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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 15, 2022 Session

STATE OF TENNESSEE v. MIRANDA CHEATHAM

Appeal from the Criminal Court for Bradley County
No. 2017-CR-206 Don R. Ash, Senior Judge[1]

No. E2021-01241-CCA-R3-CD

Miranda Cheatham, Defendant, was convicted of second degree murder for the shooting death of her husband on Halloween of 2016. As a result of the conviction, she was sentenced to 18 years in incarceration. After the denial of a motion for new trial, Defendant raises a variety of issues on appeal. On appeal, Defendant argues: (1) the evidence was insufficient to support the conviction; (2) the evidence supported Defendant's claim of self-defense; (3) the "crime scene negligence" entitles Defendant to a new trial; (4) the "investigative negligence" by the State entitles Defendant to a new trial; (5) the State mislabeled evidence presented to the grand jury; (6) the State failed to disclose evidence in violation of *Brady v. Maryland*; (7) the trial court permitted improper testimony from more than one witness; (8) the State committed a discovery violation for failing to disclose an audio recording; and (9) cumulative error. After a review, we affirm the judgment of the trial court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and JOHN W. CAMPBELL, SR., J., joined.

William M. Speek and Jonathan T. Turner (on appeal), Chattanooga, Tennessee, and Amy Reedy and Bill Reedy, Cleveland, Tennessee, for the appellant, Miranda Michelle Cheatham.

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[1] The trial was presided over by Criminal Court Judge Andrew Mark Frieberg. After trial, when Defendant filed a motion seeking recusal of the District Attorney's Office, the trial judge recused himself. Judge Ash was appointed to preside over any remaining proceedings.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Stephen D. Crump[2] and Jennings H. Jones, District Attorneys General; and Coty Wamp, Drew Robinson, Allison Abbott and John C. Zimmerman, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual Background

Defendant shot and killed her husband, James "Tooter" Cheatham, on October 31, 2016. Defendant claimed that she shot the victim in self-defense. She was indicted by the Bradley County Grand Jury for second degree murder in June of 2017.

Defendant filed various pretrial motions. In addition to seeking discovery materials and exculpatory evidence, Defendant filed a motion in which she complained that a sample of the victim's blood was destroyed before she could test it to determine if the victim was using steroids at the time of his death. The trial court determined Defendant could cross-examine the State about the lack of testing. After the ruling on the motion, the State located a sample of the victim's blood and offered it for testing. Defendant declined to seek a continuance and declined to test the blood.

Defendant also filed a motion in limine seeking to exclude an autopsy photo that depicted the path of the bullets through the victim's body. The trial court denied the motion, ruling the photograph admissible. Even though the trial court ruled the photograph admissible, the trial court prohibited the medical examiner from testifying about the trajectory of the bullets outside of the body. Defendant also filed a pretrial motion pursuant to Tennessee Rule of Evidence 404(b) to exclude "any and all" prior bad acts.

Proof at Trial

On the evening before the victim's death, Defendant received a Facebook message claiming that the victim was having an affair with a woman named Jenny Newberry.[3] Defendant confronted the victim with this information, and he denied that he was having an affair. Defendant was upset and went to the home of her daughter, Jade Bivens.

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[2] After trial, for reasons that will be set forth later in this opinion, the 10th Judicial District Attorney's Office withdrew from the case. The trial court ordered the appointment of a district attorney pro tempore to litigate the remainder of the case. District Attorney General Jennings H. Jones was appointed.

[3] Defendant's version of the events comes primarily from her recorded interview at the police station. She did not testify at trial.

Ms. Bivens and Defendant drove around trying to find Ms. Newberry's home. They planned to confront her about the affair. When they did not find Ms. Newberry, the two women returned to Defendant's house at about 3:00 a.m. Defendant confronted the victim again, and he again denied the affair. Defendant went back to Ms. Bivens' home.

Defendant returned to her home around 6:00 a.m. to wake her teenage son. She carried a container of silverware downstairs so that she could return it to a friend. Defendant reported that the victim either hit or kicked the silverware onto the floor and followed Defendant into the bathroom, choking her and throwing her to the ground. Defendant claimed she asked the victim not to kill her. Defendant stated that the victim went to the door like he was going to leave. Defendant got a gun out of the drawer in the bedroom, following the victim into the kitchen. Defendant told the victim to "leave" while she was holding the gun. Defendant told police that the victim moved toward her and threatened to kill her. Defendant shot the victim three times.

Defendant placed a call to 911 at 6:16 a.m. on October 31, 2016. She reported to the 911 operator that she shot her husband. Officer Steve West of the Cleveland Police Department was the first officer to arrive at the home at 6:19 a.m. When he arrived, he activated his body camera. The recording from the body camera was introduced into evidence at trial and shown to the jury.

Officer West testified extensively about his arrival on the scene and the events that took place in the first hours after the 911 call. Officer West testified at trial that he had only responded to a "handful" of homicides. When Officer West arrived at the house, Defendant was on the front porch, "frantic." Defendant stated to Officer West that the victim "choked me, tried to kill me, and I shot him." Officer West told Defendant to wait for detectives to take her statement.

Officer West instructed Defendant to stay on the porch. Defendant "alluded to her son still being in the house." Officer West entered the home through the front door and saw Defendant's teenage son, Jeris Cheatham. Officer West asked Jeris if he knew where the gun was and the boy "pointed to it . . . on the top of the bar or the kitchen counter."

The victim was lying on his back in the kitchen wearing pants and a t-shirt. Officer West could see "three obvious penetration wounds" to the victim's torso and could not locate a pulse. He noted that there was a "projectile laying on the floor, off of [the victim's] right shoulder, near the underside of the cabinet."

Officer West was alone with the victim for a few short minutes before emergency medical services arrived and "started working on [the victim]." Officer West admitted that

he "froze" when he saw a "bullet hole right above [the victim's] heart," and did not perform CPR because he was afraid he would harm the victim further.

Kristin Brogdon, one of the emergency medical services ("EMS") workers who arrived on the scene, noted visible bruising to Defendant's trachea and slight darkening to the center of the neck accompanied by swelling. She referenced an EMS run report during her testimony. Counsel for Defendant complained that this document was not provided to Defendant during discovery.

Officer West eventually put on gloves and "secured" the weapon by picking it up off the counter. He described it as a "poorly aged" revolver with a "rough . . . patina." Officer West was still waiting on backup, so he carried the weapon with him while he had a "quick look through the rest of the house" to "see if there was anybody else there." Officer West then "secured the weapon" in the trunk of his patrol car. Officer West put the three expended rounds and three live rounds from the chamber into a clean coffee cup in his trunk next to the gun. The evidence was not placed into an evidence bag or other container. Both the gun and ammunition were later transported to the evidence locker. Officer West could not recall who entered the gun into evidence and did not recognize the handwriting on the evidence bag but identified the weapon at trial.

Defendant remained on the porch with her son after the victim was transported to the hospital by emergency medical services. She can be heard gagging and screaming in the background of the body camera footage. Multiple officers were on the scene by this time, helping Officer West with processing the crime scene. Officer West admitted that he and other officers walked freely through the home before evidence technicians arrived on the scene. None of the officers wore protective coverings over their shoes.

Officer Brandy Brown, a master patrol officer with the Cleveland Police Department, arrived on the scene after emergency medical services. She talked with Officer West and was tasked with keeping an eye on Defendant and her son. Defendant was "whimpering a little bit" and Jeris was "really quiet." As she watched Defendant, she noticed Defendant "rubbing her neck . . . , right below her collar bone." Officer Brown took pictures of Defendant's neck using her "city-issued phone."

Officer Brown noted that the photos depicted "[r]edness in . . . the neck area below the collar bone" on Defendant. Officer Brown described Defendant as "calm" and "assumed" the redness on Defendant's neck was caused by Defendant rubbing her neck. Officer Brown did not recall seeing Defendant with a white towel around her neck even though a white towel was visible in the footage from Officer West's body camera. A white towel was not collected as evidence. Officer Brown opined that the "markings" on Defendant's neck were "not consistent with other cases [she] worked where someone says

they've been strangled." Defendant objected to this testimony, but the trial court overruled the objection. Officer Brown further explained that "if someone chokes someone, . . . there will be marks higher up around the front of the neck and the back of the neck." In some cases, she had even seen bruising and fingerprints. Officer Brown transported Defendant to the police station. Officer Brown did not recall Defendant's changing clothes at the scene but acknowledged that Defendant changed clothes at the police station. Officer Brown did not recall giving Defendant permission to wash her hands.

As officers processed the scene, they took note of a container of silverware that was strewn about the floor of the otherwise tidy primary bedroom. A man's bracelet was found in the bowl of the primary bathroom toilet. Officers found six fake fingernails in the bathroom and closet. One fingernail was on the floor of the bathroom in front of the shower. Another fingernail was on the floor near the doorjamb between the bathroom and the closet. The third fingernail was on the floor of the closet. The fourth fingernail was on the bathroom counter. The fifth fingernail was next to the toilet, and the sixth fingernail was found inside the bathroom trashcan. Defendant was missing six fake fingernails from her hands. Investigator Shane Clark collected gunshot residue from Defendant's hands before she left the scene. He also performed a gunshot residue test on the victim.

Investigator Clark took blood swabs from several locations throughout the home. Swabs were taken from a spot close to the bar in the kitchen, from the rug, from the hallway, and in the kitchen. There was also a sample taken from a smear on the bathroom floor. Investigator Clark admitted that the packaging on the samples did not indicate where they were found in the home but testified that the report by the Tennessee Bureau of Investigation ("TBI") incorrectly identified one sample from the bathroom when it was found in the kitchen.

Defendant was interviewed at the police station. She did not complain of any injuries and declined medical treatment. Defendant's neck was swabbed for DNA. Testing of the neck swabs showed that only Defendant's DNA was present.

Dr. James Metcalfe performed the autopsy of the victim. Before his testimony, there was a jury-out hearing to discuss the admissibility of a photograph of the victim's body in which dowels were inserted into the bullet wounds to show the path of the bullets in the body. The trial court determined that Dr. Metcalfe could only testify about the trajectory of the bullets inside the body and that the photograph could be introduced to explain the testimony.

Dr. Metcalfe testified that the victim was shot three times. One of the bullets traveled from the front of the victim's body to the back, "toward the right . . . and a little bit upward," passing through the stomach and exiting the body. The second bullet likely

passed through the victim's right hand as he was holding it up before entering the victim's body "further down" on the right side of the chest. The bullet traveled "upward, backward, and to the left." The second bullet passed through the fourth rib, right lung, spine, and spinal cord. The third bullet entered the victim's chest on the left side and went "upward, backward, and right" through the left lung, spine, spinal cord, and aorta before becoming lodged in the upper-mid back. Because of the angle of the wounds, Dr. Metcalfe opined that the victim was standing when he was shot in the abdomen and probably held up his hand to defend himself as he was shot in the chest. Dr. Metcalfe also explained that the victim was likely on the floor for at least one of the chest wounds because they both passed through his spinal cord and would have rendered him unable to stand. Dr. Metcalfe opined from the angle of the wounds that the victim was not directly facing Defendant at the time she fired the shots but was probably standing "off of the side a bit."

Defense Proof

The defense proof highlighted the victim's past as an experienced boxer, attempting to prove that he was the first aggressor. The victim had a trophy room in the basement of the home with trophies and items from his boxing matches. At the time of his death, the victim had not competed in a boxing match for a few years.

Jade Bivens, daughter of Defendant and the victim, recalled a time when she told her father about a disagreement with another girl. The victim became enraged, drove to the girl's home, and confronted the girl's parents. The victim got into a verbal altercation with the girl's father. The neighbor approached the victim with a rifle. The victim seemed unphased and "stood there" for about 20 minutes. The event ended when Ms. Bivens and Defendant called the victim back to the car.

James Nathan Taylor went to high school with the victim. He testified that the victim attacked one of his friends in the fall of 1992. The victim came up during a conversation and started "beating on" Mr. Taylor's friend without any warning. Mr. Taylor noted that the victim had a reputation for fighting.

James Ruth, a retired police officer, had an encounter with the victim in 1989 on Halloween. Mr. Ruth was at work at the Justice Center when he heard people yelling. He went outside and discovered the victim's father lying on the sidewalk where he was being hit and kicked by the victim. The victim pled guilty to "assault and battery" as well as disorderly conduct for his actions.

Several of the victim's prior girlfriends testified for Defendant. Tina Hickman dated the victim in 1990. When their relationship ended, the victim followed her to work and called her every day. Ms. Hickman had to move away to get away from the victim. Colleen

McCowan, another former girlfriend, described the victim as "very controlling." Ms. McCowan was married when she dated the victim, and the victim threatened to beat her if she told her husband about their relationship. When she tried to end the relationship, the victim called her names and became physically abusive.

The State offered the testimony of Ms. Newberry in rebuttal. Ms. Newberry was having an affair with the victim at the time of his death. Ms. Newberry denied that the victim was violent, explaining that she tried to end the relationship several times and the victim responded by becoming emotional.

After the proof, the jury found Defendant guilty of second degree murder. She was sentenced to 18 years in incarceration. Defendant filed a motion for new trial and amended motion for new trial. In the motins, Defendant alleged multiple issues, including a matter that arose after the trial. Defendant complained of a discovery violation for failing to turn over a recording in which the victim's half-sister claimed she had an affair with the district attorney general. The trial court denied the motions and Defendant filed a timely notice of appeal.

