

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
March 7, 2023 Session

FILED

05/15/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. MICHAEL MARCELL BROWN**

**Appeal from the Circuit Court for Madison County  
No. 20-322 Donald H. Allen, Judge**

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**No. W2022-00156-CCA-R3-CD**

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The Defendant, Michael Marcell Brown, was convicted by a Madison County Circuit Court jury of first degree felony murder in the perpetration of or attempt to perpetrate robbery; conspiracy to commit aggravated robbery, a Class C felony; and attempt to perpetrate aggravated robbery, a Class C felony. *See* T.C.A. §§ 39-13-202(a)(2) (2018) (subsequently amended) (first degree felony murder), 39-12-103(a) (conspiracy) (2018); 39-13-402(a) (2018) (aggravated robbery); 39-12-101(a) (2018) (criminal attempt). The trial court sentenced the Defendant to life for first degree murder and to six years for each of the two remaining convictions. The court imposed the sentences concurrently to each other but consecutively to the Defendant's sentences in another case. On appeal, the Defendant contends that: (1) the evidence is insufficient to support his convictions, (2) the trial court erred in denying his motion to suppress his pretrial statement, (3) the court erred in excluding hearsay evidence, (4) the court erred in admitting a photograph exhibit because it was not properly authenticated, and (5) the cumulative effect of multiple trial errors requires relief. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Mitchell A. Raines (on appeal), Assistant Public Defender – Appellate Division; George Morton Googe (at trial), District Public Defender; Jeremy Epperson and Joshua Phillips (at trial), Assistant District Public Defenders, for the appellant, Michael Marcell Brown.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Shaun Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

The Defendant's convictions relate to an attempted robbery of the Goldline convenience store on April 30, 2018, during which Najeab Alshaif was fatally shot. The evidence at the trial showed that the Defendant and Tony Latrell Greer planned and perpetrated the robbery, with Mr. Greer going inside the store and the Defendant remaining outside as a lookout and maintaining telephone contact with Mr. Greer throughout the incident. Mr. Greer provided a pretrial statement in which he inculpated himself and the Defendant, and the Defendant and Mr. Greer were indicted jointly. Codefendant Greer pleaded guilty and testified as a State's witness at the Defendant's trial.

At the trial, Jackson Police Department (JPD) Officer Jeremy Dunlap testified that on April 30, 2018, he responded to a call about a shooting at Goldline. When he arrived, he saw the victim with an abdominal gunshot wound lying on the ground behind the counter. Officer Dunlap said he spoke with LaTeesha Matthews, a store employee, about what had happened, while another officer provided aid to the victim. Officer Dunlap said the victim was responsive and was later transported from the scene by ambulance. Officer Dunlap said that he searched the store to see if anyone else was present, that the area was safe, and that he photographed and collected a nine-millimeter shell casing he found on a rug near the front door. He said a semi-automatic weapon would discharge a shell casing after the weapon was fired but that a revolver would not. Officer Dunlap said that during the hours he was at the store, the store's owner arrived and allowed him to view the video security footage. Officer Dunlap agreed that other businesses were located nearby. He said another officer searched the area outside Goldline for suspects but did not locate anyone.

JPD Investigator Adam Pinion testified that he obtained the video surveillance footage of the incident from Goldline's owner. The recording was received as an exhibit and played for the jury. Referring to the recording, Investigator Pinion identified the victim and Ms. Matthews as the store's employees and another individual as the last customer to be inside the store before the incident. The recording showed that a person dressed in black and with the person's face obscured by a black covering approached the counter behind which the victim stood. The person in black held a gun and a cell phone, and he pointed the gun at the victim. The recording did not capture audio, but it showed the victim speaking to the person in black and waving a stack of paper bags at the person. The person in black fired the gun, striking the victim's abdomen, and the victim fell to the ground. The person in black left the area shown in the recording.

Investigator Pinion identified a video recording from a surveillance camera outside the front of the store, and it was played for the jury. It showed a person dressed in black with the person's face covered holding a gun and running into the store and later running outside and going south. Investigator Pinion identified a video recording from another

camera which showed the south side of the store, and it was played for the jury. The recording was of low resolution and showed a person, whose features and clothing were not discernible, walk toward the store from the direction of a parking lot of a former Kmart and later run away from it in the same direction. Investigator Pinion identified a video recording from another camera which showed the north side of the store's parking lot, and it was played for the jury. The recording showed a person, whose identifying features are not discernible, walk across the parking lot of an adjacent business, a Goldline customer get into a car in the Goldline parking lot and leave, and police cars and officers come into the parking lot.

Codefendant Tony Greer testified that on April 30, 2018, he went with the Defendant to Goldline with the intent to rob the store and that he shot the victim during the incident. He acknowledged that he had pleaded guilty to second degree murder, conspiracy to commit aggravated robbery, and attempted aggravated robbery, and that he had not yet been sentenced. He acknowledged a past aggravated burglary conviction and "a couple of thefts." He later acknowledged additional convictions for tampering with government records, auto burglary, identity theft, and criminal impersonation.

Codefendant Greer testified that before the incident, he had received a Facebook message from the Defendant, who asked if codefendant Greer wanted "to get some money." Codefendant Greer said that because he was interested, he went to Jackson to meet the Defendant. He said he knew they were not going to obtain the money through legal means but that he did not know the specifics. He said that the Defendant drove them to Goldline in the Defendant's girlfriend's car, a Nissan Juke, and that the Defendant went inside to photograph bags containing money while codefendant Greer remained outside. Codefendant Greer said he knew "Teesha" Matthews but did not know any other store employees. Codefendant Greer said that neither he nor the Defendant had a gun and that they "went looking for" one. Codefendant Greer said that while they rode around trying to obtain a gun, they discussed a robbery plan in which codefendant Greer would go inside the store and commit the robbery. He explained that the Defendant was concerned about being recognized if he went inside because he lived in the neighborhood. Codefendant Greer said they planned to split the proceeds. He said that a person he did not know brought a gun outside an apartment and handed it to him.

Codefendant Greer testified that after dark, they parked by a fence near the store. He said the Defendant got out of the car and stated he would call codefendant Greer "when the coast was clear." Codefendant Greer said the Defendant went across the street. Codefendant Greer said that he had the gun and that he wore black clothing the Defendant had obtained for him from the Defendant's house. Codefendant Greer said he waited one to one and one-half hours before the Defendant called and told codefendant Greer to go inside the store.

Codefendant Greer testified that he went into the store and told the victim to give him the money. Codefendant Greer said the victim waved bags in front of codefendant Greer and told codefendant Greer that he was crazy. Codefendant Greer said that he tried to shoot the victim, that the gun's safety was activated, and that he released the safety and shot the victim. Codefendant Greer explained that he shot the victim because Codefendant Greer panicked. Codefendant Greer said that he did not get any money before leaving and that he remained on a telephone call with the Defendant throughout the incident. He said he had known that the nine-millimeter semiautomatic gun was loaded.

Codefendant Greer testified that he ran outside and left alone in the Nissan Juke. Codefendant Greer said that he spoke with the Defendant by telephone while Codefendant Greer drove around, that the Defendant asked if codefendant Greer had taken the money and stated they were supposed to split it with Ms. Matthew, and that codefendant Greer told the Defendant that he shot the victim. Codefendant Greer said he met the Defendant later at a location the Defendant specified during their telephone conversation. Codefendant Greer said that they went to another location where the Defendant wanted to get rid of the gun and that codefendant Greer said he gave the gun to the Defendant, who got out of the car with the gun. Codefendant Greer said he did not see where the Defendant went with the gun before returning to the car without it.

Codefendant Greer testified that the Defendant took him to the Defendant's house, where codefendant Greer slept. The Defendant did not stay at his house. Codefendant Greer said that when he woke, the Defendant returned to the house to get him and that they disposed of the clothing codefendant Greer had worn during the incident by placing them in a dumpster. Codefendant Greer said the Defendant told him that the victim had died, but he later acknowledged a prior statement in which he had said that the Defendant learned of the victim's death during a telephone call with Ms. Matthews and that the Defendant told codefendant Greer before the Defendant took codefendant Greer to the Defendant's house to sleep. Codefendant Greer said the Defendant dropped him off near Codefendant Greer's parents' house. Codefendant Greer said the Defendant never asked why codefendant Greer had not taken any money during the incident. Codefendant Greer said that he never spoke to Ms. Matthews and that any information he received about "what she did or said" came from the Defendant.

When shown the video recording from inside the store, codefendant Greer acknowledged that he was the person dressed in black with a gun. When shown one of the video recordings from outside the store, he identified the Defendant as the person who walked across the parking lot of an adjacent business. Codefendant Greer said he recognized the Defendant's gait.

Codefendant Greer testified that he was not questioned as a suspect by police after the shooting but that over one year later, he decided to confess because his conscience

bothered him. He said that he was in jail for aggravated burglary at the time and that he sent a message to the police that he wanted to speak with them. He said he admitted his and the Defendant's involvement in the incident and that he and the Defendant were charged with the offenses.

JPD Lieutenant Chris Chestnut testified that he was not involved in the initial investigation but that he received word from the jail in October 2019 that an inmate, codefendant Greer, wanted to provide information about a homicide. Lieutenant Chestnut said that until this time, the police had no suspects. He said he interviewed codefendant Greer, who admitted his involvement and implicated the Defendant. Lieutenant Chestnut said he and other officers reviewed the surveillance video recordings to verify details that codefendant Greer provided before Lieutenant Chestnut interviewed the Defendant. Lieutenant Chestnut said that in reviewing the recordings, they identified the Defendant as having been inside the store one to one and one-half hours before the shooting. Lieutenant Chestnut said surveillance footage from a neighboring business showed a car which matched the color, make, and model of the car codefendant Greer identified as the one which he and the Defendant had taken to the store and which codefendant Greer had driven from the scene after the shooting.

Lieutenant Chestnut testified that when he interviewed the Defendant, he told the Defendant that he wanted to discuss the homicide at Goldline and that the Defendant indicated his familiarity with the homicide. Lieutenant Chestnut said the Defendant stated that he had been across the street from the store when the homicide occurred, that he had been talking to his girlfriend by telephone, and that he fled when he heard the gunshot. Lieutenant Chestnut said that he and other officers verified the Defendant's presence across the street by reviewing the surveillance footage. Lieutenant Chestnut identified still photographs captured from the recordings, which were received as exhibits. One of the photographs depicted a car matching the color, make, and model of the car which codefendant Greer said he drove from the scene after the shooting. Lieutenant Chestnut said that this photograph had been captured from the security recording from a nearby business and that the recording had been made ten to fifteen minutes after the shooting was reported, which Lieutenant Chestnut said was "about consistent with" the time it would take a person to make the drive codefendant Greer described making after the shooting. Lieutenant Chestnut identified the Defendant as the person in photographs from video footage inside Goldline recorded about one hour before the shooting. Lieutenant Chestnut said the person in the photographs from inside the store appeared to be the same person depicted in video footage who was crossing the parking lot at a business across the street from Goldline.

Lieutenant Chestnut said that when he interviewed the Defendant after speaking to codefendant Greer in October 2019, he told the Defendant that codefendant Greer had confessed to the shooting and implicated the Defendant. Lieutenant Greer said the

Defendant asked for written immunity from prosecution in exchange for information about the location of the weapon used in the shooting. Lieutenant Greer said the Defendant declined to discuss the matter further after Lieutenant Greer said he did not have the authority to make such an agreement.

Lieutenant Chestnut testified that he interviewed LeTeesha Matthews and that he told her codefendant Greer had implicated her in the incident. Lieutenant Chestnut said Ms. Matthews provided information “for her phone . . . for Facebook.” He said Ms. Matthews and the Defendant “had previously dated.”

Lieutenant Chestnut testified that the cell phone the Defendant had at the time of his October 2019 interview was collected as evidence but that the police could not “100 percent determine the phone that [the Defendant] was possessing” on the night of the shooting. Lieutenant Chestnut agreed that codefendant Greer had said he had used his stepmother’s cell phone on the night of the shooting but that the telephone number could not be determined because the phone had been a prepaid model and no one remembered its number over one year later.

Lieutenant Chestnut testified that he met with codefendant Greer a second time about one week after the initial October 2019 interview. Lieutenant Chestnut said codefendant Greer never asked for leniency or immunity in their meetings.

When Lieutenant Chestnut was shown an excerpt of a security recording from inside Goldline from about one hour before the shooting which depicted the Defendant handing his cell phone to the victim, Lieutenant Chestnut agreed that he did not know what the victim was doing with the phone. Lieutenant Chestnut agreed that the recording showed the Defendant walking away from the victim, who was “on” the Defendant’s phone. Lieutenant Chestnut agreed that the recording showed the Defendant “in and out of the store . . . for several minutes” and that the Defendant approached Ms. Matthews after leaving and returning to the store. Regarding another video excerpt from inside the store, Lieutenant Chestnut agreed that Ms. Matthews was shown “[w]riting something down” and handing it to the Defendant. The recordings were received as exhibits and played for the jury.

Erica Curry, M.D., an expert in forensic pathology, testified that she conducted the autopsy of the victim’s body. She determined that the victim’s cause of death was an abdominal gunshot wound and that the manner of death was homicide. She recovered a bullet from the victim’s body and collected it as evidence. The autopsy report and photographs she identified as having been taken during the autopsy were received as exhibits.

Christina Brown, the Defendant's sister, testified for the defense that she and the Defendant had lived in the same area as Goldline for twenty-six years and that they went to the store regularly. She said the Defendant went to Goldline every morning for coffee and frequented at other times, as well.

Ms. Brown testified that on April 28, 2018, the Defendant arrived on foot at her mother's house around 12:00 or 1:00 p.m. She said he was alone, for fifteen to twenty minutes as the family prepared for her nephew's birthday barbecue, and left on foot. She later agreed he was there for about one hour. She said that he returned alone around 7:00 p.m. but that she did not know whether he arrived on foot or in a car. She said he remained at the gathering until around midnight, when he left on foot. When asked if she saw codefendant Greer at her mother's house that night, she said that she did not know him and that the Defendant had been there alone.

When shown the video recording of the person walking across the parking lot of an adjacent business on the night of the shooting, Ms. Brown testified that she did not recognize the person. She said that she left her mother's house around 8:00 a.m. on April 29, 2018, to return to her home in Memphis, that she had not seen the Defendant before her departure, and that she did not know what he had done after 12:00 a.m. Ms. Brown acknowledged that she pleaded guilty in 2019 to theft of property valued at \$1,000 but less than \$10,000 and to criminal impersonation.

The Defendant elected not to testify.

After receiving the evidence, the jury found the Defendant guilty of first degree felony murder in the perpetration of or attempt to perpetrate aggravated robbery, conspiracy to commit aggravated robbery, and attempted aggravated robbery.

After a sentencing hearing at which the trial court imposed an effective life sentence to be served consecutively to the Defendant's sentences in another case, the Defendant filed this appeal.

## I

The Defendant contends that the evidence is insufficient to support his convictions. He argues that codefendant Greer's pretrial statement inculcating the Defendant was not sufficiently corroborated. The State responds that the evidence is sufficient to support the convictions based upon the corroborating evidence provided by the Defendant's admission that he was at the scene during the incident, the video evidence, and the Defendant's attempt to obtain immunity by offering to provide information about the location of the weapon used in the shooting. We agree with the State.

In determining the sufficiency of the evidence, the standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is “afforded the strongest legitimate view of the evidence and all reasonable inferences” from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not “reweigh or reevaluate the evidence,” and questions regarding “the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

“A crime may be established by direct evidence, circumstantial evidence, or a combination of the two.” *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). “The standard of review ‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

## **1. Corroboration**

“[A] conviction may not be based solely upon the uncorroborated testimony of an accomplice.” *See, e.g., State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001); *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994); *Monts v. State*, 379 S.W.2d 34, 43 (Tenn. 1964), *overruled on other grounds by State v. Collier*, 411 S.W.3d 886 (Tenn. 2013). In order for accomplice testimony to be adequately corroborated:

[T]here must be some fact testified to, entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant’s identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice’s evidence.

*Bigbee*, 885 S.W.2d at 803 (quoting *State v. Gaylor*, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992) (citations omitted)); *see Shaw*, 37 S.W.3d at 903.



Codefendant Greer's status as an accomplice was not disputed at the trial. Codefendant Greer said in his statement and in his testimony that the Defendant acted as a "lookout," directing him when to go inside the store to avoid detection by bystanders, that he and the Defendant remained on a telephone call while codefendant Greer awaited the Defendant's prompt to go inside Goldline and while codefendant Greer was inside the store committing the crimes, and that the Defendant left the scene on foot. The Defendant admitted in his pretrial statement that he had been in a parking lot across the street from Goldline talking to his girlfriend by cell phone when the shooting occurred and that he fled on foot when he heard the shot. Video evidence showed the Defendant, whom Lieutenant Chestnut and codefendant Greer identified, in this location and talking on a cell phone. Codefendant Greer identified the Defendant's distinctive gait on the recording of the person talking on the phone across the street from Goldline. Lieutenant Chestnut also identified the Defendant in this recording. Video evidence also showed codefendant Greer holding a cell phone and a gun when he was committing the offenses. Codefendant Greer said the Defendant obtained black clothing and a toboggan fashioned into a ski mask in preparation for the robbery, and the video evidence showed the robber, whom codefendant Greer identified as himself, in this attire. Codefendant Greer said the Defendant had gone inside Goldline earlier in the evening before the shooting, and the video evidence showed the Defendant inside the store earlier in the evening. Codefendant Greer said that after the shooting, he and the Defendant went to a location chosen by the Defendant, where the Defendant disposed of the gun. When Lieutenant Chestnut questioned the Defendant after codefendant Greer implicated the Defendant, the Defendant asked for immunity in exchange for information about the location of the murder weapon, thereby indicating his knowledge of the weapon's location.

To the extent that the Defendant argues that codefendant Greer's statement was not adequately corroborated by other evidence, we disagree. Thus, we will consider whether the State otherwise provided sufficient evidence of each of the conviction offenses.

## **2. Attempted Aggravated Robbery**

"Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401(a) (2018). As relevant here, aggravated is a robbery "[a]ccomplished with a deadly weapon . . . or . . . [w]here the victim suffers serious bodily injury[.]" *Id.* § 39-13-402(a)(1), (2) (2018).

A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

- (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
- (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
- (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

*Id.* § 39-12-101(a)(1)-(3) (2018).

“Criminal responsibility, while not a separate crime, is an alternative theory under which the State may establish guilt based upon the conduct of another.” *State v. Dorantes*, 331 S.W.3d 370, 386 (Tenn. 2011) (quoting *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999)).

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

...

- (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]

T.C.A. § 39-11-402(2) (2018). For a defendant to be convicted of a crime under the theory of criminal responsibility, the “evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission.” *Dorantes*, 331 S.W.3d at 386; *see State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994).

Viewed in the light most favorable to the State, the evidence shows that the Defendant proposed to codefendant Greer that they get money through illegal means, which codefendant Greer later learned involved a robbery. They went together in the Defendant’s girlfriend’s car to the store they planned to rob, where the Defendant went inside. They left the store’s parking lot together to obtain a gun to use during the robbery

and clothing that would hide the perpetrator's identity. They returned to the scene together, and the Defendant remained outside to serve as a lookout. The Defendant and codefendant Greer maintained telephone communication for an extended period of time, with the Defendant directing codefendant Greer when to go inside the store to take the money. Codefendant Greer demanded money from the victim, who did not provide any, and codefendant Greer shot the victim before fleeing the store. The Defendant and codefendant Greer maintained telephone communication while codefendant Greer was inside the store, and after the shooting, the Defendant left the scene until codefendant Greer drove back to the area and picked up the Defendant. At this point, the Defendant drove to a location where he got out of the car and disposed of the gun codefendant Greer had used to shoot the victim. Several hours later, the Defendant and codefendant Greer disposed of the clothing codefendant Greer had worn during the incident by throwing the clothing in a dumpster. From this evidence, a rational jury could find beyond a reasonable doubt that the Defendant solicited and aided codefendant Greer in the commission of an attempted robbery and that the Defendant's actions were taken with the intent to promote or assist the commission of the offense and with the intent to benefit in the proceeds or results of the robbery. *See* T.C.A. § 39-11-402(2). Further, a rational jury could find beyond a reasonable doubt that the Defendant acted with the intent to complete a robbery and that his conduct was a substantial step toward the commission of the offense. *See id.* § 39-12-101(a)(3). The evidence is sufficient to support the Defendant's attempted aggravated robbery conviction.

### **3. First Degree Felony Murder**

As relevant to this appeal, first degree felony murder is “[a] killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery[.]” *Id.* § 39-13-202(a)(2) (2018) (subsequently amended).

As we have discussed, the State presented sufficient evidence of the Defendant's guilt of attempted aggravated robbery. The evidence also shows that the victim died during the Defendant and codefendant Greer's attempt to perpetrate the robbery. A rational jury could find beyond a reasonable doubt that the Defendant was guilty of first degree felony murder in the attempt to perpetrate robbery. The evidence is sufficient to support this conviction.

### **4. Conspiracy to Commit Aggravated Robbery**

Next, we turn to the Defendant's conviction for conspiracy to commit aggravated robbery.

The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense that is the object of

the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense.

*Id.* § 39-12-103(a). Viewed in the light most favorable to the State, the evidence shows that the Defendant asked codefendant Greer if codefendant Greer wanted to get some money and that codefendant Greer understood this would be accomplished through illegal means. Codefendant Greer agreed, and the two went to Goldline, where the Defendant entered the store and interacted with the victim and Ms. Matthews. After they left the store's parking lot, the Defendant made telephone calls to locate a gun, and they drove to a location where an unknown person handed a gun to codefendant Greer. The Defendant obtained black clothing and fashioned a hood from a toboggan, which codefendant Greer wore to obscure his identity during the attempted robbery. Before the attempted robbery, they agreed that codefendant Greer would enter the store because the Defendant was known to the store's employees as a frequent customer. The Defendant remained outside the store, acting as a "lookout" and maintaining telephone communication with codefendant Greer throughout the incident. After codefendant Greer shot the victim, they fled the scene separately and later reunited, disposing of the clothing and the gun in the ensuing hours. From this evidence, a rational jury could find beyond a reasonable doubt that the Defendant conspired with codefendant Greer to commit aggravated robbery. The evidence is sufficient to support the conviction.

## II

### **Motion to Suppress**

The Defendant contends that the trial court erred in denying his motion to suppress his pretrial statement to police investigators on October 3, 2019. The State responds that the court properly denied the motion. We agree with the State.

A trial court's findings of fact on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Jones*, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about 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." *Odom*, 928 S.W.2d at 23. The prevailing party is entitled to the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998); *see State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). A trial court's application of the law to its factual findings is a question of law and is reviewed de novo on appeal. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997). In reviewing a trial court's ruling on a motion to suppress, this court may consider the trial evidence as well as the evidence presented at the suppression hearing.

*See State v. Henning*, 975 S.W.2d 290, 297-99 (Tenn. 1998); *see also State v. Williamson*, 368 S.W.3d 468, 473 (Tenn. 2012).

At the pretrial suppression hearing, JPD Sergeant Nick Donald testified that he was called to investigate an attempted robbery and shooting at Goldline on April 30, 2018. His investigation did not reveal any suspects until October 2019, when a jail inmate, codefendant Greer, said he wanted to talk about what happened at Goldline and confessed to committing the robbery and homicide. Sergeant Donald said that codefendant Greer's account of the events was consistent with the store's video recordings of the crimes. Sergeant Donald said codefendant Greer stated that he and the Defendant discussed committing the robbery, that the Defendant knew someone at the store who told the Defendant where the money was kept, and that the Defendant picked up codefendant Greer in a silver Nissan Juke and drove to Goldline on the day of the robbery.

Sergeant Donald testified that, at the time he interviewed codefendant Greer, the Defendant was incarcerated for a pending violation of probation. Sergeant Donald said that on October 3, 2019, he and JPD Lieutenant Chris Chestnut interviewed the Defendant about the events at Goldline. Sergeant Donald stated that he explained *Miranda* rights to the Defendant, that the Defendant indicated he understood his rights, and that the Defendant signed a written *Miranda* waiver, a copy of which was received as an exhibit at the hearing. Sergeant Donald said the interview, which was recorded, lasted approximately thirty minutes.

Sergeant Donald testified that the Defendant admitted he knew codefendant Greer and said they had been together earlier in the day before going to Goldline. Sergeant Donald testified the Defendant said that he was across the street at a gas station and that he had been on a telephone call with his girlfriend when the shooting occurred. Sergeant Donald said the Defendant stated that he frequented Goldline, that he knew the victim, and that he had spoken with the clerk, Latisha Matthews, about "getting some food."

Sergeant Donald testified that, at some point during the interview, the Defendant asked for a written immunity agreement before the Defendant would offer additional information. Sergeant Donald said he told the Defendant that neither Sergeant Donald nor Lieutenant Chestnut had the authority to enter into an immunity agreement, and the Defendant said he would not talk any longer without a lawyer. Sergeant Donald stated that they stopped the interview at that point. Sergeant Donald stated that he and Lieutenant Chestnut were the only two people conducting the interview, that they were together for the entire interview, and that they interviewed the Defendant on only that occasion.

Sergeant Donald testified that they told the Defendant that they wanted to talk about robberies, and the Defendant was asked to "think carefully." In response, Sergeant Donald stated the Defendant said, "I don't want to get into that." Sergeant Donald agreed the

Defendant was very clear he did not want to talk about “that,” but that the interview continued without the Defendant invoking his right to counsel. Sergeant Donald stated that he explained to the Defendant that “there’s a big difference between killing somebody and stealing something,” with the hope that the Defendant would want to clarify his involvement in what happened at Goldline. Sergeant Donald stated that he never indicated to the Defendant that the Defendant would not be charged if he discussed the events that took place at Goldline.

Sergeant Donald testified that Lieutenant Chestnut told the Defendant that the Defendant “looked” guilty and that the Defendant should explain what happened to distinguish his involvement from that of codefendant Greer. Sergeant Donald testified he told the Defendant that unless the Defendant was honest about his involvement, “[E]veryone will get the same charge.” Sergeant Donald said Lieutenant Chestnut told the Defendant that the Defendant was “going to have fifty-one years sitting on” him.

Sergeant Donald stated that after about twenty-two minutes, the Defendant said he did not want to talk anymore but “told his story and continued to talk.” Sergeant Donald said that the goal for the interview was to find out if the Defendant had an alibi, however, the Defendant only offered to tell them the location of the gun involved in the Goldline homicide in exchange for immunity. Sergeant Donald testified that he and Lieutenant Chestnut had previously provided the District Attorney’s office information that could lead to leniency, but that decision was made by the District Attorney.

The trial court viewed the video recording of the interview. Our review of the recording reflects that it was consistent with Sergeant Donald’s testimony regarding the Defendant’s interview.

The trial court found that the Defendant was advised of and voluntarily waived his *Miranda* rights. The court noted that the written waiver form signed by the Defendant stated in relevant part, “I understand my rights. . . . I’m willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing.” The trial court found the Defendant was thirty-six years old, appeared intelligent and well-spoken, and had a previous criminal conviction. The court noted that the interview lasted no longer than thirty minutes and was conducted with only three individuals present. Based upon the totality of the circumstances, the court denied the Defendant’s motion to suppress, finding that the Defendant’s statements were freely and voluntarily made with no coercion and not as a result of any promises made by investigators.

The Defendant argues that the trial court erred in denying the motion to suppress because the evidence shows that he indicated he did not want to discuss the Goldline shooting, thereby asserting his Fifth Amendment privilege against self-incrimination, but

the investigators ignored his assertion and continued to question him rather than stop the interview in accord with his rights.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution protect an individual from being compelled to provide evidence against himself or herself and afford the right to remain silent. *See* U.S. Const. amend. IV; Tenn. Const. art. 1, § 9. If an individual invokes the right to remain silent, police questioning must end. *State v. Climer*, 400 S.W.3d 537, 557 (Tenn. 2013). The invocation, however, of the right to remain silent must be unambiguous and unequivocal. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *State v. Dotson*, 450 S.W.3d 1, 53 (Tenn. 2014).

We have reviewed the evidence presented at the suppression hearing and at the trial. *See Henning*, 975 S.W.2d at 297-99. The Defendant signed a written waiver of his *Miranda* rights. In the recorded interview, the Defendant indicated, at times, that he did not want to discuss certain matters, but he continued talking to the officers, eventually offering to provide information about the location of the gun used in the homicide in exchange for immunity. He never invoked his right to counsel, and he never unambiguously and unequivocally asserted his right to remain silent. The trial court found that the Defendant freely and voluntarily waived his *Miranda* rights and that he was not coerced or induced by promises from the investigators in waiving his rights. The record supports the court's determination. The Defendant has not shown that the court erred in denying the motion to suppress the Defendant's pretrial statement, and he is not entitled to relief on this basis.

### III

#### Exclusion of Hearsay Evidence

The Defendant contends that the trial court erred in excluding evidence of Ms. Matthews's denial to investigators that she had been involved in the attempted robbery and homicide, which was made after the investigators told her that codefendant Greer had implicated the Defendant and her in planning a robbery of Goldline. The Defendant sought to introduce this evidence to impeach codefendant Greer's credibility. The State argues that the trial court did not err in excluding the evidence. We agree with the State.

Ms. Matthews was deceased at the time of the trial, and the Defendant filed a motion in limine seeking admission of her recorded statement to two police officers. Although her recorded statement is not in the record, the record reflects that she was interviewed by two police officers after codefendant Greer implicated the Defendant and Ms. Matthews in conspiring to commit the robbery. In her statement, Ms. Matthews denied that she had planned the robbery with the Defendant or participated in its execution. She was not charged with conspiring to commit the robbery.

The defense sought to introduce the recorded statement based upon her unavailability as a witness and posited that the evidence was relevant because it “would seem to contradict what [codefendant] Greer stated took place.” The defense conceded that the evidence was hearsay and that no hearsay exception specifically provided for the admission of a statement of an unavailable witness. Nevertheless, the defense argued that the evidence should be admitted pursuant to Tennessee Rule of Evidence 804(b)(5), which states “[Reserved.]”, and its Advisory Commission Comments. The Comments to Rule 804(b)(5) note that although the Rules contain no residual hearsay exception for the admission of a statement of an unavailable witness, a court may permit a criminal defendant “to introduce trustworthy hearsay not falling within a traditional exception,” in accord with *Chambers v. Mississippi*, 410 U.S. 284 (1973). The defense argued that Ms. Matthews’s statement was trustworthy.

The trial court denied the Defendant’s motion in limine on the basis that codefendant Greer’s statement was hearsay for which no exception to the general rule of exclusion existed. The court found that codefendant Greer never himself implicated Ms. Matthews and that his statement involved his relaying information the Defendant had provided about Ms. Matthews’s alleged involvement. The court found, as well, that the statement was unreliable, again noting that it was codefendant Greer’s statement about what the Defendant told him.

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). Hearsay is inadmissible unless it qualifies as an exception. *Id.* at 802. A trial court’s factual findings and credibility determinations relative to a hearsay issue are binding upon an appellate court unless the evidence preponderates against them. *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015). The determination of whether the statement in question is hearsay and whether a hearsay exception applies are questions of law that are reviewed de novo. *Id.*

Tennessee Rule of Evidence 804(b) lists four types of evidence which are not excluded by the hearsay rule if the declarant is unavailable as a witness: former testimony, a statement under belief of impending death, a statement against interests, and a statement of personal or family history. As we have noted, Rule 804(b)(5) contains no substantive rule regarding a residual exception.

The Defendant urges this court to look to the Federal Rules of Evidence for guidance in interpreting the Advisory Commission Comment to Tennessee Rule of Evidence 804(b)(5). The Comment refers to Federal Rule 804(b)(5), which has, since the publication of the Comment, been transferred to Federal Rule 807 and provides for the admission of otherwise inadmissible hearsay evidence if the court determines that the statement is



trustworthy and if it is more probative than other evidence its proponent could obtain through reasonable efforts. See Fed. R. Evid. 804(b)(5), 807(a); Tenn. R. Evid. 804(b)(5), Advisory Comm'n Cmt. Speaking for our court of appeals, Judge (and now Justice) Holly Kirby has noted, "Th[e] Residual Exception [to the hearsay rule] was not adopted in the Tennessee Rules of Evidence." *In re L.A.J., III*, No. W2007-00926-COA-R3-PT, 2007 WL 3379785, at \*9, n.9 (Tenn. Ct. App. Nov. 15, 2007). Nevertheless, we recognize, consistent with the advisory commission comment to Tennessee Rule 804(b)(5), that a defendant's due process rights may override a hearsay bar in some cases. See *Chambers*, 410 U.S. at 294. That said, "an evidentiary ruling ordinarily does not rise to the level of a constitutional violation." *State v. Rogers*, 188 S.W.3d 593, 614 (Tenn. 2006) (appendix) (citing *State v. Powers*, 101 S.W.3d 383, 397 (Tenn. 2003)).

In reviewing a trial court's exclusion of evidence that a defendant contends was an abridgement of his right to present a defense, an appellate court "should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important." *State v. Brown*, 29 S.W.3d 427, 433-34 (Tenn. 2000) (citing *Chambers*, 410 U.S. at 298-301). In the present case, the Defendant cannot surpass this bar. The trial court found that the evidence was unreliable, and the record does not preponderate against this determination. Ms. Matthews's statement was both unsworn and self-serving in the face of an accusation that she had been involved in conspiring to commit an attempted robbery that culminated in a homicide. In addition, her statement was only marginally relevant, at best, to impeach codefendant Greer's statement to police that both the Defendant and Ms. Matthews had been involved in planning a robbery of Goldline. Although the State introduced evidence of Ms. Matthews's communications with the Defendant before and after the attempted robbery and homicide, the evidence also showed that Ms. Matthews was investigated but not charged. In this respect, Ms. Matthews's statement that she was not involved cannot be characterized as critical to the defense. Exclusion of hearsay evidence is a substantially important consideration when balanced against the Defendant's competing interest of introducing unsworn, unreliable evidence of minimal probative value. To the extent that the Defendant relies upon constitutional considerations based in his right to due process and a fair trial to overcome the hearsay bar, we are unpersuaded that the trial court erred in excluding this evidence. The Defendant is not entitled to relief on this basis.

#### IV

#### **Admission of Photograph Exhibit**

The Defendant contends that the trial court erred in admitting an exhibit, which was a still photograph captured from surveillance video from a business near Goldline. The photograph depicted a vehicle traveling on a public road in front of the nearby business

shortly after the attempted robbery and shooting. The State sought to show that the vehicle was the silver Nissan Juke driven by codefendant Greer after the crimes. The evidence was relevant to corroborate codefendant Greer's testimony regarding his actions after the crimes. The Defendant argues that the exhibit was inadmissible because it was not properly authenticated. The State counters that the court did not abuse its discretion in admitting the exhibit. We agree with the State.

The admission of a photograph as evidence is within the trial court's discretion. *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978). An appellate court may not overturn the court's decision in the absence of an abuse of discretion. *Id.* As a predicate to admissibility, a witness with knowledge of the facts must verify and authenticate the photograph, and its relevance must be demonstrated. *Id.*; see Tenn. R. Evid. 401, 901(a), (b)(1). The authentication requirement "is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Tenn. R. Evid. 901(a). The party offering the evidence is required to "reasonably establish the identity and integrity of the evidence"; however, "this rule does not require that the identity . . . be proven beyond the possibility of all doubt[.]" *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008) (citing *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000)).

During Lieutenant Chestnut's testimony, he stated that after the homicide occurred, "camera footage was pulled from surrounding businesses," including a muffler shop with a surveillance camera pointing toward Old Hickory Boulevard, on which codefendant Greer had said he had driven in the minutes after the attempted robbery and shooting. Lieutenant Chestnut said that a still photograph was created from a "frame" of the surveillance video and that it depicted a vehicle traveling west, the same direction identified by codefendant Greer as the route he had taken. The defense objected on the bases that the State had not established the time at which the relevant portion of the recording represented by the photograph was made and that Lieutenant Chestnut had not been established to be the "custodian of that particular record, of that video." On further questioning by the State, Lieutenant Chestnut stated that the photograph had been created from a portion of a larger area depicted on the video recording, that the video had a time stamp, and that although he did not know the exact time, the video of the vehicle driving on Old Hickory Boulevard had been recorded ten to fifteen minutes after the attempted robbery and shooting had been reported in a 9-1-1 call. The court overruled the objection. Thereafter, Lieutenant Chestnut identified the photograph as depicting a Nissan Juke traveling west on Old Hickory Boulevard, and the photograph was received as an exhibit. On cross-examination by the defense, Lieutenant Chestnut testified that surveillance video had been obtained from businesses near Goldline in the days after the shooting, that when video footage is collected "it imbeds the date, time stamp . . . in the video file." He acknowledged that the time information "may be off . . . a few minutes" but stated that the video recording also showed the police cars and ambulances at Goldline. He said this video could be compared with another video which showed the same vehicles, thereby

establishing that both video recordings depicted the same incident at Goldline. He acknowledged that he could not identify codefendant Greer on the recording from the muffler shop but stated that the recording “matches up with the information [codefendant Greer] gave” him.

Upon review, we conclude that the trial court did not abuse its discretion in admitting the photograph exhibit. The record supports the court’s determination that Lieutenant Chestnut’s testimony reasonably established the identity and integrity of the photograph as the item which the State claimed it to be. *See* Tenn. R. Evid. 901(a); *see also Cannon*, 254 S.W.3d at 296. Further, as we have stated, the evidence was relevant to corroborate codefendant Greer’s testimony about his actions after the attempted robbery and shooting. *See* Tenn. R. Evid. 401. The Defendant is not entitled to relief on this basis.

## V

### Cumulative Error

The Defendant contends that he is entitled to relief due to multiple errors in the proceedings below, the cumulative effect of which requires a new trial. The State counters that no error occurred. We agree with the State.

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 reviewed the Defendant’s allegations of trial errors and have concluded no errors occurred. Thus, reversal due to the existence of cumulative error is not appropriate.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE