IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2023 Session

STATE OF TENNESSEE v. EMANUEL KIDEGA SAMSON

Appeal from the Criminal Court for Davidson County
No. 2018-A-523 Cheryl A. Blackburn, Judge

No. M2022-00148-CCA-R3-CD

Defendant, Emanuel Kidega Samson, was convicted of three counts of civil rights intimidation, one count of first-degree premeditated murder, seven counts of attempted first-degree murder, seven counts of employing a firearm during the commission of a dangerous felony, twenty-four counts of aggravated assault, and one count of reckless endangerment. He received a sentence of life without the possibility of parole for his first-degree murder conviction. The trial court imposed an effective sentence of 281 years for the remaining convictions to be served consecutively to the life sentence. On appeal, Defendant argues that the trial court improperly excluded expert testimony as to his mental health; that the evidence was insufficient to support his convictions for civil rights intimidation, attempted first-degree premeditated murder, and first-degree premeditated murder; that his conviction for civil rights intimidation in Count 3 of the indictment and his convictions for employing a firearm during the commission of a dangerous felony violated double jeopardy; that the State failed to make an election of offenses as to his convictions for civil rights intimidation; that the trial court erred by admitting a note he wrote; that the trial court erred by admitting a portion of the recordings of his jail phone calls; that the trial court incorrectly charged the jury that his failure to remember the facts of the offenses was not a defense; and that his sentence was improper. Following our review of the entire record, oral argument, 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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Manuel B. Russ (at motion for new trial and on appeal); and Jennifer Thompson; and Joseph Duffy Cassidy (at trial), for the appellant, Emanuel Kidega[1] Samson.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; Roger Moore, Deputy District Attorney General; and Megan King and Amy Hunter, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

This case arises from Defendant's shooting spree at the Burnette Chapel Church of Christ ("Burnette Chapel") after worship service had concluded on the morning of September 24, 2017. Defendant shot and killed Melanie Crow in the parking lot near her car. He shot and injured Linda Bush, Catherine Dickerson, Marlene Jenkins, William Jenkins, Joey Spann, and Peggy Spann, and he injured Caleb Engle by hitting him on the head multiple times with a gun. Defendant also caused many other congregants to fear for their lives and the lives of their children as he fired numerous shots both outside and inside of the church building. The Davidson County Grand Jury indicted Defendant for three counts of civil rights intimidation (Counts 1-3), first-degree premeditated murder (Count 4), seven counts of attempted first-degree murder (Counts 5, 7, 9, 11, 13, 15, and 17), seven counts of employing a firearm during the commission of a dangerous felony (Counts 6, 8, 10, 12, 14, 16, and 18), twenty-four counts of aggravated assault (Counts 19-42), and one count of reckless endangerment (Count 43).

Pretrial Hearing – Mental Health Expert

Dr. Stephen Montgomery, a forensic psychiatrist and Assistant Professor of Clinical Psychiatry at Vanderbilt University Medical Center ("VUMC"), interviewed Defendant on September 7, 2018, for approximately "two point nine hours." He also received records such as "[p]olice reports; crime scene photographs; witness statements; arrest warrants; other investigative materials; interviews performed by investigators, or family members, and other persons; as well as, [Defendant's] school records; mental health treatment records; hospital records; and, treatment that [Defendant] has received in detention."

Dr. Montgomery noted that Defendant's medical records reflected that he was seen by his primary care doctor on April 11, 2014, and complained that he felt "stressed out."

[1] We note that Defendant's middle name is spelled Kidega in the indictments and in the court filings. However, at trial, Defendant testified that it was spelled Kidga, For consistency, we will use the spelling contained in the indictments and court filings.

Defendant's doctor diagnosed him with "Bipolar II disorder, most recent episodes major-depressive," and prescribed Olanzapine, the generic for Zyprexa, an anti-psychotic and mood-stabilizing medication. It was also recommended that Defendant follow up with a psychiatrist. Dr. Montgomery testified that Defendant returned to the same doctor three weeks later on April 30, 2014, and reported that he was doing well with the medication, that he was feeling better and his symptoms were better, that he was sleeping well, and that he was having "less thoughts." Dr. Montgomery testified that Defendant was not suicidal or homicidal, and the doctor doubled the dose of Olanzapine "from five milligrams to ten milligrams, which is a pretty moderate dose of that medication." Defendant was instructed to return if his symptoms worsened. There were no further treatment records from that doctor.

Dr. Montgomery explained the diagnosis of Bipolar II meant that Defendant's "symptoms of mania don't last a full week, or are not severe enough to cause the person to need hospitalization; or, typically, not having psychotic symptoms." He noted that Bipolar II also causes depressive episodes. Dr. Montgomery testified that Olanzapine is used to treat psychotic individuals who are hallucinating or delusional. He said that it is also used as a mood stabilizer "to stabilize people that are [in] manic states, or mixed states" and as an augmenting agent for depression. He said, "So, somebody would not give that medication by itself, but would add it to an antidepressant." Dr. Montgomery further testified that in Defendant's case, "[i]f that's the only medication they're giving, they're using it to stabilize mood."

Dr. Montgomery testified that Defendant's father had arranged for Defendant to see a primary care doctor, but his father left sometime after that and "tried to return to live in Africa for some period; and, [Defendant] didn't have the support of his father to help him, you know, go to visits, and pay for things, and, have [insurance] coverage."

Dr. Montgomery testified that Defendant saw a therapist on June 27, 2014. Defendant reported having a temper and that he was seeking counseling that was "precipitated by a spiritual awakening." He told the therapist that he had been having issues for the past one and a half years. Dr. Montgomery testified:

> The therapist's notes were not very detailed. They were, sort of, generic and vague. Stressors were listed as "cultural" and "previous relationship." Mental status examination was recorded as normal. Risk assessment for suicide, violence, child abuse, partner abuse were all recorded as none. And the diagnosis was listed as "relationship distress with spouse or intimate partner."

Dr. Montgomery testified that the therapist's records did not indicate that he reviewed Defendant's medical records from the primary care doctor. He said that the therapist's notes were "brief and very, sort of, vague and summary."

Dr. Montgomery testified that Defendant's mental health providers from the jail documented their evaluation of Defendant and his care after his arrest. The records indicated that Defendant was initially placed on suicide watch, which was gradually reduced "over the first several weeks, for a few months." Defendant reported that he had chronic depression, thoughts of suicide, mood swings, chronic insomnia, distractibility, rapid speech, racing thoughts, increased energy, decreased need for sleep, social isolation, visual hallucinations of shadows, and auditory hallucination of voices saying negative things to him. He said that he had difficulty sleeping from the time he was a young child and usually slept only three or four hours each night. Defendant reported that he was both physically and verbally abused by his parents, and "felt like he internalized some of the things they told him, about him being worthless, or them not wanting to have - - being upset when his mom was pregnant because he was not planned." Defendant said that he ingested "bath salts" in 2015 and had used cannabis "on and off." He reported that he last used cannabis the morning of the offenses. Defendant was initially not interested in being prescribed any medication at the jail.

Dr. Montgomery testified that some of Defendant's reported symptoms would "fit with bipolar disorder, being symptoms of mania." After Defendant's second mental health visit at the jail, the mental health providers at the jail documented "strong evidence of mania psychosis because he had a grandiose sense of self, rapid and pressured speech." Dr. Montgomery described pressured speech as "pressure to keep talking, even when there would be a normal lapse." Dr. Montgomery testified that the mental health providers at the jail thought Defendant had "possible signs of cognitive impairment because he seemed to be completely disconnected from the reality of a situation, because he was presenting with a euphoric and elevated mood concerning his legal case, although he claimed to be aware of why he was incarcerated." They diagnosed Defendant with "bipolar disorder, current episode manic without psychotic features, and started him on Lithium." Dr. Montgomery noted that the amount of Lithium was a "fairly low dose."

Dr. Montgomery testified that after approximately nine days on Lithium, Defendant showed "markedly decreased rapid and pressured speech." Defendant was also calmer and reported that his thoughts were "slowing down in a good way." The level of Lithium in Defendant's blood was checked, and it was on the "lower end of the therapeutic range." Dr. Montgomery testified that Defendant reported visual and tactile hallucinations in August of 2018, which Defendant attributed to "spiritual phenomenon that is consistent from beliefs from his African culture about shadow people." Dr. Montgomery said the mental health provider at the jail considered that Defendant could have had an episode of sleep paralysis; however, the doctor prescribed Defendant Olanzapine to "treat the psychotic symptoms. And that is not typically what you would do if you just thought it was sleep paralysis." Dr. Montgomery noted that by that time, Defendant was taking a higher dose of Lithium, and he was also taking a high dose of Hydroxyzine, which is an antihistamine and anti-anxiety medication.

Concerning Defendant's family background, Dr. Montgomery noted that Defendant was born in Sudan, and his family later fled to Egypt and then moved to Nashville. Defendant reported that his mother and father separated soon after arriving in Tennessee and that he lived mostly with his mother until he was fourteen and a half, and then he lived with his father until his father "attempted" to go live in Africa. He said that his father was overbearing, and he did not have much freedom growing up. Defendant described his mother as emotional and unpredictable, and she "believed in the cultural belief of shadow people walking around the home." Defendant said that his father also believed in "shadow people" but did not talk as much about it as Defendant's mother. Defendant reported that his mother was verbally abusive telling him that she wished he was never born and that she regretted having him. He thought that his mother might have had a psychiatric condition because she was irritable and abusive, and she may have been prescribed antidepressants. Some of Defendant's other siblings had also been diagnosed with bipolar disorder.

Dr. Montgomery testified that Defendant felt it was very difficult growing up because he was much older than his half-siblings, and he had to "raise" them. Defendant said that he was not allowed to go outside or have friends over, and his father would not let him do anything like go to the movies or go to someone else's house. Defendant reported memories of himself and his family running from other tribes in Uganda and some individuals being shot. He had been told stories of his maternal grandmother, brother, and other relatives being burned to death by rebels in Uganda. Defendant said that his mother was rejected by her family because she became pregnant "between the ages of seventeen and eighteen."

Defendant's records indicated that at one time, abuse had been reported to the Department of Children's Services ("DCS"). DCS interviewed Defendant and a school counselor but were unsuccessful in visiting Defendant's home or speaking to his parents. Dr. Montgomery felt that this "very negatively" affected Defendant's mental health because no one helped him after he reported the abuse and his situation did not change. Dr. Montgomery reviewed interview records of Defendant's older sister who reported that their parents fought all the time and that their father was physically abusive to their mother. Defendant's sister said that their father would administer beatings to the children with a belt, and their mother gave more severe beatings using various objects. She said their mother was also verbally abusive to Defendant "talking down to him, saying mean and hurtful things, regretting ever having him, wishing he was never born." Defendant's sister also thought that their mother was mentally ill.

Dr. Montgomery explained that Defendant had several "adverse childhood experiences," referred to as the "ACE scale." He further testified:

> It's a way of measuring negative things in the child's environment and development. And they have studied these items, and shown

> that the more adverse experiences a child has, the greater risk for a variety of negative health outcomes, both with physical and mental health.
>
> And so, in his case, he had several of these events, experiencing emotional and physical abuse. The report of his mother being treated violently, mental illness in the household, emotional neglect, and parental separation or divorce.

Dr. Montgomery explained that a person with this type of adverse experience is "going to have different wiring of their brain pathways" and may be "more prone to be numb to violence, to be hyper-vigilant, to be impulsive, to have greater risk for suicidal or violent behavior toward others."

Dr. Montgomery found six ACE factors that were applicable to Defendant: physical abuse, emotional abuse, his mother having been treated violently, mental illness in the household, emotional neglect, and parental separation and divorce. He noted that six is a high number, and in original studies on ACEs, only nine percent of males experienced four or more ACE factors. Dr. Montgomery acknowledged that Defendant maintained employment as an adult. He stated that there was a police report which indicated that Defendant had threatened to kill himself on June 26, 2017. Dr. Montgomery observed that Defendant was well-groomed and cooperative during his interview with him. He was "not loud or pressured with his speech," and he reported a stable mood. Dr. Montgomery testified:

> [Defendant] was able to give a logical response to most of my questions. And he did describe some delusions of grandeur, as I mentioned earlier. Feeling he was royalty, or a special person. Some delusional beliefs about ability to predict the future, or influence people telepathically.
>
> Described some delusions of persecution. Feeling that society was targeting non-followers, and that his cell phone had been hacked. And some beliefs in shadow people and shadow magic, and that some people could use these forces to harm other[s]. That he had experienced chronic auditory, and deprecatory hallucinations; basically, voices saying negative things to him, telling him to kill himself. At times it seemed like his own conscious, but not all of the time. And visual hallucinations of creatures.
>
> He did not appear to be pausing mid-speech or be distracted by active hallucinations during the examination.

> I thought both judgment and insight had been impaired in the past. But I thought he was alert and oriented, and could do fairly well on some basic tests of cognitive functioning.

Dr. Montgomery testified that Defendant's MRI was "somewhat incomplete" because Defendant became claustrophobic and could not complete the procedure. However, Dr. Montgomery spoke with the radiologist who "felt like the major findings would not have been impacted by doing the full study." He noted that there were no signs of brain tumors, strokes, or "any kind of traumatic brain injury that would cause significant clinical problems."

Dr. Montgomery noted that around the time of the offenses in this case, Defendant was "hearing voices telling him to kill himself, as he had for a long time." Dr. Montgomery did not recall if Defendant was having visual hallucinations. Sometime later in February after Defendant was incarcerated, he reported seeing someone in his cell. Dr. Montgomery thought Defendant was delusional at times, but it was hard for him to say "exactly when [Defendant] was delusional about what." Dr. Montgomery testified that he and Defendant discussed Defendant's belief in numerology as well as Defendant's belief that he could control people through telepathy. Defendant also felt at times that he was able to see into the future and predict things that were going to happen. When asked if that was a symptom of psychotic or schizoaffective disorder, Dr. Montgomery replied:

> It can be. Some people, in normal society, believe in certain things. They believe in numerology, or predicting the future. It, really, depends on the degree and how much the person believes in it, and how much it affects their behavior.

Dr. Montgomery agreed that certain cultural beliefs such as the belief in shadow people can disguise mental health issues.

Dr. Montgomery concluded, based on his evaluation of Defendant and a review of all of Defendant's prior records and other evaluations, that Defendant had schizoaffective disorder bipolar type. He agreed that Defendant was suffering from a severe mental disease. Dr. Montgomery testified that Defendant "clearly has had depression with chronic suicidal ideation, as well as evidence of manic episodes." He said that Defendant also has post-traumatic stress disorder ("PTSD") with dissociative symptoms, "due to the variety of abusive and adverse traumas that he has experienced. And has had a cannabis use disorder when he is not in jail or detention." Dr. Montgomery further testified:

> That [Defendant] had a very difficult traumatic childhood. That he came from a very violent environment where there was lots of violence going on. That when he came to the United States his parents separated. And, then, there was a lot of verbal, physical

> abuse, emotional neglect. That due to, probably, those experiences he was at greater risk for developing mental illness himself, and problematic behaviors.
>
> It, probably, affected his brain development. It affected his ability to understand his own emotions, understand how to mediate and control anger. He, probably, became more emotionally numb and desensitized to the violence.
>
> And these are consistent with studies that they do of, similar children having been exposed to these type of events; that because of these traumatic events, he did develop multiple mental disorders. Post traumatic stress, as well as the schizoaffective disorder.
>
> The situation was only exacerbated by exposure to cannabis during teenage years; which, again, can, maybe, precipitate these conditions.
>
> He was not provided with appropriate treatment. The State did not intervene effectively enough to stop the abuse or neglect. He was not able to get very sufficient mental health care. He only had one counseling visit, and two visits with a doctor for medication, that I'm aware of.
> So, he continued to have the symptoms of his mental illness. And he was experiencing those up until the time of the instant offenses.

According to Dr. Montgomery, Defendant most likely was experiencing "disassociation symptoms" at the time of the offenses in this case, which was consistent with Defendant's history. He said that Defendant was most likely hearing voices and having auditory hallucinations telling him to kill himself. Dr. Montgomery concluded that Defendant's capacity to conform his conduct to the requirements of law was substantially impaired by his mental disease. However, Dr. Montgomery testified that there was not enough evidence for him to conclude that Defendant lacked the capacity to form intent. He further testified:

> Typically when people have delusional beliefs, that he talked about, about at times feeling that he was a famous person, or that people were persecuting him, or that he had telepathic powers, typically, people who have those kind of beliefs will have them consistently. So, it's not as if they only have them on one day and they don't have them the next day.
>
> So he, probably, was operating - - still harboring some of these delusional beliefs, at the time. I just didn't have enough evidence to

> give a definitive opinion about whether or not his hallucinations, delusions, mental state at that time was directly impacting his capacity to appreciate the wrongfulness of his actions.

Dr. Montgomery agreed that it did not appear that Defendant was exercising good judgment, "based on his actions."

On cross-examination, Dr. Montgomery admitted that he did not conduct any psychological testing on Defendant, and he was unaware of any other psychological testing performed on Defendant. He knew that Defendant had attended the church where the offenses occurred, and he was unaware of any animosity toward Defendant by any members of the church. Dr. Montgomery agreed that his report stated that "[t]here is insufficient evidence to conclude that [Defendant's] mental disease prevented him from appreciating the nature, or wrongfulness, of his alleged actions;" that there is "[i]nsufficient evidence to conclude that [Defendant's] severe mental disease rendered him incapable of knowing or premeditated actions;" that Defendant's "capacity to exercise judgment and reflection, prior to acting, does seem to have been compromised by his severe mental illness; and, while his judgment was most likely impaired, it is not possible to definitely opine that he lacked total capacity for premeditation;" and "[d]espite [Defendant's] severe mental diseases he appreciated the wrongfulness and nature of his alleged actions." Dr. Montgomery agreed that he could not support an insanity defense under current Tennessee law.

The trial court made lengthy findings in denying Defendant's motion to permit expert testimony by Dr. Montgomery and concluded:

> In the Court's view, Dr. Montgomery's testimony in this case is similar to that presented in cases such as *Faulkner*, *Williamson*, *Wilson*, and others cited above. The experts in those cases testified that the respective defendants' abilities to form the requisite mental state was "affected" or "impaired" – some more seriously than others – but because the experts ultimately did not testify that the defendant at issue was completely unable to form the requisite mental state, the appellate court in each case concluded such testimony was not admissible under the *Hall* standard. This Court reaches the same conclusion here. Certainly Dr. Montgomery would be able to testify as a mitigation witness should a penalty phase be necessary, but his testimony does not meet the prerequisites established in *Hall* and therefore cannot be offered during the guilt phase to advance the argument that the defendant, due to mental disease or defect, was unable to form the requisite mental states for the alleged offenses.

The trial court also rejected Defendant's argument that Dr. Montgomery's testimony should have been admissible because Defendant suffers from a mental disease rather than a "personality trait, a mental state, or mental condition." The trial court noted that *Hall* and the cases that followed "make it clear that a finding that the defendant was suffering from a mental disease or defect at the time of the offense is not sufficient; the testimony about the mental disease or defect will not be admitted if the proof does not establish the defendant was *unable* to form the requisite mental state." (Emphasis in original); *see State v. Hall*, 958 S.W.2d 679, 689-91 (Tenn. 1997).

Finally, the trial court concluded that the exclusion of Dr. Montgomery's testimony did not deny Defendant's right to present a defense. Specifically, the trial court stated:

> [T]his Court relies on an opinion of the Court of Criminal Appeals in which the appeals court concluded, The *Hall/Faulkner* test was designed to ensure that the testimony regarding a defendant's mental state is relevant to negate the existence of the requisite mental state. Thus, the test necessarily takes into consideration the concerns embodied by a defendant's due process rights to present a defense. *Anthony Poole*, 2009 WL 1025868, at *11. This Court also notes, as relevant to this issue and the issue regarding Defendant's concern that *Hall* creates too high a standard for expert testimony admissibility, the Court of Criminal Appeals in *Lesergio Duran Wilson* expressed concerns over excluding testimony such as that of Dr. Montgomery in this case, but the appellate court noted that as in all cases before this court, we are bound to follow existing precedent. *Lesergio Duran Wilson*, 2015 WL 5170970, at *9. Because the appellate courts have not concluded that any of the arguments raised by Mr. Wilson entitle him to relief, so, too, must this Court rule that Defendant is not entitled to present Dr. Montgomery's testimony during the guilt/innocence phase.

(Internal citations omitted).

Trial

State's Proof

On the morning of September 24, 2017, Defendant drove to Burnette Chapel and parked near the entrance as worship service concluded. Defendant had attended services there approximately three or four years earlier with his cousins and helped with Vacation Bible School by teaching the children. Defendant left his vehicle running and got out armed with a .40 caliber Smith and Wesson pistol. He also had a fully loaded .9-millimeter pistol, multiple magazines of ammunition, and a knife in a tactical vest he was wearing.

He was wearing a leather jacket and a shirt that depicted human targets. Defendant left a non-functional pistol, additional ammunition and a semiautomatic rifle in the running vehicle, and he disguised himself with a mask and sunglasses.

As he walked toward the church, Defendant encountered Melanie Crow who was in the parking lot[2] walking to her car, and he shot her three times in the torso and once in the face causing her death. Defendant continued walking toward the church, and shot William Jenkins and his wife Marlene Jenkins, as they were leaving to walk to their car. Mr. Jenkins, who was using a walker that day, was struck three times in the legs and fell against the door frame as he attempted to run back inside the church. He slid down to the concrete unable to move his legs. Defendant shot Ms. Jenkins in the left arm as she ran toward Mr. Jenkins. Ms. Jenkins fell backward and then pushed herself "back against the wall of the inside of the church[.]" She was bleeding and all of her "tendons and everything was hanging down[.]" Ms. Jenkins thought that her husband was dead and that Defendant would kill her as well.

Barbara Davis heard "popping sounds" as she walked outside the church. She turned toward the sounds and saw Defendant dressed in black, wearing sunglasses, and holding a gun. She said that Defendant was "coming towards the door" and appeared to be "almost like in a run. The gun was pointed down." Ms. Davis looked to the left and saw Mr. and Ms. Jenkins fall as they were shot. She was afraid for her life and turned around and ran back inside the church.

Catherine Dickerson had been standing outside of the church talking to Alecia Leach, who had pulled around in her car to pick up her mother, Joyce Leach, when Defendant appeared and pointed his gun at the trunk of Alecia's car. Ms. Dickerson told Alecia that Defendant had a gun and that she should run. Alecia saw Defendant pointing the gun straight ahead, and "it looked like he was advancing [down the sidewalk] in slow motion. She described his movement as "deliberate." Alecia fell to the ground and maneuvered to the front of her car because she did not want to give Defendant a "head shot." Ms. Dickerson ran into the church, and Defendant shot her in the leg as she entered the building. Ms. Dickerson fell down, crawled to the foyer, and laid down under the water fountain next to the wall, with her purse covering her face. She hoped that if Defendant walked inside the church, he would think that she was dead. Ms. Dickerson heard additional shots before Defendant walked into the building, and "shots all over the place" once he got inside.

Alecia got into her car that was still running and drove away. She saw a woman and her daughter who had pulled into a nearby neighborhood and she pleaded with them to call 911. At that point, Alecia thought that she was the only one who had escaped the

[2] Due to several witnesses having the same last name, some of the witnesses will be referred to by their first name. We intend no disrespect.

church and that her mother was likely dead. Alecia eventually drove back to the church and was able to locate her mother outside the church under a tree.

Peggy Spann was standing outside of the church and saw Defendant holding a gun with both hands, and "he had it trained down toward the ground or parking lot." She warned her husband, Joey Spann, who was also minister for Burnette Chapel, of the shooter. Defendant shot Ms. Spann as she tried to get back inside the church building.

Wilma Crow began walking out with Melanie, her niece, after worship service, and Wilma stopped to talk with Minerva Rosa-Gonzalez while Melanie walked out the door. Wilma heard gunshots and saw Ms. Spann run through the door, and the glass shattered. Ms. Spann fell, and someone yelled that there was a shooter. Wilma ran back through the church beside the pulpit, and "cut through to the left and went through the kitchen." She was afraid that Defendant would shoot her. Wilma saw Mr. Spann's grandson, David Joseph Morales, standing in the kitchen holding the door open. They both ran out of the building into the parking lot and then to a house next door and hid behind a shed. Wilma told Mr. Morales to call 911. Wilma and Mr. Morales returned to the church after police arrived, and Tammy Luker's two daughters led her to where Melanie lay deceased in the parking lot.

Joey Spann had proceeded to the back of the church auditorium after worship service, as was his usual practice, to greet and shake hands with members as they left the church. He had spoken to Melanie as she left the building. Mr. Spann stepped into the vestibule to speak with others when he heard the gunshots. Mr. Spann walked outside, looked around, and saw Defendant walking quickly up the sidewalk wearing a mask and holding a gun. Mr. Spann walked back through the vestibule door and yelled for everyone to run. Linda Bush, who had been talking to Mr. Spann, was shot in the back of the leg as she attempted to run away and fell face first "half in the door and half out." She pretended to be dead, and Defendant stepped over her. Defendant continued shooting, and Mr. Spann picked up a wooden prayer box and threw it at Defendant as Defendant came inside the church and turned the corner. However, the box "just bounced off of him."

Defendant was ten feet or less away from Mr. Spann when he opened fire striking Mr. Spann once in the chest and once in the finger, nearly severing his finger. Two shots struck the women's restroom. Mr. Spann fell across the vestibule onto the floor. He eventually pushed himself up against the wall and thought that he was going to die. His finger was "dangling off" and covered in blood. Defendant stepped over Mr. Spann as Defendant proceeded to the church auditorium.

Peggy Pope had left the church building and was getting into her car when she heard gunshots that she initially thought were firecrackers. As she pulled around to the front of the church, she saw someone lying in the doorway of the church "halfway in and halfway

out." Ms. Pope pulled to the next driveway and saw Melanie's body lying in the parking lot. It was then that Ms. Pope realized that there had been a shooting, and she was afraid.

Ms. Davis, who had gone back inside the building, described the scene as follows:

> The preacher was already shot. Everybody in the foyer was laying down, blood everywhere. I'm looking, I trip over my best friend [Ms. Bush], I stumble; and then I turn again because that person, to me was running kind of like, to me, or run a good gait. And I turn again, and I look right into this white smile[3] like. It's just right here in my face. And then I get knocked down on my left knee. And I catch myself, and I looked up, and I is [sic] see black boots going down the aisle.

Ms. Davis got up and heard additional gunshots. She saw two young African American women sitting in the back of the church that Defendant passed over with the gun, and he began shooting at two other women who were running down the right side of the church. Ms. Davis laid down on the floor behind a pew and heard Defendant "pulling the gun back to reload." She was terrified.

Mary Pitts and Linda Stafford ran inside the women's restroom when they heard the gunshots, and Ms. Pitts locked the door. Defendant began firing shots into the walls and door of the restroom. Ms. Pitts got down in a stall and put her head in her lap and held her Bible to the side of her head hoping it would protect her if one of the bullets penetrated the stall. Ms. Stafford stood in the last stall and called 911.

Joyce Leach, who was using a walker that day, was sitting in the auditorium waiting for people to clear the area before she left. She heard gunshots and Mr. Spann "say something like 'he's coming' or 'get down' or something like that[.]" Joyce then got down on the floor, rolled underneath a pew, and "curled up in a little knot." At that point, she feared she would be shot. She heard additional shots getting closer and closer.

David Pope and another church member hid under the two rear pews after he heard gunshots and heard someone say "either run, hide, or get down or something." He was afraid that he would be injured by one of the gunshots.

Po Lin Lam and her young child also took cover behind a pew when the shootings began, and she was afraid. She described Defendant as "trying to find someone to shoot, someone that he can easily target to shoot."

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[3] The mask that Defendant was wearing was described as looking like the "Joker" from "Batman" movies.

Armilla Bishop attempted to run to the front of the church when she heard gunshots but was knocked down. She crawled under the front pew and heard "the gunshots getting closer and closer." Ms. Bishop saw Defendant's shoes as he walked down the aisle and up to the baptistry door and stopped. She described the scene as follows:

> As he was standing at the front of the church, he had a gun out firing towards the back of the church. Then, all of a sudden, a clip was ejected, a magazine was ejected, and it landed on the floor by the pews, another one was put in. And then, as I'm laying there, I thought, he kind of brought the gun down just a little bit, so I thought maybe he had seen me. But then he brought it back up and started firing at the back of the church again.

Muriel Luker was unable to run away with everyone else and took cover under a pew when the shootings began; she feared being shot. Alyria Bishop Pryor got underneath the pew in front of her. Muriel saw Defendant shoot to the left and the right with his gun pointed straight ahead. She and Ms. Pryor remained under the pews until the shootings stopped. At that point, Ms. Pryor began screaming.

Minerva Rosa-Gonzalez also took cover near a pew and called 911. She was concerned for her five-year-old son's safety because he was in the children's class, and she "thought that [Defendant] was going to the other area where the kids were."

Sandra Reed was walking toward the foyer and began running in a "zigzag" and "slid up some pews" to the nursery area door when she heard the gunshots and glass breaking. Another church member (Eric) opened the door, and Ms. Reed ran in behind him to a hallway that led outside. Ms. Reed and Eric ran to some school buses in the parking lot, and she called 911 but was placed on hold. She then climbed over a fence injuring her leg and ran to a nearby house. She asked a man there to call 911 because she was still on hold.

Jimmy Merritt knelt down, put his arm upon a pew, and said a prayer when he heard the gunshots. He thought that he was going to die, and he was worried about the safety of the other congregants.

Brenda Enderson, Rhonda Langford, Tammy Luker, Michelle Dey, and Ms. Dey's teenage daughter all ran to the men's baptistry when they heard the gunshots and barricaded the door with a heavy podium. Ms. Enderson "purposely" did not look at Defendant as she ran because she was afraid that he was going to shoot her. Ms. Langford was also afraid that Defendant was going to shoot her in the back as she ran. Ms. Enderson hid behind a curtain once in the baptistry so that Defendant could not see the light from her cell phone as she called 911. Ms. Dey's daughter was crying hysterically, and Ms. Dey attempted to shield her from the gunshots. Ms. Dey did not know the whereabouts of her ten-year-old-

son at the time of the shootings. After the gunfire stopped, she found him safe in the nursery area. She thought that six other children were present with him. The children were scared, and her son was crying. Tammy was prepared to be shot in the chest or stomach because Defendant knew that they were in the baptistry. She described Defendant as the "bogeyman walking down the aisle coming to get you, and you have nowhere to go." Tammy further described Defendant's behavior as "deliberate[ly] shooting people."

Danny Carter, the treasurer for Burnette Chapel, had walked up to the Communion table after worship service to collect the contributions when he heard gunshots outside the building. He immediately walked to the back of the church to stop his wife and the young children who were participating in youth worship from coming out of the classroom. Mr. Carter then saw a gentleman who had difficulty hearing, so he ran to the back of the auditorium to get the gentleman down on the floor. As soon as the man got down on the floor, Defendant entered through the auditorium doors. Mr. Carter was kneeling down at the time but still visible above the pews. Defendant turned and looked at him but continued walking. Defendant then discharged his weapon twice into the aisle floor. Mr. Carter initially thought Defendant was going to take the contributions that were still lying on the table but Defendant instead turned toward the right.

Bailey Engle took cover under a pew when she heard Mr. Spann announce that Defendant had a gun. She heard Defendant fire two shots through the middle of the sanctuary. Bailey noted that one shot was followed by the sound of glass shattering, and the second shot was followed by someone falling to the ground. James Engle, Bailey's father-in-law, dropped to the floor next to Bailey and began crawling toward the back doors. He planned to jump Defendant from behind. However, James saw Defendant running to the front of the church near the men's baptistry. Defendant's arm was raised, and he fired two shots. James then ducked down, lost track of Defendant, and then heard another gunshot. He described Defendant as "aiming from the waist down."

Caleb Engle, Bailey's husband and James' son, initially ducked down between the first and second pews when the shootings began. He looked up and saw Defendant circle around the front of the building and begin walking up the main aisle back toward the vestibule. Caleb testified:

> As soon as he had passed me going up the main aisle, I had got up and started following right behind him. As soon as I was a[n] arms[-]length away, I remember reaching down and trying to grab his firearm, and ended up grabbing his leather jacket and ripping it around the cuff. He had then turned around and pistol-whipped me. I can recall between three to five times on the top of my head.
>
> After he had pistol-whipped me, this was towards the vestibule now, I had dropped down to my knees and scurried into the right side of

> the pews and hid in between there. From there, he had, his back was towards the vestibule, and he had walked all the way back towards the pulpit. And I was peeking up from between the two pews, and that is whenever I'd seen him coming back towards the vestibule again. And I had stood up in front of him and he extended his arm. And the only thing I can remember is I just shoved my left arm out in front of him. And then I heard a gunshot. And we had stood there for what seemed like an eternity. I looked down at myself and I looked up at him, and then he fell down to the floor.

Caleb then shouted, "the shooter is down, is everyone ok[?]" People began emerging from hiding, and James walked up and kicked the gun away from Defendant's hand and asked Ms. Davis, who had emerged from behind a pew, to stand on the gun until police arrived. Caleb walked outside to his truck and retrieved his own handgun and walked back inside the building. He placed his foot on the small of Defendant's back and held him at gunpoint until the first police officer arrived. Caleb had blood dripping from his head and face from where he had been hit with the gun by Defendant.

Mr. Carter further described the altercation between Defendant and Caleb. He said that Caleb suddenly appeared, and Defendant pointed the gun at Caleb, "pulled the trigger and it went click." Mr. Carter testified that Caleb rushed toward Defendant, and Defendant hit Caleb on the head with the gun. The two began scuffling, Defendant broke loose, and Caleb chased him up the aisle and caught up to him. The two men began scuffling again. Defendant hit Caleb on the head with the gun a second time, and Caleb slumped to his knees. Mr. Carter testified that Defendant ran to the front of the church and reloaded his gun with a new magazine clip. Defendant walked back to Caleb and hit him a third time with the gun on the top of his head. Mr. Carter said that as Defendant's hand was coming down, the gun discharged, and Defendant fell.

Sergeant Geoffrey Odom of the Metropolitan Nashville Police Department ("MNPD") was the first officer to arrive on the scene. As he was driving toward the entrance to the church, he saw a woman near the entrance to a subdivision being comforted. She told him that "they're killing people." The woman did not know how many assailants there were or the type of guns being used. Sergeant Odom proceeded to the church and saw people both outside and inside of the vestibule area that were down on the ground bleeding, and various church members were attending to them.

Sergeant Odom drew his weapon and entered the vestibule. He saw several wounded individuals lying on the floor. Some of them reached for him and asked for help as he stepped over them looking for the shooter or shooters. Sergeant Odom walked into the church sanctuary and saw Caleb pointing a pistol at Defendant who was lying on the floor. He initially thought that Caleb was the shooter, until he was informed that Defendant, who was lying motionless and covered in blood, was the actual assailant. He

also saw that Defendant was wearing a neoprene mask "that looked like the Joker from Batman" and a "tactical style vest" with cargo pants. Caleb told him that Defendant had shot himself, and Sergeant Odom thought that Defendant was dead. Out of an abundance of caution, Sergeant Odom handcuffed Defendant and removed the pistol that was in a "cross-draw holster" on the front of the tactical vest. He noted that there was a second pistol used by Defendant lying on the floor in the vestibule.

Church members began attending to those who were wounded, and other police officers and emergency personnel arrived on the scene and began treating the wounded, evacuating the church, and securing the scene, including the parking lot where Melanie Crow lay deceased. It was then discovered that Defendant was still breathing. Defendant's blue Nissan Xterra was parked near the entrance to the church with the motor still running. There were rifle and pistol cases inside the vehicle.

Officer Blake Lutz of the MNPD testified that he was the second officer to arrive on the scene, and he began assisting Sergeant Odom with clearing the church. He noted that there were several young children in the nursery screaming and crying when he opened the door.

Courtney Bouchie, a crime scene investigator with the MNPD, arrived at the scene after the shootings. From the front passenger floorboard of Defendant's Nissan Xterra, she recovered a Citadel 1911 .22 caliber pistol with no magazine that was missing a spring. The gun was inoperable without the spring; however, there was a loose spring on the floor and a gun cleaning kit on the front passenger seat of the vehicle. Investigator Bouchie also recovered a DPMS A-15 semiautomatic rifle from the back of Defendant's vehicle.

Investigator Bouchie "collected various projectiles from bullet defects, multiple cartridge cases, three pistols, various clothing and other items" from inside the church. The pistols she collected included a Smith and Wesson SD40 semiautomatic pistol with a magazine clip containing eleven cartridges and a Ruger SRC9 .9-millimeter pistol with a magazine clip containing thirteen cartridges located on the left rear pew of the church. There was also a .45 caliber pistol, loaded with nine cartridges, collected from the same pew. Investigator Bouchie recovered sunglasses, a black leather jacket, and a tactical vest containing a Chapel magazine clip loaded with ten Federal .22 caliber cartridges. She noted that Chapel is the manufacturer for the Citadel pistol found in Defendant's vehicle. The tactical vest also contained other magazine clips loaded with cartridges, and an empty Smith and Wesson magazine clip was recovered from the right front corner of the church.

Investigator Bouchie collected Defendant's T-shirt which had an illustration with three human body targets and read: "Just Another Day" and "FLECTC," which is an acronym for the Federal Law Enforcement Training Center in Glynco, Georgia. The shirt was bloody and had a "bullet defect" in the armpit area. Defendant's wallet and a "double-edged knife with an approximate five-inch blade and sheath" were lying on the left rear

pew next to the two pistols. The tactical vest also had a bullet defect with blood stains in the left armpit area.

A handwritten note was found lying on the dashboard of Defendant's vehicle which read, "Dylann Roof is less than nothing. The blood that 10 of your kind will shed is that of the color upon the RBG flag (in terms of vengeance). 1 Up B[-]tch." The note had a smiley face at the end. After the note was read into evidence at trial by Officer Jaime Scruggs of the MNPD, the trial court took judicial notice of the following:

> Dylann Storm Roof, male white, was convicted on December 15th of 2016, of killing nine African Americans as they worshipped at Emanuel African-Methodist Episcopal Church in Charleston, South Carolina, on June 17th of 2015.
>
> The Court is also taking judicial notice of the following facts. The RBG flag, also referred to as the Pan African Flag, the Afro American Flag, Black Liberation Flag, and the Marcus Garvey Flag, was designed by the Universal Negro Improvement Association in 1920. It is a tricolored flag, consisting of three equal horizontal bands of red, black and green. You are not required to accept this as a conclusive fact as judicially noticed. You are the exclusive judges of the facts, and it is for you to decide how much weight, if any, to give such evidence.

Douglas Belcher, a crime scene investigator for the MNPD, processed Defendant's vehicle as part of the investigation. He collected a journal with Defendant's name, a notebook and ballpoint pen, a rifle case, a security uniform bearing Defendant's name, Defendant's passport and driver's license, ammunition and accessories for various weapons, a gun cleaning kit, and a black pistol holster. The note found in Defendant's vehicle appeared to have been torn from the journal.

The wounded victims from the church and Defendant were transported to the hospital by ambulance. Mr. Spann's left index finger was amputated, and he remained hospitalized until the following Thursday. Ms. Spann was hospitalized for "twenty-one or twenty-three days" due to some complications. She was shot in the left leg above the kneecap and testified that she still has scarring from her injury. Ms. Spann described the lingering effects of her injury. "I have permanent nerve damage from the knee down, unable to use it, have to work with a brace, and quite a bit of nerve pain still with it, because nerve tissue rejuvenates so slowly. That's a constant thing though."

The wound to Ms. Dickerson's leg was painful and ultimately left a scar. Mr. Jenkins had one gunshot wound to his right leg and two gunshot wounds to his left leg. He had surgery and remained in the hospital for twelve days. He was sent to a rehabilitation

center after his release from the hospital for physical therapy for an additional fifteen days. At the time of trial, Mr. Jenkins reported still having pain and scars from his injuries. Ms. Jenkins was hospitalized for twelve to fourteen days and underwent three surgeries and two skin grafts to repair her arm. At the time of trial, she still had a large scar from her injury, was experiencing numbness, and was unable to lift heavy objects. Ms. Jenkins had one finger that "didn't get put back up" and is "dead." She also had difficulty walking after the shootings.

The gunshot wound to Linda Bush's leg was extremely painful, and she had surgery the day after the shootings. She remained in the hospital for three days and testified that her quality of life had gone down "quite a bit because of [her] injury." She described her injuries as follows:

> I have what's called drop foot. It severed the peripheral nerve, it shattered the femur, and it shattered the kneecap. And I have three screws [from] the first surgery. The second surgery that I had to the knee was to take those out. And then I had so much pain and so much scar tissue, that I was flat on my back for four months in a brace that went from my hip to my toes. I wasn't able to put any weight on that leg whatsoever. So I basically lived in a recliner for four months. And I just recently had knee replacement to try to help some of the pain. It has helped it.

Caleb received approximately seven to nine stitches in his head. His left shoulder was also dislocated, which was very painful and required physical therapy for one and a half months. At the time of trial, Caleb had scars on the top of his head from his injuries.

Dr. Randy Tashjian, Assistant Medical Examiner for the Metro Nashville Davidson County Office of the Medical Examiner, performed an autopsy on Melanie Crow. She had three gunshot wounds to her torso and one to her face. One gunshot entered the left side of Melanie's upper back. According to Dr. Tashjian, the wound was fatal, and he estimated that an individual would generally survive such a wound for only "second[s] to minutes." Dr. Tashjian determined that Melanie's manner of death was homicide, and the cause of death was multiple gunshot wounds to her torso.

Mr. Spann testified at trial that the members of Burnette Chapel "thought the world" of Defendant and his cousins when they attended services there. He said that they attended services faithfully, and there were never any problems or anything out of the ordinary with them. Mr. Spann said, "They were great, great guys." He was not aware of any animosity between Defendant and anyone at the church.

Defendant's Proof

Vanansio Samson, Defendant's father, testified that he and Defendant's mother arrived in the United States through the refugee program, and they divorced approximately one year later in 1997. Defendant was five and a half years old at the time. He noted that Defendant was three months old when they first left South Sudan, due to war, and lived in Egypt as refugees before traveling to the United States. Mr. Samson testified that he had contact with Defendant during the months leading up to the shootings, and they were always close. He said that he helped Defendant fix his cars, and "other issues that [Defendant] was going through and trying to mend some kind of mental issue he was going through." Mr. Samson testified that he had noticed a change in Defendant's demeanor during this time, and Defendant sometimes did not make sense when he talked.

Mr. Samson testified that approximately one month before the shootings, he noticed a change in Defendant's attitude and how he dealt with things. He said that Defendant was "upset with his job, so he was looking for another job, so he had some kind of frustrations." He agreed that part of Defendant's frustration might have been that Defendant needed some money to pay his college tuition. He offered to help Defendant financially. Mr. Samson testified that Defendant sometimes did not pay attention when Mr. Samson was talking to Defendant, and Defendant's mind seemed to be somewhere else. When asked why he was concerned about Defendant during the month prior to the shootings, Mr. Samson responded:

> I was concerned because he was not up to his plan or his goal. He was not keeping up with his goals. Because, one time, he would say something. The next day, he said something different. He was not consistent with what he was doing.

Maya Hill testified that she and Defendant had been dating for approximately four months at the time of the shootings. Defendant is also the father of one of her children. Ms. Hill testified that the night before the shootings, she and Defendant had an argument about his plans to move in with his father. Ms. Hill testified that she was upset because she and Defendant had previously discussed buying a house together. She said that Defendant was agitated and upset that morning. Ms. Hill noted that Defendant's behavior was different the night before because he normally wanted to be left alone after an argument, but "he actually held me all night after the argument, which was really, really rare." She said that she and Defendant exchanged some "hostile" texts after he left that morning, and she tried to call him several times but the calls rolled over to voicemail. Ms. Hill testified that she later found a note that Defendant left on her porch, tucked under her son's shoe, indicating that Defendant was going to shoot himself with a .40 caliber pistol. She said that she immediately began driving around searching for Defendant but she never found him.

Ms. Hill noted that Defendant had a "high startle reflex." She explained that he did not like to be "snuck up on" or surprised. Ms. Hill felt that Defendant had poor short-term memory. She also noted that on one occasion, she and Defendant were in an argument, and he punched a hole in her wall. After the argument was over, Defendant did not remember punching the wall. Ms. Hill did not feel that Defendant was faking his lack of memory of the shootings. She said that Defendant also told her about sleep problems he was experiencing in the month leading up to the shootings, and she noticed that he was still "groggy or tired" when he woke up.

During the month prior to the shootings, Defendant was "[s]ad, down, up, down. Some days, he was happy. Some days he was sad. When he was sad, he was really, really, sad." Ms. Hill noticed that Defendant's mood "flip-flop[ped]" daily, and he expressed his desire to die. She was very concerned about his behavior. However, Ms. Hill did not seek help for Defendant. She testified that Defendant was employed by Papa Johns at the time delivering pizzas and he also worked as an unarmed security guard at Taylor Farms. She did not recall if he was scheduled to work on the day of the shootings. Ms. Hill described Defendant as caring, compassionate, and patient, and he never hurt her or her children. She thought that he had sold all of his guns prior to the shootings.

On cross-examination, Ms. Hill testified that she did not immediately end her relationship with Defendant after the shootings. They communicated while Defendant was incarcerated, but did not discuss the actual events of September 24, 2017. She claimed that Defendant did not enjoy the notoriety that he achieved from the shootings. Ms. Hill testified that Defendant told her he shot himself in the chest, but she did not remember anything "he said that happened after." There were a lot of questions she wanted to ask Defendant but she could not because the calls were recorded. Ms. Hill did not recall Defendant saying anything about Caleb Engle, other than denying that Caleb shot him in the leg as was being reported by the news. She remembered Defendant saying that he shot himself. Defendant indicated to her that he was shocked that the FBI agents were being kind to him. She did not recall Defendant trying to deceive anyone as to his true personality and about what happened.

Ms. Hill told Defendant that Joey Spann was on television and did not make Defendant out to be a "monster," and he did not think Defendant was a bad person or that Defendant had committed a hate crime. Ms. Hill did not recall Defendant saying anything about his interactions with detectives or trying to intimidate them. She said that Defendant expressed remorse "[i]n his way." Ms. Hill agreed that she told detectives that Defendant hated organized religion.

Defendant testified that in the days leading up to the shootings, he wanted to end his life, and he was "extremely depressive," and he "felt kind of numb" with no "perception of feeling." He said that he would fluctuate within minutes from being irritable to "extreme ecstasy, and then it would drop." When his mood dropped, he would sometimes place a

gun to his head. Defendant testified that he sold his guns the summer before the shootings, and the guns he had leading up to the shootings belonged to his cousin. He said that his cousin had a younger brother "who was in and out of trouble, so he was afraid for his life and his safety, so he trusted me to keep the guns for him." His cousin did not know about Defendant's suicidal thoughts.

Defendant testified that he had been diagnosed with both schizoaffective disorder and PTSD, and there were dissociative features from the PTSD. He said that he took Lithium to stabilize his mood and Olanzapine for antipsychotic thoughts. Defendant began taking some of the medication in October of 2017. He said that his thoughts had "drastically" slowed since beginning the medication.

Defendant testified that in the month before the shootings, he had a few hallucinations of a dark figure reaching toward him in his bed and while he was in the restroom. He did not know if the figure interfered with his sleep because he had had "terrible sleep problems for years." Defendant testified that he heard a voice on the day of the shootings telling him to kill himself, and "[i]t was pretty aggressive, too."

Defendant did not remember having an argument with Ms. Hill the day before the shootings. He only remembered that it was the first day of his new security job at Taylor Farms, and he came home after work and took a shower. He also remembered that he "held her" when they went to bed that night. He was having problems with his memory at the time and was unable to remember times when he would become upset or other things that happened. He said that he was upset and depressed the morning of the shootings, and he guessed that he and Ms. Hill were "still arguing about something." The morning of the shootings he was having a "consistent low, so I wasn't exactly fluctuating, but it was pretty depressive." He was supposed to work at Papa Johns later that morning delivering pizzas.

Defendant recalled attending church at Burnette Chapel for two or more years with his three cousins, and he participated in activities at the church. He stopped attending there approximately four or five years before the shootings. Defendant described the people there as follows: "They were very receptive, kind, warm, compassionate. They let us in and they let us in on beyond the church. They let us into the unity in the community within the congregation and they were good to us." Defendant said no one there did anything that made him mad or upset, and he had no reason to be angry or resentful toward the congregation. He testified that the congregation at Burnette Chapel was predominately white "sprinkled with a couple of Hispanics, maybe some Asians, and some Blacks."

Defendant testified that at the time of the shootings, he was wearing boots and the pants from his security job; the pants were "more so navy blue" than black. He said that he was supposed to be at work for the security company at 2:00 p.m. that day after he delivered pizzas for a couple of hours at 11:00 a.m. for Papa Johns. He said that a former girlfriend had given him the Homeland Security shirt that he was wearing and that it came

from a training seminar she had attended. Defendant testified that he had a "whole lot" of stuff in his vehicle at the time of the shootings, and he thought the leather jacket was "probably" lying on the seat of his car. He identified pictures of his vehicle on September 24, 2017, that showed a rifle case and winter coats. Defendant noted that he stored his cousin's guns in the vehicle because he did not want them near Ms. Hill's children. He said that he purchased the mask that he wore "at least two year prior" to the shootings, and he had previously worn it while it was snowing. Defendant testified that he purchased the tactical vest at Walmart in 2014. He said that he did not purchase any of the items worn or used during the shootings specifically for the church shootings. Defendant testified that he became involved in guns as a hobby sometime in 2012 or 2013.

On the morning of the shootings, Defendant left Ms. Hills' residence at approximately 8:30 to 8:40 a.m. He recalled writing a note to Ms. Hill, which "must have been while I was still parked in the parking lot" of her apartment. He remembered hiding the note under a pair of tennis shoes. Defendant said that although he smoked marijuana on a "nightly basis" at the time to help him sleep, he did not smoke any on the day of the shootings. Defendant testified that his mind was "oscillating on the same typical stuff," and he was "wrestling with [himself]" and contemplating suicide while he sat in the parking lot of Ms. Hill's apartment. He eventually drove down Murfreesboro Road and planned to stop by the lake in La Vergne which was a good spot to "clear my mind and get my bearings back."

Defendant testified that he remembered driving around, but then his memory "becomes pretty blurry." He noted that the house he grew up in with his father was located very close to Burnette Chapel. Defendant did not remember when he put on the mask or tactical vest. When asked what he remembered after going to the lake, he testified: "I remember driving past that stop light that leads to LaVergne Lane. I remember turning at a light. I remember there being some houses at the light that I turned down on that road, and that's about it." Defendant said the next thing he remembered was shooting himself in the middle of Burnette Chapel. He did not recall shooting Melanie Crow, Joey Spann, or anyone else, and he did not recall pointing his gun at anyone. Defendant claimed that he only remembered shooting at bricks or something like that. He remembered being at VUMC.

On cross-examination, Defendant said that he did not remember at what point on the day of the shootings he began wearing the mask, tactical vest, or t-shirt depicting human targets. He said that he usually kept the mask and tactical vest in his vehicle, and the shirt would have been in his closet. Defendant did not recall telling detectives that he remembered sitting in the church parking lot with the mask on and nothing in his hand. He also did not recall if he told detectives that he was holding the guns he used in the shootings for someone else even though the transcript of his police interview reflected that he did not tell them. The transcript indicated that Defendant told the detectives that he had guns

because he liked them. Defendant did not remember telling the detectives that he always rode around wearing the mask, as reflected in the transcript of the interview.

Defendant testified that he did not remember writing the note referencing Dylann Roof, but he agreed that the note was in his handwriting. Defendant said that he was familiar with the RBG flag, and he agreed he was familiar with some of the individuals who attended Burnette Chapel, the format of the church services, and with the layout of the building. However, he claimed that he had forgotten what time church services started and ended. When asked if he remembered having the gun in his hand and shooting toward the church, Defendant replied, "Not really, no." However, he told the detectives that he remembered shooting toward bricks outside the church. Defendant testified that he did not enjoy seeing himself on the news or seeing other people on the news talk about what happened. He did not remember saying anything about Caleb Engle to anyone. Defendant said he heard that Caleb was standing over him with a gun but did not remember thinking it was funny. Defendant testified that he did not remember what happened after he shot himself, but he remembered lying on the ground. He did not remember talking about trying to intimidate anyone in law enforcement who was investigating him or saying that they were weak or "losers" or that he was "unfazed" by what happened. Defendant denied laughing about anything related to the shootings.

On redirect examination, Defendant testified that he did not remember any telephone conversations with Ms. Hill during which he made fun of the victims or disparaged the church. He recalled talking to her about other things. Defendant said that before starting his antipsychotic medication, he did not think that he was more important, superior, or smarter than anyone else or that he was royalty. Defendant agreed that he never sought the help of a psychiatrist.

Rebuttal Proof

Careese Cannon, an investigator with the Davidson County Sheriff's Office, testified that she was familiar with how recordings of telephone calls at the Davidson County Jail were made and preserved. She provided recordings of Defendant's jail phone calls to Terry Faimon, Director of Communication Research, Court Liason with the Davidson County District Attorney General's Office who had requested recordings of Defendant's jail phone calls. Mr. Faimon reviewed recordings of the calls between Defendant and Ms. Hill and identified portions of the recordings that could be used in court. He confirmed that the transcript associated with the calls was accurate. The recordings of the calls were introduced into evidence.

During one call, Defendant told Ms. Hill that he could hear what everyone was saying after he shot himself in the church and that "some people were saying some funny sh[-]t." Ms. Hill told Defendant that Mr. Spann was on the news, and Mr. Spann said that he told his wife, "he killed me honey, he shot me and I am dying." Ms. Hill further said,

"And I am thinking ni[- -]a you gah like bruh reading what his quote was I am sitting here like get this guy off the f[- -]king stage someone please get this guy off the stage." During another call, Defendant bragged to Ms. Hill about intimidating law enforcement officers, and he referred to them as "weak a[-]s ni[- -]as." Ms. Hill also referred to law enforcement officers as "f[- -]king p[-]ssies." Defendant said that he did not speak to investigators the Sunday of the shootings, and he did not say a word to anyone until he got to the jail. During a third call, Defendant and Ms. Hill bragged about Defendant being on the news and how good he looked. Defendant specifically told Ms. Hill: "They are bragging on your man, baby." Defendant described himself as "[s]avage" and said that he was "thuggin" and "ruggin." Ms. Hill also told Defendant that "your face looked completely 110% unbothered like it didn't look like you had been crying or hysterical, you just look 100% calm." Defendant replied that he was "[u]nfazed."

During a fourth jail phone call, Defendant and Ms. Hill laughed about how the congregants at Burnette Chapel had said that Defendant "loved life" and that he "loved the Lord." Defendant said:

> You feel it, you feel it. No no where they coming from is a time back when I was a Christian I told you that, remember that so they are still hanging on to that image of "mmhm Jesus" that sh[-]t, they still hanging on to that.
> ***
> That is what they mean by he loved the Lord and by loving life, look at what everybody who don't know me was thinking. Listen listen listen I just got off the phone, I was talking to my dad earlier. My dad has always bragged on me, if there is one thing he has always bragged on me and that I have always loved life is the fact that I know how to *undecipherable* people so I may come off and confuse people that is why to even this day even the psychiatrists they just can't see or understand why I put three bullets in my chest but people like you and I do because we understand how our minds work. These people only see the external sh[-]t. They see me always laughing, joking, smiling, cracking up. You see what I am talking about? Them two things together that's why they got you thinking and saying what the f[-]ck is y'all on? You know what I am saying? But yeah.

At the conclusion of the proof, the jury convicted Defendant of each count as charged in the indictment.

Sentencing Hearings

Sentencing Phase on First-Degree Murder Charge (Count 4)

State's Proof

Bridget Polson, Melanie Crow's sister, testified on behalf of Melanie's family, including their mother, and Ms. Crow's two children. She said that Melanie "touched and left an impression on everyone she met." Ms. Polson testified that Melanie loved her children "more than life itself." She also noted Melanie's struggle with depression and anxiety. Ms. Polson testified that Melanie, for several months prior to her death, had "made great strides in her life. She was gaining self-esteem, a sense of independence, was happier and building her faith in God." Ms. Polson testified that Melanie's two children miss her very much. She said that Melanie's daughter was still grieving, and her son "is so traumatized that he doesn't want to leave his father's side." She further noted that Melanie's son is afraid every time his father leaves, and "[h]e asks every time that they go to church if he's going to die."

Ms. Polson testified that Melanie's casket had to be closed for her funeral because Defendant shot her in the face. She said that this was hard for Melanie's mother because she could not touch Melanie's hand or kiss her face and tell her goodbye. Ms. Polson testified as to the life events that Melanie would miss for her children. She said that all of Melanie's family members suffer from PTSD, anxiety, and depression. Ms. Polson testified that Melanie was also her best friend, and they talked frequently and did things together. She said that they were a "close-knit" family.

Amy Miner testified that Melanie was her sister-in-law and best friend, and they spoke every day and shared several "inside jokes." The two were pregnant with their daughters at the same time and raised them alongside one another. Melanie also introduced Ms. Miner to Ms. Miner's husband. Ms. Miner felt that she did not get to say goodbye to Melanie due to the closed casket at her funeral. She said that she no longer feels safe "going anywhere there is a lot of people, loud noises, just my kids are afraid going to school or when I go out if I'm going to come back home, my husband going to work it's just not like it used to be." Ms. Miner testified that Melanie would miss significant life events for her children, and she agreed that Melanie once had a bright future after everything had "started coming together for her."

Joey Spann testified that the last words Melanie said to him as she was walking out to her car was: "I'll be right back." He said that she had "her own spot" in church, which he was familiar with, and it would now remain empty. A garden was built in her parking space. He said, "You can't go in our building hardly without seeing the spot and remembering what took place there."

Mr. Spann testified that Melanie's death caused the church to lose a sense of security, and "just about every member" has PTSD, including Mr. Spann who takes medication for that reason. He said that visitors to the church are treated as strangers "until we find out differently." He noted that there is a "reaction" when a visitor pulls into the church parking lot. Mr. Spann testified that church members want pews in the church rather than chairs "because they could hide under the pews if it ever happened again[.]" He said that the children who were barricaded in a classroom at the time of the shootings cried for up to a year after the shootings if they heard a siren. He also noted that some of the children "even to this day get scared when they see a police car."

Defense Proof

Christina Samson, Defendant's older sister, testified that Defendant was her best friend, and she had "nothing but positive words" to say about his early childhood. She said that their parents went through a divorce after the family moved to the United States from Egypt, and she and Defendant kept each other company during that time. Ms. Samson described her parents' relationship as "like cats and dogs always fighting, abusive, verbally and physically." She also noted that her mother had anger problems, and her father had alcohol problems. Ms. Samson testified that her parents separated while living in Egypt, but her father moved back home for them to immigrate to the United States as part of the requirement that they immigrate as a family unit. She said that her father physically abused her mother while they were living in Egypt and in the United States. Her father once broke a glass bottle on her mother's forehead leaving a scar. Ms. Samson testified that on one occasion when they were living in the United States, the neighbors called police, and her father was arrested for assaulting her mother. She said that Defendant witnessed all of the violence between their parents.

Ms. Samson testified that child abuse also occurred in the home that they shared with three other half-siblings. She said that she and Defendant were both whipped with a belt. She noted that that their mother had thrown an iron at Defendant on one occasion, and he had a mark on his back from being struck by the buckle of a belt with which his mother was beating him. Ms. Samson testified that her mother set impossible standards and primarily did it to Defendant. She said her mother used Defendant as a "surrogate" for her anger against their father. Ms. Samson testified that Defendant cried and would not discuss the abuse when he was younger, and he avoided his mother when he got older. However, Defendant could not avoid their mother all of the time "[b]ecause if you avoid her for too long [] she will find a way to make you come or she will find a way to make you feel useless for avoiding her." Ms. Samson said her mother regularly told Defendant that she should have aborted him.

Ms. Samson testified that on one occasion, her mother choked her and slashed her knees to the bone with a knife because there was some money missing from her mother's purse, and she thought that Ms. Samson took it. Her mother later learned that Defendant

took the money after she caught him trying to steal from her again. Ms. Samson said that Defendant cried because of the incident, "but never really said anything" and was not willing to admit that he took the money. Ms. Samson thought Defendant stole the money to "buy friends" because he was being bullied at school over his skin color and appearance, and because he was an immigrant. She said that kids continued making fun of Defendant until he entered high school and began working out and gaining weight. Ms. Samson testified that their mother usually worked from 3:00 p.m. until 11:00 p.m., and she and Defendant were responsible for caring for their younger siblings. Therefore, she and Defendant could not participate in any after-school activities or have friends over.

Ms. Samson testified that Defendant's mental health changed drastically when he was thirteen or fourteen, and he began getting into trouble at school. His mood was "never stable" and went "up and down." Ms. Samson testified that Defendant was "hyper" when he was happy and talked fast-paced. However, he was never diagnosed with bipolar disorder because "we didn't even know those illnesses existed, because we don't have that back home[.]" She said that he also had "[b]izarre, random thoughts." Ms. Samson thought her mother displayed symptoms consistent with bipolar disorder. She said Defendant's problems became worse when he moved in with his father because his father pushed him harder about grades and other things, and Defendant wanted to "be up to his father's standards." Ms. Samson testified that during the year prior to 2017, Defendant would only be around the family when he was in a "happy mood."

Ms. Samson testified that she and her children had attended Burnette Chapel with Defendant. She said, "He loved that church. That's why he wanted me to go to experience that church." She also said that he had nothing against anyone there. Ms. Samson testified that Defendant became suicidal in 2017 and texted their mother one night in June to say that he had a gun to his head and was going to shoot himself. Defendant did not respond to any of Ms. Samson's calls or text, and her father and police later found him unharmed. Ms. Samson was frustrated with Defendant at that point and stopped communicating with him. She said that her younger sister also has mental health problems and had attempted suicide. Her sister also took medication for depression. Ms. Samson testified that Defendant had trouble sleeping because he saw "shadows or something is coming for him." Defendant would "two or three weeks without sleeping, just wandering." Ms. Samson testified that Defendant occasionally would "space out" and have a "blank stare."

On cross-examination, Ms. Samson testified that Defendant was three months old when the family left Sudan, and she agreed that he did not experience any violence there. She further agreed that the political atmosphere in Egypt was not violent. Ms. Samson testified that she lived with her mother three years longer than Defendant because he moved in with his father at the age of fourteen.

A videotape of Dr. Stephen Montgomery's testimony was then played for the jury.

Sarah Kingsbury, a private investigator and mitigation specialist, interviewed members of Defendant's family and learned that Defendant's grandfather had been diagnosed with schizophrenia. She also obtained available records from DCS concerning Defendant, his records from the Metropolitan-Nashville and Rutherford County public schools, and Motlow State Community College.

State's Rebuttal Proof

James Buford Tune, owner of the Academy of Personal Protection and Security, testified that the Friday before the shootings at Burnette Chapel, Defendant attended the "unarmed security portion" of a class to become a licensed security guard. Defendant took a test at the conclusion of the class and scored 100 percent. Mr. Tune remembered Defendant due to his "demeanor, his dress, his size." He noted that Defendant "had very short hair, dressed very nicely, questions and answers. I mean, you couldn't ask for a better person." He also noted that Defendant had been hired by Crimson Security, and he called the owners of the company and "told them what kind of job [Defendant] did and I said I would have hired him in a heartbeat." Mr. Tune testified that Defendant did not appear to be hearing voices or having a hard time staying awake in class. He did not notice anything out of the ordinary about Defendant's demeanor. Mr. Tune said, "I mean he was very polite, very nice. There wasn't any problems out of him whatsoever."

At the conclusion of the sentencing phase, the jury imposed a sentence of life imprisonment without the possibility of parole for Defendant's first-degree premeditated murder conviction in Count 4 of the indictment.

Sentencing Hearing for Remaining Counts of the Indictment

Breanna Smith, Sandra Reed, Joey Spann, Rhonda Langford, Tammy Luker, Caleb Engle, and Bailey Engle each gave victim impact statements. Ms. Smith testified that she never expected to lose her mother, Melanie Crow, so quickly. She said: "And I was personally faced with a new life that I wasn't ready for, if that makes sense. Like a world I didn't know existed." Ms. Smith also testified that "we were all affected just going anywhere."

Ms. Reed testified that she lives each day with the trauma caused by the shootings. She recalled the events of that day and how finding Melanie's body and seeing the others who were wounded affected her. Ms. Reed further testified:

> And they're the nightmares that you have with people wounded, blood, and gunfire. And trying to escape, the fight or flight that happens. It will stay with you. And, I guess, that's where you get the emotional stress that you carry with you when you go to a restaurant, Cracker Barrel. There's no simple going out. And you're

> awareness level that you carry from that day forward. Especially with your kids and grandkids.

Mr. Spann testified that the loss of his finger was "still bothersome, down into the thumb area now[.]" He said that his wife, Peggy Spann, had not regained use of her left foot because the gunshot that she received to the back of her leg severed the nerve to her foot. Mr. Spann said that she had a "dead foot" with no feeling at all, and "she has to literally step it high to make sure it doesn't catch on anything." He said that Ms. Spann was supposed to have surgery on her foot and will have to wear a brace for the rest of her life. Mr. Spann testified that there is "not a single day" that the shootings have not affected "every area" their lives.

Mr. Spann testified that although the shootings had strengthened the faith and relationships of the church members at Burnette Chapel, there was still fear that something might happen again. He said that there is an "awareness" everywhere that "really never leaves your mind." There is a memorial for Melanie on the church property, and "she's always on our mind." He noted that visitors at church are now treated as strangers, "[a]nd that's not the way a church is supposed to be." Mr. Spann testified that the church has been repaired with the help of other churches, and they now have a security system, and "people walking around with weapons, which is ridiculous, but needed now[.]" He said that the church members voted to keep pews in the church rather than install chairs in the event they needed to hide under them again.

Ms. Langford also testified that the shootings had affected "every part" of her life, and she is always "on edge" with any unexpected noise. She described the events of the shootings, her actions, and trying to locate her mother and sister in the chaos. Ms. Langford testified that her life is very different now.

Tammy Luker prepared a written statement that she read to the court. She said that she relived the trauma of the shootings each day. Ms. Luker addressed Defendant in her statement and reminded him that his actions caused many to suffer from PTSD and that he had offered no apology for the "torment" he caused. She noted how Defendant made fun of the victims during his phone calls from jail and that he was "unfazed" and "proud" of his actions. Ms. Luker pointed out that Defendant was loved and welcomed at Burnette Chapel, "but yet had no regard of the damage you would inflict onto adults, as well as children; those very children you tutored, those very children that you sang with, laughed with, and hugged." She further said: "You shot directly at people who welcomed you into their lives but you remained hidden."

Caleb also read his written statement to the court. He said that the shootings had impacted his life, "from the various news outlets swarming me, with little to no respect for my privacy, that I was trying to heal and my family was trying to heal." Caleb noted that he was uninsured at the time and had numerous visits to "medical facilities, hospitals,

doctor's offices." He said that his mental health "took a very, very bad toll with all the things going on; the nightmares the screams." Caleb testified that every time he closed his eyes, he saw "people laying in the foyer, the blood, everything." He said that he is always armed unless he is in an area where firearms are prohibited. Caleb testified that he always "scans the crowd" in a restaurant and locates "all entrance and exit points, large windows, barriers that possibly can be used, that way if another bad man were to come in we'd know where to hide." He said that he always sits with his back to the wall and carries a small makeshift medical kit in a backpack "just in case."

Ms. Engle read her written statement to the court as well and said that since the shootings, she has left two jobs "because of sudden loud bangs and noises." She also sought treatment approximately one year ago because her mental health "hit such a rock bottom point all other sources were exhausted." Ms. Engle said that she was diagnosed with "an anxiety form of PTSD."

The trial court considered the applicable mitigating and enhancement factors for each of the remaining counts of the indictment and sentenced Defendant to four years each for Counts 1-2; eleven months and twenty-nine days for Count 3; twenty-five years each for Counts 5, 7, 9, 11, 13, 15, and 17; six years each for Counts 6, 8, 10, 12, 14, 16, and 18; six years each for Counts 19-42; and a two-year sentence for Count 43. The trial court imposed partial consecutive sentencing, and Defendant received an effective sentence of 281 years in confinement for those offenses to be served consecutively to his sentence of life without the possibility of parole in Count 4.

Analysis

I. Exclusion of Expert Testimony

Defendant contends that the trial court abused its discretion by excluding the testimony of defense expert, Dr. Steven Montgomery, regarding his opinion that Defendant lacked the requisite mental capacity at the time of the offenses due to mental illness. He asserts that the trial court erred in requiring a finding of a "complete inability" to form the requisite mental state. The State argues that the trial court properly excluded the evidence because Defendant's expert could not state with a degree of medical certainty that Defendant was unable to form the requisite intent to commit the offenses.

Expert testimony regarding a defendant's capacity or lack of capacity to form the mental state required for the commission of an offense is admissible if it satisfies "general relevancy standards as well as the evidentiary rules which specifically govern expert testimony." *Hall*, 958 S.W.2d at 689. Tennessee Rule of Evidence 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, even relevant evidence may be excluded

if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. Further, Tennessee Rule of Evidence 702 requires that expert testimony "substantially assist the trier of fact to understand the evidence or to determine a fact in issue," and Rule 703 requires that the facts or data underlying the expert's opinion be trustworthy. A trial court's application of these rules to exclude expert testimony will not be reversed on appeal absent an abuse of discretion. *State v. Edison*, 9 S.W.3d 75, 77 (Tenn. 1999).

Evidence of a mental disease or defect that does not rise to the level of an insanity defense is nevertheless admissible to negate elements of specific intent. *State v. Phipps*, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994). In *Hall*, the Tennessee Supreme Court explained:

> [D]iminished capacity is not considered a justification or excuse for a crime, but rather an attempt to prove that the defendant, incapable of the requisite intent of the crime charged, is innocent of that crime but most likely guilty of a lesser included offense. Thus, a defendant claiming diminished capacity contemplates full responsibility, but only for the crime actually committed. In other words, "diminished capacity" is actually a defendant's presentation of expert, psychiatric evidence aimed at negating the requisite culpable mental state.

958 S.W.2d at 688 (citations omitted). However, "such evidence should not be proffered as proof of 'diminished capacity.' Instead, such evidence should be presented to the trial court as relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried." *Id*. at 690. Put another way, for expert testimony regarding a defendant's mental state to be admissible, the expert must testify that (1) the defendant has a mental disease or defect, and that (2) because of the mental disease or defect, the defendant lacks the capacity to form the requisite mens rea. *See id*. at 689-91.

In *State v. Ferrell*, the supreme court added, "although our holding in *Hall* referred specifically to psychiatric evidence under the circumstances of that case, it was based upon the broader legal principle that 'expert testimony is relevant to negating intent is admissible in Tennessee even though diminished capacity is not a defense.'" *Ferrell*, 277 S.W.3d 372, 379 (Tenn. 2009) (citing *Hall*, 958 S.W.2d at 691); *see also State v. Faulkner*, 154 S.W.3d 48, 56-57 (Tenn. 2005).

In this case, Dr. Montgomery concluded that Defendant's capacity to conform his conduct to the requirements of law was substantially impaired by his mental disease. However, he testified that there was not enough evidence for him to conclude that Defendant lacked the capacity to form intent. Dr. Montgomery agreed that "[t]here is insufficient evidence to conclude that [Defendant's] mental disease prevented him from

appreciating the nature, or wrongfulness, of his alleged actions;" that there is "[i]nsufficient evidence to conclude that [Defendant's] severe mental disease rendered him incapable of knowing or premeditated actions;" that Defendant's "capacity to exercise judgment and reflection, prior to acting, does seem to have been compromised by his severe mental illness; and, while his judgment was most likely impaired, it is not possible to definitely opine that he lacked total capacity for premeditation;" and "[d]espite [Defendant's] severe mental diseases he appreciated the wrongfulness and nature of his alleged actions." Dr. Montgomery agreed that he could not support an insanity defense under current Tennessee law.

The trial court found that Dr. Montgomery's testimony did not meet the prerequisites established in *Hall* to be offered during the guilt phase of Defendant's trial to advance the argument that Defendant, due to mental disease or defect, was unable to form the requisite mental states for the offenses. Defendant argues that "*Hall* requires that the defense make a showing that the expert testimony can negate the defendant's ability to form the *mens rea*, but it does not require that there be a 'complete inability' to form this intent as the trial court asserted in its ruling." Defendant further argues that the trial court's ruling constituted an abuse of discretion "as it used the incorrect legal standard when excluding Dr. Montgomery's proffered testimony." However, Defendant's arguments are not supported by case law.

In *State v. Lesergio Duran Wilson*, No. M2014-01487-CCA-R9-CD, 2015 WL 5170970, at *12 (Tenn. Crim. App. Sept. 2, 2015), this court concluded that "[i]t is well established that a mental disease or defect that impairs or reduces a defendant's capacity to form the requisite culpable mental state for the offense does not satisfy the two-prong test under *Hall*." (citing *State v. Tray Dontacc Chaney*, No. W2013-00914-CCA-R9-CD, 2014 WL 2016655, at *9 (Tenn. Crim. App. May 14, 2014); *State v. Herbert Michael Merritt*, No. E2011-01348-CCA-R3-CD, 2013 WL 1189092, at *27 (Tenn. Crim. App. Mar. 22, 2013); *State v. Anthony Poole*, No. W2007-00447-CCA-R3-CD, 2009 WL 1025868, at *11 (Tenn. Crim. App. Apr. 14, 2009); *State v. Antonio D. Idellfonso-Diaz*, No. M2006-00203-CCA-R9-CD, 2006 WL 3093207, at *4 (Tenn. Crim. App. Nov. 1, 2006); *see also State v. Becky Jo Burlison*, No. M2019-00148-CCA-R3-CD, 2019 WL 6650578, at *5 (Tenn. Crim. App. Dec. 6, 2019).

In *Lesergio Duran Wilson*, the proffered testimony of two defense experts was not admissible pursuant to *Hall* because neither expert could "conclusively testify that Wilson lacked the capacity to premeditate or act intentionally at the time of the killing." *Lesergio Duran Wilson*, 2015 WL 5170970, at *13. Similarly in *Becky Jo Burlison*, this court found that the expert's testimony did not satisfy the requirements of *Hall* because the expert could not "testify that, as a result of the Defendant's mental disease or defect, she lacked the capacity to form the mens rea for the charged offenses." *Becky Jo. Burlison*, 2019 WL 6650578, at *5. This court pointed out that the expert instead testified that the defendant's manic state, "a feature of her mental disease," combined with what the expert termed

"knowledge deficit" which was "apparently attributable to medical advice she had previously received," led the defendant to commit the offense of aggravated rape of a child because she believed it was necessary at the time. *Id*. This court concluded that the expert's testimony was "more akin to testimony about a particular emotional state or mental condition rather than on Defendant's lack of capacity to form the requisite mental intent." *Id*. (citations and internal quotation marks omitted).

Likewise in the present case, because Dr. Montgomery was unable to conclude that Defendant lacked the capacity to form the requisite intent for the offenses, the trial court did not err by excluding his testimony during the guilt phase of Defendant's trial. Defendant is not entitled to relief on this issue.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his convictions for civil rights intimidation, first-degree murder, and attempted first-degree murder. More specifically, as to his convictions for civil rights intimidation, Defendant contends that the State failed to prove that he attempted to prevent the victims from exercising a constitutional right. As to Defendant's first-degree murder and attempted first-degree murder convictions, Defendant argues that the proof was insufficient to show that he acted with premeditation during the commission of the offenses. The State responds that the evidence was sufficient to sustain Defendant's convictions.

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009) (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). "Appellate courts evaluating the sufficiency of the convicting evidence must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)); *see* Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (citing *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005); *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998). The standard of review for sufficiency of the evidence "'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 *Hanson*, 279 S.W.3d at 275). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence. *Dorantes*, 331 S.W.3d at 379 (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court "neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury." *Wagner*, 382 S.W.3d at 297 (citing *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)).

A. Civil Rights Intimidation

Defendant was convicted of three counts of civil rights intimidation under Tennessee Code Annotated section 39-17-309(b) and (c). With respect to Counts 1 and 2, subsection (b) provides:

> A person commits the offense of intimidating others from exercising civil rights who:
>
> > (2) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution of the state of Tennessee.
> >
> > *.*.*
> >
> > (4) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee

Id. § 39-17-309(b). With respect to Count three, subsection (c) provides: "It is an offense for a person to wear a mask or disguise with the intent to violate subsection (b)." *Id.* § 39-17-309(c). A violation of subsection (b) is a felony, and a violation of subsection (c) is a misdemeanor. *Id*. § 39-17-309(d).

Defendant argues that the evidence supporting his convictions for civil rights intimidation in Counts 1 and 2 is insufficient because the State failed to prove that he

attempted to prevent the victims at Burnette Chapel from exercising their right to worship freely or the right to freely assemble or that his attack was designed to intimidate them from exercising their first amendment rights. He also asserts that the proof fails to show that he "intended to damage or deface real property" with the intent to "intimidate members of Burnette Chapel and thereby prevent them from exercising any Constitutionally protected rights[. . .]." Finally, Defendant argues that because the evidence was insufficient to support his convictions in Counts 1 and 2, "he cannot be found guilty in Count 3 under subsection (c) for wearing a mask during the incident."

The First Amendment to the United States Constitution guarantees the right to freedom of religion and freedom of assembly. U.S. Const. amend. 1. As pointed out by the State, Defendant in this case was not charged with *attempting* to prevent the attendees at Burnette Chapel from exercising their right to freedom of worship or assembly with respect to Counts 1 and 2, he was charged with intimidating them *because* they were exercising those rights. T.C.A. § 39-17-309(b)(2) and (4). In other words, Defendant's conduct occurred after the attendees at Burnette Chapel had exercised their freedom to worship and assemble on September 24, 2017.

Viewed in the light most favorable to the State, the evidence shows that Defendant, who had at one time attended Burnette Chapel and was familiar with the time worship service ended, arrived at the church armed with multiple weapons and extra ammunition, and was wearing a mask and sunglasses to disguise his identity. He had also written a note referencing a prior mass shooting at a church in South Carolina and expressing his desire to commit a worse mass shooting. Defendant was in the church parking lot when worship service ended and opened fire when victims began leaving the service, killing Melanie Crow and injuring Ms. Dickerson, Ms. Bush, Mr. Jenkins, Ms. Jenkins, Mr. Spann and Ms. Spann. He also injured Caleb by hitting him on the head with his gun as Caleb tried to stop the shootings. Additionally, Defendant threatened to injure others by firing numerous rounds both inside and outside of the church in their presence. Many of the shots fired by Defendant caused damage to the outside of the church building, as well as damage to windows, a water fountain, walls, doors, and pews inside the building. At trial, Ms. Hill agreed that she told detective after the shootings that Defendant hated organized religion.

From this evidence, a rational trier of fact could find that Defendant targeted those victims at Burnette Chapel on September 24, 2017, because they were there to assemble and worship. The jury could conclude that Defendant injured or threatened to injure them and that he damaged, destroyed or defaced real or personal property to intimidate them because they were exercising their right to assemble and worship freely, and that he wore a mask or disguise while doing so.

B. First-Degree Murder and Attempted First-Degree Murder

Defendant argues that the evidence was insufficient to show that he acted with premeditation with respect to his convictions for first-degree murder and attempted first-degree murder because he was unable to form premeditation due to his mental state and mood. First-degree murder is defined as "[a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). A person acts intentionally "when it is the person's conscious objective or desire to engage in the conduct or cause the result." *Id*. § 39-11-302(a).

> "[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(e). Criminal attempt occurs when a person, acting with the kind of culpability otherwise required for the offense:

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

Id. §39-12-101(a).

The element of premeditation is a factual question to be decided by a jury from all the circumstances surrounding the killing. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Although a jury may not engage in speculation, it may infer premeditation from the manner and circumstances of the killing. *Bland*, 958 S.W.2d at 660. Our supreme court

has held that factors demonstrating the existence of premeditation include, but are not limited to, the following: the declaration of the intent to kill, the procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, the infliction of multiple wounds, the making of preparations before the killing for the purpose of concealing the crime, the destruction or secretion of evidence, and calmness immediately after the killing. *State v. Jackson*, 173 S.W.3d 401, 409 (Tenn. 2005); *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000). Additional factors cited by this court from which a jury may infer premeditation include lack of provocation by the victim and the defendant's failure to render aid to the victim. *See State v. Lewis*, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000). Further, "[e]stablishment of a motive for the killing is a factor from which the jury may infer premeditation." *State v. Leach*, 148 S.W.3d 42, 54 (Tenn. 2004) (citing *State v. Nesbit*, 978 S.W.2d 872, 898 (Tenn. 1998)).

We conclude that the evidence viewed in the light most favorable to the State proves that Defendant acted with premeditation when he committed the offenses of first-degree murder and attempted first-degree murder. Defendant declared his intent to kill in the handwritten note, and he drove to Burnette Chapel and parked his vehicle near the front entrance and left the engine running for an easy escape. Because he had once attended Burnette Chapel, Defendant was familiar with the individuals there and that some were elderly and had physical limitations. He was also familiar with the times of services and the layout of the church. Defendant got out of the vehicle armed with a .40 caliber Smith and Wesson pistol, a fully loaded .9-millimeter pistol, multiple magazines of ammunition, and a knife in the tactical vest he was wearing. He was also wearing a shirt that depicted human targets. Defendant left additional ammunition and a semiautomatic rifle in the running vehicle, and he disguised himself with a mask and sunglasses.

Defendant ambushed Melanie Crow, who was unarmed, in the parking lot by her car and shot her once in the face and three times in the torso killing her. At no time did Defendant attempt to render aid to her. Defendant was then described as walking in a "deliberate" manner toward the church where he then unprovoked shot Ms. Dickerson, Ms. Bush, Mr. Jenkins, Ms. Jenkins, Mr. Spann and Ms. Spann. None of the victims were armed. Both Mr. Spann and Mr. Jenkins, who was using a walker that day, were struck multiple times. Defendant stepped over several of the victims as they lay bleeding on the floor. Defendant also pointed his gun at Caleb Engle and pulled the trigger when Caleb tried to stop the shootings, but the gun's clip was empty. He then hit Caleb on the head with his gun three times causing injury to Caleb's head. At one point during the shootings, Defendant reloaded his weapon and continued firing.

From this evidence, a rational juror could find that Defendant "made intentional and premeditated efforts to kill multiple people in a short amount of time." *State v. Justine Welch*, No. W2021-01233-CCA-R3-CD, 2023 WL 1426367, at *20 (Tenn. Crim. App. Aug. 2, 2022) *no. perm. app. filed*. Although Defendant appears to have randomly chosen his victims, this court held that "[a] senseless, random killing is in no way inapposite to the

concept of premeditation; otherwise only planned assassinations would meet the elements of first degree premeditated murder." *State v. Timothy Dwayne Ison*, Alias, No. E2018-02122-CCA-R3-CD, 2020 WL 3263384, at *7 (Tenn. Crim. App. June 17, 2020); *Justine Welch*, 2023 WL 1426367, at *20. Furthermore, the jury, as was its prerogative, rejected any argument by Defendant that premeditation in this case was negated by his mental state both before and during the time of the offenses. Defendant is not entitled to relief on this issue.

III. Double Jeopardy

Defendant asserts that his conviction for civil rights intimidation in Count 3 of the indictment and his convictions for attempted first-degree murder and employing a firearm during the commission of those offenses violates the protection against double jeopardy. The State contends that the convictions were proper.

"The Double Jeopardy Clause protects a person from being prosecuted twice 'for the same offence.'" *Denezpi v. United States*, 142 S.Ct. 1838, 1842 (2022); *see* U.S. Const. amend. V; Tenn. Const. art. I, § 10. Under both the federal and our State constitutions, a defendant is protected against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. Watkins,* 362 S.W.3d 530, 541 (Tenn. 2012). A claim that multiple convictions violate the protection against double jeopardy is a mixed question of law and fact, which this Court will review de novo without any presumption of correctness. *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014) (citing *State v. Thompson*, 285 S.W.3d 840, 846 (Tenn. 2009)).

As to his conviction for civil rights intimidation in Count 3, Defendant argues that his conviction violates the second category of double jeopardy protection because it is a "'second prosecution,' albeit simultaneously, for the 'same offense after conviction' which is prohibited by *Watkins* as well as the Tennessee Constitution." *Watkins*, 362 S.W.3d at 541. We disagree. Because Defendant was prosecuted simultaneously for all three offenses, there is no second prosecution for the same offense after conviction. Instead, Defendant's claim as to his convictions for civil rights intimidation implicates the third category of double jeopardy protection, multiple punishments for a single offense. *Id*.

This case also involves a unit-of-prosecution claim. "Unit-of-prosecution claims arise when defendants who have been convicted of multiple violations of the same statute assert that the multiple convictions are for the 'same offense.'" Id., at 543. In such instances, "courts determine whether a single offense is involved not by applying the *Blockburger* test, but rather by asking what act the legislature intended as the 'unit of prosecution' under the statute." *Id.* "If the General Assembly has expressed an intent to permit multiple punishment, no further analysis will be necessary, and multiple convictions should be upheld against a double jeopardy challenge." *Id.* at 556. As argued by the State,

the language of Tennessee Code Annotated section 39-17-309 demonstrates the legislature's intent to permit multiple punishments. A violation of subsection (c) is listed as a separate offense from those in subsection (b) and is punishable as a misdemeanor, while a violation of the offenses listed in subsection (b) is a felony. T.C.A. § 39-17-309(b) and (c). Furthermore, subsection (e) provides: "The penalties provided in this section for intimidating others from exercising civil rights do not preclude victims from seeking any other remedies, criminal or civil, otherwise available under law." *Id.* § 30-17-309(e).

Even if the General Assembly's intent were not clear, Defendant's multiple convictions for civil rights intimidation do not violate double jeopardy. When legislative intent is not clear, we must first ascertain whether the convictions arose from the same act or transaction. *Watkins*, 362 S.W.3d at 566; *see Blockburger v. United States*, 284 U.S. 299, 304 (1932). If so, the second step is to determine whether the elements of the offenses are the same. If each offense contains an element that the other offense does not, the statutes do not violate double jeopardy. *Id*.

In this case, Defendant's actions constituted a continuing course of conduct arising out of the same act or transaction. Additionally, a violation of subsection (b) contains elements a violation of subsection (c) does not. Subsection (b) includes the elements of injury, the threat of injury or coercion and damage, destruction, or defacing of real property. T.C.A. § 39-17-309(b)(1)–(4). Subsection (c) does not contain any of those elements and requires the wearing a mask, which subsection (b) does not include. Moreover, Count 3 only requires that a defendant have the intent to violate subsection (b), while subsection (b) requires a completed offense. Therefore, each offense contains an element that the other does not, and the statute does not create a violation of double jeopardy.

With respect to Defendant's claim that his convictions for employing a firearm during the commission of a dangerous felony violate double jeopardy, he argues that the employment of a firearm is an essential element of the offense of attempted first-degree murder. However, attempted first-degree murder may be committed without the possession of a firearm. *Id.* § 39-13-202(a)(1). Our supreme court concluded in *State v. Harbison*, 539 S.W.3d 149 (Tenn. 2018), that each act of employing a firearm during the commission of a dangerous felony may be prosecuted as a separate offense:

> [We] conclude that the legislature intended the unit of prosecution for Tennessee Code Annotated section 39-17-1324 to be each act of employing a firearm during the commission of or attempt to commit a dangerous felony. Nothing in the language of the statute indicates that the legislature intended to limit the unit of prosecution to the number of firearms employed by a defendant. Therefore, Harbison's three convictions for employing a firearm during the commission of a dangerous felony based on three convictions for the attempt to

> commit voluntary manslaughter involving three victims do not violate the prohibition against double jeopardy.

Id. at 169-70.

Likewise in this case, Defendant's seven convictions for employing a firearm during the commission of a dangerous felony based on his seven convictions for attempted first-degree premeditated murder involving seven victims do not violate the prohibition against double jeopardy. *See State v. John Armstrong*, No. W2016-00082-CCA-R3-CD, 2016 WL 5210869, at *2 (Tenn. Crim. App. Sept. 20, 2016) (concluding "[t]he fact that a firearm was used to commit attempted first-degree murder does not then render possession of a firearm as an essential element of the offense" and defendant's conviction for unlawful possession of a firearm during the commission of a dangerous felony was not illegal). The legislature has identified attempted first-degree murder as a dangerous felony for which a defendant could be prosecuted for possessing a firearm, "indicating that the legislature intended for dual convictions and multiple punishments for these crimes." *Id*., *see* T.C.A. § 39-17-1324(i)(1)(A); *State v. Jeremiah Dawson*, No. W2010-02621-CCA-R3-CD, 2012 WL 1572214, at *7 (Tenn. Crim. App. May 2, 2012) (stating that "the legislature obviously intended for dual convictions and multiple punishment" for carjacking and use of a firearm by listing carjacking as a predicate felony).

We conclude that Defendant's conviction for civil rights intimidation in Count 3 of the indictment and his convictions for attempted first-degree murder and employing a firearm during the commission of those offenses do not violate the protection against double jeopardy. Defendant is not entitled to relief on this issue.

IV. Election of Offenses

Defendant argues that the State failed to elect "what proof adduced by their witnesses corresponded with each charged offense in [C]ounts 1-3, both as to conduct and as to manner in which the offense was perpetrated." He asserts that the State did not identify which of those victims present at Burnette Chapel he intimidated or which act of intimidation supported his convictions. The State contends that no election was required because it "presented proof of a single course of continuing conduct."

Where there is evidence at trial that the defendant has committed multiple offenses during a time period alleged in a single count of an indictment or presentment, the doctrine of election requires the State to elect the facts upon which it is relying to establish a charged offense. *State v. Johnson*, 53 S.W.3d 628, 630 (Tenn. 2001) (citations omitted). "The election requirement safeguards the defendant's stated constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence." *Id.* at 631 (citing *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999)). In *State*

v. Adams, the Tennessee Supreme Court outlined the situations in which an election of offenses is unnecessary:

> When the evidence does not establish that multiple offenses have been committed, however, the need to make an election never arises. To this end, this Court has made a distinction between multiple discrete acts that individually constitute separate substantive offenses and those offenses that punish a single, continuing course of conduct. In cases when the charged offense consists of a discrete act and proof is introduced of a series of acts, the [S]tate will be required to make an election. In cases when the nature of the charged offense is meant to punish a continuing course of conduct, however, election of offenses is not required because the offense is, by definition, a single offense.

24 S.W.3d 289, 294 (Tenn. 2000) (holding that the State's failure to elect which injury resulted from child neglect did not create issue of jury unanimity). This court has also concluded that jury unanimity is not violated when "alternative theories, mental states, modes of committing the crime, or means by which a crime was committed" were submitted to the jury." *State v. Hood*, 221 S.W.3d 531, 547 (Tenn. Crim. App. 2006) (quoting *State v. James Clayton Young, Jr.*, No. 01C01-9605-CC-00208, 1998 WL 258466, at *5 n.4 (Tenn. Crim. App. May 22, 1998)) (emphasis in original omitted). Additionally, Tennessee Code Annotated section 40-18-112 provides that a jury may convict even if different intents, modes, or means of committing an offense are charged, so long as the jury is satisfied that the act was committed with one of the charged intents, mode, or means.

The indictments in this case specified that Defendant was charged in Count 1 with a single offense of injuring or threatening to injure "persons present at the Burnette Chapel Church of Christ with the intent to unlawfully intimidate another," and he was charged in Count 2 with a single offense of damaging, destroying, or defacing "any real or personal property of another with the intent to unlawfully intimidate another" because those others "exercised any right or privilege by the constitution or laws of the United States or the constitution of the State of Tennessee[.]" Count 3 of the indictment specified that Defendant was charged with wearing a mask while committing the offenses in Counts 1 and 2. The proof in this case did not demonstrate multiple acts which would separately constitute the offense of civil rights intimidation as alleged in each count, and the State did not allege that any one act constituted the offenses. Instead, the State theorized that Defendant "embarked upon a course of conduct" which, viewed collectively, constituted a single violation of civil rights intimidation for each count. *State v. Kenneth Darrin Fisher*, No. E2016-01333-CCA-R3-CD, 2017 WL 4083785, at *11 (Tenn. Crim. App. Sept. 15, 2017). Therefore, election was not required, and Defendant is not entitled to relief on this issue.

IV. Admission of Defendant's Handwritten Note

Defendant next contends that the trial court erred by admitting the handwritten note found in his car referencing Dylann Roof, the RGB flag, and vengeance. He asserts that the note was not relevant to the proceedings and that the probative value of the note for the State was very minimal. Defendant further argues that the probative value of the note was substantially outweighed by the danger of unfair prejudice. The State responds that the trial court did not abuse its discretion by admitting the note.

Initially, as pointed out by the State, it is not clear from the record that Defendant contemporaneously objected to the introduction of the note. Defendant cites to a transcript of a pretrial hearing as evidence of his objection. However, his objection at the hearing was to the trial court taking judicial notice of Dylann Roof's federal indictment and the meaning of the RGB flag. Defendant did not specifically object to the admission of the note found in his car although the trial court referenced the note at the hearing as reason for the State's request to take judicial note of the other indictment and flag. Additionally, the portion of the trial transcript that Defendant cites as proof that he objected to the admission of the evidence appears to be his objection to a photograph of Melanie Crow's sermon notes and not the note found in his car. Generally, a defendant's failure to make a contemporaneous objection results in waiver of the issue on appeal. *See* Tenn. R. App. P. 36(a); *State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000).

In any event, the trial court properly admitted the note. In determining admissibility, a trial court must first decide whether the evidence is relevant. Tenn. R. Evid. 402 ("All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible."). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

However, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice[.]" Tenn. R. Evid. 403. An appellate court generally reviews a trial court's decisions regarding the admissibility of evidence for an abuse of discretion. *State v. Davis*, 466 S.W.3d 49, 61 (Tenn. 2015) (citation omitted). "A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Id.* (citations omitted).

In this case, the following note, written by Defendant and found in his car, was admitted into evidence: "Dylann Roof is less than nothing. The blood that 10 of your kind will shed is that of the color upon the RBG flag (in terms of vengeance). 1 Up B[-]tch."

As indicated by the trial court in its order denying Defendant's motion for new trial, the note was introduced by the State to show Defendant's motive and intent to commit the mass shooting at Burnette Chapel. Although Defendant claimed that he did not specifically recall writing the note, it was torn from his journal and found in his car by police. Defendant admitted the note was in his handwriting. The note was essentially Defendant's declaration of his motive and intent to carry out a mass church shooting similar to the one perpetrated by Dylann Roof on June 17, 2015, which resulted in the killing nine African Americans as they worshipped at Emanuel African-Methodist Episcopal Church in Charleston, South Carolina. Defendant expressed in the note that Dylann Roof was "less than nothing" and that Defendant wanted to exceed the number of victims from the South Carolina shooting by threatening to shed the blood of "10" and "in terms of vengeance." He ended the note with "1 Up B[-]tch." Therefore, the note was highly probative and relevant as to Defendant's intent to unlawfully intimidate those in attendance at Burnette Chapel with respect to his charges of civil rights intimidation, whether Defendant acted with premeditation with respect to the charges of first-degree murder and attempted first-degree murder, and whether he acted intentionally or knowingly with respect to the aggravated assault charges. We note that our supreme court had said that "[t]he motive and intent of the defendant in the commission of a murder are almost always critical issues." *State v. Gentry*, 881 S.W.2d 1, 7 (Tenn. Crim. App. 1993).

Moreover, the probative value of the note was not outweighed by the danger of unfair prejudice. Defendant argues that admission of the note admitted to overtly "compare him to another perpetrator of a mass shooting, particularly one that took place in a church, could hardly be calculated to be more prejudicial to him." However, as pointed out by the State, this evidence was not created by a third party to liken Defendant to Dylann Roof or to "create a post hoc link between the Burnette Chapel shooting and Roof's crimes." This was a note written by Defendant comparing himself to Dylann Roof before he went into Burnette Chapel and committed a mass shooting at the conclusion of worship service as the congregation was leaving. "[T]he mere fact that evidence is particularly damaging does not make it unfairly prejudicial." *Gentry*, 881 S.W.2d at 7. "[A]ny evidence which tends to establish the guilt of an accused is highly prejudicial to the accused, but this does not mean that the evidence is inadmissible as a matter of law." *State v. March*, 395 S.W.3d 738, 774 (Tenn. Crim. App. 2011). The trial court did not abuse its discretion by admitting Defendant's handwritten note. Defendant is not entitled to relief of this issue.

V. Admission of Jail Phone Calls

Defendant argues that the trial court abused its discretion by admitting as prior inconsistent statements portions of his recorded phone calls with Ms. Hill. More specifically, Defendant contends that the State was "permitted to play numerous portions of these phone calls and was not required to restrict their use of these phone calls to the statements that purportedly reflected inconsistencies with his trial testimony." The State

counters that this issue is waived, and despite waiver, Defendant cannot show that the trial court's ruling was erroneous.

Initially, as pointed out by the State, Defendant has also waived this issue because he does not cite to the record in support of his argument. Although he contends that the trial court erred by admitting portions of the recordings, he does not identify any statements within the admitted portions that were in excess of that necessary for impeachment. Moreover, he does not explain how the admitted portions of the recordings were not inconsistent with his trial testimony. *See* Tenn. R. Crim. P. 10(b) (Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); Tenn. R. App. P. 27(a)(7) (A brief shall contain "[a]n argument ... setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record... relied on."); *State v. Deborah Morton*, No. E2019-01755-CCA-R3-CD, 2022 WL 2301439, at *16 (Tenn. Crim. App. June 27, 2022) *no perm. app. filed*; *Michael Fields v. State*, No. E2015-01850-CCA-R3-PC, 2016 WL 5543259, at *9 (Tenn. Crim. App. Sept. 29, 2016).

In any event, despite waiver, we will address Defendant's argument. Tennessee Rule of Evidence 613 provides a potential avenue for the admission of an out-of-court statement. Under Rule 613, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same." Tenn. R. Evid. 613(b); *see State v. Martin*, 964 S.W.2d 564, 567 (Tenn. 1998) (confirming that "extrinsic evidence remains inadmissible until the witness either denies or equivocates as to having made the prior inconsistent statement"). "Extrinsic evidence of a prior inconsistent statement remains inadmissible when a witness unequivocally admits to having made the prior statement" because "[t]he unequivocal admission of a prior statement renders the extrinsic evidence both cumulative and consistent with a statement made by the witness during trial." *Martin*, 964 S.W.2d at 567. On the other hand, extrinsic evidence of a prior inconsistent statement will be admissible when a witness denies making the statement, equivocates about having made the statement, or testifies that he or she does not recall making the prior inconsistent statement. *Id.* (citing *State v. Kendricks*, 947 S.W.2d 875, 881 (Tenn. Crim. App. 1996)).

Generally, because they contain hearsay, "prior inconsistent statements offered to impeach a witness are to be considered only on the issue of credibility, and not as substantive evidence of the truth of the matter asserted in such statements." *State v. Reece*, 637 S.W.2d 858, 861 (Tenn. 1982).

In a jury-out hearing after Defendant's testimony, the State sought to play portions of the recorded jail calls between Defendant and Ms. Hill as prior inconsistent statements by them for impeachment purposes. On cross-examination of both Defendant and Ms. Hill,

the State asked each of them about certain statements they made during the calls such as whether Defendant enjoyed his notoriety from the shootings, whether they ridiculed the victims, how Defendant deceived people, or how Defendant tried to intimidate law enforcement officers who interviewed him. Both Defendant and Ms. Hill testified either that they did not make the statements or that they did not remember certain statements they made about the shootings. At the conclusion of the hearing, the trial court found that the recordings and their transcripts were admissible for impeachment purposes.

We agree with the trial court's findings. Because Defendant and Ms. Hill on cross-examination either denied making statements, or said that they did not remember making the statements in question during the recorded jail calls, the trial court did not abuse its discretion in admitting those portions of the recordings of the calls to impeach their testimony. We note, as pointed out by the State, that the trial court only admitted those portions of the calls that related to the inconsistent statements by Defendant and Ms. Hill. The trial court also gave the following instruction to the jury immediately before the recordings were played, and the trial court reminded the jurors of the instruction after each recording was played:

> Ladies and gentlemen, you are going to hear recordings purported to be discussions between Maya Hill and [Defendant]. These statements were made out of court and they cannot be considered by you for the truth of the matter asserted in these out of court statements. They can be considered in your determination of the credibility of these individuals.
>
> You're being provided with a document purporting to be a transcript of those audio recordings. The documents are provided to you to assist you in listening to the recordings. If, from your listening, you find discrepancies or inaccuracies between the transcript and the recordings themselves you should rely upon your understanding of the recordings and disregard those portions of the transcript you find to be inaccurate.
>
> As with any other evidence, it is for the jury to determine what, if any, weight to give this evidence.

The jury is presumed to follow the trial court's instruction. *State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004). "In order to overcome this presumption, an accused must show by clear and convincing evidence that such instruction was not followed." *State v. Vanzant*, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983). Defendant is not entitled to relief on this issue.

VII. Jury Instruction on Defendant's Failure to Remember Facts

Defendant argues that the trial court erred by granting the State's motion to instruct the jury that "[t]he failure of the defendant to remember the details of the alleged crime or to remember any of the facts leading up to and surrounding the commission of the alleged crime is in itself no defense to the charges." The State responds that trial court properly charged the jury.

A defendant in a criminal case "has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). A jury charge should contain no statement which is inaccurate, inapplicable, or which might tend to confuse the jury. *State v. Hatcher*, 310 S.W.3d 788, 812 (Tenn. 2010). A jury instruction is considered "prejudicially erroneous," only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997). Whether a jury instruction is required by the facts of a particular case is a mixed question of law and fact. *State v. Hawkins*, 406 S.W.3d 121, 128 (Tenn. 2013). The question of whether a jury instruction should have been given is therefore reviewed de novo with no presumption of correctness. *Id*. A special jury instruction may be given "to supply an omission or correct a mistake made in the general charge, to present a material question not treated in the general charge, or to limit, extend, eliminate, or more accurately define a proposition already submitted to the jury." *State v. Cozart*, 54 S.W.3d 242, 245 (Tenn. 2001) *overruled on other grounds.* A jury instruction must be considered in its entirety and read as a whole rather than in isolation. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). A jury instruction is only considered "prejudicially erroneous" if the jury charge, when read as a whole, "fails to fairly submit the legal issues or misleads the jury as to the applicable law." *Faulkner*, 154 S.W.3d at 58.

In *State v. Brown*, the defendant in his statement to police said that he did not "have comprehension of fully remembering" what might have happened with respect to his crime. He described the period of time when the offense occurred as "a blank" in his mind. 836 S.W.2d 530, 553 (Tenn. 1992), *superseded by statute as stated in State v. Reynolds*, 635 S.W.3d 893, 917 (Tenn. 2021). The trial court in *Brown* gave an almost identical instruction to the jury as the one given in this case concerning Defendant's failure to remember what happened. The supreme court affirmed the use of the instruction and held: "The statement made by the defendant that was presented to the jury raised questions about his memory of the events surrounding his son's death. There was no error in giving an instruction necessitated by this evidence." *Id.*

As in *Brown*, the evidence in this case necessitated the instruction on Defendant's failure to remember the events of the shootings. During his testimony, Defendant said that he said that he was having problems with his memory around the time of the shootings and was unable to remember times that he would become upset or other things that happened.

He repeatedly claimed that he could not remember certain events before the shootings and the majority of what occurred during the shootings. We conclude the trial court correctly instructed the jury that Defendant's failure to remember the facts of the offenses in this case was not a defense. The jury instructions in this case, when read as a whole, fully and fairly state the applicable law and do not mislead the jury. *State v. Inlow*, 52 S.W.3d 101, 107 (Tenn. Crim. App. 2000); *State v. Forbes*, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995). Defendant is not entitled to relief on this issue.

VIII. Sentencing

Defendant argues that the trial court erred by enhancing his sentences for his convictions for three counts of civil rights intimidation, seven counts of attempted first-degree murder, seven counts of employing a firearm during the commission of a dangerous felony, twenty-four counts of aggravated assault, and one count of reckless endangerment. He further argues that the trial court erred in ordering partial consecutive sentencing for the offenses resulting in an effective sentence of 281 years to be served consecutively to his sentence of life without the possibility of parole for first-degree premeditated murder. Additionally, Defendant contends that the jury erred by sentencing him to life without the possibility of parole for his first-degree murder conviction. The State contends that the trial court did not abuse its discretion in sentencing Defendant and that the trial court properly sentenced Defendant.

When an accused challenges the length of a sentence, this court reviews the trial court's sentencing determinations under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). "This abuse of discretion standard, accompanied by a presumption of reasonableness, applies to within-range sentences that reflect a decision based upon the purposes and principles of sentencing." *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). *See also State v. Pollard*, 432 S.W.3d 851, 859-60 (Tenn. 2013) (standard of appellate review for consecutive sentencing is abuse of discretion accompanied by a presumption of reasonableness). A finding of abuse of discretion indicates the "trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case." *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001). A trial court has not abused its discretion unless "the record [is] void of any substantial evidence that would support the trial court's decision." *Id.*

In making sentencing decisions, trial courts must consider the following: (1) the evidence received at trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the conduct involved; (5) evidence and information offered by the parties regarding the statutory mitigation and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in

Tennessee; (7) any statement the defendant wishes to make on his own behalf; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* T.C.A. § 40-35-210(b).

A. Length of Sentences

Trial courts are "required ... to 'place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.'" *Bise*, 380 S.W.3d at 698-99 (quoting T.C.A. § 40-35-210(e)). Under the holding in *Bise*, "[a] sentence should be upheld so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709-10. Although the trial court should consider enhancement and mitigating factors, the statutory enhancement factors are advisory only. *See* T.C.A. § 40-35-114; *see also Bise*, 380 S.W.3d at 701. Moreover, a trial court is "guided by - but not bound by - any applicable enhancement factors when adjusting the length of a sentence [,]" and its "misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Bise*, 380 S.W.3d at 706.

In this case, the record reflects that the trial court in sentencing Defendant, considered all appropriate principles set forth in T.C.A. § 40-35-210(b). The trial court sentenced Defendant as a Range I offender to four years each for civil rights intimidation in Counts 1and 2; twenty-five years each for attempted first-degree murder in Counts 5, 7, 9, 11, 13, 15, and 17; six years each for employing a firearm during the commission of a dangerous felony in Counts 6, 8, 10, 12, 14, 16, and 18;[4] six years each for aggravated assault in Counts 19 through 42; and a two-year sentence for reckless endangerment in Count 43. Defendant was sentenced to eleven months and twenty-nine days for civil rights intimidation in Count 3. The trial court carefully considered the enhancement factors for each of Defendant's convictions and determined which ones applied to each count. The trial court also considered mitigating factors for all of Defendant's sentences. We note that the trial court read from Dr. Montgomery's report concerning Defendant's mental state at the time of the offenses with regard to some of the mitigating factors. In some instances, the trial court noted that it did not give great weight to certain factors. Defendant does not contest the application of any specific enhancement factor, and the record reflects that they were all appropriately applied. He also does not allege any specific mitigating factor that should have been applied to his sentences.

The trial court considered the relevant principles and sentenced Defendant to a within-range sentence for each count. Defendant argues that the trial court "erred when it applied enhancements to [Defendant] within the proper range of punishment, which it

[4] Defendant's convictions for employing a firearm during the commission of a dangerous felony were subject to a six-year mandatory sentence for each count. T.C.A. § 39-17-1324(h)(1).

correctly determined to be Range I." He further contends that "[t]he severity of the mandated punishments for [Defendant's] conviction offenses made any enhancement of his sentences within the range unnecessary and excessive in light of the guidance provided by the General Assembly in T.C.A. §§ 40-35-102 and -103." However, the 2005 amendments to the Sentencing Act deleted appellate review of the weighing of mitigating and enhancement factors, so this issue is not appropriate to raise on appeal. *State v. Richard Tipton*, No. E2011-02354-CCA-R3-CD, 2012 WL 5422272, at *7 (Tenn. Crim. App., Nov. 7, 2012) *no perm. app. filed*. We cannot conclude that the trial court abused its discretion.

B. Consecutive Sentencing

The standard of review adopted in *Bise* applies to decisions by trial courts regarding consecutive sentencing. *State v. Pollard*, 432 S.W.3d 851, 859 (Tenn. 2013). This means that the reviewing court will give "deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)."[5] *Id*. at 861. As relevant to this case, the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that a defendant is "a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high[.]" T.C.A. § 40-35-115(b)(4).

Before a trial court may impose consecutive sentences on the basis that a defendant is a dangerous offender, the trial court must find that consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. *State v. Wilkerson*, 905 S.W.2d 933, 937-39 (Tenn. 1995). "The adoption of the abuse of discretion standard with the presumption of reasonableness has not eliminated this requirement." *Pollard*, 432 S.W.3d at 863. In order to limit the use of the "dangerous offender" category to cases where it is warranted, the trial court must make specific findings about "particular facts" which show that the *Wilkerson* factors apply to the defendant. *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

When imposing consecutive sentences, the trial court must still consider the general sentencing principles that each sentence imposed shall be "justly deserved in relation to the seriousness of the offense," "no greater than that deserved for the offense committed," and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. §§ 40-35-102(1), -103(2), -103(4); *State v. Imfield*, 70 S.W.3d 698, 708 (Tenn. 2002). "So long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be

[5] There are now eight grounds for consecutive sentencing listed in T.C.A. § 40-35-115(b).

presumed reasonable and, absent an abuse of discretion, upheld on appeal." *Pollard*, 432 S.W.3d at 862 (citing Tenn. R. Crim. P. 32(c)(1); *Bise*, 380 S.W.3d at 705).

The trial court in this case made the findings required under *Wilkerson* and cited specific facts from the case to support the imposition of consecutive sentences. Defendant does not dispute the trial court's finding that he is a dangerous offender, and the record fully supports the trial court's determination. Instead, Defendant argues that the trial court's decision to order partial consecutive sentencing "runs afoul of the principles outlined" in the sentencing act and "impermissibly creates a sentence greater than that which is necessary to achieve the purposes of sentencing." He further argues that since he was required to serve a minimum sentence of life imprisonment for his first-degree murder conviction, consecutive sentencing is "unnecessary to achieve the purposes of sentencing and, therefore, improper." However, Defendant does not provide any authority in support of his position. This court has consistently rejected *Wilkerson* challenges in "a variety of sentences imposed consecutively to an extremely lengthy prison sentence – up to and including sentences of life in prison and life in prison without the possibility of parole." *State v. Andrew Mann*, No. E2010-00601-CCA-R3-CD, 2012 WL 184157, at *18 (Tenn. Crim. App. Jan. 23, 2012). Our supreme court has also held that "separate and distinct violations of the law receive separate and distinct punishments." *State v. Robinson*, 930 S.W.2d 78, 85 (Tenn. Crim. App. 1995). Defendant has not demonstrated that the trial court abused its discretion by imposing consecutive sentences in this case given the circumstances surrounding the offenses. Defendant is not entitled to relief on this issue.

C. Life Without the Possibility of Parole

Regarding Defendant's challenge to the sufficiency of the evidence to support application of the aggravating circumstance set forth in Tennessee Code Annotated section 39-13-204(i) to support his sentence of life without the possibility of parole, we review the evidence under the same standard as we use to review sufficiency of the evidence to support a conviction. Tennessee Code Annotated section 39-13-204(i)(3) states,

> (i) [N]o death penalty or sentence of imprisonment for life without possibility of parole shall be imposed, except upon a unanimous finding that the [S]tate has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which are limited to the following:
> * * *
> (3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;
> * * *

Defendant argues that the jury erred by sentencing him to life without the possibility of parole because the State failed to show that he "created great risk of death" to two or more people, and that it occurred "during the act of murder." He contends that the "act of murder" against Melanie Crow was completed in the parking lot before he went into the church and perpetrated the additional assaultive acts," and therefore, the jury erred in finding that aggravating factor 3 applied. However, in *State v. Burns*, the Tennessee Supreme Court concluded that this particular aggravating circumstance "contemplates either multiple murders or threats to several persons at or shortly prior to or *shortly after* an act of murder upon which prosecution is based." 979 S.W.2d 276, 280 (Tenn. 1998) (quoting *State v. Cone*, 665 S.W.2d 87, 95 (Tenn. 1984)) (emphasis added). "It most often has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present. *Id*. This aggravating circumstance has also been applied where the defendant "'fired random shots with others present or nearby,'" "engaged in a shootout with others," or "'actually shot people in addition to the murder victim.'" *State v. Dotson*, 450 S.W.3d 1, 79 (Tenn. 2014) (quoting *Johnson v. State*, 38 S.W.3d 52, 60 -61 (Tenn. 2001)).

In this case, Defendant shot and killed Melanie Crow in the church parking lot and continued toward the church where he shot and wounded multiple people in front of the building. Defendant proceeded inside the church and continued firing his weapon wounding multiple people there. There were people inside the church in addition to those who were wounded that hid underneath pews and fled to other areas of the building and outside to escape the barrage of gunfire. Defendant committed these offenses immediately after he murdered Melanie Crow. Therefore, the evidence was sufficient beyond a reasonable doubt to show that Defendant created a risk of death to two or more persons, other than Melanie Crow, and the jury properly sentenced him to life without the possibility of parole.

CONCLUSION

Based on the foregoing analysis, we affirm the judgments of the trial court.

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JILL BARTEE AYERS, JUDGE