Analysis

Sufficiency of the Evidence/Self-defense[4]

Defendant first argues on appeal that the evidence was insufficient to sustain the conviction for second degree murder. Specifically, Defendant argues that the evidence did not satisfy the "'knowing' element" because there was no evidence that Defendant "knew that her actions could lead to the death of her husband" where Defendant had "never held or used a gun," the gun had "significant recoil" that "would affect accuracy," and Defendant did not "understand that her husband could actually be dead." Defendant argues that the evidence showed "shooting the gun may deter [the victim] from killing/attacking her" rather than that she "knew shooting the gun may kill [the victim]." Defendant also argues that the State did not disprove that she acted in self-defense. Defendant claims the trial court failed to analyze whether it was a knowing killing in denying the motion for new trial. Further, in a reply brief, Defendant alleges that the State "mischaracterizes the evidence showing self-defense" and that "gross negligence" at the crime scene "should not be allowed to serve as a basis for the State's arguments." The State disagrees, arguing that the "jury could reasonably conclude that [Defendant] knowingly killed her husband when she shot him three times in the chest and torso" and that the "evidence did not support

[4] To facilitate our discussion of the issues, we have combined several of Defendant's issues in this opinion.

[Defendant's] assertion that the victim attacked her" and, even if the victim choked Defendant, "the attack had ceased prior to the shooting."

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury's verdict replaces the presumption of innocence with one of guilt; therefore, the burden is shifted onto the defendant to show that the evidence introduced at trial was insufficient to support such a verdict. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The prosecution is entitled to the "strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). It is not the role of this Court to reweigh or reevaluate the evidence, nor to substitute our own inferences for those drawn from the evidence by the trier of fact. *Reid*, 91 S.W.3d at 277. Questions concerning the "credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008)). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *Reid*, 91 S.W.3d at 277 (quoting *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). The standard of review is the same whether the conviction is based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

In relevant part, second degree murder is a "knowing killing of another." T.C.A. § 39-13-210(a). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-106(a)(22).

Defendant relied on a theory of self-defense. In Tennessee, the right to use deadly force in self-defense is limited to circumstances in which a person reasonably and sincerely believes there is an imminent threat of death or serious bodily injury. *See* T.C.A. § 39-11-611. At the time of Defendant's offense in October of 2016, the self-defense statute read, in pertinent part, as follows:

> (b)(1) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force against another person when

and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.

(2) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:

(A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;

(B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and

(C) The belief of danger is founded upon reasonable grounds.

. . . .

(e) The threat or use of force against another is not justified:

(1) If the person using force consented to the exact force used or attempted by the other individual;

(2) If the person using force provoked the other individual's use or attempted use of unlawful force, unless:

(A) The person using force abandons the encounter or clearly communicates to the other the intent to do so; and

(B) The other person nevertheless continues or attempts to use unlawful force against the person; . . . .

T.C.A. § 39-11-611(b)(1), (2), and (e) (effective Apr. 6, 2016 to Mar. 30, 2017). Deadly force is "the use of force intended or likely to cause death or serious bodily injury. T.C.A. § 39-11-611(4). "Serious bodily injury" involves: "[a] substantial risk of death," [p]rotracted unconsciousness," "[e]xtreme physical pain," "[p]rotracted or obvious disfigurement," "[p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty. . . ." T.C.A. § 39-11-106(37).

A defendant can use the defense of self-defense when there is a "genuine, well-founded fear that [the defendant] was in danger of death or great bodily harm[.]" *State v. Ivy*, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). This belief must "meet an objective standard of reasonableness to be justified," and "the mere fact that the defendant believes that h[er] conduct is justified would not suffice to justify h[er] conduct." *State v. Bult*, 989 S.W.3d 730, 732 (Tenn. Crim. App. 1998). When a defendant relies upon a theory of self-defense, it is the State's burden to show that the defendant did not act in self-defense. *State v. Sims*, 45 S.W.3d 1, 10 (Tenn. 2001). However, it is within the prerogative of the jury to

reject a claim of self-defense. *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997).

The proof at trial, in a light most favorable to the State, established that Defendant confronted the victim about an affair. Some type of argument ensued between Defendant and the victim, during which Defendant claimed the victim choked her and threatened to kill her. Silverware was strewn on the floor of the primary bedroom of the home, and six of Defendant's fake fingernails were found throughout the home. During her police interview, Defendant stated that she told the victim to leave. At some point during the argument, Defendant retrieved the loaded revolver from a nightstand in the bedroom. Defendant shot the victim three times in the chest and torso while he was in the kitchen of the home. Defendant claimed that she had never shot a gun before, but Defendant fired shots from a revolver that all hit the victim in the chest and torso.

This Court has held that pointing a gun at someone and discharging it is sufficient to sustain the "knowing" element of second degree murder. *See State v. Anthony Bayman*, No. W2014-01537-CCA-R3-CD, 2015 WL 12978649, at *6 (Tenn. Crim. App. Aug. 17, 2015), *perm. app. denied* (Tenn. Dec. 14, 2015); *State v. Randy Ray Ramsey*, No. E2013-01951-CCA-R3-CD, 2014 WL 5481327, at *6-7 (Tenn. Crim. App. Oct. 29, 2014), *perm. app. denied* (Tenn. Feb. 9, 2015). Defendant raised self-defense by presenting evidence that the victim was controlling and claimed in her interview with police, and the 911 call, that the victim choked her and threatened to kill her. However, Defendant refused medical treatment and there was no DNA found on Defendant's neck that did not belong to her. While an employee of the Bradley County EMS noted a bruise on Defendant's neck, and there was a small spot of Defendant's blood on the bathroom floor, the jury obviously rejected the self-defense theory. *Goode*, 956 S.W.2d at 527 (stating that the jury determines "whether an individual acted in self-defense" as a factual determination). Moreover, Defendant's version of the events given to police during her interview indicated that the victim stopped choking her and went to the "front door" like he was going to leave.

Defendant points to the victim's prior acts of violence and insists that the State did nothing to rebut this testimony at trial. To the contrary, the State offered the testimony of Ms. Newberry, who explained that the victim did not display aggression when she tried to end their relationship.

Finally, in denying the motion for new trial, the trial court noted that Defendant never denied shooting the victim and that the issue in the case was whether the jury believed Defendant acted in self-defense. Given the evidence presented at trial, a rational jury could have quite reasonably rejected Defendant's self-defense theory and found Defendant guilty of second degree murder.

Investigative Negligence/Crime Scene Negligence

Defendant next complains that she is entitled to a new trial because of investigative negligence and crime scene negligence in violation of *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). Defendant points out that the crime scene was overrun by "23 people" who were seen on body camera footage "trapesing through the scene" without "any precautions to preserve the scene." The State argues Defendant waived the claim for failing to raise it "at a time when the trial court could fashion an appropriate remedy" and failed to show that there was a loss or destruction of "potentially exculpatory evidence."

We agree with the State. While we recognize that the State has a general duty to preserve all evidence subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16, we note that Defendant did not file any motions before or during the trial that raised a claim under *Ferguson*. Rather, Defendant waited until the motion for new trial to address the issue. The trial court is in the best position to fashion a remedy for a *Ferguson* error, such as including a jury instruction about missing evidence. *State v. Merriman*, 410 S.W.3d 779, 785-86 (Tenn. 2013). By failing to raise the error in the trial court, Defendant has waived the issue. Moreover, Defendant has not asked this Court to review the issue for plain error. Therefore, we decline to do so. *See State v. Ray Armstrong*, No. W2016-01996-CCA-R3-CD, 2017 WL 6375950, at *16 (Tenn. Crim. App. Dec. 12, 2017), *perm. app. denied* (Tenn. Apr. 23, 2018); *see also State v. Bristol*, 654 S.W.3d 917 (Tenn. 2022). This issue is waived.

Evidence Presented to Grand Jury

Defendant also argues that officers failed to correctly label key evidence which led to false evidence being presented to the grand jury and a delay in disclosing evidence to the defense. Defendant is specifically referring to a blood smear collected by officers from the kitchen that was mislabeled as having been found in the bathroom. Defendant admits that, at trial, Detective Gibbs testified that the information presented to the grand jury about the location of the blood was erroneous. Defendant insists that the mistake goes directly to whether there was probable cause for the grand jury to indict her for second degree murder because the location of the blood raised a question about who was the first aggressor. As a result, Defendant asks both for a new trial and for dismissal of the indictment. The State argues that "[e]vidence presented to the grand jury is not subject to judicial review" and that Defendant is not entitled to relief.

The function of the grand jury is limited to "determin[ing] whether or not there is sufficient evidence to justify bringing an accused to trial." *State v. Felts*, 220 Tenn. 484, 418 S.W.2d 772, 774 (1967). In fact, a grand jury can consider evidence obtained in violation of an accused's constitutional rights even if the evidence will utilmately be

inadmissible at trial. *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Lawn v. United States*, 355 U.S. 339, 354-55 (1958). Our appellate courts have long declined to inquire into the sufficiency and legality of evidence presented to the grand jury. *See, e.g., State v. Carruthers*, 35 S.W.3d 516, 532-33 (Tenn. 2000) (holding that the defendant's claim that a witness's grand jury testimony had been untrustworthy was not subject to judicial review); *Burton v. State*, 377 S.W.2d 900, 902-04 (Tenn. 1964); *State v. Dixon*, 880 S.W.3d 696, 700 (Tenn. Crim. App. 1992); *State v. Gonzales*, 35 S.W.2d 841, 845 (Tenn. Crim. App. 1982); *Parton v. State*, 455 S.W.2d 626, 633 (Tenn. Crim. App. 1970). Defendant did not file a motion to dismiss the indictment, instead choosing to challenge the legality of the evidence presented to the grand jury after her conviction. Moreover, at trial, Defendant cross-examined Detective Gibbs extensively about the mislabeled blood evidence. Defendant is not entitled to relief.

Brady Violation

Defendant also complains that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to timely give the defense a sample of the victim's blood and an EMS run report detailing Defendant's treatment at the scene. The State counters that there is no *Brady* violation because the State did not suppress the blood sample, there is no proof that the blood sample is favorable to Defendant, and Defendant failed to seek a continuance to test the blood sample. The State also argues that the EMS run report was "equally accessible" to Defendant and she "has suffered no prejudice" and, therefore, is not entitled to relief.

Approximately one month before trial, Defendant sought testing of the victim's blood for evidence of steroid use. The State objected, insisting that testing of that nature was usually performed on hair or urine and that the State would not have tested the blood sample. Moreover, the State thought that the sample had been destroyed. The trial court ruled that Defendant would be allowed to question the State's witnesses at trial to determine whether the blood sample was tested for steroids.

Two days after the hearing, the State informed Defendant that there was still a sample of the victim's blood that could be tested. Defendant brought this to the trial court's attention at the beginning of the trial. During this ex parte hearing, trial counsel informed the trial court that the defense would not seek a continuance "as a strategy" and decided to go to trial without testing the blood.

In the motion for new trial, Defendant alleged prosecutorial misconduct as a result of the State's failure to disclose the existence of the sample. Defendant insisted that the State's failures amounted to a violation of the right to speedy trial and to the formulation of a complete defense.

Defendant also filed a motion seeking all exculpatory evidence as part of pretrial discovery. However, at trial, a witness from EMS testified about the existence of an EMS run report that neither of the parties had seen. The report was later introduced at trial and indicated that the victim had bruising on her trachea during treatment at the scene. Specifically, the report stated that Defendant had "slight darkening noted to the center of the neck over trachea, no deformities noted and minimal swelling noted."

In her motion for new trial, Defendant argued that the delayed disclosure of the report violated her constitutional rights. At the hearing on the motion, the chief of the Bradley County EMS explained that the reports were public record and that Defendant could have gotten them with a subpoena.

"Every criminal defendant is guaranteed the right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the 'Law of the Land' Clause of Article I, section 8 of the Tennessee Constitution." *Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). In the landmark case of *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The duty to disclose extends to all "favorable information" regardless of whether the evidence is admissible at trial. *Johnson*, 38 S.W.3d at 56. Additionally, "the prosecutor is responsible for 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *Strickler v. Greene*, 527 U.S. 263, 275 n.12 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). However, the State is not required to disclose evidence that the accused already possesses or is otherwise able to obtain. *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992).

There are four prerequisites a defendant must demonstrate in order to establish a due process violation under *Brady*: (1) the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is required to disclose the evidence); (2) the State suppressed the information; (3) the information was favorable to the accused; and (4) the information was material. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). Moreover, the defendant has the burden of proving a constitutional violation by a preponderance of the evidence. *State v. Spurlock*, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). The key to proving a constitutional violation is to show that the omission is of such significance as to deny the defendant the right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 108 (1976). Whether a petitioner is entitled to a new trial based upon a *Brady* violation "presents a mixed question of law and fact." *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004).

> The lower court's findings of fact, such as whether the defendant requested the information or whether the [S]tate withheld the information, are reviewed on appeal de novo with a presumption that the findings are correct unless the evidence preponderates otherwise. The lower court's conclusions of law, however, such as whether the information was favorable or material, are reviewed under a purely de novo standard with no presumption of correctness.

Id. We shall discuss each element in turn.

1. Request for the Evidence

First, we must determine whether trial counsel requested the evidence or whether it was obviously exculpatory, thereby triggering the State's duty to disclose. We decline to determine that either piece of evidence was obviously exculpatory, necessitating the State's disclosure of the evidence. The presence of steroids in the victim's blood does not mean that the evidence was patently favorable to the defense. Likewise, the presence of a bruise on Defendant's trachea does not patently exculpate her from her actions. Moreover, defense counsel requested the blood in December 2018 before the trial and defense counsel received the run report during the trial and was able to enter it into evidence. Thus, the evidence does not preponderate against the trial court's determination that the evidence was not exculpatory and/or that counsel made a request for the evidence.

2. Suppression of the Evidence

Next, we must determine whether the State suppressed the evidence. The State is not required to "disclose information that the accused already possesses or is able to obtain." *Marshall*, 845 S.W.2d at 233. Here, the record reflects that Defendant received the autopsy report, which disclosed that a sample of the victim's blood was collected during the autopsy. Despite having the report, Defendant did not make any effort to secure the same or test the victim's blood until right before trial, at which time the State initially indicated that the sample was destroyed. The State then disclosed the evidence once it was located. Defendant declined to pursue a continuance in a hearing immediately before trial. When there is a delayed disclosure of evidence, rather than complete non-disclosure of significant exculpatory evidence, this Court must determine whether the delay kept defense counsel from effectively using this evidence in presenting and preparing the defendant's case. *Id.* If the defense fails to request a continuance after receipt of the evidence, fails to call or recall a witness to testify regarding the evidence, or fails to extensively cross-examine a witness regarding the evidence, the *Brady* violation may be cured. *State v. Sidney M. Ewing*, No. 01C01-9612-CR-00531, 1998 WL 321932, at *9 (Tenn. Crim. App.

June 19, 1998), *perm. app. denied* (Tenn. Feb. 22, 1999). Concerning the run report, either party could have requested the information. The State did not have the evidence and did not fail to disclose it. Here, the trial court determined that the evidence was "equally available" to the State and Defendant. The evidence does not preponderate against the trial court's conclusion.

3. Favorability of the Evidence

"Evidence 'favorable to an accused' includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses." *Johnson*, 38 S.W.3d at 55-56. Favorable evidence includes evidence that "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of events, or challenges the credibility of a key prosecution witness." *Id.* at 56-57. Favorable evidence also includes "'information that would have enabled defense counsel to conduct further and possibly fruitful investigation.'" *Id.* at 56 (quoting *Marshall*, 845 S.W.2d at 233).

The trial court did not determine whether the evidence was obviously exculpatory. However, we find that it was not. Thus, it could only be considered favorable if either piece of evidence challenges the credibility of a State's witness or piece of evidence. The trial court noted that Defendant had access to the blood sample and the EMS report. Defendant chose not to seek a continuance to test the blood, and the jury reviewed the EMS report, saw body camera footage of Defendant rubbing her neck after the incident, and heard proof that the victim was a professional boxer with a history of a temper. The jury heard all this evidence and rendered a verdict that accredited the testimony of the State's witnesses. This was certainly the jury's prerogative. In our view, the evidence was not favorable to the defense in the sense required by *Brady*.

4. Materiality of the Evidence

Evidence is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). The defendant does not need to prove that disclosure of the evidence would have resulted in an acquittal. *See Kyles*, 514 U.S. at 434. "Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that we may affirm a conviction or sentence when, 'after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions.'" *Johnson*, 38 S.W.3d at 58 (quoting *Strickler*, 527 U.S. at 275). Rather, the question is whether in the absence of the evidence, the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S.

at 434. The defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Irick v. State*, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998) (citing *Edgin*, 902 S.W.2d at 390). A reviewing court should evaluate the evidence "'in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense' been made aware of the favorable information." *Spurlock*, 874 S.W.2d at 619 (quoting *Bagley*, 473 U.S. at 683). In other words, "the materiality of the suppressed evidence must be evaluated within the context of the entire record." *Jordan v. State*, 343 S.W.3d 84, 97 (Tenn. Crim. App. 2011).

The trial court found that both the blood sample and the report were "available" to the State and Defendant and were not suppressed by the State, such that there can be no *Brady* violation. We agree. Neither piece of evidence served to set "the whole case in such a different light as to undermine confidence in the verdict." *Irick*, 973 S.W.2d at 657. There was other evidence introduced at trial to establish the victim's personality and demeanor to support Defendant's claim of self-defense.

Defendant has not established all four prerequisites to prove a *Brady* violation. Consequently, she is not entitled to relief on this issue with regard to either the blood sample or the EMS report.

Evidentiary Issues

Defendant complains about several evidentiary issues on appeal. We will discuss each one in turn, keeping in mind that for evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Tenn. R. Evid. 401. However, even if evidence is relevant, if "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Tenn. R. Evid. 403.

The decision to admit or exclude evidence is generally entrusted to the trial court's discretion. *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004). More particularly, a trial court's decisions regarding the admissibility of opinion evidence are reviewed for abuse of discretion. *State v. Schiefelbein*, 230 S.W.3d 88, 130 (Tenn. Crim. App. 2007). A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical or unreasonable conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *State v. Herron*, 461 S.W.3d 890, 904 (Tenn. 2015).

Testimony of Officer Brown

First, Defendant takes issue with Officer Brown's testimony about the description of injuries on Defendant's neck. She specifically challenges Officer Brown's testimony that the way Defendant's neck looked was "not consistent" with "other [strangulation] cases." Defendant insists that Officer Brown's testimony exceeded that permissible by a lay witness. The State counters that the trial court "properly exercised its discretion when it allowed [Officer Brown's lay opinion] testimony."

To provide context for the issue, it is important to include, the following exchange that occurred during Officer Brown's testimony at trial:

> STATE: Okay. (Brief Pause). When you were watching the female [Defendant] and the boy, did you ever see the female making any motions with her hands towards her neck area?
> OFFICER BROWN: Yes.
> STATE: Can you describe that?
> OFFICER BROWN: Demonstrate?
> STATE: Yes, sure.
> OFFICER BROWN: Okay. I mean, that would be easier for me. She was rubbing her neck right in here, right below her collar bone and right below this area, just kind of rubbing it.
> STATE: Okay.
> . . . .
> STATE: Ms. Brown, Officer Brown, will you take a look at those photos? (Brief Pause) What do those photos depict, Officer Brown?
> OFFICER BROWN: Redness in this area, in the neck area below the collar bone and just right below here.
> . . . .
> STATE: And let's go back to what [Defendant] was doing with her hands. When you saw her rubbing her neck like you demonstrated, was that before the photos or after the photos?
> OFFICER BROWN: Both.
> STATE: Okay. So you saw her multiple times doing that?
> OFFICER BROWN: Yes.
> STATE: Okay. (Brief Pause). You've been on patrol for nine[-]and-a-half years.
> OFFICER BROWN: Correct.
> STATE: How many calls have you responded to that, that involved assault?
> OFFICER BROWN: Hundreds.

. . . .
STATE: Okay. In those calls, how many times have you spoken with a victim?
OFFICER BROWN: Every time.
. . . .
STATE: Okay. And based on your experience and knowledge, nine and-a-half years, does anything stand out to you in these photos?

At this point, counsel for Defendant objected to the testimony arguing that if the State was offering Officer Brown as an expert, the State had failed to give proper notice of the testimony. The trial court overruled the objection. Counsel for the State continued:

STATE: What stands out to you about these photos that you took?
OFFICER BROWN: (Brief Pause) Just redness.
STATE: Okay.
OFFICER BROWN: And after seeing [Defendant] rubbing her neck, that's what I assumed it was from.
STATE: Okay.
OFFICER BROWN: I mean, it's from, from what she had told us in the beginning as far as having been stra-, I think her, her actual word was "strangled," that's not consistent with other cases I've worked where someone says they've been strangled, markings.
STATE: What do you mean by markings?
OFFICER BROWN: If, if someone chokes someone, the other cases that I've worked, several times, there will be marks higher up around the front of the neck and the back of the neck. Sometimes I've even, I've already seen they even start to bruise and leave fingerprints.

After Officer Brown's testimony, the trial court determined that it would include a jury instruction to make it clear that Officer Brown's testimony was not to be considered by the jury as expert testimony. Specifically, the trial court instructed the jury that Officer Brown's testimony was "not tendered to the jury as an expert in any field or for any purpose."

On appeal, Defendant argues that Officer Brown's testimony did not simply "testify as to her personal observations about the condition surrounding the Defendant's neck or person" and was improper expert testimony, outside what is ordinarily permitted by lay witnesses. Defendant does not cite any authority to support her claim that Officer Brown's testimony constituted an expert opinion under Rule 702, even in her reply brief. She merely argues that it was improper lay opinion testimony. The State disagrees, insisting the trial court did not abuse its discretion in admitting the lay opinion testimony.

According to the Tennessee Rules of Evidence, a lay witness may give testimony in the form of an opinion or inference if it is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Tenn. R. Evid. 701(a). Lay opinion testimony should be based on admissible facts that are in evidence. *State v. Boggs*, 932 S.W.2d 467, 474 (Tenn. Crim. App. 1996). To be admissible, a lay opinion should be within the range of knowledge or understanding of ordinary laymen. *Id.* A witness's lay opinion is admissible when the jury could not readily draw its own conclusions on the issue without the witness's lay opinion or where the witness cannot effectively testify without stating the inference or opinion. *Schiefelbein*, 230 S.W.3d at 130. "If an opinion is based upon a lay witness's own observations, his or her conclusions require no expertise and are within the range of common experience, the opinion is admissible." *State v. Samuel*, 243 S.W.3d 592, 603 (Tenn. Crim. App. 2007). "The distinction between an expert and a non-expert witness is that a non-expert witness's testimony results from a process of reasoning familiar in everyday life and an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field." *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992) (citation omitted).

Tennessee Rule of Evidence 702, on the other hand, governs expert testimony. That rule states that "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702.

Here, it is clear that the trial court treated Officer Brown's testimony as lay opinion testimony under Tennessee Rule of Evidence 701(a). The trial court even gave the jury an instruction that the testimony was not to be considered expert testimony.

Lay witnesses have been permitted to testify on a variety of subjects. In *Samuel*, for example, a police officer was permitted to testify that a mark on the victim looked "recent" and looked like someone had dug a fingernail into the victim's skin. 243 S.W.3d at 603. This Court determined this was proper lay opinion testimony, commenting that the age of a mark where a fingernail was dug into the skin was within the common knowledge of the general public. *Id.* (noting also that Tennessee common law traditionally permitted lay testimony regarding the physical condition of the witness or another person). In *State v. Brown*, a nurse testified as a lay witness that she identified an injury as a cigarette burn based on having seen other such injuries on numerous occasions over six years. 836 S.W.2d at 549, *superceded by statute as stated in State v. Reynolds*, 635 S.W.3d 893 (Tenn. 2021). The supreme court found:

> Generally, non-expert witnesses must confine their testimony to a narration of the facts based on first-hand knowledge and avoid stating mere personal opinions or their conclusions or opinions regarding the facts about which they have testified. *Blackburn v. Murphy*, 737 S.W.2d 529, 531 (Tenn. 1987). This rule preserves the province of the jury as the fact-finding body designated to draw such conclusions as the facts warrant. *Id.* An exception to this general rule exists where testimony in an opinion form describes the witness's observations in the only way in which they can be clearly described, *id.* at 532, such as testimony that a footprint in snow looked like someone had slipped, *National Life & Accident v. Follett*, 168 Tenn. 647, 80 S.W.2d 92 (1935), or that a substance appeared to be blood.

Id. at 550. The same court, however, found testimony from a paramedic that a bruising around a child's eyes was indicative of skull trauma and should not have been admitted as a lay opinion because it called for specialized skill or expertise. *Id.* at 549, 550.

After *Brown*, this Court has reviewed several cases in which one of the parties argued that evidence was improper lay testimony. For example, this Court has found that a pediatrician could properly testify that bruises on a child looked like finger and shoe prints "[b]ecause a lay witness could have offered the same opinions without error" and permitted a police officer to testify that the same marks were fingerprints. *State v. Thomas Fancher Greenwood*, No. M2013-01924-CCA-R3-CD, 2014 WL 6609308, at *33-34 (Tenn. Crim. App. Nov. 21, 2014), *perm. app. denied* (Apr. 10, 2015); *see also State v. Timothy Andrew Bishop*, No. M2015-00314-CCA-R3-CD, 2016 WL 7324307, at *8 (Tenn. Crim. App. Dec. 16, 2016) (allowing officer to testify that a bruise appeared to be a handprint), *no perm. app. filed*; *State v. Jeffrey Scott*, No. W2009-00707-CCA-R3-CD, 2011 WL 2420384, at *24 (Tenn. Crim. App. June 14, 2011) (allowing lay testimony that injury looked like a shoe print), *perm. app. denied* (Tenn. Oct. 18, 2011).

Here, Officer Brown testified that she had responded to "hundreds" of calls involving assaults and that she always spoke to the victims when she responded. She recalled that Defendant claimed that the victim "strangled" her before she shot him. Officer Brown testified that the marks on the victim were not consistent with strangulation and showed "redness" under her collarbone. In our view, the opinion was rationally based on her perception and helpful to the determination of a fact in issue. The witness' testimony utilized reasoning employed in everyday life rather than a process of reasoning familiar only by specialists in the field. As evidenced by numerous cases above, similar lay opinion testimony has been properly admitted in the past. As a result, we conclude that the trial court did not abuse its discretion in permitting the testimony. We note parenthetically that the jury also saw many pictures of Defendant's neck and chest area from actual body

camera footage from the scene to which they could compare Officer Brown's observations. Defendant is not entitled to relief on this issue.

Medical Examiner's Testimony

Defendant argues that Dr. Metcalfe was improperly allowed to testify about the trajectory of the bullets fired and the sequence in which the bullets were fired even though he was only certified as an expert concerning the trajectory of the bullets within the body, not on crime scene re-enactment. The State insists that Dr. Metcalfe's "conclusions were based on the victim's internal injuries and were well within his area of expertise."

As briefly noted above, Tennessee Rule of Evidence 702 governs expert testimony, stating that "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702.

Here, Defendant sought to prohibit Dr. Metcalfe from testifying about the trajectory of the bullets outside of the victim's body. The trial court agreed that Dr. Metcalfe was not "an expert in ballistics or in trajectory," ruling that Dr. Metcalfe "is not an expert and will not be allowed to opine about trajectory outside the body" but that "what occurs inside the body is within his area of expertise also as is general in a gun homicide case, the path of bullet trajectory within the body through tissue, through organs, sometimes through or off bone. So within the body is within the purview." The trial court permitted the introduction of two "rod photos" showing the path of the bullets through the victim's body.

During Dr. Metcalfe's testimony, he testified about the pathways that each bullet took through the victim's body. He explained that the victim was shot three times. One of the shots went through the victim's torso, and two of the shots went through the victim's chest. Dr. Metcalfe testified that both of the bullets that passed through the victim's chest severed his spinal cord.

Dr. Metcalfe also testified about the sequence in which he thought the victim was shot. He believed that the victim was probably standing when he was shot in the torso but that he would not have been able to stand when he was shot in the chest because the spinal cord was severed. Thus, Dr. Metcalfe opined that the victim was likely on the floor of the kitchen during at least one of the chest shots. Dr. Metcalfe concluded that the victim was likely holding his hand up at the time he was shot in the right side of the chest because of the angle of the wounds in the victim's hand and in his chest.

Defendant complains that Dr. Metcalfe's testimony was "unfounded and impermissible" leading to "highly prejudicial" and "detrimental" evidence "creat[ing] the image of [Defendant] standing over [the victim's] prone body and shooting him." Defendant insists that the State elicited impermissible testimony "in defiance" of the trial court's ruling and that a "simple jury instruction" did nothing to cure the problem. In our view, the conclusions made were based on the path of the bullets inside the victim's body when compared to the position of the wounds, not the trajectory of the bullets outside the victim's body. Dr. Metcalfe was certified as an expert in forensic pathology, and he testified that part of his training was to look at the bullet path as it travels through the body. The trial court did not abuse its discretion in admitting the testimony.

Testimony About Defendant's Alleged Affair and Prior Charge/Denial of Mistrial

Defendant complains about several parts of the cross-examination of her daughter, Ms. Bivens. Specifically, Defendant takes issue with the State's questions to Ms. Bivens about Defendant's affair and the trial court's decision to permit testimony from Ms. Bivens that Defendant had been previously charged with a crime. The State argues that there was no evidence introduced about Defendant's alleged affair, Defendant did not ask the trial court for a curative instruction about the assault charge, and Defendant opened the door to the testimony.

A. Assault Charge

During the direct examination of Ms. Bivens, Defendant's counsel asked Ms. Bivens about an incident where one of Ms. Bivens' friends sent something unkind "through a message." The victim "got so mad" that he took Ms. Bivens and Defendant to the friend's house to confront the friend. The victim "immediately started like getting into [verbal] fights with the family" and the victim "wanted to get really physical with the father." The victim "ripped his shirt off and was going towards" the father of the friend. The neighbor brought out a gun. The victim "[j]ust stood there." Defendant and Ms. Bivens remained in the car, yelling for the victim to get in the car and leave. Ms. Bivens testified that she and Defendant were so scared during the incident that at one point during they were in the floorboard.

On cross-examination, counsel for the State asked about the incident. Ms. Bivens admitted that Defendant was upset about the situation but not in the same way as the victim. Ms. Bivens explained that Defendant looked at situations differently and that there was "no sense getting in fights." Ms. Bivens explained that the victim did not try to fight the guy with the gun. She then testified that Defendant got charged with assault but that the charge was later dropped. Counsel for Defendant moved for a mistrial. Counsel for the State argued that Defendant opened the door. The trial court held a jury-out hearing during

which the State argued that the "defense brought this up" and "insinuated" that the victim was "the first aggressor" and Defendant was "in the floorboard of the vehicle because she was scared." Counsel for the Defendant argued that the proof was "not [offered] for first aggressor proof but for fear proof, which is an element of self-defense." The trial court determined that there was already first aggressor proof in evidence and that Defendant opened the door by "voluntarily bring[ing] out proof regarding what happened [during this incident] and what [the victim did], regardless of intent. . . ." The trial court denied the mistrial finding that it was "an open door situation" and admissible because there was a dispute about who was the first aggressor. The trial court notified the parties that it would be charging the jury that "any such proof cannot be used for a predisposition" and that the evidence "relates to rebut assertions of first aggressor."

Again, for evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Even 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. . . ." Tenn. R. Evid. 403.

Ordinarily, evidence of prior bad acts is inadmissible to show that a defendant acted in conformity with a character trait. Tenn. R. Evid. 404(b). Tennessee Rule of Evidence 404(b) states:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). Thus, evidence of prior bad acts can be admissible to show motive, identity, intent, absence of mistake or accident, opportunity, or a common scheme or plan. *State v. Tolliver*, 117 S.W.3d 216, 230 (Tenn. 2003). Here, however, the trial court permitted the testimony from Ms. Bivens about Defendant's prior assault charge because Defendant's own witness opened the door to the testimony on direct examination. The trial court determined that the State could question Ms. Bivens regarding Defendant's assault charge because Ms. Bivens testified on direct that Defendant was "scared" during the confrontation where the victim was aggressive toward one of her friends, opening the door to impeachment. *State v. Gomez*, 367 S.W.3d 237, 246 (Tenn. 2012) (finding that "[e]ven if evidence is inadmissible, a party may 'open the door' to admission of that evidence.").

A party commonly opens the door "by raising the subject of that evidence at trial." *Id.* Our supreme court has explained, "[w]hen a party raises a subject at trial, the party 'expand[s] the realm of relevance,' and the opposing party may be permitted to present evidence on that subject." *Id.* (quoting 21 Charles Alan Wright et al., *Federal Practice & Procedure Evidence* § 5039.1 (2d ed. 1987)). In other words, "'opening the door' is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence." *Id.*; *see also State v. Riels*, 216 S.W.3d 737, 746 (Tenn. 2007) (trial court erred in ruling that defendant opened the door to unlimited cross-examination concerning details of the crime after defendant expressed remorse to the victims' families); *Gomez*, 367 S.W.3d at 247 (trial court erred in ruling that co-defendant's testimony that defendant would not hurt minor victim opened the door to evidence regarding defendant's prior assaults against co-defendant).

Defendant seems to argue that the trial court ruled that the evidence of the prior assault charges was admissible under the curative admissibility doctrine. We disagree. In *State v. Vance*, the supreme court explained that curative admissibility is only applicable when the triggering party introduces inadmissible evidence. 596 S.W.3d 229, 250 (Tenn. 2020). The opposite party is then permitted to introduce otherwise inadmissible evidence to "cure" the situation. *Id.* Here, the trial court commented that this was an "open door" situation and limited the evidence only to the fact that Defendant was charged with assault and did not allow any further testimony or evidence on the subject. Opening the door applies when a triggering party, here Defendant, introduces admissible evidence. *Id.* The remedy to opening the door should be both relevant and proportional, and the State is not required to object before proceeding. *Id.* at 251. The State's questioning here went directly to impeach Defendant's assertion that she was a nonviolent person. The trial court properly exercised its discretion. Defendant is not entitled to relief on this issue.

B. Affair

With respect to another instance of allegedly improper testimony, Defendant points to the cross-examination of Ms. Bivens during the case-in-chief of the defense. The State asked Ms. Bivens if her "mom ever cheated on" the victim. The witness answered, "no, not to [her] knowledge." The State asked three additional times about whether Defendant had an affair. Ms. Bivens answered in the negative each time. After Ms. Bivens' testimony, the defense asked for a jury-out. Counsel for Defendant argued that the State improperly attempted to impeach Defendant's credibility "with something like an affair," and "uncharged bad act." Defendant asked for a mistrial. The trial court agreed that "whether or not [Defendant] even had an affair" was not relevant. The State argued that it goes to the credibility of Ms. Bivens. The trial court disagreed, cautioning the State that it was "getting into 404(b)" territory but that it was "not substantive evidence" so the court was going to "move on." The trial court offered to "craft an instruction" but cautioned that "sometimes that draws more attention to it needlessly."

In her brief to this Court, Defendant argues that the trial court erred in denying a mistrial and that she "should be granted a new trial now" but does not cite any authority to support her position. The State argues that no actual evidence about an affair was introduced at trial because Ms. Bivens repeatedly denied that Defendant ever had an affair. "Issues which are not supported by . . . citation to authorities . . . will be treated as waived in this court." Tenn. R. Crim. P. 10(b); *see also* Tenn. R. App. P. 27(a) (requiring "citations to the authorities"). This issue is waived.

Violation of Tennessee Rule of Criminal Procedure 16

Defendant argues that the State violated Tennessee Rule of Criminal Procedure 16 by failing to disclose a recording in which the victim's half-sister claimed that she had an affair with the district attorney general. During the recorded conversation, the victim's half-sister claimed she threatened to blackmail the district attorney general if he did not charge Defendant for the victim's death. The State responds that the recording was not material to preparing the defense and that the trial court properly concluded the State complied with discovery.

At the hearing on the motion for new trial, there was testimony from Detective Gibbs who recalled that the victim's half-brother, John Loach,[5] was adamant that Defendant be charged with a crime for the victim's death. Mr. Loach testified that he secretly recorded a conversation with Dana Cheatham-Pritchard, the victim's half-sister.[6] During the conversation, the two discussed potential reasons that Defendant had not been

[5] The victim's half-brother and half-sister are not related to each other.

[6] It is not entirely clear from the record when the recording was made, other than after the victim's death in October of 2016 and prior to its delivery to the police in May of 2017.

indicted. Mr. Loach brought the recording to the police department in May of 2017, well in advance of Defendant's January 2019 trial.

During the recording, Mr. Loach expressed his opinion that the district attorney had not sought an indictment against Defendant because he was having an affair with Ms. Cheatham-Pritchard. Mr. Loach falsly claimed that he had photos of the two of them together. Ms. Cheatham-Pritchard admitted that she had an affair with the district attorney but that it happened about four years before 2017 and that other people knew about the affair. However, Ms. Cheatham-Pritchard told Mr. Loach that she told the district attorney she would tell everyone about the affair if there was not an indictment charging Defendant for the victim's death. Later during the conversation, Ms. Cheatham-Pritchard claims she had "not done anything" with the district attorney.

Detective Gibbs recalled that he did not listen to the recording when he received it, but gave it to the police chief. According to Detective Gibbs, the chief listened to it and contacted the district attorney. Mark Gibson, the police chief, reported that the district attorney did not listen to the recording. The recording was not placed in the Defendant's case file even though counsel for the State learned about the recording prior to trial. Counsel for the State did not listen to the tape or turn it over to trial counsel as part of discovery. After trial, when defense counsel asked about the recording, counsel for the State suggested Defendant submit a public records request.

Detective Gibbs explained that there was a delay in presenting the case to the grand jury because there were several tests that had not been returned from the TBI. The reports containing the results from the tests were returned from the TBI in April and June of 2017. Defendant was indicted on June 21, 2017.

The district attorney submitted an affidavit in which he stated he was familiar with the recording prior to the indictment but that he had not listened to it. The district attorney denied the allegations in the recording and denied being "blackmailed" by Ms. Cheatham-Pritchard.

Ms. Cheatham-Pritchard claimed that most of the recording was false but insisted that she had a sexual relationship with the district attorney. However, she denied threatening to expose the affair or speaking with the district attorney about the case. Instead, Ms. Cheatham-Pritchard claimed that she lied to Mr. Loach because she knew he had a gun in the car during their conversation and she was afraid of him. She also claimed that she drank alcohol prior to the recording and that it interacted with her prescription medications of Prozac, Xanax, and Adderall.

Mr. Loach admitted that he did not have any photos of Ms. Cheatham-Pritchard with the district attorney and claimed that he never owned a gun.

The trial court found no violation of Rule 16, pointing to the fact that the recording was not used by the State at trial and neither Mr. Loach nor Ms. Cheatham-Pritchard testified at trial. Moreover, the trial court determined that the recording was not material to the defense.

Rule 16 requires disclosure of certain evidence by the State in advance of trial. Tenn. R. Crim. P. 16. Specifically, as applicable herein, the rule requires disclosure of "Documents and Objects" as follows:

> Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

Tenn. R. Crim. P. 16(a)(1)(F).

In our view, the recording, while in the possession of the State, was not material to preparing the defense. The recording did not contain any statements that would have exculpated Defendant in the crime. Moreover, even if Defendant had the recording prior to trial, she would not have been able to use it to challenge the indictment.. The recording was not "material" to prepare the defense. Moreover, the State did not use the recording at trial. Defendant's argument that the recording "casts a significant shadow on the legitimacy of the actual prosecution" is unavailing. Simply put, the contents of the recording, true or not, had absolutely no bearing on Defendant's claim that she acted in self defense by killing the victim. Defendant is not entitled to relief on this issue.

Cumulative Error

Defendant contends she is entitled to relief due to multiple errors, the cumulative effect of which requires a new trial. The State disagrees.

The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require

reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("'[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.'") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)). We have found no error thus Defendant's claim is legless. Defendant is not entitled to relief.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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TIMOTHY L. EASTER, JUDGE