

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 2, 2022

FILED
01/31/2023
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JUSTINE WELCH

**Appeal from the Criminal Court for Shelby County
No. C1800802, 18-00253 W. Mark Ward, Judge**

No. W2021-01233-CCA-R3-CD

A Shelby County jury convicted the Defendant, Justine Welch, of first degree premeditated murder, attempted first degree murder resulting in serious bodily injury, attempted first degree murder, vehicular homicide, evading arrest in a motor vehicle, and two counts of employing a firearm during the commission of a dangerous felony. The Defendant received an effective sentence of life imprisonment without the possibility of parole plus sixty-two years. On appeal, the Defendant asserts that (1) the evidence is insufficient to support his convictions for first degree premeditated murder and attempted first degree murder; (2) the trial court erred in denying his motion to suppress witnesses' out-of-court and in-court identifications of him due to an impermissibly suggestive photographic lineup; and (3) the trial court erred in declining to issue a special jury instruction on identification. After review, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which TIMOTHY L. EASTER, J., joined. JOHN EVERETT WILLIAMS, J., not participating.¹

Phyllis Aluko, Shelby County Public Defender; and Tony N. Brayton (on appeal), Jennifer Case, and Samuel Christian (at trial), Assistant Shelby County Public Defenders, for the appellant, Justine Welch.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Greg Gilbert and Jose Leon, Assistant District Attorneys General, for the appellee, State of Tennessee.

¹ The Honorable John Everett Williams died on September 2, 2022, and did not participate in this opinion. We acknowledge his faithful service to this Court.

OPINION
I. Background

This case arises from the June 4, 2016 shooting, and ultimately death, of Joshua Walton, the shooting of Adul Sakan and Christopher Dickens, and the motor vehicle death of Officer Verdell Smith. As background, on June 3, 2016, the Defendant was in Little Rock, Arkansas, staying with a friend, Ronique Boykins, who allowed him to borrow her vehicle. Rather than return the vehicle, the Defendant drove the vehicle to Memphis, Tennessee, where he abandoned it. During the evening hours of Saturday, June 4, 2016, the Defendant took Randy Henderson's silver Chevrolet Camaro from a gas station in Memphis while Mr. Henderson was inside the store. Later that night, the Defendant walked up to a group of people eating outside of Westy's, a restaurant in downtown Memphis, and shot Joshua Walton in his neck and Adul Sakan in his face. Mr. Sakan sustained multiple permanent injuries, and Mr. Walton was rendered paralyzed and survived for approximately one year before dying as a result of his injuries. Shortly after the shooting, the Defendant fled to the parking lot of the nearby Bass Pro Shops where he shot an employee, Christopher Dickens, three times and fled in Mr. Henderson's Camaro.

Police officers located the Defendant, who led them on a high speed pursuit through downtown Memphis. The Defendant drove the wrong direction down a one-way street and toward an intersection of Beale Street, which had been blocked off from traffic to allow the Saturday night crowd of pedestrians to freely walk up and down the street. The Defendant drove through the barricades and struck Memphis Police Department ("MPD") Officer Verdell Smith with the Camaro as Officer Smith was assisting in clearing pedestrians from the street. Due to the impact, a portion of Officer Smith's leg was severed, and he sustained numerous blunt force injuries and died as a result of the injuries. The Defendant continued driving through the intersection and to a nearby street where he crashed the Camaro into a tree. He exited the Camaro and led police officers on a foot chase after which he was apprehended.

A Shelby County grand jury indicted the Defendant for four counts of felony murder of Officer Smith, first degree premeditated murder of Mr. Walton, attempted first degree murder of Mr. Sakan resulting in serious bodily injury, attempted first degree murder of Mr. Dickens, vehicular homicide of Officer Smith, intentionally evading arrest in a motor vehicle, theft of property valued at \$10,000 or more for taking Mr. Henderson's Camaro, theft of property valued at \$1,000 or more for taking Ms. Wright's vehicle, employing a firearm during the commission of a dangerous felony related to the attempted first degree murder of Mr. Sakan, and employing a firearm during the commission of a dangerous felony, related to the attempted first degree murder of Mr. Dickens. According to an order entered prior to trial, the State dismissed one of the felony murder charges; the remaining three felony murder charges were "withdrawn from the jury"; and the theft charges were

severed from the indictment. The judgments reflect that the State subsequently dismissed the felony murder and theft charges. The Defendant proceeded to trial on the charges of first degree premeditated murder, attempted first degree murder resulting in serious bodily injury, attempted first degree murder, vehicular homicide, evading arrest in a motor vehicle, and two counts of employing a firearm during the commission of a dangerous felony.

II. Facts

A. The Defendant's Arriving in Memphis and Taking the Camaro

Ronique Boykins testified that in May 2016, the Defendant came to stay at her home in Little Rock, Arkansas, while he was seeking to obtain his commercial driver's license. The Defendant arrived by bus and had clothing and a gun with him. Ms. Boykins described the gun as having a clip and agreed that the gun looked like a "police gun." She drove the Defendant from the bus station to Walmart where, at the Defendant's request, she used her identification card to purchase a box of ammunition for the Defendant's gun. While staying with Ms. Boykins, the Defendant practiced shooting the gun at a nearby shooting range.

Ms. Boykins testified that on June 3, 2016, the Defendant asked to borrow her vehicle, a GMC Envoy. She agreed, and the Defendant left in the vehicle at approximately 1:00 p.m. He left his clothing at Ms. Boykins's home, and she believed he would return. When the Defendant did not return, Ms. Boykins called a mutual friend and asked her to contact the Defendant. Ms. Boykins also attempted to contact the Defendant on the following day. She searched her home for the Defendant's gun but did not locate it. After her friend provided information regarding the location of the vehicle, Ms. Boykins contacted the police and reported the vehicle stolen. Ms. Boykins later learned that officers with the MPD had located the vehicle, but they declined to return the vehicle, explaining that the vehicle constituted evidence.

On June 7, 2016, MPD Officer Lawrence Williams located Ms. Boykins's Envoy in the parking lot of a liquor store in Memphis and testified that he saw a box of ammunition in the backseat of the vehicle. The Envoy was towed to a location where MPD Officer Michael Coburn processed the vehicle. He located a box of TulAmmo brand ammunition on the third row seat and testified that he believed the box contained nine-millimeter ammunition but that he could not specifically recall. He processed the vehicle and the box of ammunition for fingerprints. MPD Officer Nathan Gathright, a member of the Latent Print Division and an expert in the field of latent prints, testified that the Defendant's thumb print was on the vehicle's "shifter" chrome button in the interior of the vehicle and that a fingerprint of the Defendant's right index finger was on the box of ammunition.

Randy Henderson testified that between 7:00 and 7:30 p.m. on June 4, 2016, he drove his 2012 silver, stock Chevrolet Camaro to a Valero gas station located on Knight Arnold Road in Shelby County. He recalled that it was hot and still light outside. He parked the Camaro, left the keys in the ignition, and entered the store to purchase beer. He went to the gas station on a daily basis and knew those who frequented the store. Mr. Henderson testified that, while he was inside the store at a location where he could see his vehicle through the store's windows, he began speaking to a man who was sitting on a cooler. Mr. Henderson stated that he saw a man wearing a black hooded shirt with the hood up covering his head enter the Camaro and drive away. Mr. Henderson chased after the car and was able to catch up to the car before the man drove away, but the doors were locked. Mr. Henderson stated that he was able to see the man inside the Camaro. The man drove the Camaro out of the parking lot, turned left, and then turned right. MPD officers later obtained surveillance video from the gas station showing the Camaro being taken. The surveillance video was played for the jury and entered as an exhibit at trial, but the video is not included in the appellate record.

Mr. Henderson testified that his iPhone was in the Camaro, and a social security card belonging to his wife, Tiffany Houseton, was in the glove compartment. Mr. Henderson went to his home located near the gas station and used an application on his wife's iPhone to determine his iPhone's location. He returned to the gas station and showed the information to a police officer, who stated that the application did not provide a clear description of the iPhone's location. Mr. Henderson drove to Sam Cooper Boulevard, the location reflected in the application, where he found his iPhone on the side of the highway. He stated that the iPhone was in "[e]xcellent condition" and that the perpetrator appeared to have simply laid the iPhone face-down on the side of the road.

Mr. Henderson testified that an acquaintance subsequently contacted his wife and reported seeing his Camaro in downtown Memphis. The Camaro had a distinctive license plate with skulls whose eyes lit up, and the acquaintance reported seeing the license plate on the Camaro. Mr. Henderson called the police during the early morning hours of June 5th but was not provided with any information.

On June 7, 2016, Mr. Henderson went to the police department where he gave a statement and viewed a photographic lineup in an effort to identify the perpetrator. Prior to viewing the photographic lineup, Mr. Henderson read a form setting forth the rules and testified that he did not believe that he was required to choose someone in the photographic lineup. He identified the Defendant in the photographic lineup as the perpetrator and wrote, "This is the guy who took my car at the corner of Knight Arnold and Mendenall." Mr. Henderson also identified the Defendant as the perpetrator at trial and stated that the Defendant's appearance differed at trial from his appearance at the time of the offense, explaining that the Defendant "ha[d] a haircut." Mr. Henderson viewed a photograph of

the Defendant that was later identified at trial as a photograph taken by an officer of the Defendant while at the hospital following his arrest, and Mr. Henderson agreed that the photograph depicted the Defendant's appearance in 2016. Mr. Henderson stated that the perpetrator had "twists" in his hair and that the Defendant's hair in the photograph was "more twisted." Mr. Henderson explained that "twists" can be easily combed out of a person's hair and that the Defendant could have combed out his "twists" before the photograph in the lineup was taken. Mr. Henderson testified that a police officer also showed him a photograph of his Camaro, which was "burned to a crisp," and that he was able to recognize portions of his Camaro.

On cross-examination, Mr. Henderson recalled testifying at a prior hearing that, while he was in the store, he saw the perpetrator's face when the perpetrator looked into the store to see if Mr. Henderson was exiting the store. Mr. Henderson explained, "When I saw somebody get in my car, I looked and he looked. And then I chased. So it was a blur." He agreed that when he looked out of the store window, the perpetrator was in the process of sitting inside the Camaro and that the perpetrator put the car in drive and closed the door as the car was moving. Mr. Henderson chased after the car and was close enough to the car to touch it, but he was aware that the car's doors locked automatically once the car was placed in drive. He stated that he was able to see the perpetrator through the passenger side window, which was not tinted.

Mr. Henderson testified that he did not see a photograph of the Defendant in a newscast before identifying him in the photographic lineup. He agreed that the Defendant was the only person in the photographic lineup who had what appeared to be a band-aid on his forehead. He also agreed that an area underneath one of the Defendant's eyes appeared "dark" and could have been a black eye. He noted that one other person depicted in the second photograph of the lineup could have also had a black eye. He agreed that the Defendant's hair in the photograph did not appear as "twists" but was "combed out." On redirect examination, Mr. Henderson testified that the perpetrator appeared to have "twists" in his hair and that, due to the hood on the perpetrator's shirt, Mr. Henderson was unable to determine whether the perpetrator had "full braids." Mr. Henderson stated that he did not choose the photograph of a man with "twists" in his hair or a man with "a mark" because neither one matched the description of the perpetrator who he saw.

B. Shooting at Westy's

On June 4, 2016, a group of seven people, including John Douglas Conrey, John Steve Lyon, and Michael Becker attended a Harley Davidson motorcycle rally at the Convention Center in downtown Memphis. Following the rally, they decided to walk to Westy's, a restaurant located at the corner of Main Street and Jackson Avenue. When the group arrived, several customers were sitting at picnic tables outside in front of the

restaurant. The group entered the restaurant and sat at a table near the front door and windows with a view of the area in front of the restaurant.

Mr. Conrey testified that, while he was sitting at the table, he heard two gunshots coming from outside the restaurant and that within “a matter of seconds,” a woman, who he later identified as Nova Walton, Mr. Walton’s wife, ran inside the restaurant and announced that her husband had been shot. Mr. Conrey described the scene as “pure panic.” He said that he and others tried to take cover and that they feared the shooter would attempt to enter the restaurant. Once “the commotion calmed down,” Mr. Conrey looked out of a window and saw a thin African-American man wearing a dark hooded shirt and standing in the crosswalk. The man had the hood pulled up covering his head, and Mr. Conrey was unable to clearly see the man’s face. Mr. Conrey said the man was holding a “pistol,” and Mr. Conrey was unable to determine whether people were outside in the area where the man was pointing the gun. Mr. Conrey testified that the street lights and the lights on the building illuminated the area outside the restaurant.

Mr. Conrey exited the restaurant where several people had gathered, but Mr. Conrey did not see the man with the gun. He looked to his left where he saw a man who had been shot in his face, and Mr. Conrey believed the injuries were fatal. Mr. Conrey looked to his right, saw Mr. Walton lying on his back, and attempted to render aid. Mr. Walton stated that he was unable to move his legs, and, as a result, Mr. Conrey believed Mr. Walton sustained a spinal injury. Once paramedics arrived and moved Mr. Walton, Mr. Conrey observed that a majority of the blood was in the area of Mr. Walton’s upper shoulder. Mr. Walton was with his wife and two daughters, and at one point, Mr. Conrey and his wife accompanied the two daughters inside the restaurant where an employee who knew the daughters agreed to watch over them.

Mr. Lyon testified that, while inside the restaurant, he heard three gunshots. He stated that the gunshots initially sounded like firecrackers because of the music playing in the restaurant, but that a woman ran inside the restaurant and stated that her husband had been shot. People began “scrambling,” and Mr. Lyon looked through a nearby window where he had a clear line of sight to the outside area, which he stated was “pretty well lit.” He saw an African-American man, who was approximately six feet tall, wearing a black hooded shirt and camouflage pants, and standing on the opposite side of the street. At trial, Mr. Lyon identified a black hooded shirt and a pair of camouflage pants that the Defendant was wearing when he was arrested as resembling the clothing that the man was wearing. Mr. Lyon said the man had what appeared to be a weapon “kind of in and out of his pocket,” but Mr. Lyon could not recall the type of weapon that the man possessed. The man’s hood was up covering his head, preventing Mr. Lyon from seeing his hair. The man’s face, however, was not concealed, and Mr. Lyon described the man was having a thin build and a goatee and appearing to be “a little bit younger.” Mr. Lyon testified that when he opened

the restaurant door, the man was still standing in the same area and that the group went outside as the man “veered off from that corner.” Mr. Lyon saw the man cross the street and stated that the man “kind of didn’t run” but moved “a little faster than a walk maybe” in a westward direction. Mr. Lyon stated that two men who had been shot were lying on the ground outside the restaurant, and he described the scene as “chaotic.”

Mr. Lyon briefly spoke to police officers after they arrived at the restaurant. Approximately ten days later, he went to the police department where he gave a formal statement and identified the Defendant in a photographic lineup as the man he had seen on the night of the shooting. Mr. Lyon acknowledged that he had seen the Defendant’s photograph on television by the time that he viewed the photographic lineup but testified that he chose the Defendant’s photograph based upon his observing the man’s facial features and goatee. At trial, Mr. Lyon viewed a photograph of the Defendant taken at the hospital following the Defendant’s arrest, and Mr. Lyon covered the Defendant’s hair in the photograph, explaining that he did not see the man’s hair on the night of the shooting and only saw the “lower part” from his eyes to his chin. Mr. Lyon affirmed that the photograph was of the same man who he saw on the night of the shooting. Mr. Lyon also identified the Defendant at trial as the same man who he saw that night, and after the Defendant stood, Mr. Lyon stated that the Defendant’s height was similar to the man’s height.

On cross-examination, Mr. Lyon acknowledged that he wrote on the photographic lineup, “Saw him on TV after news showed him.” He denied that he identified the Defendant in the photographic lineup as the man who he saw on television rather than the man who he saw on the night of the shooting. Mr. Lyon explained that the police officer who showed him the photographic lineup asked him whether he had viewed any information about the shooting and that when Mr. Lyon responded that he had watched a newscast about the shooting, the officer instructed him to note the information on the lineup. Mr. Lyon denied noticing the Defendant’s black eye in his photograph when the officer showed the lineup to him.

Mr. Lyon agreed that he testified at a prior hearing that he stood inside the restaurant watching the man from a window for five to eight minutes. He stated that he did not know how long he had watched the man from the window, and that although he likely did not watch the man for five to eight minutes, “it sure felt like it.” He did not go outside until he saw the man walking away. He saw the man walk diagonally across the street and to a fence but did not see the man once he reached the fence.

Mr. Becker testified that, while the group was seated inside the restaurant, a woman entered the restaurant and screamed that her husband had been shot. Mr. Becker stated that he looked out of a window and saw a man standing “right across the street right there at

the window” while waving what appeared to be a gun. The lighting outside made the area so bright that “it was like daylight at night.” Mr. Becker said the African-American man was around five feet, eight inches tall with a thin build, a goatee, and a mustache. The man was wearing a black hooded shirt and camouflage pants, and he had the hood up covering his head. Mr. Becker was unable to see the man’s hair, but he saw the man’s face. Mr. Becker went outside once he saw the man leaving. When asked what led him to believe the man was holding a gun, Mr. Becker replied, “Seeing two people full of blood on the ground.” Once Mr. Becker saw the man walking along a construction fence away from the area, Mr. Becker turned his attention toward the two victims.

Mr. Becker provided his name and contact information to police officers once they arrived at the scene. He later gave a statement to the police and identified the Defendant in a photographic lineup. When asked why he chose the individual in the photographic lineup, Mr. Becker responded, “Well first off because we saw him. And second off because it was plastered all over the media. I mean, soon as we saw it, that’s him.” Mr. Becker acknowledged that prior to viewing the photographic lineup, he saw the Defendant’s photograph on the news “[c]ountless times.” He stated that he chose the individual in the photographic lineup because “before we went to the police department to give our statement, like I said it was on the news constantly. And so as we went up there, they put the lineup in front of me. I said yep, that’s him.” Mr. Becker was asked whether he also saw the individual who he identified in the photographic lineup on the night of the shooting, and he replied, “I saw him that night and there he was, a picture of him.” Mr. Becker identified a photograph of the Defendant taken at the hospital following his arrest as the same person who Mr. Becker identified in the photographic lineup. Mr. Becker also identified the Defendant at trial as the man who he saw on the night of the shooting. He later testified that he was unsure whether the Defendant who he identified in the courtroom was the same man who he saw on the night of the shooting.

On cross-examination, Mr. Becker agreed that the photograph that he chose in the lineup was the same photograph that he viewed on the news and that one of the reasons he chose the photograph in the lineup was his seeing the photograph on the news. He agreed that the photograph that he chose was the only man in the lineup who had a black eye and a bandage on his head. Mr. Becker also agreed that it was clear to him which of the photographs that he intended to choose and that he was able to clearly see the face of the man outside of Westy’s.

Prior to the shooting, Jacob Schorr, an owner of Westy’s, and Martin Norris, a manager, were meeting with Mr. Schorr’s son and the general manager outside by the side door of the restaurant on Jackson Avenue. Mr. Norris testified that he saw a man alone on the east side of the street walking toward them while “being very loud, argumentative, yelling at somebody, cursing, like he was speaking with somebody.” The man walked

across the street toward the restaurant, and Mr. Norris believed the man was going to “hassle” some of the customers who were outside in front of the restaurant. As Mr. Norris was walking up the sidewalk toward the front of the restaurant, he heard a gunshot, but due to an echo, he was unsure of the location of the gunshot. He heard a second gunshot and saw Mr. Sakan, who had been sitting on a picnic table near the front corner of the restaurant, fall into Mr. Norris’s line of sight and onto the ground.

The man, who had been walking northbound, turned around and began walking southbound in the same direction from which he had initially approached the restaurant. Mr. Norris testified that the man saw him and pointed the gun at him, and Mr. Norris ducked and moved quickly to avoid being shot. Mr. Norris stated that the man was more than six feet tall with a medium build and was wearing a black hooded shirt and dark pants. The hood was “pulled up in a strange way” and was “kind of obscuring his face.” Mr. Norris was unsure whether the pants were camouflage. He was able to see the man’s hands and determined that the man was African-American. Mr. Norris described the man’s gun as a semiautomatic with a “medium frame” that was larger than a .380 caliber firearm that would fit comfortably in a person’s hand but was not quite as large as a .45 caliber firearm.

The man continued walking south on Main Street, and Mr. Schorr followed the man on foot, while Mr. Norris followed in his vehicle. Mr. Norris and Mr. Schorr yelled at the man to stop, drop his gun, and then get down on the ground. The man turned around, saw Mr. Norris and Mr. Schorr, and then ran toward the Convention Center, down a side street, and across Front Street. Mr. Norris stated that the man jumped over a fence into the parking lot of Bass Pro Shops. Mr. Schorr chased after the man, while Mr. Norris drove to the entrance of Bass Pro Shops, hoping that the man would go toward the entrance. Mr. Norris lost sight of the man once he went over the fence into the parking lot. Mr. Norris testified that, although he and Mr. Schorr were armed, neither of them shot the man because they never had a clear shot. During the pursuit, Mr. Norris was speaking to police officers on his cell phone regarding his location and stated that his “thought was pursue and contain.”

Mr. Norris testified that he returned to the restaurant and was standing in the street while talking to a police officer while looking down Jackson Avenue. He saw a Camaro that was either silver, white, or light gray travel around the corner and turn left down Third Street. Shortly thereafter, a police car with flashing blue lights that appeared to be chasing the Camaro drove around the corner. An officer later showed Mr. Norris a photographic lineup, but he was unable to identify the shooter because he never saw the shooter’s face.

On cross-examination, Mr. Norris testified that, before the shooting, he heard the man before he saw the man walking down the street. He heard someone arguing, cursing, and stating, “how dare you talk to me like that, you can’t talk to me.” He looked toward the yelling and saw only the man, who appeared to be arguing with himself.

Mr. Schorr also testified to the man's "rambling cussing," shouting, and "talking angry" as the man walked down the street to the front of the restaurant where customers were sitting. Mr. Schorr described the man as African-American, approximately six feet tall with a medium build, and wearing dark pants and a black hooded shirt with the hood pulled up on his head. Mr. Schorr stated that, although it was nighttime, the area was well-lit by the street lights. Mr. Schorr and Mr. Norris began walking up the side of the restaurant toward the front of the restaurant when Mr. Schorr heard more "cussing and swearing like what are you looking at." He then heard gunshots and stated that he may have heard a total of three, four, or more gunshots. When Mr. Schorr heard the initial gunshots, he went to his truck to retrieve his gun. He then heard an additional gunshot and saw Mr. Sakan, who had been sitting at a picnic table close to the corner of the restaurant, fall on the ground.

Mr. Schorr testified that the man then pointed the gun toward him, and Mr. Schorr described the man's gun as an automatic with a "block shape." The man ran and ducked behind a car across the crosswalk, and Mr. Schorr yelled at the man to stop. The man ran southbound on Main Street while Mr. Schorr chased after him. The man ran next to the Convention Center and then onto Winchester Avenue. Mr. Norris drove up in his car; Mr. Schorr jumped into the car; and they drove to Front Street where Mr. Schorr saw the man run across the street, jump over a fence, and run toward the parking lot and front entrance of Bass Pro Shops, which he referred to as "the Pyramid." Mr. Schorr stated that he was never close enough to the man to shoot him. Surveillance video of the man running through the different areas and the pursuit by Mr. Schorr and Mr. Norris was played to the jury and entered as an exhibit at trial, but the video is not included in the appellate record.

Mr. Schorr testified that, during the chase, he was speaking to a police dispatcher on his cell phone regarding the man's location when he saw a police car driving down Front Street and flagged down the car. He saw the man jump over the fence and then heard additional gunshots. He then saw a silver Camaro and a van in the parking lot of the Bass Pro Shops moving at a "strange pace" or "faster than you would normally drive in a parking lot that was full." The Camaro traveled southbound at the main entrance, while the minivan traveled northbound beside the Bass Pro Shops. Mr. Schorr returned to Westy's with an officer and stated that while he was speaking with an officer, he saw a silver Camaro, which looked and sounded like the silver Camaro that he observed near Bass Pro Shops, "racing up" Jackson Avenue and "make a wide sweeping" left turn onto Third Street, which is now B.B. King Boulevard. Mr. Schorr was unable to see the Camaro's license plate. Mr. Schorr was shown the surveillance video of the theft of Mr. Henderson's silver Camaro and testified that the Camaro taken from the gas station resembled the Camaro that he viewed near the scene. Mr. Schorr later gave a statement to the police and viewed a photographic

lineup. He was unable to identify the shooter in the lineup, explaining that he was unable to see the man's face, which was hidden by the dark hood.

On cross-examination, Mr. Schorr agreed that the shooting occurred shortly before 10:00 p.m. and testified that he was unable to identify the shooter due to the lack of lighting and the hood worn by the shooter. Once the shooter, who had been yelling, walked in front of Westy's, Mr. Schorr heard the same voice yell something similar to, "Why are you looking at me?" Mr. Schorr then heard the first gunshot. He agreed that he heard three or four gunshots, and following a pause, he heard another gunshot after which he saw Mr. Sakan collapse. The shooter was standing next to Mr. Sakan, and after Mr. Sakan fell, the shooter aimed his gun toward Mr. Schorr and Mr. Norris.

MPD Lieutenant John Stone of the Crime Scene Investigative Unit responded to the scene and collected two bullet projectiles and a nine-millimeter TulAmmo brand casing outside the restaurant. He also collected a Ducks Unlimited hat, eyeglasses later identified as belonging to Mr. Sakan with possible blood on them, and a set of dentures and a white towel with a red substance that appeared to be blood on it. On the following day, MPD Lieutenant Velda Thayer collected another shell casing outside of Westy's.

Basma Lucchesi, Mr. Sakan's daughter, testified that at approximately 10:00 p.m. on June 4, 2016, her husband called her and informed her that Mr. Sakan had been shot. She drove to the hospital where Mr. Sakan was being treated. She learned that Mr. Sakan had been shot in his face, and she stated that the bullet entered the left side of his neck and exited through his left eye. His jaw was shattered, and he required a tracheotomy and a feeding tube. He was in a medically induced coma for a period of time and underwent multiple surgeries. Ms. Lucchesi stated that Mr. Sakan, initially, was "touch and go," and he had to live with her for a period of time. Mr. Sakan, who was sixty-two years old at the time of trial, had issues with memory and was unable to clearly recall the shooting. He continued to suffer pain due to metal plates in his face and eye drainage from where the bullet exited his eye.

Sheri Gatlin, Mr. Walton's aunt, testified that Mr. Walton passed away on July 21, 2017, at the age of forty. Prior to the shooting, Mr. Walton was a tree trimmer, drove a tow truck, and owned and cared for horses. He had one daughter and was active in her life. Following the shooting, he was paralyzed and remained in a hospital or a skilled nursing facility until his death. He required assistance with all activities of daily living. Mr. Walton's condition deteriorated to such a degree that his family decided that ceasing care would be more humane.

Dr. Katrina Van Pelt, the Shelby County Medical Examiner and an expert in forensic pathology, conducted a medical examination of Mr. Walton following his death. Dr. Van

Pelt examined Mr. Walton's medical records, the autopsy report, police reports, and the results of blood draws taken shortly before Mr. Watson's death in determining the cause and manner of his death. Dr. Van Pelt testified that according to the medical records, Mr. Walton sustained a gunshot wound to his neck, injuring the last vertebra in his neck and the first vertebra in the thoracic area and essentially paralyzing him from the chest downward. Dr. Van Pelt stated that, according to the medical records, Mr. Walton was on a ventilator during the early portion of his hospital stay. Doctors inserted a tracheotomy to help him breathe and talk and a percutaneous gastric tube to feed him. Because Mr. Walton did not have control of his bowels or bladder, doctors inserted a Foley catheter and performed an ostomy where his bowels were redirected to allow stool to be collected in a bag. Dr. Van Pelt said that the tubes, which required intrusions into Mr. Walton's body, increased the risk of infection and that Mr. Walton had multiple infections during the course of his treatment.

Dr. Van Pelt testified that because Mr. Walton was confined to a bed for most of the time, he sustained decubitus ulcers or pressure ulcers on both sides of his buttocks, which were treated using wound care in an attempt to prevent them from worsening and from increased infection. Mr. Walton also had pressure sores on the heels of both of his feet. Dr. Van Pelt stated that Mr. Walton's paralysis affected his muscle mass. At the time of his death, he was five feet, eight inches tall, weighed ninety-one pounds, and did not have any muscle mass in his legs or lower torso. Dr. Van Pelt said Mr. Walton's emaciated state was likely due to the lack of musculature from the paralysis rather than the lack of nourishment.

Dr. Van Pelt testified that Mr. Walton had a urinary tract infection at the time of his death that was being treated and that his blood cultures were positive for a bacteria called staphylococcus capitis. The autopsy showed some evidence of kidney damage and revealed that Mr. Walton also had pneumonia. Dr. Van Pelt determined that Mr. Walton's cause of death was sepsis due to complications from the gunshot wound to his neck. She stated that although multiple possible sources of the sepsis existed, all possible sources were complications of paralysis and that the paralysis was a direct result of the gunshot wound. Thus, she agreed that the gunshot wound was the cause of Mr. Walton's death, and she concluded that the manner of his death was homicide.

C. Shooting at Bass Pro Shops

Christopher Dickens testified that on June 4, 2016, he was employed at Bass Pro Shops at the Pyramid and that, shortly prior to the store's closing at around 11:00 p.m., he was in the parking lot gathering carts when a silver Camaro drove up and stopped approximately ten to fifteen yards away from him. Mr. Dickens described the Camaro as a fairly new model with stock, silver and black tire rims, but he believed one of the tire

rims was black. He initially believed that the driver was trying to ask him a question and took a step toward the car. The passenger side window was down, and Mr. Dickens saw the driver pointing a gun at him through the passenger side window. He said the man was African-American with a haircut that was somewhat like a “high top” and somewhat like a “fade.” Mr. Dickens acknowledged that he did not have the “best view” of the man’s face because the gun was somewhat in front of the man’s face. Mr. Dickens testified that the gun was pointed at his face, so he threw up his left arm to protect his face. As soon as he raised his arm, the first shot struck him in the arm, and he said that, had he not raised his arm, he would have been shot in his face. He was shot two additional times with one bullet grazing his left calf and another bullet striking his cell phone in his right pocket. He stated that he heard a total of three or four gunshots. He acknowledged that he previously stated that he heard six gunshots but testified at trial that he believed the shooter shot the gun three or four times based upon the number of times that Mr. Dickens was struck.

Mr. Dickens took cover on the ground behind the carts that he had gathered. He did not know how long he remained behind the carts. He believed that he would die until he jumped up and ran to the front entrance of the store located approximately eighty yards away. He was assisted by employees, customers, and hotel staff and gave a description of the car to an officer who was already in the area. While Mr. Dickens was being treated at the store, he pulled his cell phone out of his pocket and stated that his cell phone was “completely shattered” with a dent in the back. He testified that doctors informed him that, had the cell phone not blocked the bullet, the injury likely would have been fatal due to the presence of a main artery in the area.

Mr. Dickens was transported to Regional One Hospital where he had to be treated for his injuries in a hallway due to the large number of patients who were in the hospital that night. He did not have a wound from the bullet that struck his cell phone, but he had seven stitches from the graze wound on his left calf. He stated that a portion of the bullet had exited his arm, creating an “exit wound,” while the other portion remained in his arm. Doctors were able to remove the remaining portion of the bullet without performing surgery, but Mr. Dickens sustained permanent nerve damage to his arm.

Mr. Dickens testified that, while he was at the hospital, police officers informed him that the shooter had been killed. The shooter, however, was later placed in a hospital bed in the hallway less than one yard from Mr. Dickens. Mr. Dickens expressed confusion because he had been informed that the shooter was deceased. At trial, Mr. Dickens viewed a photograph of the Defendant taken at the hospital and stated that he resembled the shooter in that they had similar hair.

Following Mr. Dickens’s release from the hospital between 3:45 and 4:30 a.m., he went to the police department where he gave a statement and viewed a photographic lineup.

He identified two photographs of those who appeared similar to the shooter, including a photograph of the Defendant, but Mr. Dickens did not circle either of the photographs because he was not “100 percent” certain that either was the shooter. Mr. Dickens identified the Defendant as the shooter at both the preliminary hearing and at trial. He also provided officers with a detailed description of the shooter’s gun. He testified at trial that the gun was a semiautomatic handgun with a clip. He explained that he told officers that the gun may have been a forty-caliber handgun but that after thinking further, he did not believe the firearm was a forty-caliber handgun because such handguns are more difficult to shoot, “especially, like one handed pointing it like this.” Rather, he believed the firearm was a nine-millimeter handgun due to the large hole that the bullet left in his arm.

On cross-examination, Mr. Dickens clarified that the store closed at 10:00 p.m. and that the shooting may have occurred either at or a short time after 10:00 p.m. He did not see where the Camaro went following the shooting. Mr. Dickens believed the Defendant was in police custody when he was in the hospital because he was surrounded by police officers. Mr. Dickens also watched news coverage about the shootings and believed the Defendant’s photograph was shown on the news, explaining, “It’s been a long time, but I believe they would have shown something if they had somebody.” He agreed that after viewing the news coverage, he testified at the preliminary hearing and identified the Defendant in the courtroom as the shooter. On redirect examination, Mr. Dickens agreed that he believed he recognized the Defendant as the shooter upon seeing him in the hospital.

MPD Sergeant Eric Hutchison with the Crime Scene Investigation Unit responded to the Bass Pro Shops where he collected two bullet casings in the parking lot. He observed a puddle of what appeared to be blood near the shopping cart return stall. He went to Regional One where he collected a bullet projectile that medical personnel removed from Mr. Dickens’s arm.

MPD Officer Matthew Wheeler testified that he responded to Westy’s and received information that led him to Bass Pro Shops. He went down a nearby service road due to information that the suspect had fled to a field near the road. Officer Wheeler exited his car and began searching the area using his flashlight. He stated that, as he was searching, he heard shots fired west of his location in the parking lot. He ducked down behind his car, and after the shooting stopped, he drove to the location from which he heard the shots fired. Once he reached the parking lot of Bass Pro Shops, he did not see a suspect. An off-duty officer flagged him down and described a silver Camaro that was headed southbound away from the store.

Harold Rogers, who was an MPD officer assigned to the downtown precinct on June 4, 2016, testified that, while on patrol less than one-half mile away from Westy’s, a woman pulled up in a vehicle next to his car and reported that a shooting had occurred at the

restaurant. Officer Rogers responded to Westy's where a man reported that the shooter ran toward Bass Pro Shops, and Officer Rogers began driving toward the area. As he was turning to the road leading to the store's entrance, a dispatcher advised that another shooting had occurred in the parking lot of Bass Pro Shops. While Officer Rogers was driving toward the store, he met a Chevrolet Camaro leaving the area. Officer Rogers identified a still photograph of the Camaro passing by his patrol car taken from the dash camera video. He stated that he continued driving toward the store because he had not yet received any information about a Camaro. Once he entered the parking lot, an off-duty officer who was working as a security guard for Bass Pro Shops reported over the radio that a silver Camaro had been stolen after the shooting. Officer Rogers advised that he had observed a car matching the description, and he began driving around the area searching for the Camaro.

D. Police Pursuit and the Death of Officer Smith

Robert Forbert, who was an MPD police officer assigned to the downtown precinct on June 4, 2016, testified that he was on a domestic violence call when he heard a report over the radio of a shooting at Westy's. Approximately five minutes later, he heard a report of a shooting at Bass Pro Shops. Officer Forbert's partner agreed to complete the domestic violence call while Officer Forbert responded to Bass Pro Shops. When Officer Forbert arrived in the area, he received information that the suspect had fled in a silver Chevrolet Camaro with stock rims, and he began driving around and searching for the car. He believed that there was a connection between the shootings and that the shooter was searching for additional victims.

Officer Forbert testified that he located a Camaro matching the description parked as a gasoline pump at an Exxon. As the car left the station, Officer Forbert ran the tags on the car, learned that the car was reported as stolen, and initiated a traffic stop. The driver stopped the Camaro, and Officer Forbert exited his vehicle. From the cover of his vehicle, Officer Forbert instructed the driver to show his hands, after which the driver drove away, traveling back toward the downtown area. Officer Forbert pursued the Camaro, at some points traveling between seventy and ninety miles per hour. The Camaro turned southbound onto B.B. King Boulevard and traveled the wrong way down a one-way street toward the downtown area. Officer Forbert continued pursuing the Camaro but stated that he was "[p]retty far behind" the Camaro because the Camaro was much faster than his vehicle. Other officers were behind Officer Forbert assisting in the pursuit. The Camaro approached the intersection of B.B. King Boulevard and Beale Street, which was closed to traffic to allow pedestrians to freely walk up and down Beale Street. Officer Forbert broadcast over the radio the pursuit details and asked officers to clear the streets.

MPD Officer Charles Cathey and his partner, Officer Verdell Smith, were working overtime detail on Beale Street on the night of June 4, 2016. Officer Cathey testified that hundreds of people were on Beale Street, which was typical for a Saturday night during the summer. At approximately 10:15 p.m., Officer Cathey and Officer Smith were at an area of Beale Street near B.B. King Boulevard, and Officer Cathey heard radio traffic regarding shootings and a pursuit of a vehicle at an area at Poplar Avenue and B.B. King Boulevard, approximately one to two miles from Beale Street. Officer Cathey stated that he did not expect the vehicle to approach Beale Street on B.B. King Boulevard since to do so would mean that the vehicle would be traveling the wrong way down a one-way street.

Officer Cathey testified that, once he heard Officer Forbert's radio call to clear the streets, he began hearing "this weird loud noise" that sounded "like a race car." Officer Cathey and Officer Smith were getting people out of the streets as the noise grew louder, and both officers stepped onto the sidewalk. At some point, Officer Smith left the sidewalk, and Officer Cathey saw Officer Smith near the passenger side tire of a car that was illegally parked on the street with the driver's side next to a curb. Officer Cathey saw a light-colored car drive through the barricades and turned his head to prevent the debris from striking his face. He testified that the car was traveling at a high speed and that he never saw the car brake. When Officer Cathey looked back, he saw the red lights of the car as it was leaving the area, traveling toward G.E. Patterson Avenue, and people "running everywhere." As Officer Cathy searched for Officer Smith, he heard Officer Charnetta Walker screaming that an officer was "down." Officer Cathey found Officer Smith lying against a curb with medical personnel who had been in some of the clubs on Beale Street trying to assist him. Officer Cathey attempted to console Officer Walker, who was "hysterical." Surveillance videos showing the car striking Officer Smith were played to the jury and entered into evidence at trial but are not included in the appellate record.

Multiple witnesses testified to seeing the car drive through the street and strike Officer Smith. Officer Walker, who had since retired, testified that she saw the car strike Officer Smith, stating, "It happened so fast. I just heard loud pipes and saw a flash." Her initial reaction was to chase after the car. She saw police cars following the car and returned to the area where others were attempting to render aid to Officer Smith. She did not recall whether she broadcast over the radio that an officer was "down."

Bobbie Harms, an employee of one of the restaurants on Beale Street, testified that she was standing outside when she saw police officers ordering people out of the street. She heard an engine on B.B. King Boulevard approaching the area. She assumed that the car would not drive down the intersection because the car would be traveling down the wrong way on a one-way street and the intersection was closed to traffic. She testified that she saw the car strike Officer Smith, stating, "He bounced off the car, hit extremely hard." She said that "it was a brutal injury and it was quick and it was loud and it was violent and

it was hard.” Ms. Harms described the car as a light-colored sports car but stated that the car was traveling too fast for her to determine the car’s make and model. She estimated that the car was traveling “80 plus” miles per hour and said the driver never applied the brakes or otherwise slowed down.

Drake Holt, who was employed with the West Memphis Fire Department and was licensed and certified in emergency medical services, testified that on the night of June 6, 2016, he was with friends on Beale Street and was walking down a sidewalk when he heard a “commotion of some sort” and saw police officers “rushing north.” While standing at the edge of the street, he saw a “light colored, possibly silver” Camaro top a “slight hill” at a high rate of speed, and he estimated that the Camaro was traveling eighty to ninety miles per hour. The Camaro drove through the barricades, which “[d]isintegrated into pieces.” Mr. Holt testified that he hid behind a vehicle that was parked on the street and that Officer Smith was near the vehicle when the Camaro struck him and a portion of the vehicle. Mr. Holt stated that the Camaro knocked Officer Smith high in the air, causing him to somersault and land on the edge of the street on a storm drain.

Mr. Holt testified that he and others ran to Officer Smith, who was unresponsive. Mr. Holt initially did not see any visible signs of trauma to Officer Smith’s body, head, or face. Officer Smith’s legs were in the storm drain, and when he was pulled out of the storm drain, Mr. Holt saw that one of Officer Smith’s legs had been severed near the knee. Mr. Holt used his belt as a tourniquet around Officer Smith’s leg and later replaced the belt with a tourniquet that he received from a police officer. Others performed chest compressions and CPR until paramedics arrived.

MPD Officer Daniel Berford was in front of the FedEx Forum entrance on B.B. King Boulevard when he saw the car pass after driving through the Beale Street intersection. He testified that the car appeared to be a Camaro but that he was unsure of the color of the car. A van and several police cars drove by the area chasing after the car. Officer Berford heard over the radio that an officer was down and went to the area to assist others in attempting to render aid to Officer Smith. Officer Berford rode in the ambulance with Officer Smith to the hospital, and shortly after arriving, Officer Berford learned that Officer Smith was deceased. Officer Berford testified that he was unaware that a portion of Officer Smith’s leg had been severed until a member of the hospital staff gave him the leg and instructed him to place it with Officer Smith’s body.

MPD Officer William Porter with the Special Traffic Investigation Squad responded to the scene and created a sketch showing where the Camaro struck Officer Smith, who then struck a Volkswagen that was parked on the side of the road. Based upon the damage to the Volkswagen, Officer Porter concluded that Officer Smith’s body struck the vehicle at its “A-pillar” or the body frame that holds up the front windshield. Officer Smith’s body

went along the right side of the vehicle to the “C-pillar” or the frames that holds up the rear window before going over the vehicle and striking the sidewalk. Officer Porter also noted that the Camaro left a trail of debris that included the body molding of the Camaro and the bicycle racks that were used as barricades as the Camaro traveled through the intersection and southbound on B.B. King Boulevard.

Dr. Marco Ross, the Chief Medical Examiner at the West Tennessee Regional Forensic Center and an expert in forensic pathology, testified that he reviewed the autopsy of Officer Smith completed by Dr. Zachary O’Neal, who was no longer with the forensic center, and Dr. Ross agreed with Dr. O’Neal’s findings. Dr. Ross stated that the cause of Officer Smith’s death was blunt force injuries to his torso and lower extremities and that the manner of his death was homicide. According to Dr. Ross, Officer Smith sustained an abrasion on his right cheek, lacerations to his right lung and the right side of his diaphragm, a fracture to his lower thoracic spine in the chest region, multiple pelvis fractures, fractures of both femurs, a traumatic amputation of his right lower leg below his knee, and associated fractures to the amputated portion of his leg. Dr. Ross stated that the laceration to the right lung, the multiple pelvis fractures, and the amputation of the right leg caused extensive bleeding, which led to Officer Smith’s death. Dr. Ross noted that a thoracic spinal fracture can lead to “spinal shock” where a dilating effect in the blood vessels can result in blood pooling in the blood vessels away from the heart so that the heart does not pump as well. He stated that amputation, the lung injury, or the pelvic fractures, in and of itself, would have been sufficient to cause Officer Smith’s death. Dr. Ross testified that Officer Smith’s injuries were consistent with having been struck by a vehicle.

E. The Defendant’s Arrest and the Testing of Evidence

Multiple officers testified regarding their pursuit of the Camaro and their arrival at the scene where the Camaro crashed. Sergeant Onrico testified that he saw the Camaro strike an embankment around the area of G.E. Patterson Avenue, go airborne, and land. The driver, later identified as the Defendant, climbed out of the Camaro and fled on foot while being chased by numerous officers. The Defendant resisted arrest and officers had to deploy a Taser device so that they could handcuff him and take him into custody. Officer Wheeler acknowledged that he kicked the Defendant in his face while arresting him, causing a black eye. Officer Wheeler noted that the Defendant had a scrape on his forehead that was caused either by the kick in his face or by his face being up against a fence when he was arrested. Officers did not recover a gun from the Defendant. The Camaro caught fire and became fully engulfed in flames. Multiple officers testified that they believed a firearm or ammunition was inside the car because they heard rounds going off inside the car during the fire.

Officer Forbert reached Beale Street after the Camaro had driven through the intersection. He saw a crowd of officers near the intersection and continued driving until he reached the wrecked Camaro. He saw officers chase and apprehend the Defendant, who he recognized as the same person who occupied the Camaro at the gasoline pump. Officer Forbert identified the Defendant at trial as the person who he pursued and who was detained. At the scene of the accident, the Defendant was wearing a dark hooded shirt and camouflage pants, which Officer Forbert testified was consistent with the description provided over the police radio of the suspect's clothing. Officers placed the Defendant in the back of Officer Forbert's patrol car. Officer Forbert asked the Defendant for his identification, and the Defendant replied that his identification was in the pocket of his camouflage pants that were on the floorboard of the patrol car. Officer Forbert removed a wallet out of the pants pocket and located a Tennessee identification card bearing the Defendant's name.

MPD Officer Brad Hannah testified that he and another officer subsequently escorted the Defendant by ambulance to Regional One Hospital where personnel treated the Defendant's injuries. Due to the large number of patients at the hospital, the Defendant was brought into the hallway. Officer Hannah acknowledged that Mr. Dickens, the victim from the shooting at Bass Pro Shops, was also at the hospital during that time. Sergeant Shayne Tarena with the Crime Scene Investigation Unit went to the hospital and collected the Defendant's clothing and his Tennessee identification card.

Pursuant to a warrant, officers obtained a sample of the Defendant's blood while at the hospital. Special Agent Julian Conyers with the Tennessee Bureau of Investigation ("TBI"), an expert in blood and alcohol toxicology, analyzed the blood sample and determined there was no alcohol in the Defendant's blood. TBI Special Agent Tonya Horton, an expert in toxicology, analyzed the Defendant's blood sample and did not detect any drugs in the Defendant's blood.

Officer Porter testified that he went to the location on G.E. Patterson Avenue where he saw the burned Camaro. He stated that, based upon his investigation, the Camaro drove through the intersection of Beale Street and B.B. King Boulevard and continued southbound toward G.E. Patterson Avenue. The Camaro approached a portion of the street that curves to the left and then curves back to the right. Rather than taking the curve, the driver continued straight, jumped the curb, and struck the remaining foundation of a building that once stood in the area, causing the Camaro to go airborne. Officer Porter stated that the Camaro likely landed at an angle or sideways because the Camaro began rolling across G.E. Patterson Avenue to the southside of the street where it struck a tree. The Camaro was partially airborne and struck the tree approximately three feet above the ground, which indicated that the Camaro was still traveling at a fast speed. Sergeant Tarena

collected a live nine-millimeter round that was in the street and a social security card belonging to Mr. Henderson's wife.

The Camaro was taken to a facility where Sergeant Coburn processed it. He found areas of possible blood on the front bumper and swabbed those areas for DNA. TBI Special Agent Militza Kennedy, an expert in the field of DNA analysis, analyzed the swabs and testified that the swabs tested positive for blood and that the DNA profile taken from the swabs matched the DNA profile of Officer Smith. Sergeant Corburn also collected a gun magazine from melted debris in the area of the right door, a spent projectile on the floor that did not have an associated casing, a spent casing in melted debris on the window, a casing on the front floorboard, two projectiles in melted debris on the door or window, and a spent projectile in the passenger side door. Sergeant Corburn testified that one of the casings was a nine-millimeter Luger shell casing and that he was unable to determine the caliber of the other casing.

TBI Special Agent Cervinia Braswell, an expert in firearms identification, testified that she analyzed the cartridge casings, bullets, a bullet jacket, a live cartridge, and a magazine recovered in this case. She determined that two nine-millimeter caliber cartridge casings recovered from the parking lot of Bass Pro Shops and two nine-millimeter caliber cartridge casings recovered from outside Westy's were fired from the same gun and had class characteristics that were common in Smith and Wesson and SD Series pistols. Special Agent Braswell stated that the two nine-millimeter cartridge casings recovered from the Camaro, the cartridge casings recovered from Bass Pro Shops, and one of the cartridge casings recovered from Westy's were all TulAmmo brand cartridge casings. The two cartridge casings recovered from the Camaro were so damaged that they had no markings of comparison value. The bullet jacket recovered from the Camaro had few characteristics due to its damaged condition, but Special Agent Braswell stated that the bullet jacket was consistent with TulAmmo brand ammunition. The bullets recovered from the Camaro were too damaged and had few characteristics to allow Special Agent Braswell to conduct a comparison. She determined that the magazine recovered from the Camaro was a Smith and Wesson nine-millimeter caliber magazine. She also determined that the rifling characteristics present on the two bullets recovered from Westy's were common to nine-millimeter caliber firearms manufactured by Smith and Wesson, but the bullets had insufficient similarities for a more conclusive determination.

On cross-examination, Special Agent Braswell testified that, although she was unable to determine the caliber of the bullets recovered from the Camaro, she concluded that the caliber of the bullets was not larger than a nine-millimeter bullet. She acknowledged that the bullets recovered from Westy's could be a different brand and different caliber than the bullets recovered from the Camaro.

F. Defense Proof

Dale Hensley, a retired MPD lieutenant, testified that he responded to the scene at Westy's and spoke to a woman who was assisting one of the victims. The woman described the shooter as an African-American man who had dread-locks and was wearing dark clothing. Lieutenant Hensley broadcast this description to other officers over the police radio. He did not know the woman's identity and assumed the woman had witnessed the shooting. Brian Rickett, a lieutenant with the Memphis Housing Authority Police in June 2016, testified about the information that he received over the police radio, the wreck of the Camaro, and his participation in the foot chase and apprehension of the Defendant. The defense also presented a partial transcript of prior testimony of Officer Forbert during which he admitted to drawing his gun and pointing it at the Defendant.

MPD Lieutenant Robert Wilkie, who was a sergeant in the Homicide Bureau in June 2016, testified that the Homicide Bureau was assigned to investigate the shootings at Westy's and Bass Pro Shops on June 5, 2016, the morning after the shootings occurred, and that he was the case coordinator. The Felony Response Bureau was initially involved in investigating the case, and officers from that bureau generated a photographic lineup using driver's license photographs and showed the lineup to multiple witnesses. Lieutenant Wilkie believed the lineup was suggestive because the Defendant had more hair and facial hair in his photograph than those depicted in the other photographs in the lineup, but he acknowledged that no witnesses who viewed the lineup identified the Defendant. As a result, Lieutenant Wilkie had a detective create a second photographic lineup using booking photographs, including the Defendant's booking photograph following his arrest in this case. Lieutenant Wilkie acknowledged that the Defendant had a black eye and a bandage on his forehead, and Lieutenant Wilkie covered the bandage using a black marker and placed similar black mark across the photographs of the others in the lineup. He stated that he intended for officers to show witnesses the photographic lineup with the black marks but that some witnesses were shown the lineup without the black marks. He did not consider the lineup with the black marks suggestive but testified that the lineup without the black mark was "more suggestive" because "there is a small obviously something different than what everybody else has." On cross-examination, Lieutenant Wilkie testified that the witnesses' identification of the Defendant in the photographic lineup was not the only evidence that supported the Defendant's identification as the perpetrator.

Dr. Stacy Wetmore, a cognitive psychologist and an expert in the field of eyewitness identification, testified about the factors that affect the reliability of an eyewitness's identification of a suspect in a photographic lineup. She stated that the amount of time the witness was able to view the perpetrator's face, lighting conditions, the witness's level of stress, the witness's intoxication level, the presence of a hat or other covering on the perpetrator's head, cross-racial identifications where the witness and the perpetrator are of

a different race, the presence of a weapon causing the witness to be more focused on the weapon than the perpetrator, and the subsequent exposure to secondary information about the offense, such as newscasts, can affect the accuracy of a witness's identification of the perpetrator.

Dr. Wetmore testified that the guidelines established by the United States Department of Justice for conducting a fair and unbiased photographic lineup procedure included an instruction to the witness that the suspect may or may not be in the lineup so that the witness does not feel pressured to make a decision, the use of a "match-to-description procedure" whereby the lineup is developed using photographs matching the description of the suspect provided by witnesses rather than "having a suspect and trying to find fillers or foils that match that particular person," and the assurance that the suspect's photograph does not unduly stand out in the lineup. She stated that videotaping the lineup procedure and using a "double-blinded administration" is "best practice." She said that a record of the witness's confidence level of the identification should be made and that the practice of showing a witness multiple lineups, including the photograph of the same suspect, was discouraged.

Dr. Wetmore testified that the photographic lineup shown to Mr. Henderson and Mr. Becker, which showed the Defendant with a black eye and a white bandage across his forehead, "would be considered a suggestive lineup" because none of the other photographs depicted anyone with a black eye and a white bandage on his forehead and that, as a result, "it's pretty obvious that he's . . . the one they would like [the witness] to choose." Dr. Wetmore noted that the photographic lineup shown to Mr. Lyon depicted black marks across the foreheads of those in the photographs and acknowledged that "match[ing] a mark if it's on one person to the other foils" was a "best practice," but she observed that the Defendant was the only person in the lineup with a black eye. She stated that Mr. Lyon noted that he saw the Defendant's photograph on the news and that Mr. Lyon appeared to have relied upon the information he obtained from the newscast rather than his own memory in making his selection.

Dr. Wetmore said that the original lineup identified at trial as the lineup using the driver's license photographs was "much better in terms of best practices" in that each person was wearing similar clothing. She stated that the lineup could have been suggestive because the Defendant's haircut is "a bit different" than the others depicted in the lineup. Dr. Wetmore testified that she could not conclude whether the identifications made by the witnesses who viewed the lineup were accurate or inaccurate, did not know the environment in which the witnesses viewed the perpetrator, did not interview any of the witnesses, was not present when the witnesses viewed the lineup, and did not know the witnesses chose a particular photograph in the lineup.

The Defendant testified that, in June 2016, he was staying with Ms. Boykins in Little Rock, Arkansas, and planned to take his CDL test. Rather than take the test, he drove Ms. Boykins's GMC Envoy to Memphis on June 3rd. He acknowledged that he was armed with a gun but stated that he did not have any ammunition in the vehicle. He stated that the vehicle broke down in the parking area of a liquor store. He testified regarding apartment complexes that he visited and stated that he slept at an apartment where his brother was staying.

The Defendant testified that on the next day, June 4th, he walked to a gas station while wearing a black North Face hooded shirt and camouflage pants and that he entered a store because he was being followed. The Defendant testified that, when he was being followed, his "imaginary friend" joined him. He explained that he referred to the person as his "imaginary friend" because "I don't think he's here anymore." After leaving the store, he entered a car that he described as a silver "NASCAR fast car." He testified, "I wouldn't say it was my vehicle," but stated, "Unless it was said to be my vehicle. I'm not sure what the record would reflect." The Defendant said his "imaginary friend" was in the car with him but that he did not know how his "imaginary friend" came to be in the car. He described his "imaginary friend" as having long hair, but he did not know the man's race and could not recall the man's clothing. He drove to an apartment complex because "[s]omething just told me to go," and he then left the complex.

The Defendant testified that his "imaginary friend" drove the car to Bass Pro Shops but that "I was at the location, but I wasn't at the crime scene." When asked why he went to Bass Pro Shops, he stated, "Well it was just a location. It was a target. I had to be certain places at certain times. And I had to account for certain things. Just like in the real world, certain things ha[d] to be accounted for." The Defendant entered the store but then returned to the car. He stated that before he returned to the car, he heard gunshots fired, and he denied that he was armed at that time. He testified that the gunshots did not come from Bass Pro Shops but from another location. He said that, once he reached the car, his "imaginary friend" was no longer there, and the Defendant explained, "I can't say what he did and what he didn't do. That wouldn't be the truth. But I did hear some gunshots. I'm not sure if he was armed and I didn't see him commit any crimes." He testified that although his "imaginary friend" approached the car, the Defendant drove away in the car and that he was unsure whether his "imaginary friend" was inside the car.

The Defendant testified that he did not drive directly out of the parking lot because there was a crime scene at the location. He then testified that he was at a location close to the crime scene but was not present at the crime scene itself. He drove to a barber shop located by a trolley stop where he unsuccessfully tried to enter another car. He stated, "I wasn't armed. I had no weapons. I had been cleared from the officers and everything."

He explained that the officers did not arrest him or try to pursue him following the gunshots at Westy's because the officers knew he was at Bass Pro Shops.

The Defendant testified that, while leaving an Exxon in the silver Camaro, he was pulled over by a police officer. He stated that he drove away because the officer pointed a weapon at him. The Defendant then "proceeded down a wrong way on Beale Street and [he] was still in pursuit by a Memphis Police Department, allegedly." He said he drove through the barricades and through the "checkpoint," after which he drove into a tree. He testified that following the crash, "I left myself but I don't want to talk about that." He maintained that he was being held against his will, that he was unsure whether he was under arrest, and that he was "never informed" and did not "know what the record reflects."

On cross-examination, the Defendant testified that Ms. Boykins gave him permission to use her Envoy, and he agreed that he did not return the vehicle to her and that he did not answer any of her calls. He agreed that he was armed while inside the Envoy and that if Ms. Boykins testified that he had a nine-millimeter handgun while in Arkansas, her testimony would be true "[t]o an extent." He stated that he believed the gun that he had while in Arkansas was an AK-47 but that he was unsure. He denied that the box of ammunition found in the backseat of the Envoy belonged to him, and he said he did not know how his fingerprint came to be on the box.

The Defendant acknowledged that he took the silver Camaro from the gas station. He estimated that he was driving the car sixty to eighty miles per hour when he fled from the officer after the traffic stop. He denied that he was in the car that drove through the barriers on Beale Street. He stated that he did not know how he ended up on G.E. Patterson Avenue and B.B. King Boulevard. He acknowledged that after hitting a tree, he exited the car and ran, but he said, "I can't say that I was running from the police." He testified, "Maybe it's possible that—I'm not sure. Anything is possible. The sky is the limit." He then denied running from the police or doing anything wrong, explaining that the "[o]nly thing I did was enter a vehicle and I exited a vehicle." At the conclusion of the Defendant's testimony, the parties stipulated that the Defendant "has been diagnosed with a mental illness and has been prescribed medication to treat it."

G. The State's Rebuttal Proof

The State entered as an exhibit a recording of a telephone conversation between the Defendant and a third party while the Defendant was in jail for the purpose of showing the Defendant's demeanor and the appropriateness of his responses so that the jury could compare it to the Defendant's demeanor and the appropriateness of his responses during his testimony at trial. This recording was not included in the appellate record.

The State recalled Lieutenant Wilkie, who testified regarding his interview of the Defendant following the Defendant's release from the hospital on the morning of January 5, 2016. The Defendant waived his rights and agreed to speak to Lieutenant Wilkie. Lieutenant Wilkie stated that the Defendant did not appear to be under the influence of drugs or alcohol during the interview. The Defendant told Lieutenant Wilkie that he could not remember what happened but that he knew he should not be in the Homicide Office. The Defendant stated that he had been visiting friends, who suggested that he go to Beale Street, and that he met a woman but could not recall her name or telephone number. He said he and the woman went to Beale Street where he tried to persuade the woman to go with him to a hotel room. He stated that he did not have any money and that the woman refused to pay for a hotel room and left him on Beale Street. The Defendant said that the next thing he recalled was being chased by police officers, being on the ground, and seeing a helicopter in the sky. Lieutenant Wilkie stated that they took a break and that when he returned to the interview room, the Defendant announced that he no longer wanted to speak to him and requested counsel. As a result, Lieutenant Wilkie ended the interview. He testified that the Defendant never mentioned an imaginary friend during the interview.

The jury convicted the Defendant of first degree premeditated murder of Mr. Walton, attempted first degree murder of Mr. Sakan resulting in serious bodily injury, attempted first degree murder of Mr. Dickens, vehicular homicide of Officer Smith, intentionally evading arrest in a motor vehicle, and two counts of employing a firearm during the commission of a dangerous felony. Following the presentation of proof during the penalty phase, the jury sentenced the Defendant to life imprisonment without the possibility of parole for the first degree murder conviction. The trial court held a separate sentencing hearing for the remaining convictions and imposed sentences of twenty-two years for attempted first degree murder resulting in serious bodily injury, eighteen years for attempted first degree murder, six years for vehicular homicide, four years for intentionally evading arrest in a motor vehicle, and six years for each firearm conviction. The trial court ordered that the sentences run consecutively for an effective sentence of life imprisonment without the possibility of parole plus sixty-two years. The Defendant filed a motion for new trial, which the trial court denied. This appeal followed.

III. Analysis

On appeal, the Defendant asserts that (1) the evidence is insufficient to support his convictions for first degree premeditated murder and attempted first degree murder; (2) the trial court erred in denying the Defendant's motion to suppress witnesses' out-of-court and in-court identifications of the Defendant due to an impermissibly suggestive photographic lineup; and (3) the trial court erred in declining to issue a special jury instruction on identification.

A. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his convictions for the first degree premeditated murder of Mr. Walton and the attempted first degree murders of Mr. Sakan and Mr. Dickens. Specifically, he challenges the sufficiency of the evidence as it relates to the element of premeditation, arguing that the record is devoid of any evidence that he had “a preconceived plan to shoot, harm or kill any of the victims” and that the evidence established that “the shootings were spontaneous acts taken without forethought.” The State responds that the evidence is sufficient to support the convictions for first degree premeditated murder and attempted first degree murder. We agree with the State.

When an accused challenges the sufficiency of the evidence, this court’s standard of review is whether, after considering the evidence in the light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). “The jury decides the weight to be given to circumstantial evidence, and [t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). “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 *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). “Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.”

State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This court must afford the State of Tennessee the ““strongest legitimate view of the evidence”” contained in the record, as well as ““all reasonable and legitimate inferences”” that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000) (citations omitted).

First degree murder is the premeditated and intentional killing of another person. T.C.A. § 39-13-202(a)(1). As the trial court instructed the jury, “[a] person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts 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[.]” T.C.A. § 39-12-101(a)(2). A premeditated killing is one “done after the exercise of reflection and judgment.” T.C.A. § 39-13-202(d). Section 39-13-202(d) further states:

“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 preexist 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.

The element of premeditation is a question of fact for the jury. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances surrounding the killing. *Bland*, 958 S.W.2d at 660. In *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000), our

Supreme Court delineated the following circumstances from which a jury may infer premeditation:

Declarations by the defendant of an intent to kill, evidence of procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, infliction of multiple wounds, preparation before the killing for concealment of the crime, destruction or secretion of evidence of the murder, and calmness immediately after the killing.

The jury may also infer premeditation from the establishment of a motive for the killing and the use of multiple weapons in succession. *State v. Leach*, 148 S.W.3d 42, 54 (Tenn. 2004). Likewise, lack of provocation by the victim, failure to render aid, and destruction or secretion of evidence may also support an inference of premeditation. *State v. Larkin*, 443 S.W.3d 751, 815-16 (Tenn. Crim. App. 2013) (internal citations omitted).

When viewed in the light most favorable to the State, the evidence presented at trial established that the Defendant went on a shooting spree in downtown Memphis whereby he shot multiple unarmed victims without any provocation. Specifically, the Defendant drove in Ms. Boykins's Envoy to Memphis armed with a gun and ammunition, took Mr. Henderson's silver Chevrolet Camaro, and drove it to downtown Memphis. He walked up to Westy's while armed and wearing a hooded shirt with the hood up covering his head, despite it being the middle of summer. On that basis, a reasonable jury could conclude that the Defendant was attempting to hide his identity while approaching the restaurant with a gun because he planned to shoot patrons who were eating outside the restaurant. The Defendant shot both Mr. Sakan and Mr. Walton in their necks. The Defendant did not render aid to Mr. Sakan or Mr. Walton and did not immediately flee. Rather, he stood in the street for a period of time and pointed his gun at Mr. Norris and Mr. Schorr and then fled the scene once Mr. Norris and Mr. Schorr retrieved their guns and ordered him to stop.

The Defendant ran toward Bass Pro Shops where he retrieved the Camaro, drove up to Mr. Dickens in the parking lot, and shot him three times. Specifically, the Defendant pointed his gun at Mr. Dickens's face and fired the gun. The Defendant missed shooting Mr. Dickens in his face only because Mr. Dickens was able to use his arm to block his face. After the Defendant shot Mr. Dickens in his arm, the Defendant shot him two additional times. The Defendant did not render aid but fled the scene, leading officers on a high-speed chase through downtown Memphis. He drove at a high rate of speed through a street that was closed to traffic and crowded with pedestrians, and he struck Officer Smith, killing him. Officers were able to apprehend the Defendant only after he crashed the Camaro.

The evidence demonstrates that the Defendant made intentional and premeditated efforts to kill multiple people in a short amount of time. Although the Defendant appeared

to have randomly chosen which victims to shoot, this court has recognized 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), *no perm. app. filed*. We conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish premeditation.

B. Denial of Motion to Suppress Identification Evidence

The Defendant challenges the trial court’s denial of his motion to suppress the identifications of him as the perpetrator made by Mr. Henderson, Mr. Lyon, and Mr. Becker from photographic lineups and at trial. The Defendant maintains that the photographic lineups were unduly suggestive and tainted the subsequent in-court identifications made by each of the three witnesses. The State responds that the trial court properly determined that the photographic lineups were not unduly suggestive and that the identifications were otherwise reliable.

1. Suppression Hearing

Prior to trial, the Defendant filed a motion to suppress evidence of witnesses’ out-of-court and in-court identifications of him as the perpetrator. He sought exclusion of identification evidence of eleven witnesses, including Mr. Henderson, Mr. Lyon, Mr. Becker, and numerous police officers. The Defendant argued that the procedure under which the witnesses selected his photograph in a photographic lineup was unnecessarily suggestive and that the likelihood of misidentification was substantial. He also argued that, under the totality of the circumstances, the identifications were unreliable and that the admission of the out-of-court and in-court identifications violated his due process rights. As relevant to the issues raised on appeal, the following evidence was presented during the suppression hearing.

Lieutenant Wilkie offered testimony about the creation of the photographic lineup that was similar to his testimony at trial. He previously had assisted in creating “many hundreds” of photographic arrays and explained that when he created a photographic lineup, he attempted to include photographs of those with similar facial features, hair, facial hair, skin tone, scars, and tattoos. A lieutenant with the Felony Response Unit, an after-hours investigative bureau that assisted in the initial investigation of the offenses, created a photographic lineup that included the Defendant’s photograph (“lineup A”). Lieutenant Wilkie testified that he believed this photographic lineup was suggestive because the Defendant, whose photograph was located in the center of the first row, was the only one of the six people depicted who had “puffy hair” and noticeable facial hair, a small goatee.

Lieutenant Wilkie noted that the other five individuals had short haircuts and that only two of the other individuals appeared to have a small amount of facial hair.

Lieutenant Wilkie testified that he assigned Detective Latonya West the task of creating a photographic lineup using a database program called “Mugshots,” which generates a lineup using the mugshots and booking photographs in Shelby County (“lineup B”). He stated that once the officer chooses the “target,” the program generates “hundreds” of photographs and that the officer examines the photographs and attempts to choose photographs that are the “most similar” to the “target.” Because the Defendant’s arrest in June 2016 was his first arrest in Shelby County, his booking photograph from that arrest was used in compiling lineup B. Lineup B consisted of six photographs in two rows with three photographs in each row. The Defendant’s photograph appeared as photograph number six and was the last photograph on the bottom row. The Defendant had a white bandage across his forehead in his photograph, and Lieutenant Wilkie used a black marker to cover the bandage and to place a black mark across the forehead of the others in the lineup so that each photograph had a similar marking. He then approved lineup B to show to witnesses.

Lieutenant Wilkie identified a form entitled “Advice to Witness Viewing Photographic Display” that he provided to witnesses prior to showing a photographic lineup. The form advised that (1) the lineup will include photographs of individuals with similar descriptions in similar poses; (2) “[t]here is no significance to the order in which the photos will appear”; (3) “[t]he persons pictured may or may not have anything to do with the suspect offense and I am not to assume that the guilty party must be one of the persons represented”; (4) “[d]uring the interviewed process, no one is to give me any hints or suggestions or attempt to influence my identification in any way”; (5) any identification will be done in writing; and (6) “I am to make no identification unless I am positive of such identification.” The form included an area for the date and the signatures of the witness and the police officer. The form also included a section where the witness indicates whether an identification was made and a space for the witness to initial.

Lieutenant Wilkie testified that the Felony Response Unit showed lineup A to a few witnesses, including possibly Nova Walton and Emily Templeton, who were unable to make an identification. These two witnesses subsequently were shown lineup B and were able to make an identification. Lieutenant Wilkie was aware that a few witnesses were shown the version of lineup B that did not include the black markings across the foreheads of each person depicted in the lineup.

On cross-examination, Lieutenant Wilkie agreed that the Defendant is an African-American man with medium brown skin, was twenty-one years old at the time of his arrest, and was six feet, four inches tall and weighed approximately 180 pounds. The Defendant

had black hair, brown eyes, black facial hair that consisted of a full mustache, a small goatee shaped in a rectangular fashion, and a “shadow length beard.” He had a left black eye and a light-colored bandage across the top of his forehead. When the Defendant was arrested, his hair was not styled in dreadlocks or “twists,” but he had a short, “natural afro” haircut.

Lieutenant Wilkie testified that officers had two databases available to generate photographic lineups of adults, the Mugshot database used to generate lineup B and the Visions database that used driver’s license photographs to generate lineup A. He stated that the Visions database does not have access to as many photographs since it is limited to driver’s license photographs. The Visions database does not allow officers to search and choose photographs that the officer believes are similar to the target photograph but generates its own set of photographs that the program determines to be similar to the target photograph.

Lieutenant Wilkie testified regarding the importance of providing the witness with the form advising the witness of the procedure prior to presenting the photographic lineup so that the witness knows “I’m just not going to hand them a picture and say he’s on here or she’s on there or something like that.” He stated that before providing the witness the photographic lineup, he will ask the witness to read the form and then sign the form, indicating that the witness had read and understood the form.

Lieutenant Wilkie agreed that the Defendant’s left black eye was visible in the photograph in lineup B, but Lieutenant Wilkie did not believe the presence of the black eye resulted in a suggestive lineup. He explained, “I didn’t think that the black eye stood out enough to make him be the one that jumps off the page and make people pick him.” He agreed that no witness who viewed lineup A was able to identify the Defendant in the lineup and that any witness who identified the Defendant in a lineup did so upon viewing lineup B. Lieutenant Wilkie stated that two witnesses, Emily Templeton and Nova Walton, viewed both lineups and that, although neither witness selected the Defendant in lineup A, they both selected the Defendant in lineup B. Lieutenant Wilkie testified on redirect examination that there were witnesses who were shown lineup B and did not make an identification, but Lieutenant Wilkie did not know the number of witnesses who failed to do so.

Multiple officers testified during the suppression hearing regarding their efforts to take the Defendant into custody after he wrecked the silver Camaro. Officer Wheeler identified a photograph of the Defendant taken after the Defendant was placed in the backseat of a police car. The photograph depicted the Defendant with an injury to his left eye, and Officer Wheeler testified that he had injured the Defendant’s eye by kicking him while attempting to take him into custody.

Mr. Henderson testified regarding the theft of his silver Camaro from a gas station on June 4, 2016, at around 7:00 p.m. He stated that while it was “getting dark” outside, the car was parked underneath an awning in an area that was well-lit. He was inside the store while standing in line and looking outside at his car, which was less than thirty steps away. He said he saw the man open the car door and look inside the store at Mr. Henderson as if the man was trying to see whether Mr. Henderson was exiting the store. Mr. Henderson stated that he had a clear view of the man’s face. Mr. Henderson said that by the time he exited the store, the man had already driven away in the car, and he confirmed that once he exited the store, he did not have the opportunity to view the man again.

Mr. Henderson testified that the man who took his car was African-American, had a slender build, had “twists” in his hair, and was taller than Mr. Henderson, who was five feet, six inches tall. Mr. Henderson explained that many people confuse dread-locks with “twists” and that at the time of the theft, Mr. Henderson had dread-locks in his own hair but would have referred to them as “twists.” Mr. Henderson stated that he told the officer at the scene that the man who took his car had dreadlocks because he did not think the officer knew the difference between dreadlocks and “twists.”

On June 7, 2016, Mr. Henderson met with a police officer, viewed a photographic lineup, and gave a statement. Mr. Henderson stated that the officer gave him the “Advice to Witness Viewing Photographic Display” form and asked him to read it. He signed the form acknowledging that he read the entire document, and he testified that the officer told him that the suspect may or may not be in the photographic lineup. Mr. Henderson was shown the version of lineup B that did not include the black marks covering the bandage on the Defendant’s forehead. Mr. Henderson circled the Defendant’s photograph and wrote, “This is the guy who took my car took my car at the corner of Knig[h]t Arnold and Mend[en]hall.” The lineup is dated June 7, 2016, at 6:20 p.m. Mr. Henderson stated that the officer did not tell him who to choose in the lineup, and Mr. Henderson did not feel obligated to choose someone from the lineup. He testified that he recognized the person who he chose in the lineup as “[t]he guy who was getting in my car” and that he chose the person because “his face stood out because it was—of the six pictures, it was the most recent picture—most recent face I’ve seen.”

On cross-examination, Mr. Henderson, an African-American man who was forty-three years old at the time of the offense, testified that he pulled up to the entrance of the store and left the car running and unlocked while he entered the store. He said he saw the man walk toward the car, open the door, enter the car, and begin to drive before closing the door. Mr. Henderson reacted as the car was moving and stated that the man was already in the street by the time Mr. Henderson exited the store. He agreed that he was never close enough to the car to touch it or to look through the windows of the car. He called 911 and

described the driver to the 911 operator and to the police officer who responded to the scene as an African-American man with dreadlocks and a heavy build.

Mr. Henderson agreed that a few hours after his car was taken, he heard about an incident that occurred downtown involving a silver Camaro and that a friend of his wife had observed his car in the downtown area. He stated that his wife watched news coverage about the events involving his car and informed him of the events. He called the police and was told that the car was involved “in an incident” but was not informed of the car’s condition. He stated that he did not watch news coverage of the events and did not read about the events on the internet.

Mr. Henderson agreed that when he met with a police officer on June 7th, he knew that his car had been involved in a high-speed chase with police and that the officers had arrested someone who might have been responsible for stealing his car. Mr. Henderson stated that although the officer told him that the police department had his car, the officer did not tell him that the car was wrecked or damaged in a fire. Mr. Henderson testified that the officer told him that the officer needed for Mr. Henderson to identify the man who he saw take his car, that the officer was going to show him a photographic lineup, and that if Mr. Henderson saw the person who he believed or knew entered his car, he should circle and initial the photograph. Mr. Henderson stated that upon viewing the lineup, he circled the person whose “face was the most recent and stood out to me that I have last seen because it was who I saw get in my car.” The Defendant did not have dreadlocks or “twists” in his hair in the photograph chosen by Mr. Henderson. Mr. Henderson did not circle the photograph of a man with dreadlocks because the hair of the perpetrator was “more like twists,” which can be combed “back out into an afro.” He acknowledged that he also did not circle a photograph of another man with “twists” in his hair.

Mr. Henderson testified that he would not forget what happened to the car because the car was “my wife’s anniversary gift.” He agreed that he gave a statement to the police officer in which he described the perpetrator as tall with dark skin and wearing a hooded shirt, but he did not tell the officer whether the man’s hood was up covering his head. Mr. Henderson was not close enough to the perpetrator to see his eyes and could not tell the man’s age, and he did not tell the officer that the perpetrator had dreadlocks. He acknowledged that in his statement to the police, he did not mention the perpetrator’s weight, hair color, facial hair, or any distinctive marks or injuries. On redirect examination, Mr. Henderson testified that he initially described the perpetrator to officers as having a heavy build because the perpetrator was wearing baggy clothes that made him appear larger.

Mr. Lyon testified that he and a group of people went to Westy’s on the evening of June 4, 2016, and sat at a table inside the restaurant that was in a corner about three feet

from the front door and near windows looking out into the front of the restaurant. Mr. Lyon was sitting on the north side of the table and had a clear view of the outside through a nearby window. He heard gunfire, and someone ran inside and announced that a person had been shot. Mr. Lyon “kind of ducked” and looked outside through a window where he saw a man who was standing in the street approximately ten to fifteen feet away and facing the front of the restaurant so that Mr. Lyon could see the man’s face. Mr. Lyon stated that it was “[d]usk or after” but that the street lights lit up the area. He described the man as African-American male, who appeared to be in his early to late twenties, was thin, and had a small build and a “little goatee.” Mr. Lyon stated that he was six feet tall and that the man was “probably a little shorter.” The man was wearing camouflage pants and a hooded shirt with the hood pulled up over his head, and Mr. Lyon was unable to see the man’s hair. Mr. Lyon stated that the man had a chrome semiautomatic gun in the pocket of his hooded shirt. Mr. Lyon went outside and saw the man still standing in the street and “right in” the lights while facing the picnic tables. The man then walked to the corner of the street and away from the scene.

On June 16, 2016, Mr. Lyon went to the police department where he viewed a photographic lineup and gave a formal statement to the police. He identified the “Advice to Witness Viewing Photographic Display” form, which he stated the officer gave to him prior to showing him the lineup. Mr. Lyon stated that he read the form and that the officer explained it to him, after which Mr. Lyon signed and dated the form. Mr. Lyon said the officer told him that the suspect may or may not be in the lineup, and Mr. Lyon did not believe he was required to choose someone from the lineup. Mr. Lyon was shown the version of lineup B that included the black marks across each person’s forehead. He circled the Defendant’s photograph and wrote, “Saw him on TV after News showed him.” Mr. Lyon signed the lineup and included the date of June 16, 2016, at 10:38 a.m. Mr. Lyon testified that when he looked at the lineup, he “immediately picked out the person that [he] saw.” He said he was able to quickly make an identification because “I saw him. Saw his face when I was standing outside.”

On cross-examination, Mr. Lyon, who is Caucasian and was fifty-nine years old in June 2016, testified that he did not drink any alcohol prior to going to Westy’s and that although he ordered one beer upon arriving at Westy’s, he did not believe he drank the beer prior to the shooting. He stated that following the gunshots, there was “a lot of panic inside” the restaurant and that some people hid underneath tables. Mr. Lyon backed away from the window but continued looking outside where he saw a man standing in the street and facing the picnic tables. Mr. Lyon agreed that the man was approximately forty feet away from him, and Mr. Lyon estimated that he spent five to eight minutes looking at the man before exiting the restaurant. Mr. Lyon testified that upon exiting the restaurant, he saw the man remove a gun from his pocket and then return the gun to his pocket. Mr. Lyon stated that he watched the man, who was standing in the middle of the street, for what “felt

like a while, but it was probably not really that long.” He estimated that he watched the man for approximately five minutes after exiting the restaurant. The man then moved to a sidewalk and fled down Main Street toward the area of Bass Pro Shops. Mr. Lyon and others attempted to help the injured victims.

Mr. Lyon testified that once the police officers arrived at the restaurant, he provided them with his name and contact information and that the officers did not allow him to leave the restaurant until midnight or later. He acknowledged that while at the restaurant, he heard about the other offenses that occurred that night. He also acknowledged that after leaving the restaurant, he watched news coverage about the offenses and saw images of the person who was arrested. Mr. Lyon stated that his notation on the photographic lineup that he saw the person who he identified on a newscast was in response to the officer’s question about whether Mr. Lyon had viewed a photograph of the suspect on a newscast.

Mr. Lyon agreed that when asked to describe the perpetrator in his statement to the police, he did not describe the perpetrator’s age, eye color, tone or shade of skin, hair, build, or facial hair. He agreed that according to his written statement to the police, when asked whether the man who he identified in the lineup was the same man who he saw at the restaurant, he may have replied, “The guy on photo six had facial hair and I noticed that, but other than that, I’m not sure if it is the same person or not.” Defense counsel asked, “So you were not sure whether the person who identified in the photographic lineup was the same person as the shooter you saw; correct?” Mr. Lyon replied, “To a degree I guess you can say that. But, I mean, I recognized him.” On redirect examination, he agreed that he told the officer that, “[t]he guy in number six is the guy that I saw in the news that was responsible for the shooting.” When asked whether the person who he identified in the lineup was the shooter, the person who he saw on the newscast, or both, Mr. Lyon testified, “Well, both, because I sat there and looked at him outside of Westy’s.”

Mr. Becker testified that while he and his friends were at Westy’s, a woman ran inside the restaurant and screamed that her husband had been shot. He looked outside through a nearby window where he saw “the dude sitting right there, standing right there, playing gangster.” Mr. Becker went outside the help those who were injured when “all of a sudden we’re looking straight eyeball to eyeball” with the man. Mr. Becker stated that he was approximately fifteen feet away from the man. He described the man as approximately five feet, seven or eight inches tall with a small build, a “funny-looking goatee,” and what appeared to be tape or a bandage on his forehead. He stated that the man was wearing black pants and a black hooded shirt and that although the hood was up over the man’s head, it was not covering the man’s face. The man fled, running toward the Mississippi River, and Mr. Becker “guess[ed] he went to the Pyramid.”

Mr. Becker testified that when police officers arrived at the scene, he provided them with his name and contact information and that an officer later contacted him and requested that he come to the offices to provide a statement and view a photographic lineup. He identified the “Advice to Witness Viewing Photographic Display” form that he signed on June 14, 2016. He stated that he understood the instructions, and he agreed that the officer told him that the individual may or may not be in the lineup and that he should not make an identification unless he was certain. Mr. Becker viewed the version of lineup B that did not include the black marks across the foreheads of each individual but showed a bandage on the Defendant’s forehead. Mr. Becker chose the Defendant’s photograph and wrote, “This is the person I saw that shot both victims [at] Westy[’]s Restaurant.” Mr. Becker stated that no one assisted him in making his selection and that he made the selection because “I recognized him for what happened.”

On cross-examination, Mr. Becker, who is Caucasian and in his sixties, testified that he and his group, which included Mr. Lyon, arrived at Westy’s around dusk. Mr. Becker did not drink any alcohol prior to going to the restaurant and stated that he probably drank one-half of a beer while at the restaurant prior to the shooting. He did not hear the gunshots and first learned of the gunshots when the woman ran into the restaurant and yelled that her husband had been shot. Mr. Becker stood up and briefly looked out of a window that was five to six feet away. He stated that he saw the shooter holding a gun outward. He said that the object that the shooter was holding was black, that he assumed that the object was a gun, and that he determined that the object was a gun after he saw the victims bleeding. Mr. Becker estimated that the man was fifteen to twenty feet away from him while the man was standing in the street. Mr. Becker stated that once he went outside, he saw the man crossing the street and walking along a fence toward the Pyramid.

Mr. Becker testified that prior to leaving the restaurant, he learned that officers had pursued someone during a high-speed chase, that the car struck and killed a police officer, and that the chase ended with the car crashing and the police arresting a person who they believed to be the driver. He stated that news coverage regarding the offenses lasted for a week and a half during which the photograph of the person arrested was shown “all over the media.” He agreed that in his statement to the police, he stated that the man who he saw was five feet, seven or eight inches tall with a small build. He believed he mentioned the man’s facial hair, but this information was not included in his statement. He recalled seeing what he believed to be a band-aid on the man’s head but later stated, “I saw something on his head. I don’t know if it was a Band-Aid or not.” He agreed that the man whose photograph he circled in the lineup was the only person in the lineup with a black eye and a bandage on his forehead. Mr. Becker testified that in preparing for his testimony at the suppression hearing, he “Googled” the offenses to refresh his memory regarding “what happened when at what point” and that he saw “the person that’s accused.”

On redirect examination, when asked whether the bandage in the lineup affected his selection, Mr. Becker responded, “Well, it was quite apparent he had something on his forehead and that’s—that’s how I determined, you know, it was him.” He stated that the man who he selected in the lineup was the man who he saw on the night of the shooting. The trial court asked, “So you picked this guy out because he had a Band-Aid on?” Mr. Becker testified, “I picked him out because of the facial feature. I picked him out because his—his goatee was—had a little goatee. And that’s the reason why.” The trial court stated, “I thought you just said you picked him out because he had a Band-Aid on.” Mr. Becker replied, “Well, he had a Band-Aid too.”

Following the hearing, the trial court entered an order in which the court made extensive findings and denied the Defendant’s motion to suppress. The trial court found that the “filler photographs” in lineup B were not “grossly dissimilar” to the Defendant’s photograph. The court noted that although the Defendant was the only person depicted in lineup B with a black eye, courts in other jurisdictions have found that this did not indicate suggestiveness when the prior descriptions of the suspect did not include the presence of a black eye. The court stated that although the Defendant had a bruised left eye socket in the photograph, “it is by no means pronounced.” The court noted Lieutenant Wilkie’s testimony that he did not believe the black eye stood out to such a degree that it influenced a person’s decision. The court also noted that none of the witnesses subject to the motion to suppress testified that the black eye influenced their selection of the Defendant’s photograph and that these witnesses did not mention the black eye unless questioned by the attorneys. The court stated that Mr. Henderson and Mr. Becker were shown a lineup in which the Defendant was the only person with a bandage on his forehead but that only Mr. Becker indicated that the bandage influenced his selection in any way.

The trial court stated that, although Mr. Henderson was shown the version of lineup B in which the Defendant was the only person with a “faint black eye” and a bandage across his forehead, Mr. Henderson stated that he did not know that his car had been wrecked when he made the identification, that he did not give a prior description of the perpetrator as having a black eye or a bandage, that he indicated that he recognized the Defendant’s face as the person who he saw take his car, and that he was not asked during the hearing whether he noticed the black eye or the bandage at the time he was shown the lineup or whether they influenced his decision. The court concluded that “any suggestiveness in the photospread was minimal.” The court weighed “this degree of suggestiveness” against the totality of the circumstances and concluded that there was no substantial likelihood of irreparable misidentification and, therefore, no due process violation. The court stated that although Mr. Henderson did not view the perpetrator’s face for a long period of time, the perpetrator looked at Mr. Henderson before entering the car, which allowed Mr. Henderson to see the perpetrator’s face from a relatively short distance in a well-lit area. The court found that Mr. Henderson’s degree of attention was heightened

in that the car had been given to him as a gift and was he was not “a mere bystander or a victim of a violent crime staring down the barrel of a gun.” The court stated that although Mr. Henderson’s prior description of the perpetrator as a heavy-set man with dreadlocks appeared “somewhat inaccurate,” Mr. Henderson explained the inconsistency during his testimony and that “there remains a big difference between a person’s ability to ‘describe’ someone and their ability to ‘recognize’ someone.” The court also stated that although Mr. Henderson was not asked about his degree of certainty when he made his identification, he acknowledged reading the information on the advice form, instructing him against making an identification unless he was positive. The court noted that Mr. Henderson viewed the lineup three days after the offense.

The trial court found that Mr. Lyon was shown the version of lineup B with the black marks across the foreheads of each individual and that this version of lineup B was somewhat “darker” than the other versions such that the Defendant’s black eye was “even slightly fainter than in other versions.” The court stated that Mr. Lyon was shown the lineup twelve days after witnessing the offenses and that he “immediately” chose the Defendant because he had seen the perpetrator’s face but also noted on the lineup to seeing the person’s photograph on a newscast. The court noted Mr. Lyon’s testimony that the person who he identified in the lineup was both the person who he saw on the newscast and the person who he saw outside Westy’s. The court also noted that Mr. Lyon was not asked whether he noticed the black eye at the time of the identification procedure or whether the black eye influenced his decision, that Mr. Lyon did not describe the perpetrator prior to viewing the lineup as having a black eye, and that although he was aware that a crash had occurred, he did not indicate any knowledge of the seriousness of the crash or any injuries sustained by the perpetrator. The court concluded that any suggestiveness in the lineup was “minimal.”

The court weighed the degree of suggestiveness against the totality of the circumstances and concluded that there was no substantial likelihood of irreparable misidentification and, thus, no due process violation. The court noted that Mr. Lyon “had an unusually long time to view the suspect as he loitered around after the shooting,” that the area was well-lit, that Mr. Lyon was able to see the perpetrator’s face from as close as forty feet away, and that Mr. Lyon’s attention would have been heightened because he was observing an “extremely dangerous situation.” The court stated that, although the record is unclear whether Mr. Lyon gave a physical description of the perpetrator on the night of the offenses or in his statement to the police, “there is no indication of their being any material difference.” The court also stated that the record is unclear regarding Mr. Lyon’s level of certainty and that he viewed the lineup twelve days after the offenses, which is “a relatively short period of time.” The court found that the fact that Mr. Lyon’s identification of the Defendant in the lineup may have been influenced by Mr. Lyon’s observing a

photograph of the Defendant on the news prior to making the identification did not invoke State action.

With respect to Mr. Becker, the trial court noted that Mr. Becker was shown the version of lineup B in which only the Defendant had a bandage on his forehead and that when Mr. Becker described the perpetrator following the offenses, he did not describe the perpetrator as having a black eye, a bandage on his forehead, or any other injuries. The court found that Mr. Becker's testimony at the suppression hearing gave rise to the inference that his testimony was influenced by both his observations of the newscasts following the offenses and the information he obtained, including a photograph of the Defendant, when he conducted an internet search of the case in preparation for his testimony. The trial court continued:

This would explain the reason why Mr. Becker identified the person in his testimony during the motion to suppress as having a band-aid on his head and a funny looking goatee, although he made no mention of either in his statements of description given at the scene. It can be reasonably inferred that he observed the same from the photograph of the [D]efendant disseminated by the news media and on the internet. This inference is further bolstered by the fact that none of the other witnesses indicated in their pre-identification procedure descriptions that the culprit had a band-aid on his forehead. This inference is further bolstered by an examination of Ex. W, a photo of the defendant sitting in a police car at the scene of his arrest. There is no band-aid on the forehead of the [D]efendant at that time. Other testimony indicates that the [D]efendant was treated at the scene of his arrest. Further evidence of this influence can be seen from the exact wording used by Mr. Becker in describing the person he picked out of the photospread. According to [Mr.] Becker: "That was a photo of the gentleman who was accused of shooting those two people." He later described the person he saw holding a gun that night as "the gentleman accused of killing those two people." The record is clear that Mr. Becker observed and followed the extensive media coverage of this matter before he was asked to make his identifications. In addition, the testimony at the suppression hearing is ambiguous as to the time Mr. Becker learned that there had been a car crash.

Based upon the evidence and the inferences flowing from such evidence, the trial court concluded that "Mr. Becker confused his on the scene viewing of the suspect with the pictures he saw on the news and by the time of the suppression hearing thought the man he had seen had a band-aid on his head at the time." The court declined to accept the defense's interpretation of Mr. Becker's testimony that he chose the Defendant's photograph in the lineup because the bandage, alone, singled out the Defendant for

identification. The court stated, “A more logical interpretation is that the presence of the band-aid on the [D]efendant’s photo contributed to the identification primarily because Mr. Becker had followed the media and seen pictures of the [D]efendant with a band-aid prior to making his formal identification.” The trial court also stated that although Mr. Becker testified that when he viewed the lineup, he was aware that a crash occurred, he did not state that he had any knowledge of the seriousness of the crash or any injuries sustained by the perpetrator. Noting that Mr. Becker did not describe the perpetrator as having a bandage, black eye, or any other injuries on the night of the offenses or at any time prior to viewing the lineup, the court concluded that “any suggestiveness in the photospread was minimal.”

The trial court weighed the degree of suggestiveness against the totality of the circumstances and concluded that there was no substantial likelihood of irreparable misidentification and, thus, no due process violation. The court noted that Mr. Becker saw the perpetrator both briefly through a window while Mr. Becker was inside the restaurant and then after Mr. Becker exited the restaurant, that the area was well-lit, that Mr. Becker was able to see the perpetrator’s face from fifteen to twenty feet away, and that Mr. Becker’s attention would have been heightened because he was observing “an extremely dangerous situation.” The court stated that the only material difference in the physical description of the perpetrator given by Mr. Becker related to the perpetrator’s height, which is “something that is very subjective.” The court noted that Mr. Becker viewed the lineup ten days after the offenses, which was “a relatively short period of time,” and that with regard to Mr. Becker’s level of certainty, the advice form signed by Mr. Becker indicates that he was told that he should not make an identification unless he was certain. The court also found that the fact that Mr. Becker’s identification of the Defendant in the lineup was influenced, in part, by Mr. Becker’s seeing a photograph of the Defendant on newscasts prior to making the identification did not invoke State action. The court concluded that “although the presence of the band-aid may have assisted Mr. Becker in making his identification, it did so primarily because Mr. Becker had seen a photograph of the defendant with a band-aid on his forehead in the news media prior to making his formal identification.”

2. Analysis

When reviewing a trial court’s ruling on a motion to suppress evidence, this court must afford the prevailing party the “strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.” *State v. Martin*, 505 S.W.3d 492, 500 (Tenn. 2016) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). We must uphold the trial court’s findings of fact in a suppression hearing unless the evidence preponderates against them. *Id.* (citing *Keith*, 978 S.W.2d at 864). The

application of the law to the facts found by the trial court is a question of law that we review de novo on appeal. *Id.* (citations omitted).

Pursuant to the due process protections afforded in the United States Constitution, “a witness’s pretrial identification of the defendant by photograph will be suppressed ‘only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’” *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). Such due process concerns arise “‘only when law enforcement officers use an identification procedure that is both suggestive and unnecessary,’ and only if the eyewitness’s identification ‘is tainted by police arrangement.’” *Id.* (quoting *Perry v. New Hampshire*, 564 U.S. 228, 238-39 (2012)). If a witness’s in-court identification is tainted by an unconstitutional pretrial identification, the witness’s in-court identification is not admissible in evidence. *State v. Cannon*, 642 S.W.3d 401, 447 (Tenn. Crim. App. 2021) (citations omitted).

In assessing whether evidence of an identification from a photographic lineup is admissible, the court first must determine whether the identification procedure was unduly suggestive. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). An improperly constructed photographic lineup “may sometimes cause witnesses to err in identifying criminals,” and the danger of erroneous identification is increased if the witness is shown a series of photographs in which one individual recurs or is emphasized in some way. *Simmons*, 390 U.S. at 383. However, photographs in a photographic lineup need not “mirror the accused.” *State v. Hall*, 976 S.W.2d 121, 153 (Tenn. 1998). A lineup “would be considered unduly suggestive only when the other participants were grossly dissimilar.” *State v. Edwards*, 868 S.W.2d 682, 694 (Tenn. Crim. App. 1993); see *United States v. Wade*, 388 U.S. 218, 233 (1967); *State v. Scarborough*, 300 S.W.3d 717, 728-29 (Tenn. Crim. App. 2009).

If the identification procedure or lineup was unduly suggestive, the court must determine whether the identification was reliable despite the undue suggestion. *Biggers*, 409 U.S. at 198-99. The United States Supreme Court has identified five factors to be considered in making this determination:

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200. “The court must consider the ‘totality of the circumstances’ in determining whether the identification was reliable.” *Scarborough*, 300 S.W.3d at 729 (quoting *Biggers*, 409 U.S. at 200). However, “[t]he *Biggers* test for reliability is only triggered if

the identification procedures were conducted in an impermissibly suggestive manner.” *State v. Bonds*, 502 S.W.3d 118, 139 (Tenn. Crim. App. 2016) (citations omitted).

a. Identification by Mr. Lyon

Mr. Lyon was shown the version of lineup B, which depicted the Defendant with a black eye and a black mark covering the bandage on his forehead and the other five men in the lineup with corresponding black marks on their foreheads. Although the Defendant was the only person depicted in the lineup with a black eye, this alone does not necessarily render the lineup unduly suggestive. *See, e.g., State v. Varquez Sails*, No. M2014-01343-CCA-R3-CD, 2015 WL 5032342, at *10 (Tenn. Crim. App. Aug. 26, 2015) (holding that even though the defendant was the only person in the lineup with cheek and neck tattoos, the lineup was not unduly suggestive when the cheek tattoos were faint and could have been mistaken for shadows, the neck tattoo could have been mistaken for hair or a shadow and was largely hidden by clothing, and the appearances of the others in the lineup were otherwise similar).

Other jurisdictions have held that a lineup depicting the defendant with an injury or a bandage was not unduly suggestive when the defendant or perpetrator was not injured at the time of the offense and/or the witnesses did not mention the injury or bandage in describing the perpetrator. *See, e.g. Cooper v. State*, 531 P.2d 1187, 1191 (Idaho 1975) (holding that the defendant’s black eye at the time of the lineup did not “elevate the lineup to the requisite level of suggestiveness” as the black eye “was not an identifiable characteristic of the perpetrator of the robbery”); *People v. Bragg*, 659 N.E.2d 1378, 1383 (Ill. App. 1995) (concluding that the fact that the defendant wore a bandage in a lineup due to a subsequent head injury did not render the lineup unduly suggestive as “bandages are not impermissibly suggestive so long as the bandages were not present when the witness first viewed the defendant”); *People v. Gourdine*, 223 A.D.2d 428, 429 (N.Y. Sup. Ct. 1996) (proving that “[a]lthough defendant was the only participant who appeared in the lineup with a bruised face and a black eye, these were not features that witnesses utilized in describing the perpetrator of the crime and did not create a substantial likelihood that he would be singled out for identification”); *People v. Moore*, 193 A.D.2d 627, 627-28 (N.Y. Sup. Ct. 1993) (rejecting the defendant’s claim that his presence in the lineup as the only person with visible bandages on his arm rendered the lineup unduly suggestive and noting that the defendant sustained the injuries following the offense, the witness did not rely on the bandages in identifying the defendant, and those in the lineup had otherwise similar appearances); *State v. Ratliff*, 90 P.3d 79, 83 (Wash. App. 2004) (holding that the lineup was not unduly suggestive when the defendant was the only person in the lineup with a black eye because none of the witnesses described the perpetrator as having a black eye).

In *State v. Derri*, the Supreme Court of Washington, sitting *en banc*, rejected the defendant's contention that a photographic montage was impermissibly suggestive because he was the only person pictured with a neck tattoo. *State v. Derri*, 511 P.3d 1267, 1278-79 (Wash. 2002). The court noted that the rule that a montage is impermissibly suggestive if it "directs undue attention to a particular photo," generally, is applied "when the undue attention stems from a distinctive feature of the defendant that the witness previously described." *Id.* at 1278 (quotations omitted). "[I]n other words, that rule has generally been applied when the defendant is the only possible choice *given the witness's earlier description.*" *Id.* (quotations omitted) (emphasis in original). The court observed that while "current eyewitness identification research agrees that lineup administrators should avoid constructing a lineup so that any photo stands out from the others," the majority of the research supporting this conclusion "considers photomontage pictures showing a suspect's distinctive physical characteristic that was previously described by, or at least visible to, a witness." *Id.* at 1279 (citing Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 L. & HUMAN BEHAV. 3, 8, 19 (2020); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUMAN BEHAV. 1, 7 (2009)). The court in *Derri* reasoned that although the defendant was the only person in the photomontage with a neck tattoo, which is a "distinctive characteristic," no witnesses previously described seeing a neck tattoo on the perpetrator, and the perpetrator's neck would not have been visible during the commission of the offense as he was described as wearing a hood that was pulled up and cinched around his face. *Id.*

As noted by the trial court, the record is unclear as to whether Mr. Lyon gave a physical description of the shooter to the police on the night of the shooting. However, neither Mr. Lyon's description of the shooter in his statement to the police nor his description of the shooter as testified at trial included a black eye. Furthermore, the evidence established that the Defendant sustained the eye injury after the shooting when officers were attempting to take him into custody. The trial court found that Mr. Lyon was shown a lineup that was "somewhat" darker than other versions such that the Defendant's black eye was "even slightly fainter than in other versions." The black eye could have been mistaken for a shadow. Mr. Lyon was not asked during the suppression hearing whether he noticed the black eye at the time of the identification procedure or whether the black eye influenced his decision. However, Mr. Lyon testified at trial that he did not notice the black eye when the officer presented the lineup to him. *See State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998) (recognizing that an appellate court may consider the evidence presented during the suppression hearing and at trial in evaluating a trial court's ruling on a pretrial motion to suppress). We conclude that the Defendant's photograph was not "grossly dissimilar" from the other photographs in the lineup.

Mr. Lyon's viewing the Defendant's photograph on a television newscast prior to identifying the Defendant in the lineup does not constitute state action implicating the Defendant's constitutional due process rights. *See Martin*, 505 S.W.3d at 500-01; *State v. Reid*, 91 S.W.3d 247, 272-73 (Tenn. 2002). Although evidence was presented that some witnesses viewed multiple lineups that included the Defendant's photograph, Mr. Lyon was not one of those witnesses. We conclude that because the lineup was not unduly suggestive, the trial court properly denied the Defendant's motion to suppress Mr. Lyon's out-of-court and in-court identifications of the Defendant.

b. Identifications by Mr. Henderson and Mr. Becker

Mr. Henderson and Mr. Becker viewed the version of lineup B depicting the Defendant with a black eye and a white bandage on his forehead. Although the Defendant's black eye did not render the lineup unduly suggestive, the bandage is a closer issue. Unlike the cases concluding that a photograph depicting a defendant with an injury or other distinctive feature was not unduly suggestive as none of the witnesses included the injury or distinctive feature in their description of the perpetrator, one witness, Mr. Becker, testified at the suppression hearing that the shooter appeared to have tape or a bandage on his forehead and that his identification of the shooter in the lineup was due, in part, to the bandage depicted in the photograph. *See, e.g. Bragg*, 659 N.E.2d at 1383; *Gourdine*, 223 A.D.2d at 429; *Moore*, 193 A.D.2d at 627-28; *Derri*, 511 P.3d at 1279; *Ratliff*, 90 P.3d at 83.

The trial court, however, declined to credit Mr. Becker's testimony at the suppression hearing describing the shooter with a bandage on his forehead. As noted by the trial court, Mr. Becker's description of the shooter to the police did not include the bandage; no other witnesses described the shooter as having a bandage on his forehead; and the evidence established that the Defendant did not sustain the injury requiring the bandage until after the commission of the offenses when he was apprehended by police. Mr. Becker acknowledged following media coverage of the offenses during which a photograph of the Defendant wearing a bandage was shown, and he researched the case prior to testifying during the suppression hearing. The trial court found that "Mr. Becker confused his on the scene viewing of the suspect with the pictures he saw on the news and by the time of the suppression hearing thought the man he had seen had a band-aid on his head at the time." The trial court also found that "a logical interpretation" of the evidence is that the bandage contributed to Mr. Becker's identification of the Defendant in the lineup primarily because Mr. Becker had followed the media coverage and viewed photographs of the Defendant with the bandage prior to making a formal identification. Thus, the trial court essentially found that any taint in Mr. Becker's identification of the Defendant was not due to an unduly suggestive photographic lineup in violation of the Defendant's due process rights but was due to Mr. Becker's viewing the Defendant's photograph during

news coverage of the offenses, which is not a state action implicating the Defendant's due process rights. See *Martin*, 505 S.W.3d at 501-02; *Reid*, 91 S.W.3d at 272. "[U]nless the defendant establishes 'the taint of improper state conduct,' the trial court need not screen eyewitness identification evidence before allowing the jury to assess it." *Martin*, 505 S.W.3d at 501 (quoting *Perry*, 565 U.S. at 245).

Regarding Mr. Henderson's identification of the Defendant, we conclude that even if the photographic lineup was unduly suggestive on its face, Mr. Henderson's identification of the Defendant in the lineup was otherwise reliable under the *Biggers* factors. Although Mr. Henderson's testimony at trial regarding the circumstances in which he viewed the perpetrator's face was somewhat inconsistent with his testimony during the suppression hearing, the trial court credited Mr. Henderson's testimony at the suppression hearing that the perpetrator looked at him before entering the car, which allowed Mr. Henderson to view the perpetrator's face in a well-lit area and from a relatively short distance. While the Tennessee Supreme Court held in *State v. Henning* that an appellate court may consider evidence presented both at trial and during the suppression hearing in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, the Court reiterated that the holding did not modify the applicable appellate standard of review, including the provision that "questions of credibility of witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Henning*, 975 S.W.2d at 299 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). Regardless, Mr. Henderson's testimony at trial and during the suppression hearing established that Mr. Henderson was able to clearly view the perpetrator's face.

As found by the trial court, Mr. Henderson was not "a mere bystander or a victim of a violent crime staring down the barrel of a gun," and his degree of attention was heightened as the car had been given to him as a gift. Mr. Henderson viewed the photographic lineup three days after the offense, which is a short amount of time, and during the suppression hearing, he explained the inconsistencies in his prior descriptions of the perpetrator. Although Mr. Henderson did not testify regarding his degree of certainty in making the identification, he acknowledged reading the advice form, which instructed him against making an identification unless he was positive. We conclude that based on the totality of the circumstances, Mr. Henderson's identification of the Defendant was reliable regardless of any undue suggestion in the lineup. Thus, the trial court properly denied the Defendant's motion to suppress Mr. Henderson's out-of-court and in-court identification of the Defendant as the perpetrator who took Mr. Henderson's car. Furthermore, any error in the admission of the evidence is harmless beyond a reasonable doubt in light of the overwhelming evidence establishing that the Defendant was the perpetrator who took Mr. Henderson's car, which included the Defendant's testimony at trial admitting that he took the car and evidence that he was driving the car when it crashed.

See State v. Philpott, 882 S.W.3d 394, 401 (Tenn. Crim. App. 1994) (holding that although the pretrial identification procedure was impermissibly suggestive and the in-court and out-of-court identifications were unreliable, the admission of the evidence was harmless beyond a reasonable doubt).

We likewise conclude that any error in the admission of Mr. Becker's out-of-court and in-court identifications of the Defendant was harmless beyond a reasonable doubt. Although Mr. Becker initially identified the Defendant at trial as the man who he saw following the shooting at Westy's, Mr. Becker subsequently testified that he was unsure whether the Defendant was the same man who he saw at Westy's. Defense counsel questioned Mr. Becker extensively on cross-examination regarding whether his identification of the Defendant in the photographic lineup was based upon Mr. Becker's observations following the shooting at Westy's or his viewing of the Defendant's photograph during the extensive news coverage of the offenses. Mr. Lyon identified the Defendant as the man who he saw at Westy's following the shooting; multiple witnesses identified the clothing that the Defendant was wearing when he was arrested as similar to the clothing that the shooter was wearing; and witnesses saw the shooter flee toward Bass Pro Shops after which Mr. Dickens was shot. Extensive evidence that the Defendant was the person who shot Mr. Dickens was presented at trial, including Mr. Dickens's identification of the Defendant at trial as the shooter, Mr. Dicken's testimony that the shooter was in a silver Camaro, and the Defendant's acknowledgment at trial that he was in the area of Bass Pro Shops in a silver Camaro at the time of the shooting. Special Agent Braswell determined that the nine-millimeter cartridge casings recovered from the parking lot of Bass Pro Shops and outside of Westy's were fired from the same gun, thus tying the same shooter to both shootings. In light of Mr. Becker's equivocal in-court identification of the Defendant at trial, defense counsel's extensive cross-examination of Mr. Becker, and the other evidence presented at trial establishing the Defendant's identity as the shooter at Westy's, we conclude that any error in the admission of Mr. Becker's identification of the Defendant as the shooter was harmless beyond a reasonable doubt.

C. Identification Instruction

The Defendant asserts that the trial court erred in denying his motion for a special jury instruction on identification. He maintains that the special instruction is "superior" to the pattern jury instruction on identification "as a safeguard of due process and fundamental fairness" in that the special instruction "expressly calls upon the jury to consider all of the *Biggers* factors and additional judicially recognized aspects of reliability and/or unreliability that are implicated by the evidence." The State responds that the trial court's instruction was not erroneous in that the instruction was a "correct and complete" explanation of the current law as applied to the present case. The State further responds that the Defendant's proposed special instruction is not a correct statement of the law and

“would have required the trial court to usurp the jury’s role as finder of fact and direct it to accredit the testimony of the [D]efendant’s expert witness.

Prior to trial, the Defendant filed a motion requesting the following special jury instruction on identification:

One of the issues in this case is the identification of the [D]efendant as the person who committed the crimes charged in the indictment. The state has the burden of proving identity beyond a reasonable doubt. For each charged offense, therefore, you must determine not only whether the state has proven each and every element of the offense beyond a reasonable doubt, but also whether the state has proven beyond a reasonable doubt that this defendant is the person who committed the offense.

Identification testimony is an expression of belief or impression by the witness, and the reliability of the testimony is a question for you to decide. If you determine that a witness’s out-of-court identification is not reliable, you may still consider the witness’s in-court identification of the defendant if you find that it resulted from the witness’s observations or perceptions of the perpetrator during the commission of the offense, and that the identification is reliable. If you find that the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate question of the reliability of both the in-court and out-of-court identifications is for you to decide.

To decide whether identification testimony is sufficiently reliable evidence to support the conclusion that this defendant is the person who committed the offenses charged, you should evaluate the testimony of each witness in light of the instruction on credibility of witnesses that I have already given you. In addition, you should consider factors that bear on the reliability of eyewitness identification evidence.

The instruction listed and explained the following factors that the jury may consider: (1) the witness’s opportunity to view the perpetrator and degree of attention to the perpetrator; (2) any description of the perpetrator made by the witness prior to identifying the perpetrator and any identification made by the witness at a prior identification procedure; (3) any level of confidence or certainty expressed by a witness in identifying the Defendant; (4) the amount of time that elapsed between the witness’s observation of the incident and the witness’s identification of the Defendant; (5) any effect that a difference in race between the Defendant and the witness may have upon the witness’s ability to identify the perpetrator; (6) the circumstances under which any out-of-court identification was made,

the nature of the identification procedure, and the manner in which the identification procedure was conducted; (7) the witness's exposure to other information or influence such as photographs or newspaper accounts; other witnesses' opinions, descriptions, or identifications; or any other information or influence that may have affected the independence of the witness's identification; and (8) any other relevant factors. As to factor (1), the witness's opportunity to view the perpetrator and level of attention to the perpetrator, the proposed instruction listed the following subfactors that a jury may consider: (a) the witness's level of stress; (b) the amount of time in which the witness observed the perpetrator; (c) the presence of a weapon; (d) the distance between the witness and the perpetrator; (e) the lighting conditions; and (f) any level of intoxication by the witness. As to factor (6), the circumstances of the prior identification, the proposed jury instruction listed and explained the following subfactors that a jury may consider: (a) the composition of the lineup; (b) any multiple viewings of the defendant by the witness during separate out-of-court identification procedures; and (c) the manner in which law enforcement conducted the out-of-court identification procedures, including any application of a double-blind procedure, any instructions provided by the officer prior to the identification, and any feedback provided by the officer following the identification.

The Defendant maintained that due process required an instruction that assisted jurors in "conducting a critical and comprehensive appraisal of the reliability of eyewitness identification." He asserted that the factors listed in the proposed instruction were relevant to the reliability of a witness's identification of a perpetrator, that the proposed instruction was "superior" to the pattern instruction as a safeguard to the Defendant's due process rights and fundamental fairness, and that the proposed instruction did not unduly reiterate expert testimony or invade the province of the jury. The State filed a response in opposition, arguing that the pattern jury instructions on identity are based upon established caselaw, that the proposed jury instruction was essentially an expanded version of the special jury instruction rejected by the Tennessee Supreme Court in *State v. Dye*, 899 S.W.2d 607 (Tenn. 1995), as an impermissible comment on the evidence, that this court had previously rejected special jury instructions that included the factors described in the Defendant's proposed instruction, and that the pattern jury instructions are more "succinct, clear, and balanced" than the Defendant's proposed instruction.

The State correctly notes in its brief that the Defendant failed in his brief to cite to the appellate record where the trial court's ruling appeared. *See* Tenn. R. App. P. 27(a)(7)(A) (requiring an appellant's argument include "appropriate references to the record"); Tenn. Ct. Crim. App. R. 10(b) (providing that issues not supported by "appropriate references to the record will be treated as waived"). The State, however, incorrectly states that the appellate record does not include a transcript of a hearing addressing the Defendant's motion and the trial court's ruling. Rather, the record reflects that the motion was discussed on multiple occasions prior to and during the trial. The trial

court ultimately denied the Defendant's motion, finding that the proposed instruction would be an improper comment on the evidence and would result in the court "lending [its] weight." The court found that the pattern instruction, which allowed the jury to consider "any other factors fairly raised by the evidence," allowed the jury to consider the factors about which the Defendant's expert witness testified.

The defendant 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) (citing *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990)). A trial court has a duty to provide a "complete charge of the law applicable to the facts of the case." *State v. James*, 315 S.W.3d 440, 446 (Tenn. 2010) (quoting *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986)). "A trial court's refusal to grant a special instruction is error only when the general charge does not fully and fairly state the applicable law." *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013). Issues regarding the propriety of jury instructions involve mixed questions of law and fact, and, therefore, this court's standard of review is *de novo* with no presumption of correctness. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001).

In *State v. Dye*, 899 S.W.2d 607, 612 (Tenn. 1995), the Tennessee Supreme Court held that when identity is a material issue in the case and when requested by the defendant, the trial court must give the following instruction to the jury:

One of the issues in this case is the identification of the defendant as the person who committed the crime. The state has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:

- (1) The witness' capability and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;
- (2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;

- (3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and
- (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.

Again, the state has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which he or she is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

This instruction was subsequently included as a pattern jury instruction. *See* 7 T.P.I.-Crim. 42.05. Our supreme court adopted this identity instruction over a more expansive instruction to avoid “impermissibly comment[ing] on the evidence; thus, invading the province of the jury.” *Dye*, 899 S.W.2d at 612.

In *State v. Christopher Epps*, the defendant requested a special jury instruction on identity, which incorporated issues raised by the testimony of the defense’s identification expert. No. M2014-01955-CCA-R3-CD, 2015 WL 5968339, at *5-6 (Tenn. Crim. App. Oct. 14, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016). The trial court found that the proposed instruction would amount to a comment on the evidence and denied the request. *Id.* at *6. Instead, the trial court amended its instruction on identification to allow the jury to consider “any other factors fairly raised by the evidence.” *Id.* On appeal, this court upheld the trial court’s denial of the proposed instruction, concluding that the proposed instruction was not a correct statement of the law and “would have required the trial court to usurp the jury’s role as finder of fact and direct it to accredit the testimony of the Defendant’s expert witness.” *Id.* at *9. This court concluded that the trial court’s instruction to the jury was “complete and accurate” and that the additional language instructing the jury to consider “any other factors fairly raised by the evidence” was broad enough to allow the jury to consider the factors identified by the defense’s expert as affecting eyewitness identification. *Id.* The pattern jury instruction subsequently was amended to include language allowing the jury to consider “[a]ny other factors fairly raised by the evidence.” *See* 7 T.P.I.-Crim. 42.05.

In the present case, the trial court instructed the jury in accordance with *Dye*, *Christopher M. Epps*, and the pattern jury instruction. The instruction proposed by the Defendant was more expansive than the instructions rejected in *Dye* and *Christopher M.*

Epps and would have required that the trial court usurp the jury’s role as finder of fact and direct the jury to accredit the testimony of the Defendant’s expert witness. The instruction utilized by the trial court, which instructed the jury to consider “[a]ny other factors fairly raised by the evidence,” was sufficient to allow the jury to consider the factors identified by the Defendant’s expert witness as affecting eyewitness identification. We conclude that the trial court’s instruction was a “correct and complete” explanation of the current law as applicable to this case and that, therefore, the trial court’s instruction was not erroneous.

III. Conclusion

We conclude that the Defendant is not entitled to relief. Accordingly, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE