavior of locking the door to her home behind her when she saw the police, of giving the police permission to search her home and then locking the police inside her home, and then of voluntarily giving the police the key to the attic space where the victim's body was found, Dr. Avery stated that the aforementioned acts "show[ed] some disorganized behavior" on the part of the Defendant. She acknowledged that the Defendant's behavior in locking the police in the home and then leading them to the body was "odd," did not "fit together in a coherent way" and could have been symptomatic of the Defendant's mental illness. Dr. Avery said that while the Defendant admitted that the voices were telling her to wrap her husband's head with tape, the Defendant denied knowing that her actions would ultimately lead to her husband's death and denied knowing that her acts were wrong at the time. She stated that the Defendant told her she put concrete over her husband's body "because she did not want him to leave." However, the Defendant never explained why she "put other items" in the bin with her husband. Dr. Avery said the Defendant said she did not know that her husband had died until the police told her that information. The Defendant claimed she had "been hearing [her husband's] voice" and "thought he was talking to her." She also said that after the police told her that her husband was dead, she believed that she was "hearing him from another life[.]"

Dr. Avery said the Defendant told her she was not taking her medication at the time of the incident. Although the Defendant's pharmacy records indicated that she was consistently picking up her medicines and had picked them up the month of the incident, the Defendant told Dr. Avery that she had not been taking her medicines because her husband was "throwing them out."

Dr. Avery opined that at the time the victim was killed, the Defendant was suffering from a severe mental disease or defect. She also opined that there was "some evidence to support" a conclusion that the Defendant could not appreciate the nature and wrongfulness of her actions.

On cross-examination, Dr. Avery acknowledged that the issue in this case was the Defendant's state of mind at the time she killed her husband. She noted that the Defendant had worked in retail and food service but had been "fired multiple times[,]" mainly for her "failure to show up for work." Dr. Avery acknowledged that the Defendant's failure to show up for work could have been because the Defendant was apathetic or could have been because of her mental illness. She acknowledged that psychology, her field of expertise, was a soft science rather than a hard science because it was subjective and required the interpretation of data.

Dr. Avery admitted that she could not "definitively" say to a reasonable degree of psychological certainty that the Defendant did not know the wrongfulness of her behavior at the time she killed her husband. She said there was "data for both sides" and she "couldn't say reasonably one way or the other." Dr. Avery acknowledged that there was "some evidence to show that [the Defendant] may have understood that [killing her husband] was wrong." She agreed that the Defendant's hiding of the victim's body could have meant that the Defendant knew that what she had done was wrong or that she wanted to hide the body so she was not caught. On the other hand, Dr. Avery said that if the Defendant "thought an angel was [directing] her to do that, then maybe [the Defendant] didn't think it was wrong."

Dr. Avery said that when the Defendant was being treated by Dr. Buchalter, the Defendant denied having command hallucinations and never had a problem with voices telling her to take action. However, when the Defendant voluntarily committed herself to St. Francis Hospital in 2008, the Defendant reported that she was having "hallucinations" and "some suicidality and some homicidal ideation." She said the records from St. Francis Hospital showed that the Defendant was thinking of killing "[h]er children, her husband, and [the] children that she was babysitting." Dr. Avery agreed that circumstantially, the inference was that the Defendant realized that she needed to receive mental health treatment because she did not want to kill her husband, her children, or other children.

When the State asked Dr. Avery about what benefit the Defendant would receive if she was found insane, Dr. Avery replied that the Defendant would be "go[ing] to a secure mental health facility" rather than "going to a prison." She acknowledged that if the Defendant was convicted and sent to prison rather than a mental health facility, she would receive a fixed sentence consisting of years in prison. She also agreed that if the Defendant went to a mental hospital after being declared insane, there would be no guarantee how long she would stay at that hospital. She acknowledged that the test for release from a mental hospital was whether the individual was no longer a danger to herself or others. When asked whether the Defendant would receive a benefit if she was declared insane and sent to a mental health facility, Dr. Avery replied, "It would depend on if you think going to a secure mental health facility is a benefit." The State then asked, "[I]f you were on trial for murder, would you rather go to a mental hospital or prison?" Dr. Avery hesitated to answer but ultimately said, "It actually is a difficult question." When the State asked if she would rather go to "prison for . . . 50 years or go to a mental hospital for 6 months to a year, Dr. Avery said, "Six months to a year in a mental hospital."

Dr. Avery said that the Defendant had received some sort of outpatient treatment in November 2008 and on December 30, 2008, she voluntarily admitted herself to St. Francis Hospital because she was having homicidal ideations about her husband and children. She acknowledged that a few days after the Defendant voluntarily admitted herself to St. Francis Hospital in December 2008, the Defendant checked herself out against the advice of hospital staff. Dr. Avery acknowledged that at the time the Defendant received this treatment at St. Francis, which was the first time the Defendant had ever sought mental health treatment, the Defendant had criminal charges pending.

Thereafter, the following exchange occurred:

Prosecutor:	And [the Defendant] actually had, I guess it would be a major charge; fair to say?
Defense counsel:	Judge, I—I object. I think that calls outside of the bounds. I've objected. You've ruled.
Prosecutor:	I'll withdraw the question.
The Court:	Okay.
Prosecutor:	I'll withdraw the question.

Dr. Avery acknowledged that the Defendant had criminal charges pending when she went to St. Francis Hospital, checked herself out of the hospital four days later, and then pled guilty to a lesser offense and received a lesser sentence after obtaining this mental health treatment. She agreed that the Defendant potentially received a benefit after presenting her mental health defense in that previous criminal case. Then, the following exchange occurred:

> Prosecutor: How do we know that that's not what [the Defendant is] doing this time?
>
> Dr. Avery: Well, [the Defendant has] a lengthy history of mental illness. . . . So I would think that this would be a long game to play. I mean, a decade long—over a decade game to play, and it would be hard to be presenting as mentally ill [f]or that long to do so successfully and to take intense medication, multiple medications if you really weren't mentally ill.

Dr. Avery admitted that the Defendant's mental health issues were not formally treated until after she had been criminally charged in her earlier criminal case.

Dr. Avery stated that she listened to the recordings of the Defendant's jail phone calls and acknowledged that the Defendant never appeared to be responding to command hallucinations and did not have any signs of mental illness during those calls. She said that the Defendant admitted she killed her husband on one call but denied killing him on another call, which meant that the Defendant was not being honest. She also acknowledged that the Defendant told one of her family members on a third call that she was going to have to do some jail time, which indicated that the Defendant knew there would be consequences for her actions.

Dr. Avery said that at their first meeting, the Defendant denied killing her husband. However, when she pressed her, the Defendant said she "didn't really want to talk about it" and eventually "admitted to killing him." Dr. Avery acknowledged that the Defendant completely denied killing her husband to police, which indicated that the Defendant "knew that it was wrong" or that there would be "consequences[.]"

Dr. Avery agreed that the Defendant never said anything to police or during her jail phone calls about hearing voices telling her to kill her husband. She said that based on the records she received, the Defendant never had command hallucinations to kill her husband until after she was arrested and charged with her husband's murder. The Defendant told Dr. Avery that "the voices told her to take every step" including "handcuff[ing] him and

tap[ing] his mouth" but that the voices never told her to "kill [her husband." The Defendant also told her that "her husband knew what the voices wanted and . . . did not fight back." Dr. Avery said while the Defendant informed her that she put her husband's body in the attic because there was an angel by the door, the Defendant never told anyone else about the angel to the best of her knowledge. Dr. Avery also acknowledged that the Defendant never told police about the voices telling her to commit these acts against her husband; she agreed that this could be because the Defendant knew what she did was wrong and was trying to hide what she did to her husband. Dr. Avery admitted that the Defendant did not disclose to her the information about hearing voices or seeing an angel until much later, maybe years later.

Dr. Avery said the Defendant told her that she was going to do some projects with the concrete at her home, but the Defendant also admitted she had put concrete over her husband. When asked if the Defendant ever told her why she had been mixing concrete in her upstairs bedroom, Dr. Avery said that the Defendant did not explain, and she never asked her. She said it was possible that the Defendant brought a heavy bag of concrete up to her bedroom because she planned on killing her husband.

Dr. Avery asserted that the Defendant told her the "handcuffs were used to restrain" her husband but that the Defendant also said she and her husband had used the handcuffs in their sexual relationship. Although the Defendant told her that she duct taped her husband and handcuffed him at the direction of the voices she heard, the Defendant provided "a few different versions of the events" to the West Tennessee Regional Forensic Center, police officers, and other individuals. Dr. Avery said that the Defendant's different versions could have been the result of the Defendant's confusion related to her psychosis; however, she also acknowledged that the Defendant could have been lying when she provided these different versions of what happened.

Dr. Avery said her opinion about the MMPI test results was that "the test was invalid" because the Defendant responded "true" to too many questions and claimed a great number of semantic complaints that were consistent with individuals overreporting symptoms. She admitted that the Defendant may have been trying to fool her about the seriousness of her mental health issues.

Dr. Avery acknowledged that while the Defendant claimed she did not know what she did was wrong, the proof that the Defendant planned the killing, tried to hide the body, and was untruthful about her actions could also support the position that the Defendant knew killing her husband was wrong. Dr. Avery agreed that the Defendant's medical records showed that she "had thoughts about killing [her husband] years prior." She said that when the Defendant had these thoughts of killing her husband in 2008, the Defendant recognized that she needed to check herself into a hospital.

Dr. Avery stated it was not uncommon for psychologists to disagree on a person's mental health diagnosis. She agreed that she, the staff at St. Francis Hospital, and Dr. Buchalter came up with slightly different diagnoses for the Defendant. She also acknowledged that if the Defendant had been dishonest with her, this could skew her diagnosis.

Dr. Avery acknowledged that she had testified on direct that a person can have antisocial personality disorder and be insane. However, she asserted that antisocial personality disorder is not considered a mental disease or defect. She agreed that when viewing the offense in this case, the Defendant appeared to meet several of the criterion for antisocial personality disorder.[3]

Dr. Avery said she concluded that the Defendant had a severe mental illness when she diagnosed the Defendant with schizoaffective disorder. However, she was unable to determine whether the Defendant could understand the consequences or wrongfulness of her behavior. Dr. Avery admitted that some people with schizoaffective disorder manage their lives without committing a homicide. She concluded that it was unclear whether the murder of the victim in this case was dictated by the Defendant's impaired reality or by the Defendant's criminal motivation. She agreed that it was possible that the Defendant was suffering from a mental illness but still committed a criminal act because she knew was she was doing was wrong.

On redirect examination, Dr. Avery asserted that it was also possible that the Defendant was suffering from a mental illness and could not appreciate the wrongfulness of her actions. She said that antisocial personality disorder is not considered a mental disease or defect for the purposes of insanity. She also stated that someone can have antisocial personality disorder and also be diagnosed with schizoaffective disorder. She noted that individuals with antisocial personality disorder have a pattern of criminal behavior, aggression, fighting, hurting others, and selfishness. Dr. Avery said that if the Defendant's actions were not the product of a mental disease or defect, then her actions would check some of the boxes needed for antisocial personality disorder, but she did not believe that there was "enough evidence" of a "pattern" to diagnose the Defendant with antisocial personality disorder. In particular, she said there was not sufficient evidence that the Defendant had a conduct disorder during childhood, which is necessary to even meet the criteria for antisocial personality disorder. Dr. Avery stated that in most cases schizophrenia, or any type of psychosis, shows up between the late teens to twenties. As a result, she said it would not be unusual for schizoaffective disorder not to show up until

[3] Dr. Avery's testimony concerning the specific criteria for antisocial personality disorder exhibited by the Defendant is included in the analysis section of this opinion.

adulthood. Dr. Avery said it was possible that the Defendant did not realize what she was doing at the time she killed her husband because she was in the middle of a psychotic episode but that the Defendant later recognized that what she did was wrong.

On recross-examination, Dr. Avery reiterated that if an individual only has antisocial personality disorder, then that individual is not qualified for insanity because antisocial personality disorder is not a severe mental disease. She agreed that some people with antisocial personality disorders, including serial killers, kill people.

The Defendant, Latosha Starks-Twilley, did not to testify on her own behalf.

At the conclusion of trial, the jury found the Defendant guilty of first degree premeditated murder, and the trial court imposed a sentence of life imprisonment. The Defendant timely filed a motion for new trial, arguing that the trial court erred in admitting several photographs; that the trial court erred in allowing the State to ask Dr. Avery about the Defendant's prior misconduct and the Defendant's use of mitigating evidence of her mental illness "where the prejudicial effect of said evidence was not substantially outweighed by its probative value"; that the trial court erred in allowing the State on cross-examination to characterize the Defendant's aforementioned prior misconduct as a "major" criminal charge; that the trial court erred in prohibiting the Defendant from asking Dr. Avery whether there was evidence of diminished capacity; that the trial court erred in allowing the State to question Dr. Avery about whether she would prefer to go to prison for a lengthy period or would prefer to go to a mental institution for a short period of time; that the trial court erred in allowing testimony about whether the Defendant met the criteria for antisocial personality disorder; and that the trial court erred in denying the Defendant's request for a jury instruction on reckless homicide. Following a hearing, the trial court denied the motion for new trial by written order. Thereafter, the Defendant timely filed a notice of appeal.

ANALYSIS

I. Cross-examination of Defense Expert. The Defendant argues that the trial court erred in allowing the State to ask prejudicial questions of the defense expert, Dr. Avery, on cross-examination. She claims that the State's questions impermissibly implicated her prior convictions, her prior mental health diagnosis, and Dr. Avery's personal preference regarding sentencing. The State responds that the trial court properly allowed it to cross-examine Dr. Avery regarding the topics. We conclude that the Defendant is not entitled to relief on these issues.

Generally, the propriety, scope, manner and control of the cross-examination of witnesses rest within the sound discretion of the trial court, subject to appellate review for

abuse of discretion. State v. James, 315 S.W.3d 440, 460 (Tenn. 2010); State v. Caughron, 855 S.W.2d 526, 540 (Tenn. 1993); State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995). However, the questions on cross-examination are "subject to the restrictions created by the applicable statutes, rules of evidence, rules of criminal procedure, and the common law rules created by the appellate courts." State v. Adkisson, 899 S.W.2d 626, 644-45 (Tenn. Crim. App. 1994).

Prior to trial, the State filed a notice pursuant to Tennessee Rule of Evidence 608(b).[4] In it, the State said it wanted to cross-examine "the Defendant or her Mental Health Expert" about "the mental defense [the Defendant] previously asserted in her Aggravated Assault and Aggravated Statutory Rape conviction[s] in case 07 05655-06210109 on January 6, 2011." The State argued that the reduction of charges in the aforementioned case was "probative of the Defendant's truthfulness and the Mental Health Expert's opinion [as to] whether the Defendant [was] malingering" and contended that the probative value of this evidence "substantially outweigh[ed] any prejudicial impact." The State asked for a hearing on this motion outside the presence of the jury.

During the ensuing jury-out hearing, which occurred just prior to presentation of the defense's proof at trial, the State said it filed its motion because in 2007, the Defendant was charged with a "sexual offense and the attempted murder of her stepson," and the State made a ten-year offer, which she "revoked," and the State set her case for a trial on December 1, 2008. The State said that "between setting the trial date and going to trial," the Defendant began "to seek mental health treatment for the first time in her life" and ultimately never went to trial because the Defendant "voluntarily commit[ed] herself December 30[,] 2008." The State said that when the Defendant checked herself out of her voluntary commitment, her defense attorney brought documentation regarding her mental health treatment to the prosecutor, who allowed the Defendant to enter a guilty plea to aggravated assault and receive a sentence of six years on probation. The State stressed the significance of these facts:

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[4] Rule 608(b) provides as follows:

> Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified.

Tenn. R. Evid. 608(b) (emphasis added).

> [The Defendant] only has mental health symptoms after she's charged with a criminal offense. When she's 30 years old, she's suddenly hearing voices, seeing things. She gets the benefit of this reduction. Sounds similar to this case. She doesn't want to take the offer. She doesn't want to plead guilty so she's fishing for a benefit . . .

In response to the trial court's questioning, the State said that it made the Defendant a twenty-five year offer in the present case, and the Defendant "rejected it many times." The State asserted that it wanted to ask the Defendant or the defense expert, Dr. Avery, about the fact that the Defendant never sought mental health treatment until she faced criminal charges and that the Defendant got a benefit the last time and wanted a benefit this time by claiming insanity. It maintained that there was "some evidence" in Dr. Avery's report that "maybe [the Defendant] is malingering." The State outlined the type of questions it wished to ask Dr. Avery:

> I don't want to ask about the underlying charges or facts, but I do want to . . . at least ask Dr. Avery, isn't it true that [the Defendant] was charged with a criminal offense that was pending when she . . . first started . . . seeking mental health treatment and isn't it true that she had received a reduction in her sentence, and isn't it possible that she is—is malingering in order to get a benefit in this case. And I think it goes to . . . [the Defendant's] state of mind.

In response, defense counsel argued that Rule 403, rather than Rule 608, was the correct rule to be applied. He said, "I think we're starting from a place where when you're talking about a prior conviction of a defendant and you're talking about something that's more than 10 years old, [the] starting point is that this is prejudicial, it's unfair, it shouldn't be let in. So the question is, is there some probative value that outweighs that." Defense counsel also argued that there was no evidence the Defendant was malingering in her earlier criminal case. The trial court noted, "We have a conviction, so there's clear and convincing evidence" that the Defendant was charged and entered a guilty plea to a reduced charge in the 2007 case.

The State then passed forward documentation, including the St. Francis Hospital records from the Defendant's voluntary commitment, that the Defendant's prior attorney submitted to the district attorney's office in order for the Defendant to receive a reduced guilty plea and sentence in the 2007 case. Although it does not appear that this documentation was included in the appellate record, it was referred to at length in the trial transcript.

The State reiterated that the Defendant "sought mental health treatment from an outside provider in November just before [her] trial date and then . . . committed herself [to St. Francis Hospital] around December 30[, 2008]. The trial court remarked, "[I]t does raise the question, I mean, if [the Defendant] used that [mental illness] defense before to obtain a more favorable outcome and . . . her condition only arose after being charged with . . . attempted murder [in the previous case][.]" The State confirmed that the Defendant was originally charged with attempted murder of her stepson, which was reduced to aggravated assault. The State then referenced the documentation from the district attorney's office concerning the Defendant's reduction, which noted the Defendant had been diagnosed as a "schizophrenic" and was "taking her medications[.]" The State then argued that the Defendant's mental treatment seemed to be a "negotiating chip" in obtaining her reduced conviction and sentence. The trial court, after confirming that the Defendant was not diagnosed with schizophrenia until after she was charged with the attempted first degree murder of her stepson, then stated, "[I]t sounds fair to be able to [ask] the doctor about that particularly since [the doctor] had the . . . medical records." The State explained that although Dr. Avery noted that the Defendant was "exaggerating [her mental health] symptoms" on one of her tests, Dr. Avery ultimately opined that the Defendant was "not malingering." The State acknowledged that the parties were "probably going to argue" about whether the Defendant was malingering her mental health issues in this case.

In support of its claim that the Defendant was malingering, the State confirmed that the West Tennessee Regional Forensic Center's evaluation found that the Defendant was competent to stand trial in this case and that the Defendant was not insane. Defense counsel countered that the aforementioned evaluation also found that the Defendant was "severely mentally ill."

Defense counsel also asserted that there was no proof that the Defendant was malingering when she voluntarily committed herself to St. Francis in December 2008 and that "all indications [were] that she was in fact severely mentally ill when she went to St. Francis." He also claimed there was no proof that now, some "10, 11 years later that [the Defendant] again malingers . . . because she got away with it the first time." However, the trial court countered that there was "circumstantial proof that . . . [the Defendant's] mental problems benefited her." The court then added,

> [I]t would appear that anything that goes along those lines should be admissible. . . . [The State is] limiting their question to isn't it true that the first time [the Defendant] showed any signed of . . . having problems is after she was charged with a serious crime, and isn't it true that she . . . benefited from that claim. And I think that's a fair thing to ask."

The trial court determined that this issue was "a combination of [Rule] 404[(b)] and [Rule] 608, because 608 is specific conduct[.]" It said "the way [Rule] 608 applies is that it talks about [the Defendant's] truthfulness or untruthfulness to [Dr. Avery] about being insane." The State added that Dr. Avery noted in her report that the Defendant was "exaggerating her symptoms" on the MMPI test. The trial court observed that the State was "not going to put in what the [Defendant's previous] crime was and what it was reduced to" and that the State's purpose was to question Dr. Avery's opinion using this information from the Defendant's prior act. The State emphasized that because Dr. Avery used the Defendant's "criminal history as a basis of coming to her conclusions," its proposed line of questioning was "fair game[,]" especially since "the defense ha[d] the burden of proof" on insanity.

Defense counsel countered that "the State ha[d] misinterpreted [Dr. Avery's] findings about malingering" and that Dr. Avery's actual findings were that the Defendant's test results could have been the result of "noncooperative test taking," "over reporting of symptoms[,]" or the Defendant's "confusion" or "impaired cognition" due to her "severe mental illness." The trial court determined that the State should be able "to go into the basis of [Dr. Avery's] opinion," including information about the Defendant's prior charge, its resolution, and the fact that the Defendant never showed "any signs of mental illness before she was charged with an attempted [first degree] murder [of her stepson]. Defense counsel countered that the probative value of this evidence was "limited" because there were two different interpretations—the State was arguing that the Defendant "made this up once and it worked" and "she's making it up again" while the defense was arguing that "[the Defendant's claim of mental illness] worked [for the Defendant the last time] because it was true . . ." The court observed that the parties' differing interpretations went into the "weighing process."

After defense counsel asked for the trial court to note his objection for the record, the trial court made the following ruling:

> I think that it was a fair thing for the State to frame the question the way they did, because they don't get into the particulars of [the previous case]. It's just . . . isn't it true that [the Defendant] never showed signs of any [mental] problems until after she was charged with a major crime and didn't it benefit her . . . it's relevant to whether or not [the Defendant] was malingering here. I think it's highly relevant to that issue . . .
>
> So we have the prior conviction [for the lesser charge of aggravated assault] so it's clear and convincing evidence that this prior thing occurred,

> and . . . it's highly relevant to whether or not [the Defendant] . . . is malingering now. And to the expert's opinion as to such, so the evidence is clear and convinc[ing], the material issue I think is clear, and it says the Court must exclude the evidence if its probative value is merely outweighed by the danger of unfair prejudice where the relevance standard substantially outweighs the unfair prejudice.
>
> . . . I think it's only fair [that the State be allowed to pursue this line of questioning]. [S]ince [the defense is asserting] that [the Defendant] was insane at the time of this event, [the State] should be entitled to go in[to] this. . . . I think it's highly relevant, extremely relevant, and [the State is] not going to try to get into the particular nature of that prior event or even [disclose] what the [prior] charges were[.]
>
> I think that's a good . . . way to protect the record. I can also in my final charge put in something to the effect of . . . you can only use it to [determine] whether or not the [D]efendant is malingering or something to that effect. So I think all that can be cured by proper instructions. So I'm going to allow [the State] under the limitations they set for themselves . . . to inquire into that[.]

Thereafter, the State pursued a lengthy line of questioning during its cross-examination of Dr. Avery that was particularly aimed at showing that the Defendant had previously benefitted in a criminal case by exaggerating her mental illness and that the Defendant was attempting to do the same thing in this case by asserting the affirmative defense of insanity.

A. <u>Preference Between Prison or a Mental Institution.</u> First, the Defendant maintains that the trial court erred when it allowed the State to ask Dr. Avery about whether she would personally prefer to go to prison for fifty years or be committed to a mental institution for six months to a year. The Defendant claims this line of questioning was irrelevant, or, alternatively, that any probative value associated with this questioning was outweighed by the prejudicial effect. She contends that because the trial court abused its discretion in allowing the State to pursue this line of questioning and failed in providing a curative instruction, her conviction should be reversed.

In response, the State asserts that the Defendant's motivation to malinger, by falsely claiming to have not understood the wrongfulness of her actions in order to avoid prison, is relevant to a determination of the Defendant's guilt. The State maintains that Dr. Avery, an expert in forensic psychology, was expected to have some familiarity with the process by which a person admitted to a mental health facility could be released. Moreover, the

State asserts that Dr. Avery could reasonably testify whether a person would find a shorter commitment to a mental facility more favorable than a longer incarceration in prison. In addition, the State argues that while Dr. Avery's personal preference regarding these options might have been irrelevant to the Defendant's motivation to malinger, Dr. Avery's preference "represents that of an ordinary person and suggests that the [D]efendant's preference would be the same." The State claims its question was "rhetorical" in the sense that "the question itself in the minds of the jurors is as important as the answer from the doctor."

After Dr. Avery testified that the Defendant was suffering from a severe mental defect and there was "some evidence" indicating that the Defendant did not understand the wrongfulness of her actions in killing her husband, the State cross-examined Dr. Avery regarding her opinion. Specifically, the State quizzed Dr. Avery about the Defendant's voluntary commitment in 2008. Dr. Avery acknowledged that at the time the Defendant voluntarily committed herself to St. Francis Hospital, the Defendant was having "hallucinations" and "some suicidality and some homicidal ideation" toward the Defendant's "children, her husband, and children that she was babysitting." Dr. Avery agreed that the Defendant realized that she needed some help, which was why she admitted herself to the hospital.

When the State asked Dr. Avery about the standard for keeping a person in a mental health facility after the person is declared insane, Dr. Avery replied, "[T]here is a point in time at which somebody would be reviewed for release . . . and you would look to see if they were a danger . . . to themselves or others." The State then asked, "So if [the Defendant] took her medication and acted right, she . . . could be released [from] mandatory treatment relatively quickly?" Dr. Avery equivocated about whether going to a secure mental health facility was really a benefit. The State then asked, "[I]f you were on trial for murder, would you rather go to a mental hospital or prison?," and defense counsel immediately objected on the ground of relevance. However, the trial court overruled this objection and instructed the witness to answer, and Dr. Avery replied, "It actually is a difficult question." When the State asked Dr. Avery if she would "rather go to prison . . . for fifty years or to a mental hospital for [six] months to a year?," Dr. Avery responded, "Six months to a year in a mental hospital."

Shortly thereafter, defense counsel asked for a bench conference, objecting on the basis that the State was improperly getting into the "consequences" for the charged offense. The State countered that it was not intending to ask about whether the Defendant was going to be "out walking the streets"; instead, it intended to ask Dr. Avery about whether 2008, which was the first time the Defendant had criminal charges pending, was the first time the Defendant had presented for mental health treatment, and if the Defendant had ultimately received a reduced charge based on her guilty plea in that case. When defense counsel

argued that the State was "trying to sway the jury that [the Defendant] can walk away and she's going to be out," the State argued that this issue had been "raised in voir dire," and the trial court noted that this issue was "in the [jury] charge too[.]"

At the motion for new trial hearing, the trial court recalled that the State's line of questioning on this issue "had to do with the [Defendant's] malingering and the fact that she had gotten out of trouble before or [had received] a very reduced sentence [in a previous case after claiming that she was mentally ill]" and that the Defendant was attempting to do the same thing in this case. The trial court said that while the State perhaps should not have mentioned the number of years the Defendant would receive if found guilty and sentenced to prison, this question, if error, was harmless in light of "the questioning" and the Defendant's statements during her jail phone calls indicating that she would be "coming home soon."

Here, the Defendant contends that the State's question, over the defense's objection, about Dr. Avery's preference of fifty years in prison or six months to one year in a mental institution, was irrelevant and, therefore, had no probative value. The Defendant also argues that even if the State's question has probative value, which she does not concede, any probative value is outweighed by the prejudicial effect. The Defendant asserts that it is "not legally or factually correct" for the State to suggest that the only sentencing alternatives were a fifty-year prison sentence or a six to twelve month hospitalization. Although the Defendant acknowledges that a life sentence is close to fifty years in length, she claims the State's questioning "presupposes any other defenses or mitigating factors" in her case. She also argues, pursuant to Code section 33-7-303, that any commitment following a finding of insanity "is based on an individual's diagnosis, treatment, and prognosis." The Defendant insists that "the prejudicial effect of this line of questioning cannot be overstated" and that the jury instruction, referencing the immediate referral of the defendant to a mental health facility for evaluation following a finding of not guilty by reason of insanity, is "hardly curative."

We agree with the trial court that if the State's line of questioning is error, such error is harmless. See Tenn. Rule App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."). Defense counsel informed the prospective jurors during voir dire that it believed the trial court would instruct the jury that "a verdict of not guilty by reason of insanity shall result in the automatic detention of the defendant in a mental hospital or treatment center[,] pending further medical and legal findings." Defense counsel then asked if there were any prospective jurors who felt that they would never find someone not guilty by reason of insanity after knowing what the consequences for the defendant would be, and there was no response from the prospective jurors. At trial, the

defense asserted an affirmative defense of insanity, and the State argued that the Defendant was malingering her mental illness with the hope that she would be found not guilty by reason of insanity. The State's theory was supported by Dr. Avery's testimony that the Defendant's responses to the MMPI test indicated that the Defendant was "exaggerating" her mental illness symptoms. While the defense could have asked additional questions to Dr. Avery on redirect examination regarding the review process for release by a mental health facility, it did not. Moreover, while the defense could have reviewed the varying defenses that could have resulted in different convictions or sentences during its closing argument, it did not. Following closing arguments, the trial court in its final charge instructed the jury that "[a] verdict of not guilty by reason of insanity shall result in the automatic detention of the defendant in a mental hospital or treatment center, pending further medical and legal findings." The Defendant has failed to show that the State's questions regarding Dr. Avery's preference between prison or a mental institution, or Dr. Avery's responses to such questions, more probably than not affected the verdict, particularly in light of the trial court's instruction on insanity, the Defendant's failure to present clear and convincing proof of her insanity, and the overwhelming evidence of the Defendant's guilt. Because any error regarding the aforementioned questions or answers was harmless, the Defendant is not entitled to relief.

B. Defendant's Prior Misconduct. Second, the Defendant asserts the trial court erred in allowing the State to ask Dr. Avery about the Defendant's "prior misconduct" regarding her previous charge for attempted first degree murder of her stepson. She asserts that although the trial court complied with most of the procedures outlined in Rule 404(b), the court did not determine whether proof of the other crime or wrong was clear and convincing, and she specifically notes that the record is unclear as to when this prior incident of misconduct occurred. The Defendant asserts that this particular line of questioning caused the jury to disregard the proof that she "suffered a severe mental disease or defect, that she "did not appreciate the wrongfulness of her actions," and that she "should have been found not guilty by reason of insanity."

In response, the State argues that the trial court did, in fact, find that proof of the other crime or wrong was clear and convincing. The State also contends that it did not disclose the nature of the underlying crime or crimes to the jury and that it elicited this evidence, not to prove the Defendant's propensity to commit "a sex crime or attempted murder," but to provide context for the Defendant's "previous claim of insanity to avoid accountability for her crime(s)."

Here, we recognize that during the jury-out hearing on this issue, defense counsel never objected on the ground of Rule 404(b) to the State's intended cross-examination regarding the Defendant's 2007 "prior misconduct" and never requested a Rule 404(b) hearing. Instead, defense counsel only asserted that Rule 403 barred the State's intended

cross-examination. In addition, the Defendant did not raise this Rule 404(b) issue in her motion for new trial and did not argue this issue at the motion for new trial hearing. Accordingly, the Defendant's argument on this issue regarding Rule 404(b) is waived. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); State v. Howard, 504 S.W.3d 260, 277 (Tenn. 2016) ("[A] defendant may not advocate a different or novel position on appeal."); State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996) ("Ordinarily, issues raised for the first time on appeal are waived.").

In any case, it is likely that this is actually a Rule 608 or Rule 403 issue, rather than a Rule 404(b) issue. The Defendant seems to have placed her character for truthfulness regarding the severity of her mental health difficulties at issue when Dr. Avery, the defense expert, testified that the Defendant was not malingering on the MMPI test despite the fact that the Defendant's responses indicated that she was exaggerating her mental health symptoms. Significantly, the Defendant does not ask for plain error review of this issue, and we conclude that no plain error exists. At trial, the State never identified the specific felony with which the Defendant was charged and never identified the reduced charge to which the Defendant ultimately entered a guilty plea in 2007. In addition, the trial court instructed the jury in its final charge that it could not consider the evidence regarding the Defendant's prior misconduct to prove her disposition to commit such a crime as that on trial. Given the Defendant's assertion of the affirmative defense of insanity and the issues regarding whether the Defendant was malingering regarding the severity of her mental illness in this case, we conclude that the Defendant is not entitled to relief on this issue.

C. State's Reference to the Defendant's "Major Charge." Third, the Defendant contends that the trial court erred when it failed to give a curative instruction or failed to strike the question after the State referred to the Defendant's charge of attempted first degree murder of her stepson as a "major charge" during its cross-examination of Dr. Avery. Although the Defendant acknowledges that the jury never heard "the precise nature of the charges" against her, she nevertheless argues that the State, by characterizing her prior misconduct as a "major charge," unfairly prejudiced the jury and encouraged the jury to speculate as to what this charge might be. Second, the Defendant, while acknowledging that she did not testify and asserting that impeachment is not the issue, nevertheless argues that Tennessee Rule of Evidence 609 "provides analogous guidance for further determining the relevance of and the weight that should be given acts that are so remote in time by creating a higher burden to show relevancy." See Tenn. R. Evid. 609(b) (Rule 609, which concerns impeachment by evidence of conviction of a crime, provides that "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution[.]"). The Defendant contends that the prejudice suffered by her as a result of

the State's line of questioning caused the jury to find her guilty and resulted in the jury disregarding the clear and convincing evidence that she was not guilty by reason of insanity. In response, the State argues that the trial court properly determined that the Defendant's "prior claim of insanity was relevant to show that she was again raising the same false claim in the current case." The State also maintains that its reference to the Defendant's prior underlying offense(s) as a "major charge" was not so prejudicial as to overcome the probative value of this evidence.

On cross-examination, Dr. Avery confirmed that November 2008 was the first time the Defendant had ever received mental health treatment and that at that time, the Defendant was facing criminal charges. The State then asked, "And [the Defendant] actually had, I guess it would be a major charge; fair to say?" When defense counsel objected on the basis that this question was "outside the bounds" of the trial court's ruling, the State said, "I'll withdraw the question." Upon considering this issue at the motion for new trial, the trial court recalled that the charge at issue was attempted first degree murder, which was reduced to aggravated assault. It stated, "I don't see any harm in that question myself."

Initially, we note that the trial court held that the State could ask about the Defendant's "major charge," and the State echoed this language in its cross-examination of Dr. Avery. We also recognize that although defense counsel objected to the State's characterization of the Defendant's 2007 case as a "major charge," he never asked the trial court for a curative instruction and never requested that the court strike the State's question. A trial court should provide a curative instruction once an objection is made. State v. Griffis, 964 S.W.2d 577, 599 (Tenn. Crim. App. 1997). However, if the trial court fails to give a curative instruction sua sponte, then counsel for the party has the obligation to request the trial court to provide a curative instruction. Id. If the party fails to request a curative instruction, or is dissatisfied with the instruction and fails to request a more complete instruction, then the party waives this issue for appellate purposes. Id. Because the Defendant never asked the trial court for a curative instruction and never requested that the court strike the State's question, she has waived this issue. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); State v. Trenton Jermaine Bell, No. M2019-01810-CCA-R3-CD, 2021 WL 794771, at *6 (Tenn. Crim. App. Mar. 2, 2021) (reiterating that when a defendant fails to ask for a curative instruction, he waives the issue on appeal). Once again, the Defendant does not ask for plain error review of this issue, and we conclude that no plain error exists. Accordingly, the Defendant is not entitled to relief.

D. Defendant's Use of Mental Illness to Mitigate Responsibility. Fourth, the Defendant argues the trial court erred in allowing the State to suggest that the Defendant

"used" her mental health diagnosis to mitigate responsibility for her prior misconduct in her 2007 case and that the Defendant intended to do the same thing in the instant case by pursuing an affirmative defense of insanity. The Defendant claims that the trial court erred in permitting the State to use Rule 404(b) evidence to prejudice the jury by intimating that the Defendant was malingering in order to receive confinement to a mental institution rather than a fixed prison sentence. She asserts that the prejudice from this line of questioning caused the jury to find her guilty by encouraging the jury to disregard the clear and convincing evidence that she was not guilty by reason of insanity. The State counters that the Defendant waived this issue by failing to cite to any supporting authority.

During the State's cross-examination of Dr. Avery, the following exchange occurred:

The State:	[The Defendant] did have criminal charges pending [in her 2007 case]?
Dr. Avery:	Yes.
The State:	She goes to the hospital, and she's released four days later; does—
Dr. Avery:	Yes.
The State:	-- is that fair and accurate? And ultimately, [the Defendant] received a reduction to a lesser plea and lesser sentence after she went to seek mental health treatment?
Dr. Avery:	That was the information I was given this morning.
The State:	And if that's true . . . that would indicate that [the Defendant] . . . potentially received a benefit of presenting a mental defense previously?
Dr. Avery:	Yes. . . .[S]o I was told that she presented this mental defense—
The State:	Uh-huh.
Dr. Avery:	—and then that theoretically gave her a reduced sentence, then yes.

The State:	Okay. And so how do we know that that's not what she's doing this time?
Dr. Avery:	Well, you have a lengthy history of mental illness. So . . . I would think that this would be a long game to play. I mean, a decade long—over a decade game to play, and it would be hard to be presenting as mentally ill or that long to do so successfully and to take intense medication, multiple medications if you really weren't mentally ill.
The State:	But the fact of the matter is, the mental health issues were not formally treated until after she was part of the Criminal Justice System and that's true, isn't it?
Dr. Avery:	Yes.

At the motion for new trial, the trial court noted that the Defendant never claimed to have had mental problems until she was charged in the 2007 case, and because of her claim of mental illness, the Defendant was "actually given a pretty good reduction" on her conviction offense and sentence in that previous case. The court said it believed the evidence regarding what happened in the Defendant's prior case was "relevant and highly probative" of whether the Defendant "was malingering in this particular instance."

Initially, we disagree with the State's claim that the Defendant has waived this issue by failing to cite any supporting authority for her position. The Defendant argues that the trial court erred in permitting the State to use Rule 404(b) evidence to prejudice the jury by suggesting that the Defendant was malingering in order to receive confinement to a mental institution rather than a fixed prison sentence. Nevertheless, we conclude that the Defendant is not entitled to relief on this issue.

Previously in this opinion, we concluded that the Defendant waived any claim that the trial court should have precluded the State from pursuing this line of questioning based on Rule 404(b) because the defense never objected on the ground of Rule 404(b), never requested a Rule 404(b) hearing, and never raised this issue with respect to Rule 404(b) in her motion for new trial or at the hearing on this motion. We reiterate that the Defendant seems to have placed her character for truthfulness regarding the severity of her mental health difficulties at issue when Dr. Avery testified that the Defendant was not malingering on the MMPI test, despite the fact that the Defendant's responses indicated that she was exaggerating her mental health symptoms. Once again, the Defendant does not ask for

plain error review of this issue, and we conclude that no plain error exists. At trial, the State never identified the specific felony with which the Defendant was charged and never identified the reduced charge to which the Defendant ultimately entered a guilty plea in 2007. In addition, the trial court instructed the jury in its final charge that it could not consider the evidence regarding the Defendant's prior misconduct to prove her disposition to commit such a crime as that on trial. Given the Defendant's assertion of the affirmative offense of insanity and the issues regarding whether the Defendant was malingering regarding the severity of her mental illness in this case, we conclude that the Defendant is not entitled to relief on this issue.

II. Antisocial Personality Disorder. The Defendant also asserts that the trial court erred in allowing the State to ask Dr. Avery extensive questions about whether the Defendant met the criteria for antisocial personality disorder. She claims that this line of questioning was irrelevant and prejudicial because antisocial personality disorder is not a mental disease or defect as defined in the affirmative defense of insanity in Code section 39-11-501. See Tenn. R. Evid. 402, 403. In response, the State contends that the Defendant waived this issue by failing to cite to any authority in support of this claim and that, in any case, the trial court properly allowed the State to question Dr. Avery about antisocial personality disorder with respect to her professional opinion because it was a proper subject for cross-examination. Because the State's line of questioning was relevant to the Defendant's claim of insanity, the Defendant is not entitled to relief on this issue.

On direct examination, Dr. Avery testified that she "coded a descriptor of adult antisocial behavior" when evaluating the Defendant. She explained that an individual with antisocial personality disorder "hurts others, might be aggressive, [does not] show remorse, might lie[.]" She added, "I didn't think that [the Defendant] met criteria for [antisocial personality] disorder, but I noted that there had been some antisocial behavior . . . just things that violate norms of the law in [the Defendant's] past."

On cross-examination, Dr. Avery acknowledged that she evaluated the Defendant for antisocial personality disorder. Defense counsel immediately asked for a bench conference, wherein he argued that antisocial personality disorder was not a psychological diagnosis. The State replied that it wanted to ask Dr. Avery if, based on the instant offense, the Defendant met the criteria for antisocial personality disorder. When defense counsel questioned the relevance of this inquiry because antisocial personality disorder was not a mental illness, the State countered that it could be "an alternative interpretation" and asserted that Dr. Avery had testified on direct examination that a person can have an "antisocial personality disorder and still be insane." The trial court noted that pursuant to Code section 39-11-501(b) a "mental disease or defect does not include an abnormality, manifested only by a repeated criminal or otherwise antisocial conduct." The State replied that Dr. Avery had testified that a person can have antisocial personality disorder and be

insane and that it "want[ed] to clarify something on that." When the defense again questioned the relevance of this inquiry, the State asserted, "[Antisocial personality disorder] would be the explanation for [the Defendant's] behavior and not schizophrenia." The State acknowledged that Dr. Avery had equivocated about whether the Defendant had antisocial personality disorder; however, it asserted its belief that the Defendant had antisocial personality disorder and was "not just mentally ill." When the defense again questioned the relevance of this issue, the State said, "Well, maybe [the Defendant's] not schizophrenic, but she's lying to manipulate the system[,] and she actually ha[s] antisocial personality disorder." The trial court ultimately held that the State's inquiry was "relevant for those purposes" and agreed to allow the State to pursue this line of questioning.

When cross-examination continued, Dr. Avery agreed that she had testified on direct that a person can have antisocial personality disorder and be insane. However, she asserted that antisocial personality disorder is not considered a mental disease or defect. Dr. Avery acknowledged that when viewing the offense in this case, the Defendant appeared to meet several of the criterion for antisocial personality disorder. She agreed that from the age of fifteen, the Defendant had a failure to conform to societal norms with respect to lawful behaviors. She also said it was reasonable to conclude that the Defendant was dishonest with her family, police, and evaluators about her acts related to this incident. In addition, Dr. Avery agreed that the Defendant exhibited aggressiveness during this offense; however, she asserted that antisocial personality disorder requires "a pattern of behavior, not a single instance." Dr. Avery also acknowledged that it took the Defendant time to commit this offense and that it took some planning for the Defendant to get the materials and to execute this plan to kill her husband. Dr. Avery agreed that the Defendant had a reckless disregard for the safety of others based her actions during this offense. Moreover, she stated that the Defendant had consistent irresponsibility because the Defendant was unable to keep a job. Dr. Avery also acknowledged that the Defendant had an alcohol use disorder and a cannabis use disorder that interfered with her personal life and with performing her daily obligations and duties. She agreed that the Defendant smoked cannabis daily from the age of eighteen until 2010, and she acknowledged that if individuals use too much cannabis, it can cause psychosis. Finally, Dr. Avery said that although she interpreted the Defendant's flat affect as being a symptom of a mental illness, the Defendant's flat affect could also be indicative of her lack of remorse, which was also one of the criterion for antisocial personality disorder.

Dr. Avery conceded that the Defendant definitely exhibited more than three of the criterion required for antisocial personality disorder based on her commission of the act in this case. However, she reiterated that there must be a pattern of behavior from childhood forward in order to diagnose someone with antisocial personality disorder. Dr. Avery said she explained in her report why she did not believe it was clear that the Defendant had exhibited the pattern of behavior required for this diagnosis. However, Dr. Avery admitted

that with regard to the incident involving this victim, many of the criterion for antisocial personality disorder were present. She stated in her report that antisocial personality disorder was noted for the Defendant and that this disorder should be assessed in any future evaluations if additional evidence was available. She agreed that the Defendant's behavior with regard to the instant offense "could be" consistent with someone who has antisocial personality disorder.

At the motion for new trial, defense counsel claimed he argued that the State's questioning about whether the Defendant had antisocial personality disorder was "akin to propensity evidence, which is prohibited under [Rule] 404[(b)] because it is not a mental health diagnosis" but a "series of personality traits." The trial court noted that Dr. Avery referenced in her report that the Defendant might have an antisocial personality disorder; the court also said it did not recall this line of questioning "being a major issue" at trial.

The trial transcript shows that the Defendant claimed that she was not guilty by reason of insanity, and the State responded by arguing that the Defendant was suffering from antisocial personality disorder as an alternate explanation for her actions involving the murder of her husband.

The trial transcript shows that during bench conference on this issue, defense counsel never objected on the ground of Rule 403 and only argued that the State's line of questioning was irrelevant because antisocial personality disorder is not a mental illness. Accordingly, the Defendant's argument regarding Rule 403 is waived. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); Howard, 504 S.W.3d at 277 ("[A] defendant may not advocate a different or novel position on appeal."); Alvarado, 961 S.W.2d at 153 ("Ordinarily, issues raised for the first time on appeal are waived.").

In any case, we conclude that the Defendant is not entitled to relief on this issue. We reiterate that generally, the propriety, scope, manner and control of the cross-examination of witnesses rest within the sound discretion of the trial court. James, 315 S.W.3d at 460 (citing Caughron, 855 S.W.2d at 540; Dishman, 915 S.W.2d at 463). Dr. Avery's responses to these questions were relevant because they had a tendency to make the Defendant's claim of insanity less probable that it would have been without this evidence. See Tenn. R. Evid. 401. In addition, waiver notwithstanding, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice because antisocial personality disorder provided an explanation, other than insanity, for the Defendant's actions in killing her husband. See Tenn. R. Evid. 403. Given the Defendant's assertion of the affirmative defense of insanity and Dr. Avery's testimony on direct that she had evaluated the Defendant for antisocial personality disorder, we conclude that the

trial court did not abuse its discretion in allowing the State to ask Dr. Avery whether the Defendant met the criteria for this disorder.

III. Diminished Capacity. In addition, the Defendant argues that the trial court erred in preventing the defense from asking Dr. Avery whether the Defendant lacked the capacity to form the requisite mental state for the charged offense. The Defendant insists that she did object at trial to the trial court's determination that notice was required to ask questions about a defendant's "diminished capacity." The Defendant also asserts that even if she failed to make a contemporaneous objection to the trial court's ruling, she is nevertheless entitled to relief under plain error analysis. She claims that preventing the defense from asking Dr. Avery about her ability to form the requisite mental state for the charged offenses violated her right to due process as well as her right to present a defense. The State counters that the Defendant withdrew this line of questioning at trial and that the trial court properly precluded the defense from asking Dr. Avery about whether the Defendant lacked the mens rea required for the offense. We conclude that because the Defendant failed to file the proper notice and this failure prejudiced the State by failing to allow it to present rebuttal proof, the trial court properly prevented the defense from asking Dr. Avery whether the Defendant lacked the capacity to form the requisite mental state for the charged offense.

Prior to trial, the defense filed a "Notice of Insanity Defense," asserting that it intended "to use expert testimony of Defendant's mental condition under Rule 12.2" and "to rely upon the testimony of Dr. Megan Avery."

At trial, defense counsel asked Dr. Avery the following question:

> . . . [W]e've talked about the . . . legal standard for . . . sanity or for insanity. There's also this idea of diminished capacity, right, that somebody can[not] form the intent necessary for a certain offense. The jury's been told about murder being a premeditated, intentional act, intending to cause a result, right, intending to cause—

At that point, the State immediately asked for a bench conference, wherein it argued that the defense had not provided notice of a diminished capacity argument and had only provided notice of the affirmative defense of insanity. The defense replied that notice of the defense of insanity and diminished capacity "go hand in hand," and the State countered that if the defense had provided notice of a diminished capacity defense, the State "would've had West Tennessee [Regional Forensic Center] do a diminished capacity evaluation[.]" The trial court interjected that it had previously asked defense counsel if he was "going to go down that road" and the defense said "no[,]" even when the court specifically "inquired about diminished capacity." The State additionally argued that Dr.

Avery had given no opinion on diminished capacity in her report[5] and that the defense was required to have an expert who would support its position on diminished capacity to even present it. When the trial court held that the defense was required to provide notice of its intent to present a diminished capacity defense, defense counsel stated, "I'll withdraw the line of questioning."

Following the Defendant's conviction, the defense filed a motion for new trial, asserting that its "notice of insanity defense gave the [S]tate ample notice of the nearly identical testimony that would have been used to explain the mitigating evidence of diminished capacity. At the hearing on this motion, the trial court acknowledged that "diminished capacity does appear to be almost identical to a not guilty by reason of insanity" but asserted that while insanity and diminished capacity both required a finding of a mental disease or defect, insanity required a showing that a person was unable to appreciate the wrongfulness of the act while diminished capacity required a finding that the person did not know what they were doing. The State argued that the defense failed to provide notice regarding diminished capacity and failed to make an offer of proof showing that Dr. Avery could testify that the Defendant "was prevented from forming [the] requisite intent as a result of her mental illness." Ultimately, the trial court denied the Defendant's claim, stating, "I didn't hear any testimony that this witness . . . mentioned that [the Defendant] didn't know what she was doing. In fact, I wasn't even certain that [the Defendant] met the criteria for insanity. Seems like [Dr. Avery's] testimony was . . . kind of iffy when it came to that as well."

The Defendant claims that the notice of her defense of insanity was sufficient to provide notice of diminished capacity, arguing that "[d]iminished capacity—the inability to form the requisite mental state—is part of the defense of insanity." She also asserts that the State would not have been prejudiced from the defense asking Dr. Avery about the Defendant's incapacity to form the requisite intent because the State had notice of her insanity defense, because the elements of diminished capacity are subsumed by the defense of insanity, and because the State had advance notice of Dr. Avery's testimony.

Generally, expert testimony regarding a defendant's capacity to form the requisite mental state for a particular offense is admissible. State v. Ferrell, 277 S.W.3d 372, 379 (Tenn. 2009) (citing State v. Hall, 958 S.W.2d 679, 689-90 (Tenn. 1997)); State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994); see Tenn. Code Ann. § 39-11-201(a)(2) (stating that no person may be convicted of an offense unless the culpable mental state required is proven beyond a reasonable doubt). In Hall, the Tennessee Supreme Court stated:

[5] Although the record repeatedly references Dr. Avery's report of her findings from her examination of the Defendant, it appears this report was never admitted into evidence.

> [D]iminished capacity is not considered a justification or excuse for a crime, but rather an attempt to prove that the defendant, incapable of the requisite intent of the crime charged, is innocent of that crime but most likely guilty of a lesser included offense. United States v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990). Thus, a defendant claiming diminished capacity contemplates full responsibility, but only for the crime actually committed. State v. Padilla, 347 P.2d 312 (N.M. 1959). In other words, "diminished capacity" is actually a defendant's presentation of expert, psychiatric evidence aimed at negating the requisite culpable mental state.

958 S.W.2d at 688. Such evidence "should not be proffered as proof of 'diminished capacity.'" Id. at 690. Rather, this evidence "should be presented to the trial court as relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried." Id. (footnote omitted). In order for expert testimony regarding a defendant's mental state to be admissible, the expert must testify: (1) the defendant had a mental disease or defect, and (2) the defendant's inability to form the requisite culpable mental state was because of the defendant's mental disease or defect, rather than the defendant's emotional state or mental condition. See id. at 689-90; see also Ferrell, 277 S.W.3d at 379; State v. Faulkner, 154 S.W.3d 48, 56-57 (Tenn. 2005).

While Tennessee Rule of Criminal Procedure 12.2(a) details the notice of an insanity defense and the timing of such a defense, Rule 12.2(b) details the notice of expert testimony concerning a defendant's mental condition and the timing of that notice. Tenn. R. Crim. P. 12.2(a), (b). Rule 12.2(b)(1) provides that "[a] defendant who intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt shall so notify the district attorney general in writing and file a copy of the notice with the clerk." This notice "shall be filed within the time provided for the filing of pretrial motions or at such later time as the court may direct." Tenn. R. Crim. P. 12.2(b)(2). However, "[t]he court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders." Id. This rule further provides that "[o]n motion of the district attorney general, the court may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order." Tenn. R. Crim. P. 12.2(c)(1). Moreover, "[i]f a defendant fails to give notice under Rule 12.2(b) or does not submit to an examination ordered under Rule 12.2(c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition." Tenn. R. Crim. P. 12.2(d). As the Advisory Commission Comment for this rule explains,

> The burden is upon the defendant to give notice of any defense based upon mental condition, without a triggering request from the state.
>
> Rule 12.2(b) imposes a notice requirement on the defendant when expert witnesses are to testify as to the defendant's mental state. The commission approves the federal advisory committee notes which indicate that lack of notice about the defendant's mental state may seriously disadvantage the district attorney general in preparing possible rebuttal proof.

Tenn. R. Crim. P. 12.2, Adv. Comm'n Cmt.

While the defense provided notice of its intent to present the affirmative defense of insanity, it never provided notice that it was pursuing a defense based on the Defendant's incapacity to form the required mental state, despite the fact that Rule 12.2 clearly contemplates separate notices for each of these defenses. See Tenn. R. Crim. P. 12.2(a)(1), (b)(1). In addition, the Advisory Commission Comment to this rule recognizes that lack of notice about the defendant's mental state may seriously disadvantage the State in preparing possible rebuttal proof. Tenn. R. Crim. P. 12.2, Adv. Comm'n Cmt. During the bench conference on this issue, the State asserted that if it had known that the defense was pursuing a defense based on the Defendant's inability to form the required mental state, it would have had a "diminished capacity evaluation" performed on the Defendant. The State also argued that that Dr. Avery had given no opinion on diminished capacity in her report, which prevented the State from having proper notice of her analysis and findings with regard to this defense. After the trial court held that the defense was required to provide notice of its intent to present a defense based on the Defendant' incapacity to form the requisite mental state, the defense abandoned this argument when it withdrew that line of questioning and failed to make a continuing objection or an offer of proof regarding Dr. Avery's testimony. In any case, because the defense failed to properly file a notice of this defense and this failure seriously disadvantaged the State in preparing possible rebuttal proof, we conclude the trial court did not err in preventing the defense from asking Dr. Avery whether the Defendant lacked the capacity to form the requisite mental state for the charged offense.

IV. Reckless Homicide Instruction. The Defendant additionally maintains that the trial court erred in denying her request for the pattern jury instruction on reckless homicide. She asserts that the court's failure to charge reckless homicide, a lesser-included offense that supported her alternate defense theory that she did not possess the requisite mental state to commit first degree murder, was error that violated her constitutional right to due process. The State responds that the trial court properly determined that an instruction on reckless homicide was not supported by the evidence. We conclude that the

trial court did not err by denying the Defendant's request for a jury instruction on reckless homicide.

Prior to trial, the Defendant filed a "Motion to Instruct the Jury on Lesser Included Offenses," which listed several offenses, including reckless homicide, that could be considered lesser-included offenses of first degree premeditated murder.

During a jury-out hearing after all the proof had been presented, the trial court discussed its proposed jury charge. The court said it saw "no proof of voluntary manslaughter," noting that "[i]t's either insanity or not, first degree murder or second degree murder." The defense then asked for an instruction on the lesser-included offense of reckless homicide, stating:

> [O]ne other request would be for the lesser[] included [offense] of reckless homicide, the theory being that if [the jury does not] believe that [the Defendant's] mental illness fits under the definition of insanity, that perhaps [the Defendant] still didn't understand that her actions would lead to his death and that, you know, that would be required knowingly for a second degree murder. Without that knowing—if [the jury] still think[s] that [the Defendant] knew what she was doing was wrong, but didn't know it would lead to his death, that would be arguably reckless [homicide].

The trial court replied, "Seems like a stretch to me." The State agreed that the evidence did not support an instruction on reckless homicide. The trial court ultimately denied the request, stating, "[B]y no means was anything here done recklessly. No, I—I can't see it."

At the motion for new trial, the trial court reiterated that it "saw no proof of reckless homicide" at trial. The court noted that the proof showed that the Defendant killed the victim, and the defense argued that the Defendant committed the killing "because she was insane." The trial court reiterated, "There was no proof that this homicide was reckless."

In determining this issue, we recognize that a criminal defendant has the "right to a correct and complete charge of the law." State v. Hanson, 279 S.W.3d 265, 280 (Tenn. 2009) (citing State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000)). Because the defendant has a constitutional right to a correct and complete charge of the law, each issue of fact raised by the evidence should be submitted to the jury with proper instructions. State v. Dorantes, 331 S.W.3d 370, 390 (Tenn. 2011). Whether a jury instruction is required by the facts of a particular case is a mixed question of law and fact, and the question of whether a jury instruction should have been given is reviewed de novo with no presumption of correctness. State v. Hawkins, 406 S.W.3d 121, 128 (Tenn. 2013).

A jury charge should contain no statement which is inaccurate, inapplicable, or which might tend to confuse the jury. State v. Hatcher, 310 S.W.3d 788, 812 (Tenn. 2010). A trial court must instruct the jury on a lesser-included offense if it determines that "any evidence as to a lesser-included offense exists that reasonable minds could accept and that the evidence, viewed liberally in the light most favorable to the lesser-included offense, is legally sufficient to support a conviction[.]" Howard, 504 S.W.3d at 268 (citing State v. Burns, 6 S.W.3d 453, 469 (Tenn. 1999)). A trial court's failure to instruct the jury as to a lesser-included offense is a non-structural constitutional error, and the State has the burden of showing that the error is harmless beyond a reasonable doubt. State v. Brown, 311 S.W.3d 422, 434 (Tenn. 2010); see State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008) (holding that "[t]he test used to determine whether a non-structural constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (citations and internal quotation marks omitted)). When determining whether an error is harmless beyond a reasonable doubt, this court "should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." State v. Allen, 69 S.W.3d 181, 191 (Tenn. 2002).

Reckless homicide is the "reckless killing of another." Tenn. Code Ann. § 39-13-215(a). "Reckless" means that a person

> acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Id. §§ 39-11-106(a)(31) (Supp. 2015), -302(c).

The trial court did not err by declining to instruct the jury on reckless homicide. The central issue in this case was whether the Defendant was not guilty by reason of insanity, and we have already concluded that the trial court did not err in precluding the defense from presenting proof that the Defendant lacked the capacity to form the means rea required for the charged offense. During closing argument, defense counsel asserted that there were two ways to look at this case, either that the Defendant was guilty because she acted intentionally and with premeditation or that the Defendant was not guilty by reason of insanity, and he maintained that only insanity made sense. After carefully reviewing the trial transcript, we conclude that no evidence existed that reasonable minds could accept as to the lesser-included offense of reckless homicide. There was no proof showing that the

Defendant acted recklessly with respect to circumstances surrounding her conduct or the result of her conduct; instead, the proof established that the Defendant committed a premeditated, intentional killing of her husband. In addition, we conclude that the evidence, viewed liberally in the light most favorable to the lesser-included offense, is not sufficient to sustain a conviction for reckless homicide. In this case, the trial court instructed the jury on first degree premeditated murder and the lesser-included offense of second degree murder. The evidence at trial showed that the Defendant wrapped the victim's head with multiple layers of plastic and duct tape to cause the victim's death by suffocation. After carefully examining the record, there is no proof indicating that the Defendant acted recklessly. Accordingly, we conclude that the trial court did not err by denying the Defendant's request for a jury instruction on reckless homicide.

We also note that even if the trial court's failure to instruct on reckless homicide in this case was somehow error, this error was harmless beyond a reasonable doubt. The trial court instructed the jury on first degree premeditated murder, second degree murder, and the Defendant's affirmative defense of insanity. The jury's guilty verdict in this case necessarily required a finding that the Defendant acted with premeditation. Although the jury had the option of finding the Defendant guilty of second degree murder, which was the immediately lesser-included offense of first degree premeditated murder, the jury still found the Defendant guilty of the charged offense. The Tennessee Supreme Court has held that when a jury receives a sequential instruction as well as an instruction on the immediately lesser-included offense, and the jury finds the defendant guilty of the highest offense, the omission of an additional lesser-included offense is harmless error. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998) ("[B]y finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses"). Accordingly, the Defendant is not entitled to relief on this issue.

V. Exhibits. The Defendant contends that the trial court erred in admitting Exhibits 43, 44, 47, 59A, 59C, 59D, 59H, and 59I because these photographs were cumulative and gruesome. She asserts that because the identity of the victim and the perpetrator and the manner and cause of the victim's death were not in question, the only reason for the State to introduce these photographs was to prejudice the jury. In response, the State asserts that the Defendant failed to provide any specific argument regarding the alleged prejudicial nature of the photographs and that, in any case, that the trial court properly admitted these exhibits. After carefully evaluating each of the challenged photographs, we conclude that the trial court did not abuse its discretion in admitting them into evidence.

"The admission of photographs lies within the sound discretion of the trial court and will not be overturned on appeal absent a showing that the trial court abused that discretion." State v. Odom, 336 S.W.3d 541, 565 (Tenn. 2011) (citing State v. Banks, 564

S.W.2d 947, 949 (Tenn. 1978)). A trial court is found to have abused its discretion when it applies "an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting State v. Ruiz, 204 S.W.3d 772, 778 (Tenn. 2006)). "[T]he modern trend is to vest more discretion in the trial judge's rulings on admissibility." State v. Carruthers, 35 S.W.3d 516, 577 (Tenn. 2000).

To be admissible, all evidence, including photographs, must be relevant to an issue the jury must decide. State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Unfair prejudice has been defined as "'[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one.'" Banks, 564 S.W.2d at 951 (quoting Fed. R. Evid. 403, Advisory Comm. Notes).

When determining the admissibility of relevant photographic evidence, the trial court should consider the following factors:

> [the photographs'] accuracy and clarity, and whether they were taken before the corpse was moved, if the position and location of the body when found is material; the inadequacy of testimonial evidence in relating the facts to the jury; and the need for the evidence to establish a prima facie case of guilt or to rebut the defendant's contentions.

Id.

"[P]hotographs of [a victim's body] are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Id. at 950-51. However, if the photographs "are not relevant to prove some part of the prosecution's case, they may not be admitted solely to inflame the jury and prejudice them against the defendant." Id. at 951. In addition, if photographs do not add anything to the testimonial descriptions, they may be excluded. Id. Moreover, if the defense offers to stipulate to the facts shown in a photograph or never disputes the testimony that the photograph illustrates, then admission of the photograph itself may not be justified. Id. However, "'photographs are not necessarily rendered inadmissible because they are cumulative of other evidence or because descriptive words could be used.'" State v. Willis, 496 S.W.3d 653, 728 (Tenn. 2016) (quoting State v. Derek Williamson, No. M2010-01067-

CCA-R3-CD, 2011 WL 3557827, at *9 (Tenn. Crim. App. Aug. 12, 2011)). If the State is required to establish the degree of a homicide, it may properly introduce photographs and other evidence bearing on that issue. Banks, 564 S.W.2d at 950; State v. McAfee, 784 S.W.2d 930, 933 (Tenn. Crim. App. 1989). Likewise, photographs of a victim can be relevant to the defendant's deliberation or premeditation. Banks, 564 S.W.2d at 950.

During a bench conference at trial, defense counsel, pursuant to Tennessee Rule of Evidence 403, objected to several photographs of the deceased victim, arguing that they were "graphic" and "unfairly prejudicial." Defense counsel also asserted that because there was no issue with regard to "cause of death, manner of death" or "even who caused [the victim's] death," the photographs had "very limited probative value." Thereafter, the trial court dismissed the jury to have a hearing on the admissibility of these photographs.

Regarding Exhibit 43, the trial court noted that this photograph showed the victim's "whole body, . . . the ankle cuffs, . . . the body after it's been taken out of the . . . plastic bin, it shows the concrete on the body and the plastic wrap around the [victim's] head and upper torso." The State argued Exhibit 43 was admissible because it depicted "the way [the victim] looked before the medical examiner started working on him." The State noted that the victim was in his underwear at the time of his death and asserted that "there had to be some sort of deception to get [the victim] into those cuffs[,]" and that the handcuffs were "genuine law enforcement handcuffs," which showed "some planning and time." The State added that Exhibit 43 showed that the victim "meant to kill [the victim]" and meant "to secure him" so she could do it, which was "relevant" to the Defendant's "state of mind." The trial court held that Exhibit 43 was "admissible, because it shows . . . that it took a while to do this [to the victim]" and makes you wonder "how in the world [the Defendant] got [the victim] in this position in order to do that to [him]." In response to the trial court's questioning, the State asserted that the medical examiner would testify that the victim's cause of death was suffocation, and the trial court noted that this cause of death "goes hand in hand with [the victim's head] being wrapped in plastic."

The trial court also determined that Exhibit 44, which depicted "how tight the handcuffs" were based on the blood around the victim's wrists, was admissible because it provided some evidence that the victim was "struggling to get out" and that it might have "taken a while for [the victim] to suffocate."

The trial court asserted that Exhibit 47 was admissible because it showed "both sets of cuffs" while Exhibit 43 showed only "one set of cuffs." It also noted that Exhibit 47 showed "scrapes" on the victim and the "plastic around his head[,]" which is "probative of the [Defendant's] deliberative process" and "premeditation."

Later, defense counsel objected to several autopsy photographs, including 59A, 59C, 59D, 59H, and 59I, on the ground that they were "unduly prejudicial" and that they "play[ed] to the sympathies and prejudices of the jurors," which "greatly outweigh[ed] the[ir] probative value." The State countered that the number and tightness of the layers of plastic and duct tape in these exhibits were probative of the Defendant's "premeditation" and "how much she wanted to make sure that [the victim] was not alive after this[.][490]" The State argued that 59C showed "the tape inside [the victim's] mouth," which indicated that the Defendant put the layers of tape and plastic on "so tightly that [the victim] inhaled it trying to survive." The State also asserted that 59D showed "how tightly [the Defendant] put those handcuffs on [the victim," noting that the victim's wrists looked "about half the size [they] should be." The State argued that the other photographs in this group showed "various bruising to [the victim's] body," which would correspond to the medical examiner's testimony. It also asserted that there was "nothing overly prejudicial about [these photographs]" and that it was not "trying to elicit any kind of sympathy, just show all of the steps that the [D]efendant went through to make sure [the victim] stayed dead."

The trial court held that 59A was admissible because it accurately shows how "the plastic wrap is wrapped around his head" and was not "that inflammatory." Regarding 59C, which showed how the victim had inhaled the duct tape and plastic, the trial court held it was "highly probative of what . . . [the victim] went through" and showed "the force and . . . perhaps even . . . the [Defendant's] intent." The court added that Exhibit 59C showed how the plastic "was crammed inside [the victim's] mouth, like . . . he was bound and gagged with the plastic" and concluded that it was "not unduly prejudicial." The trial court also concluded that Exhibit 59D was admissible because it showed how tight the handcuffs were on the victim's wrists and how deeply the handcuffs cut into his wrists, which could be "indicative of [the victim] struggling" to escape. With regard to Exhibit 59H, the court said this photograph depicted "some of the damage to [the victim's] skin" and perhaps "drag marks," which was consistent with someone "dragging" the victim across something. The court held that Exhibit 59H was admissible and was not "inflammatory at all." The trial court also held that Exhibit 59I, which "measure[ed] the size of the contusions" on the victim's arm, was admissible because it was "not unduly prejudicial[.]"

At the motion for new trial hearing, the court considered the Defendant's claim that it had erred in admitting the aforementioned exhibits. It asserted that "none of those exhibits were particularly gruesome" and that it was "satisfied that [its] ruling at the time was correct."

We conclude that the trial court did not err in admitting the aforementioned photographs because they were relevant, probative of intent and premeditation, and not unfairly prejudicial. Because the Defendant was charged with first degree premeditated

murder, the State was required to prove that she intentionally killed the victim and that she acted with premeditation, and the challenged photographs, which depict the manner in which the killing was carried out and the time and planning it took to accomplish the killing, were especially probative of these issues. Moreover, we agree with the trial court that these photographs were not particularly gruesome and were limited to the victim's condition as of the time of his death, which reduced the risk of undue prejudice. In addition, we do not believe these photographs were cumulative to each other or to the other evidence presented at trial because they depicted the deceased victim from different perspectives and depicted different areas of the victim's body, which assisted the jury in fully understanding the nature of the offense and the manner in which the victim died. We note that although the trial court reviewed a large number of photographs of the victim's body, the court only allowed a few photographs to be admitted after eliminating several on the basis that they were, in fact, cumulative. Accordingly, because these photographs were relevant and their probative value was not substantially outweighed by the danger of unfair prejudice or the needless presentation of cumulative evidence, we conclude that the trial court did not abuse its discretion in admitting them into evidence.

VI. Sufficiency of the Evidence. Lastly, the Defendant argues that the evidence is insufficient to sustain her conviction for first degree premeditated murder. Taking into account Dr. Avery's testimony, the Defendant's odd reaction to the police, her failure to prevent anyone from getting a key to the attic where she had hidden her husband's body, her calm demeanor when questioned by the police, her insistence on staying outside her home when the police entered it, her decision to lock the police inside her home, and the nature of the crime, the Defendant claims that she presented clear and convincing evidence that as a result of a severe mental disease or defect, she was unable to appreciate the nature or wrongfulness of her acts. In response, the State contends that because the Defendant's proof of insanity was not clear and convincing, the jury properly rejected this affirmative defense. We conclude that the Defendant failed to present clear and convincing evidence that she was insane. We also conclude that there was overwhelming proof presented at trial establishing that the Defendant was guilty beyond a reasonable doubt of first degree premeditated murder.

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." Hanson, 279 S.W.3d at 275 (citing State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)). "Appellate courts evaluating the sufficiency of the convicting evidence must determine '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. Wagner, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of

the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. State v. Davis, 354 S.W.3d 718, 729 (Tenn. 2011) (citing State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Sutton, 166 S.W.3d 686, 691 (Tenn. 2005); State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). The standard of review for sufficiency of the evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" Dorantes, 331 S.W.3d at 379 (quoting Hanson, 279 S.W.3d at 275). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. State v. Campbell, 245 S.W.3d 331, 335 (Tenn. 2008) (citing Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, and the inferences to be drawn from this evidence and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury. Dorantes, 331 S.W.3d at 379 (citing State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court "neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury." Wagner, 382 S.W.3d at 297 (citing State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997)).

First degree murder, as applicable here, is the premeditated and intentional killing of another person. Tenn. Code Ann. § 39-13-202(a)(1) (Supp. 2015). "A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim[.]" 7 Tenn. Prac. Pattern Jury Instr. T.P.I.—Crim. 7.01. Premeditation is defined as "an act done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-202(d) (Supp. 2015). This section further defines premeditation:

> "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. The 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.

The existence of premeditation is a question of fact for the jury to determine and may be inferred from the circumstances surrounding the offense. State v. Clayton, 535 S.W.3d 829, 845 (Tenn. 2017) (citing State v. Dotson, 450 S.W.3d 1, 86 (Tenn. 2014); State v. Davidson, 121 S.W.3d 600, 614 (Tenn. 2003)). "Proof of premeditation may be

supported by either direct or circumstantial evidence." Id. Factors that may support the existence of premeditation include but are not limited to the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, the infliction of multiple wounds, declarations by the defendant of an intent to kill, lack of provocation by the victim, failure to aid or assist the victim, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, destruction and secretion of evidence of the killing, and calmness after the killing. State v. Kiser, 284 S.W.3d 227, 268 (Tenn. 2009); State v. Leach, 148 S.W.3d 42, 53-54 (Tenn. 2004); Davidson, 121 S.W.3d at 615; Bland, 958 S.W.2d at 660. A jury may also infer premeditation from any planning activity by the defendant before the killing, from evidence concerning the defendant's motive, and from proof regarding the nature of the killing. State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). Methods of killing that require more time, effort, and intimate contact than the pulling of a trigger on a gun are more consistent with premeditation. State v. Adams, 405 S.W.3d 641, 663 (Tenn. 2013).

Tennessee Code Annotated section 39-11-501, which governs the affirmative defense of insanity, provides:

> (a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.
>
> (b) As used in this section, "mental disease or defect" does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> (c) No expert witness may testify as to whether the defendant was or was not insane as set forth in section (a). Such ultimate issue is a matter for the trier of fact alone.

This court "should reverse a jury verdict rejecting the insanity defense only if, considering the evidence in the light most favorable to the prosecution, no reasonable trier of fact could have failed to find that the defendant's insanity at the time of the offense was established by clear and convincing evidence." State v. Flake, 88 S.W.3d 540, 554 (Tenn. 2002). Clear and convincing evidence is defined as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Id. at 551 (quoting State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999)). This reasonableness standard of review, which does not fully insulate the jury's finding as to

the issue of insanity, "enhances appellate review by virtue of its similarity to the familiar sufficiency standard which appellate courts are accustomed to applying." Id. at 554. This court, in applying this standard, "should consider all the evidence in the record in the light most favorable to the [S]tate in determining whether the jury appropriately rejected the insanity defense." Id. Where the evidence is contested, this court "should rarely reverse a jury's rejection of the insanity defense under this deferential standard of review." Id. at 556.

Although the State "is required to prove all essential elements of a crime beyond a reasonable doubt, sanity is not an element of a crime." Holder, 15 S.W.3d at 911 (citing Patterson v. New York, 432 U.S. 197, 204-16 (1977)). The defendant has the burden of establishing the affirmative defense of insanity, and the State may counter any defense proof on this issue by presenting expert or lay testimony or by vigorously cross-examining defense experts for the purpose of undermining their credibility. Flake, 88 S.W.3d at 554 (citation omitted). The Tennessee Supreme Court has "explicitly reject[ed] the notion that the State must rebut defense proof of insanity with substantial evidence." Id. Moreover, "[i]n determining whether a defendant is insane, a jury is entitled to consider all the evidence offered, including the facts surrounding the crime, the testimony of lay witnesses, and expert testimony." Id. at 556. "Where there is a conflict in the evidence, the trier of fact is not required to accept expert testimony over other evidence and must determine the weight and credibility of each in light of all the facts and circumstances of the case." Id. at 554 (citing Edwards, 540 S.W.2d at 647). This court does not reweigh the evidence or reevaluate the credibility determinations made by the jury. Id. (citing Holder, 15 S.W.3d at 912). "While a jury may not arbitrarily ignore [expert] evidence," it is "not bound to accept the testimony of experts where the evidence is contested." Id. at 556.

Officer Morrow said that when he encountered the Defendant at her home on June 18, 2016, the Defendant was calm and did not appear to be a danger to herself or others. Sergeant Frias said the Defendant, during her interview, answered his questions coherently, and there was nothing about the Defendant suggesting she was suffering from some sort of mental break. He said the Defendant did not mention that she had any kind of mental illness or had received any mental health treatment in the past. Lieutenant Sewell testified that officers found a summons to the victim for a hearing on a child support petition that was scheduled two days after the deceased victim was found.

Dr. Avery opined that the Defendant was suffering from a severe mental disease or defect when she killed the victim. She also opined that there was "some evidence" to support a conclusion that Defendant could not appreciate the nature and wrongfulness of her actions. Dr. Avery acknowledged that she could not "definitively" say to a reasonable degree of psychological certainty that the Defendant did not know the wrongfulness of her behavior at the time she killed the victim. She acknowledged that there was "data for both

sides" and she "couldn't say reasonably one way or the other." She agreed that there was "some evidence to show that [the Defendant] may have understood that [killing her husband] was wrong." She also acknowledged that hiding the body could mean that the Defendant knew that what she had done was bad or that the Defendant had wanted to hide the body so she would not be caught.

Dr. Avery admitted that the Defendant never told police and never admitted during her jail phone calls that she was hearing voices telling her to kill her husband in the six months prior to this incident. She stated that the Defendant's results on the MMPI test were "invalid" because the Defendant responded "true" to too many questions, which was consistent with someone overreporting their mental health symptoms. She admitted that the Defendant may have been trying to fool her about the seriousness of her mental health issues. Dr. Avery said that although the Defendant claimed she did not know what she did was wrong, the proof that the Defendant planned the killing, tried to hide the body, and was untruthful about her actions could support the position that the Defendant knew killing her husband was wrong. She agreed that in order for the Defendant to commit the offense against her husband, it took time, planning, and a reckless disregard for the safety of others. Dr. Avery also said it was possible that the Defendant was suffering from a mental illness but still committed a criminal act because she knew her acts were wrong.

While the Defendant claims the jury erred in not finding her insane at the time of the offense, the jury simply chose to accredit evidence that the Defendant was sane at the time she killed her husband, and we will not disturb the jury's verdict. The aforementioned portions of Dr. Avery's testimony, along with the officers' testimony regarding the Defendant's behavior and demeanor a short time after the incident were sufficient to rebut the evidence suggesting that as a result of a severe mental disease or defect, the Defendant was unable to appreciate the nature or wrongfulness of her acts. Viewing the evidence in the light most favorable to the State, we conclude that the Defendant failed to establish by clear and convincing evidence that she was insane at the time of the offense. Consequently, the jury appropriately rejected the Defendant's affirmative defense of insanity. See Flake, 88 S.W.3d at 554.

We also conclude that the evidence, when viewed in the light most favorable to the State, also shows overwhelming proof of premeditation. The Defendant extensively planned the victim's murder before executing her plan. She cuffed the victim's hands and ankles and wrapped the victim's head with multiple layers of duct tape and plastic until the victim suffocated. Thereafter, the Defendant attempted to conceal the victim's dead body by putting it in a plastic storage bin in her attic and having her children dig a large hole in the backyard, presumably for the purpose of burying the victim there. Given this evidence, a rational jury could have found beyond a reasonable doubt that the Defendant killed the

victim intentionally and with premeditation. For these reasons, the Defendant is not entitled to relief.

CONCLUSION

Based on the aforementioned authorities and reasoning, we affirm the judgment of the trial court.

_____
CAMILLE R. MCMULLEN, JUDGE