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In The
Supreme Court of the United States

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Carlos Cornwell

Petitioner,

v.

State of Tennessee

Respondent

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**On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Tennessee, Eastern Division at Knoxville**

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APPENDIX

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 Neutral
As of: September 17, 2018 8:05 PM Z

Cornwell v. State

Supreme Court of Tennessee, At Knoxville

April 18, 2018, Filed

No. E2016-00236-SC-R11-PC

Reporter

2018 Tenn. LEXIS 214 *

CARLOS CORNWELL v. STATE OF TENNESSEE

Prior History: [\[*1\]](#) Criminal Court for Knox County. No. 101725.

[Cornwell v. State, 2017 Tenn. Crim. App. LEXIS 994](#)
[\(Tenn. Crim. App., Dec. 1, 2017\)](#)

Opinion

ORDER

Upon consideration of the application for permission to appeal of Carlos Cornwell and the record before us, the application is denied.

PER CURIAM

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 Neutral
As of: September 17, 2018 8:02 PM Z

Cornwell v. State

Court of Criminal Appeals of Tennessee, At Knoxville

February 23, 2017, Session; December 1, 2017, Filed

No. E2016-00236-CCA-R3-PC

Reporter

2017 Tenn. Crim. App. LEXIS 994 *; 2017 WL 5957667

CARLOS CORNWELL v. STATE OF TENNESSEE

Subsequent History: Appeal denied by [Cornwell v. State, 2018 Tenn. LEXIS 214 \(Tenn., Apr. 18, 2018\)](#)

Prior History: [Tenn. R. App. P. 3](#) [*1] Appeal as of Right; Judgment of the Criminal Court Affirmed. Appeal from the Criminal Court for Knox County. No. 101725. Steven W. Sword, Judge.

[State v. Cornwell, 2012 Tenn. Crim. App. LEXIS 868 \(Tenn. Crim. App., Oct. 25, 2012\)](#)

Disposition: Judgment of the Criminal Court Affirmed.

Core Terms

lead counsel, co-counsel, post-conviction, misconduct, injuries, thirteenth juror, recalled, cheese, motion for a new trial, pretrial, front, grater, marks, slats, trial court, hearings, constitutional error, heat shield, trial judge, cross-examination, argues, trial proceedings, out-of-court, tire, witnesses, backed, blood, defense team, ineffective, traveling

Case Summary

Overview

HOLDINGS: [1]-Under the *Sixth Amendment*, [Tenn. Const. art. I, § 9](#), and [Tenn. Code Ann. §§ 40-30-103, 40-30-110\(f\)](#), defendant's petition for post-conviction relief was properly denied as lead counsel was not ineffective because defendant did not establish that he was prejudiced by lead counsel's failure to timely inspect defendant's car as there was no exculpatory evidence to be preserved on defendant's car; and, despite the fact that the car had been stored outside, defendant's expert accident reconstructionist was still

able to opine that the physical evidence was consistent with defendant's explanation of the incident in which the victim had been run over by defendant's car and to testify that he did not believe that the officers' opinions that the victim was struck in one direction could be proven by the evidence.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings

[HN1](#) Criminal Law & Procedure, Postconviction Proceedings

Post-conviction relief is available when a conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States. [Tenn. Code Ann. § 40-30-103](#).

Criminal Law & Procedure > Postconviction Proceedings

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Clear & Convincing Proof

[HN2](#) Criminal Law & Procedure, Postconviction Proceedings

The burden in a post-conviction proceeding is on the

petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence.
[Tenn. Code Ann. § 40-30-110\(f\)](#)

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

[HN3](#) De Novo Review, Conclusions of Law

On appeal, an appellate court is bound by the post-conviction court's findings of fact unless the appellate court concludes that the evidence in the record preponderates against those findings. Additionally, questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court. However, the appellate court reviews the post-conviction court's application of the law to its factual findings *de novo* with no presumption of correctness.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

[HN4](#) Harmless & Invited Error, Harmless Error

Some errors compromise the integrity of the judicial process itself by involving defects in the trial mechanism. Those errors are known as structural constitutional errors and they deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no such criminal punishment may be regarded as fundamentally fair. Examples of structural constitutional errors include a biased trial judge, racial discrimination in the selection of a grand jury, the complete denial of counsel, the denial of a public trial, a defective reasonable-doubt instruction, and the denial of self-representation at trial. Those errors are not amenable to harmless error review, and therefore, they require automatic reversal when they occur.

Governments > Courts > Judicial Precedent

[HN5](#) Courts, Judicial Precedent

A published opinion of an appellate court shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction. [Tenn. Sup. Ct. R. 4\(G\)\(2\)](#)

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Grounds for Disqualification & Recusal

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN6](#) Disqualification & Recusal, Grounds for Disqualification & Recusal

The right to a fair trial before an impartial judge is a fundamental constitutional right. However, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Rather, those questions are answered by common law, statute, or the professional standards of the bench and bar. The floor established by the Due Process Clause simply requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case. A trial judge's misconduct amounts to a structural constitutional error when the misconduct affects the judge's impartiality. Put another way, a trial judge's misconduct constitutes a structural error when that conduct pierces the veil of judicial impartiality.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Grounds for

Disqualification & Recusal

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN7 Disqualification & Recusal, Grounds for Disqualification & Recusal

The denial of a petitioner's right to an impartial judge is a constitutional error which affects the integrity of the judicial process with a new trial being the only remedy.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Grounds for Disqualification & Recusal

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN8 Disqualification & Recusal, Grounds for Disqualification & Recusal

The mere appearance of bias is not sufficient to establish a structural constitutional error. The Due Process Clause requires a trial judge with no actual bias against the defendant.

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Appeals > Standards of

Review

HN9 Postconviction Proceedings, Findings of Fact & Conclusions of Law

Factual issues are to be resolved by the post-conviction court as are questions concerning the credibility of witnesses and the weight and value to be given to their testimony. An appellate court is constrained in its review of those issues and is bound by the post-conviction court's findings of fact unless it concludes that the evidence in the record preponderates against those findings.

Evidence > Weight & Sufficiency

Governments > Courts > Judges

HN10 Evidence, Weight & Sufficiency

Tenn. R. Crim. P. 33(d) is the modern equivalent of the thirteenth juror rule and imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Governments > Courts > Judges

Criminal Law & Procedure > Trials > Verdicts

Criminal Law & Procedure > Appeals > Standards of Review

HN11 Postconviction Proceedings, Motions for New Trial

An appellate court may presume that the trial court approved the verdict as the thirteenth juror when it has overruled a motion for new trial without comment. It is only when the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or evidence indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, that an appellate court may reverse the trial court's judgment on the basis that the trial court failed to carry out its duties

as the thirteenth juror.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Constitutional Right

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

HN12 **Criminal Process, Assistance of Counsel**

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN13 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

When a claim of ineffective assistance of counsel is made under the *Sixth Amendment to the United States Constitution*, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. In reviewing a trial counsel's conduct, an appellate court makes every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN14 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In an ineffective assistance of counsel claim, deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness, despite the fact that reviewing courts

must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The fact that a particular strategy or tactical decision failed does not by itself establish deficiency.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN15 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In an ineffective assistance of counsel claim, prejudice requires proof of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN16 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Because a petitioner must establish both prongs of the ineffective assistance of counsel test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Constitutional Right

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

HN17 **Criminal Process, Assistance of Counsel**

The Strickland ineffective assistance of counsel standard has been applied to the right to counsel under [Tenn. Const. art. I, § 9.](#)

Evidence > ... > Testimony > Expert Witnesses > Credibility of Witnesses

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

Evidence > Admissibility > Expert Witnesses

[HN18](#) [blue icon] Expert Witnesses, Credibility of Witnesses

While trial courts act as gatekeepers when it comes to the admissibility of expert testimony, that role is not unconstrained. When making an admissibility determination, trial courts are not empowered to choose between legitimate competing expert theories by excluding the lesser of the two. To the contrary, that task must be left to the trier of fact. The party proffering expert testimony need not establish that the expert testimony is correct, only that the expert testimony rests upon good grounds. Where such a foundation exists, even if the trial court is of the view that there are better grounds for an alternative conclusion, the proffered expert testimony should be tested by the adversary process - competing expert testimony and active cross-examination - rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Evidence

Evidence > Admissibility > Expert Witnesses

[HN19](#) [blue icon] Preliminary Hearings, Evidence

While pretrial McDaniel hearings regarding expert testimony are preferable, it is not erroneous for a trial court to conduct a McDaniel hearing during a trial.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

[HN20](#) [blue icon] Effective Assistance of Counsel, Trials

For purposes of an ineffective assistance of counsel

claim, the method by which a witness is examined is a strategic and tactical decision of trial counsel which is not to be measured by hindsight. Counsel must make quick and difficult decisions respecting strategy and tactics which appear proper at the time but which, later, may appear to others, or even to the trial lawyer himself, to have been ill-considered.

Counsel: Stephen Ross Johnson, Knoxville, Tennessee (at hearing and on appeal); Chelsea Caitlin Moore (at hearing) and Christy Ann Smith (on appeal), Student Attorneys, University of Tennessee College of Law Innocence and Wrongful Convictions Clinic, for the appellant, Carlos Cornwell.

Herbert H. Slatery III, Attorney General and Reporter; Lacy Wilber, Senior Counsel; Charme Allen, District Attorney General; and Ta Kisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

Judges: D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Opinion by: D. KELLY THOMAS, JR.

Opinion

The Petitioner, Carlos Cornwell, appeals as of right from the Knox County Criminal Court's denial of his petition for post-conviction relief. The Petitioner contends (1) that he was denied his right to a competent and impartial trial judge, "resulting in structural constitutional error," due to the presiding trial judge's out-of-court misconduct during the [*2] course of the Petitioner's trial proceedings; (2) that the trial judge failed to perform his role as the thirteenth juror; (3) that the Petitioner received ineffective assistance of counsel because trial counsel failed to inspect the Petitioner's vehicle in a timely manner and failed to properly challenge evidence that was not properly preserved by the State; and (4) that the Petitioner received ineffective assistance of trial counsel because trial counsel failed to "properly investigate, challenge, and counter" the testimony of one of the State's expert witnesses and failed to properly address that witness's having questioned trial counsel's credibility during cross-examination. Following our review, we affirm the judgment of the post-conviction court.

OPINION

FACTUAL BACKGROUND

I. Procedural History

The Petitioner was indicted on one count of first degree premeditated murder for the March 2008 death of his wife, Leoned Cornwell. [State v. Carlos Radale Cornwell, No. E2011-00248-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *1-2 \(Tenn. Crim. App. Oct. 25, 2012\)](#), perm. app. denied (Tenn. Mar. 5, 2013). Following a jury trial in May 2009, the Petitioner was convicted of the lesser-included offense of second degree murder and sentenced to thirty-five years' imprisonment. [*3] [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *1](#).

This court affirmed the Petitioner's conviction and sentence on direct appeal. [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *1](#). On March 5, 2013, our supreme court declined to review that decision. On June 7, 2013, the Petitioner filed a timely pro se petition for post-conviction relief. Counsel was appointed to represent the Petitioner in this matter and an amended petition and memorandum of law in support of the amended petition were subsequently filed on the Petitioner's behalf. Following a lengthy post-conviction hearing, the post-conviction court entered a written order denying the petition on January 22, 2016.

II. Trial Facts

At approximately 4:30 a.m. on March 5, 2008, two of the Petitioner's neighbors were awakened by the sound of the Petitioner's "screaming at the victim" and "calling her profane names." [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *2](#). One of the neighbors heard the Petitioner say to the victim, "Stupid, [motherf---r], you know that I'll kill you." [Id.](#) The Petitioner was then seen at his workplace around 5:00 a.m. [Id.](#) However, the Petitioner left work between 5:30 and 5:45 a.m., shortly after receiving a phone call. [Id.](#) Another of the Petitioner's neighbors saw the Petitioner and the victim walking toward their car and "bickering" at approximately [*4] 6:00 a.m. [Id.](#)

Titonia Sawyer was using the ATM at an ORNL Federal Credit Union branch just before 6:30 a.m. when the Petitioner and the victim's car pulled up behind her.

[Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *2](#). Ms. Sawyer saw the victim exit the passenger side of the vehicle and look "down into the car." [Id.](#) Ms. Sawyer testified that the victim did not seem agitated and that she did not hear the Petitioner and the victim arguing. [Id.](#) When Ms. Sawyer looked back at the car a second time, the victim "had both passenger side doors open." [Id.](#) Ms. Sawyer drove away after receiving her ATM receipt and noticed that the Petitioner's vehicle had not moved, "but she could no longer see the [victim]." [Id.](#)

What happened next was not captured on the credit union's surveillance cameras, and no one witnessed it. The Petitioner was then seen walking down Magnolia Avenue "screaming hysterically for someone to call [911]" because "someone had been hit." [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *3](#). Gail and Devery Cox stopped to assist the Petitioner. [Id.](#) They called 911 and "saw the victim on the ground behind" the Petitioner's car "[a]s soon as . . . [they] entered the parking lot" of the credit union. [Id.](#) The victim's eyes were open and she was still breathing when Mr. and Ms. [*5] Cox found her, but the victim "died before emergency personnel arrived on the scene." [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *3-4](#).

The Petitioner was "frantically running about," "hysterical," and saying, "Oh my God, oh my God,' 'I need help,' 'What have I done?,' and 'What am I going to do?'" [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *3-4](#). The Petitioner told Ms. Cox that "he and the victim were arguing when the victim" got out of the car and "immediately" started walking. [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *3](#). According to Ms. Cox, the Petitioner stated that "he shifted the car into reverse and began backing up without realizing that he ran over the victim." [Id.](#) The Petitioner told Ms. Cox that he got out of the car and saw that the victim was underneath it. [Id.](#) So, the Petitioner stated, "he got back into the vehicle in order to move it off of the victim's body." [Id.](#)

The Petitioner was interviewed by Detective Steve Still of the Knoxville Police Department (KPD). [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *4-5](#). The Petitioner told Detective Still that "he thought he and the victim might be splitting up." [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *5](#). The Petitioner explained that he and the victim went to the ATM that morning to get cash for a car payment. [Id.](#) The Petitioner then told Detective Still the following:

[T]he victim cursed [the Petitioner], exited their vehicle, retrieved her umbrella [*6] from the back of the car, and began walking toward Magnolia [Avenue]. [The Petitioner] backed up the vehicle to see where the victim was going, then accidentally ran over her. When [the Petitioner] realized he struck the victim with the car, he pulled forward to get the car off her. [The Petitioner] stated that he did not mean to hit her and that it was not intentional.

Id.

Detective Still, who had "previously served as a fatal accident investigator," testified that what he "witnessed at the scene indicated that the victim's body was dragged in the opposite direction of what [the Petitioner] told him" and noted that the Petitioner "could offer no explanation for the blood on the bottom front of the car." [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *4-5](#). Detective Still also noted that there was no damage to the hood or trunk of the Petitioner's car. [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *4](#). That indicated to Detective Still that "the victim's center of gravity was below the hood or trunk line of the car." [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *5](#). Put another way, Detective Still opined that "the victim was already on the ground when [the Petitioner] ran over her." Id.

In addition to Detective Still, KPD accident reconstructionists Officers Ron Trentham and L.B. Steele testified at trial. [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *7-9](#). Officer Trentham described [*7] his observations of the scene as follows:

[Officer Trentham] noted several drag marks from the edge of the roadway leading toward the final resting spot of the victim and the automobile. He also observed the presence of red drag marks that were consistent with blood. He saw blood drops at the edge of the roadway and blood smear from the sidewalk onto the asphalt area of the parking lot. Officer Trentham found blue drag marks that were consistent with the victim's denim jacket. All of the marks he found started at the edge of the road and led up to the final point of rest of the victim's body and [the Petitioner's] car. Officer Trentham located a tan or brown scrape mark that was consistent with the victim's skin and the injury pattern the medical examiner found on the victim's lower body. He observed two small black marks that were consistent with the victim's shoes. Again, all of the

lines Officer Trentham observed led from the street toward the credit union to the point where the victim's body came to rest. He was able to determine the direction of movement because the marks were darker at the initial points of impact and faded as they moved forward.

[2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *8](#).

In observing the Petitioner's [*8] car, Officer Trentham opined that "the victim's body was struck from the front as the vehicle moved in a forward direction," in part, because he "determined that something had disturbed the dirt around the front license plate holder and the lower part of the front bumper." [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *8](#). Underneath the car, there was evidence "that something had cleaned off parts of the underside" and what appeared to be blood stains. [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *7](#). "The blood and 'brush off' were located on the front passenger side of the automobile." Id. Subsequent forensic testing confirmed the presence of the victim's blood on "the metal sheet, the front guard, and the tubing guard" underneath the car. [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *9](#).

Officer Trentham testified that the blood stains ran "the length of the vehicle on the passenger side leading to the rear passenger side tire." [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *8](#). In addition to blood found on the underside of the car, Officer Trentham observed "blue lines that were consistent with the victim's denim jacket" "on the frame of the car next to the rear tire." Id. Officer Trentham observed "[g]rease marks and dirt on the victim's jacket [that] were consistent with her clothing coming into contact with the right front wheel area" of the Petitioner's car. Id.

[*9] Based upon the foregoing, Officer Trentham opined that "the victim was lying on the ground bleeding at the curb line" when she was struck by the Petitioner's car. [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *9](#). Officer Trentham further opined that "from the point where the victim was struck[] she was then pushed by the vehicle." Id. Officer Trentham noted that the "victim's skin was transferred to the pavement as a result of her jogging pants coming down, exposing her hip area to the concrete, and leaving marks." Id. Additionally, the blood spatter evidence at the scene suggested that "the general direction of motion of the victim's body was . . . toward the credit union from the street." [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *7](#).

Doctor Darinka Mileusnic-Polchan performed an autopsy of the victim's body and testified at trial as an expert in forensic pathology. [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *10](#). Dr. Mileusnic-Polchan opined that the victim's manner of death was homicide. *Id.* Dr. Mileusnic-Polchan's observations and opinions regarding the victim's death were described in this court's direct appeal opinion as follows:

Dr. Mileusnic-Polchan documented sixty separate injuries. The victim suffered several head and neck injuries, including linear marks on the chin consistent with tire marks. An abrasion by the right eyebrow displayed directionality, indicating that the body was moving against the surface. Dr. Mileusnic-Polchan found blood stains and hair attached to the shoulder of [the] victim's jacket, most likely caused by forced bending of the head over the shoulder.

Dr. Mileusnic Polchan noted that the victim's right clavicle was broken, and the neck and spine junction was fractured. The fracture was caused by extraordinary force that separated the head from the neck. The tire [*10] marks on the victim's neck indicated that the vehicle's rear tire ran over it. This injury was one of the primary causes of the victim's death. The victim also had linear abrasions under and on her right breast. Dr. Mileusnic-Polchan described the injury to the victim's breast area as indicating movement of the victim in a particular direction, and attributed the injury to contact with the front bumper of [the Petitioner's] vehicle. She analyzed a bruise pattern and a burn on the victim's body and matched the injuries to a hot part from underneath the car, perhaps part of the exhaust or catalytic converter.

The victim's abdomen sustained a great deal of injury, including "abrasions and stretch abrasions." Dr. Mileusnic-Polchan identified a tire track along the victim's abdominal abrasions. She stated that the tire marks could only have been made by the front tires because the rear tires were bald and could not have left those particular indentations. Dr. Mileusnic-Polchan pointed out a large burn that was over four inches long by two inches across. The skin from that burn was retrieved from underneath the vehicle. She commented on an extensive deep bruise on the right thigh that could [*11] only be consistent with the tire crossing the victim's thigh. The victim's pelvis was completely crushed, including the sacrum.

Dr. Mileusnic-Polchan noted that the victim's back was relatively clear of injury, which indicated that she was facing the vehicle with clothing covering her back. The victim did, however, receive a road rash injury to her back and buttocks. In the sacral area, some of the victim's skin was missing. Dr. Mileusnic-Polchan explained that the pattern of the injury established the direction of movement of the victim's body.

As part of her investigation, Dr. Mileusnic-Polchan examined [the Petitioner's] vehicle at the impound lot. She compared the victim's injuries with the damage to and evidence on [the Petitioner's] vehicle. Dr. Mileusnic-Polchan found that the evidence and victim's injuries supported the conclusion that the victim was struck by the front of the vehicle.

[Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *10-11](#).

Doctor Gregory James Davis testified at trial on the Petitioner's behalf as an expert in forensic pathology. [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *11](#). Dr. Davis explained, in reference to Dr. Mileusnic-Polchan's testimony, "that the term 'consistent with' merely implie[d] that physical evidence could support a particular scenario; the [*12] term itself [did] not mean that the scenario or story [was] true." *Id.* The remainder of Dr. Davis's testimony was described in this court's direct appeal opinion as follows:

Based on his review of the evidence, Dr. Davis could not offer an opinion as to whether [the Petitioner] intended to inflict harm on the victim, nor could he confirm that the victim's injuries were unidirectional. The injuries were consistent with being unidirectional but were not indicative or diagnostic of them being unidirectional. Dr. Davis disputed Dr. Mileusnic-Polchan's findings that that injury on the victim's face was consistent with being run over by the tire of the car. If her face had been run over by a car, he would have expected to find more fractures to the jaw and skull. Dr. Davis believed that the victim's death should have been classified as "undetermined" or "not determined." His view of the physical evidence was that the evidence was consistent with [the Petitioner's] backing over the victim. The injuries sustained by the victim, specifically the wrist fracture and the abrasions on both hands, were consistent with her walking away from the vehicle, falling, and being struck by [the Petitioner's] [*13] vehicle.

Id.

James Alan Parham testified on the Petitioner's behalf as an expert in accident reconstruction. [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *11](#).

"Mr. Parham testified that his examination of [the Petitioner's] car was limited because the car had been stored outdoors exposed to weather." [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *12](#). Mr. Parham explained that "the police department did not sufficiently document the vehicle in order for him to determine the presence of dirt rub on the trunk, hood, or bumpers of [the Petitioner's] vehicle." Id. Mr. Parham did not believe that "the photograph of the front license plate . . . [was] conclusive of dirt rub or interaction with a person." Id. Likewise, Mr. Parham "did not find dirt rub documented anywhere on the topside of the vehicle." Id.

"Mr. Parham generally agreed with many of Officers Trentham's and Steele's findings." [Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *11](#). However, despite the fact that the car had not been properly preserved, Mr. Parham testified that he "did not believe that the officers' opinions that the victim was struck in one direction could be proven by the evidence." [2012 Tenn. Crim. App. LEXIS 868, \[WL\] at *12](#). Instead, Mr. Parham opined "that the physical evidence was consistent with [the Petitioner's] explanation of the incident." Id.

III. Post-Conviction Hearing

A. Former Judge Richard [*14] R. Baumgartner

Former Judge Richard R. Baumgartner presided over the Petitioner's trial court proceedings. During the time that the Petitioner's case was pending in the trial court, Judge Baumgartner "was taking opiate pain killers." According to the subsequent investigation, Judge Baumgartner began getting multiple prescriptions for these narcotics from multiple doctors in 2008. In 2009, Judge Baumgartner approached Deena Castleman, a former offender in the Knox County Drug Court program that Judge Baumgartner oversaw, and asked her to "procure hydrocodone for him." [United States v. Baumgartner, 581 Fed. App'x. 522, 525 \(6th Cir. 2014\)](#).

From that point, Judge Baumgartner regularly gave Ms. Castleman "money to procure pills for him" and even "bought her a cellphone to facilitate the transactions." [Baumgartner, 581 Fed. App'x. at 525](#). Eventually, Judge

Baumgartner and Ms. Castleman began "a sexual relationship." Id. Ms. Castleman revealed the identities of her suppliers to Judge Baumgartner and introduced him to one of the suppliers, whom Judge Baumgartner "began dealing [with] directly." Id. Until his arrest in 2011, Judge Baumgartner also attempted to intervene on Ms. Castleman's behalf with other judges, a nonprofit housing director, and a prosecutor. [Id. at 525-26](#).

The Petitioner's lead trial counsel [*15] testified at the post-conviction hearing that he was the elected District Public Defender for the Sixth Judicial District. Lead counsel further testified that as the District Public Defender, he regularly appeared before Judge Baumgartner. Initially, lead counsel "enjoy[ed] trying cases in front of" Judge Baumgartner and thought Judge Baumgartner "was a very good judge" who "wanted to be challenged intellectually" by novel legal issues.

However, lead counsel noticed a change in Judge Baumgartner's demeanor in 2008 and 2009. Lead counsel testified that Judge Baumgartner became "aggressive," "snarky," "disrespectful," and "snikey." According to lead counsel, Judge Baumgartner started making "unprofessional" personal comments about lawyers in his courtroom. Lead counsel believed that Judge Baumgartner's behavior was directed mostly at defense counsel and that "the [S]tate's side got the benefit of the doubt." Lead counsel candidly admitted that he "still harbor[ed] a good bit of hostility toward [Judge Baumgartner] over the way he changed and the way he treated" the defense bar.

Lead counsel noted that the Petitioner's case was tried in May 2009. Lead counsel testified that during the pretrial [*16] phase, he thought Judge Baumgartner had trouble "manag[ing] the lawsuit." Specifically, lead counsel complained that he "couldn't get [Judge Baumgartner] to schedule [and hold] hearings." Lead counsel further testified that Judge Baumgartner could not "recall from one hearing to the next . . . what [they] were there for and . . . what had happened at the last hearing." Lead counsel also stated that Judge Baumgartner's rulings before and during the trial, in his opinion, "didn't make any sense."

Lead counsel testified that Judge Baumgartner's condition appeared to be worse during the hearings on the Petitioner's motion for new trial. Specifically, lead counsel recalled that his impression from the last motion for new trial hearing was that Judge Baumgartner "was paying no attention . . . to what was going on" and was

"[v]ery" confused.

However, lead counsel admitted that he could not recall anything during the proceedings in the Petitioner's case that caused him to think that Judge Baumgartner was "under the influence of something." For example, lead counsel did not recall Judge Baumgartner ever slurring his speech, laying his head down, closing his eyes, falling asleep, or appearing [*17] "to lose interest." Lead counsel also admitted that in an interview with the Knoxville News-Sentinel in February 2011, he stated that he thought the "fallout" from Judge Baumgartner's misconduct and subsequent arrest would be "minimal."

Co-counsel testified that he had been the District Public Defender's Office's supervisor for Judge Baumgartner's courtroom and that he was in Judge Baumgartner's courtroom "every day." Initially, co-counsel thought that Judge Baumgartner was "highly analytical," "very intelligent," "fair to both sides," and "kept good control of his courtroom." Over time, however, co-counsel thought "Judge Baumgartner seemed to be less happy, less attentive, more prone to anger, [and] certainly a lot less patient." Co-counsel noted that Judge Baumgartner's irritation "was directed at . . . members of the bar, . . . his own court officer[,] and witnesses."

Other than Judge Baumgartner's general irritation, co-counsel did not recall "anything that [Judge Baumgartner] did in the courtroom that would indicate that he was under the influence during [the Petitioner's] trial." Co-counsel also could not "point to anything about Judge Baumgartner's behavior specific to this case [*18] that . . . would indicate that he wasn't paying attention." Specifically, co-counsel could not recall ever seeing Judge Baumgartner with his head down or sleeping during the proceedings.

Co-counsel did recall that at the last hearing on the Petitioner's motion for new trial, Judge Baumgartner was "particularly distracted" and "appeared not to be focused . . . at all." Co-counsel testified that this was the only day of the proceedings when he thought "[s]omething was wrong" with Judge Baumgartner. Co-counsel noted that after the hearing, Judge Baumgartner entered a short written order denying the Petitioner's motion for new trial stating that "[t]he verdict of the jury [was] specifically approved by the court."

Walter Davis testified that he was an investigator at the District Public Defender's Office and that at the time of the Petitioner's trial, he had been recently hired as a legal assistant to lead counsel. Mr. Davis worked with lead counsel on the Petitioner's case. Mr. Davis testified

that he thought Judge Baumgartner "appeared like he was bored and he wasn't paying attention" during the Petitioner's trial. Mr. Davis further testified that he "noticed several times" that Judge [*19] Baumgartner would "have his head in his hand[s]," but he was unsure if Judge Baumgartner was asleep during those times. Mr. Davis also testified that Judge Baumgartner "seemed really confused" at the last motion for new trial hearing and that lead counsel and co-counsel were "concerned" about Judge Baumgartner after the hearing.

The Petitioner testified that he saw Judge Baumgartner with his eyes closed and asleep on "a few occasion[s]" during his trial. However, the Petitioner admitted that he never told lead counsel or co-counsel about these alleged incidents. The Petitioner also testified that during one of the motion for new trial hearings, he saw Judge Baumgartner with his eyes closed and "a stupid grin on his face." The Petitioner claimed that he recognized the look on Judge Baumgartner's face from his personal experience of "get[ting] high." However, the Petitioner admitted that he did not think that Judge Baumgartner was intoxicated at the hearing. The Petitioner only came to that conclusion after reading news reports about Judge Baumgartner's misconduct. The Petitioner also recalled that Judge Baumgartner seemed "confused and shaky" at the last motion for new trial hearing. [*20]

B. Inspection of the Petitioner's vehicle and alleged Ferguson violation

Lead counsel testified that his office was appointed to represent the Petitioner shortly after the Petitioner was charged. However, lead counsel testified that he waited to inspect the Petitioner's vehicle until after he had received funding for an expert in accident reconstruction. Upon inspecting the vehicle, lead counsel learned that "[i]t had been stored outside at the impound lot" and was exposed to the elements.

Lead counsel recalled that his expert, Mr. Parham, told him that "the weather and elements had affected [the car] to the point where . . . there was really nothing [they] could do to determine what the condition of the vehicle was at the time" of the incident. Contrary to the trial record and this court's opinion on direct appeal, lead counsel recalled that Mr. Parham "was unable to render an opinion" on the direction the car was traveling "based on the condition of the car at the time he inspected it."

As a result of his discovery that the Petitioner's car had been stored outside, lead counsel filed a motion based on State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), seeking to have the indictment against the Petitioner dismissed. Lead counsel admitted [*21] that dismissal was the only remedy he sought in his Ferguson motion. Lead counsel testified that the decision not to seek other remedies in his Ferguson motion, such as a limiting jury instruction or suppression of any evidence regarding the "dirt rub" on the front of the vehicle, was not a tactical decision.

According to lead counsel, part of the reason he only sought a dismissal of the indictment was because he was frustrated that he "was having trouble getting [the Ferguson motion] heard." Lead counsel explained that Judge Baumgartner unexpectedly rescheduled the hearing "a couple of different" times. Lead counsel further explained that he got "the impression that [Judge Baumgartner] had prejudged the issue" when the hearing was finally held.

However, the trial record showed that lead counsel's Ferguson motion was filed on March 17, 2009, and the trial court held a hearing regarding the motion on March 27, 2009. The trial court denied the motion, concluding that there was not a Ferguson violation because the underside of the vehicle had been preserved and there were photographs of the alleged dirt rub.

Lead counsel raised the Ferguson issue again at a hearing the Friday before the [*22] Petitioner's trial began. Specifically, lead counsel asked the trial court "to consider the other remedies [available for a Ferguson violation], particularly [a] jury instruction."¹ However, the trial court reiterated that it denied the motion because it did not believe there had been a Ferguson violation. Lead counsel testified that he did not renew his request for a Ferguson jury instruction at the end of the Petitioner's trial.

C. Dr. Mileusnic-Polchan's testimony

Lead counsel testified that after he received Dr. Mileusnic-Polchan's autopsy report, he retained Doctor Randall Pedigo as a consulting expert and sent Dr. Pedigo the report. Lead counsel explained that Dr.

Pedigo was the former Knox County Medical Examiner, but that Dr. Pedigo had lost his medical license due to "some criminal convictions."² Dr. Pedigo arranged a meeting between the Petitioner's defense team and Dr. Mileusnic-Polchan at her office to discuss the autopsy report. Lead counsel, co-counsel, Mr. Davis, and Dr. Pedigo³ were all present at the meeting with Dr. Mileusnic-Polchan.

Lead counsel testified that during the meeting, he asked Dr. Mileusnic-Polchan to explain "the injuries indicated in the autopsy" [*23] report and the correlating photographs from the autopsy. Near the end of the meeting, lead counsel asked Dr. Mileusnic-Polchan to explain a pattern of injuries on the victim's abdomen. Lead counsel recalled that Dr. Mileusnic-Polchan explained "that there was an item underneath the car[, the heat shield,] that had slats on it" that "were angled." Dr. Mileusnic-Polchan further explained that "as the car traveled over the body it was . . . like a cheese grater in that those slats rubbed against . . . the skin and caused this pattern injury."

Lead counsel recalled that as Dr. Mileusnic-Polchan was explaining this, he noticed co-counsel looking through a binder of photographs of the Petitioner's car. According to lead counsel, co-counsel then confronted Dr. Mileusnic-Polchan by stating that "the car would have had to have been backing over" the victim "in order for that cheese grater effect to have left that pattern injury on her body." Lead counsel recalled that Dr. Mileusnic-Polchan "stopped what she was saying" and there was an "uncomfortable pause." According to lead counsel, Dr. Mileusnic-Polchan then stated that "it would depend on which angle the slats . . . were running, whether [*24] they were running backwards or forwards," and that she would need to look at the car even though co-counsel confronted Dr. Mileusnic-Polchan with three photographs he thought showed that "those slats [ran] towards the back of the car."

Lead counsel testified that the defense team left the meeting with Dr. Mileusnic-Polchan and "celebrated" because they were all under the impression that her description of the "cheese grater effect" had "confirmed what [the Petitioner] said happened." Lead counsel

¹ This court's opinion on direct appeal incorrectly states that lead counsel did not request any Ferguson remedies other than dismissal of the indictment. Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *14.

² In the 1990s, Dr. Pedigo pled guilty "to multiple counts of illegal dispensing of a controlled substance and sexual battery." Pedigo v. UNUM Life Ins. Co. of Am., 145 F.3d 804, 806 n.1 (6th Cir. 1998).

³ Dr. Pedigo did not testify at the post-conviction hearing.

admitted that Dr. Mileusnic-Polchan did not say that the Petitioner's car had backed over the victim. However, lead counsel reiterated that by "the way [Dr. Mileusnic-Polchan] was describing the cheese grater effect, there was no doubt in anyone's mind she was describing the car going backwards."

Co-counsel recalled that going into the meeting with Dr. Mileusnic-Polchan, the defense team was not sure what had caused the pattern injury to the victim's abdomen but that the "heat shield was already a suspect," and they wanted to ask Dr. Mileusnic-Polchan about the injury. According to co-counsel, Dr. Mileusnic-Polchan "related those injuries directly to" the slats on the heat shield, "indicating [*25] that as the vehicle traveled over the body, that would be the . . . type of injuries she would expect to see from that shape of an object."

Co-counsel explained that he was "a car guy" and that he was confident the slats on the heat shield "were bent toward[s] the back" of the Petitioner's car. Contrary to lead counsel's recollection, co-counsel recalled that he "was just watching" as lead counsel questioned Dr. Mileusnic-Polchan at the meeting. Co-counsel testified that he thought Dr. Mileusnic-Polchan "was saying that she believed that based on [the victim's abdominal injuries], that the vehicle was traveling backwards."

Co-counsel further recalled that he "explained to" lead counsel "what [he] thought [he] was hearing" about the direction of the slats while Dr. Mileusnic-Polchan was out of the room. According to co-counsel, lead counsel then asked Dr. Mileusnic-Polchan about the heat shield again and Dr. Mileusnic-Polchan "maintained . . . [her] earlier statement . . . that the vehicle was traveling . . . in a reverse manner." Co-counsel testified that he thought Dr. Mileusnic-Polchan started to "get a little concerned about . . . the level of [their] interest in those photographs [*26] and what those [injuries] meant." So, co-counsel believed that Dr. Mileusnic-Polchan "reserved a final opinion on the subject until she had had an opportunity to look at that car."⁴

Mr. Davis recalled that co-counsel told Dr. Mileusnic-Polchan during the meeting that if the injuries to the victim's abdomen had been caused by a "cheese grater effect," it supported the Petitioner's version of events.

Mr. Davis testified that Dr. Mileusnic-Polchan "sort of became defensive" and disagreed with co-counsel's assertion. According to Mr. Davis, co-counsel then showed Dr. Mileusnic-Polchan a picture of the heat shield and "she said she would have to go back out to the scene to look at it."

Despite having the autopsy report and having met with Dr. Mileusnic-Polchan, lead counsel claimed that he "didn't really know what" opinions she would offer at trial. Lead counsel explained that the autopsy report merely "describe[d] the injuries" and that Dr. Mileusnic-Polchan was "very careful" when interviewed "not to volunteer anything." According to lead counsel, Dr. Mileusnic-Polchan would only provide "answers to [his] specific questions" and did not provide any information about "what opinion [she was] [*27] going to offer as an expert." However, lead counsel admitted on cross-examination that he asked for a continuance to retain an expert in forensic pathology after the meeting with Dr. Mileusnic-Polchan because he had learned that she would opine that all of the victim's injuries were "unidirectional" and that her testimony would be consistent with the State's theory of the case.

Nonetheless, lead counsel filed a motion for a hearing pursuant to [McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257 \(Tenn. 1997\)](#). Lead counsel explained that he filed the motion in order to learn at the hearing what Dr. Mileusnic-Polchan would testify to at trial and to examine "whether there [was] science to support [her] opinion[s]." Lead counsel admitted that he did not request the hearing to challenge Dr. Mileusnic-Polchan's qualifications, but rather to challenge her opinions that the victim's death was a homicide and that the victim's injuries were "unidirectional."

Lead counsel testified that he did not attach a "countervailing expert opinion" to his motion because he "[d]idn't think to do it." Lead counsel claimed that the prosecutor and Judge Baumgartner kept postponing the hearing and that they "never got around to it" prior to trial. Co-counsel also testified [*28] that it was "hard to get . . . a full-blown, meaningful [McDaniel] hearing out of Judge Baumgartner" and that he felt "[u]nprepared" going into trial with respect to Dr. Mileusnic-Polchan's testimony. Instead, Judge Baumgartner agreed to hold a jury-out hearing prior to Dr. Mileusnic-Polchan's testimony.

Co-counsel testified that the defense team "agonized over how to use [the] information [from their meeting with Dr. Mileusnic-Polchan] and whether it was going to

⁴ Co-counsel incorrectly recalled the defense team's viewing the car with Dr. Mileusnic-Polchan. It is clear from the trial court record and the post-conviction hearing that a second meeting between Dr. Mileusnic-Polchan and the defense team never occurred.

hold up in trial." Co-counsel further testified that the defense team was aware of how they "might suffer if . . . [they had] misinterpreted [the meeting] or if [Dr. Mileusnic-Polchan] changed her testimony." Specifically, co-counsel worried that they had misinterpreted what Dr. Mileusnic-Polchan had told them during the meeting. Nevertheless, the defense team prepared to cross-examine her about the meeting.

During his opening statement, lead counsel raised the defense team's meeting with Dr. Mileusnic-Polchan as follows:

And then you're going to hear from Dr. Darinka Mileusnic[-Polchan]. Dr. Darinka Mileusnic[-Polchan] is the medical examiner here in town, and she's going to tell you two things. She's going to tell you she [*29] classified this, the manner of death here is homicide, and she's going to tell you that all the injuries that [the victim] sustained were unidirectional. They were caused -- they were inflicted in one direction.

When I went to interview Dr. Mileusnic[-Polchan] to get ready for this trial, you saw a picture of [the victim], the stomach, the open torso of [the victim], and you saw a black mark that runs up her side that almost looks like a ladder, two brown marks with connecting slats, and when I was talking to Dr. Mileusnic[-Polchan], I asked her, I said, "What would have caused that injury? What is that injury?" And, very frankly, she told me. She said, "Well, that's pretty easy. There's a heat shield underneath that car . . . If you'll look at that heat shield real carefully," she said, "that heat shield has slats and they're angled," and she said, "you know, an analogy would be a cheese grater. You know how a cheese grater has slats, and when you drag it over the cheese, it cuts the cheese. That's what made that mark on her body. As it drug over her body, it made those slashing marks."

[Co-counsel] was there for that interview with me, and [co-counsel] says, "But, Doctor, that cheese [*30] grater, that heat shield slants towards the back of the car," and she says, "Well, I'd have to reorient myself on that piece," and he had a picture with him, and he showed it to her, and he said, "The slants move in an angle backwards. If the car went over her forward, by the cheese grater analogy, it wouldn't leave any mark on her at all. It would go over her without leaving any mark. The car would have to go backward in order for that cheese grater effect to happen." And she said,

"Well, I'll have to check my orientation on that." So we'll hear from Dr. Mileusnic[-Polchan] this week. We'll ask her about her orientation on that cheese grater analogy, and it will be interesting to see whether Dr. Mileusnic[-Polchan] has changed her opinion about whether or not that cheese grater heat shield effect could only have occurred on her as the car was backing up toward Magnolia Avenue just precisely the way [the Petitioner] said the accident occurred.

Prior to Dr. Mileusnic-Polchan's testimony, the trial court held a jury-out McDaniel hearing at which Dr. Mileusnic-Polchan and Dr. Davis testified. Lead counsel claimed that Dr. Mileusnic-Polchan offered twenty-six opinions during the jury-out [*31] hearing that he was hearing "for the first time." Co-counsel testified that he believed they did not hear all of the opinions Dr. Mileusnic-Polchan would ultimately testify about in front of the jury during the McDaniel hearing. Lead counsel claimed that the jury was "immediately" brought back into the courtroom after the jury-out hearing.

Lead counsel further claimed that he was unable to concentrate on Dr. Mileusnic-Polchan's testimony and was hesitant to raise objections because he was overwhelmed by what he had heard during the jury-out hearing immediately before. Lead counsel also claimed that he did not have the opportunity to speak to his expert witness, Dr. Davis, before Dr. Mileusnic-Polchan's testimony to the jury. However, the trial court record contradicted lead counsel's recollections of the jury-out hearing. At the conclusion of the jury-out hearing, the trial court recessed for the day, and Dr. Mileusnic-Polchan did not testify in front of the jury until the next morning.

Lead counsel testified that he tried to impeach Dr. Mileusnic-Polchan "with . . . the conversation that [they] had in her office" because she had testified that the injuries to the victim's abdomen were [*32] "caused the opposite way that she explained it in her office." However, Mr. Davis recalled that during Dr. Mileusnic-Polchan's trial testimony, she had "stuck . . . to her version" and continued to disagree "with what [co-counsel] had pointed out" during the pretrial meeting.

During cross-examination, lead counsel brought up the defense team's pretrial meeting with Dr. Mileusnic-Polchan and the "cheese grater effect." The following exchange then occurred:

[Lead counsel]: And that did not happen, you're right. And so after our discussion and after you

telling us that the car would have had to have backed over her in order to make that pattern, the cheese grater analogy, Dr. Mileusnic[-Polchan], you told us if it went with the slats, it would not leave a pattern on her skin. If it went against her, it would leave the pattern that is indicative in the picture?
[Dr. Mileusnic-Polchan]: No. Actually, what -- just what statement made was a lie. I never said that the car backed over the lady. I never ever said that this car backed over Ms. Cornwell. Never ever said --

[Lead counsel]: Dr. Mileusnic[-Polchan] --

[Dr. Mileusnic-Polchan]: Please let me finish. It was a lie. I never said that the car [*33] backed over Ms. Cornwell. What I said is that the cheese grater in one direction would leave one set of injuries. In the opposite direction would be definitely different sort of injuries because of the orientation of the slats. Because I never heard from the defense team again, I went myself to see what direction was and how sharp it was. So that's why we're discussing it today.

[Lead counsel]: Dr. Mileusnic[-Polchan], you never told us that the car backed over Leoned Cornwell. You are correct there. The cheese grater analogy you gave us was if the car passed over her in the direction of the slat, it would not leave a mark. The cheese grater analogy was that it had to go -- her body had to go against the slat to leave the pattern. You did not ever say that it went backwards. You didn't know which angle the slats went to?

[Dr. Mileusnic-Polchan]: Exactly, because I didn't know, because of the angle, I couldn't ever actually even say or -- or state that I know for a fact that one direction leave no marks whatsoever, and yet the other would leave marks. That was the whole point of conversation, the whole point of having agreement that we would look at it together. Because it never happened, [*34] I went to look at it. So having in mind that the car is - - pressed under that car, one direction would leave one set of marks. How intense that would be, I don't know until I looked at it again. The other direction would definitely cut the body.

Lead counsel testified that he felt like his "head was about ready to explode" when Dr. Mileusnic-Polchan said his statement was a lie. Lead counsel explained that he took her statements to mean that she was calling him a liar in front of the jury. Lead counsel recalled that Dr. Mileusnic-Polchan was "animated"

during this exchange. Lead counsel testified that Judge Baumgartner did "nothing" during the exchange. Lead counsel admitted that he did not object to Dr. Mileusnic-Polchan's statements or request a mistrial. Lead counsel testified that his failure to object or request a mistrial was not a strategic decision. Lead counsel admitted that even after his exchange with Dr. Mileusnic-Polchan, he continued to cross-examine her for several minutes.

The Petitioner recalled that Dr. Mileusnic-Polchan "got really upset and told [lead counsel] that he was a liar" when lead counsel brought up the "cheese grater effect." The Petitioner further recalled [*35] that Dr. Mileusnic-Polchan "was real aggressive on the stand" and that lead counsel "back[ed] up" during the exchange and then "drifted off" the topic. Mr. Davis recalled that lead counsel's cross-examination of Dr. Mileusnic-Polchan "got pretty heated" and that he thought Dr. Mileusnic-Polchan "was pretty angry" when she said lead counsel's statement was a lie because "she felt that she was being accused of something."

Dr. Davis was also present in the courtroom during Dr. Mileusnic-Polchan's testimony and he testified at the post-conviction hearing that he would "never forget" the exchange because he had "never heard . . . anything like that in [a] court before or since." Co-counsel recalled that Dr. Mileusnic-Polchan was "very animated" during the exchange. Co-counsel testified that the exchange "was a very ugly moment" and that he had "never seen anything like" it. Co-counsel further testified that he thought the exchange affected the remainder of lead counsel's cross-examination, that lead counsel had a "deer in headlights" look, and that the exchange "threw [lead counsel] off track."

Lead counsel recalled that there was a recess after his cross-examination of Dr. Mileusnic-Polchan. [*36] Lead counsel testified that he felt he "needed to deal with" Dr. Mileusnic-Polchan's statements. However, lead counsel decided that he could not call Dr. Pedigo to testify because of Dr. Pedigo's criminal history. Lead counsel also decided that it would not be "fair" to call Mr. Davis to the stand because Mr. Davis "had just joined the staff" at the District Public Defender's Office. With that in mind, lead counsel "felt like [he] needed to call" co-counsel to rebut Dr. Mileusnic-Polchan's testimony about the pretrial meeting.

Lead counsel testified that during the recess, he and co-counsel met with the prosecutor and Judge Baumgartner in Judge Baumgartner's chambers to

discuss the situation because he thought there might be "an [ethical] issue calling co-counsel to testify." Lead counsel recalled that when he told Judge Baumgartner that he was planning on calling co-counsel as a witness, Judge Baumgartner told him "not [to] do that." Lead counsel explained that Judge Baumgartner "said the jury would hate [him] for doing that."

Lead counsel testified that he "listened to" Judge Baumgartner's advice and then went outside to think "about what [he] should do." Lead counsel further testified [*37] that he "convinced [himself]" that he "was going to make a bad situation worse" by calling co-counsel as a witness and that he "could handle" the situation without doing so. Lead counsel admitted that he never requested a jury-out hearing to make an offer of proof of what co-counsel's testimony would have been.

Lead counsel testified that his decision not to call co-counsel as a witness or make an offer of proof was not a tactical decision. Lead counsel further believed that he had provided ineffective assistance of counsel to the Petitioner in his handling of Dr. Mileusnic-Polchan's testimony. Lead counsel also believed that his handling of Dr. Mileusnic-Polchan's testimony prejudiced the Petitioner because her testimony "was [the] critical issue in the case." Co-counsel testified that Dr. Mileusnic-Polchan "was viewed by the defense as being possibly the most powerful witness." However, co-counsel admitted that even if Dr. Mileusnic-Polchan had been discredited, there was other "corroborating evidence" and that the State's other expert witnesses also testified that the victim was "hit with the front of the [Petitioner's] car and . . . [run] over."

Co-counsel recalled that he had "a [*38] rather extensive conversation" with lead counsel about how to respond to Dr. Mileusnic-Polchan's testimony during the recess. Due to the ethical concerns of having one of the Petitioner's attorneys become a witness at trial, lead counsel and co-counsel "wanted to get . . . Judge Baumgartner involved." Co-counsel explained that "[i]t was a mind-blowing judgment call that [they] were being required to make under circumstances [when] [they] were still stunned." Co-counsel further explained that they "were looking for some guidance from the court" and that they "wanted someone to tell [them] 'yes' or 'no.'"

Co-counsel testified that he "was kind of leaning toward" testifying because they "didn't have any other way to refute" Dr. Mileusnic-Polchan's testimony. However, co-

counsel "didn't trust [his] opinion at that point" and "was second-guessing [himself] through the whole process" because he was so stunned by what had occurred. Co-counsel recalled that Judge Baumgartner "was clearly leaning the other way." Judge Baumgartner told them that they "shouldn't do that" because it would "be confusing" and "possibly upsetting" to the jury. Judge Baumgartner told them that he thought that it would [*39] not "work out well for [them]" and that "it could make [them] look" even worse.

Dr. Davis testified at the post-conviction hearing on the Petitioner's behalf. Dr. Davis explained that he had been "bothered" by this case since the trial in 2009 because he believed that Dr. Mileusnic-Polchan "went beyond the bounds not only of her expertise, but of forensic pathology in general in offering opinions that did not have a basis in sound forensic pathology practice." Dr. Davis further explained that Dr. Mileusnic-Polchan "came across to [him] in her testimony as an advocate for the prosecution" rather than an impartial expert.

Specifically, Dr. Davis took issue with Dr. Mileusnic-Polchan's testimony that the victim's head had been run over by one of the car's tires, her "opinion on the direction of travel of the vehicle," her "offering of an opinion of intent," and her testimony that the victim "definitively . . . was not under the influence of marijuana" when the victim was killed without any discussion of "the hangover effects of marijuana." However, Dr. Davis admitted that he testified at trial about his disagreement with Dr. Mileusnic-Polchan's opinions regarding the tire running over the [*40] victim's head, the direction the car was traveling, and the Petitioner's intent to harm the victim. Dr. Davis also admitted that he testified about the fact that a "marijuana metabolite" was found in the victim's blood sample, but he did not testify "about the residual effects of marijuana."

Dr. Davis testified that there were "portions of [Dr. Mileusnic-Polchan's] opinion[s]" that he heard for the first time during her trial testimony. Dr. Davis further testified that he was not able to assist lead counsel in preparing to cross-examine Dr. Mileusnic-Polchan because he "didn't hear the full scope of [Dr. Mileusnic-Polchan's] opinion until she was testifying at trial."

IV. Post-Conviction Court's Order

The post-conviction court found that "[t]hroughout the time the Petitioner's case was pending" in the trial court, Judge Baumgartner "was taking opiate pain killers."

However, the post-conviction court did "not find evidence in the [trial] record that . . . [Judge Baumgartner's] use of the . . . [pain killers] affected . . . [his] ability to perform his function as a competent, neutral, and detached magistrate." The post-conviction court did not accredit the Petitioner's testimony that he [*41] saw Judge Baumgartner fall asleep during the trial. The post-conviction court further found as follows:

[Co-counsel] testified at the post-conviction hearing that he could not remember any head nodding by the trial judge during the Petitioner's trial nor any other point that would indicate that the trial judge was impaired. In addition, the record [did] not reflect any instances where the judge had to be awakened, or have questions repeated for . . . [his] benefit. None of the attorneys who were involved in the case testified that the judge was ever asleep. Nor [did] the record reflect that the trial judge was confused or unable to function at any point.

The post-conviction court did not find that Judge Baumgartner's statement, "I want you to help me out here as I go through this," and his inability to recall what he had previously done at two of the three hearings on the Petitioner's motion for new trial to be evidence that Judge Baumgartner was confused or intoxicated during those hearings. Instead, the post-conviction court found that it was "not unreasonable for . . . [Judge Baumgartner] to simply not recall what happened during the previous hearing" due to the fact that several [*42] months had passed between two of the hearings and the complex nature of the Petitioner's motion. The post-conviction court also found that "[o]nce having his memory refreshed, [Judge Baumgartner] demonstrated recall of the previous hearings and a complete understanding of the issues."

The post-conviction court concluded that "the Petitioner [had] failed to establish the existence of structural error in his [trial] proceedings due to the [out-of-court] behavior of" Judge Baumgartner. The post-conviction court rejected the Petitioner's argument that Judge Baumgartner's out-of-court misconduct caused him to be biased in favor of the State in an attempt to curry favor with prosecutors and deflect suspicion. The post-conviction court found that this argument was "not supported by the record" because Judge Baumgartner was investigated by the Tennessee Bureau of Investigation and a special prosecutor. The post-conviction court also rejected the Petitioner's argument that Judge Baumgartner "was impaired during court appearances." Instead, the post-conviction court found that the trial record showed Judge Baumgartner "to

be coherent, engaged, and thoughtful" during the Petitioner's proceedings. [*43]

With respect to the Petitioner's argument that Judge Baumgartner failed to perform his duty as the thirteenth juror, the post-conviction court found that Judge Baumgartner "never explicitly stated that he was exercising his role as the thirteenth juror in the Petitioner's case." However, Judge Baumgartner stated during the motion for new trial hearing that he thought "there was sufficient evidence to support [a second degree murder conviction] by the jury beyond a reasonable doubt." The post-conviction court concluded that "by [that] statement the trial court effectuated [its] duty of serving as the thirteenth juror."

With respect to the inspection of the Petitioner's car and subsequent Ferguson motion, the post-conviction court concluded that lead counsel was not deficient. The post-conviction court found that lead counsel requested other Ferguson remedies in addition to dismissal of the indictment. The post-conviction court concluded that "[t]he reason no other remedies were given was not because [lead counsel] failed to effectively advocate for his client," but because Judge Baumgartner "found that no Ferguson violation had occurred." The post-conviction court also found that lead [*44] counsel had "spent a considerable amount of effort and [pretrial] work trying to address the issue in any manner he could to assist the Petitioner."

With respect to Dr. Mileusnic-Polchan's trial testimony, the post-conviction court found that lead counsel "was well prepared for . . . [her] potential testimony" and that "[t]he entire defense team took steps to prepare for her trial testimony." The post-conviction court noted that lead counsel hired Dr. Davis to rebut Dr. Mileusnic-Polchan's opinions and "made arguments to counter her opinions." The post-conviction court concluded that lead counsel attacked Dr. Mileusnic-Polchan's opinions "vigorously during the trial testimony and in closing arguments."

Regarding the cross-examination of Dr. Mileusnic-Polchan, the post-conviction court found that "[t]he defense team engaged in lengthy deliberations" and "took ample time to consider whether to call" a witness to rebut Dr. Mileusnic-Polchan's testimony about the pretrial meeting. The post-conviction court concluded that "[t]actical reasons for not calling each [potential witness] [had been] elicited during the post-conviction hearing."

The post-conviction court also found that, despite

Dr. [*45] Mileusnic-Polchan's having called one of lead counsel's statements a lie, lead counsel's cross-examination "was effective in demonstrating to the jury" that Dr. Mileusnic-Polchan was not confident in the direction the car was traveling when confronted with the heat shield and "supported the [defense] theory . . . that the authorities jumped to conclusions in this case." The post-conviction court concluded that Dr. Mileusnic-Polchan's statement did not damage lead counsel's credibility and that "[t]here was no basis for a mistrial" or "need for any kind of limiting instruction."

ANALYSIS

I. Post-Conviction Standard of Review

HN1 Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." [Tenn. Code Ann. § 40-30-103](#). **HN2** The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. [Tenn. Code Ann. § 40-30-110\(f\)](#); see [Dellinger v. State](#), 279 S.W.3d 282, 293-94 (Tenn. 2009). **HN3** On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. [Fields v. State](#), 40 S.W.3d 450, 456 (Tenn. 2001). Additionally, "questions [*46] concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. *Id.* However, we review the post-conviction court's application of the law to its factual findings *de novo* with no presumption of correctness. *Id. at 457*.

II. Structural Error

The Petitioner contends that "he was deprived of a competent and impartial judge, resulting in a structural constitutional error," due to Judge Baumgartner's out-of-court misconduct during the course of the Petitioner's trial proceedings. The Petitioner argues that our supreme court's unpublished order in [State v. Letalvis Cobbins, LeMaricus Davidson, and George Thomas](#), No. E2012-00448-SC-R10-DD, 2012 Tenn. LEXIS 965, *6 (Tenn. May 24, 2012), holding that a trial judge's out-of-court misconduct does not constitute structural error

"when there is no showing or indication in the record that the trial judge's misconduct affected the trial proceedings" is not binding authority. The Petitioner further argues that Judge Baumgartner's illegal misconduct affected the trial proceedings because Judge Baumgartner had "a motivation to be biased in favor of [*47] the prosecution in order to prevent suspicion or investigation into . . . [his] misconduct." The Petitioner also argues that Judge Baumgartner was not competent to preside over the trial proceedings because it was likely that he was intoxicated due to his use of narcotics. The State responds that our supreme court's order in [Cobbins](#) is controlling on this issue. The State further responds that the Petitioner failed to establish that Judge Baumgartner's out-of-court misconduct affected the trial proceedings.

HN4 Some errors "compromise the integrity of the judicial process itself" by "involv[ing] defects in the trial mechanism." [State v. Rodriguez](#), 254 S.W.3d 361, 371 (Tenn. 2008). These errors are known as structural constitutional errors and they "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no [such] criminal punishment may be regarded as fundamentally fair.'" *Id.* (alterations in original) (quoting [Moman v. State](#), 18 S.W.3d 152, 165 (Tenn. 1999) (quoting [Neder v. United States](#), 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))). Examples of structural constitutional errors include a biased trial judge, racial discrimination in the selection of a grand jury, the complete denial of counsel, the denial of a public trial, a defective [*48] reasonable-doubt instruction, and the denial of self-representation at trial. See [Washington v. Recuenco](#), 548 U.S. 212, 218 n.2, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). These errors "are not amenable to harmless error review, and therefore, they require automatic reversal when they occur." [Rodriguez](#), 254 S.W.3d at 371.

Our supreme court's order in [Cobbins](#) dealt with three cases presided over by Judge Baumgartner that were pending at approximately the same time as the Petitioner's trial proceedings. [No. E2012-00448-SC-R10-DD, 2012 Tenn. LEXIS 965, slip op. at 1](#). In the [Cobbins](#) order, our supreme court stated that it was "aware of no authority holding that a trial judge's misconduct outside the courtroom constitutes structural error when there is no showing or indication in the record that the trial judge's misconduct affected the trial proceedings." [2012 Tenn. LEXIS 965 at *6](#). While noting that Judge Baumgartner's actions were "a clear and palpable violation" of the canons of judicial conduct, the

supreme court, "in the absence of controlling authority otherwise," declined "to hold that a trial judge's out-of-court misconduct, by itself, constitutes structural error unless there is proof that the misconduct affected the trial proceedings." [2012 Tenn. LEXIS 965 at *8](#).

The Petitioner argues that the Cobbins order should not be viewed as "controlling authority [for] subsequent cases" because [*49] the order was unpublished and "limited to the facts of those cases for which it was issued." The State responds that the Cobbins order is controlling authority because it has been "repeatedly cited to . . . as binding authority" by this court. Regardless of whether the Cobbins order is controlling or persuasive authority, this court has adopted the Cobbins order's holding on structural constitutional error in a published opinion. See State v. Leath, 461 S.W.3d 73, 116 (Tenn. Crim. App. 2013). [HN5](#) A published opinion of this court "shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction." [Tenn. Sup. Ct. R. 4\(G\)\(2\)](#).

Nor do we believe that our previous reliance on the Cobbins order was misplaced. [HN6](#) "The right to a fair trial before an impartial judge is a fundamental constitutional right." [State v. Benson, 973 S.W.2d 202, 205 \(Tenn. 1998\)](#) (emphases added). However, "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the *Due Process Clause of the Fourteenth Amendment* establishes a constitutional floor, not a uniform standard." [Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 \(1997\)](#). Rather, these questions are "answered by common law, statute, or the professional standards of the bench and bar." [Id.](#) The floor established by the *Due Process Clause* simply "requires a 'fair trial in a fair tribunal,' [*50] before a judge with no actual bias against the defendant or interest in the outcome of his particular case." [Id. at 904-05](#) (emphasis added). A trial judge's misconduct amounts to a structural constitutional error when the misconduct affects the judge's impartiality. Put another way, a trial judge's misconduct constitutes a structural error when that "conduct pierces the veil of judicial impartiality." [People v. Stevens, 498 Mich. 162, 869 N.W.2d 233, 242 \(Mich. 2015\)](#).

For example, in Benson our supreme court held that "bribery solicitation [by a trial judge], if proven, would constitute the denial of [a] petitioner's fundamental constitutional right to a fair trial before an impartial judge" and that the likelihood of bias was "even

stronger" when the trial judge solicited "but did not receive a bribe from the petitioner." [973 S.W.2d at 206](#). While our supreme court broadly stated in Benson that "[a] trial is either fair or not" and that "[e]vidence of judicial corruption requires reversal regardless of the other facts of the particular case," those generalities are in conflict with the case law cited in the opinion and the court's ultimate holding that [HN7](#) "[t]he denial of [a] petitioner's right to an impartial judge is a constitutional error which affects the integrity of the judicial [*51] process" with "[a] new trial [being] the only remedy." [Id. at 207](#) (emphasis added).

More instructive is the United States Supreme Court's opinion in Bracy, which our supreme court relied on for its holding in Benson. In Bracy, the trial judge "was shown to be thoroughly steeped in corruption" by accepting bribes from criminal defendants to "fix" their cases. [520 U.S. at 901, 909](#). The petitioner in Bracy was not solicited for a bribe but argued that the trial judge's corruption caused him to have a "compensatory, camouflaging bias" against the petitioner. [Id. at 905](#). Key to the Supreme Court's holding was the fact that the petitioner pointed "not only to [the trial judge's] conviction for bribe taking in other cases, but also to additional evidence . . . that [lent] support to his claim that [the trial judge] was actually biased in the petitioner's own case." [Id. at 909](#). Furthermore, the Supreme Court's holding was limited in that the petitioner had established "good cause" for discovery in his federal habeas corpus action. [Id.](#) The Bracy opinion acknowledged that it was possible the petitioner could have been "unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case." [Id.](#)

The Petitioner [*52] argues that Judge Baumgartner had "a motivation" to be biased in favor of the State "in order to prevent suspicion or investigation into . . . [his] misconduct" and that this "appearance of bias [was] a structural constitutional defect." However, as appalling as Judge Baumgartner's out-of-court misconduct was, [HN8](#) the mere appearance of bias is not sufficient to establish a structural constitutional error. As stated in Bracy, the *Due Process Clause* requires a trial judge with "no actual bias against the defendant." [520 U.S. at 905](#) (emphasis added). Furthermore, the petitioner in Bracy did not just rely on the trial judge's out-of-court misconduct but presented specific evidence as to how that misconduct affected his particular case. [Id. at 909](#); see also In re Hunt, 163 Vt. 383, 658 A.2d 919, 921-23 (Vt. 1995) (holding that there was no structural error when an appellate judge's misconduct in rejecting a plea

agreement and change of venue in an interlocutory appeal was "wholly unrelated to [the] petitioner's trial".

Here, the Petitioner did not present evidence of Judge Baumgartner's out-of-court misconduct causing him to be biased specifically against the Petitioner. Lead counsel and co-counsel both testified about a change in Judge Baumgartner's demeanor and their perception that Judge [*53] Baumgartner's behavior was directed at the defense bar in general. However, there was nothing in the trial court record or this court's opinion on direct appeal that would demonstrate a specific bias against the Petitioner in this case. Put another way, no evidence showed that Judge Baumgartner's out-of-court misconduct pierced the veil of judicial impartiality in the Petitioner's trial proceedings.

The Petitioner also argues that Judge Baumgartner's presiding over his trial court proceedings constituted a structural constitutional error because Judge Baumgartner was impaired during the proceedings due to his addiction to pain killers. There is a surprising dearth of case law regarding whether the impairment of a trial judge would constitute a structural constitutional error. The cases dealing with a trial judge's misconduct and structural constitutional error focus on the misconduct's effect on the trial judge's impartiality. See, e.g., *Bracy*, 520 U.S. at 905-09; *Benson*, 973 S.W.2d at 205-06. The Petitioner relies on Summerlin v. Stewart, to support his argument that a trial judge's admitted drug use and subsequent criminal conviction alone would constitute a structural constitutional error. 267 F.3d 926, 950-56 (9th Cir. 2001), opinion withdrawn on reh'g en banc, 341 F.3d 1082 (9th Cir. 2003), rev'd [*54] and remanded on other grounds, *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

We do not find Summerlin to be persuasive. First, we believe that it is clear from the applicable case law that a trial judge's out-of-court misconduct must directly affect the trial proceedings at issue to constitute a structural constitutional error. Second, the opinion was withdrawn by the United States Ninth Circuit Court of Appeals and ordered not to "be cited as precedent by or to [the Ninth Circuit] or any district court of the Ninth Circuit." *Summerlin v. Stewart*, 281 F.3d 836, 837 (9th Cir. 2002). Finally, the cases relied upon in the Summerlin opinion involved the competency of jurors rather than jurists. 267 F.3d at 948-49 (citing *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987); *Jordan v. Massachusetts*, 225 U.S. 167, 32 S. Ct. 651, 56 L. Ed. 1038 (1912)). Incidents of juror bias and misconduct have generally been found not to

constitute structural constitutional error. See *United States v. Tejeda*, 481 F.3d 44, 50 (1st Cir. 2007) (rejecting a defendant's argument that claims of juror bias should be treated as structural constitutional error like claims of judicial bias); see also 7 Wayne R. LaFave et al., Criminal Procedure § 27.6(d) (4th ed. Supp. 2016).

In his brief, the Petitioner also cites to an order granting post-conviction relief by a different post-conviction court in a separate case involving Judge Baumgartner. See Final J. Order at 35, Raynella Leath v. State, No. 104426 (Tenn. Knox County Crim. Ct. May 12, 2016). [*55] However, the trial for the petitioner in Raynella Leath v. State occurred several months after the Petitioner's trial. Id. at 2 (noting that Ms. Leath's trial occurred in January 2010). Furthermore, unlike this case, there was testimony at the Raynella Leath v. State post-conviction hearing from a former courtroom officer that Judge Baumgartner appeared asleep during the trial and that she would slam the courtroom door to awaken him. Id. at 26-28. Accordingly, we do not find the post-conviction court's order in Raynella Leath v. State to be persuasive to our decision in this case because the testimony at the Petitioner's post-conviction hearing was much less compelling than what was presented at the Raynella Leath v. State hearing.

In the end, the question of whether Judge Baumgartner was intoxicated during the Petitioner's trial court proceedings is one of the credibility of the witnesses. The Petitioner testified that he saw Judge Baumgartner asleep on several occasions but told no one. Mr. Davis testified that he saw Judge Baumgartner with his head slumped down, but he was unsure if Judge Baumgartner was asleep. Lead and co-counsel both testified that they saw nothing during [*56] the Petitioner's trial that would lead them to believe Judge Baumgartner was asleep or intoxicated. However, both lead and co-counsel were concerned that Judge Baumgartner was confused and not paying attention during the last motion for new trial hearing.

The post-conviction court accredited the testimony of lead and co-counsel over the Petitioner's testimony regarding Judge Baumgartner's appearance during the trial. Conversely, the post-conviction court disagreed with lead and co-counsel's assessment of Judge Baumgartner's performance during the motion for new trial hearings. The post-conviction court found after its review of the trial record that "[o]nce having his memory refreshed, [Judge Baumgartner] demonstrated recall of the previous hearings and a complete understanding of

the issues" at the motion for new trial hearings and that the trial record overall showed Judge Baumgartner "to be coherent, engaged, and thoughtful." The post-conviction court concluded that the evidence did not show that Judge Baumgartner was impaired during the trial or in denying the Petitioner's motion for new trial.

HN9 Factual issues are to be resolved by the post-conviction court as are questions concerning [*57] the credibility of witnesses and the weight and value to be given to their testimony. *Fields, 40 S.W.3d at 456*. We are constrained in our review of these issues and bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Following our review of the record and regardless of our abhorrence at Judge Baumgartner's illegal, out-of-court misconduct, we conclude that the evidence in the record does not preponderate against the post-conviction court's factual findings regarding whether Judge Baumgartner was intoxicated during the Petitioner's trial proceedings. Accordingly, we affirm the post-conviction court's denial of post-conviction relief with respect to the Petitioner's claim of structural constitutional error.

III. Thirteenth Juror

The Petitioner contends that Judge Baumgartner failed to perform his role as the thirteenth juror. The Petitioner argues that the post-conviction court erred in denying his petition with respect to this issue because it "improperly attribut[ed] the trial court's views on the sufficiency of the evidence to its thirteenth juror ruling on the weight of the evidence." The Petitioner further argues [*58] that Judge Baumgartner could not make a "proper thirteenth juror ruling" due to the passage of time and his status as "a drug addict." The State responds that Judge Baumgartner approved the jury's verdict by denying the Petitioner's motion for new trial.

Tennessee Rule of Criminal Procedure 33(d) provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." **HN10** This is the modern equivalent of the thirteenth juror rule and "imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment." *State v. Biggs, 218 S.W.3d 643, 653 (Tenn. Crim. App. 2006)* (internal quotation marks omitted) (quoting *State v. Carter, 896 S.W.2d 119, 122 (Tenn.*

1995)).

HN11 We "may presume that the trial court approved the verdict as the thirteenth juror" when it has overruled a motion for new trial without comment. *Biggs, 218 S.W.3d at 653* (citing *Carter, 896 S.W.2d at 122*). It is only when "the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or [evidence] indicating that the trial court absolved itself of its responsibility to act as the thirteenth [*59] juror, [that] an appellate court may reverse the trial court's judgment" on the basis that the trial court failed to carry out its duties as the thirteenth juror. *Carter, 896 S.W.2d at 122*.

Here, the post-conviction court concluded that Judge Baumgartner had performed his duty as the thirteenth juror by stating at the motion for new trial hearing that "there was sufficient evidence to support [a second degree murder conviction] by the jury beyond a reasonable doubt." The Petitioner is correct that the role of the thirteenth juror is to judge the weight of the evidence rather than the sufficiency of the evidence and that Judge Baumgartner's statement was not evidence of his approval of the jury's verdict as the thirteenth juror.

However, there was no evidence in the trial record that Judge Baumgartner ever expressed dissatisfaction or disagreement with the weight of the evidence or that he had absolved himself of his responsibility to act as the thirteenth juror. Instead, Judge Baumgartner denied the Petitioner's motion for new trial in a written order that stated "[t]he verdict of the jury [was] specifically approved by the [c]ourt." Accordingly, we conclude that this was sufficient to establish that Judge Baumgartner [*60] approved the verdict as the thirteenth juror.

With respect to the Petitioner's argument that Judge Baumgartner could not perform his duty as the thirteenth juror due to the passage of time, we note that this court has previously held that Judge Baumgartner had fulfilled his duty as the thirteenth juror when he entered a similarly worded order in a different case on the same day he entered the order denying the Petitioner's motion for new trial. See *Leath, 461 S.W.3d at 115*.

Furthermore, while our supreme court has recognized that "[t]he more time that passes between the trial and the trial court's evaluation of the evidence as the

thirteenth juror, the less meaningful the 'safeguard' becomes," that statement addressed the performance of the thirteenth juror duty on remand "after the case [had] work[ed] its way through the appellate courts." [State v. Moats, 906 S.W.2d 431, 435 \(Tenn. 1995\)](#). We do not believe that statement was meant to imply that a trial judge could not approve of the weight of the evidence by denying a motion for new trial when, like in this case, the denial was delayed by the complex nature of the case and the motion for new trial. Accordingly, we conclude that this issue is without merit.⁵

IV. Ineffective Assistance of Trial Counsel

The Petitioner [*61] contends that he received ineffective assistance from his trial counsel. The Petitioner's ineffective assistance of counsel claims center around two issues: (1) lead counsel's failure to inspect the Petitioner's car in a timely manner and to request Ferguson remedies other than the dismissal of the indictment; and (2) lead counsel's handling of the testimony of Dr. Mileusnic-Polchan, including his handling of Dr. Mileusnic-Polchan's accusation that one of his questions was a "lie."

The Petitioner argues that he was prejudiced by lead counsel's failure to timely inspect his car because "potentially exculpatory evidence was eroded" by the State's storing the car outside and lead counsel "was left unable to effectively refute the [S]tate's evidence." The Petitioner further argues that he was prejudiced by lead counsel's failure to request Ferguson remedies other than the dismissal of the indictment. The State responds that there was no Ferguson violation with respect to the Petitioner's car; therefore, the Petitioner was not prejudiced by lead counsel's handling of the issue at trial.

The Petitioner also argues that lead counsel was ineffective for failing "to attach [a] report from the [*62] defense's expert or an affidavit" to his motion for a McDaniel hearing and that this failure prejudiced the Petitioner because it prevented "a pretrial evidentiary hearing on the full scope of the [S]tate's forensic pathology testimony." The Petitioner further argues that lead counsel failed to object and properly cross-examine

Dr. Mileusnic-Polchan because he was "unprepared and ill[-]equipped to process the information coming at him from the witness stand in the middle of trial." Finally, the Petitioner argues that lead counsel "improperly put his personal credibility at issue . . . by choosing to impeach" Dr. Mileusnic-Polchan "with her pretrial statement to [lead] counsel" and that he compounded the error by not putting on a witness to impeach Dr. Mileusnic-Polchan's testimony about the pretrial meeting.⁶ The State responds that lead counsel was effective in his preparation for Dr. Mileusnic-Polchan's testimony and his cross-examination of her.

A. Standard of review

[HN12](#) [↑] Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. [Dellinger, 279 S.W.3d at 293](#) (citing *U.S. Const. amend. VI*; [Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 64 L. Ed. 2d 333 \(1980\)](#)). [HN13](#) [↑] When a claim of ineffective assistance of counsel is made under the *Sixth Amendment to the United States Constitution*, the burden is on the petitioner to show [*63] (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. [Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#); see [Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 122 L. Ed. 2d 180 \(1993\)](#). In reviewing a trial counsel's conduct, we make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." [Felts v. State, 354 S.W.3d 266, 277 \(Tenn. 2011\)](#) (quoting [Strickland, 466 U.S. at 689](#)).

[HN14](#) [↑] Deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness," despite the fact that reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Strickland, 466 U.S. at 688-89](#). "The fact that a particular strategy or tactical decision failed does not by itself establish deficiency." [Felts, 354 S.W.3d at 277](#) (citing [Goad v. State, 938 S.W.2d 363, 369 \(Tenn. 1996\)](#)). [HN15](#) [↑]

⁵With respect to the Petitioner's argument that Judge Baumgartner could not properly fulfill his duty as the thirteenth juror because he was "a drug addict," we addressed Judge Baumgartner's competency to perform his duties as the presiding trial judge in the previous section.

⁶Lead counsel's failure to object to Dr. Mileusnic-Polchan's statement, failure to request a mistrial, and failure to address this issue on direct appeal are not raised as claims of ineffective assistance of counsel in the Petitioner's appellate brief.

Prejudice requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. HN16 [↑] "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad, 938 S.W.2d at 370. HN17 [↑] The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

B. [*64] Inspection of the Petitioner's vehicle and Ferguson motion

The Petitioner did not establish that he was prejudiced by lead counsel's failure to timely inspect the Petitioner's car or request multiple Ferguson remedies. As noted in this court's opinion on direct appeal, there was no exculpatory evidence to be preserved on the Petitioner's car. See Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *14-16 (holding that "[t]he location of the dirt rub [on the front of the car] was inculpatory, not exculpatory" and that the Petitioner "obtained 'comparable' evidence through photographic preservation of the evidence"). More importantly, Mr. Parham, the Petitioner's expert accident reconstructionist, contradicted the testimony of the State's experts about the dirt rub by testifying at trial that he did not believe that "the photograph of the front license plate . . . [was] conclusive of dirt rub." 2012 Tenn. Crim. App. LEXIS 868, [WL] at *12. Moreover, despite the fact that the car had been stored outside, Mr. Parham was still able to opine "that the physical evidence was consistent with [the Petitioner's] explanation of the incident" and to disagree with the opinions of the State's experts that the car was traveling in a "unilateral" direction. 2012 Tenn. Crim. App. LEXIS 868, [WL] at *12. Accordingly, we conclude that the post-conviction [*65] court did not err in denying the Petitioner post-conviction relief with respect to this issue.

C. Dr. Mileusnic-Polchan's Testimony

At the outset, we conclude that lead counsel was not deficient in his preparation for Dr. Mileusnic-Polchan's trial testimony. Lead counsel hired a consulting expert, Dr. Pedigo, to review the autopsy report. Lead counsel then had a meeting with Dr. Mileusnic-Polchan to review her autopsy report. Co-counsel, Dr. Pedigo, and a

member of lead counsel's staff, Mr. Davis, also attended the meeting. As a result of the meeting, lead counsel requested a continuance in order to retain an expert in forensic pathology, Dr. Davis, because he had learned that Dr. Mileusnic-Polchan would opine that all of the victim's injuries were "unidirectional" and that her testimony would be consistent with the State's theory of the case.

Much of the Petitioner's complaints about lead counsel's preparation for Dr. Mileusnic-Polchan's trial testimony are based on lead counsel's handling of his request for a McDaniel hearing. Lead counsel admitted at the post-conviction hearing that he did not request the McDaniel hearing to challenge Dr. Mileusnic-Polchan's qualifications as an expert [*66] in forensic pathology. Rather, lead counsel requested a McDaniel hearing as a discovery device to learn what Dr. Mileusnic-Polchan's trial testimony would be and "whether there [was] science to support [her] opinion[s]." Lead counsel explained that he needed to use the McDaniel hearing as a discovery device because Dr. Mileusnic-Polchan was "very careful" when interviewed "not to volunteer anything." Lead counsel also testified that he was aware that Dr. Mileusnic-Polchan had classified the victim's death as a homicide and of her opinion that the victim's injuries were "unidirectional."

HN18 [↑] While "[t]rial courts act as gatekeepers when it comes to the admissibility of expert testimony," that role "is not unconstrained." State v. Scott, 275 S.W.3d 395, 402, 404 (Tenn. 2009). Our supreme court has explained the constraints on a trial court's gatekeeping role as follows:

When making an admissibility determination, trial courts are not empowered to choose between legitimate competing expert theories by excluding the lesser of the two. To the contrary, that task must be left to the trier of fact. The party proffering expert testimony need not establish that the expert testimony is correct, only that the expert testimony "rests upon 'good grounds.'" [*67] Where such a foundation exists, even if the trial court is of the view that there are better grounds for an alternative conclusion, the proffered expert testimony "should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies."

Id. at 404 (internal citations and footnotes omitted).

With that in mind, we conclude that the Petitioner failed to establish that he was prejudiced by lead counsel's handling of the McDaniel hearing request. Lead counsel did not attach a "countervailing expert opinion" to his motion. However, the trial court eventually granted his motion for a McDaniel hearing at which both Dr. Mileusnic-Polchan and Dr. Davis testified. [HN19](#) [↑] While pretrial McDaniel hearings are preferable, it is not erroneous for a trial court to conduct a McDaniel hearing during a trial. See Scott, 275 S.W.3d at 404 (noting that the abuse of discretion standard of review for a trial court's admission or exclusion of expert testimony "applies regardless of whether the ruling was made during [pretrial] proceedings or during the trial itself"). Contrary to lead counsel's [*68] recollection at the post-conviction hearing, he had time after the McDaniel hearing to prepare for Dr. Mileusnic-Polchan's trial testimony and consult with Dr. Davis.

More importantly, this court held on direct appeal that Dr. Mileusnic-Polchan's testimony about the direction the Petitioner's car was traveling when it struck the victim, and specifically her testimony about the injuries left by the car's heat shield, was not "outside her area of expertise." Cornwell, 2012 Tenn. Crim. App. LEXIS 868, 2012 WL 5304149, at *18. Rather, her testimony was "a proper subject upon which a medical examiner may offer testimony" because it dealt with "the interaction between the automobile and the victim's body." Id. This court also held that there was "no error in [Dr. Mileusnic-Polchan's] opinion that the manner of death was homicide." Id. Furthermore, Dr. Davis testified at trial about his major areas of disagreement with Dr. Mileusnic-Polchan's opinions. As such, the Petitioner was not prejudiced by lead counsel's handling of the McDaniel hearing because a foundation existed for Dr. Mileusnic-Polchan's testimony, and it was thoroughly tested by the adversarial process.

With respect to Dr. Mileusnic-Polchan's testimony to the jury, we note that [HN20](#) [↑] "the method by [*69] which a witness is examined is a 'strategic and tactical decision of trial counsel which is not to be measured by hindsight.'" William A. Osborne v. State, No. M2014-00458-CCA-R3-PC, 2015 Tenn. Crim. App. LEXIS 128, 2015 WL 832288, at *10 (Tenn. Crim. App. Feb. 26, 2015) (quoting State v. Kerley, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991)). "[C]ounsel must make quick and difficult decisions respecting strategy and tactics which appear proper at the time but which, later, may appear to others, or even to the trial lawyer himself, to have been ill[-]considered." Hellard v. State, 629 S.W.2d 4, 9-10 (Tenn. 1982). While lead counsel's "decisions

throughout [Dr. Mileusnic-Polchan's] testimony may have been ill-advised," we cannot say that "a failed witness examination strategy . . . rises to the level of incompetent representation." Osborne, 2015 Tenn. Crim. App. LEXIS 128, 2015 WL 832288, at *10.

With respect to his objections, lead counsel testified at the post-conviction hearing that he was hesitant to object during Dr. Mileusnic-Polchan's testimony because she testified "immediately" after the McDaniel hearing and because he did not have the opportunity to process what he heard at the hearing or consult with Dr. Davis about it. However, as we noted above, the trial record belies lead counsel's recollection of Dr. Mileusnic-Polchan's testimony. Rather than, as the Petitioner argues on appeal, lead counsel being "unprepared and ill[-]equipped to [*70] process" what he learned at the McDaniel hearing, the record established that lead counsel was aware of Dr. Mileusnic-Polchan's opinions regarding the manner of death and direction of travel of the Petitioner's car, that he had extensively prepared for Dr. Mileusnic-Polchan's testimony, and that he had the benefit of a McDaniel hearing the day before Dr. Mileusnic-Polchan testified to the jury.

With respect to lead counsel's attempt to impeach Dr. Mileusnic-Polchan with her statements from their pretrial meeting, co-counsel testified that the defense team "agonized over how to use [that] information" and was aware that they "might suffer" by questioning Dr. Mileusnic-Polchan about the pretrial meeting. However, both lead and co-counsel believed that Dr. Mileusnic-Polchan's statements about the heat shield at their pretrial meeting confirmed the Petitioner's version of events. As such, lead counsel told the jury in his opening statement about the pretrial meeting, about what Dr. Mileusnic-Polchan had said regarding the heat shield, about co-counsel's confronting Dr. Mileusnic-Polchan with the orientation of the slats on the heat shield, and about Dr. Mileusnic-Polchan's leaving the meeting [*71] saying that she was unsure about the orientation of the slats and that she would have to check the car to confirm the orientation.

The Petitioner contends that by raising the pretrial meeting, lead counsel improperly put his credibility at issue. However, the case cited by the Petitioner to support this argument, State v. Zimmerman, dealt with a claim of ineffective assistance of counsel when trial counsel promised to present evidence during his opening statement but failed to do so during the course of the trial. 823 S.W.2d 220, 225 (Tenn. Crim. App.

1991). That is not the case here. Lead counsel confronted Dr. Mileusnic-Polchan about her statements at the pretrial meeting during his cross-examination, and Dr. Mileusnic-Polchan admitted that at the time of the pretrial meeting she was unsure of the orientation of the slats and that she needed to physically inspect the car to be sure.

In hindsight, it is clear that this attempt to impeach Dr. Mileusnic-Polchan was ill-advised given that lead counsel mistakenly stated that Dr. Mileusnic-Polchan said the car backed over the victim and Dr. Mileusnic-Polchan's strong reaction to that. However, we cannot say that adopting this strategy was deficient because lead and co-counsel believed [*72] that Dr. Mileusnic-Polchan had confirmed the Petitioner's version of the incident and had weighed the possible benefits of impeaching Dr. Mileusnic-Polchan with a prior statement that confirmed the Petitioner's story against the possible risks.

With respect to lead counsel's failure to call any witnesses to impeach Dr. Mileusnic-Polchan's testimony about the pretrial meeting, we note that lead counsel had strategic reasons for not calling each of the possible witnesses. Lead counsel felt that he could not call Dr. Pedigo due to Dr. Pedigo's prior criminal convictions. Lead counsel felt that it would not be "fair" to call Mr. Davis because Mr. Davis was a relatively new employee at lead counsel's office. Lead counsel seriously considered calling co-counsel to testify and met with the prosecutor and Judge Baumgartner to discuss the ethical concerns of doing so. However, after considering the issue and Judge Baumgartner's advice, lead counsel decided not to call co-counsel as a witness for fear of how the jury would react and of making "a bad situation worse." Given that lead counsel had strategic reasons for not calling each of the potential witnesses, we conclude that his performance [*73] was not deficient in this regard. Accordingly, we affirm the post-conviction court's findings that lead counsel was not deficient in his handling of Dr. Mileusnic-Polchan's trial testimony.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

D. KELLY THOMAS, JR., JUDGE

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 Neutral
As of: September 17, 2018 8:01 PM Z

State v. Cornwell

Supreme Court of Tennessee, At Knoxville

March 5, 2013, Filed

No. E2011-00248-SC-R11-CD

Reporter

2013 Tenn. LEXIS 246 *

STATE OF TENNESSEE v. CARLOS RADALE
CORNWELL

Prior History: [\[*1\]](#) Criminal Court for Knox County. No. 89044.

[State v. Cornwell, 2012 Tenn. Crim. App. LEXIS 868](#)
[\(Tenn. Crim. App., Oct. 25, 2012\)](#)

Opinion

ORDER

Upon consideration of the application for permission to appeal of Carlos Radale Cornwell and the record before us, the application is denied.

PER CURIAM

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 Neutral
As of: September 17, 2018 8:00 PM Z

State v. Cornwell

Court of Criminal Appeals of Tennessee, At Knoxville
February 28, 2012, Session; October 25, 2012, Filed
No. E2011-00248-CCA-R3-CD

Reporter

2012 Tenn. Crim. App. LEXIS 868 *; 2012 WL 5304149

STATE OF TENNESSEE v. CARLOS RADALE
CORNWELL

Subsequent History: Appeal denied by [State v. Cornwell, 2013 Tenn. LEXIS 246 \(Tenn., Mar. 5, 2013\)](#)

Post-conviction relief denied at [Cornwell v. State, 2017 Tenn. Crim. App. LEXIS 994 \(Tenn. Crim. App., Dec. 1, 2017\)](#)

Prior History: [*1] [Tenn. R. App. P. 3](#) Appeal as of Right; Judgment of the Criminal Court Affirmed. Appeal from the Criminal Court for Knox County. No. 89044. Richard R. Baumgartner, Judge.

[United States v. Baumgartner, 2012 U.S. Dist. LEXIS 124013 \(E.D. Tenn., Aug. 30, 2012\)](#)

Disposition: Judgment of the Criminal Court Affirmed.

Core Terms

trial court, sentence, blood, front, dirt, photographs, struck, rub, credit union, scene, admissibility, witnesses, marks, injuries, mistrial, expert testimony, closing argument, investigator, convictions, reliability, arrived, enhancement, forensic, factors, tire, mitigating factors, police department, reconstructionists, exculpatory, documented

Case Summary

Overview

Defendant's second degree murder conviction was affirmed, as the State did not fail to adequately preserve evidence. Any potentially exculpatory evidence was not apparent to agents of the State, and the evidence was available at trial through comparable means. The sentencing issues raised in defendant's brief were

deemed waived.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

[HN1](#) Defendant's Rights, Right to Fair Trial

The critical inquiry in determining the appropriate consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory is: Whether a trial, conducted without the lost or destroyed evidence, would be fundamentally fair?

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > Weight & Sufficiency

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN2 Procedural Due Process, Scope of Protection

Whatever duty the U.S. Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Only if the proof demonstrates that the State had a duty to preserve the evidence and that the State failed in that duty, the analysis then shifts to a consideration of the following factors in deciding the consequences of the State's breach: (1) The degree of negligence involved; (2) The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) The sufficiency of the other evidence used at trial to support the conviction. If, after due consideration of the three factors, the trial court concludes that a trial without the missing or destroyed evidence would not be fundamentally fair, the court may order dismissal of the charges. Dismissal is, however, but one of the trial judge's options. The trial court may craft a special jury instruction or grant other appropriate remedies.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN3 Procedural Due Process, Scope of Protection

When the chances are extremely low that preserved samples would have been exculpatory, the Due Process Clause of the Fourteenth Amendment does not require law enforcement agencies to preserve evidence for later use. Moreover, the possibility that evidence could have exculpated respondent if preserved or tested is not

enough to satisfy the standard of constitutional materiality in *Trombetta*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN4 Expert Witnesses, Daubert Standard

Admissibility of expert testimony is governed by the Tennessee Rules of Evidence: If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. *Tenn. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN5 Expert Witnesses, Daubert Standard

Trial courts act as gatekeepers when it comes to the admissibility of expert testimony. Their role is to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. A court must assure itself that the expert's opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. The court's reliability analysis has four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4) foundational reliability. The Supreme Court of Tennessee has further noted: There are certain methods and foundations that, as a matter of law, are

established for purposes of admissibility as being reliable or unreliable either by statute or by having already been assessed for their reliability in a prior controlling judicial decision. There are also "ordinary cases" where methodological and foundational reliability may be simply assumed in the absence of some sufficiently weighty showing by the objecting party that warrants a more in-depth inquiry. However, other cases will require trial courts to make a more probing inquiry.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Expert Witnesses

[**HN6**](#) Abuse of Discretion, Evidence

The trial court is vested with broad discretion in resolving questions regarding the admissibility of expert testimony. On appellate review, the Court of Criminal Appeals of Tennessee will not disturb a trial court's decision regarding the admission or exclusion of expert testimony absent an abuse of discretion. A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[**HN7**](#)  Appellate Jurisdiction, Final Judgment Rule

A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

[**HN8**](#) Waiver, Triggers of Waivers

Nothing in [Tenn. R. App. P. 36\(a\)](#) 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.

Evidence > ... > Scientific Evidence > Bodily Evidence > Blood & Bodily Fluids

Evidence > Admissibility > Expert Witnesses

[**HN9**](#) Bodily Evidence, Blood & Bodily Fluids

A forensic pathologist may offer testimony regarding blood spatter analysis.

Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter & Murder > General Overview

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

Evidence > Admissibility > Expert Witnesses

[**HN10**](#) Criminal Offenses, Homicide, Manslaughter & Murder

When the foundation of an expert's opinion is reliable, expert can testify that the manner of death was homicide.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of Evidence

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

[**HN11**](#) Province of Court & Jury, Credibility of Witnesses

The jury is not bound to accept expert testimony in preference to other testimony, and must determine the

weight and credibility of each in the light of all the facts shown in the case. The weight to be given expert testimony is a question for the jury under careful instruction of the trial judge.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

[HN12](#) **Brady Materials, Brady Claims**

There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

[HN13](#) **Brady Materials, Brady Claims**

When there has been a delayed disclosure of evidence, as opposed to a complete non-disclosure, Brady is normally inapplicable unless the delay itself causes prejudice. When there has been a delayed disclosure, as opposed to a non-disclosure, the appellant must establish that the delayed disclosure prevented him from using the disclosed material effectively in preparing and presenting his case.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

[HN14](#) **Brady Materials, Brady Claims**

Tennessee case law has not expanded the meaning of "suppression" for the purposes of a Brady violation to include late disclosure wherein appellant suffered no prejudice.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

[HN15](#) **Conduct Evidence, Prior Acts, Crimes & Wrongs**

See [Tenn. R. Evid. 404\(b\)](#).

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

[HN16](#) **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Possible "other purposes" for which evidence of other crimes, wrongs or acts may be admitted under [Tenn. R. Evid. 404\(b\)](#) include identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

Evidence > Burdens of Proof > Clear & Convincing Proof

[HN17](#) **Conduct Evidence, Prior Acts, Crimes & Wrongs**

To satisfy the requirement of relevancy under [Tenn. R. Evid. 404](#), the first inquiry by the trial court must be whether a material issue exists other than conduct conforming with a character trait. Upon the court's satisfaction of the existence of a material issue, the trial court must then weigh the proffered evidence to determine whether the probative value outweighs the danger of unfair prejudice to the defendant. The trial court must finally find that appellant committed the other crimes, wrongs, or acts by clear and convincing evidence.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

[HN18](#) **Abuse of Discretion, Evidence**

When it substantially complies with the procedural requirements of [Tenn. R. Evid. 404\(b\)](#), the trial court's determination of admissibility is entitled to deference on

appeal. In reviewing a trial court's ruling on [Rule 404\(b\)](#) evidence, an appellate court may not disturb the lower court's ruling absent an abuse of discretion.

abuse. A trial court abuses its discretion when it applies an incorrect legal standard or reaches an illogical or unreasonable conclusion that causes an injustice to the complaining party.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Trials > Motions for Mistrial

[HN19](#) [] Abuse of Discretion, Mistrial

A trial court may declare a mistrial if it appears that some matter has occurred which would prevent the jury from reaching an impartial verdict. A trial court should only declare a mistrial in criminal cases where a manifest necessity requires such action. A mistrial is appropriate when a trial cannot continue or a miscarriage of justice would result if it did. The Court of Criminal Appeals of Tennessee will review the trial court's decision to grant or deny a mistrial for abuse of discretion. The party requesting the mistrial bears the burden of establishing the necessity for it.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Exceptions to Failure to Object

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Prosecutorial Misconduct

[HN22](#) [] Preservation for Review, Exceptions to Failure to Object

A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument. An improper closing argument will not constitute reversible error unless it is so inflammatory or improper that it affected the outcome of the trial to the defendant's prejudice. When called upon to review the propriety of a prosecutor's closing argument, the court should consider: (1) the conduct at issue in light of the facts and circumstances of the case, (2) the curative measures undertaken by the trial court and the prosecution, (3) the intent of the prosecutor in making the improper argument, (4) the cumulative effect of the improper argument and any other errors in the record, and (5) the relative strengths and weaknesses of the case. Trial courts have significant discretion to control closing arguments. Ordinarily, counsel must object contemporaneously to a perceived improper argument. However, when flagrantly improper arguments are made, the trial court, with or without objection, should step in and take proper curative action. Some arguments may be so exceptionally flagrant that they constitute plain error and provide grounds for reversal even if they were not objected to.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Evidence > ... > Presumptions > Particular Presumptions > Regularity

[HN20](#) [] Trials, Jury Instructions

Jurors are presumed to follow the instructions given to them by the trial court.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Criminal Law & Procedure > Trials > Judicial Discretion

[HN21](#) [] Abuse of Discretion, Evidence

Questions regarding the admissibility of evidence rest within the sound discretion of the trial court, and the Court of Criminal Appeals of Tennessee will not disturb the trial court's ruling absent of a clear showing of

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

[HN23](#) [down] Trials, Closing Arguments

Closing arguments that do not elicit an objection warrant reversal only in exceptional circumstances. The Court of Criminal Appeals of Tennessee adheres to the principle that fleeting comments that passed without objection during closing argument in the trial court should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

[HN24](#) [down] Plain Error, Definition of Plain Error

The standard contained in [Tenn. R. Crim. P. 52](#), error that affects substantial rights, has been construed as error with a prejudicial effect on the outcome of a judicial proceeding.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

[HN25](#) [down] Procedural Matters, Briefs

[Tenn. R. App. P. 27\(a\)\(7\)](#) states that an appellant's brief shall contain the following with respect to an argument: (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

[HN26](#) [down] Waiver, Triggers of Waivers

See [Tenn. Ct. Crim. App. R. 10\(b\)](#).

Counsel: Mark E. Stephens, District Public Defender; John Halstead and Robert Edwards, Assistant Public Defenders, Knoxville, Tennessee, for the appellant, Carlos Radale Cornwell.

Robert E. Cooper, Jr. Attorney General and Reporter; Renee W. Turner, Senior Counsel; Randall E. Nichols, District Attorney General; and Ta Kisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

Judges: ROGER A. PAGE, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Opinion by: ROGER A. PAGE

Opinion

Appellant, Carlos Radale Cornwell, appeals his conviction of second degree murder and resulting sentence of thirty-five years. Appellant cites the following errors: (1) the State failed to adequately preserve evidence; (2) the trial court erred in permitting the State's medical expert to testify beyond the scope of her expertise; (3) the trial court improperly allowed two of the State's witnesses to testify as experts; (4) the trial court erred in allowing improper [*2] testimony of certain lay witnesses; (5) the State improperly argued a theory in its closing argument that was not supported by the evidence; (6) the State failed to provide audio tapes of witness interviews in a timely fashion; (7) the trial court erred by allowing an officer to read aloud the affidavit of complaint supporting a domestic violence warrant taken by the victim against appellant; and (8) the trial court erred in sentencing appellant as a Range II offender and in determining the length of appellant's sentence. Discerning no error, we affirm appellant's conviction and sentence.

OPINION

I. Facts

A. Procedural History

A Knox County Grand Jury indicted appellant for one count of first degree murder of his wife, Leoned Cornwell. The trial court appointed the Knox County Public Defender to represent appellant. After a jury trial, the jury convicted appellant of the lesser-included offense of second degree murder.

This case involves a motor vehicle fatality where appellant struck the victim, his wife, with his automobile. Appellant did not challenge the fact that he struck the victim with his automobile. The primary dispute involved whether appellant moved his vehicle forward to strike [*3] the victim, or whether, as he contended, he accidentally struck the victim as she walked behind his vehicle. As such, evidence tending to support either theory was important. Thus, prior to trial, appellant filed a motion based on *State v. Ferguson*, asking that the trial court dismiss the indictment against him.¹ *Ferguson* provides the legal analysis to be employed by the court when an accused alleges loss or destruction of evidence by the State.

Appellant argued to the trial court that after officers impounded and examined his vehicle, they improperly stored it in an unprotected outdoor area, leading to material alteration of evidence. Appellant maintained that his expert would contend that it was not feasible for the State to draw the conclusions it reached based on the documentation it provided to appellant and that independent visual inspection by appellant's expert was necessary, yet impossible. Thus, appellant argued that he could not defend himself against the indictment. The State responded that it adequately preserved the evidence photographically and made the photographs available to appellant. After hearing testimony [*4] from Gillis Dewayne Terry from the Knoxville City Impound Lot and accident reconstructionists James Alan Parham and L.B. Steele, III, the trial court denied appellant's motion.

In a subsequent pre-trial hearing, the parties addressed issues pertaining to the expert testimony of Dr. Darinka Mileusnic-Polchan, Joe Cox, and L.B. Steele. At that time, the trial court heard appellant's argument regarding the anticipated testimony of his neighbors Anthony and Stephanie Anderson. On the morning of trial, appellant offered further argument about the expert testimony and the Andersons' testimony.

B. Facts from Trial

Stephanie Anderson testified that she was a neighbor of the Cornwells at Morningside Hills Apartments. She lived next door to appellant and the victim with her husband and daughter. The Andersons' apartment shared a common wall with the Cornwells' apartment. On March 5, 2008, Ms. Anderson was awakened at approximately 4:30 a.m. by the Cornwells' arguing.

Appellant was screaming at the victim, calling her profane names such as, "B***h. You stupid b***h. You stupid MF." Ms. Anderson believed that appellant sounded angry. Later that day, Ms. Anderson heard something about a death that [*5] prompted her to call Detective Steve Still. He interviewed Ms. Anderson at her home the following day. Another investigator accompanied Detective Still and simultaneously interviewed Mr. Anderson in a different room.

Anthony Anderson, Stephanie Anderson's husband, confirmed that he heard appellant yelling at the victim, including a great deal of profanity and cursing. He also heard appellant threaten the victim by saying, "Stupid, mother f***er, you know that I'll kill you."

Cebra Griffin, Sr., testified that he worked with appellant at Smokey's restaurant at the University of Tennessee. Mr. Griffin was at work around 5:00 a.m. on March 5, 2008, and saw appellant arrive at approximately 5:25 a.m. Appellant was looking for their supervisor. Mr. Griffin believed that appellant left around 5:30 or 5:45 a.m. According to Mr. Griffin, appellant did not appear to be upset when he left.

Angieel Williams testified that she worked at Smokey's with appellant and Mr. Griffin. She was at work on March 5, 2008. Appellant was already there when she arrived at 5:30 or 5:45 that morning. He was in a good mood and did not indicate that he and the victim had argued. Ms. Williams received a call for appellant. [*6] She did not see him leave Smokey's.

Sandra Moore testified that she also lived in Morningside Hills Apartments. Ms. Moore's apartment shared a common wall with the Cornwells' apartment. On March 5, 2008, she awoke at 5:30 a.m. and did not hear any yelling or screaming as she was getting dressed for work. Ms. Moore left her apartment around 6:00 a.m., when she passed appellant and the victim. They were walking toward their car. She heard them bickering but did not describe it as yelling.

Titonia Sawyer testified that she made a transaction using the ATM at ORNL Federal Credit Union at 6:22 a.m. on March 5, 2008. She approached the credit union from a back street, the name of which she did not recall. From the direction Ms. Sawyer approached, she was facing the teller lanes. Ms. Sawyer noticed a car just in front of the teller lanes. She drove around the credit union to the ATM. The car she previously noticed pulled around, also. The driver of the vehicle approached in such a way as to leave a space between Ms. Sawyer's car and the other vehicle. Ms. Sawyer's

¹ See generally *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999).

window was rolled down and the driver's side door was ajar, allowing better access to the ATM. Ms. Sawyer did not hear arguments [*7] or music coming from the other car. From her vantage point, Ms. Sawyer could see that a male was in the driver's seat. She could not clearly see anything else until a woman exited the front passenger side of the vehicle. After the passenger exited the vehicle, the passenger looked down into the car. The female passenger did not appear agitated; Ms. Sawyer thought the woman was simply looking for her purse. The next time Ms. Sawyer looked back, the woman had both passenger side doors open. Ms. Sawyer became very nervous, thinking that she was about to be ambushed. When Ms. Sawyer received her ATM receipt, she left the credit union by the same route she arrived. The other vehicle was in the same location, but she could no longer see the woman.

Ms. Sawyer then went to work. While at her desk, Ms. Sawyer watched the local news on her computer. A news story reported that a hit-and-run had occurred at the ORNL Credit Union at approximately 6:23 or 6:24 a.m. Ms. Sawyer checked her ATM receipt, and upon confirming that her transaction occurred at 6:22 a.m., she called the police. When she spoke with the investigator, he informed her that the police were looking for her. Ms. Sawyer viewed a [*8] photograph of where the vehicle was oriented after the incident. She stated that the other vehicle was farther "down," meaning toward the street, than where she last saw it.

Gail Cox testified that she, along with her husband, Devery Cox, and their two children were in their vehicle traveling west on Magnolia Avenue on the morning in question. They stopped at a traffic light and saw a man in the eastbound lane of the road walking toward the credit union. The man was waving his arms over his head and was screaming hysterically for someone to call 9-1-1. They traveled through a green traffic signal when they noticed the man was then in the median and was signaling them to stop or slow down. Mr. Cox pulled to the median, at which time the man shouted for them to call 9-1-1 because "someone had been hit." Mr. Cox moved their vehicle from the roadway into the parking lot of ORNL Credit Union and dialed 9-1-1. As soon as the Coxes entered the parking lot, Mr. Cox saw the victim on the ground behind a maroon car. Mr. Cox saw shoes, an umbrella, and a few other items. Shortly thereafter, Mrs. Cox moved their car to another area of the parking lot to clear the way for emergency vehicles.

Mr. [*9] Cox spoke with the 9-1-1 operator at first, but because Mr. Cox was frantic and yelling, Mrs. Cox took

the telephone and began to inform the operator about the incident. The victim's face was full of blood. One of her arms was contorted in such a way that it appeared it may not have been attached to the victim's body. The victim was breathing but not consistently. She would, at times, try to catch her breath. The victim's eyes were open.

Appellant was frantically running about, saying that he could not believe this was happening and that he hoped the victim was okay. Appellant informed Mrs. Cox that he and the victim were arguing when the victim exited the vehicle. Mrs. Cox gave a statement to Detective Still later that morning. She stated that appellant told her that the victim started walking immediately after exiting the vehicle, so he shifted the car into reverse and began backing up without realizing that he ran over the victim. When appellant exited the vehicle, he observed that the car was on top of the victim. Knowing that he had to move the car, he got back into the vehicle in order to move it off of the victim's body.

Mrs. Cox testified that she advised appellant to collect [*10] the victim's purse and debit card, which were on the ground, and move the items out of the way for emergency personnel. Mrs. Cox noted that one of the victim's shoes was in close proximity to her body, while the other shoe was farther down the driveway of ORNL Credit Union. She recalled that someone put the victim's shoes in the trunk of appellant's car.

Mr. Cox testified that he was more concerned about the victim than the appellant. The victim's eyes were open and she was gasping for breath. Mr. Cox was anxious for 9-1-1 to arrive and save the victim's life. Mr. Cox was worried that the victim might go into shock, so he gathered jackets from appellant, Mrs. Cox, and their son to cover the victim. As Mr. Cox was on his knees beside the victim, appellant was running around, hysterical, saying, "Oh my God, oh my God," "I need help," "What have I done?" and "What am I going to do?" Mr. Cox told appellant to calm down. At some point, Mr. Cox asked appellant to come over to where the victim was lying and call her name to see if she would respond. The victim died before emergency personnel arrived on the scene.

Stacy Foster testified that she was employed as the vice-president supervising [*11] the security and fraud department at ORNL Federal Credit Union. Ms. Foster confirmed that the victim had an account with the credit union. She provided video footage from the surveillance cameras fixed on the ATM at the credit union at the time

of the victim's death. From the angle of the camera at the ATM, one could see approaching headlights. The camera recorded a customer making an ATM transaction at 6:21 a.m. on March 5, 2008. Ms Foster identified a second set of headlights in the video footage beginning at 6:22 a.m. However, neither appellant's vehicle nor the victim were visible in the footage.

Steve Still, an investigator with the Knoxville Police Department's violent crimes unit, previously served as a fatal accident investigator. Detective Still completed training to investigate traffic fatalities but was not an accident reconstructionist. He testified that accident reconstruction involves formulas and more technical issues, while fatal accident investigators make determinations based on the evidence at the scene, witness interviews, and toxicology reports.

On his way to work on March 5, 2008, Detective Still responded to an incident on Magnolia Avenue. The police department's [*12] reconstructionists worked the fatalities but often called investigators to assist in interviewing witnesses. Detective Still's duty at the scene was to interview the witnesses. At some point, the status of the incident changed from being a traffic accident to "possibly something more." When he arrived on the scene, Detective Still spoke with officers to obtain a basic understanding of what had happened. As he walked around the scene and the vehicle, someone pointed out that blood appeared to be under the front of the car. The spot of blood was located on a guard or cross-piece some distance farther back from the front of the car. Detective Still would have expected to see damage to a vehicle that struck a pedestrian but observed no damage to the hood or the trunk of appellant's car. He did, however, observe drops of blood, pieces of clothing, and a brownish mark that appeared to be skin near the sidewalk of the parking lot. Detective Still asked Mr. Cox to meet him at the police department to give a statement and asked officers to transport appellant to the department.

After informing appellant of his *Miranda* rights, Detective Still interviewed appellant. Detective Still videotaped [*13] and tape-recorded the interview. In appellant's statement to Detective Still, appellant said he thought he and the victim might be splitting up. Appellant and the victim had an issue regarding car payments. Appellant went to work on the morning of the incident but left so he and the victim could make the car payment. They went to the ATM together, where they were behind another vehicle. According to appellant, the victim cursed him, exited their vehicle, retrieved her umbrella

from the back of the car, and began walking toward Magnolia. Appellant backed up the vehicle to see where the victim was going, then accidentally ran over her. When appellant realized he struck the victim with the car, he pulled forward to get the car off her. Appellant stated that he did not mean to hit her and that it was not intentional. Detective Still pointed out to appellant that before he moved the vehicle, he should have checked underneath to see exactly where the victim was in relation to the tires. If the victim was between the two axles of the car, her body may have been in contact with the undercarriage but not necessarily being crushed by it. In that case, moving the vehicle off her would have injured [*14] her further.

Detective Still did not believe that appellant's version of the incident matched the evidence at the scene. Everything that Detective Still witnessed at the scene indicated that the victim's body was dragged in the opposite direction of what appellant told him. The blood under the front of the vehicle, between the front axle and the very front of the car, indicated that if appellant had indeed backed over the victim as he stated, he would have run over her with both axles of the vehicle. Based on the level of jarring that appellant would have experienced in the car, running over the victim with both axles of the car would have indicated very aggressive driving. Appellant could offer no explanation for the blood on the bottom front of the car. Detective Still was troubled by the absence of directional marks supporting appellant's version of the incident. Detective Still contacted the Knoxville Police Department reconstructionists, Ron Trentham and L. B. Steele.

Detective Still charged appellant with first degree murder. He continued investigating the case and developing information with the accident reconstructionists. In conducting his investigation, Detective Still gathered [*15] information from the following sources: Anthony and Stephanie Anderson; the medical examiner, Dr. Darinka Mileusnic-Polchan; Titonia Sawyer; credit union personnel; a co-worker of appellant; and photographs and evidence from the credit union scene. Detective Still agreed with the experts' opinion, based on the evidence and condition of the vehicle, that the victim's center of gravity was below the hood or trunk line of the car. His conclusion indicated that the victim was already on the ground when appellant ran over her.

Officer Beth Goodman was an evidence technician with the forensic unit of the Knoxville Police Department. Her duties involved gathering evidence, documenting crime

scenes, and taking photographs. Officer Goodman collected the victim's clothing and personal items from the forensic center where the victim's body was autopsied. The articles of clothing included a black "hoodie," a pair of pants, underwear, a white t-shirt, a denim jacket, socks, and a sports bra. Officer Goodman also collected the victim's jewelry and keys.

Officer Dan Crenshaw, a senior evidence technician at the Knoxville Police Department, responded to the scene at ORNL Credit Union. Officer Crenshaw [*16] believed that he was responding to an accident with an injury. When he arrived, he observed a vehicle with a body partially protruding from the rear of the car. The first thing Officer Crenshaw did was take photographs. He placed cones, markers, and numbered placards beside the evidence. He also photographed the inside of the vehicle. Officer Crenshaw saw blood spatter on the ground and blood on the undercarriage of the car around the radiator. He did not notice any damage to the hood, trunk or bumpers of the vehicle. Officer Crenshaw took several other photographs before Officer Joe Cox arrived at the scene to relieve him.

Lachrisa Clemons was the victim's daughter. On the day of the incident, Ms. Clemons expected her mother to take her to the orthodontist around noon. Ms. Clemons tried repeatedly to reach the victim by telephone. She called the victim's employer, Food City, to find out if the victim had gone to work. She learned from an employee that her mother was not at Food City that day. When Ms. Clemons was finished at work, she went home, changed clothes, and took the trolley to the orthodontist. She persisted in trying to reach her mother. At 5:00 p.m., Ms. Clemons arrived [*17] back at her home. A few minutes later, Detective Still knocked on her door and informed her that her mother had been killed earlier that day. According to Ms. Clemons, the victim left appellant in January 2008 and stayed at the Hamilton Inn for about a week. Some time during that week, appellant stayed with the victim in the hotel while visitors from North Carolina stayed at their apartment. The victim later returned to live with appellant. Ms. Clemons had previously seen her mother with a black eye in November 2006.

Officer Joe Cox of the Knoxville Police Department was working crime scene detail in 2008. His duties included taking photographs, collecting samples, collecting evidence, and analyzing evidence or sending the evidence away to be analyzed. When he arrived at the scene at ORNL Credit Union, he saw a maroon Infiniti in the parking lot and a deceased woman on the ground.

He photographed the scene and collected blood samples. In addition to collecting blood spatter evidence, Officer Cox collected a cigarette lighter and a clump of hair from the scene. He later collected appellant's white t-shirt and pants. Officer Cox collected a pair of tennis shoes from the scene. The insole [*18] of one of the shoes had been dislodged, and the shoelace had been torn off. At the scene, Officer Cox noticed that the trunk of the vehicle was open. He ordered removal of the vehicle by a wrecker that pulled the vehicle onto the bed of the wrecker. The wrecker transported the vehicle to the police department's safety shop where it would be covered and placed on a lift so that investigators could examine the bottom of the car.

When officers examined the bottom of the vehicle, Officer Cox saw evidence that something had cleaned off parts of the underside of the car. He also observed stains that appeared to be blood on the underside of the car, as well as some other material. He swabbed the blood stains and forwarded them to the Tennessee Bureau of Investigation. The blood and "brush off" were located on the front passenger side of the automobile. Officer Cox swabbed blood stains from the front guard of the car, the rocker panel underneath the passenger-side door, the tubing guard, and the sway bar guard. He also obtained a blood swab from a back tire.

After extensive *voir dire* by appellant's counsel, during which Officer Cox offered information about his training, education, and experience, [*19] the trial court allowed Officer Cox to testify as an expert in blood spatter analysis. Officer Cox testified that he collected a blood sample from the gutter along Magnolia Avenue and from the sidewalk between Magnolia Avenue and the credit union. Officer Cox explained that when blood goes straight down at a ninety degree angle, the blood leaves a round impact mark with small marks called spines protruding from it. The blood spatter from the gutter was round with a degree of elongation. The spines pointed in a particular direction, which Officer Cox found useful in determining the general direction of motion. The blood spatters were not high velocity; high velocity spatter would result in very small droplets, or misting. The blood on the sidewalk had large spines all pointing in the same direction. Officer Cox opined that, based on the direction of the spines on the blood splatter, the general direction of motion of the victim's body was toward the resting location of the victim's body, or toward the credit union from the street.

Officer Ron Trentham was in the motor unit of the Knoxville Police Department but also served as a traffic

accident reconstructionist. After *voir dire*, the [*20] trial court allowed Officer Trentham to testify as an expert in accident reconstruction. In investigating an accident where the front of a vehicle struck a pedestrian, Officer Trentham would expect to see damage to the front bumper of the car and to the leading part of the hood. He would also expect to see damage on the hood or on the windshield. If a car backed up and struck a pedestrian, he would expect to see contact on the bumper or trunk deck area. Officer Trentham considered dirt on a vehicle to be very important in determining whether a vehicle made contact with another object or person. If he observed damage on a vehicle, it could be previous damage; however, if something touched a dirty vehicle, the impact of the object that touched it will disturb the dirt and make a smear. If a vehicle struck a pedestrian below his or her center of gravity, the body would either be pushed forward or it would go up onto the hood or the windshield. There should be some evidence, such as disturbed dirt, a dent, or contact damage. If a car struck a pedestrian above his or center of gravity, the car would push the pedestrian over and move on top of the body.

When Officer Trentham responded to [*21] the scene at the credit union, he believed he was investigating a case involving a pedestrian being struck by a vehicle. Upon arrival, Officer Trentham initially thought that a pedestrian was walking down the sidewalk and was struck by a car entering the parking lot. At that time, he had not yet seen the front of appellant's vehicle. Officer Trentham walked around and surveyed the scene. He noted several drag marks from the edge of the roadway leading toward the final resting spot of the victim and the automobile. He also observed the presence of red drag marks that were consistent with blood. He saw blood drops at the edge of the roadway and blood smear from the sidewalk onto the asphalt area of the parking lot. Officer Trentham found blue drag marks that were consistent with the victim's denim jacket. All of the marks he found started at the edge of the road and led up to the final point of rest of the victim's body and appellant's car. Officer Trentham located a tan or brown scrape mark that was consistent with the victim's skin and the injury pattern the medical examiner found on the victim's lower body. He observed two small black marks that were consistent with the victim's shoes. [*22] Again, all of the lines Officer Trentham observed led from the street toward the credit union to the point where the victim's body came to rest. He was able to determine the direction of movement because the marks were darker at the initial points of impact and faded as they moved forward.

Officer Trentham's examination of appellant's vehicle indicated that the dirt around the trunk key had been disturbed. He did not observe any disturbance of dirt around the occupants' sides of the vehicle. He determined that something had disturbed the dirt around the front license plate holder and the lower part of the front bumper. These marks indicated to Officer Trentham that the victim's body was struck from the front as the vehicle moved in a forward direction. He looked under the car with a flashlight and noticed blood on the frame next to the right front wheel. He also saw blue lines that were consistent with the victim's denim jacket. Grease marks and dirt on the victim's jacket were consistent with her clothing coming into contact with the right front wheel area of appellant's car.

As Officer Trentham completed his initial investigation at the crime scene, he observed a cigarette lighter [*23] and a clump of hair at the point where he believed that the victim was initially struck at the curb line. He testified that the driver of the wrecker that towed appellant's car to the Knoxville city impound lot did not enter the vehicle or turn the steering wheel. Officer Trentham further insured that no one disturbed any dirt on the body of the vehicle. He followed the car to the impound lot. He had the car taken into the police garage and placed on a rack so that investigators could observe any further evidence. As part of the reconstruction, Officer Trentham measured the vehicle. At the garage, he observed blood running the length of the vehicle on the passenger side leading to the rear passenger side tire. Just before the rear tire, he noticed a pattern of lines consistent with the victim's jacket on the frame of the car next to the rear tire. While at the garage, Officer Trentham transferred the victim's shoes and the clump of hair to Officer Cox.

Officer Trentham found that the marks on the victim's left shoe were significant in that they were consistent with the victim being dragged across the concrete and asphalt. Officers found the shoestring just beside the driver's door of [*24] the vehicle as it came to rest. Officer Trentham gave his expert opinion regarding the point of impact between appellant's car and the victim. Based on the evidence and location of the blood, skin, and blue fibers, he gleaned that, from the point where the victim was struck, she was then pushed by the vehicle. The victim's skin was transferred to the pavement as a result of her jogging pants coming down, exposing her hip area to the concrete, and leaving marks. Officer Trentham's opinion was that the victim was lying on the ground bleeding at the curb line and that the point of impact with appellant's automobile was

at the curb line.

L.B. Steele was assigned to the motor traffic unit of the Knoxville Police Department and was Officer Trentham's partner. After *voir dire*, the trial court qualified Officer Steele as an expert in accident reconstruction. On the morning of March 5, 2008, Officer Trentham called Officer Steele and asked him to gather their measuring equipment then proceed to the crime scene. When he first arrived, Officer Steele believed he was responding to an accident involving a vehicle striking a pedestrian. In reviewing the evidence, he and Officer Trentham tried to determine [*25] how a pedestrian fatality could have occurred because the evidence indicated that the victim had been lying on the ground, or at the very least, was lower to the ground than she was to a standing position. Officer Steele took crime scene measurements with their equipment and loaded the information into the data storage system. He later transferred the data to a computer at the police department and made two discs containing the information. The distance from the first blood drop near the edge of the roadway to the left front tire at its resting position was 34.91 feet.

Special Agent Lisa Wessner was a special agent forensic scientist with the Tennessee Bureau of Investigation ("TBI") crime laboratory, assigned to the forensic serology and DNA analysis unit. In the course of this case, she received a DNA sample from the victim, buccal swabs from appellant, and swabs from appellant's vehicle taken from a sway bar guard, metal sheet, right rear tire, front guard and tubing guard. The sample from the sway bar guard failed to indicate the presence of blood; the remainder of the swabs from the vehicle contained blood. DNA obtained from the metal sheet, the front guard, and the tubing guard [*26] matched the victim's DNA profile. Agent Wessner could not obtain a DNA profile from the rear tire because the DNA was insufficient or degraded. The probability of the DNA belonging to an individual unrelated to the victim exceeded the current world population.

Officer Scott Noe with the Knoxville Police Department responded to a domestic call made by the victim on November 16, 2006. When he arrived, Officer Noe observed that the victim had a black eye. He transported the victim to the commissioner's office so she could sign a warrant against appellant. In the warrant, the victim alleged that she and appellant argued over bus fare, at which time appellant punched her in the eye. Appellant pled guilty to the charge.

The trial court allowed Dr. Darinka Mileusnic-Polchan to testify as an expert witness in forensics. Dr. Mileusnic-Polchan responded to the crime scene at the credit union, where she observed the victim in a supine, or face-up, position under the rear bumper of appellant's car. After reviewing the scene and taking photographs, Dr. Mileusnic-Polchan performed the autopsy of the victim the same day. She took additional detailed photographs of the victim's clothing. Dr. Mileusnic-Polchan [*27] opined that in cases such as this, the existence of conflicting information makes it necessary for her to document the case very carefully, because even the smallest finding on the body can prove important in determining what actually happened. Based on her findings, Dr. Mileusnic-Polchan formed the opinion that the victim's manner of death was a homicide.

In most cases involving a pedestrian accident, Dr. Mileusnic-Polchan would expect to see injuries to the lower extremities, specifically the calves, knees, and sometimes the thighs, of the victim. She did not find those injuries on the victim. She examined the victim's body and documented every injury. Dr. Mileusnic-Polchan documented sixty separate injuries. The victim suffered several head and neck injuries, including linear marks on the chin consistent with tire marks. An abrasion by the right eyebrow displayed directionality, indicating that the body was moving against the surface. Dr. Mileusnic-Polchan found blood stains and hair attached to the shoulder of victim's jacket, most likely caused by forced bending of the head over the shoulder.

Dr. Mileusnic-Polchan noted that the victim's right clavicle was broken, and the neck and [*28] spine junction was fractured. The fracture was caused by extraordinary force that separated the head from the neck. The tire marks on the victim's neck indicated that the vehicle's rear tire ran over it. This injury was one of the primary causes of the victim's death. The victim also had linear abrasions under and on her right breast. Dr. Mileusnic-Polchan described the injury to the victim's breast area as indicating movement of the victim in a particular direction, and attributed the injury to contact with the front bumper of appellant's vehicle. She analyzed a bruise pattern and a burn on the victim's body and matched the injuries to a hot part from underneath the car, perhaps part of the exhaust or catalytic converter.

The victim's abdomen sustained a great deal of injury, including "abrasions and stretch abrasions." Dr.

Mileusnic-Polchan identified a tire track along the victim's abdominal abrasions. She stated that the tire marks could only have been made by the front tires because the rear tires were bald and could not have left those particular indentations. Dr. Mileusnic-Polchan pointed out a large burn that was over four inches long by two inches across. The skin from that [*29] burn was retrieved from underneath the vehicle. She commented on an extensive deep bruise on the right thigh that could only be consistent with the tire crossing the victim's thigh. The victim's pelvis was completely crushed, including the sacrum.

Dr. Mileusnic-Polchan noted that the victim's back was relatively clear of injury, which indicated that she was facing the vehicle with clothing covering her back. The victim did, however, receive a road rash injury to her back and buttocks. In the sacral area, some of the victim's skin was missing. Dr. Mileusnic-Polchan explained that the pattern of the injury established the direction of movement of the victim's body.

As part of her investigation, Dr. Mileusnic-Polchan examined appellant's vehicle at the impound lot. She compared the victim's injuries with the damage to and evidence on appellant's vehicle. Dr. Mileusnic-Polchan found that the evidence and victim's injuries supported the conclusion that the victim was struck by the front of the vehicle.

Dr. Gregory James Davis testified on behalf of appellant as an expert in the field of forensic pathology. He reviewed all of the evidence collected in the case, together with reports from the [*30] medical examiner and TBI. In scrutinizing Dr. Mileusnic-Polchan's testimony, Dr. Davis explained that the term "consistent with" merely implies that physical evidence could support a particular scenario; the term itself does not mean that the scenario or story is true. Dr. Davis explained that while the evidence is consistent with the classification of the victim's death as a homicide, it is also consistent with other classifications.

Based on his review of the evidence, Dr. Davis could not offer an opinion as to whether appellant intended to inflict harm on the victim, nor could he confirm that the victim's injuries were unidirectional. The injuries were consistent with being unidirectional but were not indicative or diagnostic of them being unidirectional. Dr. Davis disputed Dr. Mileusnic-Polchan's finding that the injury on the victim's face was consistent with being run over by the tire of the car. If her face had been run over by a car, he would have expected to find more fractures

to the jaw and skull. Dr. Davis believed that the victim's death should have been classified as "undetermined" or "not determined." His view of the physical evidence was that the evidence was consistent [*31] with appellant's backing over the victim. The injuries sustained by the victim, specifically the wrist fracture and the abrasions on both hands, were consistent with her walking away from the vehicle, falling, and being struck by appellant's vehicle.

James Alan Parham, a civil engineer with Parham Engineering Consultants, testified on behalf of appellant. Mr. Parham's primary focus was on highway design and transportation safety. The trial court allowed him to testify as an expert in accident reconstruction. In preparing for this case, Mr. Parham reviewed all of the evidence, reports, and photographs. He also visited the scene of the incident on more than one occasion and examined appellant's automobile. Mr. Parham generally agreed with many of Officers Trentham's and Steele's findings. However, Mr. Parham opined that the absence of black scrape marks and scuffs going toward Magnolia Avenue does not rule out the possibility that the victim's body was dragged in that direction. Because of the downhill slope of the parking lot, a body would not offer much resistance to being pushed. Also, the asphalt would offer less friction force on a body than would the sidewalk.

Although Mr. Parham [*32] agreed that the victim was not standing at the time of impact, he disagreed with the officers' findings that the victim was pushed by appellant's automobile and dragged until her body was dislodged under the right rear tire. He stated that the police department did not sufficiently document the vehicle in order for him to determine the presence of dirt rub on the trunk, hood, or bumpers of appellant's vehicle. Mr. Parham did not find the photograph of the front license plate to be conclusive of dirt rub or interaction with a person. He did not find dirt rub documented anywhere on the topside of the vehicle but found dirt rub underneath the vehicle itself. Mr. Parham identified dirt rub on the undercarriage of appellant's automobile. He did not believe that the officers' opinions that the victim was struck in one direction could be proven by the evidence.

Mr. Parham testified that his examination of appellant's car was limited because the car had been stored outdoors exposed to weather. He disagreed with Officer Steele about the importance of storing the vehicle under cover, stating that in a low-impact case the data is very fragile. Mr. Parham believed that one rain incident could

compromise [*33] the evidentiary value of the car.

Mr. Parham placed great value on the location of the victim's broken shoelace. In his opinion, the shoelace was broken due to a forceful break, such as a tire pinning the shoelace to the ground as the body is being dragged. The location of the shoelace indicated to him that the victim's body had to be at the point where the shoelace was recovered when it was struck. The shoelace would not have held such value to him if it were located closer to Magnolia Avenue or if the body was located beyond the shoelace. Based on the evidence and appellant's theory of the incident, Mr. Parham offered the opinion that the physical evidence was consistent with appellant's explanation of the incident.

After deliberating, the jury found appellant guilty of second degree murder as a lesser-included offense of first degree murder.

C. Facts from Sentencing

The victim's daughter, Lachrisa Clemons, and the victim's son, Leon Boulanger, offered victim impact evidence. Each of them testified regarding verbal and physical abuse that the victim suffered at the hands of appellant. Virginia Thompson, the victim's mother, testified that the victim had been a happy child and that as [*34] an adult, she was uplifting to other people. The victim was an optimistic and religious woman who prayed regularly for her husband and others. At some point, appellant became withdrawn at family functions. Ms. Thompson also witnessed a decline in the victim's general disposition. She confronted appellant once and advised him to pray about his problems instead of hitting the victim, but he laughed at her.

Gail Carter met the Cornwells when she worked next door to where they both were previously employed. Appellant and the victim were not married at the time. The victim was slow to open up to Ms. Carter about personal issues. The victim's co-workers, however, called Ms. Carter on several occasions and reported that appellant struck the victim in their presence. On one occasion, appellant dragged the victim through the parking lot by her hair. Several weeks later, Ms. Carter observed that the victim's toes were broken. She denied that appellant inflicted the injuries. On a separate occasion, appellant was beating the victim when she ran to Ms. Carter's office. Ms. Carter locked the door. Although the victim did not want Ms. Carter to call the police, she did so. The victim suffered two [*35] black eyes but did not want to press charges against

appellant.

Ms. Carter worked in the office of a marriage counselor. When the victim told Ms. Carter that she wanted to marry appellant, Ms. Carter advised her to consider the decision carefully but that she would ultimately support her decision. Ms. Carter attended the wedding. Sometime after appellant and the victim were married, the victim wanted to visit her mother in North Carolina. The victim's car was not working, so Ms. Carter allowed the victim to borrow her car with the understanding that appellant was not to drive the car because he did not have a valid license. After the victim returned, appellant would not return Ms. Carter's car. He told her he wanted to buy it. Ms. Carter said she would sell it, but appellant said he would have to make payments. When Ms. Carter declined, she asked him for the keys and appellant refused. She obtained a spare set of keys from her desk and drove her car home.

Appellant testified at the sentencing hearing. He met the victim in North Carolina. Appellant had been dealing drugs, and both he and the victim used drugs. He decided that North Carolina was not a healthy place for him to live, and [*36] appellant talked to the victim about leaving her family and moving to Knoxville. Upon relocating to Knoxville, appellant and the victim stayed with friends. They both found jobs at the Marriott and moved into an apartment. They stayed mostly drug-free, except for one mistake he made. In 2006, appellant and the victim had an argument and he hit her. She filed charges and had him arrested. The victim went to be with her family in North Carolina but later returned and posted appellant's bond. Appellant stated that he promised the victim that he would never hurt her again. After that, he went to anger management classes and they attended a Bible study together. Appellant maintained that he kept his promise to the victim and never struck her again.

Appellant had a history of violence against women. He assaulted Africa Williams in 1990 and 1991. In 1992 and 1993, he assaulted Tina McBride. Although he began anger management classes after pleading guilty to the charge involving the victim, he never completed the classes.

After hearing testimony and receiving evidence, the court sentenced appellant as a Range II offender to thirty-five years in prison. Following the trial court's denial of his [*37] motion for new trial, appellant timely filed this notice of appeal.

II. Analysis

A. Alleged *Ferguson* Violation

Prior to trial, appellant filed a motion to dismiss the indictment pursuant to our supreme court's *Ferguson* decision. See generally [*Ferguson, 2 S.W.3d at 915-17*](#). Appellant contended that while under the State's control, his vehicle lost exculpatory evidentiary value because the State allowed the vehicle to remain outdoors, unprotected, and exposed to the elements. The importance of the evidence, according to appellant, was that valuable dirt rub evidence would have been visible at the point of contact on the automobile where it struck the victim. While the State's experts testified that they observed dirt rub on the front license plate of the car and took photographs of the dirt rub, appellant argues that the photographs did not clearly reflect their observation. Moreover, appellant emphasized the alleged prejudice inherent in his experts being denied the opportunity to examine both the front and the rear areas of the automobile to determine if dirt rub was present in either area.

In *Ferguson*, our supreme court considered the appropriate "consequences that flow from the State's [*38] loss or destruction of evidence which the accused contends would be exculpatory." [*Ferguson, 2 S.W.3d at 914*](#). Our supreme court exercised its authority to "expand the minimum level of protection mandated by the federal constitution," [*Burford v. State, 845 S.W.2d 204, 207 \(Tenn. 1992\)*](#), by rejecting the United States Supreme Court's "bad faith" standard in favor of a test that is less onerous on a criminal defendant. [*Ferguson, 2 S.W.3d at 916*](#). See generally [*Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 \(1988\)*](#). The court, instead, "promulgate[d] . . . an analysis in which [HN1](#) the critical inquiry is: Whether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair?" [*State v. Coulter, 67 S.W.3d 3, 54 \(Tenn. Crim. App. 2001\)*](#) (quoting [*Ferguson, 2 S.W.3d at 914*](#)). In *Coulter*, this court reiterated the State's general duty to preserve all evidence to allow a criminal defendant the opportunity for discovery and inspection, but noted that for the purpose of determining "fundamental fairness," our supreme court "seemingly cited with approval" the following standard enunciated in [*California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 \(1984\)*](#):

[HN2](#) Whatever duty the Constitution imposes on the [*39] States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.

To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Coulter, 67 S.W.3d at 54 (quoting [*Ferguson, 2 S.W.3d at 917*](#)).² Only if the proof demonstrates that the State had a duty to preserve the evidence and that the State failed in that duty, the analysis then shifts to a consideration of the following factors in deciding the consequences of the State's breach:

- (1) The degree of negligence involved;
- (2) The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
- (3) The sufficiency of the other evidence used at trial to support the conviction.

(quoting [*Ferguson, 2 S.W.3d at 917*](#)). If, after due consideration of the three factors, the trial court concludes that a trial without the missing or destroyed evidence would not be fundamentally [*40] fair, the court may order dismissal of the charges. [*Ferguson, 2 S.W.3d at 917*](#). "Dismissal is, however, but one of the trial judge's options." *Id.* The trial court may craft a special jury instruction or grant other appropriate remedies. *Id.*

On appeal, appellant argues that the trial court should have dismissed the indictment against him or granted "other appropriate relief," including prohibiting the State's witnesses from testifying about the presence or absence of dirt rub evidence. Notably, at trial, appellant asked only for the remedy of dismissal of the indictment. Appellant did not request a special jury instruction and did not [*41] ask the court to limit the testimony of the State's witnesses. Nor did he claim the trial court's

² Our court recently discussed this issue and pointed out that panels of this court have determined that evidence should have been preserved without first finding that its exculpatory value was apparent. [*State v. Jerome Sidney Barrett, No. M2010-00444-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 520, 2012 WL 2914119, at *21 \(Tenn. Crim. App. July 18, 2012\)*](#), perm. app. granted, No. M2010-00444-SC-R11-CD (Tenn. Sept. 17, 2012). The Barrett court criticized the *Coulter* court's analysis of *Ferguson*; however, because *Coulter* is a published opinion, the Barrett court was bound to follow it. *Id.* at *22.

failure to do so was error at the hearing on the motion for a new trial. Appellant is bound by the ground he asserted when making his *Ferguson* argument in the trial court. See *State v. Adkisson*, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994). He cannot assert a novel theory or request different relief on appeal. *Id. at 635*. Inasmuch as appellant failed to request relief other than dismissal, he has waived his right to other such relief. See *State v. Randy Ray McFarlin, a/k/a Mac Ray McFarlane*, No. M2010-00853-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 13, 2012 WL 76902, at *9 (Tenn. Crim. App. Jan. 9, 2012) (holding that, "[t]o the extent that the defendant may have claimed relief via *Ferguson* in any manner that would merely result in the grant of a new trial [rather than dismissal of the indictment], this issue is waived"), perm. app. denied (Tenn. May 21, 2012).

Appellant contests the State's allowing dirt rub and other physical evidence to degrade from the vehicle while it sat unprotected in the elements. In analyzing the issue of fundamental fairness, we note that officers observed the dirt rub evidence on the front of [*42] the car. The location of the dirt rub was *inculpatory*, not exculpatory. Appellant does not contend that further examination would have revealed dirt rub on the rear of the vehicle, which would have been exculpatory in nature. He merely asserts that he suffered prejudice because his experts could not independently examine the vehicle. However, law enforcement officers testified about the lack of dirt rub evidence on the rear portion of appellant's automobile. *HN3* [↑] When "the chances [were] extremely low that preserved samples would have been exculpatory," the *Due Process Clause of the Fourteenth Amendment* does not require law enforcement agencies to preserve evidence for later use. *Trombetta*, 467 U.S. at 488-491. Moreover, "[t]he possibility that . . . [evidence] could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*." *Youngblood*, 488 U.S. at 56 n.1.

Furthermore, the evidence was available at trial through comparable means. The State's witnesses, including two accident reconstructionists, an evidence technician, and the medical examiner, each testified that he or she observed what appeared to be dirt rub on the [*43] front license plate of the car and did not observe such evidence on the rear portion of the automobile. They collectively documented blood spatter and other evidence on the front portion of the undercarriage, which was consistent with the State's theory of the case that appellant struck the victim while traveling in a

forward motion. All of the aforementioned evidence was provided to appellant before the trial. In light of the officers' initial findings, all of which tended to inculpate appellant, any potentially exculpatory evidence was not apparent to agents of the State. For these reasons, we conclude that the vehicle itself did not possess sufficient evidentiary value to rise to the level of "constitutional materiality." *Youngblood*, 488 U.S. at 56 n.1.

Even if this court found the evidence to be material, analysis of the three *Ferguson* factors would result in no relief. Addressing first the degree of negligence involved, *Ferguson*, 2 S.W.3d at 917, we cannot conclude from our review of the record that the State acted negligently. Law enforcement officers carefully documented all evidentiary aspects of appellant's vehicle by photographing dirt rub patterns, photographing the undercarriage [*44] of the vehicle, and obtaining DNA swabs from various points on the vehicle. The only complaint appellant has with the State's collection of evidence is that the photograph of the front bumper does not, in his opinion, reflect the presence of dirt rub. To the extent that appellant argues there was no dirt rub evidence on the front of the vehicle, the jury received photographs of the dirt rub. The jury, as the trier of fact, reviewed the photographs and determined for itself whether dirt rub was visible in the photographs. In light of the photographic evidence and DNA testing, all of which was probative and reliable, the ability to observe the actual dirt remaining on the vehicle months later was insignificant. See *id.*

The second prong of the initial inquiry focuses on whether the lost or destroyed evidence is of such a nature that appellant would be "unable to obtain comparable evidence by other reasonably available means." *Ferguson*, 2 S.W.3d at 917. The State thoroughly photographed appellant's vehicle from all angles, including photographs taken of the undercarriage. Our preceding discussion outlines the procedures utilized by the State in preserving evidence. Appellant obtained "comparable" [*45] evidence through photographic preservation of the evidence.

Finally, we conclude that the jury had sufficient evidence by which to sustain appellant's conviction, including but not limited to: (1) testimony regarding motive; (2) DNA testing confirming the victim's blood on the undercarriage of the vehicle; (3) blood spatter evidence indicating directionality of the vehicle and the victim's body; (4) medical testimony regarding the identification of wound patterns and the mechanisms or parts of the vehicle that caused them, and (5) photographs of the

front of the vehicle license plate holder where officers observed dirt rub evidence. See *id.*

For the foregoing reasons, "to conclude that the [vehicle] possessed exculpatory value on the basis of the record before this court would constitute an exercise in pure speculation." *Coulter*, 67 S.W.3d at 54-55. The State did not have a duty to preserve the evidentiary value of the exterior of appellant's automobile, and even if it did, appellant's trial was not rendered fundamentally unfair without this evidence. Therefore, appellant is not entitled to relief on this issue.

B. Expert Testimony

1. Standard of Review

Appellant contests the expert testimony [*46] of three of the State's witnesses, medical examiner Dr. Mileusnic-Polchan, and accident reconstructionists L.B. Steele and Ron Trentham.

We begin our analysis with the proposition that [HN4](#) [↑] admissibility of expert testimony is governed by the Tennessee Rules of Evidence:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

[Tenn. R. Evid. 702](#). Our supreme court has further defined the role of the trial court in assessing the propriety of expert testimony:

[HN5](#) [↑] Trial courts act as gatekeepers when it comes to the admissibility of expert testimony. Their role is to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. A court must assure itself that the expert's opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. The court's [*47] reliability analysis has four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4) foundational reliability.

[State v. Scott](#), 275 S.W.3d 395, 401-02 (Tenn. 2009) (internal citations and quotations omitted). The supreme court further noted:

There are certain methods and foundations that, as a matter of law, are established for purposes of admissibility as being reliable or unreliable either by statute or by having already been assessed for their reliability in a prior controlling judicial decision. There are also "ordinary cases" where methodological and foundational reliability may be simply assumed in the absence of some sufficiently weighty showing by the objecting party that warrants a more in-depth inquiry. However, other cases will require trial courts to make a more probing inquiry.

[Scott](#), 275 S.W.3d at 403.

[HN6](#) [↑] The trial court is vested with broad discretion in resolving questions regarding the admissibility of expert testimony. [State v. Copeland](#), 226 S.W.3d 287, 301 (Tenn. 2007). On appellate review, we will not disturb a trial court's decision regarding the admission or exclusion of expert testimony absent [*48] an abuse of discretion. [Scott](#), 275 S.W.3d at 404; see [Stevens](#), 78 S.W.3d at 832. A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. [State v. Ruiz](#), 204 S.W.3d 772, 778 (Tenn. 2006) (citing [Howell v. State](#), 185 S.W.3d 319, 337 (Tenn. 2006)).

2. Dr. Darinka Mileusnic-Polchan's Testimony

Appellant filed a pre-trial motion requesting disclosure of the opinions to be proffered by Dr. Mileusnic-Polchan as well as a hearing to determine the admissibility of her opinions. Following an evidentiary hearing, the trial court determined that her opinions were admissible. At trial, the State tendered Dr. Mileusnic-Polchan as an expert in the field of forensic pathology. The court held a jury-out *McDaniel* hearing to ascertain the reliability of her testimony. Dr. Mileusnic-Polchan is a board-certified forensic pathologist. She based her opinions on her personal observations at the crime scene; the evidence, including her examination of the vehicle; reports; witness statements; a professional treatise; [*49] and the autopsy she conducted. Dr. Mileusnic-Polchan had been accepted as an expert witness in other cases and permitted to testify in court. Following the hearing, the trial court ruled that Dr. Mileusnic-Polchan could testify due to her expertise in the field of forensic pathology. Appellant did not object to Dr. Mileusnic-Polchan's being qualified as an expert by the court.

We first note that in the sixty-six pages of the State's

direct examination of the witness, appellant lodged four objections, one to the form of a question. He objected to the following three opinions: 1) that the front of appellant's vehicle had an imprint of the denim jacket victim was wearing when she was struck; 2) that the injury to the victim's chest was caused by the front license plate holder of appellant's car; and 3) that there was a part on the underneath side of the automobile that resembled a cheese grater and that the wound pattern on the victim indicated forward movement of the car because the skin was stretched and not cut.

We must agree with appellant that Dr. Mileusnic-Polchan's testimony regarding the denim jacket leaving an imprint on the front of appellant's vehicle was not a proper subject [*50] for expert testimony by a forensic pathologist. We are inclined to view this as an expert's offering an opinion on a matter that would not substantially assist the trier of fact. The State admitted several photographs of all angles of appellant's automobile. A lay witness could make the comparison as easily as an expert witness. Any error in this regard, however, is harmless. See [Tenn. R. App. P. 36\(b\) \(HN1\)](#) [↑] "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.").

Appellant's remaining two objections involve Dr. Mileusnic-Polchan's testimony about the manner of infliction of a wound or injury. We conclude that this is a proper subject upon which a medical examiner may offer testimony. To the extent that appellant argues herein that said opinions constituted Dr. Mileusnic-Polchan's testifying outside of her area of expertise, we conclude otherwise. Her testimony did not involve accident reconstruction or engineering, as appellant advances. Rather, she testified about the interaction [*51] between the automobile and the victim's body.

On appeal, appellant raises new challenges to the testimony of Dr. Mileusnic-Polchan on two bases: 1) that Dr. Mileusnic-Polchan was biased in favor of the State; and 2) that Dr. Mileusnic-Polchan testified outside of her area of expertise by testifying with regard to blood spatter. Although appellant failed to contemporaneously object to the testimony on these grounds, he raised the issue in his motion for new trial and on appeal. This court has held waiver to be appropriate in such circumstances. See [State v. Robert Lee Mallard, No. M1999-00336-CCA-R3-CD, 1999 Tenn. Crim. App.](#)

[LEXIS 1274, 1999 WL 1209523, at *1 \(Tenn. Crim. App. Dec. 17, 1999\).](#)

While plain error review is available to this court as a tool by which to review appellant's new challenges, he does not request plain error review of this issue, and we do not discern a basis for such under the facts of this case. [State v. Gary Thomas Reed, No. E2009-02238-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 340, 2011 WL 1842711, at *5 \(Tenn. Crim. App. May 12, 2011\)](#), perm. app. denied (Tenn. Aug. 24, 2011); see [Tenn. R. App. P. 36\(a\) \(HN8\)](#) [↑] "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to [*52] take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Moreover, this court has previously held that [HN9](#) [↑] a forensic pathologist may offer testimony regarding blood spatter analysis. [State v. Wayne Robert Wait, No. E2010-01212-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 801, 2011 WL 5137178, at *9 \(Tenn. Crim. App. Oct. 28, 2011\)](#) (holding that blood spatter testimony is within the purview of a forensic pathologist). We further find no error in the expert's opinion that the manner of death was homicide. See, e.g., [State v. Ayers, 200 S.W.3d 618, 623 \(Tenn. Crim. App. 2005\)](#) (holding that [HN10](#) [↑] when the foundation of an expert's opinion is reliable, expert can testify that manner of death was homicide). But see [State v. Ward, 138 S.W.3d 245, 268 \(Tenn. Crim. App. 2003\)](#) (disallowing expert testimony that manner of death was homicide when foundation of opinion involved the unreliable "rule of three" attributing homicide as cause of death when victim is the third child under care of a single caretaker to suffer an undetermined cause of death). Appellant is not entitled to relief on this issue.

3. Officers L.B. Steele and Ron Trentham

Appellant next argues that the trial court improperly qualified [*53] Officers L. B. Steele and Ron Trentham as experts in the field of accident reconstruction. Appellant filed a pre-trial motion to obtain the credentials of both witnesses and the opinions to be rendered by each of them at trial. During a pre-trial motion hearing, appellant contested the qualifications of Joe Cox and L.B. Steele to testify as experts. He did not address Officer Ron Trentham as a possible expert witness. The State and appellant agreed that the field of accident reconstruction is a generally accepted scientific field and is appropriate for expert testimony. The State disclosed the officers' reports to appellant in advance of trial. Although the trial court did not hold a pre-trial hearing to

ascertain the witnesses' qualifications and credentials, the court permitted appellant to ask questions on *voir dire* before it accepted the witnesses as experts.

a. Qualifications of Officer Ron Trentham

Following his *voir dire* of Officer Trentham, appellant lodged no objection to the court's accepting him as an expert witness. In light of appellant's failure to object to the trial court's ruling allowing Officer Trentham to testify as an expert in the field of accident reconstruction, [*54] this issue is waived. Again, while plain error review is available to this court as a tool by which to review appellant's new challenges, he does not request plain error review of this issue, and we do not discern a basis for such under these particular facts. [Gary Thomas Reed, 2011 Tenn. Crim. App. LEXIS 340, 2011 WL 1842711, at *5](#). Appellant is not entitled to relief on this issue.

b. Qualifications of Officer L. B. Steele

Following his *voir dire* of L. B. Steele, appellant lodged an objection to the court's accepting Officer Steele as an expert witness. In ruling on the objection, the court stated that the witness would likely testify about documentation and measurements. Appellant rescinded his objection to the witness's testimony if it were limited in scope as the court expected. The court reserved ruling on appellant's objection in the likelihood that Officer Steele offered objectionable expert opinions.

As the trial court anticipated, Officer Steele's testimony was factual in nature. He did not offer any "expert" opinions regarding his synthesis of the evidence. Officer Steele's testimony indicated that he obtained measurements at the crime scene, loaded the information into the data storage system, transferred [*55] the data to a computer at the police department, and then made two discs containing the information. Appellant must not have found Officer Steele's testimony objectionable, as he did not renew his objection or ask the trial court for a ruling on the issue. For these reasons, we find that appellant waived his complaint for our review and decline to employ a plain error analysis. See [Gary Thomas Reed, 2011 Tenn. Crim. App. LEXIS 340, 2011 WL 1842711, at *5](#).

c. Substance of Accident Reconstructionists' Testimony

In his brief, appellant contests the accident reconstructionists' testimony as demonstrating "a lack of expertise" in failing to adequately photograph the vehicle, failing to protect the automobile from the elements, and failing to account for the slope of the

driveway at the credit union. The State responds that the experts' opinions that are disagreeable to appellant do not render them unqualified to offer said testimony. We agree.

Appellant presented his own accident reconstructionist as an expert to rebut and refute many of the State's experts contentions and opinions. His expert addressed the points of the State's experts testimony of which appellant complains on appeal. [HN11](#) [↑] "[T]he jury is not bound to accept [*56] expert testimony in preference to other testimony, and must determine the weight and credibility of each in the light of all the facts shown in the case." [Dellinger, 279 S.W.3d at 292](#) (quoting [Sparks, 891 S.W.2d at 616](#)). "[T]he weight to be given [expert testimony] is a question for the jury under careful instruction of the trial judge." [State v. Ayers, 200 S.W.3d 618, 623 \(Tenn. Crim. App. 2005\)](#) (quoting [Mullendore v. State, 183 Tenn. 53, 191 S.W.2d 149, 152 \(1945\)](#)). Accrediting the verdict of a properly instructed jury, we discern no error with respect to the qualifications of the expert witnesses or the opinions they rendered at trial.

C. Trial Testimony of Anthony Anderson and Stephanie Anderson

Appellant raises two issues pertaining to the trial testimony of Anthony Anderson and Stephanie Anderson. He first contends that the State suppressed evidence, namely audiotape recordings of interviews with the witnesses, and that the trial court erred in allowing the State to present their testimony at trial.

1. Alleged *Brady* Violation

Appellant argues that the State violated the tenets of [Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 \(1963\)](#), by withholding exculpatory or impeaching evidence until two days prior to [*57] trial. The evidence in question consists of audiotapes of interviews with Anthony Anderson and Stephanie Anderson. The State's *Brady* violation was further compounded, asserts appellant, by the trial court's allowing the witnesses to testify despite the State's alleged error.

In interpreting its holding in *Brady*, the United States Supreme Court succinctly stated:

[HN12](#) [↑] There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State,

either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Although the inconsistencies among Mr. Anderson's statements to law enforcement, his testimony at the preliminary hearing, and his trial testimony are minute, the audiotapes were arguably favorable to appellant in that they could have been used to impeach Mr. Anderson's trial testimony.

However, the second and third components of the *Strickler* standard are not established by the facts of this case. This court has previously addressed the difference between delayed disclosure of evidence and [*58] absolute non-disclosure of evidence:

Indeed, HN13[¹⁵] when there has been a delayed disclosure of evidence, as opposed to a complete non-disclosure, *Brady* is normally inapplicable unless the delay itself causes prejudice. When there has been a delayed disclosure, as opposed to a non-disclosure, the appellant must establish that the delayed disclosure prevented him from using the disclosed material effectively in preparing and presenting his case.

The petitioner has failed to show how, or even allege, the delay in receiving the materials . . . prejudiced his case.

Norris E. Ray v. State, No. W2010-01675-CCA-R3-PC, 2011 Tenn. Crim. App. LEXIS 882, 2011 WL 5996037, at *18 (Tenn. Crim. App. Nov. 30, 2011) (internal citations omitted), perm. app. denied (Tenn. Apr. 24, 2012). Our holding in Norris E. Ray is dispositive of this issue. Appellant has neither alleged nor proven that the delay in the State's production of the audiotapes prejudiced his case in any way. HN14[¹⁶] Our case law has not expanded the meaning of "suppression" for the purposes of a *Brady* violation to include late disclosure wherein appellant suffered no prejudice. As such, appellant has not demonstrated a "true *Brady*" violation. Strickler, 527 U.S. at 281-82. The trial [*59] court properly permitted the witnesses to testify.

2. Tennessee Rule of Evidence 404(b)

The State proffered the testimony of appellant's neighbors Anthony and Stephanie Anderson. Pursuant to appellant's objection, the trial court held a 404(b) hearing to determine the admissibility of their testimony.

Tenn. R. Evid. 404(b).

Rule 404(b) provides:

HN15[¹⁷] Other Crimes, Wrongs, or Acts.— Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). HN16[¹⁸] Possible "other purposes" for which evidence of other crimes, wrongs or acts may be admitted include [*60] identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake. Tenn. R. Evid. 404(b), Advisory Comm'n Comm't.

Thus, HN17[¹⁹] to satisfy the requirement of relevancy, the first inquiry by the trial court must be whether "a material issue exists other than conduct conforming with a character trait." State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996) (quoting State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994)). Upon the court's satisfaction of the existence of a material issue, the trial court must then weigh the proffered evidence to determine whether the probative value outweighs the danger of unfair prejudice to the defendant. McCary, 922 S.W.2d at 514 (citing Rickman, 876 S.W.2d at 829). The trial court must finally find that appellant committed the other crimes, wrongs, or acts by clear and convincing evidence. *Id.* (citations omitted).

HN18[²⁰] When it substantially complies with the procedural requirements of Rule 404(b), the trial court's determination of admissibility is entitled to deference on appeal. State v. Gilley, 297 S.W.3d 739, 758 (Tenn. 2008); see State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). In reviewing a trial court's ruling on 404(b) evidence, an [*61] appellate court may not disturb the lower court's ruling absent an abuse of discretion. Gilley, 297 S.W.3d at 758; State v. Thacker, 164 S.W.3d 208, 239 (Tenn. 2005).

The substance of Anthony Anderson's testimony was that he heard appellant yell obscenities at his wife and threaten to kill her. Stephanie Anderson's testimony recounted her overhearing appellant's argument with the victim and his calling the victim profane names. Following the jury-out proffers, the trial court determined that their testimony was relevant to the material issue of appellant's intent and motive. The trial court found that the probative value of the evidence outweighed the potential for unfair prejudice. Finally, the court found by clear and convincing evidence that appellant committed the acts to which the Andersons testified.

Over the State's objection, the trial court disallowed testimony by Mrs. Anderson that she heard victim tell appellant, "Carlos, you would be that stupid to kill me and sit in the jail cell the rest of your life? You're stupider than what I think you are." Clearly the trial court followed the procedural mandates of [404\(b\)](#) and Tennessee case law in ascertaining the admissibility of [\[*62\]](#) the proffered testimony and erred on the side of caution in disallowing questionable evidence. In light of the trial court's substantial compliance with the procedural requirements, we defer to the trial court's ruling. The trial court did not abuse its discretion in admitting the testimony of Anthony and Stephanie Anderson.

3. Failure to Declare a Mistrial

Although the trial court disallowed Mrs. Anderson from testifying that she heard the victim state, "Carlos, you would be that stupid to kill me and sit in the jail cell the rest of your life? You're stupider than what I think you are," the court did not issue said ruling until trial was well underway. The prosecutor had already used the comment in her opening statement. Her remarks to the jury did not elicit an objection from appellant. During trial, upon receiving the trial court's ruling excluding this testimony, appellant moved for a mistrial. See [State v. J.C. Fair and Krederick Fair, No. W2007-00730-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 670, 2009 WL 2501991, at *15 \(Tenn. Crim. App. Aug. 14, 2009\)](#) (holding that "[d]espite the absence of a contemporaneous objection, [appellant] did move for a mistrial"), *perm. app. denied* (Tenn. Feb. 22, 2010). Thus, appellant [\[*63\]](#) preserved this issue for our review.

HN19 [↑] A trial court may declare a mistrial if it appears that some matter has occurred which would prevent the jury from reaching an impartial verdict. [Arnold v. State, 563 S.W.2d 792, 794 \(Tenn. Crim. App. 1977\)](#). A trial court should only declare a mistrial in criminal cases where a manifest necessity requires such action. [State](#)

[v. Millbrooks, 819 S.W.2d 441, 443 \(Tenn. Crim. App. 1991\)](#). A mistrial is appropriate "when a trial cannot continue or a miscarriage of justice would result if it did." [State v. McPherson, 882 S.W.2d 365, 370 \(Tenn. Crim. App. 1994\)](#). This court will review the trial court's decision to grant or deny a mistrial for abuse of discretion. See [State v. Hall, 976 S.W.2d 121, 147 \(Tenn. 1998\)](#) (citing [State v. Adkins, 786 S.W.2d 642, 644 \(Tenn. 1990\)](#)). The party requesting the mistrial bears the burden of establishing the necessity for it. [State v. Williams, 929 S.W.2d 385, 388 \(Tenn. Crim. App. 1996\)](#).

In ruling on appellant's motion for a mistrial, the trial court stated:

This is a-this is an insignificant-in the overall scheme of this trial and the evidence that's come into this trial, this is insignificant. . . . We've got all kinds [\[*64\]](#) of physical proof. We've got all kinds of eyewitness testimony. We've got the statement of the defendant. We've got expert proof . . . whether or not that-those eight words were spoken or not spoken is not going to make a difference in this trial, period.

Clearly, in light of the evidence the State had developed up to that point of the trial, the court did not believe that the prosecutor's statement during her opening remarks would result in a miscarriage of justice.

Our 2008 decision in [State v. Willie R. Dyer](#) is instructive on this issue. [State v. Willie R. Dyer, No. M2007-02397-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 910, 2008 WL 4949266 \(Tenn. Crim. App. Nov. 19, 2008\)](#), *perm. app. denied* (Tenn. April 27, 2009). In *Dyer*, appellee³ lodged a pre-trial objection to the introduction of blood alcohol concentration levels, claiming a problem with the chain of custody. [Willie R. Dyer, 2008 Tenn. Crim. App. LEXIS 910, \[WL\]at *1](#). The trial court denied the motion at that time but warned the State that if it mentioned the blood alcohol concentration level in its opening and the court later deemed the evidence inadmissible, the court would order a mistrial with prejudice. *Id.* Despite the trial court's admonition, the State nonetheless mentioned the blood alcohol [\[*65\]](#) concentration level in its opening statement. *Id.* During trial, the court conducted a jury-out hearing regarding the evidence. [2008 Tenn. Crim. App.](#)

³ The procedural history of the *Dyer* case is that defendant Dyer moved for a mistrial, which the trial court granted. The State appealed, thus, for our discussion of the case, the State is appellant and the defendant is appellee.

LEXIS 910, [WL] at *2. After hearing testimony at trial from officers and agents from TBI, the trial court excluded the evidence. *Id.* The trial court ultimately ordered a mistrial.

On appeal, after holding that the trial court erred in its exclusion of the blood concentration evidence, this court then considered whether the trial court's granting of a mistrial was appropriate. 2008 Tenn. Crim. App. LEXIS 910, [WL] at *6. Applying the "manifest necessity" standard, we held:

We agree with the State that there was no manifest necessity for a mistrial. Having excluded from evidence the results of Appellee's blood alcohol test, the trial court could have instructed the jury that the opening statement of the prosecutor is not evidence and that the panel should not consider the reference to the test results as such. This is typically the manner in which references in opening statements to [*66] evidence that is later excluded is handled.

2008 Tenn. Crim. App. LEXIS 910, [WL] at *6.

We agree with the rationale employed by the *Willie R. Dyer* court. Although appellant did not request a special curative instruction, the trial court charged the jury, "The statements, arguments, and remarks of the attorneys are intended to help you in understanding and applying the law, but they are not evidence. You should disregard any statements made that you believe are not supported by the evidence." HN20 [↑] Jurors are presumed to follow the instructions given to them by the trial court. *State v. Smith*, 893 S.W.2d 908, 914 (Tenn. 1994). It is noteworthy that in the instant case, the State was not forewarned of the possibility of mistrial if it mentioned evidence in its opening statement that the court later found to be inadmissible. Following our precedent in *Willie R. Dyer*, we hold that the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

D. Domestic Violence Affidavit of Complaint

The court held a jury-out hearing to discuss the admissibility of evidence of the victim's prior injuries. The parties raised three separate instances: 1) the victim's daughter returned home from a trip and observed her [*67] mother with fourteen stitches on her face and two broken toes but did not have personal knowledge about how the victim received the injuries; 2) the victim sustained an injury to her arm at the hands of appellant but reported to the hospital that she injured her arm at work and no one could connect appellant

with the injury; and 3) the victim signed an affidavit for a warrant accusing appellant of domestic violence, to which appellant pled guilty.

HN21 [↑] Questions regarding the admissibility of evidence rest within the sound discretion of the trial court, and this court will not disturb the trial court's ruling absent of a clear showing of abuse. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A trial court abuses its discretion when it applies an incorrect legal standard or reaches an illogical or unreasonable conclusion that causes an injustice to the complaining party. *Ruiz*, 204 S.W.3d at 778 (citing *Howell*, 185 S.W.3d at 337).

In discussing the evidentiary issues pertaining to the victim's various injuries, appellant argued to the court that if it were to conduct a 404(b) analysis of the first two instances, the evidence would be deemed highly prejudicial. *Tenn. R. Evid. 404(b)*. Without [*68] necessity of a hearing, the trial court excluded the first two allegations of injuries. The court, however, ruled that the State would be allowed to introduce evidence of the domestic violence warrant because appellant pled guilty to it. By entering a guilty plea, appellant admitted the allegations, thus transforming the allegations into an admission.

Appellant did not request a 404(b) hearing on the admissibility of the warrant. In fact, appellant agreed that the warrant was admissible at trial. The State introduced the warrant through the testimony of the responding officer, Scott Noe. Officer Noe testified with regard to receiving the call, interviewing the victim, and observing her injuries. He then read the summary aloud to the jury. Appellant's complaint on appeal is that the court erred by allowing the police officer to read the narrative segment of the affidavit to the jury, to which appellant contemporaneously objected at trial. In his brief, appellant asks this court to employ a 404(b) analysis with regard to the officer's reading of the affidavit, not to the court's admission into evidence of the warrant itself.

We first note that because appellant failed to request a 404(b) [*69] jury-out hearing when the officer first began to read the warrant aloud, appellant has waived his right to appellate review of this issue. *State v. Undray Luellen*, No. W2009-02327-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 481, 2011 WL 2557010, at *5 (Tenn. Crim. App. June 27, 2011), perm. app. denied (Tenn. Oct. 18, 2011). Moreover, we fail to discern how application of *Rule 404(b)* would have precluded the reading of the warrant at trial or would entitle appellant

to relief in this court. Appellant did not object to the State's introduction of the domestic violence warrant. The warrant itself was entered into evidence through Officer Noe. The warrant was not redacted in any form, nor did appellant request redaction. It is axiomatic that the jury would receive the warrant and have the opportunity during deliberations to read the content thereof. Appellant's attempt to make the comparison between the jury's opportunity to read the warrant and the jury hearing the language of the warrant from the officer results in a distinction with no practical difference. The trial court did not abuse its discretion in allowing the police officer to read a segment of the warrant that would soon be in the jury's hands.

E. State's Closing [*70] Argument

In its closing argument, the State advanced its theory of the case by arguing to the jury that appellant punched the victim in the face and knocked her to the ground before running over her with his vehicle. Appellant claims error, stating that there was no evidence to support the State's theory and that the argument constituted "inflammatory speculation."

Our supreme court has aptly noted that "[c]losing arguments in criminal cases have a 'rough and tumble quality' about them." [State v. Banks, 271 S.W.3d 90, 131 \(Tenn. 2008\)](#) (quoting [State v. Skakel, 276 Conn. 633, 888 A.2d 985, 1060-61 \(2006\)](#)). The court further held:

[HN22](#) [↑] A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument. An improper closing argument will not constitute reversible error unless it is so inflammatory or improper that it affected the outcome of the trial to the defendant's prejudice. When called upon to review the propriety of a prosecutor's closing argument, the court should consider: (1) the conduct at issue in light of the facts and circumstances of the case, (2) the curative measures undertaken by the trial court and the prosecution, (3) the intent of the prosecutor [*71] in making the improper argument, (4) the cumulative effect of the improper argument and any other errors in the record, and (5) the relative strengths and weaknesses of the case.

Trial courts have significant discretion to control closing arguments. Ordinarily, counsel must object contemporaneously to a perceived improper argument. However, when flagrantly improper arguments are made, the trial court, with or without

objection, should step in and take proper curative action. Some arguments may be so exceptionally flagrant that they constitute plain error and provide grounds for reversal even if they were not objected to.

[Banks, 271 S.W.3d at 131-32 \(internal citations and quotations omitted\)](#). While we would ordinarily employ an abuse of discretion standard of review in determining whether the trial court allowed the prosecutor too much latitude during closing argument, appellant acknowledges that he failed to contemporaneously object to the comment by the prosecutor. [State v. Hall, 976 S.W.2d 121, 157 \(Tenn. 1998\)](#) (citing [State v. Sutton, 562 S.W.2d 820, 823 \(Tenn. 1978\)](#)). Our analysis is thus limited to a review for plain error.

[HN23](#) [↑] Closing arguments that do not elicit an objection warrant [*72] reversal only in exceptional circumstances. [Banks, 271 S.W.3d at 132 n. 30](#) (citing [United States v. Smith, 508 F.3d 861, 864 \(8th Cir. 2007\)](#)). We adhere to the principle that "fleeting comments that passed without objection during . . . closing argument in the trial court should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers." *Id.* (quoting [United States v. Mullins, 446 F.3d 750, 758 \(8th Cir. 2006\)](#)).

This court has previously analyzed a prosecutor's closing argument under the "plain error" standard of review. [State v. Gann, 251 S.W.3d 446, 462 \(Tenn. Crim. App. 2007\)](#). This court characterized the State's closing as an "argument on the defendant's character, the brutal nature of the crime, and the strategy of the defense" and opined that the statements "were improper, inflammatory, and utterly indefensible as they violate nearly every rule established for proper closing argument." [Gann, 251 S.W.3d at 462](#). We found that the prosecutor's comments were intentional, in light of having been previously cautioned by the supreme court to "temper" his closing arguments. *Id.* The State's comments [*73] were so egregious that this court stated it would have reversed appellant's convictions had counsel objected appropriately. *Id.*

Even so, in *Gann* this court was not convinced that "a substantial right of the accused was adversely affected" or that "consideration of the issue is necessary to do substantial justice. *Id.* We also noted that [HN24](#) [↑] the standard contained in [Tennessee Rule of Criminal Procedure 52](#), "error that affects substantial rights" has been construed as "error with a prejudicial effect on the

outcome of a judicial proceeding." *Id. at 462-63* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 81, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)).

Appellant acknowledges that he did not contemporaneously object to the State's closing argument but insists that "[n]evertheless, trial courts have a duty to restrict any improper argument." Appellant fails to address, much less establish, the factors supporting a finding of plain error. We decline to infer that appellant is invoking this court's authority to conduct a plain error review, nor do we discern a basis for such under the facts of this case. *Gary Thomas Reed*, 2011 Tenn. Crim. App. LEXIS 340, 2011 WL 1842711, at *5; see *Tenn. R. App. P. 36(a)* ("Nothing in this rule shall be construed as requiring [*74] 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."). Appellant is not entitled to relief on this issue.

F. Sentencing Issues

HN25 [↑] *Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure* states that an appellant's brief shall contain the following with respect to an argument:

- (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and
- (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)[.]

Tenn. R. App. P. 27(a)(7)(A)-(B). Moreover, *Rule 10(b) of the Rules of the Court of Criminal Appeals* reads, **HN26** [↑] "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this Court." Appellant's raises two arguments pertaining to sentencing [*75] errors. While appellant cites to the record, neither argument contains a statement of the applicable standard of review or citation to any legal authority. The sentencing issues raised in appellant's brief are deemed waived. If we reviewed the sentencing issues, we would nonetheless find no error.

1. Standard of Review

In determining an appropriate sentence, a trial court

must consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant makes on his own behalf as to sentencing; and (8) the potential for rehabilitation. *Tenn. Code Ann. §§ 40-35-102, -103, -113, -114, -210(b)* (2010). "The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence [*76] is imposed." *Tenn. Code Ann. § 40-35-103(4)* (2010).

When imposing a sentence within the appropriate range of punishment for a defendant,

the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in *§§ 40-35-113* and *40-35-114*.

Tenn. Code Ann. § 40-35-210 (2010). From this, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act]'." *State v. Carter*, 254 S.W.3d 335, 343 (*Tenn. 2008*) (quoting *Tenn. Code Ann. § 40-35-210(d)*).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory minimum sentence and rendered enhancement and mitigating factors advisory only. See *Tenn. Code Ann. §§ 40-35-114, [*77] 40-35-210(c)* (2010). The 2005 amendments set forth certain "advisory sentencing guidelines" that are not binding on the trial court; however, the trial court must nonetheless consider them. See *id. § 40-35-210(c)*. Although the application of the factors is advisory, a court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors in *§§ 40-35-113* and *40-35-114*." *Id. § 40-35-210(b)(5)*. The

trial court must also place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, to ensure fair and consistent sentencing." *Id.* [§ 40-35-210\(e\)](#). The weighing of mitigating and enhancing factors is left to the sound discretion of the trial court. [Carter, 254 S.W.3d at 345](#). The burden of proving applicable mitigating factors rests upon appellant. [State v. Mark Moore, No. 03C01-9403-CR-00098, 1995 Tenn. Crim. App. LEXIS 763, 1995 WL 548786, at *6 \(Tenn. Crim. App. Sept. 18, 1995\)](#). The trial court's weighing of the various enhancement and mitigating factors is not grounds for reversal under the revised Sentencing Act. *Id. at 345* (citing [State v. Devin Banks, No. W2005-02213-CCA-R3-DD, 2007 Tenn. Crim. App. LEXIS 536, 2007 WL 1966039, at *48 \(Tenn. Crim. App. July 6, 2007\)](#), [*78] aff'd as corrected, [271 S.W.3d 90 \(Tenn. 2008\)](#)).

Additionally, when a trial court orders a sentence involving confinement, the court should consider whether: (A) "confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;" (B) "confinement is necessary to avoid depreciating the seriousness of the offense" or to "provide an effective deterrence to others likely to commit similar offenses;" or (C) less restrictive measures have been frequently or recently applied to defendant unsuccessfully. [Tenn. Code Ann. § 40-35-103\(1\)](#) (2010).

When an accused challenges the length and manner of service of a sentence, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. [State v. Bise, No. E2011-00005-SC-R11-CD, S.W.3d](#), 380 S.W.3d 682, 2012 Tenn. LEXIS 645, 2012 WL 4380564, at *17 (Tenn. Sept. 26, 2012). If a trial court misapplies an enhancing or mitigating factor in passing sentence, said error will not remove the presumption of reasonableness from its sentencing determination. *Id. at 17*. This Court will uphold the trial court's sentencing decision "so long as it is within [*79] the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. See [State v. Carter, 254 S.W.3d 335, 346 \(Tenn. 2008\)](#). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. [Tenn. Code Ann. § 40-35-401](#) (2010), Sentencing Comm'n

Cmts.; [State v. Ashby, 823 S.W.2d 166, 169 \(Tenn. 1991\)](#).

2. Trial Court's Finding as to Range of Punishment

Appellant maintains that the trial court erred in accepting evidence of prior convictions in the form of a certified packet of information from North Carolina, commonly known as a "pen pack." He claims that the evidence is unreliable because it does not contain sufficient identifying information such as docket numbers and dates of convictions. We disagree.

The certified packet included copies of photographs/mug shots, fingerprints, and copies of the judgments of conviction, including dates of offenses. The presentence report further detailed appellant's lengthy criminal history, [*80] which also included docket numbers, dates of offenses, and dates of dispositions.

In reviewing the propriety of a trial court considering prior convictions that are not established by certified copies of judgments, this court reasoned:

Under the Tennessee Rules of Evidence, properly certified copies of judgments of conviction or of other official records showing such convictions would be admissible as an exception to the hearsay rule of exclusion. See [Tenn. R. Evid. 803\(22\), 901](#) and [902](#). It is such a document that the defendant claims should have been used in this case. However, by [T.C.A. § 40-35-209\(b\)](#) allowing "reliable hearsay" other than that allowed by the rules of evidence, the legislature apparently did not intend such a restriction. Further, although "certified copies of convictions" are included in [§ 40-35-209\(b\)](#) as an explicit example of reliable hearsay, we do not read the statute to mean that use of a certified copy is the only admissible documentary method of proving the existence of a conviction for sentencing purposes under a preponderance of the evidence standard.

In this respect, we do not believe that the legislature contemplated that a trial court must exclude from [*81] the evidence or refuse to consider information about prior convictions solely because it is only contained in a presentence report. Unless the parties agree to a specific sentence in a felony case, a presentence investigation must be conducted and a report made to the trial court. [T.C.A. § 40-35-205\(a\)](#) and [\(d\)](#). The report must contain the defendant's record of prior

convictions. [T.C.A. § 40-35-207\(a\)\(4\)](#). At the conclusion of a sentencing hearing, in determining an appropriate sentence, the trial court must consider the presentence report and the sentence is to be based in part upon that report. [T.C.A. § 40-35-210\(b\)\(2\)](#) and [\(g\)](#).

Obviously, these statutes contemplate the use of presentence investigative procedures which assure the acquisition of reasonably reliable information and it is incumbent upon the trial court to insure that such procedures are used. However, we see little problem in concluding that a trial court is in the best position to know the procedures used by presentence officers in his or her court and is entitled to rely on such a report's contents, absent a showing that the report is based upon unreliable sources or is otherwise inaccurate. Such a showing may occur through [\[*82\]](#) the report, itself, or through other evidence submitted at the sentencing hearing.

[State v. Richard J. Crossman, No. 01C01-9311-CR-00394, 1994 Tenn. Crim. App. LEXIS 652, 1994 WL 548712, at *5-6 \(Tenn. Crim. App. Oct. 6, 1994\).](#)

Based on this rationale, we conclude that the trial court's reliance on certified documents from North Carolina and the presentence report was proper. Both the documents from North Carolina and the presentence report contained identifying information such as docket numbers, dates of offenses, dates of conviction, and sentences imposed. The information was sufficient for the court to ascertain which felonies could properly be considered. As evidence thereof, the trial court excluded one of the felony drug convictions because it bore the same offense date as another conviction. The evidentiary record establishes that appellant had at least two requisite felony convictions in his criminal history to satisfy the statutory requirement for sentencing as a Range II offender. While some of appellant's convictions are listed in the presentence report without corresponding documentation from North Carolina, the two sources of information taken together provide a comprehensive criminal history on which [\[*83\]](#) the trial court properly relied in sentencing appellant as multiple offender. Appellant neither raised an argument concerning the presentence report or the investigative methods utilized in researching his criminal history nor presented evidence tending to demonstrate the report's unreliability or inaccuracy. Appellant has not met the burden of establishing that the trial abused its discretion in sentencing him as a Range II offender. Therefore, the

trial court properly sentenced appellant.

3. Trial Court's Consideration of Mitigating Factor

Appellant cites as error the trial court's failure to attribute weight to the mitigating evidence he presented at the sentencing hearing. The trial court found the following statutory enhancement factors: Number (1): The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and Number (8): The defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the community. [Tenn. Code Ann. § 40-35-114\(1\), \(8\)](#) (2010). Appellant urged the court to consider the fact that he immediately summoned help for the victim [\[*84\]](#) upon realizing he ran over her as a mitigating factor.

A trial court's weighing of enhancing and mitigating factors is entrusted to the sound discretion of the trial court. [Carter, 254 S.W.3d at 345](#); see also [Tenn. Code Ann. § 40-35-210](#) (2010), Sentencing Comm'n Comm't; [State v. Kelley, 34 S.W.3d 471, 479 \(Tenn. Crim. App. 2000\)](#) ("weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record"). Because enhancing and mitigating factors have been rendered merely advisory by the revised Sentencing Act, the trial court's discretion has been broadened. [Carter, 254 S.W.3d at 345](#). In considering the enhancing and mitigating factors, the trial court gave particular weight to (1), appellant's long history of domestic violence. See [Tenn. Code Ann. § 40-35-114\(1\)](#) (2010). In considering appellant's request to consider his flagging down a passing motorist as a mitigating factor, the trial court found the proffered evidence "unconvincing."

Our supreme court has reiterated the deference to be given to a trial court's sentencing decision, stating [\[*85\]](#) that "if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred." [State v. Ralph, 347 S.W.3d 710, 717 \(Tenn. 2010\)](#) (citing [State v. Fletcher, 805 S.W.2d 785, 789 \(Tenn. Crim. App. 1991\)](#)). The trial court followed the statutory procedure for sentencing and appropriately considered applicable sentencing

principles, thus, we attribute a presumption of reasonable to the trial court's sentencing order. Because the trial court imposed a lawful sentence, we uphold the sentence.

CONCLUSION

We have thoroughly reviewed the record and have considered the briefs of the parties and applicable law. After due consideration, we discern no error in the trial court requiring reversal of appellant's conviction and sentence.

Therefore, we affirm the judgment of the trial court.

ROGER A. PAGE, JUDGE

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