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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2023 Session

STATE OF TENNESSEE v. ROBERT JOSEPH ATKINS

Appeal from the Criminal Court for Knox County
No. 117759 Steven Wayne Sword, Judge

No. E2022-01027-CCA-R3-CD

The Defendant, Robert Joseph Atkins, was convicted in the Knox County Criminal Court of second degree murder, tampering with evidence, and unlawful possession of a handgun by a convicted felon and received an effective thirty-one-year sentence. On appeal, he claims that (1) the evidence is insufficient to support his murder conviction, (2) the trial court erred by admitting testimony about his prior assault of the victim, (3) the trial court erred by admitting an unauthenticated video into evidence, (4) the trial court should have granted a new trial because a police officer, who testified at trial, was the subject of an internal affairs investigation, (5) the trial court committed plain error by allowing the medical examiner to testify outside her area of expertise, and (6) he was denied his right to a fair trial under the cumulative error doctrine. Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and TOM GREENHOLTZ, JJ., joined.

Tyler M. Caviness (on appeal) and Mary L. Ward (at trial), Knoxville, Tennessee, and Clinton E. Frazier (at trial), Maryville, Tennessee, for the appellant, Robert Joseph Atkins.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Charme P. Allen, District Attorney General; and Hector Sanchez, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case relates to the shooting death of Kaitlyne Warwick on February 4, 2020. In August 2020, the Knox County Grand Jury indicted the Defendant for the first degree premeditated murder of the victim, tampering with evidence by concealing her body, and being a convicted felon in possession of a handgun. The Defendant went to trial in January 2022.

At trial, Lori Warwick testified that she was the victim's mother and that the victim was twenty-nine years old at the time of her death. The victim was loving and caring and had a daughter. On cross-examination, Ms. Warwick testified that the victim was addicted to heroin and that she lived "[d]ifferent places" but mainly with friends.

Michael Alan Mays of Knox County Emergency Communications District, 911, identified a recording of a 911 call placed at 6:29 a.m. on February 4, 2020, and the State played the call for the jury. During the call, a woman, who sounded distraught, reported that she was in her white truck and that a body was in the alley between Iredell and Pickett Avenues.

Captain John Kiely of the Knoxville Police Department ("KPD") Criminal Investigations Unit testified that on February 4, 2020, he was dispatched to an alleyway north of Pickett Avenue. When he arrived, his investigators were with a deceased female. Captain Kiely drove to 1227 Pickett Avenue and saw a man, Corey Stevenson, exit the front door of the house. Mr. Stevenson was "excited," so Captain Kiely stopped him and talked with him. Captain Kiely also saw the Defendant come out of the home. On cross-examination, Captain Kiely acknowledged that the Defendant did not attempt to flee.

Bethany Simmons, a KPD crime scene technician, testified that she was dispatched to 1227 Pickett Avenue to photograph the scene and collect evidence. The victim was lying in an alleyway behind Pickett Avenue and was covered with a sheet. She was clothed but barefoot, and blood was on the left side of her body. A purse and a broken cellular telephone were in the alleyway, and muddy tire tracks were in the back yard of a home nearby. A white Ford pickup truck was parked next to the alleyway, but the tread on the truck's tires was not consistent with the muddy tire tracks. The white truck belonged to the woman who had called 911.

Ms. Simmons testified that the police obtained a search warrant for 1227 Pickett Avenue and found drug paraphernalia in the living room. The home had two bedrooms, and blood was on the mattress, carpet, furniture, and walls in one of the bedrooms. There was no bedding or pillows on the mattress. A bullet hole appeared to be in a wall of the bedroom, so Ms. Simmons cut into the wall and found the bullet. A nine-millimeter cartridge case was on the bedroom floor, but Ms. Simmons did not find a firearm. A blue

shed was in the back yard, and Ms. Simmons saw a sleeping area and family photographs in the shed. She said someone appeared to be living there.

Ms. Simmons testified that she photographed the Defendant at the KPD on February 4. The photographs showed him wearing black shoes, dark pants, and a gray hoodie but no shirt. Ms. Simmons did not see any injuries on the Defendant's hands.

On cross-examination, Ms. Simmons testified that the blood on the mattress was fresh because the blood was still damp. However, she did not know how long the blood had been in the other areas of the bedroom or how long the bullet hole had been in the wall.

Investigator Andrew Markham of the KPD's Violent Crimes Unit testified that he was the lead investigator and that he went to the alleyway on February 4, 2020. The weather was cold and rainy, and a white sheet was covering the victim. The victim appeared to have been shot and placed in the alleyway, and the police received information that led them to a house at 1227 Pickett Avenue. Investigator Markham saw people coming out of the residence, so the police surrounded it to stop people from leaving. The Defendant's aunt, Katherine Rodgers, was renting the home and gave officers consent to enter it.

Investigator Markham testified that the police obtained a search warrant for the residence and that the police transported the people inside to the KPD. Based on Investigator Markham's investigation, he determined that the Defendant, the victim, Mr. Stevenson, Ms. Rodgers, and a juvenile were inside the home at the time of the shooting. April Williams and Dewey Bolling were in the blue shed behind the home. Investigator Markham interviewed the witnesses, including Ms. Rodgers and Mr. Stevenson, at the KPD and learned that the Defendant and the victim were alone in the bedroom when the shooting occurred. Investigator Markham then interviewed the Defendant. Initially, the Defendant was "very shut down" and "confrontational." He later said that he and the victim struggled over the gun and that the gun "ended up going off, shooting her." Investigator Markham remembered that the victim appeared to have gunshot injuries to her eye, skull, and hand; that no bedding was on the mattress in the bedroom; and that the police did not find a gun. Moreover, the Defendant moved the victim to the alleyway and cleaned up after the shooting. Therefore, Investigator Markham did not think the Defendant's story about the accidental shooting made sense. The Defendant was in the interview room for several hours prior to his interview. During that time, he slept, "chew[ed] on a sucker," and ate a pack of crackers.

On cross-examination, Investigator Markham acknowledged that the Defendant was at the KPD for a total of six to eight hours and that he voluntarily agreed to be interviewed. The Defendant told Investigator Markham that he and the victim had drug problems and

that the victim wanted him to get drugs for her. The Defendant claimed that the victim pointed the gun at him and that he accidentally pulled the trigger. The Defendant said that he had bought the gun for five dollars and that the gun could be loaded with only one bullet at a time.

Investigator Markham acknowledged that after the shooting, Ms. Rodgers told the Defendant to remove the victim from the home. Mr. Stevenson and Mr. Bolling helped the Defendant move the victim to the alleyway, and neither of them rendered aid or called 911.

On redirect examination, Investigator Markham testified that the Defendant signed a Waiver of Rights form before his interview. At first, the Defendant claimed he was asleep, woke, and found the bedroom "a mess." He eventually changed his story and claimed that a struggle occurred and that he pulled the trigger.

Investigator Chas Terry of the KPD's Violent Crimes Unit testified that he went to Pickett Avenue on February 4, 2020, and later assisted Investigator Markham with the Defendant's interview. He said that the Defendant's interview "started off as, of course, like so many, 'I wasn't there. I don't know what you're talking about,' no knowledge of anything. And it eventually evolves to several admissions." The Defendant finally admitted to pulling the trigger but claimed the shooting was an accident.

At that point, the State played the Defendant's video-recorded interview for the jury. The Defendant initially said he was asleep and woke to find the room a "mess." Later, the Defendant said that the victim got mad at him and grabbed the gun, that they tussled over the gun, and that the gun fired. Investigator Terry asked the Defendant, "How long you known her, how long ya'll been [f*cking] around?" The Defendant answered, "We been [f*cking] around a few months." The Defendant said that he loved the victim but that he thought she was going to kill him. He stated that "a dude got rid of the gun" but that he did not know the man's name.

After the State played the interview, the prosecutor asked Investigator Terry if, based on his training and experience, he thought the Defendant's statement was credible. Investigator Terry responded, "Ultimately."

On cross-examination, Investigator Terry acknowledged that the Defendant claimed he and the victim were using drugs. Investigator Terry also acknowledged that the police found drug paraphernalia in the house. The Defendant himself said during his interview that he did not have any credibility, but Investigator Terry believed the Defendant when the Defendant said he shot the victim. The Defendant claimed the shooting was an accident, and Investigator Terry acknowledged that no eyewitnesses were available to dispute that claim. Investigator Terry said that the Defendant ended up taking "some

responsibility" for shooting the victim but that "[h]e couldn't tell you where the gun came from. All he knew, mysteriously, she had the gun."

Katherine Rogers, the Defendant's aunt, testified that in February 2020, she lived at 1227 Pickett Avenue. Her son, the Defendant, and the Defendant's sister lived with her. When Ms. Rodgers went to bed in the early morning hours of February 4, Mr. Bolling and the Defendant were in the house. The victim also must have been in the house, but Ms. Rodgers did not see her. Ms. Rodgers said that at some point, the Defendant came into her bedroom and said something to the effect of, "'Aunt Kathy, she dead. She shot herself[.]'" Ms. Rodgers went to the Defendant's bedroom and saw the victim sitting on the mattress with her back against the wall and her legs straight out toward the end of the bed. Ms. Rodgers was scared because she was African-American with African-American people in her home; however, the victim was white. Ms. Rodgers did not know what to do, so she told the Defendant to get the victim out of her house. Ms. Rodgers then returned to her bedroom and locked the door. She said that she was "shaking, crying, scared" but that she went back to sleep. The police later arrived, and Ms. Rodgers went to the KPD. She told the police what she knew about the victim's death.

On cross-examination, Ms. Rodgers testified that she did not hear any arguing or gunshots prior to the Defendant's coming into her bedroom. The Defendant, Mr. Bolling, and Mr. Stevenson carried the victim out of the house, but Ms. Rodgers did not see them do so. She said she did not approve of guns being in her home.

Corey Stevenson testified that he knew the Defendant "from the streets" and that they were friends. In February 2020, Mr. Stevenson was living with Ms. Rodgers temporarily. About two weeks before the victim's death, Mr. Stevenson saw the Defendant and the victim get into "a physical altercation" in Ms. Rodgers's home. The Defendant grabbed the victim by her hair and hit the victim's face two or three times with his fist. Mr. Stevenson said that the victim had a black eye, that she was bleeding, and that she was begging the Defendant to stop hitting her. Ms. Rodgers and the Defendant's uncle hid the victim in their bedroom, but the Defendant "busted in the room to try to get her again." The Defendant's uncle got the victim out of the house and "took her away."

Mr. Stevenson testified that in the early morning hours of February 4, he was in the kitchen cooking a turkey when the victim came into the kitchen. The Defendant also came into the kitchen and wanted to know why the victim was up so late. The victim told him that she was making something to eat. The victim and the Defendant went back into the Defendant's bedroom, and they closed the door. Mr. Stevenson went into the living room, sat on the couch, and started "rolling . . . a blunt." Ms. Rodgers came into the living room and sat down with him. Suddenly, they heard a "boom." The Defendant came out of his bedroom and said the victim shot herself. Ms. Rodgers went to the Defendant's bedroom

and started screaming, and Mr. Stevenson went out the back door and had Mr. Bolling come into the house. Mr. Stevenson walked toward the Defendant's bedroom and saw the Defendant dragging the victim, who was wrapped in a blanket, by her hair. The victim was gasping, and the Defendant told Mr. Stevenson and Mr. Bolling to help him move her "or there was going to be another problem." The Defendant had a gun, so Mr. Stevenson and Mr. Bolling helped the Defendant carry the victim to the alleyway. She was still gasping for air.

Mr. Stevenson testified that they left the victim in the alleyway and that they returned to the house. Mr. Stevenson began gathering his belongings, but the Defendant told him that "'ain't nobody leaving.'" The Defendant said that he needed bleach in order to wash his hands and that he had to get the victim's "stuff" out of the house. Mr. Stevenson recalled seeing a small black bag with red straps in the home. The Defendant left the house one or two times, but Mr. Stevenson did not see him leave. Therefore, Mr. Stevenson did not know if the Defendant took the black bag with him. A neighbor called the police when the sun came up, and Mr. Stevenson was about to leave the house when the police arrived. He said that he did not want to help the Defendant move the victim but that the Defendant threatened him.

On cross-examination, Mr. Stevenson testified that Ms. Rodgers and the Defendant's uncle witnessed the Defendant's altercation with the victim two weeks before the shooting. Although the victim left the house after the altercation, the Defendant threatened her and forced her to return to the house on the day of the shooting.

Mr. Stevenson acknowledged that Ms. Rodgers was not in her bedroom at the time of the shooting. Mr. Stevenson said he was about to smoke marijuana when he heard a "muffled" boom. He did not do anything to help the victim and did not call 911 after the shooting. He explained to the jury that he was scared because he had prior convictions and a warrant had been issued for his arrest. During Mr. Stevenson's police interview after the shooting, the investigators promised to help him by contacting his probation officer. However, they never did so. Mr. Stevenson denied that the investigators tried to "coach" him into making certain statements. On redirect examination, Mr. Stevenson acknowledged that he told the truth during his police interview and at trial and that his story about the shooting never changed.

Dewey Bolling testified that on February 4, 2020, he and his girlfriend, April Williams, were living in his aunt's shed. The Defendant woke Mr. Bolling and told him that "somebody shot themselves." The Defendant had a gun in his hand and wanted Mr. Bolling to help him move the victim. Mr. Bolling went into his aunt's house and saw his aunt "standing there crying." He then went into the Defendant's bedroom. The victim was leaning against the wall and was gasping. The Defendant "had her by the hair on the head,"

so Mr. Bolling "grabbed her feet." Mr. Stevenson got between them, and the three of them carried the victim outside to the alleyway. Mr. Bolling said that the victim was still breathing but that she sounded "like she was taking her last breath."

Mr. Bolling testified that after they moved the victim to the alleyway, he and Ms. Williams left because the incident "bothered" him. Two days later, Mr. Bolling tried to jump off a bridge because he was upset about what had happened. He said that he did not want to help the Defendant move the victim but that he did so because he was scared.

On cross-examination, Mr. Bolling acknowledged that he had prior convictions for criminal simulation and that he was "strung out on meth" when the shooting occurred. He said that he last used methamphetamine two days before trial and that he did not call 911 for the victim because he was scared.

April Williams testified that on February 4, 2020, she and Dewey Bolling were living in a shed behind a home on Pickett Avenue. About 3:00 a.m., they were asleep when the Defendant "came screaming and ripped the door off the hinges." He told them that "Kat shot herself." The Defendant had a black gun, pointed it at them, and told them to get dressed and go into the house. Ms. Williams and Mr. Bolling did as they were told. When they entered the house, Ms. Rodgers was in the living room, and everyone was upset. Mr. Bolling helped the Defendant carry the victim outside. Mr. Stevenson was in the kitchen and did not help them. After Mr. Bolling and the Defendant returned to the house, everyone sat around a table and used drugs. The police arrived, and Ms. Williams and Mr. Bolling left the home while the police were there. Ms. Williams said she never called 911, explaining, "I wasn't physically told not to call the police, but I was scared."

On cross-examination, Ms. Williams acknowledged that she had a prior conviction for the manufacture, sale, or delivery of methamphetamine and that she was in violation of her probation. In February 2020, Ms. Williams was addicted to methamphetamine and was using about one gram per day. Ms. Rodgers stayed in the living room with Ms. Williams while Mr. Bolling and the Defendant moved the victim. Ms. Williams later spoke with the police but did not tell them that the Defendant had a gun. She told the police that she never entered the home on February 4, which was not true.

Dreama Norman testified that in the early morning hours of February 4, she "was getting a ride to go handle something." Specifically, Ms. Norman was going to fight a woman who had posted some "derogative things" about Ms. Norman's children on Facebook. Ms. Norman's driver, Ronnie Love, told her that the Defendant needed a ride, so they picked up the Defendant at a house on Pickett Avenue soon after 5:00 a.m. Ms. Norman said that the Defendant, who was sitting directly behind her, "was very frantic and trying to get [Mr. Love] to hurry and pull off." The Defendant had a gun in his pocket,

was carrying a black bag, and was wearing black shoes and dark pants. Ms. Norman had never met the Defendant prior to February 4.

Ms. Norman testified that Mr. Love drove to the Pilot gas station at the corner of Middlebrook Pike and Western Avenue. They arrived between 5:20 and 5:30 a.m., and the Defendant told her, "'[B*tch], get out and pump the gas.'" Ms. Norman told the Defendant that he could pump his own gas. She said the Defendant "got very angry," put the gun against the back of her seat, and told her that "he had already killed one [b*tch] and didn't care to kill another." The Defendant got out of the car and walked around the side of the building. He returned about ten minutes later, and Mr. Love drove to the Western Heights community. The Defendant went inside an apartment in Western Heights and returned to the car. Mr. Love dropped him off in an alley.

On cross-examination, Ms. Norman acknowledged that she gave a statement to the police and that she did not tell them the Defendant had a gun or put the gun to her seat. She also acknowledged that she did not call 911 while the Defendant was gone for ten minutes at the Pilot gas station. She said that she did not see what the Defendant was doing at the gas station and that she did not call the police because she did not know he had done anything wrong.

After Ms. Norman's testimony, the trial court ruled that the State could introduce a video recorded by Investigator Markham's cellular telephone into evidence. The State called Investigator Markham back to the stand, and he testified that he spoke with Ms. Norman sometime after the shooting. Based on her information, he went to the Pilot gas station on February 26, 2020, and reviewed surveillance video for February 4, between 5:00 and 6:00 a.m. The Pilot video showed that about 5:20 a.m., someone went to the dumpster area outside the store and placed a bag in a trashcan. The bag appeared to be black with red straps. The person then walked to the gas pumps. Investigator Markham recorded the relevant portion of the Pilot video with his cellular telephone.

Investigator Markham testified that the Pilot video was consistent with what Ms. Norman told him. Additionally, the bag in the video was consistent with the black bag Ms. Norman saw the Defendant carrying and matched the description of a black bag with red straps that Mr. Stevenson saw in Ms. Rodgers's house. The individual carrying the bag appeared to be wearing the same pants and shoes the Defendant was wearing at the time of his arrest.

Investigator Markham testified that he later submitted a written request to Pilot for the video. However, he forgot to put the date of the video on his request. By the time he realized his mistake, Pilot had "overwritten" the video. The trial court allowed the State to

play Investigator Markham's cell phone video for the jury and introduce the video into evidence.

On cross-examination, Investigator Markham acknowledged that he only recorded five to six seconds of the Pilot video and that the loss of the Pilot video was his fault. He also acknowledged that the video on his cellular telephone did not show the date stamped on the Pilot video. The Defendant was wearing a gray hoodie when he was arrested, but the individual in the Pilot video was not wearing a gray hoodie.

At the conclusion of Investigator Markham's testimony, the parties stipulated that no gunshot residue was found on the Defendant or Mr. Stevenson. According to the stipulation, the absence of gunshot residue was consistent with an individual who had not discharged a firearm or otherwise been exposed to a source of gunshot residue.

Special Agent Kim Lowe of the Tennessee Bureau of Investigation (TBI) testified as an expert in forensic biology that she analyzed evidence swabs collected from the Defendant's bedroom for the presence of blood and then extracted DNA from the blood. Swabs of the mattress, door, and carpet were positive for blood. The DNA profile for the blood on the mattress and carpet was a mixture of at least two individuals, and at least one of the individuals was male. The victim was the major contributor to the mixture, but the DNA for the minor contributor was inconclusive. The DNA profile for the blood on the door matched the victim.

Stephanie Ogle testified that she was the Office Supervisor and keeper of records for Knox County Criminal Court. She identified a judgment of conviction, showing that the Defendant was convicted of simple possession, a Class E felony, in 2013 and that he received a two-year sentence. On cross-examination, Ms. Ogle testified she was not aware of any other felony convictions for the Defendant.

Dr. Darinka Mileusnic-Polchan, the Chief Medical Examiner for Knox County, testified as an expert in forensic and anatomic pathology that she conducted the victim's autopsy. The victim sustained a gunshot wound to her head. The bullet entered her right eye, traveled "almost straight," and exited the back of her head. The right hemisphere of the victim's brain was severely damaged, and her brain injury was not survivable. The victim could have lived a couple of minutes after the shooting but would have been unconscious. In addition to the victim's brain injury, she had a "deep graze" gunshot wound to the fourth finger of her left hand. Soot and gunpowder residue were around the wound, indicating that the distance between the muzzle of the gun and the victim's finger was less than a couple of inches. Dr. Mileusnic-Polchan opined that the victim's hand was close to her eye when the shooting occurred, and Dr. Mileusnic-Polchan did not see anything on the victim's hands to suggest the victim had been in a physical fight. She

concluded that the victim's cause of death was the gunshot wound to the head and that the manner of death was homicide.

On cross-examination, Dr. Mileusnic-Polchan testified that the victim's blood was positive for methamphetamine; a small amount of fentanyl; and isotonitazene, a powerful opioid. Defense counsel asked if Dr. Mileusnic-Polchan saw any "old" bruising on the victim's face, and she said no.

At the conclusion of Dr. Mileusnic-Polchan's testimony, the State rested its case. The Defendant did not present any proof, and the jury convicted him of second degree murder, a Class A felony, as a lesser-included offense of first degree premeditated murder. The jury also convicted him as charged in the indictment of tampering with evidence, a Class C felony, and unlawful possession of a handgun by a convicted felon, a Class E felony. After a sentencing hearing, the trial court sentenced him as a Range I, standard offender to twenty-five years for second degree murder, six years for tampering with evidence, and two years for unlawful possession of a handgun by a convicted felon. The trial court ordered that the Defendant serve the six-year sentence consecutively for a total effective sentence of thirty-one years.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his conviction of second degree murder because the proof fails to show that he knowingly killed the victim. He notes that he told the investigators the shooting was an accident and that no eyewitnesses were available to dispute his claim. The State argues that the evidence is sufficient. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court 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 also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses,

the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

Second degree murder is the knowing killing of another. Tenn. Code Ann. § 39-13-210(a)(1). Second degree murder is a result-of-conduct offense. *See State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b).

The Defendant claims that this case is similar to *State v. Parker*, 350 S.W.3d 883, 888 (Tenn. 2011). In *Parker*, the defendant tried to rape the sixty-five-year-old victim in her apartment. 350 S.W.3d at 888. After the incident, the victim went to the hospital for treatment, complained of a headache, and received Tylenol. *Id*. at 891. The next day, a police officer found her deceased in her residence. *Id*. Dr. Mileusnic-Polchan performed the victim's autopsy and concluded that she died of a subdural hematoma that resulted from hitting her head against a hard surface during the defendant's attack. *See id*. at 891-92. The defendant was charged with first degree felony murder, but the jury convicted him of second degree murder. *Id*. at 895. Affirming this court, our supreme court determined that the evidence was insufficient to show the defendant "knowingly" killed the victim because there was no proof in the record that he was aware his treatment of the victim was "'reasonably certain'" to cause her death. *Id*. at 904-05. As examples of where a death may be "reasonably certain," our supreme court noted that there was no proof that the defendant slammed the victim's head onto a hard surface and no proof that simply pushing someone to the floor was reasonably certain to cause a person's death. *Id*. at 905.

The Defendant's reliance on *Parker* is misplaced. Here, the Defendant admitted shooting the victim but claimed he did so accidentally while they struggled over the gun. Taken in the light most favorable to the State, though, the evidence shows that the Defendant initially told witnesses the victim shot herself. He did not seek help for her; moved her to the alleyway; and left her there, still alive and gasping. The Defendant

cleaned his hands of any blood and gunpowder residue, disposed of the gun and the victim's belongings, and told Ms. Norman that "he had already killed one [b*tch] and didn't care to kill another." Finally, there were no marks on the Defendant's or the victim's hands to indicate they struggled over the gun, and the State presented proof that the Defendant physically assaulted the victim just two weeks before the shooting. Therefore, a reasonable jury could have rejected the Defendant's claim that he accidentally shot the victim and could have concluded that he knowingly killed her. Accordingly, the evidence is sufficient to support his conviction of second degree murder.

II. Prior Assault

The Defendant claims that the trial court erred by allowing the jury to hear about his prior assault of the victim because the evidence was not relevant and that, in any event, the minimal probative value of the evidence was outweighed by the danger of unfair prejudice. The State argues that the trial court did not err. We agree with the State.

After opening statements, which are not in the appellate record, the trial court held a bench conference. At the bench, the State argued that defense counsel opened the door to the State's presenting evidence about the Defendant's prior assault of the victim because defense counsel said in her opening statement that the Defendant and the victim were in a "loving relationship" when, in fact, there was evidence that the Defendant routinely beat the victim. The trial court stated that it would hold a jury-out hearing on the issue during the trial.

The trial court held the jury-out hearing after Investigator Terry's testimony. During the hearing, the trial court noted that the Defendant's defense was that the shooting was an accident. The trial court also noted that our supreme court and this court had held that prior violent interactions between a defendant and a victim were relevant to rebut the defendant's claim of accident and to show the defendant's hostility and intent to harm the victim.

The State called Mr. Stevenson to the stand. He testified that about two weeks before the shooting, the Defendant and the victim got into an argument and had a "physical fight." Mr. Stevenson stated, "It got to the point where [the Defendant's] auntie and uncle was trying to hide [her] to get her out of the house." Mr. Stevenson said that the Defendant grabbed the victim by her hair, that the Defendant was trying to get the victim out of his aunt's bedroom, and that the Defendant hit the victim's face one time. He then stated that the Defendant "had hit her prior to that." The State asked Mr. Stevenson to explain, and he responded, "He punched her in her face." The State asked how many times the Defendant hit the victim, and Mr. Stevenson answered, "At that time -- it was, like, twice I seen, but it was an altercation in the bedroom I didn't get to see." Mr. Stevenson said that the victim was bleeding and that he thought she had a black eye. The fight ended because

the Defendant's aunt and uncle were able to get the victim out of the house. Mr. Stevenson identified the Defendant in the courtroom as the man he saw hitting the victim.

On cross-examination, Mr. Stevenson testified that at the time of the assault, he was living with the Defendant's aunt. The victim had been staying there for two or three days. She left the home after the assault, and Mr. Stevenson did not see her again until she returned the Monday before the shooting. Mr. Stevenson did not tell the investigators about the assault because they did not ask him about it. He acknowledged that he used drugs with the Defendant and the victim while he was living in the Defendant's aunt's house. Defense counsel asked if Mr. Stevenson ever used heroin or methamphetamine with the Defendant and the victim, and he answered, "I never used heroin." He said that he smoked marijuana while he was living in the house and that he was "smoking weed" on the day of the assault.

Upon being questioned by the trial court, Mr. Stevenson testified that he was not related to anyone in the house. However, Mr. Stevenson and the Defendant were friends, and the Defendant's aunt was "like a mother" to Mr. Stevenson.

On redirect-examination, Mr. Stevenson testified that about 11:00 p.m. before the shooting, he was in the kitchen cooking a turkey for the family's dogs. The victim came into the kitchen, and she and Mr. Stevenson had a brief conversation. The victim told Mr. Stevenson that the Defendant had been "at her crib, near her apartment." Mr. Stevenson told her to be careful, and she responded, "I am."

After Mr. Stevenson's testimony, the trial court noted that it was the State's burden to show the prior assault was relevant to the State's case. The State asserted that the assault was relevant to show the Defendant's motive and intent to harm the victim at the time of the shooting. Defense counsel countered that the assault was not relevant because it was not close in time to the shooting, Mr. Stevenson did not tell the police about the assault, and there were no witnesses to corroborate his story. Defense counsel also argued that even if the assault was relevant, its probative value was "substantially outweighed" by its prejudicial effect. The trial court stated that it found clear and convincing proof that the assault occurred, that the assault was relevant to rebut the Defendant's claim of mistake or accident and to show his motive and intent, and that the probative value of the assault outweighed any danger of unfair prejudice.

Subsequently, Mr. Stevenson testified about the prior assault in front of the jury. Immediately after his testimony, the trial court instructed the jury that it could only consider the evidence to rebut the Defendant's claim of an accident and to show his motive and intent to kill the victim. The record reflects that the trial court repeated the instruction during the final jury charge.

Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Tenn. R. Evid. 404(a). Similarly, evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). Such evidence may be admitted for other purposes if relevant to some matter actually at issue in the case and if its probative value is not outweighed by the danger of its prejudicial effect. Tenn. R. Evid. 404(b); *State v. Wyrick*, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001). Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts. Before the trial court may permit evidence of a prior crime, wrong, or act, the following procedures must be met:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). Provided that the trial court has complied with these procedures, this court will not overturn the trial court's decision to admit or exclude evidence under Rule 404(b) absent an abuse of discretion. *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997).

In concluding that Mr. Stevenson should be allowed to testify about the Defendant's prior assault of the victim, one of the cases cited by the trial court was *State v. Jarman*, 604 S.W.3d 24 (Tenn. 2020). In that case, the defendant was charged with first degree premeditated murder in the death of his girlfriend.[1] *Jarman*, 604 S.W.3d at 28. The Defendant and the victim were living together at the time of her death, and the defendant claimed that the victim shot herself. *Id*. at 29. The trial court ruled that the defendant's

[1] The jury convicted Jarman of voluntary manslaughter. *Jarman*, 604 S.W.3d at 28.

prior assault of the victim, which occurred eighteen months before her death, was admissible because it was relevant to the issue of his intent to kill her. *Id*. at 33. On appeal to our supreme court, the supreme court noted that "Tennessee courts have recognized a 'line of cases' that stand[s] for the proposition 'that violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim.'" *Id*. at 49 (quoting *State v. Smit*h, 868 S.W.2d 561, 574 (Tenn. 1993)). Moreover, even a single prior act of violence may be relevant to show the defendant's animosity toward the victim or intent to harm the victim. *See id.* Our supreme court held that the trial court properly admitted evidence of the prior assault. *Id.* at 51.

Turning to the present case, we initially note that the Defendant claims we should review this issue de novo. First, the Defendant claims that we should review the issue de novo because Mr. Stevenson did not offer any testimony about the nature or duration of the Defendant's and the victim's relationship, which was necessary to establish a connection between the prior assault and the shooting. Second, the Defendant claims that we should review the issue de novo because Mr. Stevenson's testimony in the jury-out hearing differed from his testimony in front of the jury, which should have altered the trial court's ruling as to whether there was clear and convincing proof of the prior assault. We disagree with the Defendant on both points.

As to the nature or duration of the relationship, the Defendant stated in his police interview, which the State played during Investigator Terry's testimony prior to the Rule 404(b) hearing, that he and the victim had been "[f*cking] around a few months" and that he loved her. Regarding Mr. Stevenson's jury-out testimony differing from his trial testimony, Mr. Stevenson testified in the jury-out hearing that he saw the Defendant grab the victim by her hair and hit her one time. He then said he saw the Defendant punch the victim's face two times, causing bleeding and a black eye. At trial, Mr. Stevenson testified that he saw the Defendant grab the victim's hair, that he saw the Defendant hit the victim's face with his fist two or three times, and that the victim had a black eye and "had blood on her." Additionally, Mr. Stevenson testified both times that the Defendant's aunt and uncle intervened and tried to protect the victim. In our view, Mr. Stevenson's jury-out testimony was substantially similar to his trial testimony. We note that defense counsel never questioned Mr. Stevenson about any inconsistencies between his trial testimony and his jury-out testimony and never requested that the trial court revisit its Rule 404(b) ruling in light of those inconsistencies. *See* Tenn. R. App. P. 36(a). In short, the trial court complied with the procedures of Rule 404(b). Therefore, we review the issue for an abuse of discretion.

Here, as in *Jarman*, the Defendant was charged with first degree premeditated murder; therefore, the burden was on the State to prove the elements of premeditation and intent. *See* Tenn. Code Ann. § 39-13-202(a)(1). Moreover, the Defendant claimed in this case that he accidentally shot the victim. Therefore, the prior assault was relevant to rebut that claim. Finally, the prior assault in this case occurred much closer in time to the victim's death than in *Jarman*, increasing its probative value. Thus, we conclude that the trial court did not abuse its discretion by ruling that the evidence was admissible.

III. Cellular Telephone Video

Next, the Defendant claims that the trial court abused its discretion by admitting Investigator Markham's unauthenticated cellular telephone video into evidence. The State argues that the trial court did not err and that, in any event, the error was harmless. We conclude that the trial court properly admitted the video.

The record reflects that several days before trial, the State made an oral motion to introduce Investigator Markham's cellular telephone video into evidence. At a hearing on the motion, Investigator Markham testified that during his investigation, he learned that the Defendant had disposed of evidence in a dumpster at the Pilot gas station located at the intersection of Middlebrook Pike and Western Avenue. On February 26, 2020, he went to the gas station, and employees allowed him to watch the store's surveillance video that had been recorded between 5:00 and 6:00 a.m. on February 4. The video showed an individual, matching the Defendant's race and the clothing he was wearing at the time of his interview on February 4, "go towards the dumpster area and go towards a trash can and put a bag in a trash can." Investigator Markham saw that the date stamp on the Pilot video was February 4, 2020, and that the time stamp was about 5:20 a.m. While the relevant portion of the Pilot video was playing, Investigator Markham recorded it with his cellular telephone "just as a backup in case we could not get the whole video."

Subsequently, Investigator Markham contacted Pilot Corporate and requested the surveillance video. However, he failed to put the date for the video on his request. By the time he realized his mistake, Pilot had overwritten the video. Therefore, the only video available was the video Investigator Markham recorded on his cellular telephone. Investigator Markham testified that his cellular telephone video captured the time stamp on the Pilot video but not the date stamp.

On cross-examination, Investigator Markham testified that his failure to write the date on his request for the Pilot video "was just complete error on my part." He said that there was no sound on the Pilot video but that a Pilot employee could be heard talking in the background on the cellular telephone video.

Upon being questioned by the trial court, Investigator Markham testified that the employees at the gas station told him that the trash was collected weekly. Therefore, by the time Investigator Markham viewed the surveillance video, whatever items the individual put into the trash can were gone. Investigator Markham said that he was very familiar with the Pilot gas station at the intersection of Middlebrook Pike and Western Avenue and that he was able to determine the surveillance video was recorded at that gas station. After Investigator Markham's testimony, the trial court stated that it would take the matter under advisement.

At trial, Dreama Moore testified about taking the Defendant to the Pilot gas station on the morning of February 4, 2020. After her testimony, the trial court ruled on the State's authentication of Investigator Markham's "video of a video." The trial court found that the State properly authenticated the video pursuant to Tennessee Rule of Evidence 901, explaining,

> We have testimony of a witness with knowledge, that being Investigator Markham. He went to the Pilot, to that specific one, and was assisted by store employees to bring up that video of that date. I find him credible when he says it was February 4th and at the time frame that Ms. Norman just discussed.
>
> The relevance is another issue, too. . . . And there's a black backpack matching the description that we've heard during the trial.
>
> And so I do find that it's relevant.

The trial court found, though, that because Investigator Markham recorded just a very brief portion of the Pilot video, the trial court should give a jury instruction based upon the State's failure to preserve potentially exculpatory evidence as mandated by *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999).

After the trial court's ruling, the State called Investigator Markham back to the stand to testify in front of the jury about his going to the Pilot gas station, watching the surveillance video, and recording the video with his cellular telephone. Investigator Markham identified his cellular telephone video for the jury, and the trial court gave the following *Ferguson* jury instruction:

> The State has a duty to gather, preserve and produce at trial evidence which may possess exculpatory value. Such evidence must be of such a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The State has no duty to gather or

> indefinitely preserve evidence considered by a qualified person to have no exculpatory value so that an, as yet, unknown defendant may later examine the evidence.
>
> If, after considering all the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are an issue, and the production of which would be -- more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.
>
> So that's an inference the law allows you to draw, should you choose to do so. But, at this point, I am going to allow this portion of the video to be admitted as evidence. And you may publish.

The State then played the video for the jury.

Tennessee Rule of Evidence 901 generally governs the authentication of evidence and provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility 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." "Authentication can be properly established by the testimony of a witness with knowledge that the 'matter is what it is claimed to be.'" *State v. Mickens*, 123 S.W.3d 355, 376 (Tenn. Crim. App. 2003) (citing Tenn. R. Evid. 901(b)(1)). Whether evidence has been sufficiently authenticated is within the trial court's sound discretion, and its decision will not be overturned absent an abuse of discretion. *See id*.

The Defendant claims that Investigator Markham could not authenticate his cellular telephone video because he had no personal knowledge of whether the date and time stamps he observed on the Pilot video were correct. However, this court previously has rejected an almost-identical argument, explaining,

> That is not what the rule requires. To be sure, Rule 901 provides that authentication may be made by the testimony of a witness with knowledge that "a matter is what it is claimed to be." Tenn. R. Evid. 901(b)(1). In this case, Investigator Day . . . importantly testified that he reviewed the video surveillance footage and that the video recording being offered into evidence was the same recording. That he could not say with certainty that the video recording actually captured the offense in progress or vouch for the accuracy of the time stamp was irrelevant to the determination whether the recording was properly authenticated under Rule 901; it was enough that Investigator

> Day testified that the recording was what it purported to be, the surveillance video collected on the day of the offense.

State v. Odell Glass, No. E2019-00965-CCA-R3-CD, 2020 WL 3056502, at *9 (Tenn. Crim. App. June 9, 2020).

We acknowledged that this case is distinguishable from *Odell Glass* in that the evidence at issue in *Odell Glass* was the store surveillance video itself, whereas the evidence at issue here is Investigator Markham's video of the store surveillance video. Nevertheless, Ms. Moore told Investigator Markham about taking the Defendant to the Pilot gas station at the intersection of Middlebrook Pike and Western Avenue between 5:20 and 5:30 a.m. on February 4, 2020. Based on her information, Investigator Markham went to that location and requested to see the surveillance video for that specific period of time and that specific date. He testified that the date and time stamped on the Pilot video corresponded to the date and the time provided by Ms. Moore. He also testified that he was familiar with that particular Pilot gas station and that he recognized the gas station's dumpster area in the video. Moreover, Investigator Markham testified that the race of the individual in the Pilot video matched the Defendant's race and that the shoes and pants worn by the individual in the video appeared to match the shoes and pants worn by the Defendant at the time of his police interview. Additionally, the bag being carried by the individual in the video matched the descriptions of the bag given by Ms. Moore and Mr. Stevenson. Finally, Investigator Markham identified the video he recorded with his cellular telephone and indicated that the only differences between his video and the Pilot video were the missing date stamp and the background noise. As a result, we conclude that the trial court did not abuse its discretion by finding that Investigator Markham authenticated his cellular telephone video.

IV. *Brady* Violation

The Defendant claims that the trial court should have granted him a new trial because the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing evidence that Investigator Terry had been the subject of a KPD internal affairs investigation. He also claims that, in the alternative, we should remand the case to the trial court so the court can engage in fact-finding related to this case rather than relying on information presented to the court in a different case. The State argues that the trial court properly denied the Defendant's motion for new trial because the evidence in question was neither favorable nor material. We agree with the State.

The Defendant alleged in his motion for new trial that the State violated *Brady* by failing to turn over evidence that could have been used to impeach Investigator Terry. Specifically, the Defendant alleged that the State withheld evidence showing the KPD was

conducting an internal affairs investigation involving Investigator Terry's dishonesty. At the motion for new trial hearing, defense counsel advised the trial court that after the Defendant's trial, she learned about the internal affairs investigation from another attorney, who provided "information" about the investigation to her. Defense counsel further advised the trial court that the information included an opinion from another trial court judge, who had ruled that the internal affairs investigation was admissible in another trial to impeach Investigator Terry. Defense counsel asserted that, like the other case, she should have been allowed to ask Investigator Terry at the Defendant's trial if Investigator Terry was the subject of an internal affairs investigation and whether he made statements that were inconsistent with the facts of the particular case in which he was being investigated.

The prosecutor responded that he learned about a report involving the internal affairs investigation after the Defendant's trial and that he immediately turned the report over to defense counsel. The prosecutor said that the report found the investigation to be "unfounded."

The trial court noted that the State was presumed to be aware of any information that was in the possession of the KPD. However, the trial court then stated as follows:

> I actually heard this issue in another trial that I did after -- it was well after [the Defendant's trial] whenever, apparently, this came out. And [Investigator Terry] was crossed on that, too. And sort of what [the prosecutor] said is exactly what was said in that hearing. And so it makes -- there's a record before the Court, but it's not in this case, that I'm aware of. And it, basically, said what [the prosecutor] just said was, here's what the accusation was, it was deemed unfounded. And so [Investigator Terry] -- he wasn't reprimanded or anything.

The trial court found that the issue was not grounds for a new trial.

Under *Brady*, the State has a constitutional duty to furnish an accused with exculpatory evidence pertaining to the accused's guilt or innocence or to the potential punishment faced by the accused. 373 U.S. 83, 87 (1963). To that end, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. This duty extends to evidence that may be used by the accused for impeachment purposes. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

In order to establish a *Brady* violation, a defendant must show that: (1) he or she requested the information (unless the evidence is obviously exculpatory, in which case the State is obligated to release such evidence regardless of whether or not it was requested); (2) the State suppressed the information; (3) the information was favorable to the defendant; and (4) the information was material. *State v. Edgin*, 902 S.W.2d 387, 390 (Tenn. 1995). Evidence is favorable if it "'provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.'" *Johnson v. State*, 38 S.W.3d 52, 56-57 (Tenn. 2001) (quoting *Commonwealth v. Ellison*, 379 N.E.2d 560, 571 (Mass. 1978)). Generally, "[e]vidence is deemed to be material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 58 (quoting *Edgin*, 902 S.W.2d at 390).

Whether a defendant is entitled to a new trial based upon a *Brady* violation "presents a mixed question of law and fact." *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004).

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

Id.

Here, the Defendant did not introduce the information or report related to the internal affairs investigation into evidence at the motion for new trial hearing, and the information and report are not in the record on appeal. Moreover, defense counsel did not call Investigator Terry or any other witnesses to testify at the hearing, so we do not know the underlying facts of the internal affairs investigation. Therefore, the Defendant has not shown that the State suppressed favorable or material evidence. The Defendant is not entitled to relief on this issue.

V. Expert Testimony

The Defendant asserts that the trial court committed plain error by allowing Dr. Mileusnic-Polchan to testify about her analysis of the gunshot residue on the victim's body and to testify about her reconstructing the position of the victim's body at the time of the

shooting because such testimony was outside her area of expertise. Related to the latter issue, the Defendant also contends that the trial court erred by allowing the State to introduce into evidence a photograph showing the reconstruction because it was irrelevant and allowed the jury to rely on Dr. Mileusnic-Polchan's speculation that the victim was shot while in a defensive posture. The State argues that the trial court did not commit plain error. We agree with the State.

At trial, Dr. Mileusnic-Polchan testified about her education and experience in the fields of forensic and anatomic pathology. She stated that anatomic pathology involved evaluating underlying disease during an autopsy whereas forensic pathology was

> a subspecialty that concerns with the determination of the cause and manner of death when death is sudden, unexpected, without medical attendance or due to violence. And with the idea of kind of figuring out what really happened, [autopsy is] actually the main tool that we utilize in order to determine the cause or manner of death.

After Dr. Mileusnic-Polchan testified about her qualifications, the State tendered her as an expert in forensic and anatomic pathology.

On direct examination, Dr. Mileusnic-Polchan testified that part of her job as a forensic pathologist was to "collaborate with the law enforcement in order to kind of establish what happened at the scene" so that she could determine a victim's cause and manner of death. She said that she had performed well-over 5,000 autopsies, that a large number of them involved gunshot wounds, and that pathologists regularly determined two main issues: (1) the "direction of the gunshot wound in the body that can be correlated with the relationships at the scene" and (2) the distance of the gunshot from the body. She explained to the jury that soot and gunpowder exited the barrel of the gun with the bullet. The soot dissipated first, followed by the gunpowder, so pathologists looked for gunpowder or soot deposits around a gunshot wound to classify the wound as "contact," "close," or "distant." Dr. Mileusnic-Polchan explained that a close contact wound would be surrounded by soot or gunpowder and that the absence of soot or gunpowder meant the wound was a distant gunshot wound. She then explained as follows:

> So in this particular case, actually, the wound on the finger, not so much on the wound on the -- in the eye, because it was so lacerated and hemorrhagic, full of blood, but the wound on the finger, actually, had a nice kind of cloud of soot and gunpowder deposit around it that was a little bit less than an inch, indicating that the distance between the finger -- the skin on the finger and the muzzle was less than a couple of inches.

Later in her testimony, Dr. Mileusnic-Polchan identified a photograph taken during the victim's autopsy, showing the victim's left hand positioned in front of her right eye. Dr. Mileusnic-Polchan explained the photograph as follows:

> I brought this left hand together to describe or explain why there is a deep graze. And we can see, actually, close-up of this particular wound. There is some soot and gunpowder residue right around here, which would be the closest to the barrel, but not touching -- touching the muzzle. And then that could also lead in toward the eye.

The State asked Dr. Mileusnic-Polchan, "[D]o you have an opinion as to whether or not this is a consistent posture that she was in when she sustained the gunshot wound?" Dr. Mileusnic-Polchan responded,

> That would be consistent. I'm not saying that the hand is necessarily touching the skin, but it's in that particular location. And there is -- because the rigidity sets in, there is only so much we can actually do with the extremities when one is rigid. But, again, it's in this location, kind of in front of the eye. And that would explain the direction of the wound and the closeness to the muzzle, but then the absence of the soot and gunpowder residue directly on the eye.

The admissibility of expert testimony is governed by Rules 702 and 703 of the Tennessee Rules of Evidence. Rule 702 provides: "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702. Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. . . . The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703.

"[Q]uestions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court." *McDaniel v. CSX* Transp.,

Inc., 955 S.W.2d 257, 263 (Tenn. 1997) (citing *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993)). "A trial court should admit the testimony of a competent expert unless the party opposing the expert's testimony shows that it will not substantially assist the trier of fact or if the facts or data on which the opinion is based are not trustworthy pursuant to Rules 702 and 703." *Shipley v. Williams*, 350 S.W.3d 527, 551 (Tenn. 2011). "Generally speaking, the trial court is afforded broad discretion in resolving questions concerning the admissibility of expert testimony; in consequence, we will not overturn its ruling on appeal absent a finding that it abused its discretion." *State v. Ferrell*, 277 S.W.3d 372, 378 (Tenn. 2009).

The Defendant did not object to Dr. Mileusnic-Polchan's testimony at trial. *See* Tenn. R. App. 36(a). Therefore, we can only review the issue for plain error. An issue rises to the level of plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); *see also State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the *Adkisson* test for determining plain error); Tenn. R. App. P. 36(b). Furthermore, the "'plain error' must be of such a great magnitude that it probably changed the outcome of the trial." *Adkisson*, 899 S.W.2d at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)).

We conclude that the trial court did not err. Dr. Mileusnic-Polchan testified about her extensive background as a pathologist, and the trial court found her qualified to testify as an expert in forensic and anatomic pathology. Dr. Mileusnic-Polchan stated that part of her job as a forensic pathologist was to collaborate with law enforcement in order to determine a victim's cause and manner of death. She also testified that pathologists regularly determined the direction of the gunshot wound and the distance of the gunshot from the body, and she explained how the soot around the wound on the victim's finger caused her to conclude that the muzzle of the gun was less than a couple of inches from the victim's finger when the gun was fired. Therefore, her testimony about the soot and gunpowder on the victim's finger and her opinions as to the distance of the muzzle of the gun from the victim and the position of the victim's body at the time of the shooting were within her area of expertise. *See Odell Glass*, No. E2019-00965-CCA-R3-CD, 2020 WL 3056502, at *7 (affirming admission of testimony from Dr. Mileusnic-Polchan about "muzzle-to-target distance when conducting autopsies" and "conclusions in each of the

autopsies she performed on gunshot wound victims," noting that the challenges went to the weight of the evidence, not to its admissibility), *perm. app. denied* (Tenn. Oct. 7, 2020).

As to the photograph in which Dr. Mileusnic-Polchan placed the victim's hand in front of the victim's eye, the photograph was helpful to the jury, showing how the victim's finger could have sustained the grazing wound. Accordingly, the trial court did not err, let alone commit plain error, by allowing the expert evidence. The Defendant is not entitled to relief on this issue.

VI. Cumulative Error

Finally, the Defendant argues that he was denied his right to a fair trial under the cumulative error doctrine. However, because we have concluded that the trial court did not commit any errors, this issue has no merit. *See Mickens*, 123 S.W.3d at 397 ("[S]ince we have determined that the trial court did not err in the rulings raised on appeal, there is no cumulative error for us to consider.").

CONCLUSION

Upon our review, we affirm the judgments of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE