

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
April 4, 2023 Session

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STATE OF TENNESSEE v. COURDARRIUS PERKINS

Appeal from the Criminal Court for Shelby County
No. 19-04863 Paula L. Skahan, Judge

No. W2022-01111-CCA-R3-CD

A Shelby County jury convicted Defendant, Courdarrius Perkins, of first-degree felony murder and aggravated robbery. The trial court sentenced Defendant to a concurrent sentence of life imprisonment for felony murder and five years for aggravated robbery. On appeal, Defendant contends the trial court erroneously instructed the jury on the underlying felony on the felony murder charge and compounded the error by failing to require the State to elect the facts for the underlying felony. He also contends the trial court erred in denying his motion for judgment of acquittal on the felony murder charge because the evidence is insufficient. After reviewing the record, the briefs and oral arguments of the parties, and considering the applicable law, 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 J. ROSS DYER, JR., JJ., joined.

Joshua N. Corman, Memphis, Tennessee, for the appellant, Courdarrius Perkins.

Jonathan Skrmetti, Attorney General and Reporter; Garrett Ward, Assistant Attorney General; Steve Mulroy, District Attorney General; and Theresa McCusker and Eric Walton, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

In this case, Defendant was charged along with Co-defendant, Dontavious Whitfield, of first-degree felony murder in the perpetration of robbery or attempted robbery (Count 1), attempted especially aggravated robbery (Count 2), and aggravated robbery (Count 3). Co-defendant Whitfield is not joined in this appeal.

Proof at Trial

In the early morning hours of February 25, 2019, Martavious Washington was hanging out with his best friend, Kordedris Overton, at a club when he received a text message from Co-defendant Whitfield asking for a ride to McDonald's. Co-defendant Whitfield had supplied Mr. Washington with marijuana and was known to Mr. Washington only as "Tae Money."

Mr. Overton drove himself and Mr. Washington to the Pepper Tree Apartment Complex ("Pepper Tree") where they picked up Co-defendant Whitfield. The three men went to McDonald's followed by a stop at a Valero gas station so Co-defendant Whitfield could purchase some cigars. At the gas station, Mr. Washington saw Co-defendant Whitfield walk over to a car parked in front of the gas station when they arrived. Mr. Washington did not recognize the other car or the people inside the car nor did he suspect anything suspicious; he thought Co-defendant Whitfield was talking to someone in the neighborhood. After Co-defendant Whitfield made his purchase at the gas station, Mr. Overton drove back to Pepper Tree.

At Pepper Tree, Mr. Washington stepped out of the car to let Co-defendant Whitfield out. Mr. Overton drove a two-door vehicle, and Mr. Washington had to push his seat forward for Co-defendant Whitfield to exit the car. As he did so, Co-defendant Whitfield pointed a gun in Mr. Washington's face and demanded that he give him "everything." Mr. Washington testified at trial that he did not have his wallet on him so he gave Co-defendant Whitfield his phone.

When Mr. Washington turned to Mr. Overton "to tell [him] to do something," Mr. Overton sped off. Suddenly another man came from behind Mr. Washington and began firing his gun at the driver side of the vehicle as Mr. Overton drove away. Mr. Washington did not know or recognize this man and did not get a look at his face. Despite being fearful of being shot, Mr. Washington ran after Mr. Overton's vehicle in an attempt to get away from Co-defendant Whitfield and the unknown gunman. Mr. Overton crashed into a fence of a nearby house; he was trapped in his car because the driver side door was wedged into

the fence. He managed, however, to barely open the driver side door to hand Mr. Washington his cell phone. Mr. Washington reached in and grabbed the phone to call Mr. Overton's mother and the police who arrived "almost instantly."

Mr. Washington informed the officers who responded to the scene that Mr. Overton had been shot and was trapped in his car. Officers observed blood around Mr. Overton's neck and shoulders. There was one bullet hole in the rear frame of the driver side door. No projectile was found inside the car but four nine-millimeter spent casings and a nine-millimeter projectile were later collected at the scene. Mr. Overton was conscious but struggling to breathe as officers waited for the fire department and paramedics to arrive. Emergency medical personnel broke out the back windshield of the car, extracted Mr. Overton, and transported him to the hospital.

Mr. Overton, age twenty-six, died from multiple gunshot wounds. An autopsy revealed gunshot wounds to the head, upper left back, left arm, and right thigh. Two bullets were recovered. One bullet was recovered from the victim's scalp. A second bullet was found lodged in the victim's right knee. A third bullet entered the left side of the back, penetrated the spinal cord, punctured the right lung and the right rib before exiting the body through the right shoulder. This wound caused the victim to lose one-and-a-half liters of blood and was identified as his cause of death.

The surveillance footage of the Valero gas station parking lot from two camera angles was played during Mr. Washington's testimony while he identified the parties and described what was being shown on the videos. He identified himself, Mr. Overton, and Tae Money. Both videos show the vehicle carrying Mr. Overton, Mr. Washington, and Co-defendant Whitfield pull next to a gas pump. They also show a parked gray car occupied by Defendant and his cohorts.

As Mr. Overton parked his car, a woman exited the store and got into the backseat of the gray car. This woman was identified as Desiree Harris, the mother of Defendant's child. Mr. Washington stepped out of, and moved forward the front passenger seat of the car so Co-defendant Whitfield could exit. Co-defendant Whitfield walked past the gray car toward the store, but then turned around and walked back to the gray car where he talked to the person seated in the front passenger seat briefly before entering the store. After leaving the store, Co-defendant Whitfield walked back to Mr. Overton's car, but then turned back to the gray car where he crouched down to talk to the front seat passenger. Co-defendant Whitfield then returned to Mr. Overton's car, and Mr. Overton drove away. The gray car exited the parking lot and headed in the same direction as Mr. Overton. Until he had watched the surveillance footage, Mr. Washington was unaware that he and Mr. Overton were being followed. Mr. Washington later identified Co-defendant Whitfield in

a photographic lineup but was unable to give a description of the man who shot Mr. Overton.

The video from the second camera angle showed a closer and clearer view of Defendant and the gray car. As Ms. Harris exited the store and entered the back-passenger seat behind Defendant, the camera zoomed in on the front seat and the driver side of the car. The driver side back-passenger window was dark and no person or movement was visible. Defendant testified at trial that he was seated in the front passenger seat and "T" was in the driver seat. When seated, Defendant's face was partially obscured by the rear-view mirror, but Defendant and "T" were each seen with a gun laughing and talking and looking down at something in the console between them. Defendant testified that they were looking at "T's" cell phone which was recording them and streaming on Facebook Live.

As Co-defendant Whitfield passed the gray car, he glanced at Defendant. "T" looked in Co-defendant Whitfield's direction, smiled broadly and started laughing. Defendant opened his car door and showed Co-defendant Whitfield his gun while pointing at the phone. What could not be seen from the other camera angle is that Co-defendant Whitfield then showed Defendant something on his phone. As Co-defendant Whitfield walked away and out of camera view, Defendant leaned out of the car and continued to talk to him. Co-defendant Whitfield looked in the direction of the victims twice while talking only to Defendant. When Co-defendant Whitfield left to enter the store, Defendant closed the car door and looked behind him twice while gesturing with his arms. No movement or person was seen in the driver side backseat.

On March 4, 2019, Defendant went to the homicide office of the Memphis Police Department to give a statement about the case. After being advised of, and waiving his rights, Defendant stated that on day of the crimes, he and the mother of his child, Desiree Harris, were at Defendant's sister's home at Pepper Tree where he also lived. Ms. Harris was hungry and wanted to get something to eat. She and Defendant went outside and ran into a man named "T." Ms. Harris offered him \$10 if he would take her and Defendant to get some food. "T" drove Defendant, Ms. Harris, and another man known as "Kebo" to the gas station. Defendant sat in the front passenger seat and Ms. Harris sat behind him and next to "Kebo" in the backseat. Defendant did not know "T" or "Kebo's" real names. "Kebo" had a black gun with an extended clip; "T" carried a chrome colored gun with a black handle.

At the gas station, "the dude who was in the car with the victims," approached "T's" car and began talking to "T" and "Kebo." Defendant did not know "the dude's" name but was aware that he had arrived at the gas station with Mr. Overton and Mr. Washington. "The dude" stated that he was going to "stretch" Mr. Overton and Mr. Washington.

Defendant understood “stretch” to mean that “the dude” was going to rob them. “Kebo” stated that he would join in the robbery. “The dude” instructed “T” to follow him and the victim. “T” followed the victims out of the gas station and to Pepper Tree where he kept a distance five cars back. Armed, “Kebo” jumped out of the car and rushed the victims. Defendant then heard five gunshots. “Kebo” and “the dude” ran back to “T’s” car, jumped in the backseat and “T” drove off. Defendant demanded that he and Ms. Harris be dropped off because the robbery was “too much.” “T” dropped off Defendant, Ms. Harris, and “the dude” a couple of blocks from where the shooting occurred and drove away with “Kebo.” Defendant and Ms. Harris returned to Defendant’s sister’s house in Pepper Tree. Defendant did not know where “the dude” went after he was dropped off.

Defendant denied that he agreed to rob the victims or received any proceeds from the robbery. Defendant did not report the shooting because he was “scared” and worried that he would be considered a suspect.

Defendant gave a second statement later that same day. In the second statement, he admitted to participating in the robbery and identified “the dude with the victims” as “Tay.” This time, Defendant stated that when “Tay” approached him, “Kebo,” and “T” about robbing the victims, Defendant agreed to search them. When the victims parked outside the gate of Pepper Tree, “Kebo” and Defendant jumped out of “T’s” car and ran to Mr. Overton’s car. Defendant did not get to search anyone because Mr. Overton drove away, and Mr. Washington fled on foot. According to Defendant, as Mr. Overton drove away, “Kebo” ran to the driver side of the car, opened the door, and began shooting at Mr. Overton. “Kebo” and Defendant returned to “T’s” car where Defendant told “Kebo” and “Tay” that “they didn’t have to shoot.”

Defendant’s testimony at trial was similar to the two statements he gave to the police. He testified that he was at his half-sister’s residence with Ms. Harris when he and Ms. Harris went out to get her something to eat and met “T” and “Kebo.” At trial, Defendant testified that “T” was his sister’s boyfriend, that his real name was LaCedric Carbins, and that he “ran the Vice Lords,” a criminal gang. Mr. Carbins agreed to give Defendant and Ms. Harris a lift but insisted that it would need to be done quickly because “I got something going.” Defendant testified that he came along because he did not want Ms. Harris to get in a car with two men she did not know. He maintained that he and “Kebo” sat in the back behind Mr. Carbins and did not know “Kebo’s” real name.

Defendant had watched the surveillance footage from the gas station. He explained that Mr. Carbins was using his phone to video Defendant flashing a gun on Facebook Live. According to Defendant, the gun he was seen flashing belonged to “Kebo.” He agreed the gun was “big” and had an extended clip. Mr. Carbins had a chrome colored gun with a black handle. Defendant could not give a “good explanation” as to why he was flashing

“Kebo’s” gun other than to “fit[] in” and try to appear cool. He explained that it is common for people to flash their weapons “in the hood.”

As they were flashing the guns on Facebook Live, “Tay,” a man who lived in Pepper Tree and was also a member of the Vice Lords, walked up to Defendant and Mr. Carbins. Defendant did not know “Tay’s” real name at the time and learned only later that his name was Dontavious Whitfield, the co-defendant in the indictment. Defendant was familiar with Tay because Tay had previously supplied Defendant with marijuana. Seeing the guns, Co-defendant Whitfield told Defendant and Mr. Carbins that he’s “fixing to stretch the folks I[m] with,” meaning that he was going to rob Mr. Overton and Mr. Washington. According to Defendant, “Kebo” readily told Co-defendant Whitfield that he “want[ed] in.”

Co-defendant Whitfield then asked Defendant to search the victims during the robbery. Defendant testified that he did not “acknowledge” or directly answer him. Defendant maintained that the only clear conversation he had with Co-defendant Whitfield was about buying marijuana. He stated that he did not want to give Co-defendant Whitfield the “wrong impression” by saying no. Defendant denied that he was a “robber” or a “killer,” but having grown up “in the hood,” he felt compelled to join in the robbery. However, Defendant also testified that he told Co-defendant Whitfield that he wanted no part of the robbery: “I’m like look, whatever y’all got going, look I ain’t with it.” Defendant testified that he tried to stall by stepping out of the car and looking for a cigarette which was documented on the surveillance footage. When pressed, Defendant conceded that he did not get out of Mr. Carbins’ car, nor did he tell Co-defendant Whitfield or the others that committing a robbery was a terrible idea. He continued to ride with Mr. Carbins back to Pepper Tree.

Defendant recalled that by the time they arrived at Pepper Tree, Co-defendant Whitfield was holding Mr. Washington at gunpoint. He did not see Co-defendant Whitfield take Mr. Washington’s cell phone. “Kebo” jumped out of the car and ran to Mr. Overton’s car before Mr. Carbins had come to a complete stop. Defendant also jumped out and followed “Kebo.” “Kebo” tried to open the driver side door, but Mr. Overton drove off. Kebo began firing his gun at Mr. Overton. Defendant, “Kebo” and Co-defendant Whitfield ran back to Mr. Carbins’ car. Defendant demanded that Mr. Carbins drop him and Ms. Harris away from Pepper Tree to avoid being identified by the security guards. He feared that he would be identified because there was a “sky cop camera” near the apartment gate entrance where the shooting occurred. Defendant knew that they changed shifts at 5 a.m. and the shooting and robbery occurred around 4 a.m. Mr. Carbins dropped off Defendant, Ms. Harris, and Co-defendant Whitfield at another entrance to Pepper Tree. Defendant and Ms. Harris returned to Defendant’s sister’s apartment. Defendant did not know where

Co-defendant Whitfield went. Defendant did not report the shooting because he did not want to “involve [him]self” in the shooting and talk to the police.

Defendant learned from his sister and mother that he was a person of interest in the case so he went to the police station to give a statement on March 4, 2019. Defendant asserted that after he gave his first statement, the interviewing officer demanded to know what part Defendant had in the crimes or he and Ms. Harris would risk losing custody of their child. Defendant acknowledged that the only difference in his two statements was that he admitted to getting out of the car in the second statement. Defendant insisted that he never intended to kill or rob anyone, did not receive any proceeds from the robbery, and denied saying that he would search the victims as stated in the second statement.

Motion for Judgment of Acquittal and Renewed Motion for Judgment of Acquittal

After the State rested its case, the trial court granted Defendant’s motion for judgment of acquittal in Count 2 finding that the indictment specified Mr. Overton’s cell phone as the object of the robbery and “the proof in the case just doesn’t show it.”

After he testified, Defendant renewed his motion for judgment of acquittal on Count 1 because the State had failed to meet “its burden in making this an admissible case.” The trial court found that the proof showed an “intent to rob both individuals[.]” While the indictment in Count 2 was “a little too specific in putting in the cellphone of Mr. Overton,” the trial court found no issue with the wording of Count 1 and no issue with notice of the charge to Defendant. Accordingly, it denied the renewed motion for judgment of acquittal.

To preserve the issue for appeal, defense counsel reiterated that the denial of the renewed motion would preclude the jury from entering a unanimous verdict. Defense counsel argued that because Count 1 did not specify the victim of the underlying felony, some of the jurors might rely on the attempted robbery of Mr. Overton while others might rely on the completed robbery of Mr. Washington. Defense counsel argued further that in such cases, the State would need to elect the proof for the underlying felony before it rested its case. Because the indictment did not specify the victim of the underlying felony, Defendant had not received proper notice of the charge. The State maintained that the case was properly indicted. The trial court rejected the defense argument that an election was necessary in this case:

In this case, we have discussion about – I’m sorry, what was the term, that we’re going to do what, stretch –

– stretch the victims, meaning a robbery. Two people are the victims, and I don’t – it all happened almost at once. And I – in this case I don’t think it’s an issue for election of offenses. So I’m going to overrule that.

Once the jury entered the courtroom, the trial court instructed the jury regarding Count 2: “I have dismissed Count Two of the indictment, which is criminal attempt especially aggravated robbery, that will not be part of your consideration.”¹ The trial court then instructed the jury.

After the jury received the instructions, the State asked to be heard outside the presence of the jury on the instruction for Count 1. The State argued that the instruction for Count 1 should have included the following language: “the killing was committed in the perpetration of or the attempt to perpetrate the alleged Robbery[.]”² There was then a lengthy discussion about how the court should instruct the jury regarding the victim of the underlying felony in Count 1, specifically whether the victim should be described as Mr. Overton or Mr. Washington. The court’s instructions named Mr. Overton as the robbery victim, not Mr. Washington, and the court had dismissed Count 2 which charged Defendant with the robbery of Mr. Overton. The trial court declined to add the robbery of Mr. Washington as an element of the underlying felony to Count 1. The trial court stated that adding Mr. Washington as another victim of the underlying felony in the felony murder count would then create a “real issue of election.” The defense maintained its position that the indictment was poorly worded in failing to identify the underlying robbery for the felony murder charge.

During deliberations, the jury posed one question: “does criminal responsible (sic) apply to aggravated robbery?” After discussing the question with counsel for both parties, the trial court instructed the jury to refer to the jury instructions. The jury returned a verdict convicting Defendant of first-degree felony murder as charged in Count 1 and aggravated robbery as charged in Count 3. The trial court sentenced Defendant to life imprisonment for the felony murder conviction and five years for the aggravated robbery conviction and ran the sentences concurrently. Defendant filed a timely but unsuccessful motion for new trial followed by a timely notice of appeal.

Analysis

I. Jury Instruction and Election of Offenses

¹ The record shows that the Count 3 was not renumbered to Count 2 in the instructions or verdict.

² The State also argued that the trial court had omitted “criminal attempt” when describing the essential elements of the underlying felony. The court and the State later agreed that criminal attempt was included in the instructions.

Defendant claims the trial court's instruction for felony murder was erroneous and inaccurate resulting in a jury verdict that was not unanimous. Count 1 of the indictment reads that Defendant and Co-defendant Whitfield

on February 25, 2019 in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully and with the intent to commit Robbery kill KORDEDRIIS OVERTON in the perpetration of or the attempt to perpetrate Robbery, in violation of T.C.A. 39-13-202, against the peace and dignity of the State of Tennessee.

While the indictment does not specify the victim of the underlying felony in Count 1, in its charge to the jury, the trial court specified Mr. Overton as the victim of the underlying felony. Defendant maintains that this instruction was error because the trial court dismissed Count 2, the attempted especially aggravated robbery of Mr. Overton. Defendant maintains that the jury's verdict in the Count 1 felony murder charge was not unanimous because the State did not elect which robbery served as the underlying felony – the attempted robbery of Mr. Overton or the aggravated robbery of Mr. Washington. The State contends the trial court properly instructed the jury and the State was not required to make an election. We agree with the State.

A defendant has a right to complete and accurate jury instruction. *State v. Cole-Pugh*, 588 S.W.3d 254, 259-60 (Tenn. 2019). The duty to instruct the jury falls on the trial court. *Id.* at 260. A reviewing court should consider the jury instructions in their entirety. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). A jury instruction is considered prejudicially erroneous if it “fails to submit the legal issues or misleads the jury as to the applicable law.” *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). As to the latter point, a jury instruction 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). The jury is presumed to follow the trial court's instructions. *State v. Banks*, 271 S.W.3d 90, 137 (Tenn. 2008). An inquiry into the propriety of a jury instruction is a mixed question of fact and law which this court reviews de novo with no presumption of correctness. *State v. Perrier*, 536 S.W.3d 388, 396 (Tenn. 2017).

Likewise, whether an election of offenses is required is a question of law this court reviews de novo. *State v. Qualls*, 482 S.W.3d 1, 8 (Tenn. 2016). The doctrine of election “safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence.” *State v. Johnson*, 53 S.W.3d 628, 631 (Tenn. 2001); *see also Qualls*, 482 S.W.3d at 9. The purpose of an election is to assist the defendant in preparing for and defending against a specific charge, protect the defendant from double-jeopardy, enable the trial court to review the weight of evidence in its role as thirteenth juror, and allow an appellate court to review the

legal sufficiency of the evidence. *Id.* at 10. An election is required when the evidence at trial shows that the defendant has committed more offenses against the victim than were charged in the indictment. *Qualls*, 482 S.W.3d at 9; *State v. Kendrick*, 38 S.W.3d 566, 568 (Tenn. 2001); *State v. Walton*, 958 S.W.2d 724, 727 (Tenn. 1997). Electing the facts upon which the State intends to rely for each count of the indictment protects “the defendant’s state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence.” *Johnson*, 53 S.W.3d at 631.

Our review begins with an examination of the indictment. Although the specific details of the underlying felony were not alleged in the indictment, the trial court specified Mr. Overton as the victim of the underlying felony in its charge to the jury:

For you to find the defendant guilty of [first-degree felony murder], the State must have proven beyond a reasonable doubt the existence of the following essential elements:

- (1) that the defendant, or one for whom the defendant is criminally responsible, unlawfully killed the alleged victim KORDEDRIS OVERTON; and
- (2) that the killing was committed in the perpetration of or the attempt to perpetrate the alleged robbery. . . .

The essential elements of robbery are:

- (1) that the defendant knowingly obtained or exercised control over property owned by KORDEDRIS OVERTON; and
- (2) that the defendant did not have the owner’s effective consent; and
- (3) that the defendant intended to deprive the owner of the property; and
- (4) that the defendant took such property for the person of another by the use of violence or by putting the person in fear; and
- (5) that the defendant took such property intentionally or knowingly.

See T.C.A. § 39-13-401(a) (“[r]obbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear”).

Defendant contends that this instruction was erroneous arguing that because the trial court dismissed Count 2 which charged Defendant with attempted especially aggravated robbery of Mr. Overton, the jury could not consider the robbery of Mr. Overton as the required underlying felony element of felony murder. Defendant avers further that the jury’s verdict was not unanimous because the jury was allowed “to consider two different offenses, each of which matched the single underlying charge in Count 1 of the

indictment.” Although he maintains that the jury should not have considered the evidence regarding the attempted robbery of Mr. Overton, Defendant insists nevertheless that the trial court erred in not requiring the State to elect from the attempted robbery of Mr. Overton or the robbery of Mr. Washington for the underlying felony in Count 1. Defendant’s argument is flawed for several reasons.

First, while a felony murder indictment must allege that the killing was committed during the perpetration of a felony, “specific allegations of the elements and facts of the underlying felony are unnecessary.” *State v. Anderson*, No. W2000-00737-CCA-R3-CO, 2002 WL 1558491, at *2 (Tenn. Crim. App. Jan. 9, 2002)) (in habeas action, felony murder sufficiently alleged where indictment did not allege a factual basis for the underlying felony of attempted aggravated robbery); *see also State v. Hoskins*, No. E2020-00052-CCA-R3-CD, 2021 WL 2964331, at *7-9 (Tenn. Crim. App. July 15, 2021) (indictment charging defendant with six counts of felony murder held sufficient to provide defendant with notice where the indictment did not include specific allegations of the underlying felonies in all six counts); *cf. State v. Williams*, No. W2009-01638-CCA-R3-CD, 2011 WL 1770655, at *7-10 (Tenn. Crim. App. May 9, 2011) (trial court erred in failing to dismiss felony murder count where State failed to designate a particular underlying felony in the indictment but error held to be harmless because the felony murder conviction was merged with the premeditated murder conviction). The indictment here was sufficient to put Defendant on notice of the charge of the murder of Mr. Overton that occurred during the perpetration or attempt to perpetrate a robbery.

Second, the dismissal of Count 2 neither invalidated Count 1 nor barred the jury from considering the proof related to the attempted robbery of Mr. Overton as the underlying felony for the felony murder charge in Count 1. Each count of an indictment stands on its own. *See Wiggins v. State*, 498 S.W.2d 92, 93 (Tenn. 1973). The felony murder statute does not require that a defendant charged with first-degree felony murder also be charged in a separate count of the indictment with the attempt or perpetration of the underlying felony. *Moore v. State*, No. E2006-02261-CCA-R3-PC, 2007 WL 1890652, at *5 (Tenn. Crim. App. July 2, 2007).

Because each count of an indictment stands on its own, this court has upheld convictions for felony murder where the jury acquitted a defendant of the separate charge of the underlying felony. *See State v. Grogger*, No. M2008-02015-CCA-R3-CD, 2009 WL 3832921, at *14 (Tenn. Crim. App. Nov. 17, 2009) (felony murder in the perpetration of especially aggravated robbery affirmed where the jury acquitted defendant of the separate charge of especially aggravated robbery); *see also State v. Payne*, No. W2001-00532-CCA-R3-CD, 2002 WL 31624813, at *11-14 (Tenn. Crim. App. Nov. 20, 2002) (upholding conviction of second-degree murder conviction as a lesser-included offense of felony

murder in the perpetration of attempted especially aggravated robbery where jury convicted defendant of the separate count of attempted especially aggravated robbery).

Third, an election was not required because the evidence at trial did not establish that Defendant committed more offenses against the victims than were charged in the indictment. *Qualls*, 482 S.W.3d at 9; *Kendrick*, 38 S.W.3d at 568; *Walton*, 958 S.W.2d at 727. The State's proof at trial corresponded to the indictment. Put another way, the jury was not presented with evidence of conduct that was not encompassed in Counts 1, 2, or 3.

With these principles in mind, we review the trial court's instructions for reversible error. The record shows the jury convicted Defendant of the offenses with which he was charged in Counts 1 and 3. The trial court's instruction identifying Mr. Overton as the victim of the underlying felony of Count 1 did not implicate or change the elements that needed to be proven at trial. *See State v. Hale*, No. M2011-02138-CCA-R3-CD, 2012 WL 3776673, at *10-11 (Tenn. Crim. App. Aug. 31, 2012) (trial court's omission of victim cashier's name in jury instruction to "Whitwell BP" from "Rita Waters dba Whitwell BP" in indictment, did not constructively amend indictment where omission of "Rita Waters" did not modify the element of the charged crime of aggravated robbery and where "Rita Waters" and "Whitwell BP" satisfied the statutory definition of "owner") *cf. id.* at *10-11 (aggravated robbery conviction reversed and modified to theft valued at \$500 or less where the indictment charged robbery by violence but the jury was instructed that the crime could be established by proving either violence or putting the person in fear thereby modifying essential element of the charged offense on a ground not charged in the indictment); *see also State v. Wyse*, No. E2019-01454-CCA-R3-CD, 2020 WL 6141011, at *11 (Tenn. Crim. App. Oct. 20, 2020) (fatal variance existed where defendant was charged with rape accomplished by force or coercion but the jury was instructed that it could convict the defendant based on rape accomplished without the victim's consent); *State v. Smith*, No. W2019-01882-CCA-R3-CD, 2020 WL 4346798, at *7 (Tenn. Crim. App. July 28, 2020) (sua sponte remand for a new trial where the jury was instructed on multiple theories of rape but only one theory was charged in the indictment); *State v. Adkins*, No. M2019-02284-CCA-R3-CD, 2021 WL 2100447, at *5-8 (Tenn. Crim. App. May 25, 2021) (no reversible error where defendant was charged with "possession" of contraband in a penal institution but trial court instructed jury with "introduction" of contraband where the elements of the offense listed in the indictment were the same elements that were charged to the jury), *perm. app. denied* (Tenn. Sept. 22, 2021). Here, both the indictment and the jury instructions required the jury to find the elements of a robbery. We conclude the trial court's instruction regarding the elements of the underlying felony in Count 1 did not constitute reversible error.

Because the trial court specified Mr. Overton as the victim of the underlying robbery, any election issue was cured by the court's instruction. Given the trial court's unambiguous instruction on the specific underlying felony, there was no unanimity issue. Indeed, this court presumes that the jury followed the trial court's instruction. *Banks*, 271 S.W.3d at 137. We likewise presume the jury followed the trial court's instructions on criminal responsibility and conclude that the jury's question on whether criminal responsibility applied to the aggravated robbery charge of Count 3, did not constitute evidence to rebut that presumption. *Id.* The record shows the trial court instructed the jury that Defendant was criminally responsible "as a party to the offenses of first[-]degree murder and aggravated robbery if the offenses were committed by the defendant's own conduct, by the conduct of another for which the defendant is criminally responsible or by both." The jury was properly charged, and we fail to see how the jury question undermines the unanimity of the jury's verdict. As defense counsel acknowledged at oral argument, the jury received an instruction on unanimity. Such an instruction only bolsters the unanimity of the jury's verdict.

Furthermore, we are not persuaded by the cases Defendant relies on as supporting authority. We focus our attention on the three cases which garnered most of Defendant's attention in his brief, *State v. Doty*, No. W2018-00701-CCA-R3-CD, 2020 WL 4045669 (Tenn. Crim. App. July 17, 2020); *State v. Smith*, 492 S.W.3d 224 (Tenn. 2016), and *State v. Yancey*, No. W2011-01543-CCA-R3-CD, 2012 WL 4057369 (Tenn. Crim. App. Sept. 17, 2012).

These cases are distinguishable from the case at hand because the unanimity of the jury's verdict was in question due in part to the trial court's instructions. In *Doty*, 2020 WL 4045669, at *7-9, the defendant was charged with two distinct offenses, aggravated child neglect and aggravated child endangerment, in the same count of the indictment. Based on the proof, the jury could have concluded that the defendant's behavior endangered the victim. *Id.* at *10. Both the indictment and the jury instructions conflated the two offenses into the single offense of "aggravated child abuse or endangerment." *Id.* at *9-10. Thus, it was unknown whether the jury convicted the defendant upon a finding of neglect or endangerment. *Id.* Similarly, in *Smith*, 492 S.W.3d at 235-36, the defendant was charged with one count of aggravated assault but the victim testified to two incidents which matched the allegations in the indictment. The trial court did not require an election or instruct the jury on which incident to consider for the aggravated assault charge. *Id.* at 236-38. And in *Yancey*, 2012 WL 405369, at *7-8, the defendant was charged with employing a firearm during the commission of a dangerous felony but the dangerous felony was not specified in the indictment, the jury instruction, or elected by the State.

Given the trial court's instructions in this case, the unanimity of the verdict was not in question. This is a classic case of felony murder. Here, Co-defendant Whitfield declared

to Defendant and Mr. Carbins his intent to rob both Mr. Overton and Mr. Washington. He then robbed Mr. Washington at gunpoint by taking his cell phone. Mr. Overton was shot and killed during the intended robbery of both Mr. Washington and Mr. Overton. For purposes of the felony murder charge, it matters not that the plan to rob Mr. Overton was unsuccessful. Defendant was charged with a killing during the perpetration of or attempt to perpetrate a robbery. No election was required, and the trial court's instruction on Count 1 did not constitute reversible error. Defendant is not entitled to relief.

II. Motion for Judgment of Acquittal

Defendant claims the trial court erred in denying his motion for judgment of acquittal on Count 1 of the indictment "at the close of the proof" because the evidence was insufficient to support murder in the perpetration of robbery or attempted robbery. He argues that no rational juror could find the essential elements of the underlying robbery because the trial court dismissed the attempted especially aggravated robbery offense charged in Count 2. The State responds that the trial court's dismissal of the attempted especially aggravated robbery charge in Count 2 had no bearing on whether the evidence was sufficient to support felony murder as charged in Count 1. We agree with the State.

Motions for judgment of acquittal are governed by Tennessee Rule of Criminal Procedure 29 which provides in pertinent part as follows:

(b) Grounds for Judgment of Acquittal. On defendant's motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

(c) Proof After Denial of Motion. If – at the close of the [S]tate's proof –the court denies a defendant's motion for judgment of acquittal, the defendant may offer evidence without having reserved the right to do so.

Tenn. R. Crim. P. 29(b), (c). When a defendant moves for judgment of acquittal at the conclusion of the State's proof and the motion is denied, the defendant waives any claim of error if he calls witnesses after the denial instead of standing on the motion. *State v. Collier*, 411 S.W.3d 886, 893 (Tenn. 2013). However, when the same motion is made at the close of all of the evidence, any claim of error is not waived. *Id.* "[T]he trial court must favor the opponent of the motion with the strongest legitimate view of the evidence, including all reasonable inferences, and discard any countervailing evidence." *Id.* (quoting *State v. James*, 315 S.W.3d 440, 455 (Tenn. 2010)). "The standard by which the trial court determines a motion for a judgment of acquittal is, in essence, the same standard that

applies on appeal in determining the sufficiency of the evidence after a conviction.” *State v. Little*, 402 S.W.3d 202, 211 (Tenn. 2013). That standard is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also* Tenn. R. App. P. 13(e) (a conviction will be upheld if the evidence presented at trial “support[s] the finding by the trier of fact of guilt beyond a reasonable doubt”).

The offense at issue is Defendant’s conviction for felony murder which is defined as a killing that occurs during the perpetration of, or attempt to perpetrate, a number of enumerated offenses including robbery. T.C.A. § 39-13-202(a)(2). “No culpable mental state is required . . . except the intent to commit the enumerated offenses or acts[.]” *Id.* § 39-13-202(b). Robbery is the “intentional or knowing theft of property from another’s person by the use of violence or fear.” *Id.* § 39-13-401(a). A person is criminally responsible for the conduct of another if “acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]” *Id.* § 39-11-402(2). Under a theory of criminal responsibility, a defendant’s presence, association, and companionship with the perpetrator of a felony before and after the commission of the offense are circumstances from which that defendant’s participation in the crime may be inferred. *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998).

Because Defendant claims error in denying his motion for judgment of acquittal following the close of “all the proof,” we find that his claim of error upon the renewal of his motion for judgment of acquittal is not waived. *Collier*, 411 S.W.3d at 893. However, he is not entitled to relief because the evidence is sufficient to support Defendant’s conviction for felony murder. Viewing the evidence in the light most favorable to the prevailing party, the proof shows that Co-defendant Whitfield shared his plans to “stretch,” or rob, Mr. Overton and Mr. Washington to Defendant, Mr. Carbins, and “Kebo.” In his statement, Defendant agreed to search the victims. When the victims and Co-defendant Whitfield arrived at Pepper Tree, Defendant ran to the victims with “Kebo” and observed Co-defendant Whitfield rob Mr. Washington at gunpoint. “Kebo” tried to open Mr. Overton’s car door to rob Mr. Overton and fired multiple shots when Mr. Overton drove away. The shots hit Mr. Overton causing him to crash into a fence in a nearby residential neighborhood. Mr. Overton died as a result of the gunshot wounds.

Because he agreed to search the victims and then ran to Mr. Overton’s car, the jury could reasonably find that Defendant possessed the intent to promote and assist Co-defendant Whitfield in robbing the victims and was therefore criminally responsible for the killing of Mr. Overton which occurred during the attempted robbery of Mr. Overton and the aggravated robbery of Mr. Washington.

Alternatively, the proof was sufficient for a reasonable juror to find Defendant responsible for Mr. Overton's killing as a principal offender. The surveillance video showed Co-defendant Whitfield talking directly to Defendant and Mr. Carbins several times at the convenience store. As the State argued during its closing argument, the footage from the second camera angle which zoomed in on the driver side of the car, showed no movement from the back-passenger seat on the driver side. Co-defendant Whitfield crouched down several times to talk to Defendant who was seen with a "big" gun with an extended clip. Additionally, neither Co-defendant Whitfield, nor Defendant showed any indication of talking to anyone seated behind Mr. Carbins. Based on the surveillance footage, the jury could infer that there was no "Kebo" and that it was Defendant, seen handling a gun during the Facebook Live stream, who ran to the driver side to rob Mr. Overton and shot him as he fled. There was sufficient evidence for a reasonable juror to conclude that Defendant's conduct evinced a clear intent to rob the victims.

Defendant does not challenge the sufficiency of this evidence. He maintains that the trial court's dismissal of Count 2 precluded the jury from considering the attempted robbery of Mr. Overton, an essential element of felony murder. As discussed previously, this argument is without merit and yields Defendant no relief. The dismissal of Count 2 did not bar the jury from considering proof of the attempted robbery of Mr. Overton for Count 1. Each count of an indictment is viewed as a separate offense and consistency between verdicts on separate counts of an indictment is not required in Tennessee. *Wiggins*, 498 S.W.2d at 93. Indeed, when presented with seemingly inconsistent verdicts, this court's inquiry is limited to the sufficiency of the evidence of the convicted offense which we have addressed. *Id.*

The evidence is sufficient to support Defendant's conviction for a killing committed during the perpetration of an attempted robbery of Mr. Overton. We therefore affirm the trial court's denial of Defendant's motion for judgment of acquittal following the close of all the proof. Defendant is not entitled to relief.

CONCLUSION

For the forgoing reasons, the judgments of the trial court are affirmed.

JILL BARTEE AYERS, JUDGE