No. _____

In The

Supreme Court of the United States

URSHAWN ERIC MILLER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

IN THE SUPREME COURT OF TENNESSEE
June 3, 2021 Session[1]

STATE OF TENNESSEE v. URSHAWN ERIC MILLER

Automatic Appeal from the Court of Criminal Appeals
Circuit Court for Madison County
No. 16-435 Donald H. Allen, Judge

No. W2019-00197-SC-DDT-DD

A Madison County jury convicted the defendant, Urshawn Eric Miller, of first-degree premeditated murder and first-degree felony murder for fatally shooting a convenience store employee during an attempted robbery of the store. The jury also convicted the defendant of the attempted second-degree murder of another store employee and of attempted especially aggravated robbery, aggravated assault, employing a firearm during the commission of a dangerous felony, evading arrest, and resisting arrest. The jury imposed the death penalty for the first-degree murder convictions. The trial court merged the felony murder conviction into the premeditated murder conviction and the aggravated assault conviction into the attempted second-degree murder conviction, and it imposed an effective thirty-year sentence for the remaining convictions to run concurrently with the death sentence. The Court of Criminal Appeals affirmed the convictions and sentences but vacated the application of the felony murder aggravating circumstance as to the felony murder conviction. Upon our automatic review, we conclude: (1) the trial court properly ruled on challenges to certain jurors for cause during individual voir dire; (2) the evidence was sufficient to establish the defendant's identity as the perpetrator and his guilt of the convicted offenses; (3) the trial court did not abuse its discretion by allowing the State to introduce a video recording of the defendant's prior aggravated robbery during the penalty phase; (4) the death penalty generally, and lethal injection specifically, do not constitute cruel and unusual punishment; and (5) the death sentence satisfies our mandatory review pursuant to Tennessee Code Annotated section 39-13-206. Accordingly, we affirm the defendant's convictions and sentence of death; however, we reverse the portion of the intermediate court's judgment vacating the application of the felony murder aggravating circumstance.

Tenn. Code Ann. § 39-13-206(a)(1) (2018) Appeal; Judgment of the Court of Criminal Appeals Affirmed in Part, Reversed in Part

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[1] We heard oral argument through videoconference under this Court's emergency orders restricting court proceedings because of the COVID-19 pandemic.

ROGER A. PAGE, C.J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, and HOLLY KIRBY, JJ., joined. SHARON G. LEE, J., filed a separate opinion concurring in part and dissenting in part. CORNELIA A. CLARK, J., not participating.[2]

Jeremy B. Epperson, District Public Defender (on appeal); George Morton Googe,[3] District Public Defender, and Gregory D. Gookin, Assistant District Public Defender (at trial and on appeal), Jackson, Tennessee, for the appellant, Urshawn Eric Miller.

Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Nicholas W. Spangler, Senior Assistant Attorney General; Jody Pickens, District Attorney General; and Shaun A. Brown and Al Earls, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL & PROCEDURAL BACKGROUND

On November 25, 2015, a man wearing black clothing, gray gloves, and a white face covering entered the Bull Market in Jackson, Tennessee. The man pointed a gun at the twenty-four-year-old clerk, Ahmad Dhalai, and instructed him to "Drop that sh*t off or I'ma shoot you dead in the head." The man looked briefly in the direction of another employee, Lawrence Austin, before turning back to Mr. Dhalai stating, "Drop that sh*t off." The man fired an initial shot that barely missed Mr. Dhalai's head. As Mr. Dhalai slowly turned to walk away, the man again demanded, "Drop that sh*t off. Quit playing." The man then shot Mr. Dhalai in the back of the head. Next, he fired a shot in the direction of Mr. Austin and jumped over the counter. He banged on the cash register with his elbow to no avail before jumping back over the counter and fleeing the store. Mr. Dhalai died moments later. The entire encounter was captured on the store's surveillance cameras.

The defendant, Urshawn Eric Miller, was charged with first-degree murder, first-degree murder in perpetration of attempted especially aggravated robbery, attempted especially aggravated robbery, attempted first-degree murder, aggravated assault, employing a firearm in the attempt to commit a dangerous felony, being a convicted felon in possession of a handgun, resisting arrest, and evading arrest. The trial began on February 26, 2018.

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[2] Sadly, our honored colleague and friend Justice Clark passed away on September 24, 2021.

[3] George M. Googe retired as the District Public Defender while this appeal was pending. He was replaced by Jeremy Epperson, who represented the defendant at oral argument before this Court.

At trial, Mr. Austin testified that he worked at the Bull Market cleaning up, restocking, and doing other tasks as needed. He was mopping on the night of November 25, 2015, when he remembered a man entering the store. He explained that the man was wearing dark clothing, had "something on his face," and that he "believe[d] the person was black." He heard the man say, "Drop it off." Still, Mr. Austin was not concerned until he heard a gunshot. He moved toward one of the store's refrigerators to attempt to hide himself. The masked man pointed the gun at Mr. Austin and fired. Mr. Austin then witnessed the man jump over the counter before fleeing the store. He briefly chased after the man but did not see which direction the man ran.

In addition to Mr. Austin, the brief encounter was witnessed by Abdul Saleh, the victim's cousin, who was also working that evening and whose brother owned the market. Mr. Saleh was in the rear of the store in the restroom when he heard what he described as a "loud pop" followed by two more "pops." As he proceeded to the front of the store, Mr. Saleh saw Mr. Dhalai on the floor with blood around his head and observed the man standing in front of the cash register. Fearing he could also be shot, Mr. Saleh retreated to the office until the man left the market. Mr. Saleh attempted to render aid to Mr. Dhalai and called 911.

Mr. Saleh's fourteen-year-old son, Foad, was riding his bicycle in the parking lot when he heard two or three gunshots. He witnessed "a black man who was coming outside and out the store." He testified that the man he saw leaving the market was dressed in a black hoodie and black pants and was wearing a white mask. Foad Saleh gave the police a description of the man and the direction the man fled.

Timothy Sinclair, Sr., a regular customer, testified that he had just left the market with his purchases. While loading his purchases in his truck, he saw a black male wearing dark-colored clothing, a hoodie, and something white across his face coming around the side of the market. Just as the man entered the store, Mr. Sinclair saw a gun in the man's hand. Mr. Sinclair explained that he stood frozen and, a few seconds later, heard shots fired inside the store. He quickly got in his truck and started to back out of the parking lot when he saw the man run out of the store and around the side of the building. Mr. Sinclair then called 911.

Officer Kevin Livingston arrived on the scene within two minutes. At the "chaotic" scene, Officer Livingston observed Mr. Saleh behind the counter applying pressure to Mr. Dhalai's head which had a "pretty massive exit wound" with "blood, brain matter on the floor." Mr. Dhalai made shallow "gurgling" sounds but did not have a pulse. Lieutenant Shane Beaver also arrived quickly and secured the scene. After learning of the suspect's description and direction of travel, Lieutenant Beaver directed the approximately twenty officers in the area to set up a perimeter and deployed K-9 Officer Jeremy Stines.

Officer Stines and his dog, Pax, tracked the suspect to a wooded area near Lions' Field at Lambuth University where he was hemmed in by the officers. According to Lieutenant Beaver, despite repeated instructions to come out of the woods, the suspect resisted and shouted "F*ck you. You're going to have to come in here and get me" and "You might get me, but I'm going to take one of your mother f*ckers with me." Because the suspect refused to surrender, Officer Stines released Pax in an attempt to force the suspect out of the woods. Pax bit the suspect on the shoulder and they both tumbled to the ground. Officer Stines hit the suspect in the head with his gun when he refused to release his hands from around the dog's throat. Officer Kyle Hamilton ultimately used his taser to subdue the suspect. The suspect, later identified as the defendant, was handcuffed and placed in a patrol car where he was transported initially to the hospital for treatment of the dog bite and then to the jail.

The officers who remained on the scene searched the immediate area and recovered various items including a black jacket with a hood, black pants, a belt, gray gloves, a portion of a white t-shirt, a cell phone, a .38 caliber revolver, and keys. Investigator Marvin Rodish, Jr. viewed the revolver and recovered three spent shell casings and three live rounds from inside the cylinder of the firearm. He later collected three "projectiles," or bullet fragments, from inside the market.

Investigator Dan Long executed a search warrant at the defendant's residence. The keys previously found near Lions' Field unlocked the door to the house and the trunk of a car registered to the defendant that was parked near that house. A portion of a torn white t-shirt was collected from the defendant's bedroom.

Dr. Eric Warren, who was employed by the Tennessee Bureau of Investigation ("TBI") as a Special Agent Forensic Scientist, examined and test fired the .38 special revolver found at the scene. He concluded the three spent casings recovered from the revolver had been fired from the gun. As for the three "projectiles" collected from the crime scene, Dr. Warren explained that they had "class characteristics to indicate that the revolver . . . could have fired them." However, due to the damage, he could not state with certainty that the bullet fragments were fired from the revolver.

TBI Special Agent Charly Castelbuono testified that she found the defendant's DNA to be the "major contributor" on the white t-shirt fragment, the inside of the left gray glove, the hooded sweatshirt, the black pants, and the revolver.[4] In addition, TBI Special Agent Reilly Gray determined that the gray gloves tested positive for gunshot residue, and TBI

[4] Special Agent Castelbuono also testified that the t-shirt fragment had a blood stain that matched the defendant. This was in addition to the DNA swab of the item.

Special Agent Miranda Gaddes concluded that the t-shirt portion recovered from the woods was cut or torn from the t-shirt found in the defendant's bedroom.

At the close of the State's proof, the defendant moved for a judgment of acquittal. The trial court denied the motion with the exception of the count of attempted first-degree murder of Mr. Austin, which the court reduced to attempted second-degree murder upon finding that the State had not established premeditation on that count. The defendant chose not to testify and presented no evidence. The jury found the defendant guilty of the first-degree premeditated murder, first-degree felony murder, and attempted especially aggravated robbery of Mr. Dhalai, the attempted second-degree murder and aggravated assault of Mr. Austin, employment of a firearm during the commission of a dangerous felony, evading arrest, and resisting arrest. The State moved to dismiss the felon in possession of a firearm offense, and the trial court granted the motion.

As the penalty phase began, the trial court instructed the jury regarding its duty to impose punishment for the first-degree murder convictions. The court explained that Tennessee law provides three possible punishments for first-degree murder: death, imprisonment for life without the possibility of parole, or imprisonment for life.

In its opening remarks, the State advised the jury that it was seeking the death penalty based on the (i)(2) (prior violent felony) and (i)(7) (felony murder) statutory aggravating circumstances. *See* Tenn. Code Ann. § 39-13-204(i) (2018 & Supp. 2020) (listing the statutory aggravating circumstances for imposition of the death penalty or the sentence of imprisonment for life without possibility of parole). The State averred that the jury had essentially already found the (i)(7) aggravating circumstance by its guilty verdict on the felony murder count. Consequently, the State narrowed its proof to the (i)(2) aggravating circumstance. To that end, the State presented a certified copy of a May 27, 2009 judgment of conviction for an aggravated robbery that occurred in Madison County, Tennessee, on September 26, 2008, for which the defendant received an eight-year sentence. Captain Jeff Fitzgerald of the Madison County Sheriff's Department testified that he investigated the 2008 robbery of the Riverside Express convenience store. He recalled that the defendant surrendered and gave a statement admitting his participation in the robbery. The State introduced a written statement signed by the defendant admitting to his participation in 2008 robbery.

Alison Deaton testified that she was employed at Riverside Express on September 26, 2008, when three armed men with face coverings entered the store. The defendant was identified as one of the men. According to Ms. Deaton, one of the men demanded, "B*tch, give me all your money or I'm going to shoot you in the mother f*cking face." Ms. Deaton complied with the robber's demand and opened the cash register. A video recording of the robbery from the store's surveillance cameras was admitted into evidence. The video

showed the three men entering the store with guns pointed at Ms. Deaton, jumping over the counter, and taking cash from the cash register.

The State also presented victim impact testimony from Ali Dhalai, the victim's cousin, who served as the family representative.[5] Mr. Dhalai said that the victim was from a close family with seven brothers and sisters. He explained that the victim worked at the Bull Market and studied radiology at the community college. Mr. Dhalai described the victim as a hard worker and a "kind, caring, giving person" who loved his family. After the victim's death, Mr. Dhalai learned that the victim had been contributing to various charities, including the Red Cross. He said the family remains heartbroken by the loss.

The defendant opened the mitigation proof with the testimony of Dr. James Walker, a psychologist board certified in both neuropsychology and forensic psychology. Dr. Walker met with the defendant in jail where he administered a "comprehensive battery of psychological tests." In addition, he reviewed the defendant's educational, employment, and social histories, including interviews of the defendant's family members. The records revealed that the defendant's mother smoked marijuana heavily when she was pregnant with the defendant. The defendant was initially abandoned by his father, and his mother had a succession of abusive boyfriends and husbands. One of the father figures tortured the defendant by instructing him to pour alcohol on his penis. His mother often referred to the defendant as "dumb" or "stupid." As a result, he was often in the care of his alcoholic grandmother who also mistreated him.

Dr. Walker testified that the defendant had an intelligence quotient ("IQ") of 78 at age eight and 85 at age twelve according to the records he reviewed. When tested by Dr. Walker in January 2017, the defendant had an IQ of 86, which meant that he functioned "somewhere around the 18th percentile . . . as compared to the average person." The defendant also scored very poorly on several other tests performed by Dr. Walker, notably those scoring his memory and ability to focus. The defendant dropped out of school in the tenth grade and had a limited employment history, working briefly in a warehouse and as a fast food cook. The defendant smoked excessive amounts of marijuana for many years. A number of the defendant's family members also have problems with chronic substance abuse, and some of his close family members are incarcerated for committing violent crimes. The defendant was shot in the back when he was a teen. He also spent several years

[5] The trial court conducted a jury-out preview of Mr. Dhalai's testimony and ruled that the State could present the same testimony in the presence of the jury. *See State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998) ("To enable the trial court to adequately supervise the admission of victim impact proof, we conclude that the State must notify the trial court of its intent to produce victim impact evidence. Upon receiving notification, the trial court must hold a hearing outside the presence of the jury to determine the admissibility of the evidence.").

in prison. Based on this genetic background, Dr. Walker said the defendant was predisposed to getting involved in these kinds of problems. He diagnosed the defendant with several psychiatric conditions including cognitive disorders, cannabis use disorder, post-traumatic stress disorder ("PTSD"), and antisocial personality disorder.

The defense also called Dr. Keith Caruso, who is board certified in general and forensic psychiatry. Dr. Caruso interviewed the defendant, conducted a joint interview with the defendant's mother, and interviewed two of the defendant's aunts. Dr. Caruso also reviewed police records, mental health records, legal records, photos, videos, and medical records, along with psychological reports and mitigation memoranda. Like Dr. Walker, Dr. Caruso placed significance on the defendant's unstable childhood, abuse, and neglect. He also noted that the defendant had Attention Deficit Hyperactivity Disorder ("ADHD") as a child, and he agreed that the defendant had a genetic predisposition to antisocial personality disorder, substance abuse disorder, and fit the diagnosis for PTSD. Dr. Caruso admitted, however, that the defendant appreciated the wrongfulness of his conduct, and he agreed the defendant developed a plan to rob the market and made the choice to kill someone.

In rebuttal, the State called Dr. Kimberly Brown, a forensic psychologist who serves as an associate professor of clinical psychiatry and director of the forensic evaluation team at Vanderbilt University Medical Center. Dr. Brown interviewed the defendant at the jail and conducted a telephone interview with the defendant's mother. She reviewed extensive documents, videos, photos, and the expert reports of Drs. Walker and Caruso. Dr. Brown noted the defendant's disadvantaged childhood, including abuse and neglect at the hands of his mother and father figures as well as the significant family history of substance abuse. She acknowledged a connection between marijuana exposure in the womb and ADHD and low IQ in the child. As to the defendant's IQ of 86, Dr. Brown disagreed that the defendant had borderline intellectual functioning. In her view, the defendant was considered "low-average," which she described as "pretty typical for a criminal defendant." Dr. Brown agreed that the defendant had antisocial personality disorder, cannabis use disorder, and a history of ADHD. Despite the defendant's exposure to several significant traumas, Dr. Brown disagreed that the defendant met the criteria to be diagnosed with PTSD.

The trial court gave the jury additional penalty phase instructions including how the jury should consider the statutory aggravating and mitigating circumstances in its determination of punishment. The jury imposed a sentence of death for both the first-degree premeditated murder and first-degree felony murder convictions. It found that the State had proven the two aggravating circumstances beyond a reasonable doubt, and the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The trial court merged Count 2 (felony murder) into Count 1 (premeditated murder). At a subsequent sentencing hearing, the trial court imposed an effective sentence of thirty years for the remaining convictions to run concurrently with the sentence of death.

The Court of Criminal Appeals affirmed the convictions and sentences. *State v. Miller*, No. W2019-00197-CCA-R3-DD, 2020 WL 5626227, at *24 (Tenn. Crim. App. Sept. 18, 2020). However, as discussed below, the intermediate court vacated the application of the (i)(7) aggravating circumstance to the felony murder conviction. *Id.* at *21. The Court of Criminal Appeals also remanded the case to the trial court to correct a clerical error in the judgment for Count 8, resisting arrest. *Id.* at *24. This appeal followed.

II. ANALYSIS

A. Jury Selection

In three related issues, the defendant complains that the trial court erred by either removing or failing to remove prospective jurors for cause during individual voir dire based on their views on the death penalty. The underlying contention is that these rulings by the trial court denied the defendant his right under the United States and Tennessee Constitutions to an impartial jury.[6] U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); Tenn. Const. art. I, § 9 ("That in all criminal prosecutions, the accused hath the right to . . . a speedy public trial, by an impartial jury . . . ."). In our legal system, impartiality of the jury venire is assessed during the voir dire process. *See State v. Sexton*, 368 S.W.3d 371, 395 (Tenn. 2012). Voir dire in a capital case is unique in that the jury ultimately seated will initially be tasked with determining the defendant's guilt or innocence during a guilt phase. *See State v. Thomas*, 158 S.W.3d 361, 390 (Tenn. 2005). If the jury finds the defendant guilty of first-degree murder, the same jury will determine in a separate penalty phase whether his punishment should be imprisonment for life, imprisonment for life without the possibility of parole, or death. Tenn. Code Ann. § 39-13-204(a) ("Upon a trial for first degree murder, should the jury find the defendant guilty . . . it shall not fix punishment as part of the verdict, but the jury shall fix the punishment in a separate sentencing hearing . . . . The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . . ."). Due to this potential penalty phase, the impartiality of potential jurors with respect to punishment must be assessed during the singular voir dire process.

This questioning of the venire regarding punishment, commonly known as "death qualification," *see, e.g.*, *Lockhart v. McCree*, 476 U.S. 162, 167 (1986), is routinely conducted during individual voir dire.[7] To be "death qualified" under our current law, a

[6] Generally speaking, an "impartial jury" consists of jurors who will "conscientiously apply the law and find the facts." *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

[7] We note that there is no requirement that death qualification be conducted by individual voir dire. *State v.*

potential juror must possess the ability to consider all three forms of punishment. *See, e.g.*, *Sexton*, 368 S.W.3d at 390. Often guided by responses provided in jury questionnaires, the parties attempt to ascertain the potential jurors' views on punishment with the focus on the death penalty. Based on a juror's collective responses, a party may move to challenge the potential juror for cause. *See* Tenn. R. Crim. P. 24(c)(1). A party may use peremptory challenges[8] to strike a juror who was not excused for cause. *See* Tenn. R. Crim. P. 24(e). A capital defendant "has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." *Uttecht v. Brown*, 551 U.S. 1, 9 (2007) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968)). On the other hand, "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." *Id.* (citing *Wainwright v. Witt*, 469 U.S. 412, 416 (1985)).

In *Wainwright v. Witt*, the United States Supreme Court adopted a standard to be utilized when a potential juror is challenged for cause based on his or her views on the death penalty: The trial court must determine whether the potential juror's views would "prevent or substantially impair the performance of his duties as juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). This standard, which we refer to as the "*Wainwright* standard,"[9] does not require that a juror's bias be proven with "unmistakable clarity." *See id.* at 424-25 (recognizing that some in the venire simply cannot be asked enough questions to establish their bias on the "printed record"). In certain instances, a potential juror may be excused for cause when the trial judge is left with the "definite impression" based on the juror's demeanor that he or she would be unable to follow the law. *Id.* at 426.

We will also take this opportunity to clarify the standard of review that our appellate courts should employ when reviewing a trial court's decision concerning a juror under the *Wainwright* standard. The *Wainwright* court determined that a reviewing federal court must

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Austin, 87 S.W.3d 447, 471 (Tenn. 2002) (adding that it is within the trial court's discretion to allow individual voir dire of prospective jurors).

[8] In a capital case, each defendant is allowed fifteen peremptory challenges, and the State is entitled to fifteen peremptory challenges per defendant. If the trial court elects to seat alternate jurors, "[f]or each additional juror selected pursuant to Rule 24(f), each side is entitled to one peremptory challenge for each defendant. Such additional peremptory challenges may be used against any regular or additional juror." Tenn. R. Crim. P. 24(e)(4).

[9] This standard is also referred to as the *Witherspoon-Witt* Rule. The *Wainwright* court clarified the earlier standard announced in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), in which the Court held that "the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all of those members of the venire who express conscientious objections to capital punishment." *Wainwright*, 469 U.S. at 416.

accord the factual findings of the state trial court a presumption of correctness under the federal habeas corpus statute because these findings are "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.* at 428 (citing *Patton v. Yount*, 467 U.S. 1025, 1038 (1984)).[10] Following that decision, this Court, in *State v. Alley*, "th[ought] it appropriate to adopt the same standard of review prescribed in *Wainwright*," and stated that "the trial court's finding of bias of a juror because of his views of capital punishment shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that that determination was erroneous." *State v. Alley*, 776 S.W.2d 506, 518 (Tenn. 1989); *see also State v. Schmeiderer*, 319 S.W.3d 607, 633 (Tenn. 2010); *State v. Reid*, 213 S.W.3d 792, 835-36 (Tenn. 2006); *State v. Thomas*, 158 S.W.3d 361, 378 (Tenn. 2005); *State v. Austin*, 87 S.W.3d 447, 473 (Tenn. 2002). However, upon review of relevant case law, it appears that some courts of this state have applied an abuse of discretion standard without referencing the *Alley* standard.[11] *See, e.g.*, *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993). And still others have applied the abuse of discretion standard in conjunction with the *Alley* standard. *See, e.g.*, *Sexton*, 368 S.W.3d at 392-95 (citing *State v. Hugueley*, 185 S.W.3d 356, 390 (Tenn. 2006) (appexdix); *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989)). We believe that abuse of discretion is the appropriate standard of review of a trial court's decision concerning a juror's "death qualification." [12] To the extent the standard from *Alley* can be interpreted inconsistently with our decision today, we want to be clear that the abuse of discretion standard shall be used in this context moving forward. Trial judges base their decisions on a full view of the potential jurors' responses to questions during voir dire, including the jurors' facial expressions, degree of candor, and overall demeanor. A trial judge's decision as to a challenge for cause should be reversed

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[10] The United States Supreme Court reaffirmed this federal standard of review in *Uttecht*. 551 U.S. at 9-10 (adding that "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors"). Further, the "presumption" language contained in the federal habeas corpus statute has been moved to section 2254(e)(1), which provides in pertinent part that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

[11] While the defendant did not directly raise this issue on appeal, we note that the defendant's brief cited "abuse of discretion" as the standard of review without reference to the *Alley* standard. In contrast, the State referenced both the *Alley* standard and "abuse of discretion" in its brief on appeal.

[12] We note that many non-capital cases mention the abuse of discretion standard when reviewing juror challenges for cause. *See, e.g.*, *State v. Leonard*, No. M2016-00269-CCA-R3-CD, 2017 WL 1455093, at *9 (Tenn. Crim. App. Apr. 24, 2017) (citing *Hugueley*, 185 S.W.3d at 378), *perm. app. denied*, (Tenn. Aug. 16, 2017); *State v. Hill*, No. W2012-00733-CCA-R3-CD, 2013 WL 501753, at *13 (Tenn. Crim. App. Feb. 11, 2013) (citing *Schmeiderer*, 319 S.W.3d at 625).

only when the judge abuses his or her discretion—a standard that appellate courts are very familiar with in criminal cases. "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). In *State v. McCaleb*, this Court

> emphasize[d] that the abuse of discretion standard of review does not permit an appellate court to substitute its judgment for that of the trial court. *State v. Harbison*, 539 S.W.3d 149, 159 (Tenn. 2018). Rather, "[b]ecause, by their very nature, discretionary decisions involve a choice among acceptable alternatives, reviewing courts will not second-guess a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). Accordingly, if the reviewing court determines that "reasonable minds can disagree with the propriety of the decision," the decision should be affirmed. Harbison, 539 S.W.3d at 159.

State v. McCaleb, 582 S.W.3d 179, 186 (Tenn. 2019) (second alteration in original).

Before we examine each of the defendant's contentions under the *Wainwright* standard (through the lens of our abuse of discretion standard of review), it is instructive to consider the voir dire process employed by the trial court in this case. Prior to the trial, prospective jurors completed an approved jury questionnaire[13] that included questions regarding the juror's feelings about the death penalty. One open-ended question, for example, simply asked the potential juror to express his or her opinion about the death penalty. Another question asked the juror to circle one of seven statements that best described the juror's view on the death penalty, including the extremes of automatically voting for the death penalty or never voting for the death penalty. The completed questionnaires were provided to counsel for the State and the defendant to allow them to prepare for jury selection. As jury selection began, the trial court allowed general questioning of the venire. The court then conducted individual voir dire on the issues of pretrial publicity and the death penalty. During the death qualification, counsel took turns asking each potential juror about his or her questionnaire responses and each juror was given an opportunity to elaborate further on his or her feelings about the death penalty. When the questioning and any rehabilitation attempts by counsel concluded, the court inquired into whether either party desired to challenge the potential juror for cause. The

[13] The questionnaires of the jurors who were selected were not included in the record on appeal. The defendant filed a motion to supplement the record with the questionnaires of the jurors in question, which we denied. The relevant questions and answers were read into the record during individual voir dire, allowing this Court to conduct a sufficiently thorough review.

trial court made its ruling on the record for each challenge.

Defendant's Challenges for Cause

We first review the defendant's argument that the trial court erred in failing to excuse for cause prospective jurors Robinson, Little, and Graves. The defendant complains that as a result of the court's error, he was forced to use peremptory challenges to strike them. We will consider each challenge for cause in turn to determine whether the trial court abused its discretion in making its decision under the *Wainwright* standard.

Prospective juror Robinson indicated on his jury questionnaire that "we need the death penalty in some cases." He also circled the response, "I believe that the death penalty is the appropriate form of punishment in some murder cases. I could return a verdict of death if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." During individual voir dire, Mr. Robinson initially stated that, due to the costs associated with keeping a person imprisoned for life, a sentence of life without the possibility of parole was not an appropriate punishment. Upon further questioning, however, Mr. Robinson indicated he could fairly consider all three forms of punishment for first-degree murder. When questioned by defense counsel, Mr. Robinson explained that he believed the death penalty was an appropriate punishment for a premeditated killing. However, he told the court he did not consider a killing during a robbery to be premeditated. In challenging Mr. Robinson for cause, the defendant focused on Mr. Robinson's response that he would impose the death penalty for a premeditated killing. The trial court denied the defendant's challenge for cause, having determined Mr. Robinson could follow the law and consider all sentencing options.

The defendant argues that based on Mr. Robinson's answer, he was inclined to impose the death penalty and should have been excused for cause. Indeed, Mr. Robinson expressed his belief that the death penalty was the appropriate punishment for a premeditated killing. However, he indicated he would not automatically impose the death penalty and could fairly consider all three forms of punishment. Viewing Mr. Robinson's responses in their entirety, rather than any single response in isolation, the defendant has failed to prove that the trial court abused its discretion in denying his challenge of Mr. Robinson for cause.

Prospective juror Little noted on her questionnaire that she has "no problem with [the death penalty]" if a defendant is guilty. She also circled the response, "I believe that the death penalty is the appropriate form of punishment in some murder cases. I could return a verdict of death if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." Ms. Little indicated she could consider life without parole; however, she did not believe a sentence of life with the

possibility of parole[14] was appropriate for "taking a life" unless the person acted in self-defense. Ms. Little ultimately agreed she could follow the law and consider all three forms of punishment. During questioning, Ms. Little indicated she was familiar with the prosecutor through her brother who worked as a child support investigator and that her husband was a retired police officer. She further informed the court she may have a hardship because she cared for her elderly mother, was on pain medication, and had difficulty sitting on a wooden bench for long periods of time. Defense counsel challenged Ms. Little for cause based on her "heavy ties" to law enforcement and her hardship issues. In denying the challenge, the trial court found no evidence that the medication affected Ms. Little's ability to make decisions or that Ms. Little had a significant connection to law enforcement. The trial court concluded that Ms. Little could fairly consider all possible sentencing options.

The defendant argues that Ms. Little should have been excused for cause because of her familiarity with the prosecutor and her equivocal views on the death penalty. Ms. Little disclosed that she knew the prosecutor through her brother who worked as a child support investigator. However, neither party elicited responses that revealed any significant connection between Ms. Little and the prosecutor or that suggested Ms. Little held a bias in favor of the State as a result of this connection. As to punishment, Ms. Little indicated the death penalty was an appropriate punishment in some murder cases depending on the evidence and what she learned about the defendant. Ms. Little's only hesitation related to the imposition of a life sentence that carried the possibility the defendant could be released on parole. Ms. Little's reluctance was satisfactorily addressed by the trial court, and Ms. Little ultimately indicated she could fairly consider all three forms of punishment. The defendant has failed to prove the trial court abused its discretion in refusing to excuse Ms. Little for cause.

Prospective juror Graves circled the response on her questionnaire that "[a]lthough I do not believe that the death penalty ever ought to be imposed, as long as the law provides for it, I could impose it if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." During individual voir dire she retracted her questionnaire response, stating she believed in the death penalty under certain circumstances. Ms. Graves said she was "probably" inclined to impose the death penalty for premeditated murder but that she would have to "weigh everything that's presented."

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[14] Throughout the trial court proceedings, the court and the parties referred to the statutory punishment of "imprisonment for life," Tennessee Code Annotated section 39-13-202(c)(3), as "life with parole." The Court of Criminal Appeals offered a thorough explanation of the difference between "imprisonment for life" and "life imprisonment without possibility of parole," Tennessee Code Annotated section 39-13-202(c)(2), and of why "[a]rguably, there is no 'parole' from a sentence of imprisonment for life." *Miller*, 2020 WL 5626227, at *12.

Although Ms. Graves did not believe life with the possibility of parole was an appropriate punishment, she said she would follow the law and consider all three forms of punishment. Ms. Graves indicated she had served on a capital jury in the 1980s but that the jury did not return a sentence of death. Aside from the issue of punishment, Ms. Graves said she had known the lead prosecutor for years because he attended school with her daughters. However, she did not believe the relationship would affect her ability to hear the case. Ms. Graves also informed the court that her husband was on insulin and was adjusting to a new insulin pump. She expressed concern about her husband's ability to regulate the pump; however, she said her husband promised to adjust the pump in her absence. Finally, Ms. Graves informed the court that she occasionally faints at the sight of blood. The defendant challenged Ms. Graves for cause based on her responses regarding the death penalty; her tendency to faint; and her husband's health. The trial court denied the motion, finding Ms. Graves was qualified to serve and would fairly consider all sentencing options.

The defendant argues that the trial court erred in refusing to excuse Ms. Graves for cause. He complains that the relationship between Ms. Graves and the lead prosecutor was "too close" and that Ms. Graves was predisposed to trust him. The defendant argues further that, based on her responses, Ms. Graves would be inclined to favor the death penalty. The issue of Mr. Graves' health was not pursued on appeal. Although isolated responses suggest Ms. Graves might be inclined to impose the death penalty, Ms. Graves said her decision about punishment would depend on the evidence presented. Ultimately, Ms. Graves indicated that she would follow the law and consider all three forms of punishment. Viewing Ms. Graves' responses as a whole, the defendant has failed to prove that the trial court abused its discretion in denying the defendant's challenge for cause.

State's Challenges for Cause

Next, we consider the defendant's contention that the trial court erred in granting, over his objection, the State's challenges for cause of prospective jurors Eads, Milhorn, and Sesti. He suggests in each instance that when viewing the prospective jurors' collective responses their excusal was not warranted under the *Wainwright* standard.

Prospective juror Eads indicated on his questionnaire that he believed the death penalty was "fair for the crime" and that he could consider all three forms of punishment for first-degree murder. He accidentally circled more than one response to the multiple-choice question about the death penalty because he was confused by the questionnaire. During individual voir dire, Mr. Eads clarified that he believed the death penalty should never be imposed. He subsequently explained that he did not believe anyone should be put to death unless that person killed several people. In his next response, Mr. Eads said he would not fairly consider the death penalty as punishment. When defense counsel attempted to rehabilitate Mr. Eads, he asked counsel if he was being forced to impose the

death penalty. Mr. Eads said he probably could not impose the death penalty in this case because the defendant "did not kill multiple people." Mr. Eads grew frustrated and said he was confused "over the whole thing." The State challenged Mr. Eads for cause because of his inconsistent responses and his inability to fairly consider the death penalty and otherwise follow the law. The trial court agreed and excused Mr. Eads for cause over the defendant's objection.

Prospective juror Milhorn indicated on her questionnaire that she was "[n]ot sure about the death penalty or that [she] would want that decision." She also circled the response, "I believe that the death penalty is the appropriate form of punishment in some murder cases, but I could never return a verdict of death." When questioned by the State during individual voir dire, Ms. Milhorn reluctantly agreed that the death penalty could be appropriate in certain circumstances, suggesting she could possibly impose the death penalty as part of a jury. However, Ms. Milhorn made it clear that given the choices of life and life without parole she would disregard the death penalty. When the trial court questioned Ms. Milhorn, she said she could consider the death penalty if the person acted "intentionally and was vicious" or "would be a threat to someone else." The State challenged Ms. Milhorn for cause based on her responses. The trial court granted the motion based on Ms. Milhorn's equivocal answers including her response that she would not impose the death penalty if there were other options.

Prospective juror Sesti indicated that she had a hardship with being sequestered because her fifteen-year-old son would be home alone without transportation to school or tennis practice. When Ms. Sesti spoke to her husband about the questionnaire and upcoming trial, her husband responded "don't get sequestered." Ms. Sesti said she and her husband had not talked about alternative transportation for their son "because we were hoping I wouldn't get picked." In questionnaire responses about the death penalty, Ms. Sesti wrote "I guess it depends on the circumstances. I am not for it or against it." She also circled a response indicating "[a]lthough I do not believe that the death penalty ever ought to be imposed, as long as the law provides for it, I could impose it if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." During individual voir dire, Ms. Sesti expressed doubt that she could impose the death penalty or put her name on a verdict form imposing death. She added that she could "probably not" impose the death penalty because of her religious beliefs. When questioned by the trial court, Ms. Sesti repeatedly responded that she did not know if she could impose a sentence of death. The State challenged Ms. Sesti for cause because she was either "incapable or unwilling" to answer the questions so as to allow the parties to assess her ability to serve as a juror. The trial court excused Ms. Sesti for cause because the court was not certain Mr. Sesti would be able to vote for the death penalty even if it were warranted.

These three prospective jurors share a common opposition to the death penalty. Most importantly, however, these prospective jurors expressed sincere doubt as to whether they could impose the death penalty as punishment, particularly given other sentencing options. The *Wainwright* standard applies equally to this category of prospective jurors.[15] *See Uttecht,* 551 U.S. at 22. In our review of the collective responses of each of these three prospective jurors as summarized above, it is abundantly clear that none of them would fairly consider the death penalty. Thus, the record supports the trial court's determination that these jurors could not follow the law. The defendant has failed to prove that the trial court abused its discretion in excusing these jurors for cause.

Exhaustion of Peremptory Challenges

Finally, we consider the defendant's argument that the trial court erred when it failed to excuse juror Crum for cause after the defendant had exhausted all of his peremptory challenges. The defendant argues that seating juror Crum resulted in a jury that was not fair and impartial. In this posture, the error is grounds for reversal only if an incompetent juror is forced upon the defendant. *See Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993). Accordingly, our inquiry is whether Ms. Crum was "incompetent" such that her "forced" presence on the jury deprived the defendant of a fair and impartial jury.

Juror Crum was questioned as a "replacement juror" after the parties exercised peremptory challenges as to the jurors initially seated. Ms. Crum was present during the questioning in open court but, as with the other jurors, the trial court allowed the parties to conduct individual voir dire in a separate room. Ms. Crum was reminded of her questionnaire response, "I am in favor of the death penalty if no doubt of crime committed." The State explained that Tennessee utilizes a "reasonable doubt . . . not 100 percent" standard and asked Ms. Crum if she would require the State to meet this higher burden. Ms. Crum simply replied that she would not want to put an innocent person to death. Ms. Crum also circled the response, "I believe that the death penalty is the appropriate form of punishment in some murder cases and I could return a verdict of death if I believed it was warranted in a particular case depending on the evidence, the law and what I learned about the defendant." Ms. Crum said her opinion had not changed since completing the questionnaire, adding that she had not heard the evidence. When advised of the three possible punishments for first-degree murder, Ms. Crum expressed her reluctance to consider a life sentence for a premeditated murder conviction if the defendant could be released on parole. Even when informed that life with parole meant the defendant would

[15] In clarifying the earlier rule announced in *Witherspoon v. Illinois*, the *Wainwright* court noted that even the *Witherspoon* court recognized the State's legitimate interest in excluding jurors whose opposition to the death penalty would not allow them to view the proceedings impartially and whose views would prevent them from imposing the death penalty within the framework of the law. *Wainwright*, 469 U.S. at 416.

serve at least 51 years before being eligible for parole, Ms. Crum said she was still "leaning more toward" her position that such a person should not be eligible for parole. She again indicated that she would have to hear the evidence. When defense counsel asked Ms. Crum if she would have trouble seriously considering a life sentence with the possibility of parole, Ms. Crum said she would "consider it with the evidence." When the trial court pressed her further, Ms. Crum said she would consider the three options "evenly" depending on the evidence.

As stated above, by this time, the defendant had exhausted his peremptory challenges. Defense counsel challenged Ms. Crum for cause based on her inability to fairly consider a life sentence. The defense argued Ms. Crum placed the burden on the defendant to convince her a life sentence would be appropriate. The State responded that Ms. Crum indicated on more than one occasion that she would consider all three forms of punishment. The trial court agreed and denied the defendant's motion to excuse her for cause. Ms. Crum was seated on the jury.

We note that the *Wainwright* standard focuses primarily on challenges for cause based on a potential juror's views on the death penalty. Ms. Crum's responses clearly indicate she could fairly consider the death penalty as a possible punishment for first-degree murder. Of course, during "death qualification," a trial court must also be concerned with whether a juror's views on the other two forms of punishment would substantially impair her ability to follow her instructions and her oath. Indeed, to be "competent," a juror in this setting must also be able to fairly consider a sentence of imprisonment for life or imprisonment for life without the possibility of parole as provided by statute. Ms. Crum explicitly indicated she could consider a sentence of life without the possibility of parole. The narrow focus here is whether the record establishes that Ms. Crum could consider a life sentence, and therefore, competently serve as an impartial juror.

Without question, many of Ms. Crum's responses suggest she would have difficulty considering a life sentence for a premeditated killing. However, in each instance, Ms. Crum repeated that she would have to hear the evidence before making a punishment decision. Her "leaning" toward the other two possible punishments is not fatal, however, because Ms. Crum told the court that she could consider all three forms of punishment. In denying the challenge for cause, the trial court explained that it attempted to question Ms. Crum about her ability to consider all three sentences in a "non-leading fashion." Because the trial court viewed Ms. Crum's demeanor during the questioning, we must defer to its findings. Although Ms. Crum presents a closer question, the defendant has not proven the trial court abused its discretion in denying the challenge for cause. Accordingly, the defendant has not established that he was forced to accept an incompetent juror or otherwise denied a fair and impartial jury.

B. Sufficiency of the Evidence

The defendant argues that the evidence was insufficient to support his convictions for first-degree premeditated murder, first-degree felony murder, attempted especially aggravated robbery, attempted second-degree murder, aggravated assault, and employing a firearm during the attempt to commit a dangerous felony.

The standard for appellate review of a claim challenging the sufficiency of the State's evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). To obtain relief on a claim of insufficient evidence, the defendant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. This standard of review is identical whether the conviction is predicated on direct evidence, circumstantial evidence, or a combination of both. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (citing *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

On appellate review, "we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom." *Davis*, 354 S.W.3d at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *see also State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the jury as trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). This Court presumes that the jury has afforded the State all reasonable inferences from the evidence and resolved all conflicts in the testimony in favor of the State; as such, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *See Dorantes*, 331 S.W.3d at 379; *State v. Lewter*, 313 S.W.3d 745, 747 (Tenn. 2010); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). Because a jury conviction removes the presumption of innocence that the defendant enjoyed at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the State to the convicted defendant, who must demonstrate to this Court that the evidence is insufficient to support the jury's findings. *Davis*, 354 S.W.3d at 729.

In conducting our sufficiency review, we must evaluate the proof in light of the elements of the crime. *See State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017) (recognizing that the first step of a sufficiency review is to "'examine the relevant statute(s) in order to determine the elements' of the offense that must be proven by the prosecution beyond a

reasonable doubt") (quoting *State v. Stephens*, 521 S.W.3d 718, 723-24 (Tenn. 2017)). However, before we examine the statutory elements of each of these offenses, we consider the defendant's overriding argument that the State failed to prove his identity as the perpetrator of any of the offenses.

Identity

It is well established that the identity of the perpetrator is an essential element of any crime. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). Identity may be established by circumstantial evidence alone. *See State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). In prior identity cases, including *Rice*, the Court applied the standard of review for circumstantial evidence in effect at the time. As noted, however, our standard of review is now the same for direct and circumstantial evidence, including the evidence presented at the trial to establish the element of identity. *See Dorantes*, 331 S.W.3d at 381. [16]

In this case, none of the witnesses could identify the perpetrator. However, all of the witnesses consistently testified that the man was wearing dark colored clothing with a white mask covering much of his face. Mr. Austin testified that he "believe[d] the person was black." At least two of the witnesses saw the perpetrator's direction of travel upon fleeing the market. Several police officers were in the vicinity and arrived on the scene in minutes. A K-9 officer tracked the suspect to a wooded area near Lions' Field. The officers recovered dark clothing, a white cloth portion of a t-shirt, gray gloves, a weapon, a cell phone, and keys. Testing conducted by the TBI revealed that the defendant's DNA was found on the dark hooded sweatshirt, the black pants, the gray gloves, the white t-shirt fabric, and on the revolver; that the cell phone was registered to the defendant; that the keys fit the defendant's home and a car parked near his home; that the gray gloves tested positive for gunshot residue; and that the white t-shirt portion found in the woods was cut or ripped from a t-shirt recovered from the defendant's home. Presuming the jury afforded the State all reasonable inferences from this evidence, we conclude the evidence was more than sufficient to establish the identity of the defendant as the perpetrator of these offenses.[17]

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[16] *Dorantes* replaced the standard previously applied in circumstantial evidence cases that required the facts to be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *Rice*, 184 S.W.3d at 662 (quoting *Reid*, 91 S.W.3d at 277). Our Court of Criminal Appeals properly rejected a defendant's invitation to carve out an exception to *Dorantes* to retain the former circumstantial evidence standard of review in identity cases. *See State v. Harris*, No. W2017-01706-CCA-R3-CD, 2018 WL 6012620 at *8 (Tenn. Crim. App. Nov. 15, 2018), *perm. app. denied*, (Tenn. Mar. 28, 2019).

[17] We note that the defendant's only challenge to the sufficiency of the evidence to support his conviction of attempted especially aggravated robbery is that the State failed to prove identity. Because we have

Turning to the statutory elements, we next consider whether the evidence was sufficient to support each of the challenged offenses.

First-degree Premeditated Murder

The jury convicted the defendant of the first-degree premeditated murder of Mr. Dhalai. First-degree murder is a "premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (2018). The statute also provides that

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

Id. § 39-13-202(e). The defendant argues the State failed to establish the element of premeditation.

As with each element of an offense, the State must prove premeditation beyond a reasonable doubt. Premeditation may be supported by either direct or circumstantial evidence. *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). Whether a defendant acted with premeditation is a question of fact for a jury to decide. *State v. Clayton*, 535 S.W.3d 829, 845 (Tenn. 2017) (citing *State v. Dotson*, 450 S.W.3d 1, 86 (Tenn. 2014); *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003)). The jury may infer premeditation from several factors including: "the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, declarations by the defendant of an intent to kill, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, and calmness immediately after the killing." *Id.* (citing *Davidson*, 121 S.W. 3d at 614-15). The jury may also consider "a lack of provocation on the victim's part and a defendant's failure to render aid to a victim." *Id.* (citing *Finch v. State*, 226 S.W.3d 307, 318-19 (Tenn. 2007)).

The defendant entered the market armed with a deadly weapon wearing clothing that would conceal his identity. In slang terms, the defendant instructed the unarmed clerk to give him the money from the cash register or he was "gonna shoot [the victim] dead in the head." When the victim hesitated, the defendant fired a warning shot near the victim's

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concluded the evidence was sufficient to establish the defendant as the perpetrator of all of the offenses, this issue requires no further analysis.

head. After repeating his demand to open the cash drawer, the defendant shot the victim in the head without provocation as the victim slowly turned to walk away. The defendant then fired a shot in the direction of another employee. As the victim lay dying, the defendant unsuccessfully attempted to open the cash register before fleeing the market. He abandoned his weapon and clothing in a nearby baseball field in an apparent attempt to conceal his identity as the perpetrator.

The defendant suggests that his demands could have been viewed as a tactic to convince the victim to hand over the money rather than as a threat of violence. He further asserts the defendant's quick reaction in shooting the victim as he turned to walk away supports an inference that this was, at most, a knowing killing. Viewing the context of all of the circumstances surrounding the killing, the jury had more than sufficient evidence from which to conclude that the defendant acted with premeditation. This issue is without merit.

First-degree Felony Murder

The jury also convicted the defendant of first-degree felony murder of Mr. Dhalai. In relevant part, the statute provides that felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery." Tenn. Code Ann. § 39-13-202(a)(2). No culpable mental state is required for the killing except the intent to commit the underlying offense. *Id.* § 39-13-202(b). The defendant argues that the killing of the victim and the attempted robbery were not sufficiently connected to support his conviction for felony murder.

To fall within the definition of felony murder, the killing must be "done in pursuance of the unlawful act, and not collateral to it." *State v. Banks*, 271 S.W.3d 90, 140 (Tenn. 2008) (quoting *Rice*, 184 S.W.3d at 663). The killing "may precede, coincide with, or follow the felony" and still be considered "in the perpetration of" the felony "so long as there is a connection in time, place, and continuity of action." *State v. Thacker*, 164 S.W.3d 208, 223 (Tenn. 2005) (quoting *State v. Buggs*, 995 S.W.2d 102, 106 (Tenn. 1999)). The proof must establish that the defendant had the intent to commit the underlying felony either prior to or concurrent with the act causing the victim's death.

Without question, the proof established that the defendant entered the market with the intent to commit a robbery. The defendant threatened to kill the victim if he refused to give him the money from the cash register. The defendant fired a warning shot followed shortly by the fatal shot. There was ample evidence for the jury to infer that the defendant saw the victim as the only thing standing between him and the cash drawer. Thus, the proof established that the defendant had the intent to commit the robbery prior to the shooting that caused the victim's death. This close connection was sufficient to support his

conviction for felony murder. This issue has no merit.

Attempted Second-degree Murder/Aggravated Assault

The defendant was convicted of the attempted second-degree murder of Mr. Austin. Second-degree murder is "[a] knowing killing of another." Tenn. Code Ann. § 39-13-210 (2018). To prove *attempted* second-degree murder, the State was required to prove that the defendant took a substantial step toward committing a knowing killing of Mr. Austin. *See* Tenn. Code Ann. §39-12-101(a)(3) (2018). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b) (2018). Thus, as for the defendant's intent, the State was only required to prove that the defendant knew his actions were reasonably certain to cause Mr. Austin's death. *See State v. Brown*, 311 S.W.3d 422, 432 (Tenn. 2010). Whether the defendant acted "knowingly" is a question of fact for the jury and may be inferred from the surrounding facts and circumstances. *Id.*

The evidence established that the defendant noticed Mr. Austin when he entered the market. After fatally shooting Mr. Dhalai but before jumping over the counter to gain access to the cash register, the defendant fired a shot in the direction of Mr. Austin, who was attempting to move to safety. The defendant places significance on Mr. Austin's testimony that the man (later identified as the defendant) never made any direct statements or threats to him. He also emphasizes that a single shot was fired in Mr. Austin's direction. Indeed, the jury heard the evidence and later received instructions about lesser-included offenses. Nonetheless, the jury concluded the defendant's gunshot in Mr. Austin's direction was a "substantial step" toward a knowing killing and that the defendant knew his conduct was reasonably certain to cause Mr. Austin's death, having fatally wounded Mr. Dhalai just seconds before. The evidence was sufficient to support his conviction for attempted second-degree murder.

In passing, the defendant makes the same argument as to his conviction for the aggravated assault of Mr. Austin. Under this alternative theory, the State was required to show that the defendant committed an assault by "[i]ntentionally or knowingly caus[ing] another to reasonably fear imminent bodily injury" involving the use or display of a deadly weapon. Tenn. Code Ann. §§ 39-13-101(a)(2), -102(a)(1) (2018 & Supp. 2020). Again, the proof clearly established that the defendant caused Mr. Austin to reasonably fear imminent bodily injury by firing the shot in his direction. These issues are likewise without merit.

Employing a Firearm

Finally, the defendant was convicted of employing a firearm during his attempt to commit a dangerous felony. Under the statute, it is an offense to employ a firearm during

the attempt to commit a dangerous felony. Tenn. Code Ann. § 39-17-1324 (2018 & Supp. 2020). Attempted second-degree murder is one of the enumerated dangerous felonies. *See id.* § 39-17-1324(i)(1)(B). The defendant's argument relates back to his argument that the evidence was insufficient to support his conviction for attempted second-degree murder. He submits that if his conviction for attempted second-degree murder is reversed, his conviction for employing a firearm during the commission of a dangerous felony must also be reversed. For the reasons explained above, the Court concluded the evidence was sufficient to support the attempted second-degree murder conviction. Accordingly, this argument also fails.

C. Video Recording of Prior Robbery

The defendant argues the trial court erred in allowing the State to introduce during the penalty phase a video recording of his prior aggravated robbery. The defendant previously pleaded guilty to aggravated robbery of a convenience market in Madison County, Tennessee. Prior to trial, the State gave notice of its intent to use this prior aggravated robbery conviction to establish the (i)(2) statutory aggravating circumstance. In addition, the State provided the defendant with a copy of a surveillance video that captured the defendant's actual participation in the prior aggravated robbery.

The defendant filed a pre-trial motion in limine to exclude the video pursuant to Tennessee Rule of Evidence 403 because its probative value was substantially outweighed by the danger of unfair prejudice. The defendant argued the certified judgment of conviction would have sufficed. The State maintained the evidence was admissible under Tennessee Code Annotated section 39-13-204(c). After considering the arguments and viewing the video, the trial court denied the motion, concluding the evidence was reliable and relevant to establish the (i)(2) aggravating circumstance based on section 39-13-204(c) and *State v. Reid*. The surveillance video was played to the jury during the penalty phase.

The defendant raised this issue on direct review, and the Court of Criminal Appeals concluded the trial court did not abuse its discretion. *Miller*, 2020 WL 5626227 at *19. The defendant continues to argue in this Court that admission of the video was error. The introduction of evidence at the penalty phase is governed by Tennessee Code Annotated section 39-13-204(c) which provides as follows:

> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any

such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. **In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, *either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction.* Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor.** The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

Tenn. Code Ann. § 39-13-204(c) (emphasis added). The bold/italic language resulted from the 1998 amendment to the statute. *See generally State v. Odom*, 137 S.W.3d 572 (Tenn. 2004) (discussing the 1998 amendment to section 39-13-204(c)). Unlike the prior version, the current statute specifically authorizes the introduction of evidence concerning the facts and circumstances of the prior violent felony.

The statute reflects the reality that, although a capital case, the rules of evidence are somewhat relaxed during a capital sentencing hearing. *Cf. Reid*, 91 S.W.3d at 305 (Birch, J., concurring in part and dissenting in part) (explaining that the Rules of Evidence should not be applied to preclude the introduction of otherwise reliable evidence that is relevant to the issue of punishment in the capital sentencing arena). In fact, the 1998 amendment seems to suggest that Tennessee Rule of Evidence 403 does not routinely impede the admission of such evidence.

Although such a video recording is somewhat prejudicial by its very nature, we cannot conclude that its probative value was outweighed by the danger of unfair prejudice

when properly introduced at the penalty phase pursuant to section 39-13-204(c) after the defendant's guilt had been determined. Accordingly, the trial court did not abuse its discretion in admitting the surveillance video of the prior aggravated robbery.

D. Constitutionality of the Death Penalty/Lethal Injection

The defendant maintains that the death penalty in general, and lethal injection in particular, violate the United States and Tennessee Constitutions' prohibitions on cruel and unusual punishment. U.S. Const. amend. VIII; Tenn. Const. art. I, § 16. He acknowledges, however, that these arguments have been rejected by both the United States Supreme Court and this Court. *See Baze v. Rees*, 553 U.S. 35, 47 (2008); *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005). The defendant urges this Court to reconsider its earlier precedent and conclude that capital punishment, and the use of lethal injection to carry out the death penalty, constitutes cruel and unusual punishment and should therefore be invalidated in Tennessee as a possible punishment for first-degree murder. We respectfully decline the defendant's invitation, and we reaffirm our prior holdings.

E. Mandatory Review of Death Sentence

This Court is statutorily required to review the defendant's death sentence. Tenn. Code Ann. § 39-13-206(a)(1) (2018). Our review includes analyzing whether (1) the death sentence was imposed in any arbitrary fashion; (2) the evidence supports the jury's findings of statutory aggravating circumstances; (3) the evidence supports the jury's finding that the aggravating circumstances outweighed any mitigating circumstances; and (4) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. *Id.* § 39-13-206(c)(1)(A)-(D).

Imposition of the Death Penalty

Our first consideration is whether the death penalty was imposed arbitrarily in this case. The record indicates the trial court properly instructed the jury at the penalty phase of the trial. The jury unanimously determined that the State had proven the aggravating circumstances beyond a reasonable doubt and that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Our review indicates the trial court conducted the penalty phase in strict compliance with the applicable statutory provisions and the Tennessee Rules of Criminal Procedure. Accordingly, as to the first consideration, we can conclude the sentences of death were not imposed in an arbitrary fashion.

Sufficiency of the Evidence Establishing Aggravating Circumstances

Our second consideration is whether the evidence supports the jury's findings of statutory aggravating circumstances. The relevant inquiry is whether a rational jury, taking the evidence in the light most favorable to the State, could have found the existence of the aggravating circumstances beyond a reasonable doubt. *Clayton*, 535 S.W.3d at 850; *State v. Kiser*, 284 S.W.3d 227, 272 (Tenn. 2009). In the instant case, the jury found two aggravating circumstances. Therefore, we conduct an independent review to determine whether the evidence presented at the penalty phase was sufficient to support the jury's findings.

The penalty phase jury verdict forms indicate the jury unanimously found the State had proven beyond a reasonable doubt the following two statutory aggravating circumstances as to both first-degree murder convictions:

> (2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person;
>
> . . . .
>
> (7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any aggravated robbery.

Tenn. Code Ann. § 39-13-204(i)(2), (7). In support of the (i)(2) aggravating circumstance, the State introduced a certified judgment indicating the defendant had been previously convicted of aggravated robbery in Madison County, a written statement signed by the defendant admitting his role in the prior robbery, the testimony of a victim in the robbery, and a video recording of the prior robbery that showed the defendant and two other men committing the robbery. As to the (i)(7) aggravating circumstance, the proof clearly established that the defendant "knowingly" murdered the victim at the market and obviously had a substantial role in the attempted aggravated robbery as the sole perpetrator. Indeed, the evidence is more than sufficient to support the jury's finding of these statutory aggravating circumstances.

In considering this prong, the Court of Criminal Appeals concluded that the (i)(7) aggravating circumstance cannot be applied to a conviction for felony murder, and therefore, vacated the application of this aggravating circumstance for the felony murder conviction. *Miller*, 2020 WL 5626227, at *21 (citing *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992), *superseded by statute as stated in State v. Pruitt*, 415 S.W.3d 180

(Tenn. 2013)). Indeed, this Court determined in *Middlebrooks* that the (i)(7) aggravating circumstance could not support the death penalty for a defendant convicted solely of felony murder because the then-existing aggravating circumstance and felony murder statute contained duplicative language. *Middlebrooks*, 840 S.W.2d at 346. However, as the Court explained in *State v. Banks*,

> The Tennessee General Assembly responded to [*Middlebrooks*] in 1995 by amending the aggravating circumstance in Tenn. Code Ann. § 39–13–204(i)(7) to require that the murder "was *knowingly* committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit" one of the enumerated felonies. This amendment narrowed the class of offenders to whom the death penalty could be applied sufficiently so as to leave no *State v. Middlebrooks* problem *even in cases where Tenn. Code Ann. § 39–13–204(i)(7) was the only aggravating circumstance established and the conviction was for felony murder*.

Banks, 271 S.W.3d at 152 (emphasis added) (footnote omitted). As noted, the jury in this case specifically found the State had proven the (i)(7) aggravating circumstance with the "knowing" requirement beyond a reasonable doubt. Accordingly, the portion of the judgment of the Court of Criminal Appeals vacating the application of the (i)(7) aggravating circumstance to the felony murder conviction is reversed.

Aggravating Circumstances Outweigh Mitigating Circumstances

In our third consideration, we are required to determine whether the evidence supports the jury's finding that the statutory aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. After the State presented its penalty phase evidence, the defendant called Dr. James Walker, who diagnosed the defendant with cognitive disorder, cannabis use disorder, PTSD, and antisocial personality disorder. According to Dr. Walker, the defendant had an IQ of 78 at the age of eight. The defendant also called Dr. Keith Caruso, who agreed with Dr. Walker's diagnosis but further emphasized the defendant's childhood instability. In rebuttal, the State presented the testimony of Dr. Kimberly Brown, who generally agreed with Dr. Walker's diagnosis with the exception of the PTSD diagnosis.

At the close of the penalty phase evidence, the trial court instructed the jury regarding the State's burden to establish any aggravating circumstances beyond a reasonable doubt and further establish that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The trial court instructed the following as to mitigation:

Tennessee law provides that in arriving at the punishment, the jury shall consider as previously indicated any mitigating circumstances raised by the evidence which shall -- which shall include, but are not limited to, the following:

1. There are choices other than sentence of death.

2. Life without parole means that Urshawn Miller will never be released from prison.

3. If Mr. Miller is sentenced to life without possibility of parole, he will die in prison.

4. Mr. Miller has a mother, two aunts, an uncle, a brother, a sister, and other close family members. Mr. Miller's execution would have a devastating lifetime impact on all of these family members.

5. If Mr. Miller is executed, his execution will not undo the harm suffered by Mr. Dhalai's family, but life without parole will provide Mr. Miller the time to reflect on Mr. Dhalai's death for the rest of his life.

6. Mr. Miller suffers from mental disorders due to circumstances beyond his control, including genetics, abuse, neglect, trauma, and other upbringing and environmental factors.

7. Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing. That is, you shall consider any aspect of the Defendant's character or record or any aspect of the circumstances of the offense favorable to the Defendant, which is supported by the evidence.

The Defendant does not have the burden of proving a mitigating circumstance. There is no requirement of jury unanimity to any particular mitigating circumstance or that you agree on the same mitigating circumstance.

Thus, after hearing the State's evidence supporting the statutory aggravating circumstances and the defendant's mitigating evidence, it was within the jury's purview to conclude that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The record supports this conclusion.

Proportionality Review

Finally, we are statutorily required to review the defendant's sentence of death in order to determine whether it is excessive or disproportionate to the penalty imposed in similar cases. Our review is intended to determine whether the defendant's death sentence is aberrant, arbitrary, or capricious insofar as it is "disproportionate to the punishment imposed on others convicted of the same crime." *Bland*, 958 S.W.2d at 662 (quoting *Pulley v. Harris*, 465 U.S. 37, 43 (1984)). Our review employs the precedent-seeking method of comparative proportionality review, in which we compare this case with other cases involving similar crimes and similar defendants in order to "identify and invalidate the aberrant death sentence." *Thacker*, 164 S.W.3d at 233 (quoting *Bland*, 958 S.W.2d at 664). The relevant pool of cases consists of "those first degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or death." *Rice*, 184 S.W.3d at 679 (citing *State v. Godsey*, 60 S.W.3d 759, 783 (Tenn. 2001); *Bland*, 958 S.W.2d at 666).

While no crimes or defendants are identical, a death sentence is disproportionate if the case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed." *Bland*, 958 S.W.2d at 668. Thus, in our proportionality review, we examine "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved."[18] *State v. Stevens*, 78 S.W.3d 817, 842 (Tenn. 2002). More specifically, we consider

> (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances

[18] The dissent employs the phrases "worst of the worst" and "worst of the bad" in its proportionality assessment, referencing Justice Souter's dissent in *Kansas v. Marsh*, 548 U.S. 163 (2006), which cites *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002). The dissent also references the author's prior dissent in *Pruitt*, 415 S.W.3d 180. Indeed, as the dissent explains, *Roper* and *Atkins* established that the death penalty "must be limited to those offenders who commit 'a narrow category of the most serious crimes.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). This narrowing principle is implemented through a state's capital sentencing scheme that includes certain enumerated aggravating circumstances. *See Roper*, 543 U.S. at 568 (citing *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (plurality opinion)). Like most states, our General Assembly, via the adoption of certain aggravating circumstances, defined the types of first-degree murders that may warrant the death penalty in Tennessee. *See* Tenn. Code Ann. 39-13-204(g)(1). Defendants routinely challenge the constitutionality of various aggravating circumstances and frequently argue that a particular aggravating circumstance fails to adequately narrow death eligibility. However, once a jury has imposed a sentence of death in accordance with our statutory scheme and absent a categorical proportionality challenge, our review of the sentence includes mandatory proportionality review as set out in our statute. Thus, although the phrases "worst of the worst" and "worst of the bad" have made their way into capital case vernacular, neither phrase reflects a constitutional or statutory standard by which we are bound in this review.

> including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims.

Pruitt, 415 S.W.3d at 213 (citing *Bland*, 958 S.W.2d at 667). We also consider several factors about the defendant, including his (1) record of prior criminal activity; (2) age, race, and gender; (3) mental, emotional, and physical conditions; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation. *Id.* at 213-14.

The defendant is a twenty-six-year-old African-American male who shot the victim in the head. He acted with premeditation, telling the victim he would shoot him dead if he failed to obey instructions and firing a shot that barely missed the victim before firing a second shot that hit the victim in the back of the head. The defendant then fired the gun a third time, directing deadly force toward another store employee. There was no provocation or justification for the shooting. This senseless killing was committed in the course of the defendant's attempt to commit a robbery. The proof of what occurred was very clear, as store surveillance cameras recorded the entire encounter. The defendant fled the scene afterwards, and he again threatened violence, this time against police officers in a standoff, before they apprehended him. The defendant presented proof of a troubled childhood and diagnoses of various mental health conditions; however, none of the witnesses opined the defendant was incompetent to stand trial or lacked the ability to express remorse or take responsibility for his actions. The defendant had a prior conviction for a similar aggravated robbery, and the jury found that this conviction supported the (i)(2) aggravating circumstance.

Upon our review of the record and the Tennessee Supreme Court Rule 12 reports,[19] we conclude that the death sentence imposed in this case is not excessive or disproportionate when compared to the penalty imposed in similar cases, including the following:

Larry McKay, an African-American male, was twenty-five years old when he and Michael Eugene Sample shot the unarmed store clerks, Benjamin Cooke and Steve Jones, during the course of a robbery of the L & G Sundry Store despite the clerks having complied with Mr. McKay's demands. *State v. McKay*, 680 S.W.2d 447, 448-49 (Tenn. 1984). At the penalty phase, Mr. McKay introduced evidence of his broken home. The jury

[19] Tennessee Supreme Court Rule 12 requires trial courts to file extensive reports in all cases in which the defendant is convicted of first-degree murder. These reports include data about the crime, the defendant, and the punishment imposed. *See* Tenn. Sup. Ct. R. 12(1) & app.

imposed the death penalty based on the (i)(2), (i)(3),[20] (i)(6),[21] and (i)(7) aggravating circumstances. *Sample v. State*, No. 02C01-9505-CR-00131, 1996 WL 551754, at *9 n.12 (Tenn. Crim. App. Sept. 30, 1996).

The (i)(7) aggravating circumstance was later invalidated pursuant to *Middlebrooks* but the error deemed harmless. *Sample v. State*, 82 S.W.3d 267, 276-79 (Tenn. 2002), *perm. app. denied*, (Tenn. Jan. 27, 1997).

Michael Wayne Howell, a Caucasian male, was twenty-seven-years old when he fatally shot the unarmed clerk, Alvin Kennedy, in the head during the robbery of a 7-Eleven Market. *Howell*, 868 S.W.2d at 245. At the penalty phase, Mr. Howell presented evidence that he suffered from brain damage and had a troubled childhood. *Id.* at 246. The jury imposed the death penalty based on the (i)(2) and (i)(7) aggravating circumstances. *Id.* at 247. The (i)(7) aggravating circumstance was later invalidated pursuant to *Middlebrooks* but the error was deemed harmless. *Id.* at 262.

Tyrone Chalmers, an African-American male, was twenty-one years old when he killed twenty-eight-year-old Randy Allen during a robbery. *State v. Chalmers*, 28 S.W.3d 913, 915 (Tenn. 2000). In August 1994, Mr. Chalmers and his accomplices happened upon the victim and the victim's cousin while looking for someone to rob. *Id.* at 915-16. Mr. Chalmers admitted to police that he forced the victim and the cousin to strip before robbing them of $3.00. *Id.* at 916. Mr. Chalmers fired his shotgun at the victim six times. *Id.* at 916. He admitted to killing the victim and expressed remorse for doing so. He was convicted of felony murder and especially aggravated robbery. *Id.* at 914. The jury imposed the death penalty based on the (i)(2) aggravating circumstance – Mr. Chalmers had been previously convicted of attempted especially aggravated robbery and attempted first degree murder for events occurring on the same date as the murder of Randy Allen. *Id.* at 916.

Paul Dennis Reid, Jr., a Caucasian male, was thirty-nine years old when he killed two unarmed Captain D's employees, sixteen-year-old Sarah Jackson and twenty-five year old Steve Hampton, during a robbery. *Reid*, 91 S.W.3d at 261. Mr. Reid presented several witnesses at the penalty phase who testified about various mental health issues as well as Mr. Reid's difficult childhood. *Id.* at 267-70. The jury imposed the death penalty based on the (i)(2), (i)(6), and (i)(7) aggravating circumstances. *Id.* at 265-66, 271.

In this sampling of cases, the respective juries in two of Tennessee's grand divisions

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[20] "(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder[.]" Tenn. Code Ann. § 39-13-204(i)(3).

[21] "(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another[.]" Tenn. Code Ann. § 39-13-204(i)(6).

considered whether the death penalty was an appropriate punishment for males of similar ages who murdered one or more victims while attempting a robbery. In three of these cases, the victims were employees of retail establishments who were murdered during the defendant's attempt to rob the business. Like the defendant, these men had troubled childhoods, had committed prior violent felonies, and often had some type of chemical dependency. Yet, it is revealing that jurors from across our state believed each of these defendants deserved a sentence of death under our statutory scheme for these types of offenses.

Under our proportionality review, the instant case need not be identical to the other cases in every respect, and, as we have previously recognized, a death sentence is not disproportionate simply because another defendant received a life sentence under similar circumstances. Having compared the defendant's case with other cases in which the death penalty was imposed while acknowledging the differences, we can conclude the defendant's sentence of death is not an "aberrant death sentence" and is not "plainly lacking in circumstances" consistent with those cases in which the death penalty was imposed. The defendant is not entitled to relief on this basis.

III. CONCLUSION

For the reasons set forth above, we reverse the portion of the judgment of the Court of Criminal Appeals that vacated the application of the (i)(7) felony murder aggravating circumstance to the felony murder conviction. We affirm the defendant's convictions and sentence of death.

The sentence of death shall be carried out as provided on the 17th day of October, 2022, unless otherwise ordered by this Court or other proper authority. It appearing that the defendant, Urshawn Eric Miller, is indigent, the costs of this appeal are taxed to the State of Tennessee.

Roger A. Page

ROGER A. PAGE, CHIEF JUSTICE

IN THE SUPREME COURT OF TENNESSEE
June 3, 2021 Session

STATE OF TENNESSEE v. URSHAWN ERIC MILLER

Automatic Appeal from the Court of Criminal Appeals
Circuit Court for Madison County
No. 16-435 Donald H. Allen, Judge

No. W2019-00197-SC-DDT-DD

SHARON G. LEE, J., concurring in part and dissenting in part.

The Eighth Amendment to the United States Constitution protects all citizens, including Urshawn Eric Miller, from being subjected to punishment that is cruel and unusual. A sentence is cruel and unusual, and thus constitutionally prohibited, when it is excessive or disproportionate as compared with sentences imposed in similar cases. Miller was sentenced to death for shooting and killing a store clerk during an attempted robbery. The loss of the store clerk's life is tragic, and Miller deserves to be punished. But Miller and the crime he committed do not fall into the rare category of the "worst of the bad."[1] When compared with other first-degree murder cases, including capital cases, Miller's case is more like cases in which a sentence of life or life without parole was imposed rather than a death sentence. Thus, Miller's death sentence is out of line with the punishment imposed in similar cases, making his punishment cruel and unusual.

Miller's convictions for first-degree murder and other offenses should be affirmed. Under the Eighth Amendment, Miller should not be put to death but should spend the rest of his life in prison.[2]

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[1] *State v. Nichols*, 877 S.W.2d 722, 739 (Tenn. 1994).

[2] I also do not join in the Court's decision rejecting Miller's challenges to the death penalty and the lethal injection protocol. That aside, the disproportionality and excessiveness of the death penalty here is more than sufficient reason for Miller's life to be spared. In *State v. Irick*, the defendant established that the State's lethal injection protocol would cause serious and needless pain during his execution. 556 S.W.3d 686, 695–97 (Tenn. 2018) (Lee, J., dissenting). I agree with Justice Sotomayor's dissent from the denial of the defendant's application for stay of execution: "If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism." *Irick v. Tennessee*, 139 S. Ct. 1, 4 (2018) (Sotomayor, J., dissenting).

I.

The Eighth Amendment's ban on cruel and unusual punishment does not allow sentences that are excessive or disproportionate to the penalty imposed in similar cases. Criminal punishment, especially the most severe and irreversible sanction of a death sentence, must be proportional to the crime and the culpability of the defendant. Thus, we limit capital punishment to "offenders who commit 'a narrow category of the most serious of crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)). Because "the culpability of the average murderer" cannot "justify the most extreme sanction available to the State," *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), the death penalty is reserved for only the "worst of the worst"[3] or the "worst of the bad."[4]

To satisfy the Eighth Amendment's guarantee that no citizen will be subjected to cruel and unusual punishment, Tennessee Code Annotated section 39-13-206(c)(1)(D) requires a reviewing court to determine whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[5] This means that we must survey "similar cases" and evaluate any disparity between the relative degrees of culpability and the punishment imposed. A death sentence is excessive or disproportionate under the statute when the nature of the crime and the defendant align more closely with cases in which a life or a life without parole sentence was imposed rather than a death sentence.

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[3] *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (citing *Roper*, 543 U.S. at 568).

[4] *Nichols*, 877 S.W.2d at 739; *see also State v. Pruitt*, 415 S.W.3d 180, 224 (Tenn. 2013) (Koch and Lee, JJ., concurring in part and dissenting in part) (quoting *Nichols*, 877 S.W.2d at 739); *State v. Boyd*, 959 S.W.2d 557, 559–60 (Tenn. 1998) (quoting *State v. Middlebrooks*, 840 S.W.2d 317, 343 (Tenn. 1992), *superseded on other grounds by statute*, 1995 Tenn. Pub. Laws, ch. 377, § 1, *as recognized by State v. Stout*, 46 S.W.3d 689, 705–06 (Tenn. 2001)); *State v. Keen*, 31 S.W.3d 196, 208 (Tenn. 2000) ("In fact, *Odom's* legitimate concerns with sufficient narrowing of the death-eligible class of defendants are actually furthered by such an examination, and only in this manner can the sentence of death be reserved for the 'worst of the worse.'" (quoting *State v. Odom*, 928 S.W.2d 18, 27 (Tenn. 1996))); *State v. Bland*, 958 S.W.2d 651, 663 n.10 (Tenn. 1997) ("The Tennessee statutory capital sentencing scheme has been repeatedly upheld against constitutional attack, and, from the raw numbers, appears to be performing its intended purpose of reserving the death sentence for the 'worst of the bad.'" (no citation attributed in original)).

[5] The purpose of this mandated "comparative proportionality review is to identify and invalidate aberrant death sentences." *State v. Godsey*, 60 S.W.3d 759, 793 (Tenn. 2001). Under Tennessee Code Annotated section 39-13-206(c)(1)(A) through (C), we also review every death sentence to determine whether: the sentence was imposed arbitrarily, the evidence supports any findings of aggravating circumstances, and the evidence supports the jury's determination that the aggravating circumstances outweigh any mitigating circumstances.

In some cases, whether a death sentence is found to be disproportionate or excessive depends on how the sentence is reviewed. In *State v. Bland*, 958 S.W.2d 651 (Tenn. 1997), a divided Court narrowed the proportionality review for death sentences by limiting the pool to only first-degree murder cases in which the prosecution sought a death sentence, a capital sentencing hearing was conducted, and the jury decided whether the sentence should be death, life in prison without parole, or life in prison. *See id.* at 666 & n.17. In *State v. Pruitt*, I joined Justice William C. Koch in dissenting from the Court's decision to apply the *Bland* approach to proportionality review and impose the death penalty on the defendant. 415 S.W.3d 180, 223–24 (Tenn. 2013) (Koch and Lee, JJ., concurring in part and dissenting in part). In our view, the proportionality review mandated by Tennessee Code Annotated section 39-13-206(c)(1)(D) required a comparison of similar cases from the pool of *all* first-degree murder cases—not just capital cases. *Id.* at 225. A proportionality review of similar first-degree murder cases ensures that only "the worst of the bad" offenders are executed. *Id.* at 238. By limiting review to only similar capital cases, the *Bland* shortcut defies the plain language of the statute, omits most first-degree murder cases, and fatally skews the basic inquiry of which cases are similar. *See id.* at 230.[6] The question should not be whether Miller's case is "plainly lacking in circumstances" present in capital cases, *cf. Bland*, 958 S.W.2d at 665, because that inquiry assumes that death penalty cases are the most similar cases. And our comparative review should not simply rehash the aggravating and mitigating factors[7] but should concentrate instead on the "nature of the crime and the defendant" as required by section -206(c)(1)(D).

II.

In reviewing Miller's death sentence for proportionality under section -206(c)(1)(D), we first consider the nature of Miller's crime. He entered a market wearing dark clothing and a facial covering. Pointing his gun, Miller threatened to shoot a clerk if he did not turn over the money in the cash register. Miller then fired a shot in the clerk's direction. As the clerk turned to walk away, Miller shot him in the back of the head and killed him. Miller then fired a third shot in the direction of another clerk, but the shot missed. Miller had three live rounds left in his gun that he did not fire. He could not open the cash register and ran out of the market empty-handed. Miller fled into the woods, threw away his gun, and refused to come out. He grappled with a police dog, which bit him twice. Miller surrendered after an officer struck him on the head with a shotgun and another officer shot him with a taser.

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[6] Since *Bland* was decided in 1997, this Court has reviewed eighty-one death penalty cases and found the death penalty disproportionate in only one case: *State v. Godsey*, 60 S.W.3d 759. Bradley A. MacLean & H. E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 Tenn. J.L. & Pol'y 85, 119 n.97 (2018).

[7] Besides a proportionality review, the Court has to review every death sentence to determine whether the evidence supports a finding of one or more aggravating circumstances and whether these circumstances outweigh any mitigating circumstances. *See* Tenn. Code Ann. § 39-13-206(c)(1)(B)–(C) (2018 & Supp. 2021). These are independent inquiries; the proportionality review should not be conflated with the separate review of aggravating and mitigating circumstances.

Next, we consider Miller's characteristics. Growing up in an unstable family, he had a difficult childhood with a family history of substance abuse and criminal conduct. Miller moved eight times before he was ten years old. His father abandoned him. His mother smoked marijuana while pregnant with him. She mistreated Miller and had a series of abusive men in her life. When Miller was a child, one of his mother's male friends had Miller pour rubbing alcohol on his penis to see him react in pain. He was abused by his alcoholic grandmother who often cared for him. Miller was of low or low-average intelligence (eighteenth percentile), and he dropped out of school in the tenth grade. Miller used alcohol and smoked marijuana excessively for many years. He was diagnosed with antisocial personality disorder, cannabis use disorder, and a history of attention deficit hyperactivity disorder. An expert at his trial concluded that he also suffered from post-traumatic stress disorder. At seventeen, Miller was shot in the back during an attempted robbery. At eighteen, he was the victim of an armed robbery. Miller was previously convicted of armed robbery and sentenced to serve eight years. He was a twenty-six-year-old African-American male when he committed the crime for which he was sentenced to death.

In sum, the essence of this case for proportionality review is that Miller, who had a prior criminal conviction, shot and killed a single victim for pecuniary gain. While reprehensible, the crime did not involve torture, depravity, or other especially cruel conduct. Most defendants with similar characteristics who committed similar crimes have been sentenced to life or life without parole. Very few defendants who committed first-degree murder by shooting a single victim for pecuniary gain have been sentenced to death. Thus, whether we analyze Miller's case by comparing it to similar capital cases (*Bland* approach) or all similar first-degree murder cases (pre-*Bland* approach), the result is the same—Miller's death sentence is disproportionate or excessive.

The official database of Tennessee Supreme Court Rule 12 reports shows 399 reported first-degree murder convictions (excluding Miller's conviction) for single-victim shootings for "pecuniary or other gain" between 1978 and 2021.[8] Defendants in 360 (90.2%) of those cases were sentenced to life or life without parole. Only thirty-nine (9.8%) defendants were *initially* sentenced to death for shooting a single victim for pecuniary gain. Not many of these defendants stayed on death row. Thirty-two (82.1%) of these defendants had their death sentences reduced to life or life without parole. In sum, *only* seven (1.75%) out of 399 defendants convicted of first-degree murder for single-victim shootings for pecuniary gain similar to Miller's case remained on death row after appeals, habeas corpus proceedings, commutation, and other sentence modifications.

[8] This Court adopted Rule 12 to assist in proportionality review of sentences. Under this rule, trial judges submit reports in cases that result in a conviction for first-degree murder.

All seven of these death penalty cases involved more premeditation, depravity and cruelty, and/or a defendant with a more lengthy and violent criminal history than Miller:

- *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003)

The defendant was convicted of aggravated robbery and first-degree murder in the perpetration of robbery and was sentenced to death. The defendant followed the victim home after seeing her gambling at a casino. 101 S.W.3d at 388. The defendant kidnapped the victim in the driveway of her home and drove her to an abandoned house. *Id.* The defendant beat her, damaging her teeth and fracturing her jaw and other facial bones. *Id.* at 389. He shot her in the head and stole her jewelry and her casino winnings. *Id.* Over two weeks later, the victim's badly decomposed body was found at the abandoned house. *Id.* The defendant had previous convictions for aggravated assault, robbery, and assault with a dangerous weapon. *Id.* at 404.

- *Terry v. State*, 46 S.W.3d 147 (Tenn. 2001)

The defendant was convicted of premeditated first-degree murder and arson and was sentenced to death. 46 S.W.3d at 150. The defendant, who was a church official, stole money over time from a church where he worked. *Id.* at 151. He made an elaborate plan to stage his death and assume a new identity. *Id.* The defendant obtained a social security card, a driver's license, and other identifying documents in a deceased person's name. *Id.* The defendant befriended the victim and planned for him to play a role in the hoax. *Id.* When the defendant implemented his plan, he first shot and killed the victim in the church and severed his head and right forearm. *Id.* at 152. The defendant left the victim's body in the attic of the church, taking the victim's head and forearm with him in a bag. *Id.* He disposed of the victim's clothing and the hacksaw and knife used to dismember the body in a dumpster. *Id.* The defendant left the bag of the victim's body parts in a mini-warehouse and returned to the church to drop off cans of gasoline. *Id.*

From the church, the defendant went to the victim's boarding house where he left his wallet so it appeared the defendant had been there. *Id.* Near the victim's house, the defendant also left his vehicle which contained a beer bottle, some of the defendant's credit cards, a towel smeared with the defendant's blood, and the victim's fishing gear. *Id.* The defendant placed the victim's fingerprints on the beer bottle and the credit cards by using the victim's severed hand. *Id.* The defendant then took a taxi back to the warehouse, retrieved the bag containing the severed head and forearm, and drove his motorcycle from the warehouse to a lake where he rented a boat and dumped the bag. *Id.* The defendant returned to the church, where he removed some tattooed skin from what remained of the victim's arms, and flushed those pieces of skin down the toilet. *Id.* He then wrapped the victim's body in a carpet, leaving it along with chopped wood in the church's attic, and set the church on fire by dousing it with gasoline. *Id.* The defendant left town. A day later, he threw his pistol in the Mississippi River and called his lawyer. *Id.* at 152–53. When apprehended, the defendant showed no emotion or remorse. *Id.* at 153. This Court upheld the defendant's death sentence based on "extreme premeditation, an unarmed victim,

mutilation of the victim's body, and concealment of the crime to avoid detection and arrest." *Id.* at 166.

- *State v. Stephenson*, 195 S.W.3d 574 (Tenn. 2006), *abrogated on other grounds by State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012)

The defendant was sentenced to death after being convicted of first-degree murder and conspiracy to commit first-degree murder for his part in the contract killing of his wife. 195 S.W.3d at 582. The defendant, who was having an affair with another woman, was the beneficiary of a $5,000 life insurance policy on his wife. *Id.* at 582–83. He tried unsuccessfully to hire a co-worker and then another man to kill his wife. *Id.* at 582. Later, the defendant and a hired accomplice lured his wife to an isolated area where she was shot in the forehead at close range while sitting in her car. *Id.* at 583. After the killing, the defendant left the state. When he returned for questioning, the defendant denied any involvement in the crime. *Id.* When implicated by his accomplice, the defendant admitted to the contract killing of his wife. *Id.* The defendant's two sons, who were four years old and eight months old when the murder occurred, were left motherless by the actions of their father. *Id.* at 582.

- *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983)

A jury convicted the defendant of first-degree murder and first-degree burglary, and he was sentenced to death. 657 S.W.2d at 407. A priest, who did not appear at a morning mass, was found shot to death inside the rectory of a Catholic church. *Id.* at 407 n.1, 408. He had been shot twice; scrapes and lacerations on his body suggested he had struggled with his assailant. *Id.* at 408. The pockets of the priest's clothing were pulled out, coins were scattered on the floor, and there were signs of struggle in the rectory. *Id.* A witness identified the defendant as being at the scene shortly after the murder, the defendant admitted being on the premises, a strand of the priest's hair was found on the defendant's clothing, and the defendant sold the murder weapon the day after the murder. *Id.* at 411. The defendant had previously been convicted of second-degree murder of a young woman and first-degree murder of a police officer. *Id.* at 413.

- *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984)

The defendant was convicted of first-degree murder during the commission of a robbery and was sentenced to death. 667 S.W.2d at 46. The defendant entered a Wendy's restaurant just before closing time. *Id.* After the restaurant closed, he herded the employees and a customer at gunpoint into the manager's office. *Id.* The defendant stole the day's receipts, took an employee's car keys, ordered everyone to stay in the office, locked the door, and left. *Id.* An employee had tripped a silent alarm, and three police officers responded to the scene. *Id.* The defendant resisted arrest. He shot and killed one police officer and fired shots at the other two officers, hitting one in the arm. *Id.* at 46–47. The defendant had previous convictions, including aggravated assault and burglary. *Id.* at 51.

- *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000)

The defendant was sentenced to death for a felony murder committed during an especially aggravated robbery. 28 S.W.3d at 914. He and two accomplices drove around looking for someone to rob. *Id.* at 916. They pulled up in front of the victim and his cousin and demanded that they remove their clothes. *Id.* The defendant and his accomplices then stole three dollars. *Id.* The defendant fired his rifle at the victim, shooting him five times and killing him. *Id.* at 915. The defendant had previously been convicted of attempted especially aggravated robbery and attempted first-degree murder, which he committed on the same day when he fired fifteen rounds at a different victim while driving away. *Id.* at 916.

- *State v. Sims*, 45 S.W.3d 1 (Tenn. 2001)

The defendant was convicted of premeditated first-degree murder and especially aggravated burglary and was sentenced to death. 45 S.W.3d at 5. The victim returned home from work to find a vehicle in his carport and the defendant and an accomplice burglarizing his home. *Id.* The victim pulled his vehicle into the driveway, blocking the defendant's vehicle. *Id.* at 5–6. After the victim entered his home, the accomplice heard the defendant demanding the victim's keys and then heard eight or nine gunshots. *Id.* at 6. The defendant came out of the house holding the victim's gun and keys. *Id.* The defendant told the accomplice they had fought over the gun and that he had to kill the victim because he had seen his face. *Id.* The victim had a gunshot wound to his head and "had been struck at least ten times but probably many more" on his head, neck, shoulders, arms, sides, back, and buttocks. *Id.* at 7. He had been struck with a long, narrow, rod-shaped object at least a quarter inch wide and suffered at least six blows to his head, one of which fractured his skull. *Id.* The victim remained conscious and in severe pain until police and paramedics arrived. *Id.* at 6. The victim died at the hospital over four hours later. *Id.* The defendant had previous felony convictions including theft, aggravated assault, and aggravated burglary. *Id.* at 7.

We turn now to the four "similar" capital cases relied on by the Court in affirming Miller's death sentence. In all of these cases, the nature of the crimes and the defendants' characteristics are worse than in Miller's case.

In the first case, *State v. McKay*, 680 S.W.2d 447 (Tenn. 1984), the defendants' criminal conduct involved more victims and more cruelty than in Miller's case. The defendants, Larry McKay and Michael Eugene Sample, entered a store planning to rob it. *Id.* at 448–49. A customer in the store saw McKay holding a gun to the head of a store clerk. *Id.* at 449. The customer tried to run out the door, but Sample shot him in the thigh. *Id.* The customer pretended to be dead, but Sample discovered he was alive and shot him again, this time in the back. *Id.* McKay and Sample then started shooting and killed the two store clerks. *Id.* Then Sample came over to where the customer was lying on the floor and put a pistol to his head. *Id.* The pistol clicked several times but did not fire. *Id.* The customer

and Sample wrestled, and the gun fired past the customer's head. *Id.* The customer, who later identified the defendants, survived two shots and a missed shot. *Id.* In imposing the death sentence, the jury found the presence of four aggravating circumstances as to McKay, three aggravating circumstances as to Sample, and no mitigating circumstances as to either defendant. *Id.* at 448. This case is not similar to Miller's case as it involved three victims, one of whom was wounded twice and two others who died. Although Miller, like McKay, had a previous conviction of robbery committed with a deadly weapon,[9] the nature of McKay's crime and his characteristics are worse than Miller's.

In the second case, *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993), the defendant shot a store clerk at close range in the forehead, killing him. *Id.* at 245. He and a friend fled the scene in a truck that the defendant had stolen the night before. *Id.* at 244–45. Later that same day while on the run in Oklahoma, the defendant shot and killed a woman in the parking lot of her apartment complex and stole her car. *Id.* at 245. A jury found the defendant guilty of felony murder and grand larceny and sentenced him to death for killing the store clerk in Tennessee. *Id.* at 247. The defendant had previously been convicted of armed robbery in Wyoming, armed robbery and attempted first-degree murder in Florida, and first-degree murder in Oklahoma. *Id.* at 246, 259. Unlike Miller, the defendant committed two murders on the same day and had felony convictions in three other states.

The third case the Court cites—*State v. Chalmers*, 28 S.W.3d 913—has already been addressed. In *Chalmers*, the defendant drove around with his accomplices looking for someone to rob, forced the victim and his cousin to disrobe, stole three dollars, and shot the victim five times, killing him. *See supra*; *Chalmers*, 28 S.W.3d at 916. The defendant had previously been convicted of attempted especially aggravated robbery and attempted first-degree murder for firing fifteen rounds at another victim that same night as the victim drove away. *Chalmers*, 28 S.W.3d at 916. There was no evidence that the defendant suffered the kind of troubled background or mental illness as Miller. *See id.* at 916–17. Miller's crime was less wanton and chaotic, and unlike the defendant here, Miller's criminal history did not include attempted first-degree murder.

In the final case, *State v. Reid*, 91 S.W.3d 247 (Tenn. 2002), the defendant shot two Captain D's restaurant employees—a sixteen-year-old and a twenty-five-year-old father of three—execution style while robbing them as they were preparing to open the restaurant on a Sunday morning. *Id.* at 261. The defendant had picked up a job application the night before and asked whether anyone would be at the restaurant on Sunday morning. *Id.* at 262. He was told that the manager would be there. *Id.* He apparently used the job application as a ruse to gain access to the restaurant that morning. *See id.* at 263. The jury convicted the defendant of two counts of first-degree murder and one count of especially aggravated robbery. *Id.* at 260. In the penalty phase, after hearing mitigating evidence about the defendant's difficult childhood and his mental health issues, *id.* at 267–71, the jury found

[9] The details of McKay's prior violent felony convictions are in the Rule 12 report. *Cf. State v. Kiser*, 284 S.W.3d 227, 274 n.37 (Tenn. 2009) (citing a Rule 12 report for the same purpose).

that the aggravating circumstances warranted a sentence of death. *Id.* at 271. On appeal, this Court found that the evidence painted a picture of a killer in complete control, firing multiple rounds into the bodies of "two unresisting employees as they were lying face down on the floor"—so many rounds that he had to manually reload his weapon before he stopped shooting. *Id.* at 287. The premeditated and methodical way in which these killings were carried out makes them worse than Miller's. This defendant would prove to be the "worst of the bad" and would go on to be dubbed the "fast-food killer."[10]

The four cases cited by the Court to support Miller's execution are dissimilar. There are at least four capital cases with circumstances similar to Miller's case in which the jury rejected the death penalty and voted to impose a sentence of life without parole or life. *See State v. Taylor*, No. M2005-00272-CCA-R3-CD, 2006 WL 2563433 (Tenn. Crim. App. Aug. 25, 2006), *perm. app. denied* (Tenn. Dec. 27, 2006) (upholding three concurrent sentences of life without parole instead of death for the first-degree murders of three unarmed employees of a Captain D's restaurant—two shot execution style while kneeling on the floor of the walk-in freezer and one sitting in his car in the parking lot—in the course of a premeditated robbery); *State v. Nur*, No. W2004-01259-CCA-R3-CD, 2005 WL 1467904 (Tenn. Crim. App. June 21, 2005), *perm. app. denied* (Tenn. Oct. 24, 2005) (upholding a life-without-parole sentence in which the State sought the death penalty for a defendant with a prior second-degree murder conviction who kicked down the door of an apartment to steal marijuana and shot and killed the victim as the defendant was fleeing); *Welch v. State*, 836 S.W.2d 586 (Tenn. Crim. App. 1992) (reviewing the denial of post-conviction relief in a case in which a jury rejected the death penalty in favor of a life sentence for a defendant with a previous first-degree murder conviction who shot and killed an elderly victim during an attempted robbery);[11] *State v. Walden*, No. 03C01-9707-CR-00317, 1998 WL 389062 (Tenn. Crim. App. July 14, 1998), *perm. app. denied* (Tenn. Jan. 25, 1999) (reviewing the denial of a motion for new trial in a case in which the jury imposed

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[10] The defendant, Paul Dennis Reid, was dubbed the "fast-food killer" after killing seven people at three fast food restaurants within three months. In each case, he was convicted of first-degree murder and especially aggravated robbery and sentenced to death. He first committed the murders at Captain D's. A month later, the defendant entered a McDonald's restaurant and ordered four employees to lie on the floor in a storage room. *State v. Reid*, 213 S.W.3d 792, 805 (Tenn. 2006). He shot three employees, twice each. *Id.* When his gun malfunctioned, he fought with the remaining employee, stabbing him repeatedly until he feigned death. *Id.* After the defendant had robbed and left the restaurant, the employee called the police. *Id.* The jury sentenced the defendant to death in that case also. *Id.* at 808. In the third case, which occurred a month after the crimes at McDonald's, the defendant entered a Baskin-Robbins store near closing time. *See State v. Reid*, 164 S.W.3d 286, 297–300 (Tenn. 2005). He kidnapped two employees, repeatedly and brutally stabbed them, and disposed of their bodies at a nearby state park. *Id.* at 297–98. The two victims bled to death over a period of five to fifteen minutes. *Id.* at 300. According to expert testimony, they would have remained conscious and aware for 80% of that time. *Id.* The jury sentenced the defendant to death in that case as well. *Id.* at 303.

[11] The particular details of the defendants' prior violent felony convictions in *Nur* and *Welch* can be found in their Rule 12 reports.

a life sentence where the defendant robbed the victim, stomped on his head until he was dead, and then rolled the victim's car, with his body inside, into a body of water to conceal the crime).[12]

In addition, going beyond the narrow pool of cases required by *Bland*, there are first-degree murder cases similar to or worse than Miller's case that resulted in a life sentence in which the State did not seek the death penalty. *See, e.g.*, *State v. Honea*, No. M2009-01500-CCA-R3-CD, 2011 WL 332553 (Tenn. Crim. App. Jan. 28, 2011), *perm. app. denied* (Tenn. May 31, 2011) (remanding for merger of first-degree murder convictions in a case in which a defendant with a previous felony conviction was sentenced to life without parole plus 153 years for breaking into a ninety-two-year-old woman's home, kidnapping her, stealing her car, driving her to a remote location, fatally shooting her, then leaving her body covered with branches and saplings where it decomposed and was damaged by animals and insects); *State v. Carter*, No. E2005-01282-CCA-R3-CD, 2007 WL 1515010 (Tenn. Crim. App. May 24, 2007), *perm. app. denied* (Tenn. Aug. 13, 2007) (remanding for merger of first-degree murder convictions for a defendant whose prior convictions included aggravated assault, aggravated burglary, and assault with intent to murder, sentenced to life without parole for beating his friend to death with a torque wrench, striking his head twenty-two times to the point where the victim's face "caved in"); *State v. Campbell*, No. M2003-00597-CCA-R3-CD, 2004 WL 508477 (Tenn. Crim. App. Mar. 15, 2004) *perm. app. denied* (Tenn. Oct. 4, 2004) (upholding life sentence for a defendant with multiple prior assault and aggravated assault convictions who, along with an accomplice, robbed an elderly man, strangled him, bound his hands and ankles with a telephone cord and duct tape, and killed him by stuffing his mouth with paper towels, taping his mouth with duct tape, placing a plastic grocery bag over his head, and sealing the bag around his neck with duct tape); *State v. Brown*, No. W2004-01139-CCA-R3-CD, 2005 WL 885132 (Tenn. Crim. App. Apr. 18, 2005), *perm. app. denied* (Tenn. Oct. 24, 2005) (affirming life without parole for a defendant with prior convictions for aggravated assault and aggravated burglary[13] who savagely beat and stabbed an elderly victim while robbing him).

In sum, Miller's death sentence is disproportionate and excessive when compared with similar defendants in similar capital cases or in similar first-degree murder cases.

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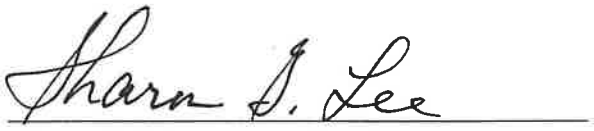
[12] There is no Rule 12 report for *Walden*.

[13] The particular details of the defendant's prior violent felony convictions can be found in his Rule 12 Report.

III.

The death penalty is the most severe and irreversible punishment that the State can impose on a defendant. There is no room for error. The death penalty should be imposed only in the rarest of cases—those cases that are the "worst of the bad." As this Court said twenty years ago, "[a]ll first degree murders are horrible"—but not many of these cases warrant the death penalty. *Godsey*, 60 S.W.3d at 792. It is our statutory duty to review each death sentence to guard against imposing aberrant sentences on individuals. Less than two out of 100 defendants like Miller who committed similar crimes have been sentenced to death. Miller's conduct in shooting and killing the market clerk for pecuniary gain is reprehensible, but it is not the "worst of the bad." Thus, Miller's death sentence is excessive and disproportionate considering the "nature of the crime and the defendant" as compared with similar first-degree murder cases, including capital cases. Tenn. Code Ann. § 39-13-206(c)(1)(D). Miller, who is currently the youngest person on death row in Tennessee,[14] should not be executed but should spend the rest of his life in prison.

Respectfully, I dissent from the decision to execute Urshawn Eric Miller. Putting him to death would not only be unjust, it would also violate his rights under the Eighth Amendment of the United States Constitution.



SHARON G. LEE, JUSTICE

[14] *See* Tenn. Dep't of Corr., Death Row Offenders, https://tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Nov. 29, 2021).

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
June 3, 2021 Session

STATE OF TENNEESSEE v. URSHAWN ERIC MILLER

Circuit Court for Madison County
No. 16-435

No. W2019-00197-SC-DDT-DD

JUDGMENT

This case was heard upon the record on appeal from the Court of Criminal Appeals, briefs, and argument of counsel, and upon consideration thereof, this Court is of the opinion that: (1) the defendant's sentence of death was not imposed in an arbitrary fashion; (2) the evidence supports the jury's findings that the aggravating circumstances were proven beyond a reasonable doubt and that these aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt; and (3) the sentence of death is neither excessive nor disporportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. We also we conclude that: (1) the trial court properly ruled on challenges to certain jurors for cause during individual voir dire; (2) the evidence was sufficient to establish the defendant's identity as the perpetrator and his guilt of the convicted offenses; (3) the trial court did not abuse its discretion by allowing the State to introduce a video recording of the defendant's prior aggravated robbery during the penalty phase; (4) the death penalty generally, and lethal injection specifically, do not constitute cruel and unusual punishment; and (5) the death sentence satisfies our mandatory review pursuant to Tennessee Code Annotated section 39-13-206. However, we reverse the portion of the intermediate court's judgment vacating the application of the felony murder aggravating circumstance.

In accordance with the opinion filed herein, it is therefore, ordered and adjudged that the defendant's convictions and sentence of death are affirmed and that the sentence of death shall be carried out as provided by law on the 17th day of October, 2022, unless otherwise ordered by this Court or by other proper authority.

It appearing that the defendant is indigent, costs of this appeal shall be paid by the State of Tennessee, for which execution may issue if necessary.

2020 WL 5626227
Only the Westlaw citation is currently available.

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

Court of Criminal Appeals of Tennessee,
AT JACKSON.

STATE of Tenneessee
v.
Urshawn Eric MILLER

No. W2019-00197-CCA-R3-DD
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January 7, 2020 Session
|
FILED 09/18/2020

Appeal from the Circuit Court for Madison County, No. 16-435, Donald H. Allen, Judge

Attorneys and Law Firms

George Morton Googe, District Public Defender, and Gregory D. Gookin, Assistant Public Defender, for the appellant, Urshawn Eric Miller.

Herbert H. Slatery III, Attorney General and Reporter; Nicholas W. Spangler, Senior Assistant Attorney General; Jody Pickens, District Attorney General; and Shaun A. Brown and Al Earls, Assistant District Attorneys General, for the appellee, State of Tennessee.

Thomas T. Woodall, J., delivered the opinion of the court, in which Norma McGee Ogle and Alan E. Glenn, JJ., joined.

OPINION

Thomas T. Woodall, J.

***1** Defendant, Urshawn Eric Miller, was convicted by a Madison County jury of premeditated first degree murder, felony first degree murder, attempted especially aggravated robbery, attempted second degree murder, aggravated assault, employing a firearm during the commission of a dangerous felony, evading arrest, and resisting arrest. The trial court merged the felony murder conviction into the premeditated murder conviction and the aggravated assault conviction into the attempted second degree murder conviction. The jury sentenced Defendant to death for the first degree murder conviction. For the remaining convictions, the trial court imposed an effective sentence of thirty years, to be served concurrently with his death sentence. On appeal, Defendant raises the following issues, as renumbered and reorganized by this Court: (1) the evidence was insufficient to sustain his convictions; (2) the trial court erred in ruling on various challenges during jury selection; (3) the trial court erred in admitting a video of his prior aggravated robbery during the penalty phase; (4) the death penalty is unconstitutional; (5) the aggravating factors did not outweigh the mitigating factors beyond a reasonable doubt; and (6) the death penalty is disproportionate in this case. Having carefully reviewed the record before us, we affirm the judgments of the trial court. However, we remand the case to the trial court for the correction of a clerical error.

Factual and Procedural Background

I. Guilt Phase

On November 25, 2015, the night before Thanksgiving, the victim in this case, twenty-four-year-old Ahmad "Mike" Dhalai, was working the cash register at the Bull Market, located on the corner of Arlington Avenue and Hollywood in Jackson, Tennessee. Abdul "Eddie" Saleh, whose brother owned the Bull Market and who was a cousin of the victim, was also working that evening, along with Lawrence Austin and Mr. Saleh's fourteen-year-old son, Foad. Mr. Saleh was in the back of the store near the restrooms when he heard a "loud pop" followed by two more "pops." He yelled, "What's going on?" as he came toward the front of the store. Mr. Saleh saw the victim on the floor with blood around his head. Mr. Saleh also saw a person standing in front of the cash register by the victim's feet. Mr. Saleh described the person as being tall and wearing dark clothing with a hoodie, mask, and gloves. Mr. Saleh went back toward the office because he was scared. When the person left, Mr. Saleh went to the victim. He saw a hole in the victim's head and blood everywhere. Mr. Saleh tried to stop the bleeding with paper towels while he called 911. Mr. Saleh handed the store's gun to Mr. Austin in case the assailant came back before the police arrived.

Surveillance cameras from the Bull Market recorded the shooting from various angles. The videos were entered into evidence and played for the jury. In the videos, the victim can be seen behind the cash register assisting Timothy Sinclair, Sr., a customer, and then assisting a female customer. Mr. Austin can also be seen mopping the floors nearby. A person wearing black clothing, gray gloves, and a white face covering enters the store. The person puts one hand up toward Mr. Austin while pointing a gun in his other hand toward the victim. The person approaches the victim and says, "Drop that shit off or I'ma shoot you dead in the head." The person looks back toward Mr. Austin, then again says to the victim, "Drop that shit off." The victim flinches as the person fires a shot that narrowly misses the victim's head. The victim turns and starts to walk away as the person continues saying, "Drop that shit off. Quit playing." The person then shoots the victim in the back of the head. The victim immediately falls to the ground, dropping his phone. The person turns and fires one shot in the direction of Mr. Austin, who is backing away towards one of the coolers. The person then jumps over the counter and briefly bangs on the cash register with his elbow. The person then jumps back over the counter and flees the store. The entire incident lasts less than twenty-five seconds.

Mr. Austin testified that he had been working at the Bull Market for more than ten years, primarily cleaning and restocking. On November 25, 2015, he was mopping the floor and getting ready for closing. When a man came in with something covering his face, Mr. Austin did not pay much attention to it because the weather was getting cool. Mr. Austin believed that the person was black because he could see part of the person's face around his eyes. Mr. Austin then heard a voice say, "Drop it off." Although he did not see a gun, Mr. Austin heard a gunshot. Mr. Austin kept mopping, trying not to attract attention to himself, while he moved toward a refrigerator for cover. He then saw the gun when the person pointed it at him and fired. Mr. Austin hid behind one of the refrigerators. When he looked out, he saw the person jumping over the counter and running out of the door. Mr. Austin ran after him but did not see which way he went. Mr. Austin then went back in the store, asked Mr. Saleh if the victim had been hit, and saw "all this blood and stuff."

***2** Foad Saleh, who was sixteen at the time of trial, testified that around 11:00 p.m. on November 25, 2015, he was riding his bike around the parking lot of the Bull Market when he heard two or three gunshots. Foad saw a black man wearing a black hoodie and pants come out of the store. The man was wearing a white mask over his face. The man ran toward Arlington Avenue around the corner of the store and jumped over a small ledge. Foad went into the store, where he saw blood on the floor and was told that his uncle had been hurt. Foad provided a description of the suspect and his direction of travel to the police when they arrived.

Timothy Sinclair, Sr., testified that he regularly shopped at the Bull Market. On the night of November 25, 2015, he drove to the store in his burgundy Tahoe in order to purchase a bag of ice and some beverages. He had parked his vehicle by the front door. As Mr. Sinclair was placing his purchased items in the back of his vehicle, he saw a person coming around the side of the building. The person was a black male wearing dark-colored clothes, a hoodie, and something white across his face. Mr. Sinclair saw a gun in the person's hand as the person entered the store. When the person fired two shots inside of the store, Mr. Sinclair quickly backed his vehicle into the street trying to get away. The person then came out of the store and went around the side of the building in the same direction from which he had come. Mr. Sinclair pulled his vehicle back into the parking lot and called 911. The police arrived on the scene very quickly.

The first officer on the scene was Officer Kevin Livingston, who was less than a mile away when the call came in at 10:55 p.m. Officer Livingston arrived on the scene in less than two minutes. When he arrived, he saw "a bunch of people standing outside in the parking lot pointing, yelling ... [I]t was kind of chaotic." Officer Livingston went inside the store and saw a man kneeling behind the counter putting pressure on the victim's head. The victim, who had a "pretty massive exit wound" on the upper left side of his head, was not moving but was still making shallow "gurgling" sounds. Officer Livingston described that "[t]here was blood, brain matter on the floor around [the victim]." Officer Livingston checked for a pulse but could not find one.

Other officers also quickly arrived on the scene, including Lieutenant Shane Beaver, the shift commander for the patrol division. After securing the scene, Lieutenant Beaver obtained a description of the suspect and a direction of travel. Lieutenant Beaver testified that there were approximately twenty officers in the area because it was shift change, and he directed them to set up a perimeter. K9 Officer Jeremy Stines and his dog, a German Shepherd named Pax, began to track the suspect. The dog led officers toward an old bowling alley and a wooded area near Lion's Field. At the top of an incline, Pax led the officers to a shirt and a pair of pants. Pax then led them toward a wooded area near the outfield fence of the

baseball field. Officer Stines heard some rustling in the bushes and gave a warning that he had a dog.

As Lieutenant Beaver crossed the baseball field, he spotted an individual "just inside the wood line" near the scoreboard and the outfield fence. This person turned out to be Defendant. Lieutenant Beaver "began to issue verbal challenges" to Defendant by saying "something to the effect of [']police, come out with your hands up[.']" Defendant responded, "[expletive] you. You're going to have to come in here and get me." Defendant had a shirt wrapped around his hand, and Lieutenant Beaver was concerned that he was concealing a weapon. Defendant was pacing back and forth in the wood line and shouting expletives. Lieutenant Beaver testified that Defendant said, "You might get me, but I'm going to take one of you mother [expletive] with me," and "you're going to have to kill me ... I'm not giving up."

***3** Defendant was boxed in by officers. Sergeant Brandon Moss, along with Officer Stines and Pax, got into position on the other side of the fence. They could hear the challenges being given by Lieutenant Beaver to Defendant. Defendant then climbed over the fence and came in their direction. Sergeant Moss shined a flashlight on Defendant and gave verbal commands to him. Defendant refused to show his hands. Officer Stines released Pax, who charged at Defendant and bit him on the shoulder. Both Defendant and the dog fell to the ground. Defendant had the dog around the neck in a chokehold and refused to let go. Officer Stines struck Defendant's head with his gun. Defendant let go of the dog but still refused to comply with commands to show his hands. Officer Kyle Hamilton used his Taser to subdue Defendant. Officer Hamilton was then able to handcuff Defendant and take him into custody. Video from Officer Hamilton's Taser was entered into evidence and played for the jury.

After Defendant was taken into custody, Sergeant Moss used his dog, Kyra, to search the area for additional evidence. Sergeant Moss located a cell phone, clothing, and a black .38 caliber revolver. The gun was found approximately ten to fifteen yards away and on the same side of the fence from where Defendant had been taken into custody. The cylinder of the revolver was opened, and it contained three unfired cartridges and three fired cartridges. Other officers on the scene also found a pair of gray gloves, a piece of white fabric made out of a t-shirt type of material, and a set of keys. Defendant stipulated that the cell phone found at the scene was registered to him.

Investigator Marvin Rodish, Jr., processed the crime scene at the Bull Market. He photographed a hole in one of the coolers and a hole and an indentation in the wall behind the counter. He found a projectile behind a package of cigarettes behind the counter. Another projectile went through the wall behind the counter into the back office and lodged in the sheet metal of a walk-in freezer. A third projectile was recovered from the ceiling above a cooler inside the store.

Investigator Daniel Long testified that he was involved in the search of Defendant's residence. One of the keys found in the woods opened a lock on the back door of the residence. The other key opened the door of a car parked on the street in front of the house, which was registered to Defendant at that address. Inside Defendant's bedroom, Investigator Long found a white t-shirt with a section cut out of it.

Dr. Thomas Deering, a forensic pathologist for Forensic Medical Management Services in Nashville, conducted the autopsy of the victim. The victim's cause of death was a gunshot wound to the head. The victim had an entrance wound on the right side of his head behind his ear. The bullet fractured the victim's skull and passed through his brain before exiting on the left side of the victim's forehead. The victim also had gunpowder stippling on his right hand and wrist and bruises on his knuckles. Dr. Deering was able to collect one of the larger bullet fragments that were still inside the victim's head. On cross-examination, Dr. Deering testified that because the bullet passed through both sides of the victim's brain, he "would expect that person to go immediately unconscious" and that the victim's death would have been quick.

Dr. Eric Warren, a former special agent with the Tennessee Bureau of Investigation ("TBI"), testified as an expert in firearms identification. The gun found at the scene was a RG .38 special caliber revolver. Dr. Warren test fired the gun, but the bullets recovered from the scene were too damaged to make a definitive match. However, Dr. Warren was able to determine that the bullets were .38 caliber and had matching class characteristics to the recovered revolver.

Special Agent Charly Castelbuono testified as an expert witness in serology and DNA analysis. She compared DNA samples from the victim and Defendant to items recovered in this case. The piece of white fabric found in the woods had a blood stain that matched Defendant. The t-shirt found in the Defendant's bedroom had a mixture of DNA, with Defendant being the major contributor. Although the tests on the inside of

the right glove were inconclusive, the inside of the left glove contained a mixture of DNA with Defendant being the major contributor. Both the hooded sweatshirt and the jeans found in the woods also contained a mixture of DNA with Defendant being the major contributor. Agent Castelbuono was able to obtain a partial DNA profile from swabs taken from the gun and determined that Defendant was the major contributor.

***4** Special Agent Rielly Lewis Gray determined that the outside of both the gray gloves found in the woods were positive for gunshot residue. Special Agent Miranda Gaddes compared the piece of white fabric found in the woods to the cut t-shirt found in Defendant's bedroom. She determined that they possessed "matching characteristics along the fracture line to conclude that the piece of white fabric from the woods and the t-shirt from the subject's bedroom were joined at one time."

At the conclusion of the State's proof, Defendant made a motion for judgment of acquittal. The trial court determined that the State had not established premeditation with regard to the charge of attempted first degree murder of Lawrence Austin and reduced the charge to attempted second degree murder. Defendant chose not to testify or present any proof. After deliberation, the jury found Defendant guilty of premeditated first degree murder of Ahmad Dhalai, first degree felony murder of Ahmad Dhalai, attempted especially aggravated robbery of Ahmad Dhalai, attempted second degree murder of Lawrence Austin, aggravated assault of Lawrence Austin, employment of a firearm during the commission of a dangerous felony, resisting arrest, and evading arrest. The State moved to nolle prosequi the charge for possession of a handgun by a convicted felon, which was granted by the trial court.

II. Penalty Phase

The State entered into evidence a certified copy of a judgment in Madison County case number 09-34, in which Defendant was convicted of aggravated robbery and sentenced to serve eight years at 30%. The State then called Captain Jeff Fitzgerald of the Madison County Sheriff's Department. Captain Fitzgerald testified that he investigated a robbery of the Riverside Express gas station and convenience store in 2008 when he was a lieutenant. Defendant turned himself in and voluntarily gave a statement concerning his involvement in the robbery.

Alison Deaton testified that she worked at the Riverside Express convenience store when it was robbed in 2008. The robbery occurred around 11:00 p.m., close to closing time. Three men with their faces covered came into the store holding guns. Defendant was identified as one of the men. Ms. Deaton testified that one of the men said, "Bitch, give me all your money or I'm going to shoot you in the mother[expletive] face." A video recording of the robbery from one of the store's surveillance cameras was admitted into evidence. The video shows three masked men entering the store, pointing guns at Ms. Deaton, jumping over the counter, and taking money from the cash register.

Ali Dhalai testified as a representative for the victim's family because the victim's parents lived in New York and could not travel due to their health. Mr. Dhalai testified that the victim had seven brothers and sisters and was very close to his family. The victim worked at his family's store while he attended school at Jackson State Community College. The victim was studying radiology and wanted to go into the healthcare field. Mr. Dhalai described the victim as mild mannered and a "kind, caring, giving person." After the victim died, his family discovered that he gave money to several charities, including the Red Cross and some charities that worked overseas in Africa and the Middle East.

In mitigation, the defense called Dr. James Stanley Walker, a psychologist who was double board certified in clinical neuropsychology and forensic psychology. Dr. Walker testified that he evaluated Defendant and administered a comprehensive battery of psychological tests. Dr. Walker also reviewed information from several of Defendant's family members. Dr. Walker diagnosed Defendant with cognitive disorder, cannabis use disorder, post-traumatic stress disorder, and antisocial personality disorder.

***5** Dr. Walker testified that Defendant had a "history of some intellectual limitations." At eight years old, Defendant's IQ was tested at 78, which was in the 7th percentile compared to the average child. Defendant dropped out of school in the 10th grade. When Dr. Walker tested Defendant's IQ in January 2017, he scored an 86, which was in the 18th percentile. Dr. Walker testified that Defendant's attention score was "in the range where we would expect a person who would be severely mentally retarded to be" and that his speed of mental processing was "quite limited." Defendant's work history, which included working in a warehouse and as a fast food cook, was "consistent with his limited cognitive skills" and never required much responsibility.

Defendant admitted that he was dependent on marijuana and had smoked an excessive amount for years. Several other family members also had chronic substance abuse problems and criminal histories. Defendant's mother smoked marijuana heavily while she was pregnant with Defendant. Defendant was abandoned by his biological father, and his mother had "a succession of boyfriends or husbands who persistently mistreated [Defendant] over the years." One told Defendant to pour rubbing alcohol on his penis so that he would scream with pain. Defendant's mother was not very loving and nurturing, calling Defendant names like "dumb" or "stupid." Defendant was often in the care of his grandmother, who was a chronic alcoholic and also mistreated him.

Dr. Walker testified that a genetic predisposition combined with childhood trauma led to Defendant's developing antisocial personality disorder. Dr. Walker described someone with antisocial personality disorder as "tend[ing] to be irresponsible ... reckless, impulsive, deceptive." He testified that people with antisocial personality disorder "are constantly getting into trouble because they violate other people[']s rights. They don't obey the rules. They bend the rules. They break the rules when they have the opportunity."

Dr. Walker also found that Defendant's rough childhood, in addition to the fact that he was shot in the back as a teenager and spent seven years in prison, contributed to his developing post-traumatic stress disorder, or PTSD. Dr. Walker explained that Defendant did not have the classic presentation of PTSD that involves flashbacks and reliving traumatic experiences. Instead, Dr. Walker testified that Defendant's PTSD manifested as emotional numbing as well as being overly suspicious of others, ready to be mistreated or persecuted.

On cross-examination, Dr. Walker agreed that Defendant did not cooperate with an initial evaluation at Middle Tennessee Mental Health Institute and that he was diagnosed with malingering, which involves fabricating or exaggerating symptoms of mental illness. Dr. Walker agreed that Defendant sought out stressful situations, like participating in robberies, rather than avoiding them like someone with PTSD typically might do. Dr. Walker explained that Defendant did not go into a lot of details about his past traumas and that much of the information came from interviews with Defendant's family. Dr. Walker testified that at the time of this incident, Defendant had recently been kicked out of the house he had been living in because his uncle discovered marijuana in Defendant's room. Defendant also joined a gang when he was younger, which would be consistent with antisocial personality disorder. Dr. Walker explained that PTSD is not related to either participating in or avoiding criminal activity.

The defense also called Dr. Keith Caruso, a board certified forensic psychiatrist with special expertise in mitigation. Dr. Caruso evaluated Defendant, interviewed Defendant and several family members, and reviewed other reports and information. Dr. Caruso agreed that this was not a case where a mental disorder prevented Defendant from appreciating the wrongfulness of his conduct. Dr. Caruso agreed with Dr. Walker that Defendant fit the diagnosis for PTSD, cannabis use disorder, and antisocial personality disorder.

***6** Dr. Caruso explained that Defendant had a disadvantaged childhood, being abused, neglected, and raised in poverty. Defendant had a genetic predisposition to antisocial personality disorder and substance abuse disorder. Defendant was abandoned by his biological father, who also had a criminal history. Defendant's mother smoked marijuana heavily during her pregnancy. Defendant's mother had been abused and had eventually been placed in foster care, leading to what Dr. Caruso called a "generational lack of instruction and normal coping mechanisms in his family." Defendant and his family moved eight times before Defendant was ten years old, creating instability. Defendant was also exposed to violence in the community at a young age, which Dr. Caruso explained "models violence as problem solving." Defendant had a lower than average intelligence as well as ADHD as a child, which negatively impacted his performance in school.

Dr. Caruso, who had a lot of experience with PTSD as a former military psychiatrist, explained that a person can develop PTSD by being "exposed to actual or threatened death or serious bodily injury." Defendant was shot in the back when he was seventeen years old. Dr. Caruso explained that Defendant avoided talking about the shooting and acted distressed when he was asked questions about it. However, Defendant did mention having a flashback to the shooting when he was held at gunpoint a year later. Defendant also talked about having dreams where people were trying to hurt him. Dr. Caruso testified that Defendant saw the world as a threatening place and that he became distrustful and emotionally detached. Defendant coped by binge drinking and using marijuana. Defendant also dropped out of high school and began carrying a gun. Defendant's troubles with the legal system accelerated after he was shot. Defendant spent several years in prison and had only been out for a

few months at the time of this incident. Dr. Caruso did not believe that Defendant was malingering, which he described as someone faking or exaggerating a condition for some kind of gain, like getting out of trouble. Dr. Caruso explained that Defendant did not try to draw attention to his condition or use terms that he did not really understand the way a person who was malingering might.

On cross-examination, Dr. Caruso testified that having PTSD did not prevent Defendant from being the aggressor but instead caused him to avoid being put in the position of the victim. Additionally, the numbing effect contributed to Defendant's committing crimes against other people. Dr. Caruso agreed that this was not a classic response to having PTSD. Dr. Caruso agreed that Defendant appreciated the wrongfulness of his conduct. Dr. Caruso agreed that Defendant made a plan to rob the Bull Market and that he made the choice to kill someone.

In rebuttal, the State called Dr. Kimberly Brown, an associate professor in clinical psychology and director of the Forensic Evaluation Team at Vanderbilt University. Dr. Brown evaluated Defendant, which included interviewing both Defendant and his mother, reviewing the records in this case, and reviewing the reports of the other experts. Dr. Brown agreed that Defendant had antisocial personality disorder, cannabis use disorder, and a history of ADHD. Dr. Brown did not agree that Defendant, whose IQ was 86, had borderline intellectual functioning, which applies to people with an IQ between 70 and 80. She explained that Defendant's IQ, although considered low-average compared to the general population, was "pretty typical for a criminal defendant."

Dr. Brown also did not agree that Defendant met the criteria to be diagnosed with PTSD. Dr. Brown acknowledged that Defendant had been "exposed to several traumas," some of which he reported to Dr. Brown that he had never told anyone else. Dr. Brown explained that not everyone who experiences traumatic events in their childhood develops PTSD. Although Defendant may have experienced flashbacks or nightmares in the past, he did not report that he was actively experiencing those types of symptoms. Additionally, one of the tests administered to Defendant by Dr. Walker, the Trauma Symptom Inventory, indicated that all of Defendant's skills were in the normal range, which was not consistent with someone who has PTSD. Rather than avoiding talking about his past, Dr. Brown found Defendant to be very open and cooperative. While he did minimize certain things, like the impact of his father not being in his life, Defendant readily talked about traumas in his life and provided details. Dr. Brown did not find Defendant to be emotionally numb and testified that he became tearful when talking about some of his past traumas. Dr. Brown testified that Defendant's paranoia and hypervigilance were typical of someone facing trial for capital murder. Dr. Brown also did not find Defendant to be emotionally distant or avoiding relationships, explaining that he had close relationships with his mother, aunts, and several close friends. Defendant even reported to Dr. Brown that the reason he lost his job a month before this incident was because he quit over how his boss was treating a coworker. After his uncle kicked him out for having marijuana, Defendant went back to living with his mother.

***7** On cross-examination, Dr. Brown testified that she primarily focuses on forensic evaluations to determine competency to stand trial and insanity at the time of the offense and that capital sentencing issues make up a minority of her evaluations. Dr. Brown agreed that Defendant tended to minimize certain things, like the impact of his father's absence and the abuse to which his mother was exposed. Dr. Brown agreed that Defendant did not display any signs of malingering during her evaluation of him. Dr. Brown testified that Defendant was diagnosed with malingering when he was evaluated by Middle Tennessee Mental Health Institute (MTMHI) shortly after his arrest. Rather than just being silent or uncooperative, Defendant claimed that he was hearing voices and gave nonsensical answers to questions about his charges. Dr. Brown agreed that Defendant had some symptoms of PTSD but not enough for a diagnosis.

Dr. Brown agreed that Defendant had antisocial personality disorder. She explained that antisocial personality disorder has both a genetic component and an environmental component, such as exposure to violence and other disadvantages in childhood. Dr. Brown agreed that Defendant had a disadvantaged childhood and a significant family history of substance abuse. Dr. Brown testified that there is a relationship between exposure to marijuana while in the womb and a person having ADHD and a low IQ.

Dr. Brown found some mitigating factors in Defendant's case, primarily "revolv[ing] around his exposure to disadvantage, neglect and trauma." Defendant had two stepfathers that were abusive to his mother, and one was also abusive toward Defendant. When Defendant was three years old, he was whipped by his stepfather, leaving marks on Defendant. Defendant's mother also struggled with her own issues. She often ridiculed Defendant and called him names.

Dr. Brown testified about four major traumas that Defendant experienced. When he was eight years old, Defendant witnessed two teenaged boys beating up a girl and saw her bleeding from the mouth. When he was twelve years old, Defendant's older brother got into a serious fight and had his head stomped. Defendant tried to protect his brother but was pushed away. His brother ended up in the hospital with his jaw wired shut. When Defendant was seventeen years old, he was shot in the back during an argument with a person who owed Defendant money. When he was eighteen years old, Defendant was held at gunpoint during an attempted robbery at his friend's house. Defendant reported to Dr. Brown that he was more scared by this incident than when he was actually shot because he could see the gun and had time to think about what could happen.

The trial court instructed the jury with regard to the statutory aggravating circumstances as follows:

> 1. Defendant was previously convicted of one or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person.
>
> The State is relying upon the crime of aggravated robbery, the statutory elements of which involve the use of violence to the person.
>
> 2. The murder was knowingly committed, solicited, directed, or aided by Defendant while Defendant had a substantial role in committing or attempting to commit or was fleeing after having a substantial role in committing or attempting to commit any especially aggravated robbery.

The trial court then instructed the jury as follows with regard to mitigating circumstances:

> Tennessee law provides that in arriving at the punishment, the jury shall consider as previously indicated any mitigating circumstances raised by the evidence which shall -- which shall include, but are not limited to, the following:
>
> 1. There are choices other than sentence of death.
>
> 2. Life without parole means that Urshawn Miller will never be released from prison.
>
> 3. If Mr. Miller is sentenced to life without possibility of parole, he will die in prison.
>
> 4. Mr. Miller has a mother, two aunts, an uncle, a brother, a sister, and other close family members. Mr. Miller's execution would have a devastating lifetime impact on all of these family members.
>
> ***8** 5. If Mr. Miller is executed, his execution will not undo the harm suffered by Mr. Dhalai's family, but life without parole will provide Mr. Miller the time to reflect on Mr. Dhalai's death for the rest of his life.
>
> 6. Mr. Miller suffers from mental disorders due to circumstances beyond his control, including genetics, abuse, neglect, trauma, and other upbringing and environmental factors.
>
> 7. Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing. That is, you shall consider any aspect of Defendant's character or record or any aspect of the circumstances of the offense favorable to Defendant, which is supported by the evidence.
>
> Defendant does not have the burden of proving a mitigating circumstance. There is no requirement of jury unanimity to any particular mitigating circumstance or that you agree on the same mitigating circumstance.

The jury found that both aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. The jury imposed a sentence of death for both premeditated murder in Count 1 and felony murder in Count 2. The trial court merged Count 2 into Count 1. At a later sentencing hearing, the trial court imposed a sentence of twelve years for especially aggravated robbery, twelve years for attempted second degree murder, six years for aggravated assault, six years for employment of a firearm during the commission of a dangerous felony, six months for resisting arrest, and eleven months and twenty-nine days for evading arrest. The trial court merged the aggravated assault conviction into the attempted second degree murder conviction. The trial court ran the felony sentences consecutively to each other but concurrently with the death sentence and the misdemeanor sentences.

Analysis

I. Sufficiency of the Evidence

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. The relevant question is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). Because the jury's verdict replaces the presumption of innocence with one of guilt, the burden on appeal is shifted onto Defendant to show that the evidence introduced at trial was insufficient to support such a verdict. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Thus, " 'we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.' " *Davis*, 354 S.W.3d at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)). Questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *Reid*, 91 S.W.3d at 277 (quoting *Bland*, 958 S.W.2d at 659). It is not the role of this Court to reweigh or reevaluate the evidence, nor to substitute our own inferences for those drawn from the evidence by the trier of fact. *Id.* The standard of review is the same whether the conviction is based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

***9** As relevant to this case, first degree murder is defined as either "[a] premeditated and intentional killing of another" or "[a] killing of another committed in the perpetration of or attempt to perpetrate any ... robbery[.]" T.C.A. § 39-13-202(a)(1), (2). Especially aggravated robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," which is accomplished with a deadly weapon and the victim suffers serious bodily injury. T.C.A. §§ 39-13-401, -403. As charged to the jury, criminal attempt is defined as follows:

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense: ....
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a). Second degree murder is defined as "[a] knowing killing of another." T.C.A. § 39-13-210(a)(1). Aggravated assault is defined as "[i]ntentionally or knowingly caus[ing] another person to reasonably fear imminent bodily injury" by "the use or display of a deadly weapon." T.C.A. §§ 39-13-101(a)(2); -102(a)(1)(A)(iii). It is an offense to employ a firearm during the commission of or attempt to commit a dangerous felony, including attempted second degree murder. T.C.A. § 39-17-1324(b), (i)(1)(B). Defendant does not challenge his convictions for resisting arrest or evading arrest.

A. Identity

Defendant challenges his convictions for first degree murder, attempted especially aggravated robbery, attempted second degree murder, aggravated assault, and employment of a firearm during the commission of a dangerous felony on the basis that the State did not adequately establish his identity as the perpetrator. "The identity of the perpetrator is an essential element of any crime." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). The perpetrator's identity "may be established solely on the basis of circumstantial evidence." *State v. Lewter*, 313 S.W.3d 745, 748 (Tenn. 2010). The State has the burden of proving the identity of Defendant as the perpetrator beyond a reasonable doubt. *State v. Sneed*, 908 S.W.2d 408, 410 (Tenn. Crim. App. 1995). The identification of Defendant as the perpetrator is a question of fact for the jury after considering all the relevant proof. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993) (citing *State v. Crawford*, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982)).

Viewed in the light most favorable to the State, the evidence at trial established Defendant's identity as the masked assailant at the Bull Market. Although none of the eyewitnesses could identify Defendant, they were able to provide a description of the suspect and a direction of travel to the police, who responded to the scene within minutes of the shooting. Using a trained police dog, the officers were able to track the suspect to a nearby wooded area behind a baseball field. Defendant was seen hiding in some bushes in that wooded area, and he responded to the officers' commands to come out with death

threats and profanity. After Defendant was taken into custody, the police found several items in the immediate vicinity that connected Defendant to the robbery at the Bull Market. The police found clothing that matched the clothing worn by the gunman, as described by the witnesses and seen in a video recording from the Bull Market's security cameras. The police also found a .38 caliber revolver that was consistent with the fired projectiles recovered from the Bull Market. The revolver contained three spent shell casings, and the assailant fired his gun three times. The police found a pair of gloves that tested positive for gunshot residue. The police also found a piece of white cloth that was consistent with the white mask worn by the assailant and that was determined to have been cut from a t-shirt found in Defendant's bedroom. The clothing, gloves, revolver, and white cloth all contained Defendant's DNA. From this evidence, a rational trier of fact could conclude that Defendant's identity as the person who shot Mr. Dhalai and attempted to rob the Bull Market had been established beyond a reasonable doubt.

B. Premeditated First Degree Murder

***10** With regard to his conviction for premeditated first degree murder, Defendant contends that the State did not establish the element of premeditation beyond a reasonable doubt. As stated above, first degree murder is defined as "[a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). "[A] person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." T.C.A. § 39-11-302(a). Premeditation is defined as "an act done after the exercise of reflection and judgment." T.C.A. § 39-13-202(d). "[T]he intent to kill must have been formed prior to the act itself," but it need not "pre-exist in the mind of the accused for any definite period of time." *Id.* Additionally, at the time the accused allegedly decided to kill, the accused must have been "sufficiently free from excitement and passion as to be capable of premeditation." *Id.*

The State must establish the element of premeditation beyond a reasonable doubt. *See State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Premeditation may be proved by circumstantial evidence. *See, e.g.*, *State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992). Whether a killing was premeditated is a question of fact for the jury to determine and may be inferred from the circumstances surrounding the offense. *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000). Factors that may support the existence of premeditation include, but are not limited to, the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, the infliction of multiple wounds, declarations by Defendant of an intent to kill, lack of provocation by the victim, failure to aid or assist the victim, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, destruction and secretion of evidence of the killing, and calmness immediately after the killing. *State v. Kiser*, 284 S.W.3d 227, 268 (Tenn. 2009); *State v. Leach*, 148 S.W.3d 42, 53-54 (Tenn. 2004); *State v. Davidson*, 121 S.W.3d 600, 615 (Tenn. 2003); *Bland*, 958 S.W.2d at 660. This Court has also noted that the jury may infer premeditation from any planning activity by Defendant before the killing. *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995) (citation omitted). Shooting a retreating victim may also be circumstantial evidence of premeditation. *State v. Dickson*, 413 S.W.3d 735, 746 (Tenn. 2013).

Viewed in the light most favorable to the State, the evidence at trial established that Defendant committed premeditated first degree murder. Defendant made preparations to conceal his identity prior to the killing by cutting a mask from a t-shirt. Defendant used a deadly weapon against an unarmed victim. Immediately prior to the shooting, Defendant threatened that he would "shoot [the victim] dead in the head" if the victim did not comply with Defendant's demands. Defendant fired one shot that narrowly missed the victim's head. The victim had turned away from Defendant when Defendant fatally shot the victim in the back of the head, just like he threatened that he would. Rather than rendering aid to the victim, Defendant fired another shot at the witness, Mr. Austin, before jumping over the counter and attempting to open the cash register. When he was unsuccessful, Defendant jumped back over the counter and fled the scene. Defendant attempted to conceal evidence of his involvement in the shooting by abandoning his revolver, his make-shift mask, and his incriminating clothing in the wooded area behind a baseball field, where he was apprehended by police. All of these circumstances support a finding by a rational trier of fact that Defendant premeditated the killing of Ahmad Dhalai.

C. Felony Murder

With regard to his conviction for first degree felony murder, Defendant argues that the killing of the victim occurred prior to the attempted robbery and that "the connection between

the demand for money and the killing is not close enough to support a conviction for" felony murder. As stated above, first degree felony murder is defined as "[a] killing of another committed in the perpetration of or attempt to perpetrate any ... robbery[.]" T.C.A. § 39-13-202(a)(2). "In order for a killing to occur 'in the perpetration of' the felony, the killing must be 'done in pursuance of the unlawful act, and not collateral to it.' " *State v. Kiser*, 284 S.W.3d 227, 286 (Tenn. 2009) (quoting *Farmer v. State*, 296 S.W.2d 879, 883 (Tenn. 1956)). The only required mental state for felony murder is the intent to commit the underlying felony. T.C.A. § 39-13-202(b). The Tennessee Supreme Court has held that the "intent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim," even if the actual killing occurs prior to the commission of the felony. *State v. Buggs*, 995 S.W.2d 102, 107 (Tenn. 1999). "Proof that such intent to commit the underlying felony existed before, or concurrent with, the act of killing is a question of fact to be decided by the jury after consideration of all the facts and circumstances." *Id.* "[A] jury may reasonably infer from a defendant's actions immediately after a killing that Defendant had the intent to commit the felony prior to, or concurrent with, the killing." *Id.* at 108.

***11** Viewed in the light most favorable to the State, the evidence at trial established that Defendant had the intent to commit a robbery at the time he killed Ahmad Dhalai and that the killing was in pursuance of, not collateral to, the robbery. Defendant entered the Bull Market wearing a mask over his face and carrying a gun. As can be seen in the video from the Bull Market's security cameras, Defendant approached Mr. Dhalai, who was standing behind the cash register. With his gun drawn, Defendant said "Drop that [expletive] off or I'ma shoot you dead in the head." When Mr. Dhalai did not immediately comply with this demand, Defendant fired his gun at Mr. Dhalai's head twice, fatally wounding him. Defendant then jumped over the counter and attempted to open the cash register. The entire incident lasted only twenty-two seconds. From this evidence, a rational trier of fact could easily conclude that Defendant intended to commit a robbery and that he killed Ahmad Dhalai in the perpetration of that robbery.

D. Attempted Second Degree Murder

Defendant argues that the evidence is not sufficient to sustain his conviction for attempted second degree murder of Lawrence Austin because the shooter did not make any threats toward Mr. Austin, only fired in Mr. Austin's direction one time, and did not attempt to chase Mr. Austin or shoot him again when the first shot missed. As stated above, second degree murder is defined as "[a] knowing killing of another." T.C.A. § 39-13-210(a)(1). To support a conviction for attempted second degree murder, the State was required to prove that Defendant acted with the intent to knowingly kill another and took a substantial step toward doing so. *See* T.C.A. § 39-12-101. Second degree murder is a result-of-conduct offense. *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-302(b). In other words, "the State is not required to prove that Defendant wished to cause his victim's death but only that Defendant knew that his or her actions were reasonably certain to cause the victim's death." *State v. Brown*, 311 S.W.3d 422, 432 (Tenn. 2010). Whether a defendant acts knowingly is a question of fact for the jury and may be inferred from the circumstances of the offense. *Id.* (citing *State v. Inlow*, 52 S.W.3d 101, 104-05 (Tenn. Crim. App. 2000)).

Viewed in the light most favorable to the State, the evidence established that Defendant attempted to commit a knowing killing of Mr. Austin. The video from the Bull Market's security cameras showed that Defendant looked in Mr. Austin's direction prior to approaching the service counter and demanding money from Mr. Dhalai. After shooting Mr. Dhalai, Defendant turned and fired his gun once in the direction of the fleeing Mr. Austin. A rational juror could infer that Defendant was aware that this conduct was reasonably certain to kill Mr. Austin had his shot not missed. This Court has previously upheld a conviction for attempted second degree murder under similar circumstances. *State v. Abel Caberra Torres*, No. M2001-01412-CCA-R3-CD, 2003 WL 21349921, at *5 (Tenn. Crim. App. June 10, 2003) (holding that the evidence was sufficient to support a conviction for attempted second degree murder when Defendant fired a gun in the direction of the victim who was not the intended victim of an attempted robbery), *no perm. app. filed.* The evidence in this case is sufficient to sustain all of Defendant's convictions.

II. Jury Selection

Defendant argues that the trial court erred during voir dire by either excusing or failing to excuse certain jurors for cause based on their views on the death penalty. Both the United

States and Tennessee Constitutions guarantee a criminal defendant to the right to a trial by an impartial jury. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. Both Defendant and the State have an interest in an impartial capital sentencing jury. *State v. Sexton*, 368 S.W.3d 371, 395 (Tenn. 2012) (citing *Uttecht v. Brown*, 551 U.S. 1, 9 (2007)). The trial court must balance these interests by eliminating potential jurors who would either automatically impose the death penalty or who, because of their personal scruples, would never impose the death penalty. *Id.* (citing *Morgan v. Illinois*, 504 U.S. 719, 734 n.7 (1992)). To that end, the "proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *see State v. Reid*, 213 S.W.3d 792, 835-36 (Tenn. 2006). "[T]his standard ... does not require that a juror's biases be proved with 'unmistakable clarity.' " *Id.* Instead, the trial court must have the "definite impression" that the prospective juror cannot follow the law. *State v. Hutchison*, 898 S.W.2d 161, 167 (Tenn. 1994) (citing *Wainwright*, 469 U.S. at 425-26).

***12** The trial court's determination of whether a juror should be excused due to his or her views on the death penalty "shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that that determination was erroneous." *State v. Alley*, 776 S.W.2d 506, 518 (Tenn. 1989). "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht*, 551 U.S. at 9.

However, any error by the trial court in either excusing or failing to excuse a potential juror is harmless unless the jury who actually heard the case was not fair and impartial. *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993). "The failure to correctly excuse a juror for cause is grounds for reversal only if Defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him." *State v. Schmeiderer*, 319 S.W.3d 607, 633 (Tenn. 2010) (citing *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); *State v. Jones*, 789 S.W.2d 545, 549 (Tenn. 1990)). "A defendant must not only exhaust his peremptory challenges, but he must also challenge or offer to challenge any additional prospective juror in order to complain on appeal that the trial judge's error in refusing to excuse for cause rendered his jury not impartial." *State v. Irick*, 762 S.W.2d 121, 125 (Tenn. 1988).

Though not raised as an issue on appeal, we note that the trial court, the parties, and the jury questionnaire all repeatedly referred to the authorized statutory punishment of "imprisonment for life," Tennessee Code Annotated section 39-13-202(c)(3) as "life with parole." Arguably, there is no "parole" from a sentence of imprisonment for life. "The determinate sentence for a life sentence [imprisonment for life] is sixty years, as set forth in Tennessee Code Annotated section 40-35-501(h)(1)." *Brown v. Jordan*, 563 S.W.3d 196, 200 (Tenn. 2018). For first degree murder committed on or after July 1, 1995, as in the case *sub judice*, 100% of the sentence of sixty years must be served. It is axiomatic that when a defendant's sentence is fully served, that defendant must be released with no further restraint or supervision, unless otherwise statutorily authorized, as in certain sex crimes offenders who remain under community supervision for life, that begins "immediately upon the expiration of the term of imprisonment imposed upon the person by the court or upon the person's release from regular parole supervision, whichever first occurs." T.C.A. § 39-13-524(c). However, a person convicted of a murder which occurs on or after July 1, 1995, and who receives a sentence of imprisonment for life, can be granted certain statutorily authorized "sentence reduction credits" up to nine years. T.C.A. § 40-35-501(i)(1). Thus, if such an inmate obtains the maximum number of allowable sentence reduction credits, he will obtain credit for service of the entire sixty-year sentence after having been incarcerated for fifty-one years. *See* T.C.A. § 41-21-236 (" 'sentence credits' includes any credit, whether called that or not, that results in a reduction of the amount of time an inmate must serve on the original sentence or sentences.") Thus, a person convicted after July 1, 1995, and who receives a sentence of imprisonment for life will never be on parole. When that person has actually served the determinate sentence of sixty years (comprising years actually incarcerated plus time credited by sentence reduction credits) he is released. "Life imprisonment without possibility of parole," Tennessee Code Annotated section 39-13-202(c)(2) is a statutory definition of a sentence created by the Tennessee General Assembly for the situation when a convicted defendant literally serves a sentence in the custody of the Tennessee Department of Correction, day for day, for the remainder of his life. Notwithstanding the use of this misnomer that there is a sentence of "life with parole," for purposes of clarity we will describe the proceedings in the trial court using the same misnomer used in the trial court.

***13** In this case, the potential jurors completed questionnaires several weeks prior to trial that contained questions designed to elicit their views on the three possible punishments for first degree murder: life, life without parole, and death. Most of the jury selection process was comprised of individual voir dire, wherein counsel for both parties as well as the trial court could ask the potential jurors more detailed questions. After each potential juror was questioned, the trial court would ask whether either party wished to challenge the juror for cause and would then rule accordingly. On appeal, Defendant argues that the trial court erred in denying his challenges for cause with respect to three potential jurors – Juror Robinson, Juror Little, and Juror Graves – forcing Defendant to use peremptory challenges to remove them. Additionally, Defendant argues that the trial court erred in granting the State's challenges for cause over Defendant's objection with respect to three potential jurors – Juror Eads, Juror Milhorn, and Juror Sesti. Finally, Defendant argues that the trial court erred in denying his challenge for cause with respect to Juror Crum after Defendant had exhausted all of his peremptory challenges, resulting in a jury that was not fair and impartial.

A. Potential Jurors Not Removed For Cause

Prospective Juror Robinson wrote on his questionnaire that he did not believe that life without the possibility of parole was an appropriate punishment because of the cost of keeping someone imprisoned. In response to a question about that comment, Juror Robinson stated, "I believe in the Bible and I just think we need to go ahead with the death penalty in some cases like that." However, he also stated that he could fairly consider both life and life without parole as possible punishments and that the death penalty was "absolutely not" appropriate in all cases. In response to defense counsel's questions, Juror Robinson stated that he believed the death penalty was the appropriate punishment if the killing was premeditated and the person had "malice in their heart"; however, he would not consider a killing during a robbery of a store to be a premeditated act. Juror Robinson stated that in considering the appropriate punishment, he would take into account "the circumstances and the background of the person." Juror Robinson reiterated that he would listen to the proof, follow the law, and fairly consider all three punishments. The trial court found that Juror Robinson "would properly follow the law" and "would properly consider all sentencing options." Defendant has not established by convincing evidence that the trial court abused its discretion in not excusing Mr. Robinson for cause.

Potential Juror Little stated that she was familiar with the prosecutor because her brother worked for the District Attorney's Office as a child support investigator and her husband was a retired officer from the Jackson Police Department. This Court has held that the "relationship of jurors to people connected with law enforcement ... does not give rise to an inherently prejudicial situation in and of itself." *State v. Taylor*, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983). Juror Little stated that she may have a potential hardship with being sequestered due to her responsibility caring for her elderly mother but that she could "probably work it out if [she] had to." Juror Little also informed the court that she was taking various prescribed pain medications. She stated that she might be uncomfortable with sitting for long periods of time but that her ability to concentrate would not be impeded. Whether a juror should be excused due to either health or hardship is also within the discretion of the trial court. *Cf. State v. H.R. Hester*, No. E2006-01904-CCA-R3-DD, 2009 WL 275760, at *19 (Tenn. Crim. App. Feb. 5, 2009), *aff'd and remanded*, 324 S.W.3d 1 (Tenn. 2010).

With regard to her views on the death penalty, Juror Little wrote on her questionnaire that she had "no problem with it" and that it could be the appropriate punishment in "some cases." Juror Little stated that she would fairly consider life without parole. On her questionnaire, Juror Little wrote that she believed there should be "no parole" for "taking life." However, in response to the State's question, she stated that "[i]t's possible" she would fairly consider life with parole depending on the circumstances of the offense and the background of Defendant. She reiterated that she would fairly consider all three forms of punishment. The trial court found that Juror Little's medications did not appear to be "affecting her mentally as far as decisions" and that the jurors would be provided with comfortable chairs to sit in. Additionally, the trial court found that Juror Little could be a fair and impartial juror in considering the possible punishments. Defendant has not established by convincing evidence that the trial court abused its discretion in not excusing Juror Little for cause.

***14** Prospective Juror Graves stated that she was personally familiar with the District Attorney because he had gone to school with her daughters and that she had known him since he was in the sixth grade. She did not believe that her familiarity with him would affect her view of the case, but she "would trust him" because she knew his character and

reputation. Juror Graves wrote on her questionnaire that she was unsure if she would be able to devote her full attention to this case because of her husband's health. She explained during voir dire that he was a diabetic and that he was still breaking in a new insulin pump that had not yet been properly regulated, which could lead to a potentially life-threatening situation if she were not there when he might have hypoglycemia during the night. She stated that she did not trust her husband to properly regulate his pump while she was sequestered and that she did not have any other family member nearby that would be able to check on him.

With regard to her opinion on the death penalty, Juror Graves wrote on her questionnaire that it "depends on the crime and the evidence." She also indicated that she agreed with the statement "Although I do not believe that the death penalty ever ought to be imposed, as long as the law provides for it, I could impose it if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about Defendant." Juror Graves stated that she did "believe in the death penalty, but under certain circumstances" and agreed that she would fairly consider it among the sentencing options. Juror Graves stated that she had previously been on a jury in a capital case in the 1980s. She recalled that the jury deliberated a long time because the evidence was largely circumstantial. She stated that she initially was in favor of imposing the death penalty, but the jury ultimately imposed a sentence of life without parole due to the circumstantial nature of the evidence. Juror Graves said that she had a tendency to faint at the sight of blood and that she might pass out if she viewed graphic photographs or video; however, she was able to glance at the photographs admitted in the prior trial and stated that she would try her best to view the video in this case. Juror Graves stated that she was "[p]robably" inclined to impose the death penalty for premeditated murder but that she "would have to weigh everything that's presented[.]" Although she wrote on her questionnaire that life with parole might be an appropriate punishment if Defendant had been rehabilitated, Ms. Graves stated during voir dire that she had "vacillated with it" and that ultimately she did not believe that life with parole was an appropriate punishment. However, Ms. Graves stated that she would fairly consider life with parole "[i]f that's the letter of the law." She agreed that her preference would be to impose the death penalty unless there was some lingering doubt about Defendant's guilt, but she agreed that she would fairly consider each of the sentencing options.

Defendant challenged Juror Graves for cause, citing her tendency to faint at the sight of blood, her inclination toward the death penalty, and her husband's health. The trial court found that Juror Graves' responses indicated that the prior capital jury on which she served "considered all options" before imposing a sentence of life without parole. The trial court found that Juror Graves was "qualified to serve" because "[s]he indicated she would fairly consider all sentencing options." Defendant has not established by convincing evidence that the trial court abused its discretion in not excusing Juror Graves for cause due to her views on the death penalty. We note that the trial court did not address the potential hardship related to Juror Graves' husband's health and the potentially life-threatening situation that could occur if she were to be sequestered for the length of the trial. However, Defendant did not raise this as an error on appeal, potentially waiving the issue. *See* Tenn. R. App. P. 36(a). Moreover, even if the trial court abused its discretion in not excusing Juror Graves for this reason, any error is harmless unless Defendant can establish that the jury that actually heard his case was not fair and impartial. *See Howell*, 868 S.W.2d at 248.

B. Potential Jurors Removed For Cause Over Defendant's Objection

***15** Potential Juror Eads wrote on his questionnaire that he believed the death penalty was "fair for the crime" and that he would fairly consider all three forms of punishment. Juror Eads acknowledged that he accidentally circled two responses to a question asking which statement best reflected his beliefs about the death penalty, one of which stated "I believe that the death penalty is the appropriate form of punishment in some murder cases. I could return a verdict of death if I believed it was warranted in a particular case ..." while the other stated "Although I do not believe that the death penalty ever ought to be imposed, as long as the law provides for it, I could impose it if I believed it was warranted in a particular case...." Juror Eads clarified that he believed "that it never ought to be imposed." Juror Eads also stated that he was confused by the question that asked him to rate his willingness to impose the death penalty on a scale of 1 to 10. On his questionnaire, Juror Eads rated himself a 10, indicating a person who would always impose the death penalty, but upon questioning, Juror Eads stated "there is no zero on there" and that he would never impose the death penalty. Juror Eads said he was confused by the whole questionnaire.

In summarizing his beliefs, Juror Eads said, "I don't believe anybody should be put to death" unless they "killed several

people." Juror Eads agreed with the prosecutor that he would not fairly consider the death penalty. In response to defense counsel's question, Juror Eads stated that he could consider the death penalty "[i]f the law informs me I am supposed to consider it," but then he immediately asked if he was being "forc[ed] ... into it[.]" Juror Eads stated that he probably could not consider the death penalty in this case because Defendant did not kill multiple people on a "murderous outrage." Agreeing that he did not know the circumstances of this case, Juror Eads stated, "I guess I could" consider all three forms of punishment and agreed that he did not know what he would do about the sentence until he heard the evidence. In response to the trial court's attempt to clarify his position, Juror Eads stated, "I don't know which one to decide whether I'm for the death penalty or against it.... I'm confused over the whole thing." The State challenged Juror Eads for cause, stating that his responses were "all over the place." The trial court agreed and excused Juror Eads for cause over Defendant's objection.

Potential Juror Milhorn wrote on her questionnaire that she was "not sure about [the] death penalty or that [she] would want that decision. [I]t would be hard and depend on the case [and] proven facts." She also indicated that she could never impose a sentence of death. Upon questioning by the State, Juror Milhorn agreed that the death penalty could be the appropriate punishment under certain circumstances but that she could not impose it. Juror Milhorn stated that she could impose the death penalty if she had to, explaining that "you do things in life that you don't want to do sometimes because that is the right thing to do." However, given the other choices of life and life without parole, Juror Milhorn agreed that she would disregard the death penalty. In response to defense counsel's questions, Juror Milhorn stated that her preference would be life without parole but that she could consider the death penalty "if I had to and it was a situation where it was proved." In response to the trial court's questions, Juror Milhorn stated that "there [are] times, yes, that the death penalty is called for" and that she could consider it if the person acted "intentionally and was vicious ... or would be a threat to someone else." The trial court ultimately granted the State's challenge for cause, finding that Juror Milhorn initially stated that she could not "impose the death penalty if there were other options ... [a]nd then she kind of went back and forth several times after that."

Potential Juror Sesti informed the parties that she had a potential hardship with being sequestered because her fifteen-year-old son would be at home alone while her husband was at work and that she did not have any friends or family that could help with transportation to and from school. She said that when she spoke to her husband after filling out the questionnaire, he told her "don't get sequestered." With regard to her views on the death penalty, Juror Sesti wrote on her questionnaire, "I guess it depends on the circumstances. I am not for it or against it" but that it "would be [her] last choice if other punishment was available." She also indicated that she agreed with the statement, "Although I do not believe that the death penalty ever ought to be imposed, as long as the law provides for it, I could impose it if I believed it was warranted in a particular case[.]" During voir dire, Juror Sesti explained, "I don't know that I could do the death penalty. I don't feel like I'm the judge[.]" She said that she did not know if she could put her name on a verdict form imposing the death penalty and she would "[p]robably not" fairly consider the death penalty based on her religious beliefs. In response to the trial court's questions, Juror Sesti kept reiterating that she did not know if she could impose the death penalty. She said that she would change her answer on the questionnaire to the statement that read "I believe that the death penalty is the appropriate form of punishment in some murder cases, but I could never return a verdict of death." She stated, "If I had to say one way or the other, I would probably say no, but I don't know." The State challenged Juror Sesti for cause, arguing that "she is either incapable or unwilling to give us an answer to any of these questions that allow us to truly judge her ability to be an appropriate juror in this case." The trial court excused her for cause, finding that it was "not certain she would be able to vote death penalty if it were warranted."

***16** On appeal, Defendant argues that the trial court abused its discretion in excusing each of these jurors for cause. Defendant asserts that "[a]ny conscientious potential juror could be conflicted about what he would do when placed in this hypothetical situation" about imposing the death penalty. However, the supreme court has held that a juror may be excused for cause due to "inconclusive responses" that indicate "he either would not or could not follow the instructions of the trial court." *State v. Keen*, 926 S.W.2d 727, 740 (Tenn. 1994), *on reh'g* (July 8, 1996). Additionally, the supreme court has affirmed a trial court's finding that a potential juror's "personal reservations [with the death penalty] ... could have prevented or substantially impaired the performance of her duties' " under similar circumstances where a potential juror gave "equivocal" responses and expressed a general "unwillingness" to judge another. *State v. Odom*, 336 S.W.3d 541, 558-59 (Tenn. 2011) (internal quotation omitted). Defendant has not established by

convincing evidence that the trial court abused its discretion in excusing Jurors Eads, Milhorn, and Sesti for cause.

C. Juror Crum

As stated above, any error on the part of the trial court in excusing or failing to excuse a potential juror for cause is harmless unless the jury who actually heard the case was not fair and impartial because an incompetent juror was forced upon Defendant. *See Howell*, 868 S.W.2d at 248. In this case, Defendant had exhausted his peremptory challenges before Juror Crum was seated on the panel and subjected to individual voir dire. We note that the questionnaires of the jurors who were ultimately selected to try this case, including Juror Crum's, were not included in the record on appeal. However, according to the transcript of the individual voir dire, Juror Crum wrote on her questionnaire, "I am in favor of the death penalty if no doubt of crime committed." She clarified that she would want to have "[a]bsolute [sic] no doubt" because she "would not want to put an innocent person to death." Juror Crum agreed with the statement that she "believe[d] that the death penalty is the appropriate form of punishment in some murder cases and [she] could return a verdict of death if [she] believed it was warranted in a particular case[.]" Juror Crum stated that she was not open to considering life with parole for a premeditated murder conviction. After being told that life with parole meant that Defendant would serve a minimum of 51 years before release, Juror Crum said that she would consider it after hearing the evidence but that she was still "leaning more toward one way" and did "not agree with parole." Juror Crum explained that she believed that a sentence of life without parole would give a person a chance for "repentance" while still suffering a "consequence of what they did." While she did not want "to put some innocent person to death," she also did not want to take the chance that someone would be able to get "out and kill again." In response to the trial court's questions, Juror Crum stated that she would consider life with parole "but it would have to be very convincing evidence to not tell me that they didn't need to be without parole." She stated, "I would take a lot of notes and I would go back and look at them and prayerfully consider wisdom in a case that's going to affect someone's life." She agreed that she would consider each of the sentencing options "evenly" and "fairly" but that she would "lean towards the other two."

Defendant challenged Juror Crum for cause, arguing that her responses indicated that "she would put [the] burden on the [D]efendant" to convince her to vote for a life sentence with the possibility of parole. The State responded that Juror Crum stated multiple times that she would consider all of the evidence and was willing to consider all three forms of punishment. The trial court agreed with the State and did not excuse Juror Crum for cause. Because Defendant had exhausted all of his peremptory challenges, Juror Crum sat on the jury that tried the case. On appeal, Defendant argues that the trial erred in failing to excuse Juror Crum for cause because her responses during voir dire indicated that she "was not seriously inclined to listen to the trial court's instructions regarding consideration of each of the three forms of punishment" and that "she would only favor life with parole if the [D]efendant was to repent." However, a fair reading of Juror Crum's responses indicates that although she had a preference for a sentence of life without parole because it provides someone a "second chance" without risking the safety of society, she would carefully consider all of the evidence presented and would fairly consider all three sentencing options. We note that in the transcript, the prosecutor made reference to a physical gesture that Juror Crum made while giving her responses that would support this interpretation. As our supreme court has said, "An assessment of the juror's ability to adhere to her oath made by the trial court, based upon not only the answers to questions posed by counsel but also nonverbal responses, is owed deference." *Odom*, 336 S.W.3d at 559 (citing *Uttecht*, 551 U.S. at 9). The trial court clearly did not get a "definite impression" from Juror Crum's responses that she could not follow the law. *See Hutchison*, 898 S.W.2d at 167.

***17** Also, as a result of the jury's imposition of death as to both convictions for murder, any risk of unfairness to Defendant from Juror Crum sitting as a juror was essentially removed. Her responses during voir dire indicated, according to Defendant, that she would never vote to impose a sentence of "life with parole." A portion of the trial court's jury instructions at the conclusion of the sentencing hearing is as follows:

> Now, I want to go over the verdicts in this matter, which you'll be asked to consider, okay?
>
> First is life imprisonment. If you do not unanimously determine that a statutory aggravating circumstance has been proven by the State beyond a reasonable doubt, then the sentence shall be life imprisonment.
>
> You will write your verdict upon the enclosed form attached hereto and make a -- and made part of this charge.

The verdict shall be, we, the jury, unanimously determine that no statutory aggravating circumstance has been proven by the State beyond a reasonable doubt. We, the jury, therefore, find that the sentence shall be imprisonment for life. The verdict must be unanimous and signed by each juror, okay? That's the verdict of life imprisonment.

Next is life imprisonment without the possibility of parole, which would be the next possible verdict.

If you unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that said statutory aggravating circumstance or circumstances have not been proven by the State to outweigh any mitigating circumstances beyond a reasonable doubt, you shall in your considered discretion, sentence the Defendant either to imprisonment for life without possibly [sic] of parole or to imprisonment for life.

In choosing between the sentences of imprisonment of life without possibility of parole and imprisonment for life, you shall weigh and consider the statutory aggravating circumstance or circumstances proven by the State beyond a reasonable doubt and any mitigating circumstance or circumstances.

In your verdict, you shall reduce to writing the statutory aggravating circumstance or circumstances so found and shall return your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows: We, the jury, unanimously find that the State has proven the following listed statutory aggravating circumstance or circumstances beyond a reasonable doubt.

We, the jury, unanimously find that any statutory aggravating circumstance or circumstances do not outweigh any mitigating circumstance or circumstances beyond a reasonable doubt. Therefore, you shall then indicate on the enclosed verdict form either -- either of these two: We, the jury, unanimously agree that the Defendant shall be sentenced to imprisonment of life without possibility of parole, or we, the jury, unanimously agree that the Defendant shall be sentenced to imprisonment for life. The verdict must be unanimous and signed by each juror.

And then third is the verdict of death. If you unanimously determine that at least one statutory aggravating circumstance or several aggravating statutory circumstances have been proven by the State beyond a reasonable doubt and said circumstances or circumstances have been proven by the State to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence shall be death.

The jury shall reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and signify that the State has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

***18** The jury was instructed that it *must* impose "life with parole" if it found no aggravating factor was proven beyond a reasonable doubt. If the jury found that at least one aggravating factor was proven beyond a reasonable doubt, but this did not outweigh mitigating factors beyond a reasonable doubt, *then* the jury must choose between life without possibility of parole and "life with parole." However, the jury found the existence of two aggravating factors for premeditated murder and two for felony murder (one of which is invalid by law – see below) *and* that the aggravating factor(s) outweighed the mitigating factors beyond a reasonable doubt. At that point, the jury was not permitted to even consider either life without the possibility of parole *or* life imprisonment (referred to by the parties as "life with parole"). The only sentence available was the death penalty.

Defendant has not established by convincing evidence that the trial court erred in failing to excuse Juror Crum for cause and, therefore, has not established that the jury that tried his case was not fair and impartial. Defendant is not entitled to relief on this issue.

III. Video of Prior Aggravated Robbery

Prior to trial, Defendant filed a motion in limine to exclude a video recording depicting his prior aggravated robbery of a different convenience store. Instead, Defendant offered to stipulate that he had a prior conviction for aggravated robbery. The trial court denied the motion in limine, and the State played the video during the penalty phase. On appeal, Defendant argues that the similarities between the video of the

prior robbery and the video of the instant offense combined to create a "shocking effect" that violated his right to a fair sentencing hearing. Defendant argues that the prejudice created by the video of the prior robbery outweighed any probative value it had, especially given that Defendant offered to concede the fact of his prior conviction and that the underlying facts could have been proven with other evidence. Defendant argues that the admission of the video "likely caused the jury to give undue weight to the aggravating factor regarding [Defendant's] prior crime of violence." Defendant asserts that "[t]he State's sole purpose for admitting the video was to inflame the passions of the jury and elicit feelings of contempt and horror towards the [Defendant]."

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. James*, 81 S.W.3d 751, 759 (Tenn. 2002). A trial court abuses its discretion by applying an incorrect legal standard, reaching a decision that is illogical or unreasonable, or basing its decision on a clearly erroneous assessment of the evidence. *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). This standard of review "does not permit an appellate court to substitute its judgment for that of the trial court." *Id.* (citing *State v. Harbison*, 539 S.W.3d 149, 159 (Tenn. 2018)).

The admissibility of evidence during a capital sentencing hearing is governed by Tennessee Code Annotated section 39-13-204(c), which states that "[a]ny such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence." As relevant to the issue herein, the statute further provides:

> In all cases where the state relies upon the aggravating factor that Defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party.

***19** *Id.*

"This statute expressly exempts evidence adduced in capital sentencing proceedings from the usual evidentiary rules." *State v. Odom*, 928 S.W.2d 18, 28 (Tenn. 1996). The Tennessee Supreme Court "has refrained, however, from holding that all evidence related to punishment is admissible without further inquiry." *State v. Sims*, 45 S.W.3d 1, 13 (Tenn. 2001). Instead, they have provided the following guidance:

> [I]n general, § 39-13-204(c) should be interpreted to allow trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing. The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both Defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

Id. at 14. Under the statute, trial courts should "exclude any evidence that is repugnant to the constitutional guarantees of due process, or that would violate a defendant's right to confrontation or cross-examination." *State v. Berry*, 141 S.W.3d 549, 564 (Tenn. 2004).

After viewing the video, the trial court found that it was reliable, relevant to the prior violent felony aggravating circumstance, and admissible under Tennessee Code Annotated section 39-13-204(c). Defendant's sole argument on appeal is that the prejudicial effect of the video of the prior robbery outweighed any probative value given his offer to stipulate to the prior conviction. As an initial matter, we note that an offer to stipulate to the facts depicted in the video does not diminish its probative value under the sentencing statute the way it might under the rules of evidence during the guilt phase. *See Odom*, 336 S.W.3d at 566. Moreover, Tennessee Code Annotated section 39-13-204(c) specifically states that evidence concerning the facts and circumstances of a prior violent felony "shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party."

The Tennessee Supreme Court has previously upheld the admission of testimony from a victim of the prior violent felony, which may be very detailed. *See Young*, 196 S.W.3d at 114 n.9; *State v. Cole*, 155 S.W.3d 885, 906 (Tenn. 2005). Although Defendant argues that admission of the video of the prior robbery violated his right to a fair sentencing hearing and generally cites the federal and state constitutions, he does not make a specific argument as to how the admission of the video violated a specific constitutional right, such as the right to due process or the right to confront adverse witnesses. *See Berry*, 141 S.W.3d at 564. Defendant has not established that the trial court abused its discretion in admitting the video of Defendant's prior aggravated robbery during the capital sentencing phase.

IV. Constitutionality of Death Penalty and Lethal Injection

***20** Defendant argues that "the death penalty in general, and lethal injection in particular, violate the United States and Tennessee constitutions' prohibition on cruel and unusual punishment." Defendant acknowledges that both the United States and Tennessee Supreme Courts have rejected this argument. *See Baze v. Rees*, 553 U.S. 35, 47 (2008) (reaffirming that "capital punishment is constitutional" and upholding Kentucky's lethal injection protocol); *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 618 (Tenn. 2018) (rejecting Eighth Amendment challenge to the current three-drug lethal injection protocol); *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012) ("This Court has held, and repeatedly affirmed, that capital punishment itself does not violate the state and federal constitutions."). However, Defendant urges this Court to "reconsider earlier precedent." We decline to do so because "we, as an intermediate appellate court, are bound by the decisions of the Tennessee Supreme Court as to state and federal constitutional questions, and the United States Supreme Court as the ultimate authority as to federal constitutional questions." *State v. Pendergrass*, 13 S.W.3d 389, 397 (Tenn. Crim. App. 1999).

V. Mandatory Review

In this case, the jury imposed a death sentence for both the conviction for premeditated first degree murder and the conviction for felony murder. The trial court then merged the convictions into a single conviction and death sentence for premeditated first degree murder. On appeal, Defendant contends that his death sentence is disproportionate and that the aggravating factors found by the jury do not outweigh the mitigating factors beyond a reasonable doubt.

When reviewing a conviction for first degree murder and an accompanying sentence of death, this Court is required to review the record to determine whether the sentence of death was imposed in any arbitrary fashion; whether the evidence supports the jury's finding of the statutory aggravating circumstances; whether the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and Defendant. *See* T.C.A. § 39-13-206(c)(1).

A. Whether the sentence of death was imposed in any arbitrary fashion

The death penalty is not imposed in an arbitrary fashion if Defendant's trial "was conducted pursuant to the procedure established in the applicable statutory provisions and rules of criminal procedure." *Young*, 196 S.W.3d at 115. A review of the record indicates that the trial court conducted the trial according to the laws and procedures of the State of Tennessee. The jury reached a unanimous verdict beyond a reasonable doubt that Defendant committed the crimes for which he was charged. Additionally, the jury reached a unanimous decision beyond a reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances. Defendant's sentence of death was not imposed in an arbitrary fashion. *See* T.C.A. § 39-13-206(c)(1)(A).

B. Whether the evidence supports the jury's finding of statutory aggravating circumstances

Under Tennessee Code Annotated section 39-13-206(c)(1)(B), this Court must independently determine whether the evidence in the record supports the jury's finding of the statutory aggravating circumstances. *See State v. Keen*, 31 S.W.3d 196, 205 (Tenn. 2000). This Court must view the evidence in a light most favorable to the State and determine whether a rational trier of fact could have found the existence of the aggravating circumstances beyond a reasonable doubt. *State v. Rollins*, 188 S.W.3d 553, 571 (Tenn. 2006). In this case, the State presented two of the statutory

aggravating factors under Tennessee Code Annotated section 39-13-204(i):

> (2) Defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person; [and] ...
>
> ***21** (7) The murder was knowingly committed, solicited, directed, or aided by Defendant, while Defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb[.]

The record supports the jury's finding that Defendant was previously convicted of a violent felony. *See* T.C.A. § 39-13-204(i)(2). The State admitted into evidence a certified judgment of Defendant's 2009 conviction for aggravated robbery in Madison County, as well as a written statement from Defendant admitting his role in that robbery. As discussed above, the State also admitted a video recording of that robbery, which showed Defendant and two other men entering a convenience store wielding guns. One of the men pointed his gun at the clerk. The Tennessee Supreme Court has held that the "use of a deadly weapon, such as pointing a gun at the victim, constitutes violence." *State v. McKinney*, 74 S.W.3d 291, 305-06 (Tenn. 2002). Defendant does not contest that his prior conviction for aggravated robbery constitutes a violent felony under the (i)(2) aggravating factor.

With regard to Defendant's conviction for premeditated first degree murder, the record also supports the jury's finding that the murder was committed while Defendant had a substantial role in attempting to commit a robbery. *See* T.C.A. § 39-13-204(i)(7). The killing of Mr. Dhalai occurred between Defendant's demand for money and his attempt to open the cash register. As to Defendant's conviction for felony murder however, we note that the Tennessee Supreme Court has held that this aggravating factor cannot be applied to a conviction for felony murder. *See State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992); *but see State v. Howell*, 868 S.W.2d 238, 259 (Tenn. 1993) (holding that such error may be deemed harmless beyond a reasonable doubt). However, we need not determine whether the error is harmless beyond a reasonable doubt because Defendant's felony murder conviction and death sentence were merged into his conviction and death sentence for premeditated first degree murder, to which this aggravating circumstance was appropriately applied. If for some reason the premeditated first degree murder is ever set aside, then this aggravating factor could not be applied to support a sentence of death for felony murder. Thus, it is necessary to vacate application of the aggravating factor in Tennessee Code Annotated section 39-13-204(i)(7) for the conviction of felony murder. As noted above, since it was merged, there is no need to determine at this time whether the error is harmless beyond a reasonable doubt.

C. Whether the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances

Under Tennessee Code Annotated section 39-13-206(c)(1)(C), this Court must independently determine whether the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. *See Keen*, 31 S.W.3d at 205. Again, this Court must view the evidence in the light most favorable to the State to determine whether "a rational trier of fact could have found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt." *Berry*, 141 S.W.3d at 570.

***22** In this case, the trial court instructed the jury on the following mitigating factors:

> 1. There are choices other than [a] sentence of death.
>
> 2. Life without parole means that [Defendant] will never be released from prison.
>
> 3. If [Defendant] is sentenced to life without the possibility of parole, he will die in prison.
>
> 4. [Defendant] has a mother, two aunts, an uncle, a brother, a sister, and other close family members. [Defendant's] execution would have a devastating lifetime impact on all of these family members.
>
> 5. If [Defendant] is executed, his execution will no undue [sic] the harm suffered by Mr. Dhalai's family, but life without parole will provide [Defendant] the time to reflect on Mr. Dhalai's death for the rest of his life.
>
> 6. [Defendant] suffers from mental disorders due to circumstances beyond his control, including genetics, abuse, neglect, trauma, and other upbringing and environmental factors.

> 7. Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing. That is, you shall consider any aspect of Defendant's character or record or any aspect of the circumstances of the offense favorable to Defendant, which is supported by the evidence.

During the penalty phase, Defendant presented the testimony of two experts who opined that Defendant suffered from low intelligence, cannabis use disorder, post-traumatic stress disorder, and antisocial personality disorder. In rebuttal, the State presented an expert witness who agreed that Defendant had antisocial personality disorder and cannabis use disorder but disagreed that he suffered from post-traumatic stress disorder. The State's expert described Defendant's IQ as low average, which she said was "typical for a criminal defendant or inmate." The experts agreed that Defendant had a disadvantaged childhood, including exposure to marijuana in the womb, poverty, an abusive stepfather, poor performance in school, and a family history of both substance abuse and criminal behavior. Defendant also suffered a trauma when he was shot in the back and again when he was held at gunpoint as a teenager. However, the experts disagreed about whether this caused Defendant to be emotionally numb and distant towards other people. The experts did agree on the fact that Defendant was capable of formulating and carrying out a plan to rob the Bull Market and that Defendant made a voluntary choice to kill Mr. Dhalai.

Moreover, this was not the first time that Defendant was involved in the armed robbery of a convenience store, as evidenced by his 2009 conviction for aggravated robbery committed under very similar circumstances. Defendant had only been out of prison for about six months at the time of this incident. Unlike in the prior robbery case where Defendant cooperated with the police by providing a voluntary statement, in this case Defendant responded with profanities and death threats when he was confronted by the police. Viewing this evidence in the light most favorable to the State, a rational trier of fact could have found that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.

D. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and Defendant

***23** Finally, this Court must conduct a comparative proportionality review under Tennessee Code Annotated section 39-13-206(c)(1)(D) in order to ensure that the death penalty is not imposed in an arbitrary and capricious manner. *Terry v. State*, 46 S.W.3d 147, 163 (Tenn. 2001). This Court does not function as a "super jury" to substitute our judgment for that of the sentencing jury. *State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001). Instead, we are to "apply a precedent-seeking method of comparative proportionality review" to determine whether Defendant's death sentence " 'is disproportionate to the sentences imposed for similar crimes and similar defendants' " in order to " 'identify and invalidate the aberrant death sentence.' " *State v. Thacker*, 164 S.W.3d 208, 232-33 (Tenn. 2005) (quoting *Bland*, 958 S.W.2d at 664).

The comparable cases for analysis are first degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment with the possibility of parole, or death. *State v. Rice*, 184 S.W.3d 646, 679 (Tenn. 2006). This Court must examine "the facts and circumstances of the crime, the characteristics of Defendant, and the aggravating and mitigating circumstances involved." *State v. Stevens*, 78 S.W.3d 817, 842 (Tenn. 2002). In conducting this comparison with regard to the nature of the crime, we generally consider

> (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims.

State v. Rimmer, 250 S.W.3d 12, 35 (Tenn. 2008); *see Rollins*, 188 S.W.3d at 575. We also compare the characteristics of Defendants, including their

> (1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation.

Rimmer, 250 S.W.3d at 35; *Rollins*, 188 S.W.3d at 575. This case need not be identical to other cases in every respect, nor must we determine that this case is "more or less" like other death penalty cases. *See State v. Thomas*, 158 S.W.3d 361, 383 (Tenn. 2005). A sentence is not disproportionate because other defendants have received a life sentence under similar circumstances. *State v. Carruthers*, 35 S.W.3d 516, 569 (Tenn.

2000). Rather, "a death sentence is disproportionate if a case is 'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed.' " *State v. Davis*, 141 S.W.3d 600, 620 (Tenn. 2004) (quoting *Bland*, 958 S.W.2d at 668).

Defendant was twenty-six years old at the time of the instant offenses. He had one prior conviction for aggravated robbery. Although Defendant presented evidence of his mental condition and disadvantaged childhood, there was no indication that these impaired his judgment or ability to control his actions. Defendant shot the victim at the victim's place of employment during an attempted robbery. The victim did not provoke Defendant but simply did not comply with Defendant's demands. Defendant also fired a shot at Mr. Austin, causing Mr. Austin to fear for his life. Defendant did not offer assistance to the police, and the trial court found that he expressed no remorse throughout the trial.

***24** We conclude that the death sentence in this case is not excessive or disproportionate when compared to the death penalty imposed in similar cases. The Tennessee Supreme Court has upheld the death penalty in cases where the victim was shot during the course of a robbery of the victim's place of employment and Defendant had at least one prior conviction for a violent felony. *See State v. Reid*, 91 S.W.3d 247, 287 (Tenn. 2002); *State v. Smith*, 993 S.W.2d 6, 18 (Tenn. 1999); *State v. Harries*, 657 S.W.2d 414 (Tenn. 1983). In *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993), the twenty-seven-year-old defendant murdered the clerk of a convenience store by shooting him in the head during the course of a robbery. As in this case, Defendant did not cooperate with the police, showed no remorse, and had previously been convicted of violent felonies, including another robbery. The defense presented mitigation proof related to Defendant's childhood environment and psychological testing. The Tennessee Supreme Court has also upheld the death penalty in cases involving defendants who presented evidence of mitigating circumstances substantially similar to that presented by Defendant in this case, including evidence of their backgrounds, poor childhood environments, parents who used drugs, and similar circumstances. *Odom*, 336 S.W.3d at 574; *Thomas*, 158 S.W.3d at 383; *Davis*, 141 S.W.3d at 621; *State v. Hines*, 919 S.W.2d 573 (Tenn. 1995). The penalty imposed by the jury in the present case is not disproportionate to the penalty imposed for similar crimes.

Conclusion

Based on the foregoing, we affirm all the judgments except those for resisting arrest and felony murder. We note that the judgment for Count 8, resisting arrest, lists the incorrect conviction offense. Therefore, we remand the case to the trial court to correct the clerical error in the judgment for Count 8. Also, the trial court shall enter an amended judgment reflecting that the aggravating factor set forth in Tennessee Code Annotated section 39-13-204(i)(7) cannot be applied in the death sentence for the conviction of felony murder.

All Citations

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