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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
August 5, 2020 Session

STATE OF TENNESSEE v. SHAUGHN WALKER

Appeal from the Criminal Court for Shelby County
No. 17-02244 J. Robert Carter, Jr., Judge

No. W2019-00751-CCA-R3-CD

A jury convicted the Defendant, Shaughn Walker, of robbery, and he was sentenced to serve ten years in the Community Corrections program. The Defendant appeals, asserting the trial court erred in denying his motion to suppress the victim's identification from a photographic lineup; that the trial court erred in refusing to allow the Defendant to sit at the table with counsel during trial; that the trial court erred in denying a continuance, additional funding, or other relief after eyewitness identification expert Dr. David Ross used the allocated funding prior to trial and refused to testify absent additional payment; and that he is entitled to cumulative error relief. After a thorough review of the record, we discern no error and affirm the trial court's judgment.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which J. ROSS DYER, J., joined. CAMILLE R. MCMULLEN, J., filed a dissenting opinion.

Phyllis Aluko, District Public Defender; and Glover Wright (at trial and on appeal) and Joshua Stanton (at trial), Assistant Public Defenders, for the appellant, Shaughn Walker.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Scott Smith and Alyssa Hennig, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Defendant was charged with two counts of attempted especially aggravated kidnapping and one count of aggravated robbery after he entered a vehicle occupied by Ms. Nabel Martinez[1] and her minor daughter, forcing them to flee. The armed Defendant then drove away in the vehicle. The Defendant shortly thereafter created a disturbance at a nearby gas station and was arrested. He matched the victim's description of the suspect as having brown hair, facial hair, wearing black shorts without any shirt, and having tattoos over his bare chest and arms. The victim identified the Defendant in a pretrial photographic lineup. The defense attempted to cast doubt on the victim's identification of the Defendant as the person who entered her vehicle.

Motion to Suppress

The Defendant filed a motion to suppress the victim's identification, asserting that the photographic lineup in this case was unduly suggestive because the lineup contained photographs of only four men who were balding and two men with goatees and because the only man who both had a goatee and was balding was the Defendant.

At the hearing, the victim testified through an interpreter that she was robbed on the morning of September 17, 2016, at approximately 6:00 a.m., as she was going to work. The victim stated that it was light outside, although she could not remember if the sun was up. She testified that it had rained that morning, but she could not remember if it was raining at the time of the offense. The victim saw a man lingering fifteen to twenty feet away from her car, but she did not closely observe the man at the time. She started the engine while standing outside the vehicle and told her seven-year-old daughter to enter the vehicle. When the victim began to get in, the assailant ran to the vehicle and got into the passenger's seat, brandishing a gun which she described as a small, .40 caliber weapon. She was able to see his face. The man appeared angry and "wanted to grab" her. He spoke to her, but she did not understand him. She agreed that she was focused on the handgun. The man "pointed it," and she "went running," instructing her daughter to likewise run. She agreed she only observed the perpetrator briefly.

The victim called the police and told officers that the robber was "tall." She did not recall if she told them he was five feet, six inches tall, and she did not know her own

[1] Although the victim's name is spelled in various ways in the record, including "Navel Martinez" in the indictment, we use the spelling which she gave at trial and which she used when signing the documents contained in the exhibits on appeal.

height. She described the suspect as neither too heavy nor too thin, with brown hair, tattoos on his arm and "around here,"[2] and shirtless, wearing only black shorts. The victim did not understand what a goatee was, but she testified she told police he had facial hair "[l]ike this kind of round," and the trial court noted that she was pointing to her upper lip and chin.

Later the same day, the victim was shown a photographic lineup at the police station and gave a written statement. She was given a form regarding the lineup procedures, and she testified that she read and understood the instructions prior to viewing the lineup. She stated initially that she did not recall if the officer reviewed the instructions with her but later testified that he read them to her.

The victim testified that the officer did not tell her that he had a suspect in mind and did not tell her that anyone had been arrested in connection with the crime. She stated, "He only told me to look at the pictures and see if someone in the picture was the person that had robbed me." The victim did not expect to see the robber in the lineup. The victim identified the Defendant in the photographic lineup after a "short time," writing, "This is the person who pointed the gun at me in my car." She confirmed for the officer that she was sure the photograph she chose was that of the offender. She did not recall being told she had picked the correct photograph or that she had done a good job. She also did not recall the officer saying anything about making an arrest. The victim gave a subsequent written statement in which she again described the suspect, this time including the fact that he was balding.

Detective Jesus Perea of the Memphis Police Department testified that he is fluent in Spanish and that he created the photographic lineup and presented it to the victim. Detective Perea received a report that the suspect was a white man, approximately five feet, six inches tall, and weighing one hundred and forty pounds. He testified he was "working off" of the report in creating the lineup. The report further described the suspect as having brown hair, a goatee, unknown tattoos over his chest and arms, and wearing black shorts without a shirt. Detective Perea did not speak to the victim prior to creating the lineup. The Defendant had been arrested as a suspect at the time the lineup was created, and Detective Perea testified that he only had one booking photograph for the Defendant. Accordingly, he tried to choose the other photographs in the lineup based on the Defendant's extant photograph. He agreed that it was important to have photographs that fit the victim's description and also resembled the Defendant. Detective Perea testified that he believed about five of the photographs depicted men with goatees,

[2] The record does not indicate if the victim was making a motion as she gave this testimony.

that four to five of the subjects depicted had brown hair, and that four to five had both brown hair and a goatee.

Detective Perea gave the victim a form, written in Spanish, which noted that the suspect may or may not be in the lineup, that she should not feel obligated to pick a photograph from the lineup, and that she should only pick a suspect if she was one hundred percent certain of her identification. He testified he reviewed the instructions with the victim, and he identified the form which she signed at 10:12 a.m. Detective Perea testified that he told the victim that someone had been arrested in connection with the crime prior to showing her the lineup but that he did not say that prosecution hinged on her identification.

Detective Perea stated that the victim circled the Defendant's photograph in about thirty to forty-five seconds. When asked about her level of confidence, the victim "said she was confident that's the person that robbed her." He acknowledged that he knew which photograph depicted the Defendant and that he did not make a recording of the lineup procedures, but he did not indicate to the victim which photograph she should pick. He did not recall if he told the victim she had picked the "right suspect."

After the victim chose the photograph, Detective Perea took her statement. In her statement, "she was a lot more descriptive than the initial report," describing the suspect as balding. Detective Perea did not have a description of the suspect as balding from the victim prior to creating the lineup.

The defense argued that the photographs did not adequately match the victim's description, that the Defendant was the only person depicted who was balding, had brown hair, and had a goatee, and that the lineup was therefore suggestive and the identification otherwise unreliable. The trial court found that all six men in the lineup were "very similar" and "look[ed] alike," that "care was used to crop the photo" to avoid revealing whether any of the suspects had tattoos, and that the lineup was not unduly suggestive.

Trial

Prior to trial, the defense filed a motion to allow the Defendant to sit at the table with trial counsel, and the trial court denied the motion, citing space constraints. The defense also made numerous motions for either a continuance or further funding after the Defendant's expert witness on eyewitness identification, Dr. David Ross, informed trial counsel that he had used up all of the funding that was intended to cover preparation, travel, and trial testimony and that he would not testify absent additional payment. The trial court, finding that the expert was "shaking this system down for money," refused to

allocate further funding. The State dismissed the kidnapping charges, and trial proceeded on the aggravated robbery charge.

The victim, through an interpreter, testified consistently with her suppression hearing testimony regarding the conditions under which she observed the assailant as she and her daughter prepared to leave the parking lot at 6:00 a.m. She testified that the assailant got into the car and spoke angrily to her, but she did not understand what he said. The man did not touch her, but he tried to grab her by her neck. The victim told her daughter to leave the car, and when her daughter got out, the victim did, too. The victim ran, and the man slid into the driver's seat and drove away in her car.

The victim stated she was able to observe the robber, who was a white man, tall and not too heavy or too thin, although he was in her car for less than a minute. The robber had "little…hair" and a "round mustache." The victim demonstrated that the "round mustache" went around the top and bottom of the suspect's lips. He was wearing black shorts and was shirtless, and she was able to observe a tattoo on his arm. The victim called 911 from her brother's telephone because hers had remained in the car. She confirmed that the robber was wearing black shorts, and she stated she did not tell the 911 operator that he was wearing blue or black pants.[3]

Later that morning, the victim was shown a photographic lineup. She testified consistently with her testimony at the suppression hearing that she was given instructions, that she was told not to identify a suspect unless she was sure of his identity, that she was not directed to pick the Defendant, and that she was able to identify the Defendant from the lineup. She identified the Defendant in court by his shirt, stating his hair was "brown, black" and "[o]n the front very little."

Defense counsel asked the victim if she had told the responding officer that the offender pulled her out of the car, and she responded, "Yes, he took the car[,] and he came at me. I got out from the car." She agreed that the robber was tall but stated she could not estimate his height. Asked if she described her assailant as five feet, six inches tall, she testified that she told the responding officer that the robber was as tall as the officer and that the officer stated that that was his height. She estimated his weight as one hundred and fifty pounds. Officer Frederic Blumer of the Memphis Police Department was the responding officer and testified that the victim gave a description of the crime and suspect. In obtaining the description, he was hampered by his limited Spanish and the victim's limited English. The parties stipulated that the Defendant was

[3] The trial court later noted that the video demonstrated that the Defendant was wearing bottoms that went approximately two inches below his knees "whether those are pants, shorts, capris, or whatever."

six feet, one inch tall, and the trial court ordered the Defendant to exhibit some of the tattoos on his arms and chest to the jury.

Officer Quentin Hogue was traveling to the crime scene when he was alerted to a nearby accident involving a vehicle matching the description of the victim's vehicle. The driver had abandoned the vehicle, which had collided with a fire hydrant, and Officer Hogue sent the vehicle to be processed for evidence. The vehicle was processed by Officer Charles Cathey, who recovered only partial fingerprints that could not be used for identification. No blood or other biological evidence was recovered. The victim's belongings, including her cell phone and daughter's doll, were in the vehicle. Law enforcement never recovered a firearm. According to Officer Blumer, the intersection where the victim's car was recovered was approximately 0.8 miles, or a fifteen-minute walk, from a nearby gas station, and it was en route between the gas station and the victim's home.

Mr. Anirudh Muthineni, the manager of the gas station, testified that the Defendant, shirtless and "not making any sense," entered the gas station and was asked to leave multiple times because he had no shirt. The Defendant was "hyper" and "mumbling" and attempted to get behind the counter, "trying to get to us." Mr. Muthineni's friend, who "always carries a gun," happened to be present, and the Defendant finally left when this friend instructed him to leave. The Defendant was not present when police responded to Mr. Muthineni's call thirty-five to forty minutes later, but he reappeared in the parking lot as Mr. Muthineni was reviewing the surveillance video with the officers. The surveillance video was entered into evidence but is not in the record on appeal. The video's time stamp revealed that the Defendant first entered the store around 6:25 a.m. The parties stipulated that the Defendant was arrested outside the store at 8:03 a.m. Mr. Muthineni believed it was still dark outside when the Defendant first came to the store, and the video of the store's exterior appeared dark. He agreed that there were other customers in the store at the time and that it was not unusual for someone to come to his store on foot. He also agreed that the incident "happened pretty quickly" and that he never saw the Defendant with a weapon.

Detective Perea testified consistently with his testimony at the suppression hearing that he was asked to assist with the case after the Defendant was taken into custody and that he created a lineup based on the Defendant's photograph, choosing five other men who were of a similar age and appearance and who had a similar hairstyle. Detective Perea told the victim that someone was in custody for the crime prior to showing her the photographic lineup. He did not recall telling her she picked the person in custody but stated it was possible he had.

Detective Perea acknowledged that a lineup should not be suggestive and that a suggestive lineup could taint a witness's memory. He also agreed that a suggestive lineup could result in a witness confident in the identification even if the identification was incorrect. Detective Perea stated it was important to create a lineup based on the description given by a witness, but he testified that the lineup in this case was created based solely on the Defendant's photograph. He initially denied relying on the victim's description, but after reviewing his testimony from the suppression hearing, he agreed he had previously testified he was relying on the victim's description. He stated it was possible that the victim had given him further information about the suspect's description during her statement.

The jury found the Defendant guilty of the lesser-included offense of robbery. The trial court sentenced the Defendant to serve ten years in the Community Corrections program. The Defendant moved for a new trial, asserting that the trial court erred in denying his motion to suppress, his motion to sit at counsel table, and his motions for relief related to Dr. Ross's refusal to testify without further payment. The trial court denied the motion for a new trial, and the Defendant appeals.

ANALYSIS

I. Motion to Suppress

The Defendant asserts on appeal that the victim's identification of him from a photographic lineup should have been suppressed because the lineup itself was unduly suggestive. He also contends that the procedures were suggestive because Officer Perea knew which photograph depicted the Defendant and because Officer Perea told the victim that a suspect was in custody. He asserts the State did not establish that the identification was reliable despite a suggestive lineup. The State responds that the Defendant's arguments about the procedure are waived and that the lineup itself is not unduly suggestive. We agree that the Defendant has only preserved the issue of whether the photographic lineup was itself suggestive, and we conclude that because all of the photographs resembled the Defendant's photograph, the lineup was not unduly suggestive.

A trial court's findings of fact in a suppression hearing are binding on the appellate court unless the evidence preponderates against them. *State v. Clark*, 452 S.W.3d 268, 282 (Tenn. 2014). Questions regarding the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The party who prevails at the trial level is entitled to the strongest legitimate view of the evidence and to reasonable and legitimate inferences which may be drawn from it.

State v. Echols, 382 S.W.3d 266, 277 (Tenn. 2012). Conclusions of law and mixed questions of law and fact are reviewed de novo with no presumption of correctness. *State v. Meeks*, 262 S.W.3d 710, 722 (Tenn. 2008). Whether a photographic lineup is suggestive is reviewed de novo with no presumption of correctness. *State v. Jose E. Molina*, No. M2005-01033-CCA-R3-CD, 2006 WL 2069429, at *4 (Tenn. Crim. App. July 25, 2006) (reviewing suppression of photographic lineup de novo because it involved no issues of credibility and the appellate court was just as capable of reviewing the lineup as the trial court).

We agree with the State that the Defendant never raised below the argument that the lineup was suggestive based on Officer Perea's knowledge of the identity of the suspect or based on Officer Perea's possibly having told the victim that a suspect was in custody. Below, the Defendant only asserted, both in his written motion and during argument at the hearing, that the lineup itself was unduly suggestive because the Defendant's photograph was in some way emphasized within the lineup or because the other photographs did not match the victim's description. Accordingly, he cannot assert error in the trial court's failure to grant the motion on the basis that Officer Perea's procedures were suggestive. *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) ("It is well-settled that a defendant may not advocate a different or novel position on appeal."); *see also State v. Bonds*, 502 S.W.3d 118, 139 (Tenn. Crim. App. 2016) (declining to find that the lineup was suggestive merely because the officer knew which picture depicted the suspect).

The Defendant argues that the lineup was suggestive because his photograph was not similar to the other photographs and was "the only one fully matching" the victim's description. The Defendant's brief summarizes the offer of proof, including Dr. Ross's assertion that the "lineup should have shown bare[-]chested men with tattoos on the chest and arms." The Defendant contends that the other subjects of the photographs did not have either hair or facial hair matching the victim's either pre- or post-lineup descriptions.

The United States Supreme Court has recognized that an improperly constructed photographic lineup "may sometimes cause witnesses to err in identifying criminals," and that the danger of erroneous identification is increased if the witness is shown a series of photographs in which one individual recurs or is in some way emphasized. *Simmons v. United States*, 390 U.S. 377, 383 (1968). While the photograph of the accused should not be emphasized, "[p]hotographs contained in a photographic array do not have to mirror the accused." *State v. Hall*, 976 S.W.2d 121, 153 (Tenn. 1998). Instead, the law simply requires police to adhere to identification procedures that are not suggestive. *Id.* In other

words, the question is whether "the procedure itself steered the witness to one suspect or another, independent of the witness's honest recollection." *Cornwell v. Bradshaw*, 559 F.3d 398, 413 (6th Cir. 2009). A lineup "would be considered unduly suggestive only when the other participants were grossly dissimilar." *State v. Edwards*, 868 S.W.2d 682, 694 (Tenn. Crim. App. 1993); *see United States v. Wade*, 388 U.S. 218, 233 (1967); *State v. Scarborough*, 300 S.W.3d 717, 728-29 (Tenn. Crim. App. 2009). If a court determines that the identification procedure was unduly suggestive, it goes on to consider a number of factors bearing on whether the witness's identification was nevertheless reliable. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

Here, the Defendant's photograph was not emphasized, and the subjects of the photographs were in no way "grossly dissimilar." In fact, the photographs chosen by Detective Perea bore a strong resemblance to the Defendant's photograph. The subjects of the six photographs were all white men of similar age. Four to five of the men had some degree of balding or thinning hair. None exhibited tattoos or scars. All had facial hair. While one subject had only a mustache, the other five had some hair on their chin. One of these five had stubble extending to his cheeks. The Defendant objects in his brief that some of the facial hair in the photographs is not properly characterized as a goatee, but the Defendant's own facial hair in the photograph also does not appear to cover the center of his chin. This court, in *Scarborough*, concluded that the photographic lineup was not suggestive despite the fact that the photographs in the lineup did not match the victim's description, noting that the suspect's photograph also did not match the description. 300 S.W.3d at 728-29 (concluding, however, that the procedure may have been suggestive based on law enforcement's statements during the identification). The trial court, in accord with *Scarborough*, found that the Defendant's argument that the lineup relied insufficiently on the victim's description was misplaced because the photographs matched the Defendant's photograph. Here, all of the photographs were generally similar, and there is nothing which emphasized the Defendant's photograph in the lineup. We conclude that the trial court did not err in refusing to suppress the identification from the photographic lineup, which was in no way suggestive. Because we conclude the lineup was not impermissibly suggestive, we do not address the factors regarding the underlying reliability of the identification. *See Bonds*, 502 S.W.3d at 139 (noting that the *Biggers* analysis is only triggered if the identification procedures were suggestive).

II. Request to Sit at the Table with Counsel

The Defendant asserts that the trial court's ruling that he could not sit at counsel table was a violation of his due process rights. The State asserts that he has not shown that the trial court abused its discretion. We conclude that the trial court's decision to deny the motion based on space constraints did not use an incorrect legal standard, reach

an illogical conclusion, demonstrate a clearly erroneous assessment of the evidence, or cause an injustice to the complaining party, and accordingly, the court did not abuse its discretion.

The defense moved prior to jury selection for the Defendant to be permitted to sit at the table with counsel. The trial court denied the motion based "on only one thing, you've got two lawyers and [you] are taking up all the table here now." The court concluded that the decision was based "strictly" on "room." The judge observed he was reluctant to "jam[] this whole situation up just for his convenience" and that the Defendant was seated two feet behind counsel and able to consult with counsel. The court noted the trial was proceeding "in cramped conditions" and that it would have granted the motion if there had been only one attorney representing the Defendant, if the tables had been longer, or if the request had been made "after the remodeling." Defense counsel noted that he had previously tried a case in the room at which the defendant was permitted to sit at the table with counsel even though there were two attorneys. In denying the motion for a new trial, the trial court again found that the Defendant was not permitted to sit with counsel at the table because there were four attorneys and "[t]here simply wasn't room" for the Defendant to sit at the table "without … basically sitting on top of the State and his attorneys."

A trial court's decision regarding whether a defendant should be permitted to sit at the table with defense counsel is reviewed for abuse of discretion. *State v. Smith*, 492 S.W.3d 224, 243 (Tenn. 2016); *State v. Rice*, 184 S.W.3d 646, 674 (Tenn. 2006). "A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Smith*, 492 S.W.3d at 243. When a trial court erroneously denies a defendant an opportunity to sit at counsel table, the defendant must demonstrate prejudice from the error. *Smith*, 492 S.W.3d at 244; *Rice*, 184 S.W.3d at 674-75.

In *Rice*, the trial court ordered the defendant to sit on a bench less than two feet behind counsel table, and the defendant asserted this was a due process violation. 184 S.W.3d at 674. The Tennessee Supreme Court concluded that the trial court did not abuse its discretion because "[t]he seating arrangement did not impair the defendant's presumption of innocence" and because "the defendant's ability to communicate with counsel" was not affected. *Id.* at 675. In *Smith*, on the other hand, the Tennessee Supreme Court concluded that arbitrarily denying the defendant the opportunity to sit at counsel table based solely on the fact that he was not an attorney was an abuse of discretion. 492 S.W.3d at 243. The court nevertheless concluded the defendant had not shown prejudice. *Id.* at 244.

In the case at bar, the trial court made findings both at the time of trial and during the hearing on the motion for a new trial that the only reason the Defendant was not permitted to sit at counsel table was the "cramped conditions" of the courtroom, where the Defendant would have been "sitting on top of the State and his attorneys" at the table. The court noted it would have granted the motion had there been fewer attorneys or larger tables or had a remodeling which was underway been completed. While the Defendant asserts that defendants in other trials in the courtroom had been permitted to sit at counsel table even when there were two attorneys, we are generally bound by a trial court's factual findings and credibility determinations unless the evidence preponderates against them, and the trial court found there was inadequate room. *See Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015). The Defendant has not cited to any authority that he has a constitutional right to sit at counsel table. *See United States v. Darden*, 364 F. Supp. 3d 798, 800 (M.D. Tenn. 2019) (noting that "neither the Sixth Amendment, nor federal law mandates that [sitting at counsel table] is constitutionally required"). The Defendant was seated two feet behind counsel and able to consult with counsel. While we reiterate that "it is the better practice to allow a defendant to sit at counsel table," the trial court did not abuse its discretion or deny the Defendant due process in denying the motion if such a denial was based on space constraints. *See Rice*, 184 S.W.3d at 675. The Defendant is not entitled to relief.

III. Eyewitness Identification Expert

The Defendant raises numerous alleged errors with respect to the trial court's rulings on the eyewitness identification experts. The Defendant asserts that his due process rights were violated when the trial court refused to grant a continuance to arrange for Dr. Ross's testimony; that his due process rights and his right to present a defense were violated by excluding Dr. Ross's testimony through a denial of additional funding; and that the trial court violated the Defendant's due process rights by refusing to allow a different expert, Dr. Jeffrey Neuschatz, to testify by telephone on the afternoon of November 2, 2018. The State responds that the trial court did not err. We conclude that the denial of a continuance had no effect on the presence of Dr. Ross, that the trial court did not abuse its discretion in refusing to allocate additional funding in the circumstances presented, and that the Defendant has not demonstrated that Dr. Neuschatz's telephonic testimony would have been admissible. Accordingly, he is not entitled to relief.

Prior to trial, in order to cast doubt on the victim's identification, the defense attempted to secure expert testimony on eyewitness identifications. On February 23, 2018, defense counsel filed an *ex parte* motion seeking funding for an expert in eyewitness identification, and the motion gave an estimate of the total cost of the services of Dr. Jeffrey Neuschatz, an eyewitness identification expert, at $3,225. The trial court approved this funding request. In April, defense counsel sought to vacate this order and

instead obtain funding for the services of Dr. David Ross, who was also an eyewitness identification expert, due to Dr. Neuschatz's unavailability during the week of trial. Dr. Ross charged the same hourly rate as Dr. Neuschatz, and the motion stated his estimated total cost, "including records review, case preparation, testimony, travel, and consultation with counsel" would be $5,000. Unlike the motion asking for funding for Dr. Neuschatz, the motion did not append an affidavit from Dr. Ross with an itemized estimate of costs. The trial court approved $5,000 to pay for the expert services of Dr. Ross, specifying that preparation, consultation, travel, testimony, and expenses were included.

On the first day of trial, October 29, 2018, defense counsel filed an *ex parte* motion seeking additional funding. Defense counsel provided an itemized invoice from Dr. Ross demonstrating that Dr. Ross had already provided services totaling $5,025. Dr. Ross anticipated that he would require an additional $3,164.80 for his travel expenses and testimony. The filing included Dr. Ross's October 25, 2018, affidavit, which mistakenly referred to an allocated $4,200 and stated that Dr. Ross had "exhausted the 28 hours" at $150 per hour that $4,200 would have funded. Defense counsel stated in the motion that Dr. Ross indicated orally that he had performed over forty hours of work, that Dr. Ross submitted an invoice reflecting thirty-three hours of work, and that Dr. Ross indicated the additional $800 which had actually been allocated would not cover his trial testimony, instead insisting that $3,164.80 was needed to secure his presence at trial. A twenty-four page draft expert report was also appended. The court entered an order denying additional funding "[f]or the reasons stated … ex parte on the record." The defense also filed a motion to continue, citing the denial of additional funding and seeking interlocutory appeal.

On the afternoon of the same day, prior to voir dire, defense counsel noted for the record that he believed the defense was not prepared to proceed with trial because the defense was "predicated [on] having a defense expert" and it appeared the expert would "not be able to come to trial." The trial court responded that it had granted funds for the expert, that the funds had been used up, and that the expert was not willing to testify. The court made a finding that the office of the public defender had some money available for expert witnesses. The court also found that the expert was "shaking this system down for money." The court noted that the Defendant had been in jail for two years and that a continuance in itself would not "do anything to change the situation other than make it older yet again." The trial court further found that having an eyewitness expert was not a fundamental right and that *State v. Copeland*, 226 S.W.3d 287, 300 (Tenn. 2007), stood for the proposition that only summarily preventing such testimony would be error. The court found that it had granted funds and that it was not error to refuse to grant additional funding "because your expert now on the day of trial — the day of trial says they want more money to come." The judge further found that he had "real reservations about the professionalism of anybody who's going to handle a case this way" and that the defense

should "choose somebody better in the future." Noting that "were money no object," the defense would "love to avail" itself of many experts and services but that money was "unfortunately an object," the trial court ordered the trial to proceed. Defense counsel noted that he had consulted with the Deputy Chief Public Defender in his office and that no funds were available to secure the testimony.

The record reflects that jury selection took place on October 29, 2018, but that the trial did not resume until October 31, 2018. On that date, trial counsel filed a motion to reconsider the continuance and denial of funding. Lead counsel further detailed his efforts to obtain expert assistance, including his requests to the Deputy Chief Public Defender and Administrative Office of Courts for extra funding and his offer to personally pay for Dr. Ross's lodging. Co-counsel noted that an offer of proof regarding the expert's testimony had been put into the record.[4] The trial court elaborated on its ruling that it did not find a "particularized need for an identity expert" because the evidence would not be based solely on the victim's identification. The court noted it had nevertheless granted funding, which "for whatever reason," whether due to "raised … rates" or "inadvertent[]" consumption of the funds, had not secured the actual expert testimony. The court summarized that it had allocated funding for an expert's testimony and that the defense "used the money for some other purpose, I have no idea what, [and] he's not ready to testify." The court found that a continuance "would only serve to delay" trial.

Dr. Ross's draft report and the offer of proof revealed that Dr. Ross concluded that the lineup procedures were flawed in numerous ways. Dr. Ross could not have testified to the accuracy of the victim's identification but only to his conclusion that the accuracy of the identification was not capable of determination in light of the errors: "The conclusion is not that [the victim's identification] is inaccurate as a result of these procedural issues, but that one can't interpret the identification evidence as accurate or inaccurate because these violations pose a potential threat to the accuracy of her testimony."

On November 1, 2018, the day that the proof was completed, defense counsel filed a motion to continue in order to permit Dr. Neuschatz to testify by telephone at 4:00 p.m. on November 2, 2018. Defense counsel noted that Dr. Neuschatz would not be available until the stated time but that he was willing to testify without any expectation of payment. The trial court denied the motion, noting that the trial would be concluded by the time of the proposed testimony and expressing doubt regarding whether testimony by telephone

[4] This document appears in the appellate record as having been filed on March 12, 2019, but the accompanying affidavit is dated October 31, 2018.

was permitted by the Rules of Evidence. The jury returned a verdict shortly after noon on November 2, 2018.

In denying the motion for a new trial on the issues related to the expert witness, the trial court noted that funding had been allocated based on a "quote" from the expert, who then "spent all of the money that was supposed to get him here to travel and to testify, on researching and preparing a presentation, and looking into other matters." The court found that the expert "a couple of days before trial" refused to testify without additional payment, which the court concluded was a "blatant attempt to get more money out of the State when he's already been paid to do the job." The court found that it had declined to approve additional funds because the expert had spent the money "in a way that was inappropriate." Finding that the case did not hinge completely on the victim's identification, the court concluded it had properly denied additional funding when the funds had been "mismanaged."

A. Excluding Dr. Ross's Expert Testimony Through the Denial of a Continuance

The Defendant asserts that the trial court violated his Sixth Amendment right to present a defense by "excluding expert testimony." He cites to *Ferensic v. Birkett*, for the proposition that a refusal to grant a continuance may amount to exclusion of testimony and, thus, to a violation of the right to present a defense and that such error is reviewed as constitutional error. 501 F.3d 469, 479-81 (6th Cir. 2007) (reviewing erroneous refusal to grant a thirty-minute continuance for a fact witness for constitutional error). The Defendant separately asserts that the refusal to grant a continuance in order to secure the testimony of Dr. Ross was an abuse of discretion and a violation of his due process rights. *See State v. Morgan*, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) for the proposition that "'insistence upon expeditiousness in the face of a justifiable request for delay' can render a trial an empty formality so as to violate due process"). He notes the importance of eyewitness identification testimony and his "weighty" interest in presenting such testimony as a defense. *Ferensic*, 501 F.3d at 476. The Defendant's arguments are premised on the assertion that the trial court committed error in denying the continuance when Dr. Ross unexpectedly demanded additional payment for his testimony and that this error resulted in the loss of Dr. Ross's testimony.

The record demonstrates, however, that the refusal to grant a continuance did not deprive the Defendant of the expert testimony of Dr. Ross. Instead, the record establishes that Dr. Ross, "a couple of days before trial," told defense counsel that he had used, in preparation for trial, all of the $5,000 that had been allocated to pay for Dr. Ross's preparation, travel, accommodations, and testimony. Dr. Ross then told counsel that he would not testify without additional payment. Trial counsel, having scrambled for

additional funding in vain, was willing to personally pay for Dr. Ross's lodging, but Dr. Ross refused to testify without further compensation. The trial court recognized the futility of granting a continuance without allocating further funding, and it found that a continuance would only delay the trial. The record demonstrates that the denial of a continuance had no effect on the presence or absence of Dr. Ross at trial, as Dr. Ross's refusal to come was, according to the Defendant's filings, based on Dr. Ross's unmet pecuniary demands. Accordingly, we cannot conclude that the refusal to grant a continuance was an abuse of discretion. *See Morgan*, 825 S.W.2d at 118 (the trial court did not abuse its discretion in denying a continuance when the defendant failed to demonstrate that the continuance might reasonably have resulted in the witness's presence).

B. Refusal to Allocate Additional Funding

The Defendant asserts that he demonstrated a particularized need for expert evidence and that the trial court's denial of his request for additional funding to secure the testimony of his expert was a denial of his due process right to present a defense. The State asserts that the Defendant has waived the issue by failing to include a transcript of the *ex parte* hearing on the motion for additional funding and that he is not in any event entitled to relief. We conclude that the record is adequate for review and that the trial court did not abuse its discretion in refusing to allocate additional funding after finding that the reasonable amount originally allocated was "mismanaged" and spent in an "inappropriate" way.

The State asserts that the absence of a transcript of the hearing on the *ex parte* motion for additional funds amounts to waiver. It contends that because the written order denying the funding refers to the "the reasons stated … ex parte on the record," the record of the *ex parte* hearing is necessary for review. The appellant has the duty to "have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). In the absence of an adequate record, we presume that the trial court's judgments were correct. *State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993). However, if the record provides an adequate basis for review, this court may reach the merits of an issue with the presumption that the missing part of the record would support the trial court's decision. *See State v. Caudle*, 388 S.W.3d 273, 279 (Tenn. 2012); *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (concluding that, in the absence of an order denying expert assistance and in the absence of any indication regarding whether an *ex parte* hearing took place, "[t]he record does not support the defendant's claim of error"). Because defense counsel raised the issue prior to voir dire and because the record contains the trial court's articulation of its reasoning for denying the additional funding, we conclude that

the record is adequate for review, with a presumption that any missing portion would support the trial court's decision. *See State v. Jones*, 568 S.W.3d 101, 137 (Tenn. 2019), *cert. denied*, 140 S. Ct. 262 (2019) (noting that the defendant had failed to include a transcript of the *ex parte* hearing on expert funding but holding that, on the basis of the record provided, the defendant had not established particularized need). The State also asserts that the absence of the video evidence from the record amounts to waiver because the appellate record does not provide a complete picture of the identity evidence, which bears on particularized need for expert evidence. Because the court's ruling rested primarily on its determinations regarding the reasonableness of the funding requested and because the evidence cited by the State was not introduced into the record until after the trial court had made its ruling, we conclude that the record is adequate for review.

A trial court's denial of request for expert funding is reviewed for an abuse of discretion. *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). The trial court abuses its discretion by applying an incorrect legal standard or reaching a decision which is against logic or reasoning and which causes an injustice to the complaining party. *Id.* When the trial court commits an abuse of discretion in denying expert assistance and this denial amounts to a violation of due process, the error is analyzed under the constitutional harmless error standard to determine whether the error complained of was harmless beyond a reasonable doubt. *Id.* at 755.

The Sixth Amendment's Compulsory Process Clause conveys a right to present a defense, including a right to present witnesses for the defense, and this right is a "'fundamental element of due process of law.'" *Ferensic*, 501 F.3d at 475 (quoting *Taylor v. Illinois*, 484 U.S. 400, 409 (1988)). "[W]hen a State brings its judicial power to bear against an indigent defendant in a criminal proceeding, it must take steps to insure that the accused has a fair opportunity to present his defense." *State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985)). The assistance provided to an indigent defendant need not equal that "his wealthier counterpart might buy," but it must amount to the "'basic tools of an adequate defense or appeal.'" *Id.* (quoting *Ake*, 470 U.S. at 77). In considering the right of the accused to State assistance in presenting a defense, the court should balance:

> (1) the private interest affected by the action of the State; (2) the governmental interest affected if the safeguard is provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, weighed against the risk of erroneous deprivation of the affected interest if those safeguards are not provided.

Id. (citing *Ake*, 470 U.S. at 77). The defendant's interest in liberty is "'almost uniquely compelling'" and weighs heavily. *Id.* at 426-27 (quoting *Ake*, 470 U.S. at 77). By

contrast, the State's interest in mitigating a fiscal burden is less substantial. *Id.* at 427 (citing *Ake*, 470 U.S. at 77). Due process requires that an indigent defendant be given a meaningful opportunity to defend his liberty. *Id.* at 428.

Under Tennessee Supreme Court Rule 13,

> (a)(1) In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel and in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, the court, in an *ex parte* hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the payment or reimbursement of reasonable and necessary expenses by the director.

Tenn. R. Sup. Ct. 13, § 5(a)(1). Accordingly, allocating funding for an expert witness requires the court to determine whether the services are "necessary" and what amount is "reasonable." Tenn. R. Sup. Ct. 13, § 5(a)(1). The trial court is directed to authorize funding "only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services." Tenn. R. Sup. Ct. 13, § 5(c)(1). The Rule further contains a schedule of maximum hourly rates. Tenn. R. Sup. Ct. 13, § 5(d)(1), (2). The trial court's order must specify the amount approved, and "[u]nless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses." Tenn. R. Sup. Ct. 13, § 5(e)(1). "Requiring prior trial court approval of both the expert and the costs focuses the *ex parte* hearing and prevents abuse." *Owens v. State*, 908 S.W.2d 923, 929 (Tenn. 1995).

While there is not a limitation on funding provided for expert services at trial, such funding should be reasonable. *Andrew Thomas v. State*, No. W2008-01941-CCA-R3-PD, 2011 WL 675936, at *45 (Tenn. Crim. App. Feb. 23, 2011) (concluding that the petitioner did not establish how any limitations on funding violated his right to present evidence). "The trial court has a duty to ensure that the requested assistance is tailored to the particular case and necessary. The cost of the requested services is also a legitimate, dutiful concern of the trial court." *State v. Georgia Lucinda Hagerty*, No. E2001-01254-CCA-R10-CD, 2002 WL 707858, at *9 (Tenn. Crim. App. Apr. 23, 2002) (holding that funding could be approved incrementally, depending on expert's findings). In general, "[a] trial court should exercise caution in issuing 'blank checks' under Rule 13."

Moncier v. Ferrell, 990 S.W.2d 710, 712 (Tenn. 1998); *see Owens v. State*, 908 S.W.2d 923, 928 (Tenn. 1995); *Paul Dennis Reid, Jr., v. State*, No. M2009-00128-CCA-R3-PD, 2011 WL 3444171, at *39 (Tenn. Crim. App. Aug. 8, 2011), *aff'd sub nom. Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013). Accordingly, this court has rejected a defendant's claim that he was precluded from presenting necessary expert testimony when the trial court "did not deny outright all additional funding for expert services, but only that which it found unnecessary." *Paul Dennis Reid, Jr.*, 2011 WL 3444171, at *38.

The Defendant argues that the trial court initially found a particularized need for an expert and that it consequently erred in denying the additional funding based on a repudiation of particularized need. The Defendant cites to *State v. Copeland*, where the Tennessee Supreme Court concluded that the defendant demonstrated a particularized need for an eyewitness expert because "the research also indicates that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification." *Copeland*, 226 S.W.3d 287, 300 (Tenn. 2007). He asserts that this case is analogous to *Scott*, where eyewitness expert evidence was "crucial" given the circumstantial nature of the evidence and where the court concluded that "[b]y denying the appellant expert assistance as to this type of evidence, the trial court deprived the appellant of a meaningful opportunity to defend when his liberty was at stake." *Scott*, 33 S.W.3d at 754.

Here, the trial court initially found particularized need for an expert and approved the request to allocate $3,225 for Dr. Neuschatz's expert assistance. Because Dr. Neuschatz was unavailable for the initial trial date, this order was vacated, and instead $5,000 was allocated to compensate Dr. Ross for similar testimony. Dr. Ross apparently informed trial counsel a few days prior to trial that he had used up all the money and was unwilling to testify without additional funds. He estimated he would require an additional $3,164.80 for expenses related to his travel and testimony. The additional funding for travel and testimony represents ninety-eight percent of the total amount that Dr. Neuschatz intended to charge for his combined services. The additional requested funding is a sixty-three percent increase in Dr. Ross's initial estimate of his own total cost, as detailed in defense counsel's motion. If the court had allocated the funding, Dr. Ross's services would have been approximately two hundred and fifty times the cost of Dr. Neuschatz's services. Dr. Ross filed an affidavit that he had completed twenty-eight hours of work on the case, but after subsequently discovering that the court had allocated more money than he believed, he told counsel that he had worked over forty hours and filed an invoice reflecting additional work for a total of thirty-three hours. We note that the record in this case is not extensive or complicated.

The trial court, expressing its "reservations about the professionalism of anybody who's going to handle a case this way" found that Dr. Ross was "shaking this system

down for money." It refused to allocate further funds. The trial court elaborated on its ruling denying funding by stating that it did not find a "particularized need for an identity expert" because the evidence would not be based solely on the victim's identification. At the hearing on the motion for a new trial, the court found that the expert had spent the money and that the expert's conduct was "inappropriate" and a "blatant attempt to get more money out of the State when he's already been paid to do the job."

This case is distinguishable from the cases cited by the Defendant, *Scott* and *Copeland*, because the trial court did not deny funding or exclude the expert evidence. Instead, it found that it had already allocated a reasonable amount to procure the expert services. The court may only approve funding "in a reasonable amount to be determined by the court." Tenn. R. Sup. Ct. 13, § 5(a)(1). The trial court must ensure the amount "is comparable to rates charged for similar services." Tenn. R. Sup. Ct. 13, § 5(c)(1). Appellate courts have cautioned that "cost of the requested services is also a legitimate, dutiful concern of the trial court," *Georgia Lucinda Hagerty*, 2002 WL 707858, at *9, and that the court should avoid issuing "blank checks," *Moncier*, 990 S.W.2d at 712; *Owens*, 908 S.W.2d at 928. The trial court allocated reasonable funding for an expert, and trial counsel, who were in the best position to supervise the expert, were regrettably surprised by the expert's unexpected demands for additional funds. Given the trial court's finding that the $5,000, which was already over one and one half times the estimated cost of a comparable expert, was "mismanaged" and that the demand for additional money was an attempt to "shak[e] this system down for money," it did not abuse its discretion in refusing to allocate a further $3,164.80 to pay Dr. Ross.

We observe that the American Bar Association directs that, "[b]efore engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field." *ABA Standards for Criminal Justice*, *Standard* 4-4.4(c). The attorney should likewise assist the expert in preparation. *ABA Standards for Criminal Justice*, *Standards* 4-4.4(e), 7-3.11(a). Under the Tennessee Rules of Professional Responsibility, when a lawyer retains a nonlawyer, the lawyer "having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Tenn. Sup. Ct. Rule 8, RPC 5.3(b). The comments clarify that when a lawyer seeks assistance from a nonlawyer, including use of an "investigative or paraprofessional service" the lawyer must "make reasonable efforts to ensure that the services are provided for in a manner that is compatible with the lawyer's professional obligations." Tenn. Sup. Ct. Rule 8, RPC 5.3, Cmt. [3]. Furthermore, "[w]hen retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." *Id.*

Numerous cases have recognized that an attorney has a duty to prepare and supervise an expert witness. *Sturgeon v. Quarterman*, 615 F. Supp. 2d 546, 572 (S.D. Tex. 2009) (trial counsel was deficient in preparing an eyewitness expert by failing to ask the expert to review material related to the case or to bring copies of relevant scientific studies); *Tillery v. United States*, 419 A.2d 970, 974 (D.C. 1980) (defense counsel failed to prepare expert for testimony); *Matter of Disciplinary Proceedings Against Warmington*, 568 N.W.2d 641, 646 (Wis. 1997) (disbarring attorney for numerous acts including a failure to supervise the preparation of an expert witness) In *Chatman v. Walker*, the Georgia Supreme Court concluded that trial counsel were deficient when they "hired [a mitigation specialist] without any investigation into his qualifications and then delegated to him responsibility for the mitigation investigation without sufficient supervision," particularly after becoming aware that the specialist had failed to travel and produced little work product. 773 S.E.2d 192, 200 (Ga. 2015). While defense counsel certainly appears to have exercised extreme diligence in attempting to secure expert testimony after Dr. Ross's unexpected refusal to testify, the defense was in the best position to negotiate with and supervise Dr. Ross to ensure that the funds allocated would secure his actual testimony. The trial judge found that he had allocated reasonable funding for an expert's testimony and that the money was used "for some other purpose, I have no idea what, [and] he's not ready to testify." The trial court then essentially refused to throw good money after bad. We cannot conclude that the refusal to allocate additional funding in these circumstances was an abuse of discretion. Whether the exhaustion of funds resulted from an attempt to "shak[e] this system down for money," from the expert's inability to estimate his own total cost, or from some other reason, this case serves as an unfortunate illustration of the caveat, "buyer beware." *See Zarzosa v. Flynn*, 266 S.W.3d 614, 619-20 (Tex. App. 2008) (granting a defense expert summary judgment because the expert performed as required by the contract but was asked to provide additional assistance that resulted additional costs exceeding the retainer).

C. Denial of Continuance to Allow Dr. Neuschatz's Testimony

The Defendant also asserts that the trial court violated his due process rights by denying his request to have Dr. Neuschatz give testimony by telephone on the following day. The State responds that the trial court did not abuse its discretion by refusing to continue the trial until 4:00 p.m. the following day to take telephonic testimony when the State was ready to conclude its proof. It further notes that the Defendant has not shown that testimony by telephone would have been permissible. Because the Defendant cites to no authority that telephonic testimony was admissible, we conclude that the trial court did not abuse its discretion in denying a continuance.

Defense counsel made numerous attempts to secure additional funding in order to obtain Dr. Ross's testimony, but they were unsuccessful. On November 1, 2018, the day

the State was concluding its case-in-chief, defense counsel filed a motion requesting the trial court to continue trial until 4:00 p.m. the following afternoon, Friday, November 2, 2018, in order to permit Dr. Neuschatz, who was willing to testify by telephone without remuneration, to give testimony. The trial court denied the motion, noting that the trial would be finished by the time Dr. Neuschatz was available and that the court was unconvinced that telephonic testimony was permitted by the Rules of Evidence.

"Tennessee law permits testimony by telephone in only a handful of narrowly drawn circumstances." *Kelly v. Kelly*, 445 S.W.3d 685, 693 (Tenn. 2014). Generally, live testimony is more desirable. *Id.* at 694 (listing advantages of live testimony); *see also State v. Dennis Lee Seale*, No. M2019-01913-CCA-R9-CD, 2020 WL 4045227, at *8 (Tenn. Crim. App. July 20, 2020) (noting, in the context of a confrontation challenge to remote audio-visual testimony, that the court was "not inclined to remove the requirement of physical presence of a witness in the courthouse, save for instances in which the most necessary public policy considerations arise"). In particular circumstances, statutes specifically permit telephonic testimony. *Kelly*, 445 S.W.3d at 693 n.1 (citing T.C.A. § 24-7-121(d); T.C.A. § 34-8-106(b); T.C.A. § 36-1-113(f)(3); T.C.A. § 36-5-2316(f); T.C.A. § 36-6-214(b)). The Tennessee Supreme Court in *Kelly* noted that Tennessee Rule of Civil Procedure 43.01 permits "'contemporaneous audio-visual transmission from a different location'" so long as the proponent establishes "'good cause … in compelling circumstances and with appropriate safeguards.'" *Id.* at 693 (quoting Tenn. R. Civ. P. 43.01); *see also* Tenn. R. Juv. P. 112(c). However, *Kelly* specifically held that this Rule contemplates "audio-visual (but not audio only) transmissions." *Id.* We note that the content of Dr. Neuschatz's anticipated testimony is not a part of the record before us. In any event, the Defendant has not cited to any statute or rule that would have permitted Dr. Neuschatz to testify by telephone. The trial court, in denying the continuance, stated that it did not believe telephonic testimony was permitted. Because the Defendant has not cited to any authority showing that the trial court was mistaken, he has not demonstrated that the court erred in denying the continuance to permit telephonic testimony. *See Yocum v. Yocum*, No. E2015-00086-COA-R3-CV, 2015 WL 9028131, at *8 (Tenn. Ct. App. Dec. 15, 2015) (concluding that the trial court did not err in refusing to let one of the parties to a divorce testify by telephone because "no Tennessee law or rule provides for a right to testify by telephone in a[n] … action such as this one").

IV. Cumulative Error

The Defendant asserts that the issues raised cumulatively infringed on his right to a fair trial. The doctrine of cumulative error recognizes that "there may be multiple errors committed in 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 (Tenn. 2010). The doctrine only applies when there has been more than one error committed during trial. *State v. Herron*, 461 S.W.3d 890, 910 (Tenn. 2015). Because the Defendant has not demonstrated multiple trial errors, he is not entitled to cumulative error relief.

CONCLUSION

Based on the foregoing analysis, we affirm the trial court's judgment.

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JOHN EVERETT WILLIAMS, PRESIDING JUDGE