

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 27, 2023 Session

FILED

09/18/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. STACY M. MILLER

**Appeal from the Criminal Court for Meigs County
No. 2019-CR-89A Jeffrey Wicks, Judge**

No. E2022-01040-CCA-R3-CD

The Defendant, Stacy M. Miller, was convicted by a Meigs County Criminal Court jury of three counts of first degree felony murder, criminally negligent homicide, especially aggravated kidnapping, aggravated robbery, and theft of property valued at less than \$1000. *See* T.C.A. §§ 39-13-202(a)(2) (2018) (subsequently amended) (first degree felony murder), 39-13-212 (2018) (criminally negligent homicide), 39-13-305 (2018) (especially aggravated kidnapping), 39-13-402 (2018) (aggravated robbery), 39-14-103 (2018) (theft). The trial court merged the three first degree felony murder convictions and imposed an effective life sentence. On appeal, the Defendant contends that (1) the evidence is insufficient to support her first degree felony murder convictions and (2) the trial court erred in failing to merge the criminally negligent homicide conviction with the first degree felony murder conviction and to merge the theft conviction with the aggravated robbery conviction. We affirm the judgments of the trial court but remand for entry of corrected judgments reflecting the requested mergers of convictions and for correction of the judgment form in Count 6 to reflect the correct conviction offense, aggravated robbery.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed,
Case Remanded for Entry of Corrected Judgments**

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Sheridan C.F. Randolph, Cleveland, Tennessee, for the appellant, Stacy M. Miller.

Herbert Slatery III, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Russell Johnson, District Attorney General; W. Jed Bassett and Robert C. Edwards, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant's convictions relate to the homicide of her ex-husband, Roger Miller. The Defendant and codefendant Clifford "Rocky" Howard were charged with the offenses after children on a school bus spotted the victim's bound, lifeless body on the side of a road on May 15, 2019. A plastic bag and a box were found near the body. A shipping label affixed to the box was addressed to an individual who was later identified as the victim's employer. The codefendant and another man were arrested for unrelated charges while traveling in the victim's SUV on May 15. The Defendant's wallet, identification, and money were inside the SUV, and the Defendant admitted in a pretrial interview that she had driven the victim's SUV with the victim and the codefendant inside on the night of May 14. The Defendant also stated that the codefendant had assaulted the victim in her home earlier on May 14 and that the victim had been bound and badly injured but alive when she drove him and the codefendant in the SUV. The Defendant claimed that she had been in the SUV against her will and that when the codefendant eventually released her, the victim was alive and inside the SUV.

The Defendant's and the codefendant's cases were severed for trial. At the Defendant's trial, Ashley Struthers, a teacher and school bus driver, testified that around 7:20 a.m. on May 15, 2019, students on her bus noticed a body and reported the sighting to her. She said she saw the body and called 9-1-1. She identified the cell phone video of the scene made by one of the students and an audio recording of the 9-1-1 call, which were received as exhibits and played for the jury.

Decatur Police Detective Brandon Crisp testified that he responded to the scene where the victim's body had been discovered, which he described as a grassy embankment off the side of a gravel road. Detective Crisp said the body appeared to have been dragged through the grass to its final location. Detective Crisp identified a video recording made by Tennessee Bureau of Investigation (TBI) Special Agent Luke Webb, and the recording was received as an exhibit and played for the jury. Detective Crisp said a plastic bag labeled to contain rope and a cardboard box with a shipping label addressed to a person later determined to be the victim's employer were recovered near the body.

Detective Crisp testified that he and Agent Webb spoke with Timothy Dixon, who viewed photographs of the victim's body and identified the victim as his employee. Detective Crisp said Mr. Dixon provided the victim's sister's name, Reba Radford, and that Ms. Radford confirmed the victim's identity from photographs of the body.

Detective Crisp testified that, after learning that the Defendant was the victim's ex-wife, he and Agent Webb went to the Defendant's home around 7:00 p.m. on May 15,

2019. He said two other officers spoke to the Defendant's son¹ at the home while he and Agent Webb spoke to the Defendant. Detective Crisp identified a video recording of his and Agent Webb's interview of the Defendant, and the recording was received as an exhibit and played for the jury.

The recording of the Defendant's May 15, 2019 interview reflects the following: The Defendant had learned from the codefendant's mother that the codefendant had been arrested and jailed in Monroe County. The Defendant last saw the codefendant on May 14 a couple of hours before sundown. She said that when he left her home, he was "going to go over to his mom's and his brother's." She had been married twice to the victim, and the relationship had involved domestic abuse. She had heard from the victim on May 14 through "texting only," and he had wanted to "come by" her home. She and her son, Jacob, did not want the victim on the property because he had "busted out the window" of her car the last time he had been there. She professed no knowledge of any events in Meigs County earlier on May 15. When asked about the relationship between the victim and the codefendant, she described it as, "None, that I know of." She added, "I wouldn't want them to be around each other." When informed that the victim had been found dead, the Defendant was silent initially and then said, "How?" and later denied any prior knowledge that he was dead. She permitted the officers to view the text messages on her cell phone. She said the messages on her cell phone were all the messages she had. She said she and the victim had "fought hard and loved hard" but that they had both moved on from their relationship with each other. She did not know who would want to hurt the victim or if the codefendant had a reason to hurt the victim. When told that the police thought the Defendant had information she was not revealing about the victim's killing, the Defendant said she had not known the victim and the codefendant to have a friendship and asked, "What do you mean?" She said that she knew the codefendant could be violent but that she did not know "he did it." When questioned further and advised that the police thought she knew more than she had revealed, the Defendant stated, "I know it to be possible," based upon the things the codefendant "ha[d] done in the past."

Upon further questioning in the recorded statement taken by Detective Crisp and Agent Webb, the Defendant stated that the victim had been supposed to come to her house on the evening of May 14, 2019. She continued to deny any knowledge of the circumstances of the victim's killing or of any involvement of the codefendant. She said she did not know the location of the victim's SUV. One of the officers stated that the codefendant's Monroe County arrest had been for charges of aggravated robbery, driving on a revoked license, and drug possession. She said the codefendant had not been violent toward her and had not threatened her. She described the codefendant as "agitated" when he left her house on May 14. She said she, the codefendant, and Jacob shared a single cell

¹ The record reflects that the Defendant had two sons, and other evidence showed that the son to whom the officers spoke was Jacob Bogle.

phone. The Defendant expressed her reservations about speaking with the authorities, and Agent Webb assured her that TBI files were confidential and that he would not tell another witness what she had said. She hoped the codefendant would call her that evening and that she would be able to “clear everything up.” When asked if she were trying to protect the codefendant, she said, “Not really.” She did not know that the codefendant killed the victim but, based upon “things [the codefendant] has done in his past,” her instincts told her that he had. The Defendant said she was not afraid of the codefendant but was afraid of others with whom he was “affiliated.” She later disclosed that the codefendant was a member of the Crips street gang.

Detective Crisp testified that when he and Agent Webb went to the Defendant’s house, the Defendant and the codefendant were suspects in the victim’s killing. Detective Crisp said they had been unaware when they went to the Defendant’s house that the codefendant was in custody. Detective Crisp said he and Agent Webb left after receiving information that the victim’s SUV had been used in a robbery in Monroe County and that the codefendant had been in the SUV and had been arrested. Detective Crisp said he and Agent Webb went to the Monroe County Sheriff’s Department to interview the codefendant but that they were unable to do so after they were advised by jail staff that the codefendant was “heavily under the influence.” Detective Crisp said he and Agent Webb interviewed Joseph Burgess, who was the codefendant’s brother and who was arrested with the Defendant after they were found in the victim’s SUV. Detective Crisp identified the following items found in the victim’s SUV: the Defendant’s wallet, which contained her State-issued identification card, a credit card bearing her name, cash, and a black handgun. Photographs of the items were received as an exhibit.

In the interview, the Defendant said that the codefendant left her house on foot on May 14, 2019, but she then said he went “nowhere.” The codefendant told the Defendant that he was going to see his mother and brother but did not. The codefendant did not know that she would be speaking to the victim in order to resolve issues about alimony. The codefendant “wasn’t supposed to be here.” When asked what happened next, the Defendant said she did not want to talk about it but then said the codefendant had a gun, but she was unsure if it was a “real gun.” Agent Webb said the victim had not been shot in the back of the head, which the Defendant had said earlier in the interview that she had heard. She said she had deleted text messages between herself and the victim because the codefendant used her cell phone. She acknowledged that the victim had come to her house at 7:30 or 8:00 p.m. on May 14. After the victim arrived, she was walking through the house when she heard a noise and discovered that the codefendant was still at her house. The Defendant said the codefendant hid in a dark area when the victim first arrived and that she had not realized the codefendant was there. The codefendant stated that he had seen the victim smirk when the victim hugged the Defendant. The codefendant “nudged” her when the three of them were together in her house, and the victim had a “hateful look in his eyes.” She said the codefendant asked the victim, “Did you disrespect my b----?”

She heard the victim “hit the floor” but that she did not know how it happened. She asked the codefendant what he was doing and urged him to let the victim leave. The codefendant stated that the victim had hurt her, and she responded that the victim had not hurt her in a long time. The codefendant told her to go to another room, and she heard sounds that she later connected with a broken television. She continued to question the codefendant about why he was hurting the victim, and the codefendant threatened to kill her if she did not go into the bedroom. When she came out of the bedroom, she shook the victim and asked if he was okay. She knew the victim was alive because he was breathing. The codefendant put the victim in the victim’s SUV, which was the only car at her house that night, and told her that he was going to kill the victim. The codefendant “made” her help load the victim into the car, but she also said she was physically unable to help. She said the codefendant had bound the victim’s hands behind the victim’s back with rope. She asked the victim if he “was alright,” and the victim responded, “No.” She said the codefendant physically pulled her out of the house and yelled at her to assist him in loading the victim in the SUV. She said the codefendant yelled at her to move the SUV, which she did. She was afraid of the codefendant because of “what he had done in prison.” The codefendant instructed her to drive, and she complied. They “ended up in Decatur,” where she stopped at a Marathon gas station at the codefendant’s instruction. The codefendant paid for gas for the SUV. She said the codefendant had a gun throughout the trip. She described the route she drove, and she said they stopped. The codefendant instructed her to drive back to her house, and she did. She said the victim was still in the SUV. She said the codefendant would not let her get out of the car but that he got into the driver’s seat. She said that he drove away from her home, that she was in the backseat, and that the victim was in the back, breathing and struggling against his restraints.

In the interview, the Defendant said she, the codefendant, and the victim returned to her house a second time. She said that the codefendant wanted to leave her there but that she wanted to go with the codefendant to prevent him from harming the victim. She said the codefendant left with the victim in the SUV. She said repeatedly that she did not know what the codefendant had done with the victim.

When Agent Webb asked in the interview if blood was in the Defendant’s house, the Defendant stated that Jacob had said a “spot of something” had been in the kitchen floor. The Defendant said that the officers could go inside and that she would show them where the victim had lain on the kitchen floor. The Defendant and the officers went inside, and Agent Webb asked Jacob, who was inside, about the spot. Jacob said it had looked like blood and identified other spots in the kitchen. Jacob said that the Defendant told him “a little bit about it” and that she had stated to Jacob that she had been scared of the codefendant. The Defendant did not know where the codefendant obtained rope but allowed the officers to search her home.

Christopher Lockmiller, M.D., an expert in forensic pathology, testified that he conducted the autopsy of the victim's body. He said the victim had been found face-down on the ground with his hands and legs "hog-tied" behind his back. Dr. Lockmiller said the victim had bruising, swelling, and lacerations on his face. Dr. Lockmiller noted ligature marks on the left hand and wrist. Dr. Lockmiller said that if the injuries had been inflicted at the location where the body was found, he would expect blood to be present at the scene.

Dr. Lockmiller said that although the victim showed lung changes consistent with being a smoker, the victim was in good health and that the facial injuries alone were insufficient to have caused death. Dr. Lockmiller said the victim's toxicology report showed the presence of marijuana, marijuana metabolite, methamphetamine, and amphetamine. In Dr. Lockmiller's opinion, neither the presence of drugs nor the manner in which the victim had been hog-tied caused nor contributed to his death. Dr. Lockmiller identified photographs of the victim's injuries, which were received as exhibits.

Dr. Lockmiller said the victim's manner of death was homicide. Regarding the cause of death, Dr. Lockmiller stated that his office had received a report that the victim had been gagged. Dr. Lockmiller agreed that if a sock containing human saliva and blood with a DNA type consistent with that of the victim were received as evidence, this would be consistent with the victim's having suffocated from a gag in his mouth. The autopsy report, which was received as an exhibit, stated that the cause of death was "asphyxia due to airway obstruction by gag." The report stated, "It is unclear as to whether [the victim] died at the scene of incident or during transport." Dr. Lockmiller acknowledged that his report stated no evidence of petechial hemorrhaging existed. He explained that petechiae were small bleeds under the skin which were sometimes present in asphyxial deaths, as from hanging or strangulation. He acknowledged that he had not examined a sock related to this case.

Detective Crisp was recalled and identified photographs of the interior and exterior of the Defendant's home. Detective Crisp testified that the Defendant had requested that he and Agent Webb return to her home after she discovered that an airsoft pistol was missing from its box. Detective Crisp identified a photograph of the airsoft pistol box. The photographs were received as exhibits.

Referring to a photograph from inside the home, Detective Crisp indicated the area where the Defendant had stated the codefendant assaulted the victim, which appears to be in a kitchen. Referring to another photograph, Detective Crisp indicated the area where the victim's SUV had been parked and the area to which the Defendant had moved the SUV in order for the Defendant and the codefendant to load the victim into the SUV.

Regarding the Defendant's statement that she had driven the codefendant and the victim to a Marathon gas station, Detective Crisp testified that security footage from the

Marathon station and the nearby courthouse corroborated the Defendant's account. Detective Crisp said that after the Defendant stated she had deleted text messages between herself and the victim, Agent Webb obtained a search warrant for cell phone records. Agent Webb read the text messages, in which the Defendant asked the victim to come to her house on the evening of May 14, 2019. In a message, the Defendant assured the victim that she was alone; the victim inquired about the Defendant's boyfriend; and the Defendant responded that she no longer had a boyfriend. She asked the victim to bring a "joint" and said she needed company. She later asked him to bring firewood and a pizza.

Agent Webb testified that the police obtained the video surveillance footage from the Marathon gas station the Defendant had mentioned in her second statement, the Meigs County courthouse, and a water treatment plant. Agent Webb acknowledged he had not seen two sets of footprints at the scene where the victim's body was found.

Detective Crisp testified that he did not see a sock at the scene where the victim's body was found. He agreed that, during her second interview, the Defendant agreed to a search of her home and that "Jason"² helped "find stains that may have been blood."

Timothy Dixon testified that he had been friends with the victim for over thirty years, whom he also employed as a truck driver and general laborer. Mr. Dixon recalled that on May 15, 2019, he spoke to Agent Webb and Detective Crisp about the box with Mr. Dixon's name found near the victim's body. Mr. Dixon said he recognized the box as one the victim had used the previous day to hold screws. Mr. Dixon said he identified the victim in photographs Agent Webb and Detective Crisp showed him.

Mr. Dixon testified that the victim had been a dependable and trustworthy person. Mr. Dixon said he had known the victim during the victim's marriages to the Defendant. Mr. Dixon said that the Defendant had worked for him and that the Defendant and the victim had an amicable relationship.

An employee of Verizon Wireless identified a disc containing records obtained by the TBI pursuant to a subpoena. She said the records contained evidence related to calls, text messages, and location data for a specified cell phone number.

TBI Special Agent Luke Webb testified that, at about 7:30 a.m. on May 15, 2019, he responded to the scene where the body was discovered. He said he collected a plastic bag "that we determined the rope [used to bind the victim] could have come from" based upon the bag's markings. He said he also collected a cardboard box marked with Mr. Dixon's name, which contained a screw. The bag and box were received as exhibits. Agent

² Other evidence showed that this person was Jacob Bogel, the Defendant's son.

Webb said the victim's body showed "obvious injuries" and that the victim's hands and feet were tied behind the body. Agent Webb said the victim's injuries included lacerations, a "split" eye, and signs of "force applied to" the hands. Agent Webb said that the victim's pants pockets had been "turned out" and that no personal belongings, such as a wallet or cell phone, were found on the body. Agent Webb said the body was collected and transported for an autopsy. Agent Webb identified the victim's clothing items and boots, which were received as exhibits. He requested a forensic examination of the shirt, which contained stains the medical examiner thought might be blood, but not of the other items. Agent Webb identified the rope that had been with the victim's body, and the rope was received as an exhibit. Agent Webb identified a belt that had been around the victim's wrists and boots, and the belt was received as an exhibit. He said the belt was used to restrain the victim's hands and that the rope was used to restrain the victim's hands and feet. Agent Webb said the victim's fingernail clippings were collected as evidence, and they were received as an exhibit.

Agent Webb testified that he and Detective Crisp ended the Defendant's first interview when they received notification that the victim's SUV had been found in Monroe County and that the codefendant had been arrested. He said that when they arrived, Monroe County authorities had already processed the SUV for the offenses for which the codefendant and the codefendant's brother had been arrested and that he and Detective Crisp photographed the SUV and "took some of the items." He said they sealed the SUV with evidence tape and had it towed for further processing at the TBI laboratory. He recalled that the TBI agents who processed the SUV found a sock and a sleeping bag with biological stains. Agent Webb identified swabs used to collect biological evidence from the victim's SUV, from a reddish-brown stain on the road near a specified address which other evidence showed was the Defendant's home, and from inside the Defendant's house. The swabs were received as exhibits or for identification. Agent Webb said the codefendant's DNA sample was collected with a swab and sent to the TBI laboratory for analysis, and the sample was received as an exhibit. Agent Webb said the victim's cell phone was not found at the scene or in the victim's SUV.

Agent Webb testified that the Verizon Wireless cell phone records previously received as an exhibit were from the victim's cell phone. Referring to the records, Agent Webb stated that he recognized the Defendant's cell phone number as one which was listed as having exchanged messages with the victim's cell phone. Agent Webb identified an exhibit containing text messages exchanged between the Defendant's and the victim's cell phones, and the exhibit was received as an exhibit. Agent Webb said the victim's cell phone, false teeth, identification, and wallet were never located.

TBI Special Agent Forensic Scientist Jillian Welker, an expert in forensic biology, testified that she participated in the forensic examination of the victim's SUV. She said the items collected from the SUV included a sleeping bag and socks. She said the sleeping

bag contained the victim's DNA. She said a belt buckle she examined contained DNA from at least three individuals, with at least one of them being male. She said examination of the victim's fingernail clippings did not reveal the DNA of any person other than the victim. She said the sample collected from a stain in the Defendant's kitchen was human blood and contained the victim's DNA. She said socks from the SUV contained blood and saliva. She said she identified the victim's DNA from the blood stain and the blood on the socks.

Jenie Diamond, a former Marathon gas station employee, testified that she was at work at Marathon on May 14, 2019, around 10:00 p.m. She said a man with tattoos and a sleeveless shirt came into the store, looked around, and gave her "a bad vibe." She said that two customers in the store said they knew the man and that one of the other customers said the man "was no good." Video surveillance footage from inside the store was played, and Ms. Diamond identified the codefendant as the man with the tattoos. She said that the man had tossed money onto the counter and stated he needed gas and that she had looked outside and seen an SUV that "was like a Jimmy" or a "Jeep Cherokee" with a woman in the driver's seat. Additional video footage from outside the store was played which showed the codefendant entering and leaving the store. Ms. Diamond said nothing prevented the woman in the driver's seat of the SUV from driving away while the codefendant was inside the store.

Meigs County Chief Deputy Brian Malone testified that the Marathon gas station referred to in previous testimony was a one-minute drive from the Decatur Police Department and a three-minute drive from the Meigs County Sheriff's Office. He identified a video surveillance recording from the sheriff's department for May 14, 2019 around 10:00 p.m. The recording was received as an exhibit and played for the jury. Deputy Malone said the recording showed a truck towing a large camper pull into the area between the SUV and the store, obstructing view of the SUV from inside the store.

Jacob Bogle, the Defendant's twenty-three-year-old son, testified that he lived with the Defendant when the events in this case occurred and had visited her once or twice before changing his cell phone number because he no longer wanted contact with her. He said he had been staying with his grandparents on May 14 and 15, 2019, and that he saw blood in the kitchen when he returned to the Defendant's house. He said that he thought "the dogs might have got into something" and that he cleaned the blood. He said that after police came to the house with information that the victim was dead, he showed them the location where the blood had been, as well as a spot he had missed when he cleaned.

Mr. Bogle testified that he owned a couple of airsoft pistols at the time, and referring to photographs, he identified the box in which they had come and one of the pistols. He said that when he heard about the victim's death, he checked the box and saw that one pistol was missing. He said he notified the TBI agent who was at the Defendant's home.

Mr. Bogle testified that he asked the Defendant “about what happened” but that he had not understood half of what she had said because she was upset and crying. Mr. Bogle did not recall when the codefendant had moved into the Defendant’s home but estimated it was about three months before the victim’s homicide.

Mr. Bogle testified that the victim called the Defendant’s cell phone on Valentine’s Day 2019. Mr. Bogle said that he answered the call and that the victim wanted to leave something the victim would not identify at the mailbox for the Defendant. Mr. Bogle identified the items as flowers, candy, a card, and a stuffed animal.

Decatur Police Chief Monty Rowland testified that on May 21, 2019, he and other officers went to the Defendant’s home to arrest her for the victim’s murder. He said the Defendant “became a little hysterical,” asked to go to the restroom, and attempted to flee on foot but was apprehended at the end of a road near her home.

At the end of the State’s case-in-chief, the trial court granted the Defendant’s motion for judgment of acquittal for the offense of especially aggravated robbery, based upon the failure of the State to show that the Defendant used a deadly weapon during the commission of a robbery. Thus, the court held that the greatest offense of which the jury could consider the Defendant’s guilt would be aggravated robbery.

The Defendant elected not to present evidence. After deliberations, the jury found the Defendant guilty of criminally negligent homicide as a lesser-included offense of first degree premeditated murder, first degree felony murder committed during the perpetration of aggravated robbery, first degree felony murder committed during the perpetration of especially aggravated kidnapping, first degree felony murder committed during the perpetration of theft, especially aggravated kidnapping, and aggravated robbery. The trial court imposed life sentences for the first degree felony murder convictions and later merged those convictions and imposed sentences of two years for criminally negligent homicide, twenty years for especially aggravated kidnapping, ten years for aggravated robbery, and eleven months and twenty-nine days for theft. The court imposed all of the sentences to be served concurrently, for an effective life sentence. This appeal followed.

I

Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support her first degree felony murder convictions. She argues that the State failed to establish the Defendant’s

guilt beyond a reasonable doubt of the underlying offenses of aggravated robbery,³ especially aggravated kidnapping, and theft because the evidence fails to show that she provided any substantial assistance to the codefendant in committing the underlying offenses. The State responds that the evidence is sufficient. We agree with the State.

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

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

“The identity of the perpetrator is an essential element of any crime.” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Circumstantial evidence alone may be sufficient to establish the perpetrator’s identity. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The identity of the perpetrator is a question of fact for the jury to determine. *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005). “The jury decides the weight to be given to circumstantial evidence, and ‘[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt[.]’” *Rice*, 184 S.W.3d at 662 (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)).

³ The Defendant argues that the State failed to prove her guilt of felony murder in the perpetration of especially aggravated robbery. The record reflects, however, that after the trial court granted the Defendant’s motion for judgment of acquittal of especially aggravated robbery, the jury found the Defendant guilty of first degree felony murder in Count 2 and of aggravated robbery in Count 6. Our analysis of the relevant first degree felony murder conviction will focus on the sufficiency of the evidence for the offense of first degree felony murder in the perpetration of robbery, the offense proscribed by the first degree murder statute. As we will address later in this opinion, the judgment form for Count 6 erroneously reflects a conviction for especially aggravated robbery, which must be corrected upon remand.

As relevant to the Defendant’s appeal, first degree felony murder is “[a] killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery, . . . theft, [or] kidnapping[.]” T.C.A. § 39-13-202(a)(2) (2018) (subsequently amended).

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

...

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

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

A. First Degree Felony Murder in the Perpetration of a Kidnapping

Although the jury found that the Defendant was guilty of especially aggravated kidnapping and first degree felony murder in the perpetration of especially aggravated kidnapping, the felony murder statute only requires that the killing occur in the course of a kidnapping. *See* T.C.A. § 39-13-202(a)(2). Our analysis will focus on the Defendant’s guilt of felony murder in the perpetration of kidnapping.

“Kidnapping is false imprisonment as defined in § 39-13-302, under circumstances exposing the other person to substantial risk of bodily injury.” *Id.* § 39-13-303 (2018). False imprisonment occurs when a person “knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.” *Id.* § 39-13-202 (2018).

Viewed in the light most favorable to the State, the evidence shows that the Defendant lured the victim to her home with repeated text messages about wanting to visit with him and falsely assured him that she was no longer dating the codefendant, who lay in hiding at the Defendant’s home awaiting the victim’s arrival. Although the Defendant claimed in her statements that she had been unaware of the codefendant’s presence, the jury was able to evaluate the credibility of this evidence and weigh it against the other evidence of the Defendant’s involvement in the crimes. Once the victim was inside the home, the codefendant assaulted and hog-tied the victim. The Defendant pulled up the victim’s SUV, and helped the codefendant load the victim into the back. Circumstantial evidence showed that the victim was gagged with a sock or socks while confined in the

SUV. The Defendant drove, following the codefendant's instructions about where to go. The victim lay restrained and helpless in the back of the SUV with the Defendant at the wheel. Although the Defendant claimed in her second pretrial statement that the codefendant forced her to participate in the confinement and removal of the injured victim, the jury was able to assess the credibility of the statement and weigh it with the other evidence pointing to her guilt. In this regard, a gas station employee testified that the Defendant remained in the driver's seat of the parked SUV at a gas station while the codefendant was inside paying for gas. The Defendant did not attempt to free the victim or to drive away while the codefendant was inside the station. Despite the Defendant's claim that the codefendant later took her home and then left in the victim's SUV with the victim still inside, the Defendant did not call or leave on foot to seek help for the victim, notwithstanding her earlier participation in and knowledge of the continuing peril he faced from the codefendant, whom the Defendant had witnessed violently assault and restrain the victim. Likewise, the Defendant was untruthful when initially confronted by the authorities and feigned ignorance of the victim's death and its cause. Although she claimed she had been afraid of the codefendant and had participated out of fear, she gave conflicting statements about her alleged fear of him and also stated that he had not threatened her. From this evidence, a rational jury could conclude beyond a reasonable doubt that after the Defendant lured the victim to her home and the codefendant beat the victim, the Defendant and the codefendant knowingly removed and confined the bound, injured, and gagged victim in the back of his SUV against his will in circumstances which posed a substantial risk of bodily injury to him. The evidence shows, as well, that the victim's death was consistent with asphyxia from his having been gagged, and socks containing human saliva and the victim's blood and DNA were found in the SUV. Although the Defendant quibbles with the proof regarding whether the victim died from asphyxia based upon the absence of a notation of petechiae in the autopsy report, the State presented sufficient evidence that the victim's cause of death was from asphyxia and that it occurred during the commission of the kidnapping. A rational jury could conclude that the victim died while inside the SUV, that is, in the perpetration of the kidnapping. This court may not reweigh the evidence. *Bland*, 958 S.W.2d at 659; see *Sheffield*, 676 S.W.2d at 547. The Defendant's argument that the proof failed to show she was still with the codefendant and the victim at the time of the victim's death is, likewise, unavailing. The evidence is sufficient to show that the victim died during the course of a kidnapping and that the Defendant was a criminal participant in the kidnapping.

We also conclude that a rational jury could conclude beyond a reasonable doubt that the Defendant was criminally responsible for the offense. The evidence supports a conclusion that without regard to whether the Defendant was aware that the codefendant lay in wait for the victim, once the codefendant began his assault of the victim, the Defendant followed the codefendant's directions to assist in transporting the bound and injured victim from the Defendant's home. The Defendant took control of the victim's SUV by pulling it up for the victim to be loaded into and by driving it where the

codefendant directed. She remained with the SUV and the bound and injured victim, even when the codefendant was inside a gas station, despite this opportunity to drive away, assist the victim in escaping, or summon help. Even if the jury accepted the Defendant's claim that the codefendant left her at home while he drove away with the victim still inside the SUV, the Defendant did nothing to alert the authorities and concealed the crime and her involvement, even after she was aware the codefendant was jailed and unable to harm her, and the victim died during the criminal episode. From this evidence, the jury could conclude that the Defendant "knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission." *Dorantes*, 331 S.W.3d at 386; *see Maxey*, 898 S.W.2d at 757.

The evidence is sufficient to support the Defendant's conviction for first degree felony murder in the perpetration of a kidnapping.

B. First Degree Felony Murder in the Perpetration of a Theft

The Defendant was convicted of first degree felony murder in the perpetration of the theft of the victim's SUV. "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103(a) (2018).

Viewed in the light most favorable to the State, the evidence shows that the Defendant moved the victim's SUV in order for the codefendant to load the victim into it. The victim then drove the SUV with the bound and injured victim inside. She followed the codefendant's instructions about where to drive and later surrendered the driver's seat to him and continued to ride in the SUV as a passenger. The codefendant was later found in possession of the victim's SUV in another county. Even if the jury accepted the Defendant's claim that the codefendant took her home and left with the victim and the SUV, the Defendant did nothing to report the theft of the SUV and initially denied any knowledge of the relevant events when questioned by the police. From this evidence, a rational jury could conclude beyond a reasonable doubt that the Defendant had the intent to deprive the victim of his SUV. Alternatively, a rational jury could conclude beyond a reasonable doubt that the Defendant was criminally responsible for the offense because she knowingly and voluntarily shared in the codefendant's intent to commit a theft and provided substantial assistance in the commission of the theft, during which the victim's death occurred.

The evidence is sufficient to support the Defendant's conviction for first degree felony murder in the perpetration of a theft.

C. First Degree Felony Murder in the Perpetration of a Robbery

Although the jury found that the Defendant was guilty of aggravated robbery and first degree felony murder in the perpetration of aggravated robbery, the felony murder statute only requires that the killing occur in the course of a robbery. *See* T.C.A. § 39-13-202(a)(2). Our analysis will focus on the Defendant's guilt of felony murder in the perpetration of robbery. "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." *Id.* § 39-13-401(a) (2018).

Viewed in the light most favorable to the State, the evidence shows that the Defendant and the codefendant committed the theft of the victim's SUV in circumstances which also constituted a robbery. The victim was assaulted, bound, and gagged. He died from asphyxiation from the gag. The circumstantial evidence showed that he died while inside the SUV, that is, during the course of the robbery. From this evidence, a rational jury could conclude beyond a reasonable doubt that the Defendant was guilty of first degree felony murder in the perpetration of an aggravated robbery, whether as a principal actor or via a theory of criminal responsibility for the codefendant's conduct.

The Defendant is not entitled to relief on this basis.

II

Merger of Offenses

The Defendant contends that the trial court erred in failing to merge the criminally negligent homicide conviction with the first degree felony murder conviction and failing to merge the theft conviction with the aggravated robbery conviction, points which the State concedes. We agree.

The Defendant was convicted of four homicide offenses for the victim's death: three counts of first degree felony murder and one count of criminally negligent homicide. The court merged the felony murder convictions in Counts 2 and 4 with the felony murder conviction in Count 3 other but did not merge the criminally negligent homicide conviction in Count 1 with Count 3. Because the convictions involved the death of one victim and represented alternative theories of guilt for the same offense, the convictions should have been merged. *See State v. Price*, 46 S.W.3d 785, 824 (Tenn. Crim. App. 2000).

Turning to the theft and aggravated robbery convictions, we note that theft is a lesser-included offense of aggravated robbery. *See State v. Hayes*, 7 S.W.3d 52, 55-56 (Tenn. Crim. App. 1999). Indeed, theft is an element of the offense of robbery. T.C.A. § 39-13-401(a). If the elements of one offense are included within the elements of another and if both arise from the same transaction, "[W]e will presume that multiple convictions

are not intended by the General Assembly and that multiple convictions violate double jeopardy.” *State v. Watkins*, 362 S.W.3d 530, 557 (Tenn. 2012).

The Defendant is entitled to merger of the criminally negligent homicide conviction with the first degree felony murder conviction, and she is entitled to merger of the theft conviction with the aggravated robbery conviction.

Additionally, we note that the judgment form for Count 6 reflects a conviction of especially aggravated robbery. The record reflects that the trial court granted the Defendant’s motion for judgment of acquittal on this offense and that the jury returned a verdict of guilt of the lesser-included offense of aggravated robbery. The judgment in Count 6 contains a clerical error and should be corrected on remand.

In consideration of the foregoing and the record as a whole, the judgments are affirmed. The case is remanded for entry of corrected judgment forms to reflect merger of the criminally negligent homicide conviction in Count 1 with the first degree felony murder conviction in Count 3; and of the theft conviction in Count 7 with the aggravated robbery conviction in Count 6. The case is also remanded for correction of the judgment form in Count 6 to reflect the correct conviction offense, aggravated robbery.

ROBERT H. MONTGOMERY, JR., JUDGE