IN THE CIRCUIT COURT OF GRUNDY COUNTY, TENNESSEE

ADAM C BRASEEL
Petitioner

v **NO: 4221**

STATE OF TENNESSEE
Respondent

STATE'S MOTION TO DISMISS AMENDED PETITION FOR WRIT OF ERROR CORAM NOBIS

Comes the State of Tennessee by and through the District Attorney General who would respectfully move this Honorable Court to dismiss the Amended Petition for Writ of Error Coram Nobis. In support of said motion the State would show:

1. The State acknowledges the fingerprint of Kermit Bryson was found on the door handle of the vehicle. However, there is no way to know when the fingerprint was placed there. The mere presence of the print does not warrant a new trial as called for in the Petition.

2. Petitioner places great emphasis on the criminal history and subsequent homicide wherein Shane Tate, a Grundy County deputy was shot and killed by Kermit Bryson, who subsequently committed suicide. That evidence is not admissible. Petitioner cites *Holmes v South Carolina*, 547 US 319 (2006), in support of this proposition but the *Holmes* case does not support this conclusion. The Court in *State v Goins*, 2010 Tenn. Crim. App. 388 considered Holmes and held as follows:

*Finally, in contradiction of his argument that Ms. Holt's statements were not admitted to prove the truth of the matters asserted therein, the defendant argues that the exclusion of Mr. Holt's statements violates his "right to present a defense which includes the right to present witnesses favorable to the defense." The defendant cites the United States Supreme Court case of Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). He also argues that the exclusion of Mr. Hilliard's [*52] testimony prevented him from presenting a constitutionally valid defense.*

We distinguish Holmes from the instant case. In Holmes, the Supreme Court deemed unconstitutional a state supreme court's ruling that arbitrarily barred the defense's presentation of proof regarding third party guilt when the State produced "strong evidence" *and the defense's evidence "d[id] not raise a reasonable inference as to the appellant's own innocence." Id. at 324. A total barring of a defense is wholly different from the instant case's exclusion of specific statements based on well-settled evidentiary rules. The Supreme Court has explicitly noted that it has "never questioned the power of*

States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)* *(citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973))*. A copy of said case is attached hereto.

Evidence of other crimes is not admissible to prove someone committed a particular crime. Indeed, this Court would not allow the State to admit evidence of a separate homicide in order to prove the defendant guilty of the instant homicide. The Tennessee Supreme Court held in *State v Adams*, 405 SW3d 641, 659 (Tenn. 2013) as follows regarding Rule 404 b Tennessee Rules of Evidence:

> *The terms of this rule establish that evidence of prior bad acts cannot be used to prove that a person has a propensity to commit a crime. Id.; State v. Adkisson, 899 S.W.2d 626, 645-46 (Tenn. Crim. App. 1994). Furthermore, in those instances where the prior conduct or acts are similar to the crimes on trial, the danger of unfair prejudice increases.*

The homicide in which Deputy Tate was killed was a situation wherein the deputy went to a residence where Mr. Bryson was purported to be staying in an effort to arrest him on a Community Corrections violation on a two year sentence. The investigation was not able to ascertain precisely what happened in the residence and Mr. Bryson subsequently committed suicide. There is no objective similarity between the murder of Deputy Tate and the murder of Malcolm Burrows. He was also arrested several times after Mr. Burrows was murdered and those arrests were without any violence.

3. Kermit Bryson's appearance in 2006 differed substantially from the photo submitted by the Petitioner. Petitioner relies on a photo taken several years before the Malcolm Burrows was killed. Subsequent to the photo being taken Mr. Bryson grew a mustache and goatee and his hair was significantly longer. A photograph of Mr. Bryson is attached hereto. The proof at trial was that the description given, *that night*, of the assailant was a medium build man with short red hair. There was no mention of a mustache or goatee. The appellate opinion from the original trial sets forth the description given at the scene, as well at the identification by Becky Hill. The opinion was quoted in the post conviction appeal by the Court of Criminal Appeals. Both opinions are attached hereto.

a. Mr. Braden described Defendant to the police officers as a medium built man with short, red hair. Mr. Braden stated that Defendant was wearing a white ball cap, a sweater, and blue jeans. Mr. Braden identified the ball cap found in Defendant's vehicle on January 8, 2006, as the cap that Defendant was wearing on the night of the offenses. Mr. Braden identified Defendant as the perpetrator two days after the offenses from a set of photographs at the Grundy County Jail. Mr. Braden also identified Defendant as the perpetrator at trial. *State v Braseel*, 2010 WL 3609247, permission to appeal denied by Supreme Court September 16, 2015.

b. Ms. Hill stated that she identified Defendant as the perpetrator from a photographic lineup at the Grundy County Jail a few days after she was released from the hospital.

On cross-examination, Ms. Hill stated that Defendant's "expressions [sic] was different" when he returned for the starter fluid, but he did not appear angry. Ms. Hill said that she did not notice any blood on Defendant's clothes, and she did not recollect whether Defendant was wearing gloves. Ms. Hill said that she immediately recognized Defendant from his photograph. On redirect examination, Ms. Hill described Defendant when he came to the house the second time as pale with "clammy" skin. Ms. Hill said, "His eyes was [sic], like, didn't blink. They was [sic] just like-they stayed wide open." *Id.*

4. There were two separate crime scenes in this case. The assault which occurred at the residence of the victim, Malcolm Burrows and scene where the deceased was located. The two eye witnesses at the residence both identified Petitioner as the assailant. The State would note that the jurors accepted this testimony. Even if a third party was present at the scene where Mr. Burrows was killed this would have no effect on Petitioner's presence at the residence and his involvement in the crime.

5. The issue as to the identification was raised at the post conviction and addressed by the Court of Criminal Appeals. Petitioner, for reasons unknown to the State, choose not to put on proof as to this issue at the post conviction hearing. The State would submit that this issue was raised in the post conviction petition and Petitioner cannot continue to litigate this issue. The State would further note the victim, Becky Hill, picked Petitioner out of a photo lineup. Any issues with that lineup should have been addressed at the original post conviction hearing. Indeed, the Court of Criminal Appeals addressed this issue in its opinion in this case, a copy of which is attached hereto:

*"The post-conviction court's finding that Mr. Braden was shown a "single photo lineup" by the sheriff is not supported by the trial transcript. Mr. Braden's trial testimony and the trial testimony of the sheriff showed that Mr. Braden was shown more than one photograph. Petitioner's photograph was the first picture in a stack of photos that Mr. Braden saw when he showed up early at the sheriff's office and before the photos could be arranged in a photo array. Prior to that time, he had provided a description of Petitioner, his car, and the hat he was wearing on the night of the murder, enabling him to make the identification of Defendant so quickly once he was shown a photograph. Moreover, Petitioner did not present any testimony at the post-conviction hearing to contradict the facts surrounding the identification of Petitioner by Mr. Braden as presented at trial. Instead, Petitioner relied on the trial transcript introduced at the hearing as an exhibit and argument of post-conviction counsel. [*23] Accordingly, the evidence in the record preponderates against the post-conviction court's finding that Mr. Braden's identification resulted from an unnecessarily suggestive single-photo lineup.*

The Court went on to say:

In this case, the Petitioner failed to demonstrate that a motion to suppress his identification would have been successful had it been filed. The only argument in the

record indicating that the identification procedure was impermissibly suggestive is the Petitioner's own claim and post-conviction counsel's statements. Because we determined above that the identification of Petitioner by Mr. Braden was not impermissibly suggestive, we conclude there would have been little likelihood of success if trial counsel had filed a motion to suppress. Further, Petitioner admits that both Ms. Hill and Mr. Braden were able to identify him from photographs and at trial. Moreover, and significantly, neither trial counsel testified at the post-conviction hearing. Without the testimony of trial counsel, we cannot determine whether the decision was a part of trial counsels' trial strategy. Braseel v State, 2016 Tenn. Crim. App. LEXIS 763.

6. Mr. Bryson was at the residence of his girlfriend, Tina Bretz the night of the homicide as they were celebrating her birthday. Her birthday was on the Thursday preceding the homicide of Malcolm Burrows and they choose to wait until Saturday night to have her birthday party.

7. In its opinion in Petitioners post conviction petition the Court of Criminal Appeals found that failure to charge the jury instruction on identity as set forth in *State v. Dyle*, 899 S.W.2d 607, 612 (Tenn. 1995) would not have resulted in a different result. The question of identity has been resolved by the Court of Criminal Appeals. The Court reviewed the matter *de novo*, concluding:

That said, we must determine whether we should remand the case to require the post-conviction court to apply the proper legal standard or whether the state of the record enables us to apply the standard and adjudicate the prejudice issue in this appeal. Petitioner did nothing to contradict the trial record's demonstration of what occurred relative to the absence of the Dyle instruction. He took no steps to articulate, other than through nonevidentiary argument of post-conviction counsel, how the failure to request the instruction prejudiced Petitioner. For this reason, we will review the prejudice issue de novo.

*To do so, we look to the non-exclusive list of factors promulgated by Dyle to assess the probable result of the jury's use of the instruction had it been given. Applying these factors, the trial record contains evidence that leads us to conclude that no probability existed that the jury would have utilized a Dyle instruction to refute the identification testimony provided by Ms. Hill and Mr. Braden. Although Petitioner may have been previously unknown to the witnesses, these witnesses had [*33] a substantial and prolonged opportunity to observe the offender amid adequate lighting and from close distances. The witnesses expressed certainty as to offender's identity and did so within a short time after the crimes were committed. Contrary to argument of post-conviction counsel upon which the post-conviction court apparently relied, the record does not reflect that either witness "mis-identified" or failed to identify Petitioner as the offender.*

The record reflects no circumstances surrounding the pretrial identifications that would derogate from those identifications or the witnesses' identifications at trial. The focus of the Dyle instruction is the competency of eyewitnesses, not their veracity or truthfulness. Having reviewed the facts in light of the Dyle factors, we hold that no probability exists that the result of the trial would have been different. Therefore, we reverse the post-conviction court's judgment on this issue.

The mere presence of the fingerprint on the automobile does not in any way impact the testimony of the two eye witnesses to the crime.

8. At the time of the murder of Malcolm Burrows the Ford Escort vehicle owned by Mr. Bryson's girlfriend did not run and had not been moved for a lengthy period of time. Thus the vehicle could not have been in the vicinity of Malcolm Burrows' residence on the either the day of the homicide or during the evening hours.

The State would move that the Amended Petition be dismissed.

Respectfully submitted,

Steven H. Strain
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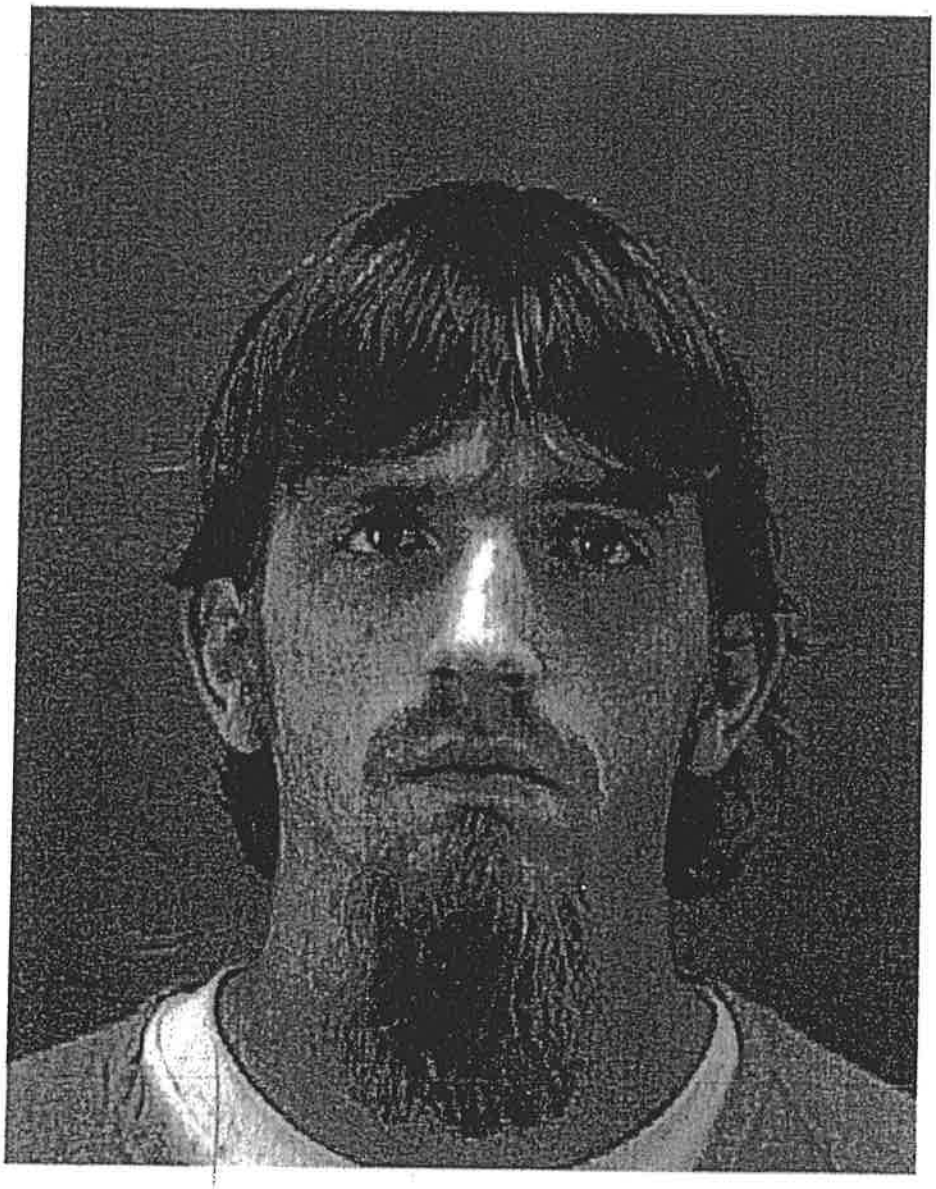
423 942 5289

CERTIFICATE OF SERVICE

I hereby certify a true copy of this Memorandum has been forwarded to Petitioner's counsel this 12th day of April, 2019.

SPN: 209421

Name: BRYSON, KERMIT EUGENE



2010 WL 3609247
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Nashville.

STATE of Tennessee
v.
Adam Clyde BRASEEL.

No. M2009-00839-CCA-R3-CD. | Nov. 18, 2009 Session. | Sept. 17, 2010. | Application for Permission to AppealDenied by Supreme CourtFeb. 17, 2011.

West KeySummary

1 **Double Jeopardy**

Homicide

Convictions for aggravated assault and attempt to commit first-degree premeditated murder violated double-jeopardy where both were based on the same evidence. The evidence for both convictions was that defendant struck the victim on the head with a weapon causing serious bodily injury. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 10; West's T.C.A. §§ 39-13-101(a)(2), 39-13-102(a)(1)(A), 39-13-202(a)(1).

Cases that cite this headnote

Direct Appeal from the Circuit Court for Grundy County, No. 4221; Buddy Perry, Judge.

Attorneys and Law Firms

Robert S. Peters, Winchester, Tennessee (on appeal and at trial) and Floyd Davis, Winchester, Tennessee (at trial) for the appellant, **Adam Clyde Braseel**.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; James Michael Taylor, District Attorney General; Steven Strain, Assistant District Attorney General; and David McGovern, Assistant District Attorney General, for the appellee, the State of Tennessee.

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JERRY L. SMITH and CAMILLE R. McMULLEN, JJ., joined.

OPINION

THOMAS T. WOODALL, J.

***1** Following a jury trial, Defendant, **Adam Clyde Braseel**, was convicted of first degree premeditated murder, first degree felony murder, especially aggravated robbery, a Class A felony, attempt to commit first degree murder, a Class A felony, aggravated assault, a Class C felony, and assault, a Class A misdemeanor. The trial court merged Defendant's convictions for first degree premeditated murder and first degree felony murder and sentenced him to life imprisonment for his murder conviction. The trial court sentenced Defendant to fifteen years for each Class A felony conviction, three years for his Class C felony conviction, and eleven months, twenty-nine days for his misdemeanor conviction. The trial court ordered Defendant to serve his sentences concurrently for an effective sentence of life with the possibility of parole. On appeal, Defendant challenges the sufficiency of the convicting evidence for murder, especially aggravated robbery and aggravated assault and argues that the pre-trial identification processes were unduly suggestive. After a thorough review, we conclude as plain error that Defendant's convictions of the attempted first degree premeditated murder of Rebecca Hill in count four of the indictment and the aggravated assault of Ms. Hill in count five violate double jeopardy principles. Accordingly, we merge Defendant's conviction of aggravated assault into his conviction of attempted first degree murder. We also find that the trial court's judgments of conviction for first degree premeditated murder and first degree felony murder do not clearly reflect the trial court's merger of the felony murder conviction into the premeditated murder conviction. We affirm the trial court's judgments

as to Defendant's convictions of first degree premeditated murder, attempted first degree murder, especially aggravated robbery, and assault, and his effective sentence of life with the possibility of parole. We remand solely for the correction and entry of appropriate judgments consistent with this opinion.

I. Background

Rebecca Hill testified that the murder victim, Malcolm Burrows, was her brother. Mr. Burrows was sixty years old at the time of his death on January 7, 2006, and he was in poor health. Ms. Hill said that she moved into her brother's home on Melissa Rock Road approximately three or four months prior to the offenses, and Ms. Hill's son, Kirk Braden, also stayed periodically at the house.

Ms. Hill stated that on Saturday, January 7, 2006, a young man, whom Ms. Hill identified at trial as Defendant, came to the door between 9:00 p.m. and 9:15 p.m. Defendant told Mr. Burrows that his vehicle would not start and asked for Mr. Burrows' help. Defendant told Mr. Burrows that he did not know if the vehicle was out of gas or had a technical problem. Mr. Burrows grabbed a can of gasoline and a battery charger and left with Defendant. Ms. Hill said that the two men were talking and laughing as they went out the door. Ms. Hill stated that Mr. Burrows and Defendant drove away in her blue Chrysler.

***2** A short time later, Defendant returned to the house and told Ms. Hill that Mr. Burrows had sent him to retrieve a can of starter fluid which was stored in the cabinet beneath the kitchen sink. Ms. Hill squatted down and began to search through the items in the cabinet. Defendant asked Ms. Hill if her nephew was staying with her. Ms. Hill told Defendant that her son stayed with her and that he was upstairs.

Defendant suddenly began hitting Ms. Hill on her head with an object which Ms. Hill described as approximately twelve to eighteen inches long. Defendant struck Ms. Hill several times, and Ms. Hill tried to crawl to the living room. Defendant kept hitting her, and Ms. Hill screamed for her son. Mr. Braden rushed into the room and began to struggle with Defendant. Mr. Braden struck Defendant on the jaw, and Defendant ran out of the house.

Ms. Hill stated that she did not remember what happened between the arrival of the emergency personnel on Saturday and the following Wednesday or Thursday night when she regained consciousness in the hospital. Ms. Hill learned from her niece that Mr. Burrows had been killed. Ms. Hill said that Mr. Burrows always carried his wallet with him. Ms. Hill stated that Mr. Burrows had approximately $800 in his wallet on the night he was killed, which included approximately $400 or $500 of her money which she had given Mr. Burrows for safekeeping. Ms. Hill stated that she identified Defendant as the perpetrator from a photographic lineup at the Grundy County Jail a few days after she was released from the hospital.

On cross-examination, Ms. Hill stated that Defendant's "expressions [sic] was different" when he returned for the starter fluid, but he did not appear angry. Ms. Hill said that she did not notice any blood on Defendant's clothes, and she did not recollect whether Defendant was wearing gloves. Ms. Hill said that she immediately recognized Defendant from his photograph. On redirect examination, Ms. Hill described Defendant when he came to the house the second time as pale with "clammy" skin. Ms. Hill said, "His eyes was [sic], like, didn't blink. They was [sic] just like-they stayed wide open."

Kirk Braden testified that he was asleep on the evening of January 7, 2006, and did not wake up until he heard Ms. Hill screaming. Mr. Braden rushed into the kitchen. Mr. Braden stated that Ms. Hill was kneeling, and Defendant was striking her with a sharp object between twelve and twenty-four inches in length. Mr. Braden pulled Defendant away from Ms. Hill and struck him in the cheek area with his fist. Defendant grabbed a fire extinguisher from the cabinet beneath the sink and threw it at Mr. Braden, striking him on the shoulder. Mr. Braden chased Defendant out of the house. Mr. Braden said that Defendant drove away in a gold vehicle which had a dent near the right front fender and a sunroof. At trial, Mr. Braden identified the photograph of a gold vehicle belonging to Imogene Davis, Defendant's mother, at trial as the vehicle Defendant was driving on the night of the offenses. After Defendant left, Mr. Braden found a baseball bat engraved with "Chicago White Sox" on the kitchen floor. The bat had been broken into two pieces. Mr. Braden said that he not seen the bat before that evening, and he put the two pieces of wood in the kitchen trash can.

***3** Mr. Braden described Defendant to the police officers as a medium built man with short, red hair. Mr. Braden stated that Defendant was wearing a white ball cap, a sweater, and blue jeans. Mr. Braden identified the ball cap found in Defendant's vehicle on January 8, 2006, as the cap that Defendant was wearing on the night of the offenses. Mr. Braden identified Defendant as the perpetrator two days after the offenses from a set of photographs at the Grundy County Jail. Mr. Braden also identified Defendant as the perpetrator at trial.

Angela White testified that she and her husband, Jeff White, were Mr. Burrows' neighbors. Ms. White said that she lived on a dead end road with little traffic other than the residents. Mr. Burrows' house was visible from Ms. White's property. Ms. White stated that on January 6, 2006, she noticed an unfamiliar gold vehicle with a dent in the front parked in her yard facing toward the victim's house. Ms. White said that the gold vehicle and another vehicle had been "in and out" during the day. The gold vehicle was not in her yard when she called her children into the house at approximately 4:00 p.m. Ms. White heard her dog bark at approximately 6:45 p.m. She looked out the window and observed the gold vehicle again parked at the front of her yard.

Andrew Martin West, a patrol officer with the Grundy County Sheriff's Department, responded to the 911 call which had been placed by Mr. Braden at approximately 9:52 p.m. Just before he reached the house, Officer West observed an older dark-colored Chrysler parked on the right hand side of the road. Officer West continued on to Mr. Burrows' house and obtained a description of the man who had been in Mr. Burrows' house that night and the vehicle he was driving. Officer West returned to the parked Chrysler and checked the vehicle's registration. Officer West found a battery charger sitting on the road next to the Chrysler, but he did not see the driver. Sergeant Troy Brown, with the Franklin County Sheriff's Department, later spotted Mr. Burrows' body lying face down in the woods approximately six to eight feet from the Chrysler.

Special Agent Larry Davis with the Tennessee Bureau of Investigation (T.B.I.), testified that he was notified at approximately 1:00 a.m. on January 8, 2006, that a body had been found on Melissa Rock Road in Tracy City. When he arrived at the scene, Special Agent Davis observed signs of a struggle near the Chrysler, and it appeared that Mr. Burrows had suffered massive trauma wounds to his head. Mr. Burrows did not have a wallet in his pants pocket.

Special Agent Davis drove up to Mr. Burrows' residence. He found a large amount of blood in the doorway to the home, and there was a puddle of blood on the floor beneath a kitchen chair. The door to the cabinet beneath the sink was open and a number of containers were sitting on the floor next to the open cabinet. A red fire extinguisher was found in a living room chair, and a broken bat with what appeared to be blood stains on it was found in one of the trash cans. Special Agent Davis stated that the blood puddle beneath the kitchen chair indicated that Ms. Hill had sat down for a few minutes while bleeding from her wounds. The blood spatter on the floor was consistent with Ms. Hill bleeding profusely as she fell to the floor.

***4** Special Agent Davis stated that Defendant was developed as a suspect the following day. Special Agent Davis and other officers drove to the home of Defendant's mother, Imogene Davis, and Ms. Davis verified that she owned a gold Acura. Ms. Davis said that Defendant had driven the Acura to the mountain where he had spent the night with a friend. After the law enforcement officials left, Ms. Davis drove away from her home in another vehicle.

Chief Deputy Lonnie Cleek, with the Grundy County Sheriff's Department, received a telephone call from Special Agent Davis on January 8, 2006, alerting him that Imogene Davis was traveling toward Grundy County on Highway 50 in a red or maroon vehicle. Chief Deputy Cleek followed Ms. Davis' vehicle until she turned into the driveway of the Seagroves' residence. Defendant was standing in the driveway next to a gold Acura. Defendant consented to a search of the vehicle. Chief Deputy Cleek retrieved a jacket and a baseball cap from the Acura, and the Acura was towed to the sheriff's department for processing because the engine would not start. Defendant was then transported to the Grundy County jail. Chief Deputy Cleek attempted to show Ms. Hill a photographic lineup after she was released from the hospital, but she was still on medication. Ms. Hill later came to the sheriff's department to view the photographic lineup. Chief Deputy Cleek said that Ms. Hill "rather quickly" identified Defendant as the perpetrator.

Grundy County Sheriff Brent Myers testified that he began to prepare a photographic lineup after Defendant was identified as a suspect. Mr. Braden stopped by the sheriff's department on January 9, 2006, as Sheriff Myers was sorting through a number of photographs on his desk which included Defendant's photograph. Mr. Braden sat down and spontaneously identified Defendant as the perpetrator from the group of photographs. Sheriff Myers handed Mr. Braden all of the photographs and told him to make sure that he had picked out the right photograph, and Mr. Braden again identified Defendant. Sheriff Myers stated that he showed Mr. Braden the baseball cap taken from Defendant's Acura, and Mr. Braden identified it as the cap Defendant was wearing on the night of the offenses.

Dr. Feng Li, an assistant medical examiner for Nashville and Davidson County, testified that he performed an autopsy on Mr. Burrows. Dr. Li discovered lacerations on the right side of the top of Mr. Burrows' head, the left side of his forehead, above his right eyebrow, on the right

ear lobe, and on the top of the his head. Dr. Li stated that all of the lacerations caused skull fractures, and "basically the skull [was] broken in[to] two pieces." Dr. Li said the skin abrasions from the lacerations were uneven and consistent with the infliction of blunt force injuries. Dr. Li stated that a fist alone would not have caused Mr. Burrow's injuries.

Dr. Li also found several contusions on Mr. Burrows' face, left shoulder, left forearm, right upper arm, the right edge of his tongue, and the back of his right hand. Dr. Li categorized the contusions of the victim's hands and shoulders as defense wounds. Dr. Li said that Mr. Burrows also sustained a fracture in his lower jaw, and suffered subdural and subarachnoid hemorrhages. Dr. Li stated that Mr. Burrows died as a result of multiple blunt force injuries.

***5** Elizabeth Reed, a special agent forensic scientist with the Tennessee Bureau of Investigation (T.B.I.), testified that she did not find any identifiable fingerprints on various items related to the crime scene including the Chrysler, the battery charger found next to the Chrysler, and the broken baseball bat found in Mr. Burrows' kitchen. Special Agent Reed stated that she found partial fingerprints on the fire extinguisher, but the details were insufficient to tell who had handled it.

Margaret Bash, a T.B.I. special agent specializing in serology and DNA analysis, testified that she did not find any blood on either the fire extinguisher or the black and white baseball cap. Special Agent Bash, however, found the presence of human blood on the baseball bat. Special Agent Bash was able to construct a partial DNA profile from the bat's blood stains, and the profile was consistent with Ms. Hill's DNA sample. Special Agent Bash stated that her examination of Defendant's jacket and gloves, as well as a tire tool and a stick from Defendant's vehicle, did not reveal the presence of any blood.

The State rested its case-in-chief, and Defendant presented his defense. Jeffrey Wade Wright, Mr. Burrows' neighbor, testified that he went to Mr. Burrows' house after the commission of the crimes. Mr. Wright said that he and Mr. Braden talked, but Mr. Braden did not mention seeing a vehicle in the driveway. On cross-examination, Mr. Wright stated that Mr. Braden told him that the perpetrator had run out of the house onto the road leading to Melissa Rock Road.

Charles Richard Partin, Jr., testified that Defendant was at his residence in Coalmont from Friday afternoon, January 6, 2006, until approximately 9:00 p.m. on Saturday, January 7, 2006. Mr. Partin stated that he left his house at approximately 9:15 p.m. on that Saturday night, and Defendant left "a few" minutes before him in a small, four door vehicle. Mr. Partin said that he had not talked to Defendant since the commission of the offenses. On cross-examination, Mr. Partin stated that Defendant was more of an acquaintance than a friend.

Kristen King testified that she and her boyfriend, Jake Baum, pulled into a church parking lot in Coalmont on January 7, 2006, between 9:00 p.m. and 10:00 p.m. Ms. King stated that Defendant pulled up beside them. Mr. Baum introduced Ms. King to Defendant, and then Mr. Baum and Defendant talked for approximately ten to fifteen minutes. Mr. Baum then drove Ms. King home. Ms. King stated that she did not know anything about the case until the night before trial.

On cross-examination, Ms. King stated that she remembered the incident because her father's birthday was on January 4. Ms. King, however, said that she could not remember what she did on January 5, January 6, or during the day on January 7, 2006. Ms. King stated the did not know whether January 7, 2006, fell on a Saturday.

Joshua Seagroves testified that he had known Defendant since his freshman year in high school. Mr. Seagroves stated that Defendant arrived at his house on January 7, 2006, at approximately 10:00 p.m. Mr. Seagroves said that Defendant did not appear to be upset, and he did not see any signs that Defendant had been in a fight. Defendant spent the night and did not leave the house until Sheriff Myers and Chief Deputy Cleek arrived on Sunday, January 8, 2006.

***6** On cross-examination, Mr. Seagroves said that he remembered talking to Deputy Jason Layne with the Grundy County Sheriff's Department. Mr. Seagroves stated, however, that the portion of his statement to the police stating that Defendant arrived at his house at 11:00 p.m. on January 7, 2006, was not accurate. Mr. Seagroves stated that he had not seen Defendant in "probably weeks, maybe months" before January 7, 2006. Mr. Seagroves said that he did not recollect that Defendant was wearing a baseball cap that night.

Defendant testified that he was twenty-four years old at the time of the trial, and he had been married for approximately eighteen months. Defendant said that he lived in Manchester and was employed by a painting company. Defendant stated that he knew who Mr. Burrows was, but he did not know him personally. Defendant also stated that he did not know where Mr. Burrows lived, and he did not know either Ms. Hill or Mr. Braden.

Defendant stated that he had returned to Grundy County approximately five or six times after moving to Manchester. Defendant said that he traveled from Manchester to Grundy County on Friday, January 6, 2006, after work. Defendant stated that he stayed with Charles Partin and was with him all day on January 7, 2006. Defendant said that he left Mr. Partin's house at approximately 9:15 p.m. or 9:30 p.m. on the evening of January 7, 2006, in a 1995 gold Acura. Defendant ran into Mr. Baum at the Coalmont Church and the two men conversed for approximately five minutes. Defendant then drove to Mr. Seagroves' house, arriving at approximately 10:00 p.m., and spent the night. Defendant said that he was with Mr. Seagroves until the law enforcement officials arrived the next day. Defendant stated he agreed to a search of his vehicle and allowed the officers to take his photograph. Defendant denied that he went to Tracy City on January 7, 2006, and denied that he committed the offenses.

On cross-examination, Defendant acknowledged that he told Chief Deputy Cleek that he had known Mr. Burrows all of his life, and that his mother also knew Mr. Burrows. Defendant said that he learned that Mr. Burrows had been killed and that he was a suspect on January 8, 2006, approximately thirty minutes to one hour prior to Chief Deputy Cleek's arrival. Defendant stated that he had not had any problems with the Acura, and he did not know how the deputies removed the Acura from Mr. Seagroves' house. Defendant said that he remembered seeing Mr. Baum after he had talked to the deputies. Defendant acknowledged that, except for Ms. King's testimony, there was a gap in time from approximately 9:00 p.m. when he left Mr. Partin's house and when he arrived at Mr. Seagroves' house between 10:00 p.m. and 10:30 p.m. Defendant acknowledged that he called Mr. Baum on January 8, 2006, to remind Mr. Baum that he was with Defendant on the evening of January 7, 2006.

Defendant acknowledged that he gave a statement to Chief Deputy Cleek at the Seagroves' residence, and that he did not tell Chief Deputy Cleek that he had been with Mr. Baum after he left Mr. Partin's house and before he arrived at Mr. Seagroves' house. Instead, he told Chief Deputy Cleek that he left Mr. Partin's house between 9:00 p.m. and 9:30 p.m. on January 7, 2006, that he rode around for approximately twenty minutes, and then drove to Mr. Seagroves' house. Defendant acknowledged that he also did not tell Chief Deputy Cleek that he had been at Mr. Partin's house on Friday, January 6, 2007. Defendant acknowledged that Mr. Partin was just an acquaintance, and said that he knew him because he was friends with Mr. Partin's brother, B.J.

*7 Special Agent Davis testified as a rebuttal witness. Special Agent Davis stated that the distance between Mr. Partin's residence and Mr. Seagroves' residence was 2.8 miles and took approximately four minutes to drive. The distance between the location where Mr. Burrows' body was found and Mr. Seagroves' residence was six miles and took approximately ten minutes to drive.

II. Photographic Line-up

Defendant argues that Ms. Hill's and Mr. Braden's pre-trial identification of Defendant as the perpetrator resulted from an impermissibly suggestive process which violated his due process rights. The State argues that Defendant has waived this issue because he failed to file a motion to suppress the photographic line-ups prior to trial and failed to object to the testimony at trial.

Rule 12(b)(2)(C) of the Tennessee Rules of Criminal Procedure provides that motions to suppress evidence must be filed prior to the trial. *See State v. McCray,* 614 S.W.2d 90, 94 (Tenn.Crim.App.1981). "The rule is applicable when a claim of a constitutional right is involved whose violation would lead to suppression of evidence." *State v. Goss,* 995 S.W.2d 617, 628 (Tenn.Crim.App.1998). Failure to timely present a motion to suppress to the trial court constitutes a waiver of the issue for appellate review, "in the absence of 'cause shown' for the failure." *Goss,* 614 S.W.2d at 94.

The record does not contain a motion to suppress the identification testimony of Ms. Hill and Mr. Braden. Furthermore, the transcript of the trial does not indicate that Defendant objected to the introduction of this evidence, and the photographic line-up shown to Ms. Hill was introduced as an exhibit at trial without objection during her direct examination. *See* Tenn. R.App. P. 36(a) (providing that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"). "When a party does not object to the admissibility of evidence, the evidence becomes admissible notwithstanding any other Rule of Evidence to the contrary, and the jury may consider that evidence for its 'natural probative effects as if it were in law admissible.' " *State v. Smith,* 24 S.W.3d 274, 280 (Tenn.2000) (quoting *State v. Harrington,* 627 S.W.2d 345, 348 (Tenn.1981)). Although Defendant raised the issue of identification in his motion for new trial, Defendant did not present the trial court with any "good cause" for his failure to file a motion to suppress before trial. *See Goss,* 614 S.W.2d at 94.

Based on the foregoing, we conclude that this issue is waived. Defendant is not entitled to relief on this basis.

III. Sufficiency of the Evidence

On appeal, Defendant argues that the evidence was insufficient to support his convictions. When a defendant challenges the sufficiency of the evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black,* 815 S.W.2d 166, 175 (Tenn.1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn.1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews,* 805 S.W.2d 776, 779 (Tenn.Crim.App.1990).

A. Offenses Against Mr. Burrows

***8** Defendant was convicted of the first degree premeditated murder, first degree felony murder, and especially aggravated robbery of Mr. Burrows. Defendant argues that the evidence was insufficient to support these convictions because there were no witnesses to the crimes and no physical evidence was found implicating Defendant in the commission of the offenses. Defendant also submits that there was no evidence of planning, motive, or any other circumstance that would support a finding that the murder was premeditated.

Although not raised by either party on appeal, we must first address the merger of Defendant's dual convictions of first degree premeditated murder and first degree felony murder as charged in counts one and two of the indictment. Our law clearly provides for the "merger of multiple convictions of first degree murder involving a single victim." *State v. Kiser,* 284 S.W.3d 227, 234 (Tenn.2009). Thus, as relevant here, Defendant's conviction of first degree felony murder in count two of the indictment is merged into his conviction of first degree premeditated murder in count one. We observe that the trial court entered dual judgments of conviction for the two murder offenses. Each judgment simply notes on the bottom of the form that "Counts I and II merge" without more specificity and, therefore, do not properly reflect the trial court's merger of offenses. Therefore, we remand for the entry of an appropriate judgment reflecting the merger of Defendant's conviction of first degree felony murder into his conviction of first degree premeditated murder for a single judgment of conviction.

Having said that, however, we observe that Defendant's felony murder conviction is not extinguished; it simply mergers into the premeditated murder conviction for a single judgment of conviction. *State v. Justin Brian Conrad,* No. M2008-01342-CCA-R3-CD, 2009 WL 3103776, at *9 (Tenn.Crim.App., at Nashville, Sept 29, 2009), *perm. to appeal denied* (Tenn. Feb. 22, 2010). Therefore, we will also address the sufficiency of Defendant's "merged" conviction for felony murder in the event of further review. *Id.; State v. Phillip Douglas Seals,* No. E2007-02332-CCA-R3-CD, 2009 WL 55914, at *8 (Tenn.Crim.App., at Knoxville, Jan. 9, 2009), *perm. to appeal denied* (Tenn. May 26, 2009).

As relevant here, first degree murder is defined as the "premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). Premeditation refers to "an act done after the exercise of reflection and judgment." *Id.* § 39-13-202(d). Premeditation "means that the intent to kill must have been formed prior to the act itself." *Id.* However, the intent to kill may be formed in an instant and need not pre-exist in the mind of the accused for any definite period of time. *Id.* The existence of premeditation is a question of fact for the jury to determine and may be inferred from the circumstances surrounding the offense. *Bland,* 958 S.W.2d at 660. Premeditation may be inferred from circumstantial evidence surrounding the crime, including the manner and circumstances of the killing. *See State v. Pike,* 978 S.W.2d 904, 914 (Tenn.1998); *State v. Addison,* 973 S.W.2d 260, 265 (Tenn.Crim.App.1997). Facts from which the jury may infer premeditation include the use of a deadly weapon on an unarmed victim; the defendant's shooting of the victim after he had turned to retreat or escape; the lack of provocation on the part of the victim; the defendant's declarations of his intent to kill; the defendant's failure to render aid to the victim; the establishment of a motive for the killing; the particular cruelty of the killing; the defendant's procurement of a

weapon, preparations to conceal the crime before the crime is committed, and destruction or secretion of evidence of the killing; and a defendant's calmness immediately after the killing. *State v. Thacker,* 164 S.W.3d 208, 222 (Tenn.2005); *State v. Leach,* 148 S.W.3d 42, 54 (Tenn.2004); *State v. Lewis,* 36 S.W.3d 88, 96 (Tenn.Crim.App.2000) (citations omitted). The circumstantial evidence of premeditation must, however, be "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford,* 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971).

***9** A person commits first degree felony murder who kills another in the perpetration or attempt to perpetrate several enumerated felonies, including, as relevant here, robbery. T.C.A. § 39-13-202(a)(2). Especially aggravated robbery is robbery as defined in section 39-13-401 which is accomplished with a deadly weapon and where the victim suffers serious bodily injury. *Id.* § 39-13-403(a). "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the victim in fear." T.C.A. § 39-13-401(a).

Viewing the evidence in a light most favorable to the State, Angela White testified that Mr. Burrows' house was visible from her house. On January 6, 2006, Ms. White observed an unfamiliar gold vehicle with a dent in the front of the vehicle parked in her front yard facing toward Mr. Burrows' house. Ms. White said that the gold vehicle and another vehicle came and went periodically throughout the day. Ms. White last observed that gold vehicle at approximately 6:45 p.m.

The following evening, on January 7, 2006, Defendant approached Mr. Burrows' house for assistance with his vehicle. Mr. Burrows collected a can of gasoline and a battery charger and left with Defendant in Ms. Hill's blue Chrysler. Ms. Hill testified that Mr. Burrows always carried his wallet in his pocket when he left the house, and that he had approximately eight hundred dollars in his wallet on the night of the offenses. Agent Davis found a battery charger at the rear of the Chrysler on the passenger side and detected signs of a struggle next to the Chrysler. Mr. Burrows' body was found approximately six to eight feet from the Chrysler, with severe injuries to the head. Dr. Li testified that a fist alone could not have inflicted Mr. Burrows' injuries. Agent Davis stated that Mr. Burrows did not have a wallet in his pocket. Imogene Davis confirmed that she owned a gold Acura, and that Defendant was driving the Acura at the time of the offenses.

Mr. Braden stated that he saw a gold Acura with a dent in the front parked in the driveway when Defendant ran out of the house after his confrontation with Mr. Braden. Mr. Braden identified a photograph of Defendant's vehicle at trial as the vehicle he saw in the driveway. Mr. Braden described the perpetrator to the investigating officers as a medium built man with short red hair and wearing a white ball cap, a sweater, and blue jeans. Two days after the offenses, Mr. Braden identified Defendant as the perpetrator from a number of photographs he saw in Sheriff Myers' office at the Grundy County jail. Mr. Braden also identified Defendant as the perpetrator at trial.

Based on the foregoing, we conclude that a rational trier of fact could conclude beyond a reasonable doubt that Defendant was the perpetrator of the offenses, that Mr. Burrow's murder was premeditated, and that the murder was accomplished during the especially aggravated robbery of Mr. Burrows. Accordingly, we conclude that the evidence is sufficient to support Defendant's convictions of first degree premeditated murder, first degree felony murder, and especially aggravated robbery. Defendant is not entitled to relief on this issue.

B. Offenses Against Ms. Hill

***10** Defendant was convicted of the attempted first degree premeditated murder and aggravated assault of Ms. Hill. As noted above, first degree murder is defined in relevant part as the "premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). Attempt, as relevant to first degree murder, occurs when a person, "acting with the kind of culpability otherwise required for the offense ... acts with the 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. § 39-13-101(a)(2).

For the purposes of the case *sub judice,* an aggravated assault is committed when a person intentionally or knowingly commits an assault as defined in section 39-13-101 and causes serious bodily injury to another. T.C.A. § 39-13-102(a)(1)(A). A person commits an assault who "intentionally or knowingly causes bodily injury to another." *Id.* §§ 39-13-101(a)(1).

Viewing the evidence in a light most favorable to the State, after killing Mr. Burrows, Defendant returned to the residence instead of driving away from the scene. Defendant told Ms. Hill that Mr. Burrows' had sent him to retrieve the can of starter fluid beneath the kitchen sink. After Ms. Hill squatted down to look in the cabinet, Defendant questioned her about who else was in the house. Ms. Hill said her son was upstairs. Ms. Hill stated

that Defendant began to strike her on her head. Ms. Hill tried to get away, but Defendant kept striking her. Ms. Hill suffered serious bodily injury and was unconscious from Saturday night until the following Wednesday or Thursday. Ms. Hill testified that she viewed a photographic line-up at the Grundy County jail a few days after she was released from the hospital and immediately identified Defendant as the perpetrator from the eight photographs. Chief Deputy Cleek said that Ms. Hill, although emotional, identified Defendant's photograph from the line-up without any hesitation. Ms. Hill described Defendant to the investigating officers as a young, small man, with red hair, and a fair complexion. Ms. Hill also identified Defendant as the perpetrator at trial. Based on the foregoing, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of attempted first degree premeditated murder and aggravated assault.

Notwithstanding the sufficiency of the convicting evidence, however, we are constrained to consider as plain error whether Defendant's dual convictions for attempted first degree premeditated murder and aggravated assault violate double jeopardy protections. *See* Tenn. R.App. P. 36(b) (providing that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal"). Dual convictions resulting in a violation of a defendant's protection against double jeopardy constitute "plain error." *See State v. Lewis,* 958 S.W.2d 736, 738 (Tenn.1997); *State v. Epps,* 989 S.W.2d 742, 745 (Tenn.Crim.App.1998) (applying plain error doctrine to review whether the defendant's dual convictions violated double jeopardy principles).

***11** In order for us to find plain error, "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.' " *State v. Smith,* 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson,* 899 S.W.2d 626, 641-42 (Tenn.Crim.App.1994)).

The record clearly establishes that Defendant was convicted of both attempted first degree premeditated murder and aggravated assault. Second, multiple convictions for the same offense breach a clear and unequivocal rule of law. Third, a fundamental constitutional right of Defendant, his Fifth Amendment right to be free from double jeopardy, is affected. Fourth, the record is devoid of any evidence that Defendant waived the issue for tactical reasons. Fifth, we conclude that consideration of a violation of Defendant's double jeopardy protections is "necessary to do substantial justice." Accordingly, we will review this issue as plain error.

The double jeopardy clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, under our Tennessee Constitution, "no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. 1, § 10. Three fundamental principles underlie double jeopardy: "(1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for the same offense." *State v. Denton,* 938 S.W.2d 373, 378 (Tenn.1996) (citations omitted). The case *sub judice* involves the third scenario, that is, multiple punishments for the same offense.

In determining whether two offenses are the "same" for double jeopardy purposes, the *Blockburger* test requires a comparison of the statutory elements of attempted first degree premeditated murder and aggravated assault. *Blockburger v. United States,* 284 U.S. 299, 307, 52 S.Ct. 180, 182, 76 L.Ed. 306; *State v. Black,* 524 S.W.2d 913, 919 (Tenn.1975). "If each statutory provision setting forth the offense requires proof of an additional fact which the other does not, then the two offenses are not the same for federal double jeopardy protection purposes. *State v. Hall,* 947 S.W.2d 181, 183 (Tenn.Crim.App.1997) (citing *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182).

As relevant here, first degree murder is defined as the "premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). Attempted first degree premeditated murder is committed when the accused, with premeditation, intentionally acts with the intent to cause the killing and believes his conduct will cause the victim's death without further conduct on his or her part. *Id.* § 39-13-101(a)(2). As charged in the indictment, aggravated assault requires proof that Defendant committed an assault on the victim involving bodily injury, and the bodily injury was serious. Thus, attempted first degree premeditated murder requires an intent to kill while aggravated assault does not. Aggravated assault requires an assault which results in serious bodily injury, neither element of which is required to support a conviction of attempted first degree premeditated murder. Therefore, the two offenses are valid under the *Blockburger* test.

***12** Nonetheless, in *State v. Denton,* 938 S.W.2d 373 (Tenn.1996), "our supreme court extended double jeopardy protection under the Tennessee constitution beyond that provided by the federal constitution." *Hall,* 947 S.W.2d at 183. In addition to the *Blockburger* test, the trial court must consider the "same evidence" test as articulated *in Duchac,* that is whether the same evidence is required to prove the offenses. *Denton,* 938 S.W.2d at 381 (citing *Duchac v. State,* 505 S.W.2d 237, 239 (Tenn.1973)). This test states in pertinent part:

> A defendant has been in jeopardy if on the first charge he could have been convicted of the offense charged in the second proceeding. One test of identity of offenses is whether the same evidence is required to prove them. If the same evidence is not required, then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes.

Duchac, 505 S.W.2d at 239. Finally, the trial court must analyze whether there were multiple victims or discrete acts and compare the purposes of the respective statutes. *Denton,* 938 S.W.2d at 381.

It is apparent from a review of the record that the State relied on the same evidence to support Defendant's dual convictions of attempted first degree premeditated murder and aggravated assault. That is, Defendant's conduct of striking Ms. Hill on the head resulting in serious bodily injury supported both the attempted murder conviction in count four of the indictment and the aggravated assault conviction in count five. *See Hall,* 947 S.W.2d at 183-84 (determining that convictions for attempted second degree murder and aggravated assault violated double jeopardy when the dual convictions were based on the same evidence, and the statutes preventing the crimes had the same purpose, that is "to prevent physical attacks upon persons"); *State v. Adams,* 973 S.W.2d 224, 229 (Tenn.Crim.App.1997) (determining that a single attack by the defendant on the victim which provided the evidence to support the defendant's conviction of both attempted first degree murder and aggravated assault violated double jeopardy principles under the "same evidence" test in Denton); *State v. Marques Lanier Bonds,* No. W2005-02267-CCA-R3-CD, 2006 WL 2663753, at *9 (Tenn.Crim.App., at Jackson, Sept. 15, 2006), *no perm. to appeal filed* (determining that the defendant's convictions for attempted second degree murder and aggravated assault were the same for double jeopardy purposes because they were part of one continuous assault, with each gunshot being used to support dual convictions).

Because these convictions fail the *Duchac* prong of the test, we find as plain error that principles of double jeopardy bar Defendant's multiple convictions. We accordingly merge Defendant's conviction of aggravated assault into his conviction of attempted first degree premeditated murder.

CONCLUSION

***13** After a thorough review, we affirm Defendant's convictions of first degree premeditated murder, attempt to commit first degree premeditated murder, especially aggravated robbery, and assault. We remand solely for the purpose of entering appropriate judgments consistent with this opinion to clearly reflect the merger of Defendant's conviction of first degree felony murder in count two of the indictment into his conviction of first degree premeditated murder in count one of the indictment, and the merger of Defendant's conviction of aggravated assault in count five of the indictment with his conviction of attempt to commit first degree premeditated murder in count four of the indictment.

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State v. Goins

Court of Criminal Appeals of Tennessee, At Knoxville

October 27, 2009, Session; May 17, 2010, Filed

No. E2009-00021-CCA-R3-CD

Reporter
2010 Tenn. Crim. App. LEXIS 388 *; 2010 WL 1957092

STATE OF TENNESSEE v. JOEY LEE GOINS

Prior History: [*1] *Tenn. R. App. 3*; Judgments of the Criminal Court Affirmed. Appeal from the Criminal Court for Sullivan County. No. S49,095. Robert H. Montgomery, Judge.

Disposition: Judgments of the Criminal Court Affirmed.

Case Summary

Procedural Posture

Defendant sought review of the decision of the Criminal Court for Sullivan County (Tennessee), which convicted him of facilitation of second-degree murder and especially aggravated robbery in violation of *Tenn. Code Ann. § 39-13-403*.

Overview

Defendant appealed his convictions for facilitation of second-degree murder and especially aggravated robbery, but the appellate court affirmed. Despite defendant's claims that a witness's statements would subject her to criminal liability for facilitation of murder and accessory after the fact, her statements did not support criminal liability for either crime; the statements did not indicate that she knowingly furnished substantial assistance in commission of the felony under *Tenn. Code Ann. § 39-11-403(a)*, nor did they show that she intentionally misled the police to help the offenders under *Tenn. Code Ann. § 39-11-411*. Thus, the statements were not admissible. The trial court did not err in denying defendant's motion to sequester the jury in light of the trial court's admonitions to the jury to avoid media coverage of the trial and in light of the jurors' reporting that there were no major violations of the trial court's instructions. The imposition of consecutive sentences was appropriate under *Tenn. Code Ann. § 40-35-115(b)(2)* given defendant's criminal history.

Outcome
The judgment was affirmed.

Counsel: Johnathan A. Minga (on appeal and at trial), Johnson City, Tennessee; and Mark Slagle (at trial), Johnson City, Tennessee, for the appellant, Joey Lee Goins.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Amber Massengill and Kaylin Hortenstine, Assistant District Attorneys General, for the appellee, State of Tennessee.

Judges: JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

Opinion by: JAMES CURWOOD WITT, JR.

Opinion

A Sullivan County jury convicted the defendant,

Joey Lee Goins, of facilitation of second degree murder and especially aggravated robbery. The defendant appeals, claiming that the trial court erred in excluding statements of certain witnesses. The defendant also appeals the court's failure to sequester the jury in light of the media coverage of the trial. Lastly, the defendant argues that the court erred in imposing the [*2] defendant's sentences consecutively to each other and to his unrelated federal sentence of life without parole. Discerning no error, we affirm the judgments of the trial court.

OPINION

Introduction

This case stems from the murder and robbery of Terry Lynn Rhymer, the victim, on June 18, 2002. On April 28, 2004, the defendant was charged by presentment with one count of the first degree premeditated murder of the victim, *see* T.C.A. § 39-13-202(a)(1) (1997), one count of first degree felony murder, *see id.* § 39-13-202(a)(2), and one count of especially aggravated robbery, *see id.* § 39-13-403. After a four-day jury trial, the jury acquitted the defendant of the first degree premeditated murder charge. The jury convicted the defendant of the lesser-included offense of facilitation of second degree murder in count two. The jury found the defendant guilty as charged of especially aggravated robbery. The trial court sentenced the defendant to 12 years' incarceration for the conviction of facilitation of second degree murder to be served consecutively to the 25 years' incarceration it imposed for the especially aggravated robbery conviction. The trial court ordered the effective 37-year sentence to [*3] be served consecutively to the defendant's sentence of life without parole imposed in an unrelated federal case. The defendant filed a timely motion for new trial and notice of appeal.

Pre-Trial Hearings

The trial court conducted extensive pre-trial hearings on two issues that the defendant ultimately presents on appeal. First, the State moved to exclude from evidence statements given by Anita Quillen Holt regarding the possible guilt of third parties in the murder of the victim. Second, the defendant requested that the trial court sequester the jury.

Motions Regarding Ms. Holt

The defense strategy involved submitting evidence to the jury of third parties' possible responsibility for the murder. This evidence included three statements given by Ms. Holt, who implicated three individuals: Larry Quillen, Jackie Nash, and Teddy Vinson. She gave two statements to the Bristol Police Department on June 24, 2002, and an additional statement on September 23, 2002. Ms. Holt died before trial for reasons unrelated to the case. The State moved in limine to prohibit the defendant from "presenting evidence and/or making reference to the statements of Anita Holt." The State subsequently moved that the [*4] defense also refrain from "referencing and/or questioning any witness concerning the victim holding Anita Holt at gunpoint." The State then amended its first motion to exclude Ms. Holt's statements from evidence. The amended motion argued that Ms. Holt's statements should not be admitted under Tennessee Rule of Evidence 804(b)(3)'s hearsay exception for statements against interest by an unavailable declarant. Although the trial court denied the State's motion in limine to exclude any mention of the victim's holding Ms. Holt at gunpoint, the court reserved its ruling on allowing Ms. Holt's statements into evidence.

In the first statement, made at 2:40 p.m. on June 24, 2002, Ms. Holt said she knew the victim through her former boyfriend, Mark Crebs. The statement alleged that in 2000, the victim held her at gunpoint and forced her to watch as his associates severely beat Mr. Crebs. She said that she and Mr. Crebs eventually made amends with the victim and that

they began smoking marijuana together. Ms. Holt's first statement reflected, however, that six months before the victim's death, the victim accused her and her then-current boyfriend, Teddy Vinson, of stealing his marijuana. The [*5] statement said that Ms. Holt's brother, Larry Quillen, lived with her and Mr. Vinson at 961 Hill Street in Bristol at the time of the victim's murder. Notably, the first statement maintained that Ms. Holt had no knowledge of who killed the victim.

In a second statement given at 9:40 p.m. on June 24, 2002, Ms. Holt stated, "I was not entirely truthful during the first statement because I am afraid of my brother Larry Quillen." The second statement said that on June 18, 2002, Ms. Holt, Mr. Vinson, Mr. Quillen, and Mr. Nash were drinking at the 961 Hill Street residence when Mr. Quillen began talking about the victim's holding Ms. Holt at gunpoint. Mr. Quillen stated, "I'm going to show that mother f***er. He don't hold my sister at gun point." Ms. Holt also recalled that Mr. Quillen said, "Let's kill him. I'll get everything he's got." Mr. Quillen then took a sword from the wall and left the house with Mr. Vinson and Mr. Nash. The statement said that the three men were gone for 20 minutes, and the men then talked on the front porch for approximately 30 minutes.

In her second statement, Ms. Holt said that when the men returned she heard Mr. Quillen say, "I killed the mother f***er. He got [*6] what he deserved." She said that Mr. Quillen stated that he "cut [the victim] and beat him" and that she heard Mr. Vinson throw "something heavy into his tool box" that "sounded like a crow bar." She heard the men discuss finding "a couple thousand" in the victim's pocket, and she remembered seeing blood spatter on the men's shirts. This statement said that Mr. Nash left the next morning and that Mr. Vinson told Mr. Quillen to leave.

Ms. Holt's last statement, given on September 23, 2002, stated that on June 19, 2002, when the police were investigating the victim's home, Mr. Vinson "was acting very 'funny.'" The statement also asserted that Mr. Vinson said, "They're coming to get me."

During the pretrial motion hearings, the defense argued that Ms. Holt's statements should be admitted as evidence pursuant to *Tennessee Rule of Evidence 804(b)(3)*. The defendant argued that, because Ms. Holt was an unavailable witness, *see Tenn. R. Evid. 804(a)(4)*, admission of her statements should be permitted because they ran afoul of her penal interests, *see id. 804(b)(3)*. The defendant pointed to Ms. Holt's second statement, where she admitted being untruthful with the police officers, and argued that [*7] this admission would subject Ms. Holt to prosecution for "false statement to a police officer." The State replied that "[the defense attorneys] don't want the statement in saying 'I lied about my first statement.' They want the statements in regarding the murder. Those statements were not against her interest."

The defense further argued that the statements of Ms. Holt should be permitted into evidence aside from the hearsay rules as part of the defendant's constitutionally guaranteed right to present a complete defense. *See generally Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)*. The defendant argued that Ms. Holt's statements were "substantive evidence of this defendant's [c]onstitutional right to present a defense on his behalf showing third party guilt." The State responded that "[y]ou can't just trump the Rules of Evidence and put in any evidence that helps the defendant in a case."

The trial court determined that, although Ms. Holt's lying to police officers may have subjected Ms. Holt to criminal liability, the court did not believe that such liability rose to the level as to make the statement reliable. The trial court also found no constitutional violation in prohibiting the [*8] evidence because other witnesses would testify about similar matters throughout the trial.

During the trial, the defendant made a final attempt to admit the statements of Ms. Holt by declaring that they were not hearsay because he intended to admit them for their effect on the listener and not

for the truth of the matter asserted. The trial court determined that, even if Ms. Holt's statements were not considered hearsay, they were not admissible under *Rule of Evidence 403* because the statements would mislead the jury and have little probative value.

Motions Regarding Eric Hilliard

[1]

The defendant also attempted to produce evidence inculpating Mr. Vinson, Mr. Quillen, and Mr. Nash through the testimony of Eric Hilliard. The State opposed this evidence as inadmissible hearsay. During an offer of proof, Mr. Hilliard testified that on the day after the victim's murder, he heard Mr. Vinson say that [*9] "it couldn't happen to a better mother f***er and he was glad the mother f***er got what he deserved." He also testified that he heard Mr. Vinson tell Mr. Vinson's brother that "it wasn't supposed to happen like that" and that "it was just supposed to have been a fight." The defense argued that Mr. Vinson's statements were contrary to his penal interests because they amounted to his confessing to the murder. The trial court found that Mr. Vinson's purported statements were not clear in implicating him in the murder. The court ruled that these statements were inadmissible hearsay, and in light of the court's ruling, the defense elected not to call Mr. Hilliard.

Sequestration of the Jury

The defense moved to sequester the jury in expectation of media coverage of the lengthy trial. Defense counsel argued that the defendant's involvement in unrelated trials for murder and bank robbery resulted in significant press coverage. The trial court noted, however, that it would be "surprised that you'll have many jurors that will know anything or read anything or heard anything about this case" because the murder occurred six years prior to trial. The trial court further credited jurors' ability [*10] to comply with the court's instructions to refrain from exposing themselves to news coverage of the case. The trial court denied the defendant's motion for sequestration.

The trial court conducted individual voir dire in order to ensure that potential jurors had no prejudicial knowledge of the defendant's previous offenses. During the course of the trial, the trial court questioned the jurors every morning as to whether they had been exposed to coverage of the trial the previous night.

Trial

Victor Sanabria testified that he knew the victim because both men frequented the American Legion. Mr. Sanabria worked as a part-time real estate agent in 2002, and he agreed to list the victim's home. He stated that he visited the home on June 18, 2002, to estimate the cost of fixing the victim's roof in preparation for selling the home. During this time, Mr. Sanabria noticed that the victim possessed a large "wad" of money, and he commented to the victim that he should not "be flashing money like that." Mr. Sanabria attempted to contact the victim later that night after leaving his home. He went to the American Legion at 7:30 or 8:00 p.m. expecting to see the victim, but the victim was not present. [*11] After having a beer, he left the American Legion to visit the victim's home. He discovered that the back door of the victim's home, which was the only door used to gain entry, was locked and that he did not hear any noise coming from the residence. He did not contact authorities because he knew the victim was recovering from surgery and that he had a habit of passing out while intoxicated.

Mr. Sanabria attempted to contact the victim several times on June 19, 2002. He again tried to locate the victim at the American Legion and at his

[1] We note that the defense attempted to introduce Mr. Hilliard's testimony during trial and did not address this issue pretrial; however, because the defendant makes similar arguments for both Ms. Holt's statements and Mr. Hilliard's testimony, we explain both in the pretrial section of the opinion.

home. When the victim failed to answer his door, Mr. Sanabria looked through a window on an unused side-access door and saw a body lying on the floor. He contacted 9-1-1, and the police arrived and gained entry to the residence. Mr. Sanabria followed the officer into the home and found the victim lying face-down with a knife in his back.

Mr. Sanabria recalled that the victim lived "like a poor man" and that most of his income came from disability payments. He knew that the victim sold marijuana, and he recalled him "flashing" a large amount of cash on another occasion in the summer of 2001. He also recalled being at the victim's house and seeing his marijuana [*12] supply and telling the victim to conceal the drugs when conducting sales in his home.

On cross-examination, Mr. Sanabria admitted that he knew little about the victim's drug-selling business. Regarding June 19, 2002, he recalled that a neighbor across the street named Larry helped him attempt to gain entry to the victim's home after he observed the body.

Detective Aaron Blevins of the Bristol Police Department testified that he was a patrol officer on June 19, 2002, and that he was dispatched to the victim's home at 961 Hill Street at 8:00 p.m. When he arrived, he met two gentlemen standing outside the victim's home. He used his pocket knife to open a window and one of the men crawled through the window and opened the back door from the inside of the house. Upon entering the home, he saw a large amount of blood on the floor and the victim lying on the floor with a large knife handle sticking from his back. At that point, he ushered the two men away from the home and secured the crime scene.

Sergeant Jason McCready of the Bristol Police Department also reported to the crime scene. He located a key ring on the left side of an arm chair in the den area of the home by the body, which he took [*13] into evidence. Sergeant McCready also collected from the residence some photographs, a small photo album, a small address book, and a prescription medication bottle containing a green leafy substance that appeared to be marijuana. He also found a green tray on which a plastic bag sat with more leafy substance that appeared to be marijuana. The tray held a small pick, a small set of scales, and two smoking pipes that Sergeant McCready associated with marijuana use.

Sergeant McCready noted that the Bristol Police Department also investigated Mr. Nash, Mr. Vinson, and Mr. Quillen and that he was present for portions of Mr. Nash's and Mr. Quillen's interviews. He believed that, at the time, these interviews provided probable cause that these three men were involved in the murder of the victim, and he charged the men with first degree murder. Sergeant McCready collected a sword from Mr. Vinson's home in June 2002 as well as a hammer and a tire tool. He explained that the charges against Mr. Quillen, Mr. Nash, and Mr. Vinson were dismissed in General Sessions Court in June or July of 2002. He further explained that he considered restarting the prosecution of the men but that on July 30, 2002, [*14] Justin Jones came forward with information inculpating the defendant in the murder of the victim.

On July 31, 2002, he visited 408 Walnut Hill Road where the defendant resided. Antoinette "Toni" Thomas owned the residence and resided there with her daughter, Elizabeth "Beth" Thomas. [2] The defendant dated Toni, and Justin Jones, who dated Beth, also resided at the home. Sergeant McCready collected the metal head of a hammer, which was found in a wooded area behind the home. He had received information that the hammer had been burned so that only the head of the hammer remained.

Sergeant McCready introduced several items of clothing belonging to Mr. Nash, Mr. Quillen, and Mr. Vinson. He explained that these items were

[2] Although this court customarily refers to people by their surname, this case involves constant references to Toni Thomas, Beth Thomas, and Brian Thomas. For the purposes of clarity, we will refer to these witnesses by their first names.

collected during his investigation of these individuals and that he was led to believe that the clothing would contain evidence of the victim's homicide.

On cross-examination Sergeant McCready admitted that probable cause supported his filing [*15] an affidavit of complaint against Mr. Quillen, Mr. Nash, and Mr. Vinson; however, he maintained that most evidence against these men was based on hearsay. He also acknowledged that he had considered attempting a second prosecution of these individuals until Mr. Jones implicated the defendant in the murder.

Sergeant McCready then read the statement of Mr. Quillen, who told officers that on the night of the victim's murder, he saw Mr. Vinson get a knife from his room and that he concealed the knife beside his right leg and went across the street to the victim's house. Mr. Quillen's statement said that he walked away after Mr. Vinson walked to the victim's house because he did not want to witness what Mr. Vinson was going to do.

Sergeant McCready then read the statement of Mr. Vinson. Mr. Vinson's statement reflected that he knew the victim through his girlfriend, Ms. Holt. Mr. Vinson stated, "She had been friends with [the victim] when she was with Mark Crebs until [the victim] held her at gunpoint while another guy beat Mark Crebs." The statement said that Ms. Holt and the victim eventually began talking again and that she bought marijuana from the victim. Mr. Vinson continued, "I always [*16] called [the victim] before I went to the house and he was always waiting on me. . . . [He] would get me some marijuana and weigh it out. If he had to give change he would pull out a wad of cash." Mr. Vinson estimated the defendant carried between $ 2,000 and $ 3,000 cash. Mr. Vinson also noted that the victim told him that he bought five to six pounds of marijuana at a time.

Mr. Vinson said in his statement that, on the week of the victim's murder, he worked for Bob Mitchell on a house in Bristol, Virginia. Mr. Vinson did not drive, so Mr. Mitchell picked him up. Ms. Holt also helped him with work on the house. Mr. Vinson told officers that he worked every day from 9:00 a.m. until 6:30 or 7:00 p.m. and that after arriving back home he would drink beer. During the evenings, several people may have visited his house including Mr. Nash and Mr. Quillen. Mr. Vinson maintained that the police informed him and the guests at his home of the victim's death and that he had no involvement in the murder.

Sergeant McCready then read two statements by Mr. Nash. In the first statement, Mr. Nash declared that he had no involvement in the murder of the victim and that he had never been in the victim's [*17] home. Mr. Nash said that he arrived at his cousin's house on Hill Street at approximately 6:30 p.m. and that he saw an estimated six-foot-tall male talking on a mobile telephone by the victim's residence.

In a second statement, Mr. Nash said that he knew of the victim through his uncle, Larry Norton, who lived across the street from the victim. Mr. Nash maintained that he "did not know that [the victim] was a dope dealer until recently." His statement reflected that Mr. Nash became acquainted with Mr. Vinson while the two were incarcerated and that on June 18, 2002, Mr. Vinson picked him up from his home. Mr. Nash said that the two men bought some whiskey and drank to intoxication in Mr. Vinson's back yard. He and Mr. Vinson then went to the victim's home across the street, and Mr. Vinson started arguing with the victim. Mr. Nash, in his statement, recalled punches being thrown between the two and that "[t]he next thing [he] saw was [the victim] lying on the floor on his back" near the coffee table. He said that Mr. Vinson stood over the victim with a knife and that Mr. Nash knew that the victim was dead. Mr. Nash said that he left the house upon seeing the knife and that he later saw [*18] Mr. Vinson carrying what "could have been a fire safe." The statement ended, "I didn't do nothing and I got out of there. I was wrong by not saying something earlier."

Lieutenant Debbie McCauley testified that,

although she originally investigated Mr. Quillen's, Mr. Nash's, and Mr. Vinson's involvement in the victim's death, she received a call on July 30, 2002, to speak with Mr. Jones involving the case. She testified that Mr. Jones was shaking, scared, "teary-eyed," and very nervous. She said that her discussion with Mr. Jones led to the discovery of physical evidence of the murder of the victim. This evidence included a guitar case, guitar, and amplifier located on Sugar Hollow Road. Mr. Jones also assisted her in finding a portable fire safe. Lieutenant McCauley then obtained the keys that Sergeant McCready found at the victim's home and successfully used them to unlock the fire safe.

Beth Thomas testified that she lived at 408 Walnut Hill Road with her mother and that she dated Mr. Jones in 2002. She explained that they had dated since 2000 and that Mr. Jones went into the Army in April 2001. She stated that the two wrote letters and spoke on the telephone during this time. Beth [*19] said that Mr. Jones came back to Bristol in February 2002 and lived with Justin Starnes for a few weeks. She stated that the defendant arrived a couple of weeks later and lived with him and that the two shared an apartment at East Tennessee State University ("ETSU"). She said that the two then moved into her residence at 408 Walnut Hill Road in late March or early April 2002 and that Toni Thomas, her mother, Brian Thomas, her brother, and Joe Balcom, her cousin, also lived at the residence.

Beth testified that the defendant began dating Toni and stayed in Toni's bedroom. Mr. Jones slept outside in a tent and was not allowed to come in the home past a certain time because Toni forbid him from being in Beth's bedroom late at night. She said that originally Mr. Jones slept on a couch in the living room but that, because he violated Toni's rules by going to Beth's room after hours, he was exiled to the tent. She stated that the sleeping arrangements caused Mr. Jones to resent the defendant. Beth stated that she often argued with the defendant; however, she defined their relationship as "pretty good." She said that Mr. Jones and the defendant "were really good friends" but that the defendant's [*20] personality dominated Mr. Jones. She testified that the defendant would "boss" people around in the household.

Beth stated that Mr. Jones had a shorter temper after returning from the Army. She recalled an incident where he punched a hole in her bedroom door after the defendant had arranged a prank where he and others bombarded Mr. Jones with water balloons. She described this behavior as "uncharacteristic" of Mr. Jones.

Beth testified that on July 30, 2002, Mr. Jones visited her at marching band camp. She testified that he seemed worried, nervous, and excited. Based on her conversation with him, she decided they should contact the police. Mr. Jones then spoke with a police officer for 30 minutes and informed Beth that he was going to the police station. After marching band camp ended, Beth also went to the police station.

Beth stated that she saw the defendant with a duffle bag containing "a big block of marijuana" some time at the end of June or beginning of July 2002. She described the marijuana as a compressed "brick." She did not ask the defendant where he obtained the marijuana.

Beth recalled that the defendant never had a significant amount of money and that, aside from his brief [*21] employment at Bryant Labels with Toni's stepfather, he was unemployed. She stated that the defendant and Mr. Jones had no operating vehicle and often drove her green Subaru Legacy or her mother's black Grand Am.

On cross-examination, Beth acknowledged that she had known Mr. Jones three years longer than the defendant. She also testified that Mr. Jones was dissatisfied with the Army and wanted to return home to be with her. She said that, on one occasion after he returned, Mr. Jones pushed her against the wall during a fight. She was aware that Mr. Jones possessed a handgun before the defendant arrived

in Bristol. She said that she had broken up with Mr. Jones at one point and that he responded by putting his gun to his head and threatening to kill himself.

Brian Thomas testified that he lived at 408 Walnut Hill with his mother, Toni, and his sister, Beth. Brian also testified that the defendant had a personality that dominated Mr. Jones. He stated that the two men would have physical altercations in the back yard and that the defendant always prevailed in the fight. He also testified that the defendant was more muscular than Mr. Jones.

Brian testified that he did not know the victim but [*22] that his cousin, Mr. Balcom, intended to introduce them. He testified that one night they went to the victim's home to look at a guitar that he had for sale but that the victim was not home. Brian said that this was the only occasion on which he visited the victim's home.

He could not recall the defendant's having much money, but he remembered that toward the end of the summer of 2002 the defendant began purchasing groceries and that he bought a massage gift certificate for Beth and Toni. The only employment Brian recalled the defendant's having was working at Bryant Labels for approximately $ 6.00 an hour.

Brian testified that in the summer of 2002 the defendant showed him "like half a pound or a pound" of marijuana rolled up in a towel or shirt and that the defendant asked him to help sell it. The defendant told him that he had gotten a "good deal" on the drugs. He specifically recalled this occurring after the victim's murder.

On cross-examination, Brian admitted that the relationship between the defendant and Mr. Jones became strained over time. He recalled that Mr. Jones kept a gun in his glove compartment. He also stated that Mr. Jones had a quick temper. Brian also confirmed Mr. [*23] Jones's becoming upset with the defendant over the sleeping arrangements in the home and his breaking Beth's door after being hit by water balloons. He admitted smoking marijuana with both the defendant and Mr. Jones.

On redirect-examination, Brian testified that the defendant took the gun from Mr. Jones and that he showed it to him and said it was for his protection.

Joe Balcom, Toni's nephew, testified that he lived with Toni while he attended college in 2000 and 2002. He also testified that the defendant dominated the relationship with Mr. Jones and that the defendant was larger than Mr. Jones.

Mr. Balcom testified that he knew the victim through the American Legion, where he went once or twice a month. He purchased marijuana from the victim for personal use and resale. Mr. Balcom went to the victim's home to conduct drug transactions, and the victim kept his marijuana underneath his seat in the living room. Mr. Balcom testified that he generally bought a pound of marijuana, which the victim provided in a five-gallon Ziploc bag. He testified that the victim always had enough money to provide change if needed. He said that, after conducting a transaction, the victim would either place [*24] the money in his pocket or in a fireproof lock box. Mr. Balcom testified that he paid $ 600 for a pound of marijuana but that he generally made $ 400 after resale.

Mr. Balcom also testified that he observed a guitar and amplifier at the victim's home that the victim was trying to sell.

He stated that he introduced the defendant to the victim at the American Legion. Mr. Balcom had discussed purchasing marijuana from the victim with the defendant in May 2002. He stated that, approximately two weeks after the meeting at the American Legion, the defendant and he went to the victim's home to view the guitar and amplifier. The defendant handled the guitar. Mr. Balcom also made a marijuana transaction in the presence of the defendant, and the defendant witnessed the victim placing $ 600 in the lock box, which already held an indiscernible amount of money.

Mr. Balcom testified that in mid-July 2002, he spoke with the defendant, who told him that he had

a pound of marijuana. The defendant told him that he had gotten a good deal on the marijuana.

On cross-examination, Mr. Balcom admitted that he never saw the defendant with the pound of marijuana. He also stated that, to his knowledge, Mr. Jones [*25] did not smoke or sell marijuana. Mr. Balcom admitted seeing a gun that may have belonged to Mr. Jones. He also admitted that his knowledge of the relationship between Mr. Jones and the defendant was somewhat limited because he only lived at the home during the weekends.

Justin Jones testified that he dated Beth for two or three years, beginning in 2000 during his senior year of high school. He joined the Army in April 2001 in hopes of becoming a Ranger. After being injured in training, he was sent to Fort Benning in Georgia and became unhappy with his time in the Army. Mr. Jones said, "One night I just made a rash decision to throw all my belongings into my vehicle and head north." He explained that he was disheartened with the Army and that he missed Beth and his family. Mr. Jones testified that he and his mother devised a plan for him to enter the Veterans Administration ("VA") hospital in Johnson City to avoid legal charges for going absent without leave. He testified that he misrepresented to personnel at the VA hospital that he had suicidal thoughts.

Mr. Jones stated that he was transferred to the psychiatric wing of Fort Benning's military hospital and that he first met the defendant [*26] there. He testified that he and the defendant were roommates and became friends. The two knew each other two or three weeks until Mr. Jones was discharged from the Army. Mr. Jones stated that he received an honorable medical discharge in early February 2002. He stated that his temperament changed after being in the Army and that he became more easily angered.

Upon returning to Bristol, Mr. Jones discovered that his parents would not allow him to live with them because of his deserting the Army. He moved into his friend Justin Starnes's parents' home in Blountville. He testified that he worked at Tri-Cities Aviation as a refueller during this time. He received a telephone call from the defendant, who said he had nowhere to go after being discharged from the Army. Mr. Jones extended an invitation to join him in the Tri-Cities and arranged for a bus ride to Bristol.

Mr. Jones testified that he and the defendant briefly stayed with the Starnes' and then moved into a dormitory room at ETSU. He explained that during this time the defendant went with him to visit Beth and that Toni and the defendant began a romantic relationship. After approximately a month, the two moved into the Walnut Hill [*27] residence with Toni in mid-April 2002. He explained that the defendant slept in Toni's bedroom and that he initially slept on the couch. Mr. Jones said that, because he violated Toni's rule that he could not be in Beth's room past 11:00 p.m., he had to stay outside the home.

Mr. Jones drove a Toyota 4Runner; however, the car broke down during the time he stayed at the Thomas residence, and he mostly used Beth's Subaru. He testified that neither he nor the defendant worked during most of their time at the Thomas residence and that neither of them paid rent.

Mr. Jones stated that his relationship with the defendant became "more and more stressful," and he fought with the defendant in the Thomas' back yard. He testified that the defendant, who was stronger than he, defeated him in the fight.

Mr. Jones testified that one day he was dropping Toni off at work when he was struck by another vehicle. He discussed the incident with the defendant, and he agreed to have the defendant break his finger "to hopefully later on get some sort of insurance money out of the accident." They met with a local attorney about the incident on June 18, 2002, the same day the victim was killed.

Mr. Jones testified [*28] that one evening the defendant returned home from the American

Legion with Mr. Balcom and that the defendant pulled him aside and stated that he had met the victim. Mr. Jones recalled that the defendant told him that the victim had a large amount of marijuana and cash in his home and would be a profitable person to rob.

He testified that he and the defendant went to the victim's home in early June. He said that the defendant told the victim that he wished to view a guitar he had for sale, although the defendant used this as an excuse to "case" the home. After the visit, he and the defendant drove past the victim's home on other occasions when he was not home.

Mr. Jones explained, "The plan pretty much consisted of, you know let's get a hold of an attorney . . . and schedule an appointment for the insurance deal, and that we can use that for an alibi for the robbery." After meeting with the attorney about his automobile accident on June 18, 2002, he and the defendant drove past the victim's house to assure he was home. The men drove in Toni's black Grand Am. The two then stopped at a McDonald's restaurant to change clothes. Mr. Jones maintained that he was unarmed and that the defendant [*29] carried a small sledgehammer and a gun. He stated that the .22 caliber pistol once belonged to him but that the defendant had taken the gun from him.

Mr. Jones admitted that, upon seeing the hammer and gun, he concluded that the defendant would likely kill the victim but that he did nothing to stop him. He said that the men knocked on the victim's back door and that the victim let them into the home. He said that, as he and the defendant walked through the home, they were cautious to not leave fingerprints. He stated that he saw the victim and the defendant round a corner and walk into a den and that he watched the defendant swing the hammer at the victim. Mr. Jones heard a thump and heard the victim say, "Oh God." When Mr. Jones entered the den, he saw the defendant leaned over the victim and hitting him repeatedly with the hammer. He testified that the men put on gloves after the defendant finished striking the victim. The defendant then told him that they needed to spread out and look through the house. Mr. Jones found a wooden box with several quarters inside, and he poured the quarters into his pocket.

Mr. Jones testified that the defendant looked through the home, then returned [*30] to the living room with a Bowie knife and that he said something "to the effect of . . . let's make sure the guy is dead and started sawing his neck." The defendant then searched the victim's pockets. Mr. Jones testified that the defendant started making fun of him because he had not participated in the killing of the victim. Mr. Jones then took the Bowie knife and stuck it in the victim's back.

He testified that the defendant removed a safe that contained a "brick and a half" of marijuana along with another bag with "crumbs." The defendant also took a set of keys, cash, and the guitar and amplifier. He testified that the men returned to their vehicle and returned to the Thomas household. He said that they started a bonfire in the back yard where they burned the hammer and that, the following day, they threw the remaining head of the hammer into the wood line behind the property. Mr. Jones eventually led police officers to the location of the hammer head. He testified that he and the defendant attempted to sell the guitar and amplifier but that, after failing to find a buyer, they tossed the items into some brush on a back road by Boone Lake. The men also threw the lock box in this [*31] area, and they threw the keys into a ditch.

Mr. Jones testified that on July 30, 2002, the defendant drove him to band camp to meet with Beth. He testified that he had a discussion with the defendant during the car ride and that, upon arriving at camp he spoke with his friend Colby Smothers about the conversation. He said that Mr. Smothers told him to talk with the police, and Mr. Jones called 9-1-1. He gave two statements to the police at the Bristol Police Station. He admitted that his first statement only implicated the defendant; however, he maintained that his second statement, which comported with his testimony, was truthful.

Mr. Jones testified that, while in custody in Sullivan County, the defendant also was in custody in the same facility. He said that the defendant arranged to have two letters and one drawing delivered to him. The letter read, "I keep asking myself why you would do this to me. I've helped you alot [sic] Justin." The letter stated that the defendant was a "father in a way" to Mr. Jones and that he "fought" to allow Mr. Jones to stay at the Thomas residence. The letter said, "I don't know of what all you have done. But I need for you to tell them that I didn't [*32] do this. I know you're sick but you don't take me with you, Justin. You know me." It continued, "Your [sic] probably going to be killed by the state. I will help Toni's family and your mom. But tell them I am innocent." The defendant wrote, "Be a man God Damnit and take responsibility for yourself. It's over for you."

Mr. Jones testified that he was confused when he first received this letter but that he concluded that the letter was a story concocted by the defendant to place the blame on Mr. Jones. Mr. Jones also testified that he read the letter as a threat toward him.

Mr. Jones also received a drawing made by the defendant that showed Mr. Jones being held down in order to be anally raped by four men. Below the picture was written, "Is Crime and Lies worth it? The truth will set me free you S.O.B." He testified that the picture upset him.

Mr. Jones received a second letter which read,

> Justin,
>
> I understand why your [sic] doing this to me. I'm sorry for pushing you around. I also should have been there more for you. Maybe you wouldn't have done these things. Everyone will find the truth. I just wish you would tell it. I feel so sorry for Beth now. You have hurt her and her family for such [*33] a long time. If you have any love for her don't leed [sic] her into your world of lies and horror. Your [sic] truly beyond help. Everyone in her family has never liked you. Brian and Joe are turning more against you than ever. Brian and Stephanie are going to tell Beth about you cheating on her. Don't you remember[?] Stephanie's sister. She is going back to school and Toni and her family are trying to show her what your [sic] truly about. Thank God you can't hurt anyone else. Also I wanted you to know that theres [sic] proof against you. I can't wait to show it. . . .
>
> Also theres [sic] over twenty people who have come forward to testify against you. Think hard Justin of what is going to happen to you. Think hard of your past and the things you have done. Trying to kill your father, pulling a gun on Joe. Talking to all sorts of people who say you were planning to hurt people.
>
> Goodby looser [sic], and don't rest in peace.
>
> P.S. Start doing pushups, because your arms are so little.

Mr. Jones testified that this letter caused him to feel very threatened. He also recalled that the defendant would yell across the jail during the time they served together, "Hey Justin, I know you're over there."

Mr. [*34] Jones admitted pleading guilty in federal court to conspiracy to commit the offense of car jacking and bank robbery. In the instant case, he pleaded guilty to second degree murder and especially aggravated robbery. Mr. Jones also acknowledged that his plea agreement required that he testify in the instant case.

On cross-examination, Mr. Jones admitted that he fantasized about robbing convenience stores, banks, and restaurants when he was in high school. He explained, "They were just theoretical, wouldn't it be cool cat burglary, James Bond type stuff . . ." He maintained that he did not intend to actually commit any of these crimes. Mr. Jones also admitted that he told people on occasion that he wanted to kill the defendant.

Mr. Jones agreed that he went absent without leave from the Army in January 2002 despite his oath to loyally serve in the Army. He again admitted that he lied to VA personnel about his homicidal hallucinations and suicidal tendencies. Mr. Jones

admitted that he viewed a medical discharge as his way out of the Army. Mr. Jones also acknowledged the incident where he broke Beth's door and another incident where he broke his windshield in anger.

He explained that his [*35] relationship with the defendant became continually strained until July 30, 2002, when he decided to contact the police. He estimated that he spoke with the police from 11 p.m. until the morning of July 31, 2002. He admitted that he initially told police that he only helped the defendant dispose of the guitar and amplifier and the lock box. He said that eventually he told the police the truth in a subsequent statement on July 29, 2003. He admitted that he did not admit to the extent of his involvement with the murder of the victim until after his federal plea agreement in an unrelated case.

Mr. Jones admitted that he formed a "very rudimentary" plan to escape the Greene County Detention Center which was discovered by federal marshals. He testified that he never attempted to complete the plan and that he was later transferred to a different jail.

Mr. Jones stated that he did not know Mr. Vinson, Mr. Quillen, or Mr. Nash.

Richard Snyder, who served jail time with the defendant, testified that he recalled a conversation regarding the defendant's killing another person with a hammer. Mr. Snyder admitted he had been convicted of federal crimes, but he maintained that the State did not promise [*36] any leniency in exchange for his testimony.

Dr. Gretal Stephens testified that she performed the autopsy on the victim. She testified that the victim suffered multiple blows to his head from a blunt object which caused multiple lacerations of the scalp and disfigured and fractured the skull. She estimated that the victim had been struck at least 16 times. Dr. Stephens testified that she observed three series of multiple cuts to the victim's neck. She said that the incisions would have required a sharp blade because they were "reasonably deep." The victim also had two injuries to his right hand: a cut to his thumb and a blunt injury to his second and third fingers. Dr. Stephens testified that the head, neck, and hand injuries occurred while the victim was still breathing and his heart was still beating.

Dr. Stephens also noted a large knife protruding from the victim's back and an additional stab wound. She estimated that these injuries occurred after the victim had died because they did not indicate any bleeding.

Dr. Stephens examined several possible weapons to discern what could have been used in causing the victim's death. Dr. Stephens explained that when law enforcement officers brought [*37] the various weapons for her examination, they did not indicate from whom those weapons were taken. She reviewed the hammer head found behind the Thomas home and determined it was capable of causing the injuries to the victim. She also reviewed a smaller hammer and a tire tool recovered from Mr. Vinson's home. She testified that the smaller hammer could have caused some of the wounds but that it could not have caused all of them. She testified that the tire tool could conceivably match some of the victim's injuries but that "the little round tip on it is a little bit too round and small for the larger scallops."

Dr. Stephens testified that the sword found at Mr. Vinson's home was sharp enough to cause the cuts to the victim's neck; however, she maintained that the handle was loose and that it would have been difficult to wield with the victim being on the ground. She also examined a set of smaller knives belonging to Mr. Nash and determined that they could have been used to cut the victim's throat; however, she testified that one serrated buck knife would not have been consistent with the victim's injuries. Dr. Stephens examined the Bowie knife found in the victim's back and determined [*38] that it was too dull to cause the incisions to the neck. Dr. Stephens noted, however, that the knife could have become dull by remaining in the victim's back for a long period of time, and she

noted that the knife had started to rust inside the body.

Dr. Stephens concluded that the cause of death of the victim was lethal brain injury due to being struck multiple times in the head with a blunt object and suffering multiple incised wounds to the neck.

Captain Charles Thomas of the Bristol Police Department's Criminal Investigation Division testified that he obtained a search warrant for the Thomas residence on July 24, 2002. He obtained a letter addressed to the defendant at 408 Walnut Hill in one of the bedrooms. He also located a firearm and bag of marijuana seeds on a night stand in the same bedroom. Captain Thomas learned that the bedroom was the one Toni shared with the defendant.

Special Agent Michael Turbeville of the TBI Crime Laboratory testified as an expert in serology and deoxyribonucleic acid ("DNA") analysis. Agent Turbeville identified the DNA of the defendant, the victim, Mr. Jones, Mr. Nash, Mr. Vinson, and Mr. Quillen to compare with several items of clothing and weapons [*39] possibly linked to the murder scene.

Agent Turbeville testified that, upon viewing Mr. Nash's, Mr. Quillen's, and Mr. Vinson's clothing and shoes, the only blood that he found was Mr. Nash's blood on his own shirt and jeans. Agent Turbeville found blood on the sword recovered from Mr. Vinson's home; however, he stated that the DNA profile of the blood did not match any of the DNA profiles he examined. Agent Turbeville only found DNA belonging to the victim on the Bowie knife stuck into the victim's back. He also examined the knives belonging to Mr. Nash. He testified that one of the knives displayed blood but that his examination showed the blood belonged to Mr. Nash.

Agent Turbeville found no blood on the hammers or the tire tool. He explained that, had the small sledgehammer purportedly used to kill the victim been fully engulfed in a fire, the blood and DNA evidence would likely be destroyed by the heat.

Roberta Davis, paralegal in the office of the local attorney who Mr. Jones and the defendant consulted, testified that she recalled on June 18, 2002, two males entered the office stating that one had been involved in a car accident.

The State also introduced several witnesses to show [*40] that the defendant intimidated Mr. Jones during his incarceration. Tracie Hyatt Goins testified that she was married to the defendant in 2000. She testified that the two also separated that year but that they were never technically divorced. She testified that she had known the defendant since fifth grade and that he was a talented sketch artist. She also testified that she was familiar with his handwriting. She then looked at one hand-drawn picture and two hand-written letters that were allegedly sent to Mr. Jones by the defendant while incarcerated. She said that all the documents were consistent with what she knew of the defendant's drawing and hand writing.

Charles Noe, who spent time incarcerated with the defendant, testified that the defendant was a talented artist and that he sketched often while in jail. Mr. Noe did not witness the defendant create the drawing received by Mr. Jones, but he said that the defendant was capable of the drawing.

Agent Derek Johnson of the Tennessee Bureau of Investigation ("TBI") testified that both the defendant and Mr. Jones were incarcerated in the same facility after Mr. Jones gave the police information accusing the defendant of the murder of [*41] the victim. He recalled an incident where he and Mr. Jones were going onto an elevator with the defendant and that Mr. Jones "bucked" when he saw him. They boarded the elevator and Mr. Jones appeared to be in distress. Agent Johnson then noted that the defendant's lips were moving and that Mr. Jones's eyes "got big and he was visibly shaking." Agent Johnson recalled, "[The defendant] was saying something under his breath to [Mr.] Jones and the effect of it was that Jones was afraid." He also saw the defendant "puffing himself

up to look bigger."

The State rested, and the defense called Antoinette "Toni" Thomas. Toni testified that she lived at 408 Walnut Road in Bristol, Tennessee, and that she had worked at Wellmont Hospital for 19 years. She stated that Mr. Jones began dating her daughter, Beth, while the two were in high school.

Toni testified that she met the defendant through Mr. Jones and became romantically involved with him. She estimated that after knowing the defendant for two months, she allowed the defendant to stay in her room. She stated that she originally did not intend to have Mr. Jones and the defendant stay at her home and that, originally, she offered food in exchange [*42] for the men's helping her with some chores. Toni stated that the defendant worked for her stepfather at Bryant Labels where he sandblasted jeans. She recalled that the defendant planned to learn the business and assume a management role.

Toni acknowledged growing tensions between the defendant and Mr. Jones but could not recall specific instances. She recalled when Mr. Jones was attacked by water balloons and then punched a hole through Beth's door. She explained that the look in Mr. Jones eyes was "just scary." Toni stated that this incident concerned her because she knew Mr. Jones had a gun; however, the defendant later took the gun from him and kept it on the night stand in her bedroom.

Toni also explained that she made Mr. Jones stay outside because he violated her house rule that he could not be in Beth's bedroom past 10:00 p.m. She testified that she felt bad about making him sleep outside but that she "didn't want [Beth] to think that it was okay just to have your boyfriend stay overnight in your room with you, that that just wasn't proper."

Toni also recalled a physical altercation between the defendant and Mr. Jones. She stated that the fight started because the defendant referred [*43] to her home as "Fort Goins." She also testified that the defendant never had much money and that he never paid rent to her. She testified that the defendant rarely left the home at night and that he generally spent his evenings with her. Toni stated that she worked until approximately 5:30 p.m. every day and that the defendant was generally home when she returned from work.

Toni testified that she found out that Beth was at the police station at Bristol in the early morning hours of July 31, 2002. She testified that while she tried to remain calm, the defendant seemed very anxious. She said, "[The defendant] was kind of pushing, 'Come on, let's go, let's go find out what's going on.'" She said that the defendant looked by the night stand for his gun but could not find it. Upon arriving at the police station, several officers approached the defendant and asked if he was Mr. Goins. Upon learning his identity, the officers said they had some questions for him and escorted him to another room.

On cross-examination, Toni testified that the defendant always had sufficient funds to buy cigarettes, but she said that she did not know where he obtained this money because he did not have a job. [*44] She also recalled a conversation where she discussed with the defendant that Mr. Jones was afraid of him and that the defendant "kind of grinned." She admitted that she was not home when the defendant and Mr. Jones did projects around the house so she could not know whether Mr. Jones was working his share.

Toni testified that she was no longer in a relationship with the defendant. She stated that when he first went to prison, he would draw pictures for her. One of his drawings to her was admitted into evidence for comparison with the threatening picture given to Mr. Jones.

Jackie Nash testified that he knew of the victim but had no relationship with him. His uncle lived across the street from the victim, and Mr. Nash often saw the victim in his yard. Mr. Nash acknowledged that he gave a statement to the police where he stated that he was in the victim's home on June 18, 2002,

and that Mr. Quillen and Mr. Vinson had a "shouting match" with the victim that resulted in violence. He said that this false statement resulted from the detectives' asking him leading questions. He testified that he eventually simply agreed to the law enforcement officers' leading in hopes of being released from [*45] the police station. Mr. Nash maintained that he was not with Mr. Quillen or Mr. Vinson on June 18, 2002, and that he had no involvement in the murder of the victim. Mr. Nash admitted telling a woman on the night of the murder that he knew the victim's murderers; however, he maintained that he was drunk and was "pulling one on her."

Larry Quillen testified that his sister, Anita Quillen Holt, killed herself. He said that Ms. Holt lived across the street from the victim. He stated that he did not personally know the victim and that he did not know that he dealt drugs. He stated that the police detained him on June 19, 2002, and that he was intoxicated when they picked him up. He admitted that he fabricated his statement to the police. Mr. Quillen testified that he was at the Haven of Rest Mission on the night of the murder.

Mr. Quillen testified that Ms. Holt and Mr. Vinson disliked the victim but that he did not know why. The two had talked about killing the victim before. Mr. Quillen also testified that Mr. Vinson kept a sword on his wall but that he never saw him carry the sword anywhere.

Based on the evidence as summarized above, the jury convicted the defendant of facilitation of second [*46] degree murder and especially aggravated robbery. At the sentencing hearing, the defendant elected to be sentenced under the pre-2005 sentencing laws. The court considered the defendant's criminal history, including federal convictions of bank robbery and carjacking resulting in death along with several less-severe state convictions. The trial court enhanced the defendant's sentence for his Class A felony conviction of especially aggravated robbery to 25 years. The trial court also noted that, by statute, the aggravated robbery sentence had to be served at 100 percent. The court sentenced the defendant to 12 years at 30 percent for his Class B, facilitation of second degree murder conviction.

The trial court found that the defendant had an extensive record of criminal activity and that the defendant was a dangerous offender whose behavior evidenced little or no regard for human life. The trial court ordered the defendant's two convictions be served consecutively and ordered that his state sentences be served consecutively to his federal sentences for unrelated crimes.

Issues on Appeal

The defendant challenges his convictions and his sentences. The defendant claims that the trial court [*47] erred by excluding the statements of Anita Holt and testimony of Eric Hilliard and that the trial court's exclusion of this evidence affected his right to present a full defense. The defendant also argues that the trial court erred in denying his motion to sequester the jury. Lastly, the defendant challenges the trial court's ordering that his sentences be served consecutively.

I. Ms. Holt's and Mr. Hilliard's Testimony

The defendant argues that Ms. Holt's statements to the police and Mr. Vinson's statements to his brother as recounted by Mr. Hilliard should have been admitted because "the statements were excluded from the rule against hearsay and were admissible as substantive evidence under *Tennessee Rule of Evidence 804(b)(3)*." In the alternative, the defendant argues that Ms. Holt's statements were admissible non-hearsay. Lastly, the defendant maintains that admitting these statements was essential to preserving his constitutional right to present a defense.

A. Rule of Evidence 804(b)(3)

The defendant claims that Ms. Holt's statement in

which she admits she previously lied to the police was a statement against her interest and therefore admissible. He argues that "Ms. Holt's second [*48] statement exposes her to criminal liability for giving a false report to a law enforcement officer" and that "her admitted exposure to [Mr. Nash, Mr. Vinson, and Mr. Quillen] directly prior to and after the crime could potentially expose her to prosecution for facilitation of murder or even an accessory after the fact." The defendant also maintains that Mr. Vinson's statements overheard by Mr. Hilliard fit within the same hearsay exception.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Tenn. R. Evid. 801(c)*. "Hearsay is not admissible except as provided by these rules or otherwise by law." *Id. 802*. *Tennessee Rules of Evidence 803* and *804* provide exceptions to the general rule of inadmissibility of hearsay. *Rule 804* provides hearsay exceptions when a declarant is unavailable under certain circumstances. *Subsection (b)(3)* creates a hearsay exception when an unavailable declarant makes a statement against his interest. The rule reads,

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended [*49] to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Tenn. R. Evid. 804(b)(3). Our review of a court's admission or exclusion of hearsay is conducted on a de novo basis. *See State v. Gilley, 297 S.W.3d 739, 759-61 (Tenn. Crim. App. 2008)*.

Despite the defendant's claims that Ms. Holt's statements would subject her to criminal liability for facilitation of murder and accessory after the fact, her statements do not support criminal liability for either crime. The statements of Ms. Holt did not indicate that she "knowingly furnishe[d] substantial assistance in commission of the felony," *see T.C.A. § 39-11-403(a)*, nor did they show that Ms. Holt intentionally misled the police to help the offenders, *see id. § 39-11-411*. Further, nothing in the evidence suggested that Ms. Holt's statements to the police were under oath. We agree with the trial court that nothing in Ms. Holt's statements amounted to an admission that "so far tended" to subject her to criminal liability. Lastly, even if we did credit the defendant's [*50] argument that Ms. Holt's admission of lying to police officers subjected her to possible prosecution, we note that such admission was merely one sentence of a two page statement. Ms. Holt's admission to giving false statements to law enforcement officers is wholly divorced from her recounting the June 18, 2002 murder and would not provide an open door to allow the remainder of the inadmissible hearsay into evidence.

Regarding Mr. Vinson's statements within hearing of Mr. Hilliard, we agree with the trial court that these vague statements did not amount to a statement against penal interest. Mr. Vinson's exclamation that he was glad the victim had died does not intrinsically imply that he murdered the victim. His vague statement about a fight going awry with no reference to when, where, and who the fight involved cannot be viewed as a statement implicating Mr. Vinson in the murder of the victim.

B. Non-Hearsay

The defendant argues that Ms. Holt's statements were not offered for the truth of the matter asserted and, therefore, were not inadmissible hearsay. *See Tenn. R. Evid. 801(c)*. The defendant claims to only want the hearsay statement admitted to show its effect on the listening law [*51] enforcement personnel. The trial court held that, under this theory, because the jury was presented with evidence that the Bristol Police Department investigated, arrested, and prosecuted Mr. Quillen,

Mr. Vinson, and Mr. Nash for the murder of the victim, Ms. Holt's statements to the police during that investigation were irrelevant and would confuse the issue. *See id.* 402, 403. We agree. The jury was presented with ample evidence of third party guilt even without the use of Ms. Holt's statements. Ms. Holt's statements to police officers effected an investigation into the three men and the fruits of that investigation were presented to the jury without need of that actual statement.

C. Constitutional Right to Present Defense

Finally, in contradiction of his argument that Ms. Holt's statements were not admitted to prove the truth of the matters asserted therein, the defendant argues that the exclusion of Mr. Holt's statements violates his "right to present a defense which includes the right to present witnesses favorable to the defense." The defendant cites the United States Supreme Court case of *Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)*. He also argues that the exclusion of Mr. Hilliard's [*52] testimony prevented him from presenting a constitutionally valid defense.

We distinguish *Holmes* from the instant case. In *Holmes*, the Supreme Court deemed unconstitutional a state supreme court's ruling that arbitrarily barred the defense's presentation of proof regarding third party guilt when the State produced "strong evidence" and the defense's evidence "d[id] not raise a reasonable inference as to the appellant's own innocence." *Id. at 324*. A total barring of a defense is wholly different from the instant case's exclusion of specific statements based on well-settled evidentiary rules. The Supreme Court has explicitly noted that it has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)* (citing *Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)*).

In light of this analysis, we cannot say that the trial court's use of evidentiary rules to exclude the statements of Ms. Holt and testimony of Mr. Hilliard violated the defendant's right to present a defense. Further, [*53] we note that the defendant was able to produce several witnesses and statements inculpating Mr. Nash, Mr. Vinson, and Mr. Quillen. The jury rejected this theory, and it is doubtful that the presentation of the statements at issue would have altered their analysis.

II. Sequestration of Jury

The defendant further argues that the trial court erred in denying his request that the jury be sequestered. Our criminal code provides that "[i]n all criminal prosecutions, except those in which a death sentence may be rendered, jurors shall only be sequestered at the sound discretion of the trial judge, which shall prohibit the jurors from separating at times when they are not engaged upon actual trial or deliberation of the case." *T.C.A. § 40-18-116*. This court reviews a court's denial of a request for sequestration of the jury on an abuse of discretion basis. *See State v. Larry Walcott, No. E2004-02705-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 901, *17 (Tenn. Crim. App., Knoxville, Aug. 22, 2005)*.

Our review of the record shows that the trial court was cognizant of the publicity surrounding the defendant and his various trials. The court conducted individual voir dire to carefully examine whether any jurors with possible [*54] knowledge of the defendant from news coverage could remain objective and fair. The court dismissed potential jurors who seemed affected by pretrial publicity. Further, during the trial, the trial court asked the jury whether any members had been exposed to media coverage every morning. On two occasions, jurors admitted to hearing media coverage about the case. In the first instance, a juror stated that the juror heard a radio newscast begin reporting on the trial while in the shower and that the juror "just

turned the shower up." The juror maintained, "I just heard the radio announcer that comes on." Although the trial court gave defense counsel an opportunity to question the juror, he declined the opportunity. On the second occasion, a juror reported hearing a report on the trial on the news, but the juror said, "I went and hid in the laundry room." Nothing in the record indicated that either of these incidences contaminated the judgment of these jurors in any regard. In light of the trial court's admonitions to the jury to avoid media coverage of the trial and the jurors' reporting no major violations of the court's instructions, we cannot say the defendant suffered any prejudice [*55] as a result of the court's denying his motion to sequester the jury. The trial court did not abuse its discretion in denying the defendant's request that the jury be sequestered, and this court will not grant defendant relief on this ground.

III. Sentencing

The defendant lastly contends that the trial court erred in imposing consecutive sentences because such sentencing was "not, as required by law, necessary to protect the public." When considering a challenge to the manner of service of a sentence this court conducts a de novo review with a presumption that the determinations of the trial court are correct. *T.C.A. § 40-35-401(d)* (2003). Our case law has long held that the presumption of correctness "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008)* (quoting *State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)*). The appealing party, in this case the defendant, bears the burden of establishing impropriety in the sentence. *T.C.A. § 40-35-401*, Sentencing Comm'n Comments; *see also Carter, 254 S.W.3d at 344*; *Ashby, 823 S.W.2d at 169*. [*56] If our review of the sentence establishes that the trial court gave "due consideration and proper weight to the factors and principles which are relevant to sentencing under the Act, and that the trial court's findings of fact . . . are adequately supported in the record, then we may not disturb the sentence even if we would have preferred a different result." *State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991)*. In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby, 823 S.W.2d at 169*.

Code *section 40-35-115* provides criteria for which a trial court may impose consecutive sentences on a defendant. The trial court in the instant case found that the defendant had an extensive record of criminal activity, *see T.C.A. § 40-35-115(b)(2)*, and that the defendant was a dangerous offender whose behavior indicated little or no regard for human life, *see id. § 40-35-115(b)(4)*. The defendant argues that the trial court erred in finding that the defendant was a dangerous offender in light of his serving a life sentence in federal prison. We need not tarry long on his argument, however, because [*57] the record amply supports the trial court's finding of the defendant's extensive record of criminal activity. The defendant's brief assumes that the trial court only cited criterion *(b)(4)* to impose consecutive sentences; however, our review shows that the court also held that *(b)(2)* justified the consecutive sentencing. The record supports the trial court's use of the defendant's extensive record of criminal activity to order that his sentences be served consecutively, and we find no error in the trial court's sentence.

Conclusion

Based on the above-stated reasons, we discern no error in the judgments of the trial court, and accordingly, we affirm its judgments.

JAMES CURWOOD WITT, JR., JUDGE

Braseel v. State

Court of Criminal Appeals of Tennessee, At Nashville

July 19, 2016, Session; October 7, 2016, Filed

No. M2016-00057-CCA-R3-PC

Reporter
2016 Tenn. Crim. App. LEXIS 763 *

ADAM C. BRASEEL v. STATE OF TENNESSEE

Subsequent History: Appeal denied by *Braseel v. State, 2017 Tenn. LEXIS 128 (Tenn., Feb. 24, 2017)*

Prior History: *Tenn. R. App. P. 3* [*1] Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded. Appeal from the Circuit Court for Grundy County. No. 4221. Justin C. Angel, Judge.

State v. Braseel, 2010 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App., Sept. 17, 2010)

Disposition: Judgment of the Circuit Court Reversed and Remanded.

Case Summary

Overview

HOLDINGS: [1]-Trial counsel was not ineffective for failing to challenge an alleged impermissibly suggestive lineup, as the trial testimony showed that the victim's nephew was shown more than one photo and had provided a description of the inmate, his car, and the hat he was wearing the night of the murder, enabling him to make the identification quickly once shown a photo; [2]-The post-conviction court improperly concluded that the inmate received ineffective assistance of counsel for trial counsels' failure to file a motion to suppress, as the inmate failed to demonstrate that such a motion would have been successful since the identification by the nephew was not impermissibly suggestive; [3]-Although trial counsels' failure to request a jury instruction on identity was deficient, the record reflected no circumstances that would derogate from the witnesses' identifications.

Outcome

Reversed and remanded.

Counsel: Herbert H. Slatery III, Attorney General and Reporter; Andrew C. Coulam, Assistant Attorney General; Mike Taylor, District Attorney General; and Steve Strain and David Shinn, Assistant District Attorneys General, for the appellant, State of Tennessee.

Douglas A. Trant, Knoxville, Tennessee, for the appellee, Adam C. Braseel.

Judges: TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Opinion by: TIMOTHY L. EASTER

Opinion

Petitioner, Adam Clyde Braseel, was convicted of first degree premeditated murder, felony murder, especially aggravated robbery, attempted first degree murder, aggravated assault, and assault and sentenced to an effective sentence of life imprisonment with the possibility of parole. *State v. Adam Clyde Braseel, No. M2009-00839-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 784, 2010 WL 3609247, at *1 (Tenn. Crim. App. Sept. 17, 2010)*,

perm. app. denied (Tenn. Feb. 17, 2011). On direct appeal, this Court merged the aggravated assault and attempted first degree murder convictions and corrected several clerical errors [*2] in the judgments. In all other respects, the convictions and sentences were affirmed. Petitioner subsequently sought post-conviction relief on the basis of ineffective assistance of counsel, arguing, among other things that trial counsel should have filed a motion to suppress the pre-trial identification of Petitioner as the perpetrator, should have challenged the eyewitness identification of Petitioner at trial, and should have requested a jury instruction on eyewitness identification. After a hearing, the post-conviction court granted relief. The State appealed. After a thorough review, we reverse and remand the judgment of the post-conviction court. All of Petitioner's covictions are reinstated and his petition for post-conviction relief is dismissed.

OPINION

Petitioner was indicted in March of 2006 for first degree murder, felony murder, especially aggravated robbery, attempt to commit first degree murder, aggravated assault, especially aggravated burglary, and assault. The State's proof at trial consisted primarily of the testimony of the victim's sister, Rebecca Hill, and nephew, Kirk Braden. Ms. Hill and Mr. Braden were staying with the victim, Malcolm Burrows, at his home in [*3] Tracy City while they were in between residences.

On the night of the victim's death, a person identified by both Ms. Hill and Mr. Braden as Petitioner, knocked on the door and asked the victim for help with his vehicle. The victim left with Petitioner in Ms. Hill's vehicle. Not long thereafter, Petitioner returned to the house alone and asked for starter fluid. When Ms. Hill reached under the sink to get the starter fluid, Petitioner began hitting her with a long object. Mr. Braden came to her assistance after she yelled for help. Petitioner threw a fire extinguisher at him. The victim's body was found in the woods a short distance from Ms. Hill's vehicle. His wallet was missing.

Ms. Hill identified Petitioner from a photographic lineup when she regained consciousness four or five days later. Mr. Braden was able to describe Petitioner's vehicle and made an unsolicited identification of Petitioner from a set of photographs. At least one of the victim's neighbors gave a description of the vehicle that was consistent with Mr. Braden's description. Petitioner's mother confirmed that she owned a vehicle matching the description of the vehicle seen at the victim's house. There was no physical [*4] evidence linking Petitioner to the crimes. Petitioner relied on an alibi defense at trial through several witnesses and his own testimony claiming that he was with a group of people four-wheeling in a nearby town, Coalmont, on the night of the victim's death. *2010 Tenn. Crim. App. LEXIS 784, [WL] at *1-7*.

At the conclusion of the jury trial, Petitioner was convicted of first degree premeditated murder, first degree felony murder, especially aggravated robbery, attempt to commit first degree murder, aggravated assault, and assault. The trial court merged the convictions for first degree premeditated murder and first degree felony murder and sentenced him to life imprisonment for his murder conviction. The trial court ordered all of the other sentences to run concurrently for an effective sentence of life with the possibility of parole. *2010 Tenn. Crim. App. LEXIS 784, [WL] at *1*.

On direct appeal, Petitioner challenged the sufficiency of the evidence for murder, especially aggravated robbery and aggravated assault. He also complained that the pre-trial identification processes were unduly suggestive. *Id.* This Court determined Petitioner waived the issue with regard to impermissibly suggestive pre-trial identification because no motion to suppress was filed pre-trial and [*5] no objection was lodged during trial to challenge the identifications. *2010 Tenn. Crim. App. LEXIS 784, [WL] at *7*. This Court found the evidence sufficient to support the murder

convictions but remanded the matter for correction of the judgments to properly reflect the merger of the conviction of first degree felony murder into the conviction of first degree premeditated murder for a single judgment of conviction. *2010 Tenn. Crim. App. LEXIS 784, [WL] at *8*. Lastly, this Court found, "as plain error that principles of double jeopardy bar . . . multiple convictions [for the aggravated assault and attempted first degree premeditated murder of Ms. Hill]." *2010 Tenn. Crim. App. LEXIS 784, [WL] at *12*. The supreme court denied permission to appeal.

Petitioner filed a timely petition for post-conviction relief on February 14, 2012. In the petition, he alleged that he received ineffective assistance of counsel, that his convictions were based on an unconstitutional failure of the prosecution to disclose evidence favorable to the defense, that his convictions were based on an unconstitutionally selected and impaneled grand jury, and that the trial court erred in admitting illegal evidence. Specifically, with regard to ineffective assistance of counsel, Petitioner questioned trial counsels' failure to object to or contest [*6] the eyewitness identifications, call certain alibi witnesses, and the failure of trial counsel to request a jury instruction regarding the reliability of eyewitness identification. Petitioner also argued that trial counsels' cumulative failure to object to evidence at trial was ineffective assistance of counsel and that the State utilized an impermissibly suggestive photographic lineup for identification.

An amended petition was filed adding allegations of due process violations based on the disappearance of a Sun Drop bottle recovered from the scene containing a fingerprint that did not match Petitioner's fingerprint and the disappearance of the photographic lineup.[1] Petitioner also submitted the findings of an independent investigator along with a list of potential witnesses as part of an amended petition for relief.

The post-conviction court held a hearing on the petition at which the entire trial transcript was entered into evidence. At the hearing, Petitioner called several witnesses to testify on his behalf, all of whom testified regarding Petitioner's whereabouts on the night of the incident. Only one of those witnesses, Charles Partin, testified at trial. Neither trial counsel nor Petitioner testified at the hearing. Petitioner was represented by two attorneys at trial. Additionally, at the time of the post-conviction hearing, Ms. Hill was deceased.

Charles Partin, one of Petitioner's friends, testified at the hearing on the petition for post-conviction relief. Mr. Partin claimed that Petitioner spent January 7, 2006, the day of the victim's death, "pretty much all day" at his house. Petitioner left that night "between 9:00 and 9:15" when Mr. Partin "and a buddy" left to go to Manchester. Danny Johnson and Robin Crabtree were also at his house that day. Mr. Partin admitted that he testified [*8] at the trial and that he only "vaguely" remembered what occurred on the day of the victim's death. Mr. Partin could not recall what type of car Petitioner drove but recalled that it was a "dark" car with four doors.

None of the remaining witnesses presented by Petitioner at the hearing on the petition for post-conviction relief testified at the trial of the matter. Robin Smith met Petitioner for the first time at Mr. Partin's house on the day that the victim was killed. She recalled that Petitioner was at Mr. Partin's house at around 8:00 p.m. Ms. Smith left at around 9:00 p.m. with her daughter.

Danny Johnson also remembered meeting Petitioner at Mr. Partin's house on the same night at Mr. Partin's house at around 8:30 p.m. Mr. Johnson testified that he left around 9:00 p.m. with Mr.

[1] The original photographic line up has not disappeared. When we requested and received the archive record from Petitioner's direct appeal, trial Exhibit 25, the photographic lineup, was included. It was filed on May 29, 2009 with other trial exhibits and has remained with the clerk since that time. It is apparent that post-conviction counsel did not request the return of [*7] the trial exhibits to the post-conviction court before the evidentiary hearing. We have reviewed this archived exhibit and find that it and the photo line up attached to Petitioner's appeal brief are identical.

Partin and Ms. Smith to go to Manchester to an establishment called "Billiards."

James Nick Brown knew Petitioner and saw him on the day the victim was killed at Mr. Partin's house with Mr. Partin, BJ Partin and Hope Nunley. Petitioner was at the house from around noon to 9:15 p.m. that night when they went to Josh Seagroves's house. When they left the Seagrove residence, they went "four-wheel drive riding." [*9] Mr. Brown was with Petitioner "until the next day about 3 or 4 o'clock."

Darren Nunley, also known as "Boog," also testified that he saw Petitioner at the house of Mr. Seagroves around 9:30 or 10:00 p.m. on the night the victim was killed. They went "riding in [his] Bronco" for most of the night and the next day. Mr. Nunley was uncertain about specific times and recalled that he was drinking.

Jake Baum testified that he had known Petitioner since the seventh grade. He did not testify at trial because he was in the military at the time and stationed in Washington State. He was not permitted to leave service to testify at trial. On the night of January 7, he was going from his house in Winchester to take his girlfriend, Kristen King, home. At around 9:30, Petitioner "pulled [him] over." Mr. Baum pulled in to a church parking lot at Altamont, and got into the car with Petitioner. Mr. Baum's girlfriend stayed in his car. According to Mr. Baum, Petitioner wanted to "smoke a joint" but neither of the men had rolling papers. Petitioner asked for Mr. Baum's sister's telephone number. Mr. Baum told Petitioner he needed to take his girlfriend home and went back to his own car. Petitioner went [*10] "toward Josh Seagroves' house." Mr. Baum was sure that it was between 9:00 and 10:00 p.m. because he "had to be in Winchester by 10:00."

Phillip Clay testified that he gave a statement to Chief Deputy Lonnie Cleek on March 2, 2007, when he was in jail. Mr. Clay testified, over objection, that he told Deputy Cleek that he was riding in the backseat of a car with Dana Frederick and Dewayne Lane at some point after the victim was killed. Mr. Lane was driving and Ms. Frederick was sitting in the passenger seat. The couple was arguing. During the argument, the car started to swerve, and Mr. Lane reached over and pushed Ms. Frederick's face. She said, "[T]ouch me again, and you'll wind up dead just like [the victim]. F—with my daddy, f—with Big Eck." Mr. Clay recalled that Ms. Frederick's father's name was "Eck." Mr. Clay was not a witness at trial.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. In a written order, the post-conviction court granted relief, finding that trial counsel were ineffective.

The State filed a timely notice of appeal.

Analysis

On appeal, the State insists that the record does not support the "essential factors upon which the court [*11] based its finding of ineffective assistance of counsel" and that the post-conviction court failed to utilize the proper legal analysis to support the findings. The State argues that the post-conviction court's judgment should be reversed and remanded and the petition for post-conviction relief dismissed with prejudice. Petitioner insists that the post-conviction court correctly determined that his petition warranted post-conviction relief.

Post-conviction Standard of Review

Post-conviction relief is available for any conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." *T.C.A. § 40-30-103*. In order to prevail in a claim for post-conviction relief, a petitioner must prove his factual allegations by clear and convincing evidence. *T.C.A. § 40-30-110(f)*; *Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999)*. "Evidence is clear and convincing when there is no serious or substantial

doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)*.

Both the *Sixth Amendment to the Constitution of the United States* and *article I, section 9 of the Tennessee Constitution* guarantee the right of an accused to the effective assistance of counsel. In order to sustain a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's representation [*12] fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)*. Under the two prong test established by *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, a petitioner must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. *See Burnett v. State, 92 S.W.3d 403, 408 (Tenn. 2002)*. Because a petitioner must establish both elements in order to prevail on a claim of ineffective assistance of counsel, "failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley, 960 S.W.2d at 580*. "Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." *Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996)* (citing *Strickland, 466 U.S. at 697*).

The test for deficient performance is whether counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. *Strickland, 466 U.S. at 688*; *Henley, 960 S.W.2d at 579*. This Court must evaluate the questionable conduct from the attorney's perspective at the time, *Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)*, and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999)*. A defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996)*. In other words, "in [*13] considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)* (quoting *United States v. Cronic, 466 U.S. 648, 665 n.38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*). This Court will not use hindsight to second-guess a reasonable trial strategy, *Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994)*, even if a different procedure or strategy might have produced a different result, *Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980)*. "The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation." *House v. State, 44 S.W.3d 508, 515 (Tenn. 2001)* (quoting *Goad, 938 S.W.2d at 369*). However, this deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992)*.

Even if a petitioner shows that counsel's representation was deficient, the petitioner must also satisfy the prejudice prong of the *Strickland* test in order to obtain relief. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Burns, 6 S.W.3d at 463* (quoting *Strickland, 466 U.S. at 694*). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Id.* "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding [*14] if the error had no effect on the judgment." *Strickland, 466 U.S. at 691*.

Whether a petitioner has been denied the effective assistance of counsel presents a mixed question of law and fact. *Burns, 6 S.W.3d at 461*. This Court will review the post-conviction court's findings of fact "under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise."

Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001) (citing *Tenn. R. App. P. 13(d)*; *Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997)*). This Court will not re-weigh or re-evaluate the evidence presented or substitute our own inferences for those drawn by the trial court. *Henley, 960 S.W.2d at 579*. Questions concerning witness credibility, the weight and value to be given to testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court. *Momon, 18 S.W.3d at 156* (citing *Henley, 960 S.W.2d at 578*). However, the post-conviction court's conclusions of law and application of the law to the facts are reviewed under a purely de novo standard, with no presumption of correctness. *Fields, 40 S.W.3d at 458*.

In the order granting relief, the post-conviction court recounted the issues raised by Petitioner as follows: (1) trial counsel failed to move to suppress the photographic lineup used when Mr. Braden identified Petitioner; (2) trial counsel failed to notice the misidentification of Petitioner at [*15] trial by Ms. Hill; (3) trial counsel failed to argue that Ms. Hill could not identify Petitioner after the incident; (4) trial counsel failed to request a jury instruction on identity; (5) trial counsel failed to object to the photographic lineup at trial; (6) the evidence does not support the convictions; (7) trial counsel failed to call alibi witnesses; and (8) the trial proceeding was flawed. The post-conviction court determined that Petitioner's "allegation that he did not receive effective assistance of counsel at the jury trial *was* supported by clear and convincing evidence at the post-conviction hearing" (emphasis added). The post-conviction court pointed to the fact that there was "no other evidence relating the Petitioner to the crimes except the identification by Rebecca Hill and Kirk Braden," placing "great emphasis on the credibility and sufficiency of the identifications." The post-conviction court went on to comment that:

> The jury clearly relied on the identification of the Petitioner by Rebecca Hill and Kirk Braden.
>
> It was testified to at trial that Rebecca Hill failed to identify the Petitioner in a photo lineup immediately after the crimes. It was only at a later time [*16] did Ms. Hill identify the Petitioner. At trial, Ms. Hill improperly identified the Petitioner on a lineup, actually identifying someone else. This misidentification was not noticed or argued to the trial jury by trial counsel. Trial counsel did not seek to suppress Ms. Hill's identification of the Petitioner. Ms. Hill is now deceased.
>
> Kirk Braden was shown a single photo lineup of the Petitioner by former Grundy County Sheriff, Brent Myers. Single photo lineups have consistently been held to be unconstitutional by our appellate courts. Mr. Braden obviously identified the Petitioner. Trial counsel failed to move to suppress the single photo lineup or object to it as well.
>
> Trial counsel also failed to request that the trial judge charge the jury on identify, found in [Tennessee Pattern Jury Instruction] 42.05. Trial counsels' actions at trial precluded the appellate court to consider the issue of identity due to the waiver said actions constituted.
>
> All of these actions or inactions by trial counsel constitute ineffective assistance of counsel, thus denying the Petitioner his constitutional rights to trial. Again, the court is considering the aforementioned issues of identification with [*17] extreme weight, based contextually with the fact that identification alone is all that ties the Petitioner to the crimes. If any other evidence whatsoever existed, then the flaws with the identification of the Petitioner would likely not be as important and fundamental to ensuring that the Petitioner receive a constitutionally fair trial.

The post-conviction court determined that trial counsels' failure to call certain alibi witnesses was most likely a strategic decision and, as such, did not rise to the level of ineffective assistance of counsel. As a result of the post-conviction court's findings, the post-conviction court granted post-conviction

relief and ordered a new trial.

At the outset, we note that in the order granting relief, the post-conviction court did not articulate the application of the *Strickland* analysis as to each specific allegation presented in the post-conviction petition. Further, our review of the issues raised is complicated by the post-conviction court's analysis of the issues presented in the post-conviction petition in the aggregate. Ordinarily, this Court undertakes review of the grant or denial of a post-conviciton petition by examining each individual [*18] allegation of ineffective assistance of counsel separately. As such, our opinion will follow this format.

Identity

1. Trial Counsels' Failure to Challenge Impermissibly Suggestive Lineup

The State argues that the post-conviction court improperly determined that trial counsel were ineffective for failing to challenge the identification of Petitioner by Mr. Braden. Petitioner insists that the post-conviction court properly determined that the "one photo line-up" was improper because it was impermissibly suggestive, relying on *State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App. 1980)*, for the proposition that no court has approved the practice of showing a single photo to a victim.

In *Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)*, and *Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)*, the Supreme Court discussed pretrial identifications by photographs. In *Simmons*, the Court held that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *390 U.S. at 384*. In *Neil*, the Court established a two-part analysis which the trial court must apply to determine the validity of a pretrial identification. *409 U.S. at 198-200*. First, the [*19] trial court must determine whether the identification procedure was unnecessarily suggestive. *Id. at 198*. Next, if the trial court determines that the identification was unnecessarily suggestive, it must then consider whether, under the totality of the circumstances, the identification procedure was nonetheless reliable. *Id. at 199*. "[A] photographic identification is admissible unless, based upon the totality of the circumstances, 'the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law.'" *State v. Hall, 976 S.W.2d 121, 153 (Tenn. 1998)* (quoting *Stovall v. Denno, 388 U.S. 293, 301-02, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)*). In Tennessee, it is unnecessary to apply the totality of the circumstances test described in *Biggers* if the trial court determines that the identification procedure was not unnecessarily suggestive. *See State v. Butler, 795 S.W.2d 680, 686 (Tenn. Crim. App. 1990)* (declining to apply the totality of the circumstances test when a lineup was not found to be unnecessarily suggestive).

At trial, Mr. Braden testified that he gave police a description of Petitioner, the hat he was wearing, and the car he was seen driving. Petitioner was identified as a suspect. Officers learned that Petitioner's mother owned a car like the one described by Mr. Braden. When confronted [*20] by officers, Petitioner's mother confirmed Petitioner was driving the car on the night of the victim's death. Mr. Braden testified at trial that he went to the police station a few days after the incident where he identified Petitioner from a photograph. The following exchange took place at trial:

> [Counsel For Defendant]: [D]id they show you one photograph or a whole bunch of photographs?
> [Mr. Braden]: A lot of photos.
> [Counsel for Defendant]: A lot of photos?
> [Mr. Braden]: Yeah.

[Counsel for Defendant]: How many photos?
[Mr. Braden]: I couldn't tell you how many. There was a stack.
[Counsel for Defendant]: All right. Now, I take it, out of those photos, you picked one of the photos, didn't you?
[Mr. Braden]: Yeah. I did.
[Counsel for Defendant]: Was there ever a live line-up where you put them behind you and you picked out live, living people? Was there anything like that?
[Mr. Braden]: He showed me the first photo and I identified him.
[Counsel for Defendant]: All right. Did they show you the first photo - -
[Mr. Braden]: He showed me several.

[Counsel for Defendant]: - - before he showed you the other photos? Do you remember? In other words, did the sheriff come up and just show and say is this the [*21] man? Is that what he did?
[Mr. Braden]: He come up and asked me, yes, is this the man who done it?
[Counsel for Defendant]: Okay. With just one photo?
[Mr. Braden]: He showed me three or four.
[Counsel for Defendant]: Was the photo you identified the first photo he showed you or the second or the third?
[Mr. Braden]: I identified the first one right off the - -
[Counsel for Defendant]: Okay. You identified the first one he showed you?
[Mr. Braden]: Yes.

Sheriff Myers testified at trial that Mr. Braden came to the office without an appointment. "He came to the sheriff's office hunting me, and he actually went inside the building, and they sent him out to the trailer [where the investigator's office was located]." When Mr. Braden came in to the investigator's office, "all of these pictures were on the desk . . . because we had to cut these pictures out [to prepare the photographic lineup]." When Mr. Braden sat down in the "metal chair that was to the right of . . . the desk[,] . . . he pointed at the picture and told me that that picture was the one that had [done] it." Sheriff Myers then "handed Mr. Braden all of the photographs and told him to make sure that he had picked out the right photograph, [*22] and Mr. Braden again identified the [petitioner]." *Adam Braseel, 2010 Tenn. Crim. App. LEXIS 784, 2010 WL 3609247, at *4*. This Court's review of the factual basis for the conviction in the opinion on direct appeal is consistent with our review of the trial transcript.

The post-conviction court's finding that Mr. Braden was shown a "single photo lineup" by the sheriff is not supported by the trial transcript. Mr. Braden's trial testimony and the trial testimony of the sheriff showed that Mr. Braden was shown more than one photograph. Petitioner's photograph was the first picture in a stack of photos that Mr. Braden saw when he showed up early at the sheriff's office and before the photos could be arranged in a photo array. Prior to that time, he had provided a description of Petitioner, his car, and the hat he was wearing on the night of the murder, enabling him to make the identification of Defendant so quickly once he was shown a photograph. Moreover, Petitioner did not present any testimony at the post-conviction hearing to contradict the facts surrounding the identification of Petitioner by Mr. Braden as presented at trial. Instead, Petitioner relied on the trial transcript introduced at the hearing as an exhibit and argument of post-conviction counsel. [*23] Accordingly, the evidence in the record preponderates against the post-conviction court's finding that Mr. Braden's identification resulted from an unnecessarily suggestive single-photo lineup.

2. Trial Counsels' Failure to File Motion to Suppress

The State insists that the post-conviction court failed to analyze the failure of trial counsel to file a motion to suppress his identification with the proper legal framework. Specifically, the State argues that any motion to suppress would have

been without basis and, as such, trial counsel cannot now be held ineffective for failing to file a motion to suppress. Petitioner maintains that trial counsel should have filed a motion to suppress prior to trial and that trial counsel was ineffective for failing to do so.

This Court has previously addressed the evidence necessary at a post-conviction hearing in order to demonstrate that counsel's failure to file a motion to suppress prejudiced the petitioner:

> It is well settled that when a [p]etitioner in post-conviction proceedings asserts that counsel rendered ineffective assistance of counsel by failing to call certain witnesses to testify, or by failing to interview certain witnesses, these witnesses should [*24] be called to testify at the post-conviction hearing; otherwise, [p]etitioner asks the [c]ourt to grant relief based upon mere speculation. *Black v. State, 794 S.W.2d 752, 757 (Tenn. 1990)*. The same standard applies when a [p]etitioner argues that counsel was constitutionally ineffective by failing to file pre-trial motions to suppress evidence. In order to show prejudice, [a] [p]etitioner must show by clear and convincing evidence that (1) a motion to suppress would have been granted and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested. *Vaughn v. State, 202 S.W.3d 106, 120 (Tenn. 2006)* (citing *Strickland, 466 U.S. at 687*). In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing.

*Terrance Cecil v. State, No. M2009-00671-CCA-R3-PC, 2011 Tenn. Crim. App. LEXIS 707, 2011 WL 4012436, at *8 (Tenn. Crim. App. Sept. 12, 2011)*, *no perm. app. filed.* Thus, "[i]f a petitioner alleges that trial counsel rendered ineffective assistance of counsel by failing to . . . file a motion to suppress[,] . . . the petitioner is generally obliged to present . . . the [evidence supporting his claim] at the post-conviction hearing in order to satisfy the *Strickland* prejudice prong." *Demarcus Sanders v. State, No. W2012-01685-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 966, 2013 WL 6021415, at *4 (Tenn. Crim. App. Nov. 8, 2013)*, *perm. app. denied* (Tenn. Mar. 17, 2014); *see also [*25] Craig Abston v. State, No. W2014-02513-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 367, 2016 WL 3007026 (Tenn. Crim. App. May 17, 2016)*, *perm. app. denied* (Tenn. Aug. 18, 2016).

In this case, the Petitioner failed to demonstrate that a motion to suppress his identification would have been successful had it been filed. The only argument in the record indicating that the indentification procedure was impermissibly suggestive is the Petitioner's own claim and post-conviction counsel's statements. Because we determined above that the identification of Petitioner by Mr. Braden was not impermissibly suggestive, we conclude there would have been little likelihood of success if trial counsel had filed a motion to suppress. Further, Petitioner admits that both Ms. Hill and Mr. Braden were able to identify him from photographs and at trial. Moreover, and significantly, neither trial counsel testified at the post-conviction hearing. Without the testimony of trial counsel, we cannot determine whether the decision was a part of trial counsels' trial strategy. This Court may not speculate about the substance of the testimony of a potential witness whose testimony was not offered at the post-conviction hearing. *Black, 794 S.W.2d at 757*. Based on the record before us, we are unable to determine that a motion to suppress would have been granted. The Petitioner [*26] has failed to show that he was prejudiced by any alleged deficiency as required by a proper *Strickland* analysis. Post-conviction counsel's argurment is all that is contained in the record, and that equates to no proof at all. The post-conviction court improperly concluded that Petitioner received ineffective assistance of counsel for trial counsels' failure to file a motion to suppress.

3. Identification of Petitioner by Ms. Hill

Next, the State argues that the post-conviction court improperly found that Ms. Hill failed to identify Petitioner from the lineup and then actually misidentified Petitioner at trial. Petitioner disagrees.

As stated previously, when this Court undertakes review of a lower court's decision on a petition for post-conviction relief, the lower court's findings of fact are given the weight of a jury verdict and are conclusive on appeal absent a finding that the evidence preponderated against the judgment. *Black, 794 S.W.2d at 755*.

With respect to Ms. Hill's identification of Petitioner prior to trial, the post-conviction court improperly found that Ms. Hill "misidentified" Petitioner both prior to trial and at trial. Again, we determine that the evidence preponderates against the findings [*27] of the post-conviction court because the trial transcript of Ms. Hill's testimony clearly demonstrates otherwise. Chief Deputy Cleek testified at trial that the first time he went to talk with her, Ms. Hill was in no position to either give a statement or look at pictures because she was unconscious. At some point after Ms. Hill was released from the hospital, she came to the sheriff's department to view the photographic lineup and "rather quickly" identified Petitioner. *Adam Clyde Braseel, 2010 Tenn. Crim. App. LEXIS 784, 2010 WL 3609247, at *4*. The testimony from Ms. Hill at trial shows that she "went to the jail" and identified Petitioner in "some pictures." At that point during the trial testimony, Ms. Hill identified Petitioner in open court as the perpetrator.

We acknowledge that post-conviction counsel also argued at the hearing that Chief Deputy Lonnie Cleek incorrectly identified Petitioner's photograph in the lineup at trial as the "third from the right" when it was allegedly the "third from the left." Petitioner took issue with the fact that trial counsel did not object during trial and did not raise this issue on appeal. However, Petitioner did not present any witnesses, including himself or either trial counsel, at the hearing to support this [*28] argument. Argument from counsel does not amount to proof. *State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003)*. Moreover, the photographic lineup does not appear in the technical record in either the post-conviction or trial transcript, so we are unable to ascertain whether any of the witnesses truly misidentified Petitioner at trial. Where the record is incomplete, an appellate court is precluded from considering the issue. *State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)*; *see also Tenn. R. App. P. 24(b)*. We determine that the evidence at the post-conviction hearing preponderates against the findings of the post-conviction court. The post-conviction court improperly granted relief by finding that trial counsel were ineffective.

4. Jury Instruction

Petitioner takes issue with trial counsels' failure to request a jury instruction regarding the reliability of eyewitness identification. The State concedes that trial counsel should have requested such an instruction. However, the State argues that the post-conviction court utilized the improper analysis of the claim and that the lack of the jury instruction was harmless. *See State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995)*.

The right to trial by jury is guaranteed by the United States and Tennessee constitutions. *U.S. Const. amend. VI*; *Tenn. Const. art. I, § 6*. Therefore, "a defendant has a right to a correct and complete charge of the law, so that [*29] 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)*). Accordingly, trial courts have a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)* (citing *State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975)*).

In *Dyle*, our supreme court held that the pattern jury

instruction on eyewitness identification used up to that point was not adequate in cases where identity of the defendant is a material issue and set forth a new, more detailed instruction to be given in those situations. *899 S.W.2d at 612*. The supreme court held that identity is a material issue "when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence." *Id. n.4*. The instruction is as follows:

> One of the issues in this case is the identification of the defendant as the person who committed the crime. The [S]tate 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' capacity and opportunity to observe the offender. This includes, among other things, the length [*30] 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'[s] 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 [S]tate 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.

Id.; *see also* 7 *T.P.I.—Crim. 42.05* (19th [*31] ed. 2015). The *Dyle* Court adopted the above-quoted identity instruction over a more expansive instruction to avoid "impermissibly comment[ing] on the evidence; thus, invading the province of the jury." *Dyle, 899 S.W.2d at 612*.

In a case so heavily dependent on the identity of the perpetrator and so lacking in physical evidence connecting Petitioner to the crime, we agree with the post-conviction court, the State and Petitioner that Petitioner's identity was a material issue at trial and that trial counsels' failure to request a jury instruction on identity was certainly deficient. The post-conviction court's order found that trial counsels' failure to request the jury instruction "precluded the appellate court to consider [sic] the issue of identity due to the waiver said actions constituted."

However, the post-conviction court did not perform the proper prejudice inquiry. In order to show prejudice at the post-conviction level, Petitioner is required to establish that there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Goad, 938 S.W.2d at 370* (quoting *Strickland, 466 U.S. at 694*). Thus the [*32] post-conviction's court's failure to perform a proper prejudice analysis results in error.

That said, we must determine whether we should remand the case to require the post-conviction court to apply the proper legal standard or whether the state of the record enables us to apply the standard and adjudicate the prejudice issue in this appeal. Petitioner did nothing to contradict the trial record's demonstration of what occurred relative to the absence of the *Dyle* instruction. He took no steps to articulate, other than through nonevidentiary argument of post-conviction counsel, how the

failure to request the instruction prejudiced Petitioner. For this reason, we will review the prejudice issue de novo.

To do so, we look to the non-exclusive list of factors promulgated by *Dyle* to assess the probable result of the jury's use of the instruction had it been given. Applying these factors, the trial record contains evidence that leads us to conclude that no probability existed that the jury would have utilized a *Dyle* instruction to refute the identification testimony provided by Ms. Hill and Mr. Braden. Although Petitioner may have been previously unknown to the witnesses, these witnesses had [*33] a substantial and prolonged opportunity to observe the offender amid adequate lighting and from close distances. The witnesses expressed certainty as to offender's identity and did so within a short time after the crimes were committed. Contrary to argument of post-conviction counsel upon which the post-conviction court apparently relied, the record does not reflect that either witness "mis-identified" or failed to identify Petitioner as the offender. The record reflects no circumstances surrounding the pretrial identifications that would derogate from those identifications or the witnesses' identifications at trial. The focus of the *Dyle* instruction is the competency of eyewitnesses, not their veracity or truthfulness. Having reviewed the facts in light of the *Dyle* factors, we hold that no probability exists that the result of the trial would have been different. Therefore, we reverse the post-conviction court's judgment on this issue.

Alibi Witnesses

In the petition for relief, Petitioner sought relief for trial counsels' failure to call certain alibi witnesses. Petitioner went on to present multiple alibi witnesses at the post-conviction hearing, but did not raise this issue on appeal. [*34] Issues raised in the pro se petition and not raised on appeal are deemed abandoned. *See Jeffrey L. Vaughn v. State, No. W2015-00921-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 278, 2016 WL 1446140, at *2 n.4 (Tenn. Crim. App. Apr. 12, 2016), perm. app. denied* (Tenn. Aug. 19, 2016); *Ronnie Jackson, Jr. v. State, No. W2008-02280-CCA-R3-PC, 2009 Tenn. Crim. App. LEXIS 893, 2009 WL 3430151, at *6 n.2 (Tenn. Crim. App. 2009), perm. app. denied* (Tenn. Apr. 16, 2010).

Conclusion

Because we have determined that the evidence preponderates against the factual findings of the post-conviction court and because Petitioner has failed to prove that he received ineffective assistance of counsel, we reverse the judgment of the post-conviction court. Petitioner's convictions are reinstated.

TIMOTHY L. EASTER, JUDGE

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