

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 21, 2026 Session

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Appellate Courts

STATE OF TENNESSEE v. DUSTY MINK

**Appeal from the Criminal Court for Knox County
No. 122698 G. Scott Green, Judge**

No. E2025-00070-CCA-R3-CD

Defendant, Dusty Mink, was indicted by the Knox County Grand Jury for aggravated assault, assault, unlawful possession of a weapon by a felon, and evading arrest. The trial court granted Defendant’s motion to sever the offenses, and the count charging unlawful possession of a weapon by a felon was tried separately.¹ A jury convicted Defendant of unlawful possession of a weapon, and the trial court sentenced Defendant as a Range III persistent offender to twenty-five years in confinement. On appeal, Defendant raises seven issues: 1) whether the evidence was sufficient to support his conviction for unlawful possession of a weapon by a felon; 2) whether the trial court erred by denying Defendant’s two motions for continuance based on the unavailability of expert witnesses; 3) whether the trial court erred by excluding a defense expert absent proof of Defendant’s drug use; 4) whether the trial court should have given the jury a *Ferguson* instruction; 5) whether the State’s closing argument was improper; 6) whether the cumulative effect of the trial court’s errors entitles Defendant to relief; and 7) whether the trial court erred in classifying Defendant as a Range III offender. Finding no error, we affirm the trial court’s judgment.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, P.J., and JILL BARTEE AYERS, J., joined.

Gena Lewis and Scott Gilbert, Knoxville, Tennessee, for the appellant, Dusty Lee Mink.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Charme P. Allen, District Attorney General; and Ta Kisha Fitzgerald and Jeannine Guzolek, Assistant District Attorneys General, for the appellee, State of Tennessee.

¹ The unlawful possession count is the only offense at issue in this appeal.

OPINION

Trial

On July 26, 2022, officers with the Knoxville Police Department (“KPD”), led by the Special Operations Squad or SWAT team, responded to a house on Dance Avenue, where Defendant had barricaded himself inside the residence. Defendant was not the owner of the house. The parties stipulated that Defendant had outstanding warrants and did not want to go back to jail when officers encountered him. The standoff that followed lasted several hours.

When Officer Chris Hutton arrived, Defendant, who officers “believed to be armed,” was in a bedroom with the door closed. Sergeant Jimmy Wilson testified that Defendant said he “would like to take a bump of heroin before he came out.” Officers attempted to make contact with Defendant using a variety of methods. When those attempts were unsuccessful, officers approached the house carrying a ballistic shield to protect themselves from gunfire. Officers fired several canisters of tear gas into the bedroom through a window, and Defendant exited the bedroom “just far enough to get on the other side of the door of the bedroom.”

Defendant then positioned himself against a wall behind a shelf that “kind of created a little L-shape[.]” Officers had entered the residence and were standing near the front door. They fired pepperballs toward Defendant, and Defendant “would lean out and look at [officers] down the hallway.” Defendant’s behavior was “erratic,” and he was making threats against law enforcement, “talking about being shot in the face and shooting officers in the face.” Officer Hutton saw that Defendant had a “stockless . . . like a .22 model rifle in one hand and a black what I would call AR pistol-style firearm in the other hand.” Officers commanded Defendant to put the guns down, and Defendant responded, “Okay, I’m just going to make you guys kill me[.]” When “[t]he effects of the pepperball started to take effect . . . [Defendant] kind of tossed that stockless .22 into the living room kind of straight in front of him, and that AR pistol-style weapon was laid at his feet.” Defendant exited the house onto the front porch, and officers took him into custody. Sergeant Wilson walked Defendant to his patrol car and gave him water and allowed him to smoke a cigarette.

Officers cleared the house, and Officer Tim Campbell photographed the weapons. Officer Hutton removed the AR pistol-style weapon from the home and discovered it was

a pellet gun. Officers searched the bedroom Defendant had been in and found a loaded handgun, ammunition, and drug paraphernalia.

On cross-examination, Sergeant Wilson agreed that officers were inside the house while Defendant was barricaded inside the bedroom. He also agreed that he located the handgun “under stuff” in the bedroom. He said officers “had to search for it to find it.” Officers found the handgun twelve minutes into their search of the bedroom. Officers also found several rounds of live ammunition, including .22 long-rifle rounds, two gun holsters, and drug paraphernalia, including a syringe, scales, and a pipe used to smoke meth in the bedroom.

The State introduced three recorded phone calls Defendant made from jail. In one phone call to his brother, Defendant said he “had three guns” and that he “shot one gun in the house so that the police would know ‘this is real.’” Defendant also stated that the police were shooting at him through the walls and that bullets were flying past him.

KPD Lieutenant Brian Dalton, a forensic firearm and toolmark examiner, inspected a 9mm Ruger 89 pistol and a .22 caliber rifle and prepared a report of his findings. Lieutenant Dalton confirmed that the pistol functioned as designed and was able to fire. He noted that “a portion of the [rifle] stock [wa]s missing[,]” but that “the mechanical function of the firearm still [] work[ed],” and it was capable of firing live ammunition. The stock allowed the rifle to be “shouldered[,]” and “removal of the stock has nothing to do with the firing function of the firearm.” Lieutenant Dalton testified, “Removing stocks as well as cutting barrels short is typically done in a way to try to conceal something, make it a smaller firearm, so that it can be easily hidden.” On cross-examination, Lieutenant Dalton testified that both the pistol and the rifle would eject casings when fired and that he was not given any cartridge cases to examine.

Private investigator Leslie Williams testified for the defense. She viewed the officers’ body camera videos. Ms. Williams testified that none of the body camera footage showed Defendant with a gun. In one part of the video, she saw the barrel of a gun behind a chair, but she could not identify the gun. Ms. Williams was unable to determine whether the stockless rifle recovered from the house was the same one seen behind the chair in the video. The video also showed “guns in a chair.” Ms. Williams said there appeared to be “more than one.” Ms. Williams viewed a still frame photo taken from the video after Defendant’s arrest, and she testified, “the far right gun” in the chair appeared to be “stockless.” On cross-examination, Ms. Williams acknowledged that she could not determine whether one of the guns in the chair was the stockless rifle recovered by police. She also agreed that she could not “say one hundred percent” that the objects in the chair

were guns. Ms. Wilson had not read the statements prepared by Officers Hutton or Campbell before trial.

Defendant testified he had “a really good family” but that he “[j]ust always made bad decisions.” Defendant started smoking marijuana when he was in middle school. In high school, Defendant’s “drinking and smoking pot turned into taking hydrocodones, taking Xanaxes, you know, partying all the time, you know.” He said that OxyContin “ruined [his] life.” Defendant said the first time he used methamphetamine was in prison. He used one or two grams a day and continued to use methamphetamine and heroin after his release from prison. Defendant said methamphetamine caused him to have “[s]evere hallucinations.” Defendant “was constantly hearing voices.” He testified, “I had lost all touch with reality, you know, pretty much the entire time I was on methamphetamine.”

Defendant worked with David Maples, the owner of the house where the standoff occurred. He had seen guns in the house before. Defendant had used methamphetamine “[m]ultiple times per day” in the days prior to the incident. Defendant testified he was suicidal at the time of the incident. Since the incident, Defendant had stopped using drugs and had been “clean” for fifteen months. He testified, “For the first time in my life, I’m seeing life clearly.”

On cross-examination, Defendant agreed that he had barricaded himself inside the house but denied he was in a standoff with police. He recalled that he communicated back and forth with police, but he could not remember what was said. When asked whether he told police he was going to shoot them in the head, he answered, “I could have.” Defendant said his “state of mind” was that he wanted police to kill him “because [he] wanted to die that day.”

Defendant acknowledged he had two prior convictions for aggravated robbery and a prior conviction for attempted aggravated robbery. Defendant acknowledged that he barricaded himself in Mr. Maples’ bedroom. He did not know whether there was a handgun in the bedroom. Defendant denied that he had a rifle that day but then said, “That I can remember. I’m just saying that I can remember.” He continued, “I don’t recall really anything much that happened that day.” When pressed about Sergeant Hutton’s testimony that he saw Defendant holding the rifle, Defendant said, “I don’t know. I don’t remember.” He then testified, “I don’t believe he saw me holding one.” Defendant acknowledged that he made phone calls from jail, but he did not remember what he said because he “was not in [his] right mind.”

Dr. Jonathan Lipman was qualified without objection as an expert in the field of neuropharmacology, which he explained was the study of the effects of drugs on the brain

and behavior. Dr. Lipman explained that amphetamines, including methamphetamine, “do all the things, . . . that fear does because they are activating the hypothalamus.” The use of methamphetamines causes anxiety and creates a “fight-or-flight reaction, and you become hypervigilant to stimuli that could potentially be threatening.” When the drug is abused, “the suspiciousness and fearfulness and anxiety expand into frank paranoia, which is irrational fear.” Dr. Lipman testified that overuse of methamphetamine can cause hallucinations.

In preparation for trial, Dr. Lipman directed an interview with Defendant, although he did not conduct the interview himself, listened to jail phone calls, read the police reports, including Defendant’s statement to police, and reviewed unspecified records “[f]rom all the way back to [Defendant’s] childhood and through to his jail arrest.” Dr. Lipman agreed that Defendant, a heavy methamphetamine user, would have difficulty accurately recalling events that happened. He testified, “there are memories that are confabulations” or “things that weren’t real.” Regarding Defendant’s jail phone call on July 27, Dr. Lipman testified, “In that bullets were, in fact, not flying through the wall. That’s what he perceived and what he said on the phone.” Dr. Lipman testified, “the abuse of amphetamines, including methamphetamine, has a very toxic and persistent effect that can last for weeks and weeks.” He further explained, “when the drug leaves the body, it leaves the brain altered.”

On cross-examination, Dr. Lipman testified that he listened to two of Defendant’s jail phone calls “[m]onths ago.” He said, “One was with a brother; one was with a woman, Sherry, I think.” Dr. Lipman requested transcripts of the phone calls, which defense counsel provided him, “because [he] could barely understand them.” The only part of the phone calls that Dr. Lipman recalled listening to or taking notes about was Defendant’s statement that the police shot through the walls at him. On redirect, Dr. Lipman clarified that “[s]ome of the things that [Defendant] recall[ed] [we]re clearly not real.”

Based on the evidence, the jury found Defendant guilty, and the trial court imposed a sentence of twenty-five years. The trial court denied Defendant’s motion for new trial. Defendant appeals.

Analysis

Sufficiency of the Evidence

Defendant asserts that the evidence at trial was insufficient to support his conviction for unlawful possession of a weapon by a felon. Specifically, Defendant argues the evidence did not establish that he was in actual or constructive possession of the firearm. The State responds that the evidence was sufficient. We agree with the State.

“The standard for appellate review of a claim challenging the sufficiency of the State’s evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Miller*, 638 S.W.3d 136, 157 (Tenn. 2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). This standard of review is “highly deferential” in favor of the jury’s verdict. *See State v. Lyons*, 669 S.W.3d 775, 791 (Tenn. 2023). Indeed, when making that determination, the State “is entitled to the strongest legitimate view of the evidence and any reasonable inferences that may be drawn from it.” *State v. Rimmel*, 710 S.W.3d 640, 645 (Tenn. 2025) (citation and internal quotation marks omitted). To that end, “[w]e do not reweigh the evidence, because questions regarding witness credibility, the weight to be given the evidence, and factual issues raised by the evidence are resolved by the jury as the trier of fact.” *State v. Curry*, 705 S.W.3d 176, 183 (Tenn. 2025) (citations omitted). “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) (citation and internal quotation marks omitted).

“A person commits an offense who unlawfully possesses a firearm . . . and [h]as been convicted of a felony crime of violence[.]” T.C.A. § 39-17-1307(b)(1)(A). Defendant stipulated that he had previously been convicted of a “qualifying felony under T.C.A. [s]ection 39-17-1307(b)(1)(a)” at trial. Therefore, the only issue for the jury was whether Defendant knowingly possessed a firearm.

Possession of a firearm “may be either actual or constructive.” *Key v. State*, 563 S.W.2d 184, 188 (Tenn. 1978). Constructive possession “‘may occur only where the personally unarmed participant has the power and ability to exercise control over the firearm.’” *State v. Ford*, No. W2015-02407-CCA-R3-CD, 2017 WL 838483, at *4 (Tenn. Crim. App. Mar. 3, 2017) (quoting *Key*, 563 S.W.2d at 188 (Tenn. 1978), *no perm. app. filed*). Because possession is about control over an object, a defendant’s mere presence in an area where the object is discovered, or association with a person who possesses the object is insufficient, without more, to support a finding of constructive possession. *See State v. Robinson*, 400 S.W.3d 529, 534 (Tenn. 2013). Issues as to whether a defendant is in constructive and joint possession of an item are questions of fact for the jury. *See State v. Copeland*, 677 S.W.2d 471, 476 (Tenn. Crim. App. 1984); *State v. Peters*, No. W2018-01328-CCA-R3-CD, 2019 WL 3775872, at *4 (Tenn. Crim. App. Aug. 9, 2019), *no perm. app. filed*.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, we conclude that the evidence is sufficient to sustain Defendant’s conviction. Officer Hutton testified that he saw Defendant holding two

weapons during the standoff, a stockless .22 caliber rifle and an AR-style pistol, which officers later determined was a pellet gun. Lieutenant Dalton examined the .22 caliber rifle and confirmed that, even without its stock, the firearm was operational and capable of firing live ammunition. Defendant acknowledged in the recorded jail phone call to his brother that he had a weapon during the standoff.

Defendant's argument on appeal goes to the weight of the State's evidence. First, he asserts Officer Hutton "did not have a clear view" of him during the standoff because he was wearing a gas mask and carrying a shield "while chemical agents had been deployed[.]" Second, Defendant asserts that "officers were in the home for a prolonged period" and "they had multiple guns on the armchair behind [Defendant] when [Defendant] exited the bedroom." The jury resolved factual issues and issues concerning the credibility of witnesses, and we will not disturb them on appeal. Defendant is not entitled to relief on this issue.

Denial of Motions to Continue

Defendant contends the trial court abused its discretion by denying two separate requests for a continuance. First, he argues the trial court's "refusal to grant a continuance following the death of the defense's original firearms expert," Christopher Robinson, materially prejudiced his defense and deprived him of his right to a fair trial. Second, Defendant argues the trial court erred when it denied his request for a continuance based on Dr. Lipman's inability to interview Defendant due to a medical emergency in Dr. Lipman's family. Defendant asserts the trial court's denial of both continuances "forced the defense to bind its case together with paperclips, when what was needed were nails[.]"

Defendant's trial was scheduled to begin on November 8, 2023. At the September 13, 2023 hearing² on Defendant's first motion to continue, defense counsel stated that her firearms expert, Mr. Robinson, passed away unexpectedly in August and that a substitute expert would not be available "until 2024." Counsel also explained that she was "in the process" of obtaining Dr. Lipman, a neuropharmacologist and an "expert on methamphetamine addiction and the psychotropic effects of methamphetamine that it produces hallucinations and delusional thinking." Counsel stated she needed the testimony of both experts to discredit Defendant's statement that he fired the gun inside the house. Dr. Lipman would testify about "why [Defendant] would've made that statement[.]" and a firearms expert would testify that if Defendant fired a gun inside the house, there would have been evidence of it.

² The appellate record was supplemented with the transcripts of the hearings on both motions to continue; therefore, the State's argument that the record is inadequate for review of this issue is moot.

The trial court found that it was “a question of fact” whether the firearm was functional. The prosecutor stated the State had provided defense counsel with “the report where it shows that the guns were examined by [Lieutenant] Dalton” and that “[t]hey function.” The trial court cautioned the prosecutor, “General, if you go to trial on this gun case and they produce an expert that says this wasn’t a firearm and I find that expert to be credible, . . . then I’ll give them a new trial. It’s just that simple.” The court asked defense counsel if her neuropharmacologist expert was available for trial, to which defense counsel answered, “possibly,” and the court tentatively denied the motion to continue. The court stated it would reconsider the motion if defense counsel’s neuropharmacologist expert was unavailable.

Defendant’s second motion to continue was heard on November 2, 2023, six days before the trial was set to begin. Defense counsel again explained that Mr. Robinson passed away in August and that a substitute expert would not be available until February 2024. The court inquired whether Mr. Robinson had generated a report, and defense counsel stated he had not. The court commented that it was “left to speculate” on what a defense firearms expert would say at trial. Defense counsel agreed and then explained that Dr. Lipman was also unavailable due to a medical emergency with his girlfriend. Defense counsel explained that Dr. Lipman would testify that “somebody who was a heavy methamphetamine user” would experience “delusions, paranoid thinking, and flat out hallucinations.” Defense counsel argued that Defendant’s statements in his jail phone calls, that the police were shooting at him through the walls of the house and that he fired a gun inside the house, did not happen. The State objected to a continuance, noting that Defendant’s jail phone calls occurred on July 27th, the day after the standoff. On that basis, the trial court denied the motion to continue but advised defense counsel, “if I find that expert to be credible and he would’ve made a difference, I will consider giving him a new trial on that basis and that alone. But from what I’ve heard right now, it’s not going to make any difference.”

The decision whether to grant a motion for a continuance is a matter of discretion for the trial court, the denial of which will not be overturned on appeal absent a clear showing the trial court abused its discretion to the prejudice of the defendant. *State v. Melson*, 638 S.W.2d 342, 359 (Tenn. 1982); *Baxter v. State*, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). In order to establish an abuse of discretion, the complaining party must make a clear showing of prejudice as a result of the continuance being denied. *State v. Teel*, 793 S.W.2d 236, 245 (Tenn. 1990).

Defendant acknowledges that Dr. Lipman testified at trial for the defense; however, Defendant argues, Dr. Lipman’s testimony lacked the “necessary credibility” because he

was unable to interview Defendant before trial due to his family emergency. During defense counsel's direct examination of Dr. Lipman, the following exchange occurred:

Q. Did you take a history of [Defendant]?

A. Yes. An interview.

Q. And did you take an interview of his -- or have an interview of his brother?

A. I did.

Dr. Lipman later clarified on cross-examination:

Q. And when was it that you first met [Defendant]?

A. I haven't met [Defendant]?

Q. Have you talked to [Defendant]?

A. No. I requested an interview be conducted according to my instructions, but I did not do the interview.

Q. So, you've never talked to [Defendant]?

A. That's correct.

On cross-examination, Dr. Lipman said he spent "more than twenty" hours reviewing records and consulting with the defense. Dr. Lipman's trial testimony indicates that he spent a substantial amount of time preparing for Defendant's trial. Additionally, Defendant has not explained why Dr. Lipman was unable to interview Defendant before his family medical emergency the week before trial.

Regarding the trial court's denial of a continuance based on the unavailability of the defense's firearms expert, Defendant argues he was unable to rebut the State's evidence that Defendant was in possession of the stockless .22 caliber rifle with the defense theory that the stockless rifle was on a chair in the living room. Defendant argues he was "forced to rely on a lay investigator's testimony, which was successfully attacked and impeached by the State." However, the jury heard evidence supporting Defendant's theory at trial. Ms. Williams, a private investigator, testified for the defense that she viewed the bodycam video and there were other firearms in a chair, including what appeared to be a stockless rifle. The State's firearms expert agreed on cross-examination that the gun on the chair could be the stockless rifle. We are left to speculate, as was the trial court, how the defense's firearms expert's testimony would have been more favorable to the defense.

Applied to the facts of this case, Defendant has made no showing of prejudice. Accordingly, Defendant is not entitled to relief.

Expert Testimony

Defendant next challenges the trial court's decision not to allow Dr. Lipman to testify "unless [Defendant] testified about his drug addiction." Defendant argues the trial court's ruling "effectively forced [Defendant] to choose between calling the expert necessary to explain his statements on the jail calls and waiving his Fifth Amendment rights and opening himself to impeachment with prior convictions." The State disputes Defendant's characterization of the trial court's ruling and argues the trial court did not err by requiring Defendant to present proof of his drug use before calling an expert to testify about the effects of the purported drug use. We agree with the State.

After a *Momon* colloquy, defense counsel announced that Defendant had not yet decided whether to testify. During a discussion of defense witnesses, the State objected to defense counsel's calling Dr. Lipman "to take the witness stand and testify that people who smoke meth act a particular way[.]" Defense counsel responded that the expert's testimony "that [Defendant] [] had a history of heavy methamphetamine use, that he had used methamphetamine prior in the day" was relevant to Defendant's credibility in the jail phone calls. The trial court noted, "I have yet to hear anything in the proof that's been introduced that [Defendant] had meth in his system. What I heard was he wanted to do another bump of heroin before he came out."

After a jury-out hearing at which Dr. Lipman read from a recorded interview Defendant gave while in jail about the incident and his drug use, the trial court found that no evidence had been introduced that Defendant had "ingested methamphetamine, which is the predicate for this doctor's opinions." The court ruled, "If there is evidence before this jury that he did that, then maybe, maybe not, this expert's testimony becomes relevant. But there's nothing there yet." Defense counsel responded, "But you're forcing me to put [Defendant] on the witness stand, Your Honor." She continued, "I mean, but the way to get that in front of the jury, Your Honor, was through this expert." The court concluded, "If you wish to introduce evidence about [Defendant]'s ingestion of narcotics on the date that this all took place, which precedes those jail phone calls, I will consider whether or not this expert may then testify."

"Trial courts act as gatekeepers when it comes to the admissibility of expert testimony." *State v. Scott*, 275 S.W.3d 395 (Tenn. 2009). A trial court's decision regarding the "admissibility, qualifications, relevancy and competency of expert testimony" is subject to review under an abuse of discretion standard. *State v. Watkins*, 648 S.W.3d 235, 260 (Tenn. Crim. App. 2021) (quoting *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997)). "[A]n abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used

to guide the particular discretionary decision.” *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019) (citation and internal quotation marks omitted). “A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.” *Moore v. Lee*, 644 S.W.3d 59, 63 (Tenn. 2022) (citation and internal quotation marks omitted).

The admissibility of expert testimony is governed by Rules 702 and 703 of the Tennessee Rules of Evidence. Rule 702 allows expert testimony if it “will substantially assist the trier of fact to understand the evidence or to determine a fact in issue” Tenn. R. Evid. 702. Rule 703 requires the expert’s opinion to be supported by trustworthy facts or data “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” The determining factor is “whether the witness’s qualifications authorize him or her to give an informed opinion on the subject at issue.” *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002).

Defendant insists that the trial court’s ruling forced him to make a “Hobson’s choice between testifying and the exclusion of his necessary expert witness.” Defense counsel announced her intent to call Dr. Lipman to testify that Defendant “had a history of heavy methamphetamine use [and] that he had used methamphetamine prior in the day” before stating in a phone call from jail that he possessed a firearm during the incident. The trial court stated, “there’s no evidence in this record that [Defendant] has used methamphetamine, so you’re going to back-door it by putting an expert on to say that, ‘He told me he used,’ and the State can’t cross-examine that.”

The trial court did not rule that only Defendant’s testimony could establish that he had used methamphetamine before making the jail phone call. Defendant cites the Advisory Committee Comment to Rule 703 that states, “If the bases of expert testimony are not independently admissible, the trial judge should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction.” However, the issue here is not the admissibility of Defendant’s drug use as a foundation for Dr. Lipman’s testimony. The issue is that no such evidence was presented. The trial court did not err by requiring that proof of Defendant’s drug use be presented before allowing Dr. Lipman to testify.

Ferguson Jury Instruction

Defendant contends the trial court erred by failing to instruct the jury on the State’s duty to preserve evidence under *State v. Ferguson*. Defendant argues that the State’s failure to preserve the “multiple guns in the living room in possession of the police”

prevented him from being able to determine “which guns were firearms and which guns were replicas.” The State responds that the trial court properly declined to give the instruction because police had no duty to seize the other weapons.

After the State rested its case at trial, the trial court discussed its jury instructions with the parties. Defense counsel said, “I also have a *Ferguson* motion concerning those other guns that were clearly there and not given to us in discovery[.]” Counsel argued that the other weapons in the house that were not confiscated by police were “potentially useful evidence” because one of those weapons could have been “a fake .22 rifle” like the “highly realistic pellet gun” that was found inside the home. After some discussion, the prosecutor responded that she had provided defense counsel the body cam video and “emailed her and showed her those guns in the chair.” The trial court ruled,

I don’t think this rises to the level of [a] *Ferguson* violation. You can obviously argue that, had they confiscated these other guns, lo and behold, one of these might have been a fake rifle, as well, and the State can argue, no, the officers identified this as the gun he saw the defendant toss as he was coming out. It’s a question of fact, and you can obviously argue that, but I don’t think it rises to the level of [a] *Ferguson* violation.

In *State v. Ferguson*, our supreme court held that “the loss or destruction of potentially exculpatory evidence may violate a defendant’s right to a fair trial.” *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *State v. Ferguson*, 2 S.W.3d 912, 915-16 (Tenn. 1999)). The court in *Ferguson* adopted a balancing approach requiring the trial court to determine “[w]hether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair.” *Id.* at 785 (quoting *Ferguson*, 2 S.W.3d at 914). Whenever a *Ferguson* claim is raised, the trial court must first determine “whether the State had a duty to preserve the evidence.” *Id.* “[T]he State’s duty to preserve evidence is limited to constitutionally material evidence described as ‘evidence that might be expected to play a significant role in the suspect’s defense.’” *Id.* (quoting *Ferguson*, 2 S.W.3d at 917). If the trial court determines that a trial would be fundamentally unfair without the missing evidence, “the trial court may then impose an appropriate remedy to protect the defendant’s right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction.” *Id.* at 786.

“In *Ferguson*, the Tennessee Supreme Court did not impose a duty upon the State to collect evidence but addressed the State’s duty to preserve evidence.” *State v. Craighead*, No. M2017-01085-CCA-R3-CD, 2018 WL 5994974, at *8 (Tenn. Crim. App. Nov. 15, 2018), *perm. app. denied* (Tenn. March 28, 2019). “On numerous occasions, this

court has held that a law enforcement officer's failure to collect certain items from a crime scene did not result in a *Ferguson* violation." *Id.* (citing collection of cases).

Regardless of what proof Defendant supposes the unrecovered weapons might have revealed, Officer Hutton testified that he saw Defendant holding weapons in both hands. Officer Hutton testified he saw Defendant toss the stockless .22 caliber rifle to the floor. That weapon was recovered and determined to be in working condition. We cannot conclude that the State had a duty to collect other weapons from the house. Thus, the trial court properly declined to give a *Ferguson* instruction. Defendant is not entitled to relief on this issue.

Closing Argument

Defendant contends that the prosecutor made improper comments during closing argument, shifting the State's burden to him. The State argues that the prosecutor's comments were not improper, and even if improper, the trial court gave an appropriate curative instruction.

The Tennessee Supreme Court "has long recognized that closing arguments are a valuable privilege that should not be unduly restricted." *Terry v. State*, 46 S.W.3d 147, 156 (Tenn. 2001) (citing *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn. 1978)). "Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion." *Terry*, 46 S.W.3d at 156 (citing *Sutton*, 562 S.W.2d at 823); see *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975). This Court has explained that "closing arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." See *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003) (citing *Coker v. State*, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995)).

This Court has recognized five general areas of prosecutorial misconduct which may arise during closing argument:

(1) intentionally misstating the evidence or misleading the jury as to the inferences it may draw; (2) expressing personal beliefs or opinions as to the truth or falsity of any testimony or the guilt of the defendant; (3) inflaming or attempting to inflame the passions or prejudices of the jury; (4) injecting issues broader than the guilt or innocence of the accused; and (5) arguing or referring to facts outside the record unless the facts are matters of common knowledge.

State v. Jones, 568 S.W.3d 101, 145 (Tenn. 2019) (citing *Goltz*, 111 S.W.3d at 6). As “[i]t is impossible to set out in detail what can and cannot be said in closing argument,” this list is not exhaustive. *Goltz*, 111 S.W.3d at 6.

This Court will not overturn a defendant’s conviction unless the prosecution’s closing argument is so improper or inflammatory that it prejudiced the jury’s verdict against the defendant. *Jones*, 568 S.W.3d at 145 (citing *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008), and *State v. Reid*, 164 S.W.3d 286, 344 (Tenn. 2005)). In measuring the prejudicial impact of an improper argument, this Court should consider the following factors: “(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case.” *Goltz*, 111 S.W.3d at 5-6 (citing *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)); see *State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984).

The Defendant argues that the prosecutor attempted to shift the burden of proof during its closing argument “by twice stating that [Defendant] had not proven his defense beyond a reasonable doubt.” The prosecutor told the jury,

That’s [Defendant’s] testimony. His testimony hasn’t established any[] proof beyond a reasonable doubt nor did the doctor’s testimony establish anything beyond a reasonable doubt nor did Ms. Williams’ testimony establish anything beyond a reasonable doubt. The only thing that you have beyond a reasonable doubt is the testimony of the witnesses that the State called: Sergeant Hutton --

Defendant objected, and the trial court issued a curative instruction, stating, “The burden is not on the defendant, ladies and gentlemen. The burden is on the State to prove this case.” The State then continued, “Compare [Sergeant Hutton’s] presentation to [Defendant’s], and that’s why I say you can’t believe [Defendant’s] testimony beyond a reasonable doubt.” Defendant objected again, stating that the prosecutor was attempting to shift the burden of proof to Defendant, and the trial court cautioned, “Just limit it to ‘You can’t believe his testimony,’ if that’s your argument.” The prosecutor then told the jury, “You cannot believe his testimony.”

The State argues the prosecutor’s comments were meant to attack Defendant’s credibility and “to convince the jury that the State had met its burden to establish the defendant’s guilt beyond a reasonable doubt, despite his testimony to the contrary.” The State further argues that the prosecutor’s comments did not fall under one of the five

general areas of prosecutorial misconduct as stated in *Goltz*; however, the list is not exhaustive. By arguing that Defendant's witnesses did not "establish anything beyond a reasonable doubt," the prosecutor implied it was Defendant's burden to do so. This is an improper statement of the law.

Nevertheless, we deem any error harmless considering the trial court's curative instruction and the relative strength of the State's case. Accordingly, Defendant is not entitled to relief on this issue.

24-Hour Merger Rule

Defendant challenges his sentence on the single ground that the trial court erred by failing to apply the 24-hour merger rule to his convictions for aggravated robbery in classifying him as a Range III offender. The State counters that the trial court properly sentenced Defendant as a Range III offender. We agree with the State.

Appellate review of sentencing is for abuse of discretion. We must apply "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *See State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The burden is on the appellant to show that the sentence imposed was improper. T.C.A. § 40-35-401(d), Sentencing Comm'n Cmts.

For the purposes of setting the range of a convicted defendant's sentence, Tennessee's sentencing act categorizes defendants into different types of offenders. T.C.A. § 40-35-105 through -109. A defendant is classified as a persistent offender "who has received any combination of five (5) or more prior felony convictions within the conviction class or higher or within the next two (2) lower felony classes, where applicable." T.C.A. § 40-35-107(a)(1). Trial courts shall sentence defendants within Range III if found beyond a reasonable doubt to be a persistent offender. *Id.* § 40-35-107(c). "In determining the number of prior convictions a defendant has received," generally, "convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions." T.C.A. § 40-35-107(b)(4). The 24-hour-merger rule, however, contains the exception that the prior convictions should be counted separately, even though they were committed within 24 hours of one another, if the statutory elements of the crimes include serious bodily injury, bodily injury, threatened serious bodily injury, or threatened bodily injury. *Id.*

In determining whether convictions should merge pursuant to the 24-hour rule, the proper inquiry is whether the statutory elements of the offenses include bodily injury. Defendant argues that "robbery and aggravated robbery can involve bodily injury,

according to their elements, but they can also involve simply placing the victim in fear.” Defendant argues the statute requires that “the victim be placed in fear, but does not specify fear of what and does not require that the fear be of bodily injury to the victim.” Defendant contends, therefore, that the 24-hour rule should apply to his convictions for aggravated robbery.

Defendant recognizes there are “multiple unreported decisions” from this Court concluding that aggravated robbery convictions do not merge under the 24-hour rule; however, Defendant asks this Court to reexamine these decisions and conduct a statutory construction analysis to determine that robbery and aggravated robbery “do not require fear of bodily injury or serious bodily injury, much less that the victim be placed in fear of bodily injury or serious bodily injury to him or herself as opposed to some other person.” We decline to do so.

This Court has previously determined that “for the purpose of the 24-hour merger rule, ‘the statutory elements of robbery include a threat of bodily injury.’” *State v. Davis*, No. M2023-00225-CCA-R3-CD, 2024 WL 1599257, at *7 (Tenn. Crim. App. Apr. 12, 2024) (quoting *State v. Middlebrook*, No. M2009-02276-CCA-R3-CD, 2011 WL 198689, at *7 (Tenn. Crim. App. Jan. 11, 2011)); *see also* T.C.A. § 39-13-402(a) (“Aggravated robbery is robbery as defined in [section] 39-13-401 . . . [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or . . . [w]here the victim suffers serious bodily injury.”); *id.* § 39-13-401(a) (“Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.”).

The trial court acted within its discretion in classifying Defendant as a Range III offender. Defendant is not entitled to relief on this issue.

Cumulative Error

Finally, Defendant contends that he is entitled to relief under the cumulative error doctrine. The cumulative error doctrine recognizes that there may be many errors that are harmless in isolation, but “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). To warrant relief under the cumulative error doctrine, there must have been more than one actual error committed during the trial proceedings. *Id.* at 77. As we have found no error, Defendant is not entitled to relief.

CONCLUSION

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

s/Timothy L. Easter

TIMOTHY L. EASTER, JUDGE