No. 24-6586

In the Supreme Court of the United States

LANDON HANK BLACK,
PETITIONER

v.

STATE OF TENNESSEE,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

APPENDIX

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Appendix 1

THE COURT: Folks, please rise for our jury.

(Jury present:)

THE COURT: All right, everyone. You may be seated.

State waive the call of the jury?

MR. ALLEN: We do.

THE COURT: Defense waive the call?

MS. AKERS: Yep.

MR. BOSCH: We do.

THE COURT: Welcome back, folks. Thanks for that break. This will be the last part of the trial before you begin your deliberations. It is the presentation of the legal instructions. And as I told you, the instructions that I'm going to give you are contained in writing, so you're going to have these with you in the jury room. So don't feel like you have to memorize everything I'm getting ready to read to you. But I want to go through each one of these in the courtroom.

If you promise not to fall asleep, I'll have Officer Thompson turn the lights down. And if you'll follow along as I read the instructions, we're going to start in the first paragraph.

The evidence and the argument in this case have been completed. And I will now instruct you as

to the law. The law applicable to this case is stated in these instructions, and it is your duty to consider all of them.

The order in which these instructions are given is no indication of their relative importance. You should not single out one or more of them to the exclusion of others, but should consider each one in the light of and in harmony with the others.

The Presentment is the formal written accusation charging the defendant with a crime. It is not evidence against the defendant and does not create any inference of guilt.

The defendant, Landon Hank Black, is charged in Presentment number 119789 with the offense of first-degree murder. To this offense he has entered a plea of not guilty.

The elements of the offense the State is required to prove are as follows:

First Count, first-degree murder.

Any person who commits the offense of first-degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven, beyond a reasonable doubt, the existence of the following essential elements:

(1) that the defendant unlawfully killed

Brandon Lee; and

(2) that the defendant acted intentionally.

A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim. A defendant's conscious objective need not be to kill a specific victim. If you find, beyond a reasonable doubt, that the defendant intended to cause the result, the death of a person, and that he did so with premeditation, then the killing of another, even if not the intended victim, would be first degree murder; and

(3) that the killing was premeditated.

A premeditated act is one 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 he 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.

If the design to kill was formed with premeditation, it is immaterial that the accused may

have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

There are lesser-included offenses that you may consider should you find the defendant not guilty of that charged offense. The first one is second-degree murder.

If you have a reasonable doubt as to the defendant's guilt of first-degree murder, as charged in this Presentment, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of second-degree murder, a lesser-included offense.

Any person who commits second-degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven, beyond a reasonable doubt, the existence of the following essential elements:

(1) that the defendant unlawfully killed Brandon Lee; and

(2) that the defendant acted knowingly.

Knowingly means that a person acts with an

awareness that his conduct is reasonably certain to cause the death of the alleged victim.

The requirement of knowingly is also established if it is shown the defendant acted intentionally, as defined above under first-degree murder.

The distinction between voluntary manslaughter and second-degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation from the alleged victim sufficient to lead a reasonable person to act in an irrational manner.

And Voluntary Manslaughter is the next lesser.

If you have a reasonable doubt as to the defendant's guilt of second-degree murder, a lesser-included offense, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of voluntary manslaughter, a lesser-included offense.

Any person who commits voluntary manslaughter is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven, beyond a reasonable doubt, the existence of the

following essential elements:

(1) that the defendant unlawfully killed Brandon Lee; and

(2) that the defendant acted intentionally or knowingly; and

(3) that the killing resulted from a state of passion produced by adequate provocation from the alleged victim sufficient to lead a reasonable person to act in an irrational manner.

Passion means any of the emotions of the mind reflecting anger, rage, sudden resentment, terror or similar feelings rendering the mind incapable of cool reflection.

Next, we have reckless homicide.

If you have a reasonable doubt as to the defendant's guilt of voluntary manslaughter, a lesser-included offense, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of reckless homicide, a lesser-included offense.

Any person who commits the offense of reckless homicide is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven, beyond a reasonable doubt, the existence of the following essential elements:

(1) that the defendant killed Brandon Lee; and

(2) that the defendant acted recklessly.

Recklessly means that a person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of recklessly is also established if it is shown that the defendant acted intentionally or knowingly, as defined above.

And, lastly, is criminally negligent homicide.

If you have a reasonable doubt as to the defendant's guilt of reckless homicide, a lesser-included offense, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of criminally negligent homicide, a lesser-included offense.

Any person who commits criminally negligent

homicide is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven, beyond a reasonable doubt, the existence of the following essential elements:

(1) that the defendant's conduct resulted in the death of Brandon Lee; and

(2) that the defendant acted with criminal negligence.

Criminal negligence means that a person acts with criminal negligence when the person ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly, or recklessly, as defined above.

Order of consideration.

In reaching your verdict, you shall, first, consider the offense charged in the Presentment. If you unanimously find the defendant guilty of that

offense beyond a reasonable doubt, you shall return a verdict of guilty for that offense. If you unanimously find the defendant not guilty of that offense or have a reasonable doubt of the defendant's guilt of that offense, you shall then proceed to consider whether or not the defendant is guilty of the next lesser-included offense in order from greatest to least within that Count of the presentment. You shall not proceed to consider any lesser-included offense until you have first made a unanimous determination that the defendant is not guilty of the immediately preceding greater offense or you unanimously have a reasonable doubt of the defendant's guilt of that offense.

If you have a reasonable doubt of the guilt of the defendant as to all offenses charged and included in that Count of the Presentment, you shall return a verdict of not guilty.

Self-Defense.

Included in the defendant's plea of not guilty is his plea of self-defense. If a defendant was in a place where he or she had a right to be, he or she would have a right to use force against the alleged victim when, and to the degree, the defendant reasonably believed the force was immediately

necessary to protect against the alleged victim's use of unlawful force.

If a defendant was in a place where he or she had a right to be, he or she would also have a right to use force intended or likely to cause death or serious bodily injury if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury, the danger creating the belief of imminent death or serious bodily injury was real, or honestly believed to be real at the time and the belief of danger was founded upon reasonable grounds.

In this case, the law of self-defense requires the defendant to have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat in this case, if, and to the extent, that it can be done so -- or to be done in safety.

In determining whether the defendant's use of force in defending himself was reasonable, you may consider not only his use of force but also all the facts and circumstances surrounding and leading up to it. Factors to consider in deciding whether there were reasonable grounds for the defendant to fear

death or serious bodily injury from the alleged victim include, but are not limited to, any previous threats of the alleged victim made known to the defendant; the character of the alleged victim for violence, when known to the defendant; the animosity of the alleged victim for the defendant, as revealed by -- to the defendant by previous acts and words of the alleged victim; and the manner in which the parties were armed and their relative strengths and sizes.

The burden is on the State to prove, beyond a reasonable doubt, the defendant did not act in self-defense. To convict the defendant, the State must prove, beyond a reasonable doubt, the defendant did not act in self-defense. If from all the facts and circumstances you find the defendant acted in self-defense or if you have a reasonable doubt as to whether the defendant acted in self-defense, you must find him not guilty.

Flight.

The flight of a person accused of a crime is a circumstance which, when considered with all the facts of the case, may justify an inference of guilt. Flight is the voluntary withdrawal of oneself for the purpose of evading arrest or prosecution for the

crime charged. Whether the evidence presented proves beyond a reasonable doubt the defendant fled is a question for your determination.

The law makes no precise distinction as to the manner or method of flight. It may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown to constitute flight.

If flight is proved, the fact of flight alone does not allow you to find that the defendant is guilty of the crime alleged. However, since flight by a defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant. On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered or by the facts and circumstances of the case.

Whether there was flight by the defendant, the reasons for it, and the weight to be given to it are questions for you to determine.

Admission against interest.

Evidence has been presented -- excuse me -- introduced in this trial of a statement or statements by the defendant made outside the trial to show an admission against interest. An admission against interest is a statement by the defendant which acknowledges the existence or truth of some fact necessary to be proven to establish the guilt of the defendant or which tends to show guilt of the defendant or is evidence of some material fact, but not amounting to a confession.

While this evidence has been received, it remains your duty to decide if, in fact, such statement was ever made. If you believe a statement was not made by the defendant, you should not consider it. If you decide the statement was made by the defendant, you must judge the truth of the facts stated.

In so determining, consider the circumstances under which the statement was made. Also, consider whether any of the other evidence before you tends to contradict the statement in whole or in part. You must not, however, arbitrarily disregard any part of any statement, but rather, should consider all of any statement you believe was made and is true.

You are the sole judge of what weight should be given each statement -- such statement. If you decide a statement was made, you should consider it with all the other evidence in the case in determining the defendant's guilt or innocence.

Video Redactions.

Video recordings have been introduced as evidence in this case. Some portions of the videos may have been redacted. You shall not speculate as to the content of any redacted portion or draw any conclusions from the fact that redactions may have been made.

Inference of concealment or destruction of evidence.

Any attempt by a person to conceal or destroy evidence is a circumstance which, when considered with all the facts of the case, may justify an inference of guilt. While that inference is by no means strong enough of itself to warrant conviction, yet, it may become one of a series of circumstances from which guilt may be logically inferred.

Whether the evidence presented proves beyond a reasonable doubt that the defendant so acted is a question for your determination. If this fact is proven, this fact alone does not allow you to find

the defendant is guilty of the crime alleged. However, since an attempt by a defendant to destroy or conceal evidence may be caused by a consciousness of guilt, you may consider this fact, if it is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant.

On the other hand, a person entirely innocent of a particular crime may attempt to destroy or conceal evidence and this may be explained by proof offered or by the facts and circumstances of the case. Concealment or destruction of evidence of a crime is not proof of premeditation.

Whether there was any attempt to destroy or conceal evidence by the defendant, the reasons for it and the weight to be given to it are questions for you to determine.

Here are some legal definitions.

Force means compulsion by the use of physical power or violence.

Violence means evidence of physical force unlawfully exercised so as to damage, injury or abuse. Physical contact is not required to prove violence. Unlawfully pointing a deadly weapon at an alleged victim is physical force directed toward the body of the victim.

Deadly weapon means a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury or anything that, in the manner of its use or intended use, is capable of causing death or serious bodily injury.

Imminent means near at hand; on the point of happening.

Serious bodily injury means bodily injury that involves a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.

Bodily injury includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ or mental faculty.

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with these rulings. Neither by these rulings, the instructions, nor by any other remark do I mean to indicate any opinion as to the facts or as to what your verdict should be.

The statements, arguments and remarks of the

attorneys are intended to help you in understanding and applying the law, but they are not evidence. You should disregard any statements made that you believe are not supported by the evidence.

You are the exclusive judges of the facts in this case. Also, you are exclusive judges of the law, under the direction of the Court. In applying the law to the facts in deciding this case, you should consider all of the evidence in light of your own observations and experience in life.

The law presumes that the defendant is innocent of the charge against him. This presumption remains with the defendant throughout every stage of the trial and it is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts, but remains on the State throughout the trial of the case. The defendant is not required to prove his innocence.

Reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. A

reasonable doubt is a doubt based upon reason and common sense, after careful and impartial consideration of all the evidence in this case.

Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required. And this certainty is required as to every element of proof necessary to constitute the offense. A reasonable doubt is just that, a doubt that is reasonable after an examination of all the facts of this case. If you find the State has not proven every element of the offense beyond a reasonable doubt, then you should find the defendant not guilty.

The State must prove, beyond a reasonable doubt, all the elements of the crime charged, that the crime, if in fact committed, was committed by this defendant in Knox County, Tennessee, and that it was committed before the finding and returning of the Presentment in this case.

Some of you have taken notes during the trial. Once you retire to the jury room, you may refer to your notes, but only to refresh your own memory of the witnesses' testimony. You are free to discuss the testimony of the witnesses with your fellow jurors, but each of you must rely upon your

own individual memory as to what a witness did or did not say.

You should not view your notes as authoritative records or consider them as a transcript of the testimony. Your notes should carry no more weight than the unrecorded recollection of another juror.

Expert witness.

During the trial, you heard the expert testimony of Brian Dalton, who was described to us as an expert in the field of firearms and tool mark examinations; Darinka Mileusnic-Polchan, who was described to us as an expert in the field of forensic and anatomic pathology; and Timothy Allen, who was described to us an expert in the field of psychiatry.

The Rules of Evidence provide that if scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by reason of special knowledge, skill or experience may testify and state his or her opinions concerning such matters and give reasons for his or her testimony.

Merely because an expert witness has expressed an opinion does not mean, however, that you

are bound to accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it.

Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment and information.

You are to give the testimony of an expert witness such weight and value as you think it deserves along with all the other evidence in the case.

It is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. The law presumes that all witnesses are truthful. However, you do not have to accept or reject everything a witness said. You are free to believe all, none or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules for judging whether you believe a witness, but it may

help you to think about these questions:

Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness? Did the witness seem to have a good memory? How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions? Has there been any evidence presented regarding the witness' intelligence, respectability or reputation for truthfulness? Does the witness have any bias, prejudice, or personal interest in how the case is decided? Have there been any promises, threats, suggestions, or other influences that affected how the witness testified? In general, does the witness have any special reason to tell the truth, or any special reason to lie? All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Sometimes the testimony of different witnesses will not agree and you must decide which testimony you accept. You should think about whether the disagreement involves something important or not, and whether you think someone is lying or is simply mistaken. People see and hear things differently,

and witnesses may testify honestly but simply be wrong about what they thought they saw or remembered.

It is also a good idea to think about which testimony agrees best with the other evidence in the case. However, you may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.

A witness may be impeached by proving that he or she has made some material statements out of court which are at variance with his or her evidence on the witness stand. However, proof of such prior inconsistent statements may be considered by you only for the purpose of testing the witness' credibility and not as substantive evidence of the truth of the matter asserted in such out-of-court statements.

Further, a witness may be impeached by a careful cross-examination involving the witness in contradictory, unreasonable and improbable statements; however, immaterial discrepancies or differences in the statements of witnesses do not

affect their credibility unless it should plainly appear that some witness has willfully testified falsely.

When a witness is thus impeached, the jury has the right to disregard his or her evidence and treat it as untrue, except where it is corroborated by other credible testimony or by the facts and circumstances proved in the trial.

The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The defendant is presumed innocent, and the burden is on the State to prove his guilt beyond a reasonable doubt. He is not required to take the stand in his own behalf, and his election not to do so cannot be considered for any purpose against him, nor can any inference be drawn from such fact.

We're almost done.

The guilt of the defendant, as well as any fact required to be proved, may be established by direct evidence, by circumstantial evidence or by both combined.

Direct evidence is defined as evidence which proves the existence of the fact in issue without inference or presumption. Direct evidence may

consist of testimony of a person who has perceived, by the means of his or her senses, the existence of a fact sought to be proved or disproved.

Circumstantial evidence consists of proof of collateral facts and circumstances which do not directly prove the fact in issue, but from which that fact may be logically inferred.

It is your duty to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves. Thus, the important thing for you to keep in mind is whether a piece of evidence is convincing beyond a reasonable doubt and not whether it is direct or circumstantial.

The verdict must represent the considered judgment of each juror and each juror must agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your own individual judgment. Each of you must

decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You can have no prejudice, or sympathy, or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

If you find that the State has proven the defendant guilty beyond a reasonable doubt, then you should find him guilty. On the other hand, if you find that the State has not proven, beyond a reasonable doubt, the defendant's guilt, or if you have a reasonable doubt as to his guilt, then you must find him not guilty.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case outside the jury

deliberation room. You may not use any electronic device or media, such as a telephone, cell phone, internet or any social media site to conduct any research about this case until you have returned your verdict and the trial has concluded.

When you retire to the jury room, you will first select one of your members as foreperson who will preside over your deliberations. You will be provided with forms for all possible verdicts in this case. The jury will complete the verdict forms and your foreperson will sign the verdict forms. When you have reached a verdict, you will return with it to this courtroom, and your foreperson will deliver it to the Court.

So there's one Count, so there's one verdict form. It looks like this. At the end of the booklet, it says, "We, the jury, find the defendant, Landon Hank Black" -- and you'll circle the appropriate letter. If you find that he's been proven guilty, beyond a reasonable doubt, of first-degree murder, then you'd circle the letter A. The foreperson would sign it and date it.

Today is October 8th, 2021.

If you unanimously find him not guilty of that, you would then consider whether or not he's

guilty of second-degree murder. If you find him guilty of that, you'd circle B and sign it.

If he's not guilty of that, then you'd consider the next lesser. And you work your way down through all the lessers.

If you believe he is not guilty, then you'd circle the letter F, not guilty. Again, sign it and date it.

All right. We can have the lights back on.

So those are the instructions, folks. As I said, they are in this booklet. The last page is the verdict form. I'm going to send one copy back with you. However, if you'd like additional copies, let us know -- so that way you don't all have to look at one -- we'll take the original back from you and we'll make as many copies as you would like, so you can look at those separate and apart.

There are -- have been a number of exhibits that have been introduced. One is an item of clothing that purports to have, potentially, biological material on it. It's in a -- it's in a Ziploc bag. I would suggest that you leave it in there. However, you have a right to examine the exhibits, and if you'd like to take that out and look at it, you certainly can. Please let Officer

Thompson know that you'd like to do that. We'll bring you some gloves in to you. We'd like anybody that's going to handle that to have gloves. He's also going to assist you by putting some paper down to let you -- to view that. He'll step out of the room, let you view it. When you're done, he'll step back in and repackage it for you.

We do that just make sure everybody's safe. Okay?

Now, there's also been some videos, as you are aware. There's a computer in the jury room that's connected to the large-screen TV. That works as a monitor for that computer. Just turn it on, put the disk in there that you'd like to watch. There's a VLC media player that will play any of these videos. If you have any difficulty getting those to play, just let us know, we'll come in there and help you.

You've also seen the attorneys zoom in on those. If any of you know how to use VLC media players, you probably already know how to do that. If not, let us know, we can come in and show you how to do that, as well, to.

Now, I believe I have fully instructed you as to the law. However, if you have a question during

Appendix 2

IN THE COURT OF CRIMINAL APPEALS FOR TENNESSEE AT KNOXVILLE

STATE OF TENNESSEE	)	
	)	Knox Crim. 119789
v.	)	
	)	E2022-01741-CCA-R3-CD
LANDON HANK BLACK	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE KNOX COUNTY CRIMINAL COURT

BRIEF OF THE APPELLANT

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July 2023

Oral Argument Requested

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STATEMENT OF THE ISSUES

1. The State introduced irrelevant evidence that wrongly implied that defense counsel might have assisted the defendant in fleeing from law enforcement. The State also suggested that defense counsel had confused or indoctrinated some witnesses by meeting with them prior to trial and that defense counsel had told a witness not to cooperate with the State. The State then directly attacked defense counsel in closing argument, saying that counsel had "tricked" witnesses. Did the trial court err in allowing the State to repeatedly impugn the integrity of defense counsel?

2. In closing argument, the State offered broad speculation, went beyond the record, and misstated the evidence. It also shifted the burden to the defense and engaged in name-calling. It also misstated the legal standard, denigrated the defense, and encouraged the jury directly to consider issues of emotion. Does the combined effect of these improper arguments require a new trial?

3. The State questioned a defense expert about the fact that the defendant had not spoken to him about the events surrounding the shooting. Did this line of questioning infringe on the defendant's right to remain silent?

4. The State was allowed to present its version of the case through the lead investigator, who narrated the publication of security videos with his own opinions and characterizations. The jury could have watched the videos just as he did. Was the introduction of this lay opinion evidence error? In the defense case, a defense expert was precluded from offering an expert opinion as to what he saw in the video for the reason that the jury could watch the video just as well as he could. Was this inconsistent holding error?

5. The trial court admitted evidence that, a few days after the homicide, the defendant met with a female friend at a hotel and had sex. Was admission of this irrelevant but prejudicial fact error?

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6. The trial court instructed the jury that Mr. Black had a duty to retreat, if possible, prior to engaging in self-defense, based on its finding that he was engaged in unlawful conduct (being a felon in possession of a firearm) at the time of the shooting. However, neither his status as a felon or even his possession of a firearm produced the confrontation. Did the trial court err in instructing the jury that he had this duty to retreat?

7. The trial court instructed the jury that second-degree murder had two elements (unlawful killing and knowing), and that voluntary manslaughter had those same two elements plus an additional element (state of passion). It instructed the jury that voluntary manslaughter was a lesser offense of second-degree murder. It also instructed the jury that it could return a guilty verdict on a lesser-included offense only if it unanimously acquitted on the greater offense. Together, these instructions, if followed, meant that the jury would never be able to return a verdict of voluntary manslaughter. Was this error?

8. The trial court instructed the jury that state of passion produced by adequate provocation is an affirmative element of the crime of voluntary manslaughter, to be proven beyond a reasonable doubt. Consequently, the jury could return a verdict of guilty of voluntary manslaughter only if it were convinced beyond a reasonable doubt that the defendant was in a state of passion. Was this instruction, rather than an instruction requiring the State to disprove state of passion beyond a reasonable doubt to convict of second-degree murder, erroneous?

9. The trial court instructed the jury that, as to voluntary manslaughter, the question was whether *the State* had proven that the defendant was in a state of passion produced by adequate provocation. Was this instruction, which essentially rendered any defense evidence of passion or provocation irrelevant, erroneous?

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10. Did the cumulative effect of these errors deny the defendant his due process right to a fair trial?

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STATEMENT OF THE CASE

The defendant, Landon Hank Black ["Mr. Black"], was charged in a two-count superseding indictment on September 29, 2021, with first-degree premeditated murder and unlawful possession of a firearm by a felon. R.2.[1] Mr. Black went to trial before the Honorable Steven W. Sword and a jury on October 4, 2021. The offenses were severed for trial. On October 8, 2022, Mr. Black was found guilty on Count 1 of the lesser-included offense of second-degree murder. Prior to the imposition of sentence on second-degree murder, Mr. Black entered a plea of guilty on Count 2 to the charge of unlawful possession. Vol. 22/110. He was sentenced to twenty-five years of imprisonment on Count 1 and six years on Count 2, to be served concurrently, on January 24, 2022. R.564-567.

A timely motion for new trial was filed on February 23, 2022. R.568. After appointment of counsel, a supplemental motion for new trial was filed on November 1, 2022. R.576. The motions for new trial were denied by order dated December 12, 2022. R.591. A timely notice of appeal was filed on December 15, 2022. R.592.

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[1] References to the technical record will be abbreviated herein as R.xx. References to the transcripts will be abbreviated as Vol. X/xx.

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STATEMENT OF THE FACTS

I. OVERVIEW.

The decedent Brandon Lee was shot one time by Hank Black and died in the early morning hours of December 27 in the parking lot of a Knoxville bar. As Mr. Lee was walking to his truck, Mr. Black's car came to a stop next to him. Mr. Lee approached Mr. Black's car and within seconds the shot was fired. Mr. Black left the scene and eventually returned to his home in California, where he was later apprehended. There was no dispute that Mr. Lee and Mr. Black did not know each other, and while they had been in the same bar that evening, there was no evidence that they had even spoken to each other at any time while in the bar.

There were at least three relevant groups of individuals at the bar. First, there was Mr. Black's group: Mr. Black, his cousin Taylor Hodge, and his cousin's date, Carrie Phillips. Second, there was Mr. Lee's group, including him; his two best friends, Chandler Jackson and Clark Longmire; and Mr. Jackson's girlfriend, Mallory Hayes. Over the course of the night, that second group grew to include a woman, Kelsey Murrell, who was being physically affectionate with Mr. Lee. Ms. Murrell's sister, Kaitlyn Murrell, was also present. Third, there was another group centered around a big man named Alan Ford, including two friends of his.

While Mr. Black and Mr. Lee did not know each other, there was one significant connection between the first two groups. Kelsey Murrell,

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who was flirting and affectionate with Mr. Lee that evening, was the ex-girlfriend of Mr. Black's cousin, Mr. Hodge. They had broken up acrimoniously a couple of months before and had not seen each other since then. The testimony suggested that Ms. Murrell was openly affectionate towards Mr. Lee that evening in an effort to upset Mr. Hodge. She admitted that, at the end of the evening, she became verbally and physically aggressive towards Ms. Phillips, Mr. Hodge's date, because she believed that Mr. Hodge had cheated on her with Ms. Phillips during their relationship.

The evidence was also undisputed that, shortly after this confrontation between Ms. Murrell and Ms. Phillips, Mr. Ford became upset and yelled a racial slur at someone. A furore then developed around him, and bouncers took him out of the bar. He continued the physical fight with a group of other individuals (though not Mr. Lee or Mr. Black) outside the bar. That was still occurring when the shooting happened not too far away.

Beyond these basic facts, there remained much that was unclear about the events of that evening. There was extensive security video, both internal video showing events inside the bar and external cameras which captured the shooting from a distance. The bar was so packed with people that it is often difficult to tell who is interacting with whom in the videos, and none of the videos had audio.

The State's theory of the shooting included two connected events. First, the State argued that Mr. Black and Mr. Hodge had seen Ms.

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Murrell's provocative behavior with Mr. Lee throughout the evening, and that when she tried to start a physical confrontation with Ms. Phillips, Mr. Black intervened forcefully, putting his hands on Ms. Murrell to restrain her. Second, the State then contended that Mr. Ford and his friends took exception to this and moved to confront Mr. Black about the fact that he had physically touched Ms. Murrell. Mr. Ford then began to speak aggressively to Mr. Black. All of this left Mr. Black feeling disrespected and humiliated. This continued until Mr. Ford used the n-word in yelling at Mr. Black.[2] This attracted the attention and disapproval of others in the bar, including bar security, and Mr. Ford was escorted out of the bar.

The State's theory was that Mr. Black, angry from the dual humiliations of his interactions with Ms. Murrell and her friends and his face-down with Mr. Ford and his friends, then stormed out of the bar, went to his car, armed himself, and pulled around the parking lot. It was his purpose to attack Mr. Ford, either directly or in a drive-by shooting. He abruptly stopped when Mr. Lee walked in front of his car. Mr. Lee then approached the driver's side window and said something to him. Mr. Black, recognizing him as the man who had been physically affectionate with his cousin's ex-girlfriend all evening, shot him and shortly thereafter drove away. Recognizing what he had done, he played dumb over the rest of the night, then advised his cousin to hide the car

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[2] Mr. Black, like Mr. Ford, is white.

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that he had been driving. Once he learned through family members that he had been charged, he turned off his phone in an effort to avoid capture and went to California.

Although portions of this narrative were established through the testimony of the witnesses -- all of the individuals named above other than Mr. Ford's group (and Mr. Black and Mr. Lee) testified at trial -- much of the State's narrative of the thought processes of Mr. Black and Mr. Lee, including what they saw, heard, and said, was offered as an inference based on parsing of the security videos.

The defense suggested that much of the State's narrative was rank speculation or demonstrably wrong. The defense offered a different, and simpler, narrative. Mr. Black and Mr. Hodges had perhaps noticed, but not been particularly interested in, Ms. Hayes' attempted provocations with Mr. Lee. Mr. Black intervened when Ms. Hayes tried to fight Ms. Phillips, putting his hands up to stop her and telling her that she was "better than that." His interactions with Mr. Ford began only when he heard Mr. Ford using the racial slur, which Mr. Ford used not against him but against a Black man that Mr. Ford saw interacting with Mr. Ford's own ex-girlfriend, who was also present at the bar.

The defense contended that, while the fracas involving Mr. Ford continued, Mr. Black went to his car to leave for the evening. Driving through the parking lot, he was met by Mr. Lee. Mr. Lee, for his part, had snorted a quantity of cocaine minutes before (shown on the video and found in his toxicology report), which may have made him aggressive and

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hypervigilant. When Mr. Black stopped his car, Mr. Lee aggressively approached, yelling at him: "What the fuck?" He quickly went to the driver's side window. He had something in his hands, possibly a handgun, and raised his hands toward the driver. Mr. Black, scared and acting in self-defense, fired one shot at him. Alarmed at what had happened, and acting unwisely and in a panic, he left the scene and did not take immediate responsibility. The defense contended that, although no gun of Mr. Lee's was found on the scene next to his body, it could have been collected by one of Mr. Lee's friends in an effort to shield him from blame.

II. THE STATE'S EVIDENCE AT TRIAL.

A. Testimony of Brian Lee.

Brian Lee testified that he lived in Iowa. He had two sons, including Brandon Thomas Lee, born on March 19, 1990. Vol. 8/356.

B. Testimony of Beth Tremaine.

Beth Tremaine, Brandon Lee's mother, testified that she moved from Iowa to Tennessee, and in 2015 Brandon Lee was laid off from his job and moved to Knoxville. Vol. 9/358-360. He worked as a machinist and also had a stump grinding business. Vol. 9/361-362.

Ms. Tremaine testified that Brandon Lee's truck had a remote start, allowing the engine to be started with the push of a button the remote. Vol. 9/369. It worked up to one hundred feet, and activated the lights when the button was pushed. Vol. 9/371.

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After his death, she gathered the belongings from his house. These included three guns: a shotgun and rifle in his closet and a FM-45 on his nightstand. Vol. 9/373. The latter was sometimes kept in his truck. Vol. 9/375.

C. 9-1-1 Call.

The State introduced, via stipulation, a copy of the 9-1-1 call made at 2:20:58 a.m. reporting a gunshot at Billiards and Brews. Vol. 9/378-379; *Exhibit 4*.

D. Testimony of Neil Tremaine.

Brandon Lee's stepfather, Neil Tremaine, testified that he helped empty out the contents of Mr. Lee's home after he died. This included a gun found on the nightstand. It was fully loaded. The case for the gun had places for two magazines, although only one was inside the gun. Vol. 9/382-386.

E. Testimony of Thomas Thurman.

1. Initial response.

Knoxville Police Department Investigator Thomas Thurman testified that he responded to the scene of the shooting at Billiards and Brews. When he arrived, he learned that the shooter was no longer at the scene. He did not develop the name of a suspect at the scene that night. Vol. 9/388-397. He said that he interviewed Clark Longmire, Chandler Jackson, and Mallory Hayes at the scene. Vol. 9/397. He did not locate Taylor Hodge or Kelsey Murrell at that time. Vol. 9/397.

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Investigator Thurman testified that he did not recover any weapons from the scene. Vol. 11/544.

2. Security videos.

He obtained external security videos from two adjacent businesses, and then later internal video from Billiards and Brews. Vol. 9/397, 403-404.

3. Questioning of Taylor Hodge.

He developed information regarding a silver Ford Fusion. Vol. 9/401-402. Reviewing video, he determined that it had damage to the bottom passenger's side bumper area. Vol. 9/402. He then determined that Taylor Hodge had a 2010 silver Ford Fusion with bumper damage. Vol. 9/414, 418.

On January 5, 2021, he went to Pennsylvania to interview Taylor Hodge. Vol. 9/420. Mr. Hodge went voluntarily to the local police department and gave a statement. Vol. 9/422-423. As a result of that statement, Investigator Thurman obtained an "arrest warrant for Landon Hank Black for first-degree murder." Vol. 9/423. While he was on his way back, Mr. Black shut off his phone. Vol. 9/426.

4. Other investigative efforts.

Investigator Thurman said that had not been able to speak with Jeffrey Alan Ford, referred to as "man bun," who had been involved in the altercation with the defendant inside the bar.[3] Vol. 10/444-445. He

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[3] Confusingly, the State indicated in opening statement that it would refer to him only as "man bun," because it was not sure of his name, Vol.

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said he tried to reach him, including having a conversation with his mother, and failed to do so. Vol. 10/448-449.

He testified that, in 2020, Mr. Black was staying in Los Angeles, but had come to Knoxville for the holidays. Vol. 10/449-450.

5. Publication of security videos.

The State introduced, through Investigator Thurman, three DVDs containing security videos of the night in question. Vol. 10/491; *Exhibits 35, 36, 37*. Portions of those were published to the jury, with Investigator Thurman providing editorial explanation. Vol. 10/505-507. He testified that he had watched the Billiards and Brews videos "a lot of times." Vol. 9/405-406.

He described Mr. Lee and Ms. Murrell going to the bar area. Vol. 10/509. There was "socializing" and "intimate contact" between Mr. Lee and Ms. Murrell. Vol. 10/510. Investigator Thurman then switched to focusing on Mr. Black, Mr. Hodge, and Ms. Phillips. Vol. 10/512. At one point, he said, that it "appears Ms. Murrell makes a gesture towards Mr. Hodge to the victim, Mr. Lee." Vol. 10/513. Mr. Lee turned his head and "look[ed] over that way." Vol. 10/513-514.

Later on, Mr. Lee and Mr. Hodge were "back to back." Vol. 10/515. Mr. Black then stood up and moved adjacent to Mr. Hodge, near Mr. Lee and Ms. Murrell. Investigator Thurman said that he then "appears to be

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7/247, and did so throughout trial. The evidence actually established, however, that both investigators for the State and the witnesses knew that his name was Alan Ford.

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looking directly at the victim, Mr. Lee, and Ms. Murrell." He "continu[ed] to look at Mr. Lee and Ms. Murrell." Vol. 10/516. At that point, Kaitlyn Murrell "comes in and tries to get ahold" of her sister, and Mr. Lee moved away to the dartboard. He explained: "As that's happening, Mr. Black, you know, advances towards Ms. Murrell there." He said that then Mr. Black and Mr. Hodge had a face-to-face conversation. Vol. 10/516. Ms. Murrell then "approaches towards Mr. Black and Mr. Hodge," and there was "physical contact between Mr. Black and Ms. Murrell." Vol. 10/517.

At that point, "Mr. Man Bun" "appears to take notice of what's going on," and moved in and "close[d] the distance." The two men who were with him got in Mr. Black's face: "face to face and physical contact." Vol. 10/517. The bartender then "I guess, sees what's going on and moves out to get into the mix there." He went to Mr. Ford. At that point, Mr. Black left Mr. Hodge. Mr. Hodge and Ms. Phillips were looking towards the entrance. Mr. Black made "kind of a flanking motion," and moved around the crowd. Vol. 10/518. He went out the emergency door. Vol. 10/518. Mr. Lee then went to the bar area to join Ms. Murrell. Vol. 10/520. Mr. Hodge then started moving towards the exit, and knocked over a chair. Vol. 10/521. Ms. Murrell was pulled towards the exit by her sister. Vol. 10/521.

Switching to another camera, and going back in time, Investigator Thurman described where the "dispute starts" between Mr. Ford and Mr. Black. There was a "physical skirmish" between them. Mr. Black then

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went out the exit, with Mr. Hodge looking to see where he was going. Vol. 10/522.

From exterior video, Investigator Thurman described Mr. Ford coming out into the parking lot. Then Mr. Lee came out, as well as Mr. Jackson, Ms. Hayes, and Mr. Longmire. Vol. 10/526. The video showed a side door opening, and Mr. Black emerged. Vol. 10/527.

Investigator Thurman said that he saw someone he believed to be Mr. Lee stop, turn around, and go back towards Mr. Ford's group. Vol. 10/529.

As to a he video showing Mr. Lee with something in his hands, Investigator Thurman testified that he had analyzed this video, along with another video, to see that the "lighting on the vehicles change[s]" at that time, suggesting that this was when the truck's key fob had been pushed to turn on the truck. Vol. 10/531.

Investigator Thurman testified that Mr. Black's car was "moving quickly" when compared to other vehicles. He suggested that, when it stopped, there was "heavy brake pressure" applied, causing the vehicle to "shift and change in its suspension." Vol. 10/534. He described the moments around the shooting:

> You can see the taillights are illuminating the area at the rear of the vehicle. And I believe Mr. Lee was out in the front of the vehicle, then moved to the side of the vehicle. There is some movement there about his upper body with his arms and so forth. And very quickly, upon him stepping to the door there, you see the -- what I believe to be a muzzle flash right there in the -- about the driver's ar- -- compartment, steering wheel area.

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Vol. 10/535. He contended that, at the time of the muzzle flash, it "appears to me that his arms are down by his side." Vol. 10/535-536.

The car then drove away, and went past Mr. Ford and Justice Hall, who had just shoved Mr. Ford. Vol. 10/536. The car stopped next to Mr. Hodge very briefly and then left. Vol. 10/537.

6. Efforts to locate Mr. Black.

Investigator Thurman testified that he and other officers went to Mr. Black's family's house in East Knox County. Mr. Black's mother and sister were there, and his father came later. Vol. 11/546. He informed them that there was a warrant for Mr. Black and that he should turn himself in peacefully. Vol. 11/547. Mr. Black was eventually taken into custody on January 28 in California. Vol. 11/547-548.

7. Mr. Lee's gun.

Mr. Lee's truck was taken to the impound lot, and his keys were recovered in the parking lot. Vol. 11/548. The truck was inventoried, and a handgun magazine for a .45 caliber gun was found in the truck. Vol. 11/549. Investigator Thurman testified that the gun associated with that magazine was found in Mr. Black's home on his side table. Vol. 11/550.

8. Cross-examination.

On cross-examination, Investigator Thurman admitted he was confused about who he had interviewed at the scene versus having interviewed later. Vol. 11/580. He was cross-examined about inaccuracies in his applications for a search warrant. Vol. 11/605.

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Investigator Thurman testified that his efforts to contact Alan Ford consisted of calling his mother twice. Vol. 11/594.

Investigator Thurman agreed that there was no point in the video that showed Mr. Black interacting with Mr. Lee. Vol. 11/637. He agreed that one portion of the video showed Mr. Lee snorting a substance out of a little bag with a key. Vol. 11/642.

Investigator Thurman was shown *Exhibit 103*, and testified that there was an object in Mr. Lee's hand. Vol. 11/643; Vol. 11/654-654 (referring to it as an "artifact"). He said he could not say whether it was a gun or not. Vol. 11/644.

Exhibit 103.

F. Testimony of Chandler Jackson.

Chandler Jackson testified that he was good friends with Brandon Lee, based on their mutual interests including motorcycles. They

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socialized together and had been roommates for six months starting in April 2020. They had another friend, Clark Longmire, they frequently hung out with, along with Mr. Jackson's girlfriend, Mallory Hayes. Vol. 12/677-683.

On the night of the incident, Mr. Lee drove the truck. He kept a gun in his truck for self-defense when he went to work but they knew "not to have a gun with you while you're going out drinking." Otherwise he would keep it in his house. Mr. Lee did not typically carry a knife. Vol. 12/683-687. Mr. Lee would sometimes use marijuana or powder cocaine. Mr. Jackson and Mr. Lee both used powder cocaine on the night that Mr. Lee died. Vol. 12/688.

On that night, the four of them went to Billiards and Brews as it was the "only place that was open." Vol. 12/689. It was very cold, and there was snow on the ground. Vol. 12/690.

Mr. Jackson testified that he knew Kelsey Murrell. He did not know Mr. Black or Mr. Hodge. Vol. 12/692. On that night, Ms. Murrell was hanging around his group, flirting. He saw her with Mr. Lee, "almost hanging over each other." After last call, Mr. Jackson and Ms. Hayes went out the door. Mr. Lee was close behind them. Mr. Lee started his truck with his remote start. Mr. Longmire was with Mr. Lee. Vol. 12/694. The truck was about 100 feet away from the exit, parked between two utility trucks. Vol. 12/695. Mr. Jackson agreed that he was "intoxicated, but more than coherent," at the time he left the bar. Vol. 12/697.

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He headed for the truck and had opened the door for Ms. Hayes, when he heard a noise. He did not think that it was a gunshot. But then a car went by, he saw Mr. Lee on the ground, and Mr. Longmire "was screaming that it was Brandon." Vol. 12/698. They ran over to him. Mr. Jackson was in disbelief. Mr. Lee was flat on his back with his feet and arms out, barely breathing. He said: "I can't believe this is happening." Mr. Jackson called 9-1-1, as did someone else. Vol. 12/698-700.

Mr. Jackson was probably the second person to Mr. Lee's body. Vol. 12/701. There were no knives, guns, or other weapons on the ground near Mr. Lee. Vol. 12/702. He did not see anyone remove any weapons from the scene. Vol. 12/702.

On cross-examination, Mr. Jackson agreed that, when he spoke to Investigator Thurman, he told him that Mr. Lee "usually kept" his gun in his truck. Vol. 12/732. He agreed that he told Investigator Thurman that he thought Mr. Lee did have his gun with him that evening. Vol. 12/736-737.

G. Testimony of Clark Longmire.

Clark Longmire testified that he was good friends with Chandler Jackson and Brandon Lee. Vol. 12/741-748. He said that Mr. Lee had a concealed carry permit. Mr. Lee smoked marijuana and would take cocaine. Vol. 12/750-751. By the end of the night, Mr. Longmire was "intoxicated," having been drinking for many hours. He did not know Mr. Hodge or Mr. Black. Vol. 12/751-753.

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Mr. Longmire testified that a friend named Blake Norman got "into an argument with somebody" in the bar. Mr. Longmire tried to get him away to defuse that situation. He did not know the cause of the argument, but was trying to keep Mr. Norman from getting in trouble. Vol. 12/756-757.

After last call, Mr. Longmire and Mr. Lee walked out together towards the truck. He did not remember any words being exchanged between Mr. Lee or anyone else in the parking lot. He then testified that:

> We are walking through the parking lot, a car approaches us quickly, almost hits Brandon and –
>
> …
>
> He says, "Dude, what the fuck?" and doesn't -- he doesn't really approach the vehicle. He just kind of throws his hands up, "Dude, what the fuck?" 'cause he almost hit him.

Vol. 12/757-760. Then "he gets shot," by the "person driving the car." Vol. 12/760. The shot came through the driver's window. Mr. Lee was standing "beside the driver's door, kind of." Vol. 12/761. It was a black Glock-style gun with an extended magazine. He was not sure if the gun came out of the car, but it was at window height. There was one shot. Vol. 12/760-762. Mr. Lee had nothing in his hands at the time he spoke to the driver. Vol. 12/762.

Mr. Lee fell to the ground. Mr. Longmire tried to help him. He did not see any knives or guns or other weapons around the body. He did not ever hear any discussion about getting rid of a weapon. He did CPR on Mr. Lee, who said: "Is this really happening?" Mr. Norman also appeared

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and gave chest compressions. They kept doing this until the ambulance came. Mr. Longmire called 9-1-1. Vol. 12/762-766.

On cross-examination, Mr. Longmire testified that Mr. Lee raised both of his hands, holding them both out to the side, when speaking to the driver of the car. Vol. 12/755. The shot was then fired immediately. Vol. 12/766. The driver of the car did not say anything. Vol. 12/776.

H. Testimony of Mallory Hayes.

Mallory Hayes testified that Chandler Jackson was her boyfriend. She also knew Mr. Longmire and Mr. Lee. They all hung out together. Neither Mr. Longmire nor Mr. Lee had a girlfriend. Vol. 13/784-789.

She testified that Mr. Lee was "normal, calm, happy" that night. Vol. 13/789-792. At the bar, they ran into a woman named Kelsey Murrell. Vol. 13/794. Ms. Hayes was a "three out of ten" that night in terms of intoxication. Vol. 13/796.

She testified, at the end of the evening, that as she and Mr. Jackson were going out the front door, "there was an altercation in the middle of the bar." Vol. 13/797. There was "yelling," "a commotion and a group of people together." She could not see anyone involved that she knew. Vol. 13/797. They left, with Mr. Lee and Mr. Longmire behind them, to go home together. Vol. 13/798. They were walking hurriedly towards Mr. Lee's truck, which was backed in and facing them. Vol. 13/798-800. Mr. Lee used his truck's remote start feature. Vol. 13/800.

As she started to get in the back door of the truck, and Mr. Jackson was outside the truck, they heard "something." She turned around and

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saw a car driving away. Mr. Lee was on the ground and Mr. Longmire was next to him. Vol. 13/800-801. They ran over. Mr. Longmire said that Mr. Lee had been shot. Mr. Lee was breathing, but she did not hear him say anything. She did not see any weapon on the ground near him, nor did she hear any discussion about weapons. No one mentioned removing a weapon. Vol. 13/802-803.

I. Testimony of Kelsey Murrell.

Kelsey Murrell ["Ms. Murrell"] testified that, six years previously, she began dating Mr. Hodge. They dated for five years, and eventually lived together. Mr. Hodge got a job in Pennsylvania, and she moved to Pennsylvania with him in January 2020. She characterized their relationship as "very mentally, physically and emotionally abusive." Vol. 13/806-812.

In July 2020, Ms. Murrell's father died in a motorcycle accident, and she came back to Knoxville to deal with that situation. While she was gone, Mr. Hodge cheated on her, and the relationship ended around Halloween. It did not end on very good terms. Ms. Murrell moved permanently back to Knoxville. She then did not see Mr. Hodge between Halloween and Christmas, nor did she speak to him. Vol. 13/812-815. She knew Mr. Black, who was Mr. Hodge's cousin. She had seen him a couple of times. Vol. 13/815-816.

On December 27, she had been bar-hopping with a group of friends. At Billiards and Brews, she became interested in Mr. Lee. She said he was a "gentleman," and reminded her of her father. They talked about

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riding motorcycles. Vol. 13/816-819. She realized that Mr. Hodge was also at the bar. This was the first time she had seen him in several months. She was upset, sad, and a "little mad." She and Mr. Lee were openly affectionate. Vol. 13/819-821. Mr. Hodge's date, Carrie Phillips, was a "sore subject" with her as Mr. Hodge had cheated with Ms. Phillips during their relationship. Vol. 13/821-822.

Ms. Murrell pointed out Mr. Hodge to Mr. Lee, after he had asked why she was upset. He told her not to worry about it and to relax. Later, her attention returned to them. She explained that she "became aggressive" and was "angry." She "was definitely having words" with Mr. Hodge and Ms. Phillips. Vol. 13/822-823. She was heavily intoxicated at that point. Vol. 13/823. She did not remember much of that night but she did remember that she "tried to fight Carrie and Taylor, both, and that Hank stopped me and told me that I was better than that and that I should not do that and I needed to leave." Vol. 13/824. Her sister dragged her out of the bar. Vol. 13/824. She learned the next day that Mr. Lee had died. Vol. 13/828.

That next day, she received a text message from Mr. Hodge. He asserted that she was "pathetic," and that the "shit you pulled got someone killed last night." Vol. 13/830. She responded that he was wrong, as the shooting had "nothing to do with what happened." Vol. 13/830; *Exhibit 109, Exhibit 110*.

On cross-examination, she indicated that Mr. Lee was not in the area when she became aggressive with Mr. Hodge and Ms. Phillips. Vol.

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13/837-838. She agreed that, on the video, she pushed Mr. Black. Vol. 13/838. She agreed that he was not being violent with her, but merely "trying to restrain me from actually fighting." Vol. 13/839. She was not aware of any interaction between Mr. Black and Mr. Lee. Vol. 13/839-840.

J. Testimony of Kaitlyn Murrell.

Kaitlyn Murrell ["Kaitlyn Murrell"] testified that she was Kelsey Murrell's younger sister. She went out with her sister that evening in order to be the designated driver. That night, she met Mr. Lee for the first time, and found him to be very respectful and gentlemanly. She saw him and Kelsey being affectionate towards each other. She was aware that Kelsey got into a verbal altercation with Mr. Hodge and Ms. Phillips at the end of the night. Mr. Lee was there initially but then went back to his area. Kaitlyn Murrell intervened to ensure that there was no fight, as did Mr. Black. She saw Mr. Black put his hands on Kelsey Murrell, which she felt was unnecessary. She testified: "I don't think that anyone necessarily needed to touch her, but that's just my personal opinion." She told Mr. Black (along with others) not to touch her sister, and he did not do so any more. Vol. 13/843-849.

She and her sister went out into the parking lot. Her sister was hysterical, and laid down, crying. They were then arguing about who was going to drive when they heard a gunshot. They got in their car and left. Vol. 13/849-850.

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K. Testimony of Robert Blake Norman.

Blake Norman testified that he was at Billiards and Brews on December 27. He said that he was aware of a fight inside the bar, which occurred after "somebody had said the N word." This was the big man with a hair bun named Alan. Alan had yelled this slur at one of Mr. Norman's friends, who is African-American, named Kelvin. This altercation then went outside and there was a fight in the parking lot. When they moved outside, Mr. Norman learned that Mr. Lee had been shot. Vol. 13/855-863; Vol. 13/870.

Mr. Norman assisted with CPR on Mr. Lee. He then went to tell his friends that Mr. Lee was dying, and Alan Ford grabbed him by the hair and pulled him into their altercation. Vol. 864. When he returned, an officer was present. Vol. 13/865. He testified that he did not see any weapons on the ground such as knives or guns. Vol. 13/865.

L. Testimony of Justice Hall.

Justice Hall testified that she was friends with Mr. Black. He was not her boyfriend and they did not date but they had had "overnight relations" in the past. She also knew Carrie Phillips and Kelsey Murrell. On that night at the bar, she saw Ms. Murrell "flirting with other people" and "walking around to make sure that he [Mr. Hodge] saw her." She did not know or interact with Mr. Lee, although she saw him being affectionate with Ms. Murrell. Mr. Hodge and Mr. Black were "brushing it off." Vol. 13/874-878.

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On that night, Ms. Hall had kissed Mr. Black in the bar. When Ms. Murrell "started to ramp up the things she was saying and doing," she saw Mr. Black "like, push her back," but she did not hear anything he said. An altercation broke out shortly after that, involving Mr. Ford, although she did not know who it was with. Vol. 13/880-883.

She was asked about viewing the video in this case. She said she had watched it with defense counsel. Vol. 13/883. Over objection, the prosecutor asked her when she was contacted by defense counsel. Vol. 13/883. She explained that, a few months before, she had been called by defense counsel, went into her office, and "stepped through the video," watching all of the videos. Vol. 13/884.

She testified that, after the altercation, she yelled at Mr. Ford in defense of Mr. Black. She explained: "I don't remember what was said to him. I just didn't like how Alan was approaching him." Vol. 13/885. She explained that Mr. Black did not "say anything to him." Vol. 13/886.

She went outside but did not hear the gunshot. She physically confronted and pushed Mr. Ford. Vol. 13/887. She then heard someone yell that someone had been shot. She went to see what had happened. She did not see any guns or weapons. Vol. 13/888.

Later that night, she called Mr. Black to make sure he was okay. He said he was fine. She told him that people had been shot, and he did not give any response. Vol. 13/889. She called him again later, to hook up, but did not meet with him. They did not talk about what happened in the parking lot. Vol. 13/890. Days later, but prior to New Year's, they

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met up at a hotel in the Strawberry Plains area. Vol. 13/891. She was asked:

Q: Okay. And where -- what did you do at the hotel there?

A: We had sex.

Vol. 13/892. An objection was overruled. She explained that they stayed the night together. Vol. 13/892.

The night after she stayed with Mr. Black she was contacted by Investigator Thurman. She said that she did not then relay information to Mr. Black that Investigator Thurman was asking questions about him. After she learned that Mr. Black was a person of interest in the investigation, she did not communicate further with him prior to his arrest. Vol. 13/892-896.

On cross-examination, Ms. Hall testified that she spent the majority of her time that evening talking to Mr. Black. He was "calm, like he usually is." Vol. 14/901. She did not see Mr. Black interact with Mr. Lee. While she did see Ms. Murrell and Mr. Lee "being flirty," she did not discuss that with Mr. Black. Vol. 14/902. Mr. Black was not intoxicated nor did she see him doing any cocaine. Vol. 14/904.

She testified that Caitlyn Elam (Mr. Ford's ex-girlfriend) was "talking to" or flirting with Kelvin Jackson. Vol. 14/908-910. She explained that she had defended Mr. Black because she "didn't like the way [Alan Ford] was talking to him." Vol. 14/912. She explained that, in the parking lot, she had an altercation with Mr. Ford, because he "called

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[her] a bitch." Vol. 14/917. That had nothing to do with Mr. Black. Vol. 14/917.

M.Testimony of Carrie Phillips.

Carrie Phillips testified that she had known Taylor Hodge for seven-and-a-half years. They had a friendship and a sexual relationship. She was not aware that he had a relationship with Kelsey Murrell. She first learned that Ms. Murrell was Mr. Hodge's ex-girlfriend during that night, "because of her actions towards me." She met with defense counsel prior to the prosecutor asking her to meet with him. She was asked about whether, when she talked to the prosecutor, she told him that she did not have to answer his questions about who she had met with previously. She said that her mother told her that she could decline to answer his questions. Vol. 14/918-925.

She met Mr. Black for the first time that evening. He was "calm, cool, collec[ted]." Vol. 14/926. Mr. Hodge rode with her in her car, and Mr. Black drove Mr. Hodge's car. During the course of the night, Ms. Murrell became "verbally aggressive towards" her. She was "belligerent," "hostile," and was taunting her. Vol. 14/935. Ms. Phillips eventually decided "I'm going to have to fight this girl, 'cause she keeps coming after me." Vol. 14/937-938. At some point, she became aware of a second skirmish, although she was not sure who was involved. Vol. 14/939. She was not aware of Mr. Lee and did not hear a gunshot. Vol. 14/941-942.

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She went home with Mr. Hodge as planned. The next day she gave him a ride to Knoxville. Vol. 14/943. She dropped him off at a Wendy's where Mr. Black was. Vol. 14/944.

On cross-examination, she testified that she had no communications with Mr. Black since that night, and was no longer dating Mr. Hodge. Vol. 14/963.

N. Testimony of Taylor Hodge.

Taylor Hodge testified that Mr. Black is his first cousin. Vol. 15/969-970. He agreed that he had met with defense counsel in the case, and gone through videotapes with them. Vol. 13/971.

Mr. Hodge testified that Mr. Black was like a brother growing up. Vol. 15/976. They continued to be close. Vol. 15/976-979. Mr. Hodge came to Tennessee from Pennsylvania on December 20. He was driving a 2010 silver Ford Fusion. It has a damaged right rear bumper. Vol. 15/980.

He had previously been in an on again, off again relationship with Kelsey Murrell. Vol. 15/980-981. There was an ugly breakup around Halloween of 2020. They had no communication after that. Vol. 15/982.

He went in the car with Ms. Phillips to Billiards and Brews, while Mr. Black drove Mr. Hodge's car. Once inside, he saw Ms. Murrell. They initially had a friendly greeting, but later she was "saying some profanity" to Ms. Phillips and seemed to be trying to antagonize him by "being all over other people," including Mr. Lee. At one point, he ended up back-to-back with Mr. Lee and Ms. Murrell. Mr. Black got up to

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defuse the situation. Vol. 15/991-997. Mr. Hodge did not see exactly what Mr. Black did, because he was watching Ms. Phillips. Vol. 15/998. Ms. Murrell tried to throw a punch at Ms. Phillips, and was taken outside by the bouncer. Vol. 15/998.

There was then a separate fight. Mr. Hodge remembered the "big dude with the man bun" yelling "the N word." He said he did not know whom it was directed toward. He said: "It wasn't at my cousin. There was a group of black people in there." Vol. 15/998-1000. He testified that he did not recall Mr. Black going after that man. Vol. 15/1003. He testified that he did not recall trying to find Mr. Black, knocking over a barstool, or seeing Mr. Black go out the exit. Vol. 15/1005.

Mr. Hodge went outside when he heard a gunshot. He saw a big fight, and somebody was "body slammed." He was worried about the whereabouts of his cousin because of this earlier altercation. He saw him driving around the parking lot, and had told investigators that he was "flying." Vol. 15/1006-1013. Mr. Black stopped and told him to get in the car. That surprised him as he was planning to go home with Ms. Phillips. Vol. 15/1013-1014. The driver's window was down, and Mr. Black seemed "very distraught" and "very scared." After he left, Mr. Hodge called Mr. Black and had a short conversation. He told him that someone had been shot. Mr. Black acted "dumbfounded" or "clueless." Vol. 15/1016.

The next day, he learned that someone had died in the shooting. He called Mr. Black to see if he was okay and to plan to get his car back. When they met, they talked about the death. Mr. Black was "very

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distraught, scared, nervous." He told Mr. Hodge that "he was the one that did it," because "he felt threatened." He told Mr. Hodge that he needed to paint the car and remove the stickers and get out of Knoxville. Vol. 15/1016-1020. Mr. Hodge duly left Knoxville before he had planned to. Vol. 15/1021.

Mr. Black told Mr. Hodge that it was the "dude in the bar with all the tattoos with Kelsey," meaning Mr. Lee. Vol. 15/1021. He explained that he "felt threatened" when Mr. Lee "came at the car." Mr. Hodge thought Mr. Black said that Mr. Lee had a knife, although he no longer remembered exactly. Vol. 15/1022. Mr. Hodge explained that he had told an investigator, regarding this conversation, that "he could have been bullshitting me." Vol. 15/1024.

Mr. Hodge was asked about the text messages he sent to Ms. Murrell blaming her. He said that it was "just an immediate response" and that he regretted saying that. He explained that he attributed it to her because she started everything by wanting to fight Ms. Phillips. Vol. 15/1025-1027.

Mr. Hodge went to North Carolina, to meet with his business partner. He agreed that he knew that Mr. Black had killed someone but did not tell authorities. He explained: "It's my cousin. I was just scared." Vol. 15/1028-1032.

On cross-examination, Mr. Hodge testified that he felt he had been misled by the investigators when he had been interviewed in Pennsylvania. He testified that he answered their questions for over two

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hours, spending "almost the entire day" with them. He said they left handcuffs on him for an hour and a half. He clarified that he did not remember whether Mr. Black said that he thought he saw a knife; he remembered only that "he said he felt threatened and he came at him." Vol. 16/1034-1043.

Mr. Hodge testified that he served in Afghanistan and spent a year in an inpatient program for PTSD, which can lead him to "shut down a bit" when confronted about killing. Vol. 16/1044-1045.

Mr. Black was in a good mood that night. Vol. 16/1051-1052. Neither one was bothered by Ms. Murrell. Vol. 16/1051-1052. Once the altercation between the women began, Mr. Hodge tried to defuse the situation and Mr. Black put his body physically between them. Vol. 16/1053. He clarified that, when Mr. Ford had used the racial slur, Mr. Black had confronted him and told him to stop. Vol. 16/1055. When Mr. Black argued with Mr. Ford, Mr. Hodge told him that it was not "worth it," as they were there to "have a good time." Vol. 16/1057.

O. Testimony of Jarrett Norman.

Knoxville Police Department patrol officer Jarrett Norman responded to the scene, and his body camera was introduced. Vol. 17/1095-1098; *Exhibit 114*. He testified that he did not see or collect any weapons at the scene. Vol. 17/1103.

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P. Testimony of Firearms Expert.

Sergeant Brian Dalton described and identified a "muzzle flash" on the video on the left side driver's area of the vehicle. Vol. 17/1108-1123; *Exhibits 115 – 118*.

Q. Testimony of Medical Examiner.

Dr. Mileusnic-Polchan testified as the chief medical examiner for Knox County. She conducted the autopsy of Mr. Lee. His toxicology report indicated a blood-alcohol level of 0.06, as well as cocaine and cocaine metabolites, marijuana, and an antidepressant. The injury to Mr. Lee was a gunshot wound to the chest, which entered the left chest, perforated the heart, lacerated the lung, and exited the back near the spine. Vol. 17/1135-1147. That gunshot was the cause of death. Vol. 17/1149. There was no evidence of "close-range firing," due to the absence of any gunshot deposit on the clothing. Vol. 17/1155. That could mean it was over three feet, depending on the gun. Vol. 17/1158. It could also be as close as two feet. Vol. 17/1161.

R. Testimony of T-Mobile Representative.

Michael Bosillo, a representative of T-Mobile, introduced records showing that the last successful incoming or outgoing call to Mr. Black's cell phone was on January 6. Vol. 17/1163-1180.

S. Testimony of Knox County Officer.

Knox County Sheriff's Officer Phillip Whitaker testified that attempted to serve a warrant on Mr. Black on January 6 at his mother's condo. He was not there. Vol. 14/1183-1188.

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T. Testimony of Dylan Williams.

Knoxville Police Department investigator Dylan Williams testified that he helped to obtain a search warrant for phone records of Mr. Hodge and Mr. Black, in an effort to find Mr. Black based on his phone location. He was involved in a meeting on January 6, 2021, at East Town Mall in the parking lot with himself, Sgt. Rodney Patton, Lt. Brian Morrow, Jeff Black (Mr. Black's father), and Chloe Akers (trial counsel for Mr. Black).[4] The purpose of the meeting was to let them know that there was a first-degree murder warrant for Mr. Black, and that he should turn himself in. After that meeting, there were no more pings from Mr. Black's cell phone. The final ping on the phone was on January 6, 2021, and was in Knoxville. Vol. 18/1203-1213.

U. Testimony of Carlos Figueira.

Los Angeles Police Department detective Carlos Figuiera testified that on January 28, 2021, he assisted in arresting Mr. Black in California. Vol. 18/1216-1222.

III. EVIDENCE PRESENTED BY THE DEFENSE.

A. Testimony of Richard Qulia.

Richard Qulia, a retired F.B.I. Special Agent, was called as a defense witness. Vol. 19/1272-1279.

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[4] Mr. Black was represented at trial by two attorneys, Chloe Akers and Don Bosch.

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1. Proffer and ruling.

The court conducted a jury-out proffer. In that proffer, Mr. Qulia testified that he had viewed the video of the shooting several times. He was shown the video with a view of Mr. Lee in the parking lot. He testified that he saw something in Mr. Lee's right hand. Using the software functions, he was able to view the image carefully. He testified:

> [T]hat still right there -- and there's another still when he's closer to the car -- there's an object that appears to be in his hand that is characteristic of a semi-automatic, full-size pistol.

Vol. 19/1280-1281. He indicated that he could not "testify definitely" that it was a full-size, semi-automatic pistol. Vol. 19/1281. He identified a photograph of an FN .45 caliber pistol, and said that it "possess[es] the characteristics" of the video of Mr Lee. Vol. 19/1283.

The court excluded this testimony, saying: "The jury can look at that just as well as he could." Vol. 19/1284.

2. Testimony to the jury.

Mr. Qulia testified that magazine (from Mr. Lee's truck) would hold fifteen bullets, but that there were fourteen in the photograph. Vol. 19/1289.

B. Testimony of Dr. Timothy Allen.

Timothy Allen, an expert psychiatrist, explained the effects of cocaine on the body, including the euphoric high; elevated heart rate and heightened senses; and also impulsive and aggressive behavior. He explained that snorting powder cocaine would get it into the bloodstream

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immediately. He also explained the combined effects of alcohol and cocaine:

> [T]he combination of those two drugs at the same time tend to have a greater effect than you might expect. It's not one plus one equals two, it's one plus one equals three.

Vol. 19/1316. He testified that the effects of cocaine would appear within a minute of snorting cocaine. Vol. 19/1319.

He was shown the video of Mr. Lee ingesting cocaine at Billiards and Brews. He indicated that there was a "pretty substantial amount" of cocaine used. Vol. 19/1324. He described the potential effect of this: "[Y]ou're hyperaware of everything, but you're not able to process it all, like, calmly and rationally." Vol. 19/1327. He looked at a video of Mr. Lee in the parking lot. He said that Mr. Lee was "walking in a very aggressive stance." Vol. 19/1331. He also described another video of Mr. Lee as being "aggressive" and acting "in a very determined manner, hiking out of there, again, seeming very intent and intense." Vol. 19/1333. Finally, Dr. Allen testified that, in the video showing Mr. Lee approaching Mr. Black's car:

> So he's walking, the car stops, he stops, looks at the car, walks pretty aggressively towards the front -- or to the driver's side. He's not, again, meandering. It was intense. It looks aggressive. It looks like purposeful, fast movement, consistent with everything we've talked about.

Vol. 19/1335. He finally testified that, in his expert opinion, Mr. Lee was, more likely than not, suffering from the "known side effect of cocaethylene, increased rage or aggression at the time of this incident."

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Vol. 19/1337. On cross-examination, he agreed that aggression was a "lower side effect" of cocaine than hypervigilance and euphoria. Vol. 19/1348-1349. He agreed that he was being compensated for his testimony. Vol. 19/1349. He agreed that he had not talked to any of the people present, including Mr. Black. Vol. 19/1352-1353.

C. Stipulation.

The parties stipulated that, if called to testify, Lt. Darrell Griffin of the Knoxville Police Department would say, based on his personal body camera, that when Investigator Thurman arrived, Chandler Jackson, Clark Longmire, and Mallory Hayes were no longer present at the scene. Vol. 19/1365.[5]

IV. CLOSING ARGUMENTS.

A. Initial Closing Argument for the State.[6]

The prosecutor noted Investigator Thurman's "vigilance" in "working hard and finding" witnesses, contending that if there had been no video, the death "would be an unsolved crime, because not one person came forward." Vol. 20/1391. He noted that Mr. Hodge and Mr. Black left, saying: "Why would somebody … flee from a crime scene? … Because they're guilty." Vol. 20/1391.

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[5] This conflicted with Investigator Thurman's initial testimony that he had spoken to them at the scene.

[6] Certain improper arguments are set forth in greater detail below.

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The prosecutor repeated his theory of the case that Mr. Black had been "humiliated by man bun, Jeffrey Alan Ford," and that he had circled around for a confrontation. He contended that Mr. Ford had made a motion, "shooting the gun at him" in the bar, and that Mr. Black had responded:

> I'm Landon Black. I got a gun in my car. Or did he have it in his pocket? Either way, it's either in the car or it's in his pocket.

Vol. 20/1393. He continued that Mr. Black's decision had then changed from "I'm going to get you now" to "I'm going to do a drive-by like a coward…. I'm going to do a drive-by." Vol. 20/1393. He contended, Mr. Black pulled his car around, the firearm must have been "at the ready," meaning: "Ready for that drive-by." Vol. 20/1394.

The prosecutor testified that, because Mr. Black later told Mr. Hodge that it had been "the tatted dude," that Mr. Black "knew exactly who it was." He continued: "[B]ecause he was primed and ready. Because he'd been humiliated and insulted." Vol. 20/1394.

After discussing premeditation, the prosecutor turned to self-defense. He argued that Mr. Lee raised his arm and then lowered both arms. Vol. 20/1398. He contended that there was no need for self-defense. He also emphasized that the court was going to instruct the jury that Mr. Black had a duty to retreat. Vol. 20/1399.

B. Closing Arguments for the Defense.

Defense counsel began by contending that: "[A]t the end of the day, [the prosecutor] has never, ever answered the question we said at the

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very beginning. This is a case of why. Why did this happen?" Vol. 20/1402. Counsel agreed that Mr. Black shot Mr. Lee. He argued that Investigator Thurman had jumped to conclusions, without "trying to understand why did this happen." Vol. 20/1402.

Defense counsel then discussed Mr. Lee's gun, which he was known to carry in his truck. He noted that there was a clip of ammunition found in his truck. Vol. 20/1403.

Defense counsel pointed out that, at the start of the case, the prosecutor had indicated that the State did not know who the man with "man bun" was, even though Investigator Thurman knew his name, knew about his mother, and had tried to call him twice. Vol. 20/1405. Showing the video, counsel pointed out Mr. Ford, and his ex-girlfriend, Caitlyn Elam, who was interacting with Kelvin Jackson. Vol. 20/1405. He contended that Mr. Ford was not looking at Mr. Black, but at Mr. Jackson (who was Black), "which makes a heck of a lot more sense":

> [H]e's upset. He's mad. And what's he doing? He's using the most awful insult that he can use to Kelvin Jackson. He's pointing at him. He's making gestures. And he's using the N word. He's not calling Hank the N word. He's pointing at Kelvin Jackson, who's killing and hugging on his girlfriend[,] and screaming the N word.

Vol. 20/1407. Mr. Black got in the middle of it because that was "not right." The bouncers and the crowd then ran Mr. Ford out. Vol. 20/1407. Counsel repeated that Mr. Black had no interaction with Mr. Lee that night, and neither of them were paying "any attention to each other." Vol. 20/1409.

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As last call was being made, people started to leave. Mr. Lee then did some cocaine. That can make people "aggressive" and make them irrational. Vol. 20/1410-1411. Mr. Longmire and Mr. Lee started to leave. On his way out, Mr. Lee turned back in an "aggressive" manner, getting "right in the fray." Vol. 20/1411.

Mr. Black then came around and stopped "well behind Mr. Lee." Defense counsel continued: "[Mr. Lee] walks right up to the car. He puts hir right hand up and his left hand." Vol. 20/1412. There was then the flash of the muzzle: "Hank Black, in fear for his life, shoots him one time. One time. Not a drive-by, not some shot, shot, shot, shot, shot, like so many of us tragically are familiar with. One time, when Brandon Lee sticks his arm and leans into Hank Black screaming, 'What the fuck?'." Vol. 20/1412.

He discussed the video showing something in Mr. Lee's hand, saying: "It's not a set of keys. It's more ominous and larger than that." Vol. 20/1414. He suggested that Chandler Jackson was "trying to cover for his friend" when he changed his story to say that Mr. Lee did not have a gun. Vol. 20/1414. The gun was later found in the house where Chandler Jackson also lived. Vol. 20/1415.

To explain how the gun could have gotten to the house, defense counsel also noted another car that drove by, with its door open, after Mr. Lee was shot. Chandler Jackson ran up to that car. Counsel suggested that he could have put the gun in the car at that time. Vol. 20/1416. He

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noted that Mr. Jackson had denied doing that, but had also admitted being dishonest to Investigator Thurman. Vol. 20/1416.

Defense counsel said that the State was wrong in claiming that Mr. Black assaulted Ms. Murrell. In fact he was trying to calm her down. Vol. 20/1421-1422. Finally, defense counsel observed that Mr. Black had not fled to Alaska or New York. He had merely gone back to California where he worked. Vol. 20/1426.

C. Rebuttal Argument for the State.

In rebuttal, the prosecutor began by commenting on the defense closing. He stated:

> So that entire argument was prefaced on the understanding that you're going to throw out your common sense. That's what he just sat up here for however long and said, throw out common sense, don't even consider things that you actually see with your own eyes on the video, like the whole thing about him yelling at Jeff -- at some other guy across the cocktail table, when you can see him honing in on the defendant and his two buddies coming in on the defendant. That's common sense. Why -- how, possibly, you could conclude otherwise when you see it with your own eyes. He's asking you to reject your sensibilities.

Vol. 20/1430. He characterized counsel's argument that Mr. Lee had a gun as "wild imagination." Vol. 20/1431. He said that if Mr. Black had acted in self-defense, he would have gone to the police station or called 9-1-1. Vol. 20/1431. The prosecutor said that the video did not suggest that Mr. Lee had a gun hidden in his clothing while in the bar. Vol. 20/1433. He said that counsel's contention that Mr. Ford was yelling about his ex-girlfriend was a "wild imagination." Vol. 20/1434.

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The prosecutor argued that it did not matter that Mr. Black had shot Mr. Lee with only one shot: "And you can see he dropped him like a rock, right through the heart. Didn't need anymore bullets, saving those for man bun." Vol. 20/1438.

The prosecutor contended that the photograph that the defense indicated showed a gun in fact showed "a big carabiner on it and a big old fat Chevy fob." Vol. 20/1439.

The prosecutor discussed Mr. Hodge, claiming that he had been "tricked" by defense counsel about what the video showed, and that he had backtracked on his initial story to Investigator Thurman that Mr. Black had told him that Mr. Lee had a knife. Vol. 20/1441. The prosecutor continued: "[W]hen you were with Investigator Thurman, you used the word knife and that you thought he was bullshitting." Vol. 20/1441.

The prosecutor suggested that the defense was contending that ingestion of cocaine turned Mr. Lee into "the Incredible Hulk." He suggested that the proof did not support that theory. Vol. 20/1442-1443.

V. VERDICT.

The jury found Mr. Black guilty of second-degree murder. Vol. 21/1487.

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ARGUMENT

I. THE STATE WAS ALLOWED TO ATTACK THE INTEGRITY OF DEFENSE COUNSEL THROUGH EVIDENCE AND ARGUMENT.

A. Introduction.

In the give-and-take of the adversarial trial, it is not uncommon for advocates to battle aggressively with their opponents. But even then, there is always a recognition that the trial is about the evidence against the defendant, not about the character, ethics, or diligence of opposing counsel. Here, unusually and with baleful consequences, the State instead deliberately chose to attack defense counsel personally. These attacks fundamentally distorted the trial and may well have had an adverse effect on the jury. They should not be countenanced by this Court.

B. Summary of Relevant Facts.

1. The meeting at the mall.

As part of its theory of the case, the State contended that Mr. Black had learned that a charge had been lodged against him and then sought to flee and hide out in California. In particular, the State contended that officers had met with Mr. Black's father, Jeff Black, and others at East Town Mall in Knoxville, and told him that his son was wanted for first-degree murder. The State contended that, within forty-five minutes of that meeting, Mr. Black powered off his cell phone, thus making it impossible for law enforcement to track his phone. *See* Vol. 7/290-292.

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The implication was that word had traveled from that meeting to Mr. Black, who turned off his phone and then left the area.

That was perhaps a permissible argument reflecting consciousness of guilt on his part. The State took it another step, however, by presenting (over objection) evidence that defense counsel, Chloe Akers, was also at the meeting. It had highlighted her presence in opening statement:

> They arrange to meet with him at the East Town Mall. And Jeff Black arrives with his attorney, Chloe Akers, at the East Town Mall. And they inform him, we have a first-degree murder warrant for his son. He needs to turn himself in, January 6th. Hank Black, then, within 45 minutes -- you're going to see the phone records -- powers off his phone.

Vol. 7/292.[7] It then elicited testimony from Dylan Williams that Chloe Akers was at the meeting with Jeff Black and other officers at noon on January 6. *See* Vol. 18/1198-1203 (objection); Vol. 18/1209.

2. Meeting with witnesses.

The State took great care to question every favorable witness as to whether he or she had met with defense counsel. *See*, *e.g.*, Justice Hall (Vol. 13/883, over objection); Taylor Hodge (Vol. 15/970); Carrie Phillips (Vol. 14/920-924). As to Ms. Phillips, the prosecutor implied that defense counsel had told her that she did not have to talk to the prosecutor

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[7] During trial, defense counsel clarified, in a bench conference, that she was not present at that time as the attorney for either Mr. Black or his father, but rather as a courtesy to a family member of Mr. Black who worked in her office. Vol. 18/1196.

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(although she said instead that her mother had told her that). Vol. 14/925.[8] As to Mr. Hodge, the prosecutor implied directly that defense counsel had somehow managed to plant the defense theory of the case in him. The prosecutor questioned Mr. Hodge:

> Q. And as a matter of fact, you sat down with them and went through videotapes in the case, right?
>
> A. Yes, sir.
>
> Q. And it was then, through that discussions, that you made some determinations about, in your mind, what had happened in the case?
>
> No, sir.

Vol. 15/970.

3. Closing arguments.

The prosecutor then carried this approach into closing argument, which became as much an attack on defense counsel as a summation of the evidence. Mentioning again the fact that defense counsel met with the potential witnesses, the prosecutor accused counsel of manipulating them:

> Police tactic 101, you don't feed information to a witness that they then spit out and pair it back to you. You get information from them about what they know. You're not going to sit down with them, like the defense did with every witness, and show the video and then convince them -- like they did with Taylor Hodge somehow, by showing that phony frame … saying it was a firearm in his hand …. It was his keys.

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[8] The defense offered an objection to this line of questioning by the prosecutor about his discussion with Ms. Phillips. Vol. 14/923-924.

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Vol. 20/1434-1435.[9] Shortly thereafter, the prosecutor repeated this contention:

> Taylor, before he came in here, he had been to the defense attorney's office, reviewed the videotape and found, based on that, that he -- he had been tricked about what the video -- what the video actually showed. And what is it you think that he was shown, the trick? Obviously, the frame of the gun to help his cousin. Because then he comes in here and he tries to back pedal on what he said three different times to Thurman.

Vol. 20/1441.

C. Summary of Applicable Law.

Decisions regarding admission or exclusion of evidence are reviewed for abuse of discretion. *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008). If an abuse of discretion is found, then a defendant is entitled to relief if the error "more probably than not affected the judgment or would result in prejudice to the judicial process." *Id.*

Courts have cautioned prosecutors against attacks not merely on the defendant's guilt but on defense counsel. As one court has written: "[T]he prosecutor may not challenge the integrity and ethical standards of defense counsel unless the prosecutor has certain proof of an offense and the matter is relevant to the case being tried." *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989).

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[9] There was a contemporaneous objection lodged to this argument. The trial court offered nothing beyond an anodyne request: "If we focus on the defense arguments, please." Vol. 20/1434-1435.

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D. Application of Law to Facts.

This issue represents the cumulative effect of the State's repeated efforts to besmirch defense counsel. The State was allowed to introduce, over objection (and with no real factual basis), information that placed defense counsel in the middle of a hypothesized effort to help Mr. Black evade authorities. Even if the meeting at the mall was somehow relevant to Mr. Black's state of mind and his decision to turn off his phone, the fact that defense counsel was present added nothing except serving to suggest that she was herself acting improperly. The defense objected for that very reason to the danger of "prejudice and confusion," saying that the State was making it look "very odd and potentially inappropriate," even though it was not. Vol. 18/1198. The State never articulated any reason as to why the jury needed to know that it was Ms. Akers, and not just an unnamed attorney, who was present at the scene, yet it was determined to introduce that fact and the court allowed it to do so. This was error.

The State then also questioned its own witnesses about the times they met with defense counsel. Again, this kind of testimony is not improper *per se*, but when highlighted so incessantly it has the danger of chilling the effective assistance of counsel. Counsel, of course, has a duty to investigate a case and talk to potential witnesses, and zealous pursuit of that duty should not be used against a defendant. Here, crucially, the State went further and implied two additional, sinister facts (neither with any factual basis): first, that defense counsel had told Ms. Phillips

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not to talk to the District Attorney; and second, that defense counsel had tried to use the video to confuse or influence the testimony of witnesses such as Mr. Hodge. Vol. 14/925; Vol. 15/970. This insinuation that counsel suppressed information and fabricated testimony was grossly improper.

Nor did these insinuations remain subtle. Rather, having raised these suspicions, the prosecutor made them explicit in closing argument. There, he directly accused defense counsel of using a "phony" image and successfully having "trick[ed]" Mr. Hodge into changing his story. Vol. 20/1434-1435; Vol. 20/1441.

All of this went beyond the line of permissibly advocacy. This Court has written: "The prosecution is not permitted to reflect unfavorably upon defense counsel or the trial tactics employed during the course of the trial." *State v. Gann*, 251 S.W.3d 446, 460 (Tenn. Crim. App. 2007) (*citing Watkins v. State*, 140 Tenn. 1, 203 S.W. 344, 346 (1918)). As the Eighth Circuit wrote in a similar case:

> These types of statements are highly improper because they improperly encourage the jury to focus on the conduct and role of [defense] attorney rather than on the evidence of [the defendant's] guilt. Such personal, unsubstantiated attacks on the character and ethics of opposing counsel have no place in the trial of any criminal or civil case.

United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005). Such an attack hurts the defendant as well as his counsel, as accusations of underhanded conduct by counsel "severely damage an accused's opportunity to present his case before the jury." *Bruno v. Rushen*, 721

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F.2d 1193, 1195 (9th Cir. 1983); *Fortune v. State*, 837 S.E.2d 37, 42 (S.C. 2019); *State v. Lindsay*, 326 P.3d 125, 130 (Wash. 2014) ("Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible").

Through the decision of the prosecutor, the case thus became not merely about the evidence against the defendant, but about the honesty and professionalism of defense counsel. This had an impact on the ability of counsel to even present a defense, as the jury may have regarded their questions, and their arguments, with skepticism due to the prosecutor's attacks on the defense counsel working for the defendant. If the State views defense counsel as unethical, perhaps the jury will conclude their words and arguments should be taken with an extra grain of salt. This was error and reversal is required. The evidence in this case was hotly disputed as to whether Mr. Black acted in self-defense, and there was also substantial evidence to conclude that he had been in a state of passion even if he had not acted in self-defense. Consequently, this strategy of impugning defense counsel cannot be deemed harmless.

II. THE STATE'S CLOSING VIOLATED NUMEROUS PROHIBITIONS ON PROPER ARGUMENT.

A. Summary of Applicable Law.

1. Limitations on closing argument.

Noting that the task of the prosecutor is to seek justice and not merely to win, the courts have imposed limitations on what is appropriate

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closing argument. "While the scope and depth of closing argument is generally a matter within the trial court's discretion, the State is not free to do what they wish." *State v. Jones*, 568 S.W.3d 101, 145 (Tenn. 2019). Courts have explained that a prosecutor's comments during closing argument must be "temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Johnson*, 401 S.W.3d 1, 20 (Tenn. 2013).

This Court in *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003), highlighted several areas of improper argument. Among other things, it is improper for the prosecutor to "misstate the evidence or mislead the jury as to the inferences it may draw," to "use arguments calculated to inflame the passions or prejudices of the jury," and to "refer to or argue facts outside the record unless the facts are matters of common public knowledge."

2. Standard of review.

In order to be entitled to relief on appeal based on a claim of improper prosecutorial argument, the defendant must "show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment." *State v. Farmer*, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996); *see State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984) (setting out factors to consider). Unpreserved claims are reviewed for plain error. *State v. Enix*, 653 S.W.3d 692, 701 (Tenn. 2022) (setting out plain error factors).

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Finally, improper prosecutorial argument can violate a defendant's constitutional right to a fair trial. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

B. Application of Law to Facts.

1. Introduction.

There were significant holes in the State's case, including the lack of evidence of any hostility or dispute between Mr. Black and Mr. Lee and the limited, and contested, video evidence of the moments before the shooting. Facing these holes in closing argument, rather than carefully arguing the actual relevant evidence and the reasonable inferences that could be drawn therefrom, the prosecutor instead presented a closing argument that violated virtually all of the guidelines for proper argument. It presented speculative and implausible conjecture as established fact; misstated pieces of evidence; altered the applicable legal standard as to self-defense and the burden of proof; went beyond the actual record; denigrated the defense and defense counsel; and urged the jury to respond out of emotion. In doing so, it went so far beyond the bounds of permissible argument as to require a new trial.

2. Speculation.

Rather than focusing on the evidence properly admitted at trial, the prosecutor produced a string of speculative claims as to what happened. He contended, as the State had done throughout the case, that Mr. Black had been "humiliated" by Mr. Ford. Vol. 20/1393. He later repeated that Mr. Black had been "humiliated and insulted," as he walked to the car.

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Vol. 20/1394. There was no evidence from any percipient witness suggesting that this was true. The prosecutor further suggested that Mr. Ford had mimed shooting a gun at him ("with his hand, the shooting the gun at him"), and that Mr. Black had responded: "Buddy, you shooting a gun at me? I got a gun. I'm Landon Black." Vol. 20/1393. This elaborate interpretation of a muddled video that shows, at most, Mr. Ford briefly pointing vaguely in the direction of Mr. Black (and of dozens of other people) was an elaborate fantasy without a basis in admitted evidence.

In response to this invented finger-gun play, the prosecutor contended, Mr. Black decided: "I'm going to do a drive-by like a coward." Vol. 20/1393. Again, there was no proof whatsoever that Mr. Black decided then (or ever) to engage in a drive-by shooting. Nor was there any proof that Mr. Black used only one bullet for Mr. Lee, as the prosecutor then asserted, because he was "saving those for man bun." Vol. 20/1438.

While a prosecution can urge a jury to draw certain reasonable inferences from the evidence, it cannot (as here) simply invent a version of events on the most tenuous of bases and then present it to the jury as fact. Such arguments will tempt the jury to believe that, because the prosecutor is so certain of these things, there must be other evidence or information known to the prosecutor, and will distract (or confuse) it from the relevant and admitted evidence.

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3. Factual errors.

In his closing, the prosecutor also misstated a few key facts. He criticized Justice Hall for having sex with Mr. Black in a motel after having interviewed with the police and not mentioning to him that they were asking him questions. Vol. 20/1440. The actual evidence was that her sexual encounter with Mr. Black occurred prior to, not after, her being interviewed by police. Vol. 13/892-894. He also contended that Mr. Hodge had told Investigator Thurman that he "thought [Mr. Black] was bullshitting" (meaning lying) in his claim of self-defense, Vol. 20/1441, when Mr. Hodge actually testified only that he was unsure, saying: "I thought he could have been bullshitting me," Vol. 15/1024, a small but significant difference. In a case of this nature, it is important for the State to stick to the actual facts, not to embroider or distort them.

4. Information beyond the record.

In his discussion of the expert testimony of Dr. Allen, the prosecutor contended that none of the expert studies regarding crack cocaine were relevant to this case, as it involved powder cocaine. He then strangely offered his own analogy: "[I]t was a common experience, if you're a kid or not, there's a difference between smoking a cigarette and putting a plug of tobacco in your mouth, there's a different way of ingesting things." Vol. 20/1442. This argument was apparently intended to imply that because the impact of smoking a cigarette is more immediate than chewing tobacco, Dr. Allen's testimony based on studies of crack cocaine should be

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discounted. Yet there was no evidence in the record about the differential impact of cigarettes and chewing tobacco or the accuracy of this analogy.

5. Burden shifting.

The State also shifted the burden of proof. In response to the defense contention that the State had pretended not to know the name of Mr. Ford, referring to him only as "man bun" even though Investigator Thurman had identified him, the prosecutor said:

> Investigator Thurman thinks it's Jeffrey Alan Ford. Jeffrey Alan Ford won't afford himself. And you heard from Investigator Thurman that people do that all the time. There were even security guards that wouldn't cooperate in this case. And you can't make people come in. And the defense has no burden in any case, but they do have the power to subpoena.

Vol. 20/1445.[10] A defendant has no burden or production or persuasion in a criminal case, and is perfectly entitled to do nothing more than test the evidence presented by the State. The prosecutor's remark, indicating that the defense should have called witnesses, was constitutionally improper.[11]

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[10] There was a prompt objection to this burden-shifting argument. The defense objected and the court responded only: "The basis of the defense objection is to remind you, once again, the defendant has no burden of proof, which is true." Vol. 20/1446.

[11] The argument was particularly misguided as it implied that the State could not "make people come in," Vol. 20/1445, when of course the State can compel people to testify at trial.

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6. Name-calling of the defendant.

The Supreme Court has explained: "It is improper for the prosecutor to use epithets to characterize a defendant." *State v. Thomas*, 158 S.W.3d 361, 414 (Tenn. 2005); *State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001) ("the prosecutor may not engage in derogatory remarks or name calling"). Here, the prosecutor instead chose to call Mr. Black a "coward." Vol. 20/1393 ("I'm going to do a drive-by like a coward").

7. Denigration of the defense.

As already mentioned above, the prosecutor repeatedly attacked the defense itself (not merely the defense proof). He argued in its initial closing that the defense was trying to distract the jury through its questioning (at this point, defense counsel had not even made a closing argument yet). Vol. 20/1395 ("[I]f you got the facts on your side, you pound the facts. If you got the law on your side, you pound the law. If you got neither, you pound the podium. You just hit the podium, keep trying to make points to distract somebody from the real issue."). This was improper. *See*, *e.g.*, *State v. West*, 767 S.W.2d 387, 395 (Tenn. 1989) ("It was improper for the district attorney to tell the jury that defense counsel was 'trying to throw sand in the eyes of the jury' and 'blowing smoke in the face of the jury' ").

He also claimed in his rebuttal argument that the defense had directly asked the jury to disregard common sense, when the defense had made no such argument. Vol. 20/1430 ("That's what he just sat up here for however long and said, throw out common sense, don't even consider

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things that you actually see with your own eyes"). He then criticized defense counsel for arguing that Mr. Ford had yelled at Kelvin Jackson, saying: "He [defense counsel] actually stood up here with a wild imagination and said … [Mr. Ford is] actually yelling at somebody who's on the other side of the table because that guy's flirting with his [ex-girlfriend." Vol. 20/1434. Yet this was not the product of defense counsel's "wild imagination," but rather the direct testimony of Blake Norman, the State's own witness, which the prosecutor simply ignored. Vol. 13/870.

The prosecutor combined all of this with the arguments discussed above, in which he accused the defense of "trick[ing]" a witness by the use of a "phony" photograph. Vol. 20/1434-1435. *See State v. Zackary James Earl Ponder*, No. M2018-00998-CCA-R3-CD, 2019 WL 3944008, at *12 (Tenn. Crim. App. Aug. 21, 2019) (improper to accuse defense of trying to "trick" the jury). All of this was impermissible, designed to denigrate not just the defendant but the whole defense team in the eyes of the jury.

8. Legal error.

As to the issue of duty to retreat (discussed in further detail below), the prosecutor misleadingly implied that this duty would preclude Mr. Black from acting in self-defense in any way. He contended "that this defendant, in this case, under these circumstances had a duty to retreat. Had a duty to retreat." Vol. 20/1399. What the prosecutor omitted was that this is only a duty to retreat *if possible to do so safely*, and that the duty to retreat does not mean that a defendant is barred from engaging

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in self-defense. *See State v. Perrier*, 536 S.W.3d 388, 404 (Tenn. 2017) ("a duty to retreat does not mean that a person cannot defend herself or himself"). The prosecutor's comments suggested the contrary -- that Mr. Black was required to try to retreat even if he could not do so safely. This was incorrect.

9. Emotional plea.

Perhaps most egregiously, the prosecutor appealed directly to the sympathy of the jurors. *See State v. Cribbs*, 967 S.W.2d 773, 786 (Tenn. 1998) ("the State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury"). The Supreme Court "has consistently cautioned the State against engaging in victim impact argument which is little more than an appeal to the emotions of the jurors, as such argument may be unduly prejudicial." *State v. Thacker*, 164 S.W.3d 208, 253 (Tenn. 2005). Yet that is exactly the kind of argument presented here. Early in his closing, he alluded to Mr. Lee's family in Iowa: "You know, a family in Iowa crying. Knoxville would have soon forgotten about it." Vol. 20/1392. He then returned to this idea:

> [T]here was a lot of talk about Taylor Hodge up here about, you know what, dividing his family and how his family -- you know, it's going to be a rough Thanksgiving for Taylor Hodge, right? 'Cause he testified against his cousin. **Well, how would you like to be that family in Iowa at Thanksgiving? It's going to be rough Thanksgiving there**, too, because of the decisions that he made to take a human life, 'cause he was hacked off.

Vol. 20/1396 (*emphasis added*). This exhortation to the jury to consider (and even place themselves in the position of) Mr. Lee's grieving family

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was grossly improper. It served no conceivable purpose other than inflaming the jury by injecting emotional considerations into the case.

10. The combined errors require reversal.

Whether evaluated for plenary or plain error (or a combination thereof),[12] the arguments cited above were improper and require reversal. In the context of this hotly-disputed case, the prosecutor's improper arguments were not offered gratuitously, but rather were intended to serve a purpose: to discredit the defense and take the jury's focus off any legitimate doubts about the State's version of events. The error cannot be considered harmless (or, as to the constitutional issue of burden-shifting, harmless beyond a reasonable doubt). For the same reasons, these improper arguments deprived Mr. Black his due process right to a fair trial. A new trial is required.

III. THE STATE INFRINGED ON MR. BLACK'S RIGHT TO REMAIN SILENT.

A. Summary of Applicable Law.

The Fifth Amendment right to remain silent also prohibits prosecutorial comment on, or a jury drawing an adverse inference of guilt from, a defendant's decision not to testify at trial. *Griffin v. California*,

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[12] As noted above, there was contemporaneous objection to some of these arguments (the burden shifting and the accusation of using a phony photograph) but not to others. As to those unpreserved issues, the record is clear, there was no reason for counsel to let these harmful arguments go unchecked, and substantial justice requires relief.

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380 U.S. 609 (1965). Article I, § 9 of the Tennessee Constitution provides similar protection. *State v. Transou*, 928 S.W.2d 949, 960 (Tenn. Crim. App. 1996).

Claims that the State has infringed on the right to remain silent are reviewed *de novo*. *State v. Jackson*, 444 S.W.3d 554, 585 (Tenn. 2014). Any error requires reversal unless shown by the State to be harmless beyond a reasonable doubt. *Id.* at 591.

B. Application of Law to Facts.

A defendant has a right to remain silent, without that fact being used against him. This right applies both to trial and to pretrial proceedings after being charged and arrested. Here, Mr. Black did not testify at trial. Other than in a very limited way through Mr. Hodge, the jury never heard Mr. Black's version of events. However, the failure of Mr. Black to testify or to otherwise provide a full statement after arrest was not something that could be considered by the jury as a reason to convict him.

The State was allowed, nonetheless, to highlight to the jury that Mr. Black did not talk to his own expert about the events on the night in question. It questioned him:

> Q. Okay. And Ms. Akers said that you've never spoken to Hank Black?
>
> A. No.
>
> Q. Okay. And don't you think that the jury, obviously, would want to hear -- you're making an opinion about the victim in this case, right, about his aggressive behavior, right?

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A. Yes.

…

Q. But you're employed by this person right here, right?

A. Yes.

Q. The guy that supposedly encountered him in an aggressive state, right?

A. True.

Q. And so wouldn't you think that it would be important, before you came in and told a jury that this guy's high on cocaine and all aggressive, that you might actually speak to the human being who encountered him?

Vol. 19/1350. At this point, the defense objected. The Court said that this was a permissible line of questioning but reminded the jury that Mr. Black had a right to remain silent. The prosecutor nonetheless decided to repeat this point again:

Q. So you testified -- or you told the jury, you're coming in here giving them an opinion you're paid for to say that the victim was aggressive, but you've talked to not one single person who encountered the victim on that evening, right?

A. Right.

Q. Including the person who is here on trial and you're here testifying for, correct?

A. True.

Q. Okay. And you don't think that would be important to know that information to form your opinion, right?

Vol. 19/1352-1353.

The implication of this line of questioning was clear -- that the jury should disregard Dr. Allen's testimony, and the defense case in general,

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because Mr. Black had not provided his version of events to Dr. Allen. Further, the likely reason he had not provided his version of events was because it would not have been helpful to his case. Yet that is the process of inference that is prohibited by the constitution. Any cautious prosecutor will stay far away from this kind of inquiry, yet here the prosecutor jumped into it with gusto.

In the context of this case, the State cannot establish that this constitutional error was harmless beyond a reasonable doubt. In a case of this type, where there was an interaction and only two people could have known exactly what happened (Mr. Black and Mr. Lee), with the jury hearing from neither of them, the jury would naturally have been curious to know what Mr. Black's testimony would have been. Reminding the jury, in one of the last witnesses of the case, that Mr. Black had not shared his story to anyone -- even though it was something the "jury, obviously, would want to hear," Vol. 19/1349-1350 -- was calculated to encourage the jury to think about that prohibited topic. A new trial is required.

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IV. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT ITS THEORY OF THE CASE THROUGH THE OPINIONS OF THE INVESTIGATOR INTERPRETING THE VIDEOS. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENSE WITNESSES TO OFFER AN OPINION AS TO WHAT HE SAW ON THE VIDEO.

A. Summary of Applicable Law.

1. Lay opinion testimony.

The Supreme Court has explained: "[N[on-expert witnesses must confine their testimony to a narration of the facts based on first-hand knowledge and avoid stating mere personal opinions or their conclusions or opinions regarding the facts about which they have testified." *State v. Brown*, 836 S.W.2d 530, 550 (Tenn. 1992). The admission of lay opinion testimony is limited to those situations where the jury cannot readily draw its own conclusions on the ultimate issue without the aid of the witness's opinion testimony. *Blackburn v. Murphy*, 737 S.W.2d 529, 533 (Tenn. 1987).

2. Expert opinion evidence.

The admission of expert testimony is governed by Tennessee Rules of Evidence 702 and 703. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). Under this framework, the trial court functions as a gatekeeper. First, the trial court must determine whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education" to offer an opinion on the issue at hand that "will substantially assist the trier of

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fact." Tenn. R. Evid. 702. Then, the trial court must ensure that the facts and data forming the basis of the expert's opinion "adequately support[ ] the expert's conclusion." *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002); *see* Tenn. R. Evid. 703.

3. Constitutional right to present a defense.

A defendant has a right to present a defense under both the federal and state constitutions. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *State v. Brown*, 29 S.W.3d 427 (Tenn. 2000).

4. Standard of review.

As noted above, decisions regarding admission or exclusion of evidence are reviewed for abuse of discretion. *Banks*, 271 S.W.3d at 116. Violation of the constitutional right to present a defense requires reversal unless it is harmless beyond a reasonable doubt. *See Brown*, 29 S.W.3d at 436.

B. Application of Law to Facts.

1. The trial court erred in allowing Investigator Thurman to narrate the State's theory of the case from the witness stand.

The essence of a trial is the presentation of evidence from witnesses with first-hand knowledge. Conclusions and inferences from this evidence are left to the jury as the finders of fact. Here, the State introduced numerous videos that showed events prior to and including the shooting. Because of the number of individuals shown, the quality of the videos, and the absence of audio, those videos left many unanswered questions. To answer these questions, the State was also allowed to

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present (over objection) the testimony of Investigator Thurman as to what he believed those videos showed. This was improper. He was not a percipient witness with first-hand knowledge, *see* Tenn. R. Evid. 602, and was in no better position to evaluate the events on the videos than the jurors were.

In the context of non-expert officer testimony regarding recorded transactions, the Sixth Circuit has explained:

> The officer's lay opinion is admissible "only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred."

United States v. Kilpatrick, 798 F.3d 365, 379 (6th Cir. 2015). The Supreme Court of Kentucky has also emphasized the requirement of personal knowledge. It has written:

> [W]itnesses are limited to a description of events when narrating video footage and any interpretation of that footage is improper.

Boyd v. Commonwealth, 439 S.W.3d 126, 131 (Ky. 2014). Here, Investigator Thurman was allowed to opine regarding events that he had no personal knowledge of, as he had not been present at the bar during the time leading up to or following the shooting.

Some of his editorial testimony regarding the videos was relatively innocuous, such as pointing out the undisputed identity of individuals. But much of it went further, crossing the line into interpretation. He testified regarding Ms. Murrell gesturing "over towards Mr. Hodge," and Mr. Lee looking "over that way" in response. Vol. 10/513-514. He

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testified that Mr. Black, at one point, "appears to be looking directly at" Mr. Lee and Ms. Murrell, and that he "continu[ed] to look at" them. Vol. 10/516. He said that, in the initial dispute, Mr. Black "advances towards Ms. Murrell," and that there was "physical contact between Mr. Black and Ms. Murrell." Vol. 10/517. He described the two men who were with Mr. Ford as "face to face" with "physical contact" with Mr. Black. Vol. 10/517. He said that Mr. Ford then "appear[ed] to take notice of what's going on," and moved towards him. He said that Mr. Black made "a flanking motion." Vol. 10/518. As to events in the parking lot, he testified that Mr. Black's car was "moving quickly" compared to other cars, and had "heavy brake pressure applied." Vol. 10/534. He testified that Mr. Lee moved to the side of the vehicle and there was "some movement there about his upper body with his arms," and then "very quickly," there was "what I believe to be a muzzle flash." Vol. 10/535. He said that, at the time of that muzzle flash, it "appears to me that his arms are down by his side." Vol. 10/535-536. All of this testimony was improper. This was all just his opinion, purportedly based on the videos. The jury was in the same position to make its own decision as to the videos.[13] Admission of this testimony was error.

There is an additional aspect of the problem in this case making erroneous admission even more harmful. The jury was aware that

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[13] Defense counsel objected to him "editorializing it and sort of reading into it when you weren't there and you don't have a basis of knowledge is what our objection is." Vol. 10/494.

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Investigator Thurman had talked to numerous witnesses, including individuals that did not testify, and taken statements that could not have been and were not introduced into evidence as they were hearsay. The jury may have decided to credit Investigator Thurman's opinions about the video because he had additional information that they did not. Yet to the extent that Investigator Thurman's comments were based on information learned from other sources, they were indirect hearsay and inadmissible for that reason.

2. The trial court erred in refusing to allow the defense to present opinion evidence that a frame in the video was consistent with a firearm.

A related, or opposite, issue arose during the defense case. The defense sought to present testimony, in the form of expert evidence from a retired FBI agent, that the item in Mr. Lee's hand shown in the video was consistent with a gun. He testified in his jury-out proffer: "[T]here's an object that appears to be in his hand that is characteristic of a semi-automatic, full-size pistol." Vol. 19/1280-1281. This opinion was based on his viewing the video several times, using the functions of the video software and informed by his expertise with firearms. Vol. 19/1279. The court excluded this testimony. It said that his testimony would not help the jury, as "The jury can look at that just as well as he could." Vol. 19/1284.

In short, having allowed the State to introduce Investigator Thurman's opinion testimony, despite the claim that the jury was equally capable of viewing the videos, the court refused to allow the defense to

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present probative evidence because the jury could view the videos just as well as the witness could. What was good for the goose was apparently not good for the gander. This was error, and given that it went to one of the key disputes at trial -- whether Mr. Lee had a weapon when he approached Mr. Black -- it cannot be deemed harmless. Further, the refusal to allow the defense to present probative information from a qualified expert violated Mr. Black's constitutional right to present a defense.

V. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT MR. BLACK HAD SEX WITH JUSTICE HALL DAYS AFTER THE HOMICIDE.

A. Summary of Applicable Law.

1. General rule for relevant evidence.

Tenn. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Claims of improper admission of evidence are reviewed for abuse of discretion. *See State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004). Admission of improper evidence may violate the federal right to due process if the consequences are so pernicious as to deny the defendant a fair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

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2. Special rule for prior bad acts.

Rule 404(b) prohibits admission of evidence of "other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity with the character trait." Tenn R. Evid. 404(b). Under the rule, such evidence may be admissible "for other purposes," which include motive, intention, and identity. *See State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004). Other act evidence may be admitted for these purposes only after certain requirements have been met. Tenn. R. Evid. 404(b). In general, a court should take a restrictive approach to admitting evidence under Rule 404(b) because of the potential that the jury will be unfairly influenced. *State v. Dotson*, 450 S.W.3d 1, 76 (Tenn. 2014).

3. Standard of review.

If the trial court substantially complies with the procedural requirements of Rule 404(b), admission of evidence is reviewed for abuse of discretion, as are rulings under Rule 403. *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010). However, if the trial court fails to substantially comply with the requirements of the rule, then the trial court's decision should be afforded no deference by the reviewing court. *DuBose*, 953 S.W.2d at 652.

B. Application of Law to Facts.

The State introduced evidence that Justice Hall met with Hank Black in the days after the homicide. She testified that they met at a hotel around New Year's. This evidence was plausibly related to the

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State's theory that Justice Hall was aligned with Mr. Black or that Mr. Black was trying to avoid detection by staying in a hotel.

Not content with establishing that fact, though, the State wanted to show what they *did* when they met, which was to have sex. The State directly asked her:

> Q. And where did you meet up with him?
>
> A. Off Strawberry Plains.
>
> Q. Where at?
>
> A. At a hotel. I don't remember what the hotel was called.
>
> Q. Okay. And where -- what did you do at the hotel there?
>
> A. We had sex.
>
> ...
>
> Q. What did you do at the hotel there?
>
> A. We had sex.
>
> Q. Okay. Stayed the night with him?
>
> A. Yes.

Vol. 13/891-892.[14]

The State clearly wanted to establish that Mr. Black had sex with Ms. Hall. This evidence was governed by Rule 404(b). Although it is not illegal, many people will consider sexual intercourse between two unmarried individuals (particularly two who were never even in a "dating" relationship according to Ms. Hall, Vol. 13/876) to be morally

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[14] Defense counsel objected in the middle: "I would object and move…." The court cut her off by overruling the objection. Vol. 13/892.

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wrong. *See State v. Clark*, 452 S.W.3d 268, 289 (Tenn. 2014) (404(b) covers moral wrongs, not only criminal acts). Consequently, this evidence was admissible only under the heightened standards of Rule 404(b), including that it addressed some issue other than character and that its probative value was not outweighed by its prejudicial effect. Here, the evidence that Ms. Hall and Mr. Black had sex on New Year's had no probative value whatsoever. Yet it portrayed Mr. Black's character (and Ms. Hall's as well) in a negative way. Rule 404(b) exists precisely to prevent this kind of irrelevant character attack. Further, even under the relaxed standard of Rule 403, given the utter lack of probative value and significant prejudice, this evidence was not admissible.

This error was not harmless. Evidence directly attacking the character of the defendant in a case of this type can only have had an effect on the jury. It is not coincidental that the State highlighted this evidence in closing argument. Vol. 20/1440. This evidence was improperly admitted, and a new trial is required.

VI. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT MR. BLACK HAD A DUTY TO RETREAT PRIOR TO USING FORCE IN SELF-DEFENSE.

A. Statement of Relevant Facts.

1. Finding under *Perrier*.

On the issue of the self-defense instruction, in a jury-out proceeding the State presented certified copies of California felony convictions for

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Mr. Black. It contended that Mr. Black was thus in unlawful possession of a weapon as a convicted felon. Vol. 18/1227.

The court ruled that Mr. Black was therefore engaged in unlawful conduct by being a felon in possession of a firearm. It continued:

> So under *Perrier*, the Court does find that he was engaged in unlawful conduct. And I also find that it has a direct nexus to this incident here, because it was that unlawful conduct, that where he had a gun in his possession, that was connected to the murder -- or the killing, I should say, of -- of Mr. Lee. And so it's not like he was recklessly driving through the parking lot and that -- or speeding down Interstate 40. So I do find that, under *Perrier*, he was engaged in unlawful conduct that was -- had a nexus to this event.

Vol. 18/1231.

2. Self-defense instruction given to the jury.

As to self-defense, the court instructed the jury in accordance with the pattern jury instructions. It then instructed on his duty to retreat:

> In this case, the law of self-defense requires the defendant to have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat in this case, if, and to the extent, that it can be done in safety.

Exhibit 126 at 8; Vol. 21/1461-1462.

B. Summary of Applicable Law.

1. The self-defense regime established in *Perrier*.

In *State v. Perrier*, 536 S.W.3d 388, 397 (Tenn. 2017), the Supreme Court established the scope of any duty of an individual to retreat prior to engaging in self-defense under Tenn. Code Ann. § 39-11-611(b). It first

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rejected the idea that someone engaged in unlawful activity was precluded by that statute from acting in self-defense; instead, it held such a person would have a duty to retreat, if possible, before using force, but if it was not possible to retreat safely, such a person could engage in self-defense. An individual doing nothing wrong, conversely, has no duty to retreat before using force in self-defense. The Court also addressed the question of whether the trial court or the jury should make the threshold determination of whether a person would have a duty to retreat before engaging in self-defense. It held that the trial court, not the jury, should determine that threshold question. *Id.* at 403.

After *Perrier*, then, the trial court must make its own finding as to whether the defendant was engaged in unlawful activity or a place where he did not have the right to be. If the court concludes that he was, then it provides a self-defense instruction that includes the duty to retreat. If it concludes that he was not engaged in unlawful activity and was in a place he had the right to be, then it provides an instruction that informs the jury that the defendant had no duty to retreat.

2. Right to accurate instruction.[15]

Defendants have a constitutional right to complete and accurate jury instructions on the law. *State v. Cole-Pugh*, 588 S.W.3d 254, 259-260 (Tenn. 2019). The failure to properly administer jury instructions can deprive a defendant of his constitutional right to a jury trial. *Id.*

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[15] This law regarding jury instructions applies to the following issues as well.

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Further, a " 'defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the judge.' " *State v. Sims*, 45 S.W.3d 1, 9 (Tenn. 2001); *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (constitutional violation where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

3. Standard of review.

Questions regarding the propriety of jury instructions are mixed questions of law and fact and thus the "standard of review is de novo with no presumption of correctness." *Perrier*, 536 S.W.3d at 403. A preserved instructional error requires reversal unless it is determined to be harmless beyond a reasonable doubt. *Id.* at 404.

C. Application of Law to Facts.

1. The trial court erred in instructing the jury that Mr. Black had a duty to retreat before engaging in self-defense.

In this case, the trial court made the threshold finding that the defendant was engaged in unlawful activity with a nexus to the confrontation. Vol. 12/1831. It thus provided an instruction that imposed a duty to retreat, if possible, on Mr. Black. Vol. 21/1461. That threshold determination, however, was erroneous.

Even accepting that Mr. Black possessed a firearm in his car, and assuming arguendo that it was unlawful for him to do so, that does not establish "unlawful activity" for purposes of self-defense in the context of

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this case. This Court in *State v. Tyshon Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *26 (Tenn. Crim. App. Apr. 8, 2020), *reversed in part on other grounds*, 656 S.W.3d 49 (Tenn. 2022), concluded that not every unlawful act imposes a duty to retreat. Rather, to trigger the duty to retreat, there must be a nexus between the alleged unlawful conduct and the perceived need to engage in self-defense: "[W]e conclude that a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary before the trial court can instruct the jury that the defendant had a duty to retreat." *Id.* at *27. It further rejected the argument that the unlawful possession of the firearm by a minor produced the confrontation in that case. It wrote:

> [B]ut for the Defendant's illegal possession of the handgun as a minor, the victim would still be alive. However, status offenses such as this will rarely qualify as unlawful activity because a person's status alone cannot provoke, cause, or produce a situation.

Id. at *27. That reasoning from *Booker* has been favorably cited by this Court. *See*, *e.g.*, *State v. James Lee Simpson*, No. M2021-01031-CCA-R3-CD, 2022 WL 16544456, at *15 (Tenn. Crim. App. Oct. 31, 2022).

Here, while the possession of a firearm by Mr. Black may have been unlawful, there was no nexus between the unlawful act and the "need to engage in self-defense." That is, on the facts here, the confrontation between Mr. Black and Mr. Lee was not, in any way, *caused by* Mr. Black's unlawful possession of a firearm. Indeed, at the time Mr. Lee angrily approached the car, there is no evidence that he was even aware that Mr. Black had a firearm (or was a felon). This case is thus

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distinguished from those cases where the argument between the two parties includes reference to the firearm. *See State v. Shannon Bruce Foster*, No. E2020-00304-CCA-R3-CD, 2021 WL 3087278, at *24 (Tenn. Crim. App. July 22, 2021) (witness "heard the victim say the Defendant was not going to shoot me with 'that F'ing gun'."). It is also distinguished from those cases where the defendant had a gun in order to protect himself during or to further some other illegal activity, like drug distribution. *State v. Vana Mustafa*, No. M2020-01060-CCA-R3-CD, 2022 WL 2256266, at *24 (Tenn. Crim. App. June 23, 2022).

The trial court here reasoned that there was a nexus because "that unlawful conduct, that where he had a gun in his possession, that was connected to the murder -- or the killing, I should say, of -- of Mr. Lee." Vol. 18/1231. Yet that logic misses the point. The question is not whether the possession of the firearm caused the death, but rather whether the unlawful possession of the firearm caused the *need to engage in self-defense*. *See Booker*, 2020 WL 1697367, at *27 ("a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary"). Here, there is no plausible argument that it did so. The instruction imposing a duty to retreat was thus erroneous.

2. The erroneous instruction was not harmless beyond a reasonable doubt.

The theory of defense was that, when Mr. Lee approached him, Mr. Black believed that he was in immediate danger, perhaps because Mr. Lee was carrying a gun or other weapon. (Indeed, in these circumstances it may have been reasonable for Mr. Black to believe that he was in

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danger even if he was not certain if Mr. Lee had a weapon or not, based on Mr. Lee's aggressive behavior and sudden raising of his arms.) The jury could have entirely credited that theory, but yet still have convicted Mr. Black, if it concluded that he could have retreated safely from the confrontation, such as by hitting the gas and driving off abruptly or pulling into reverse. For that reason, the erroneous duty to retreat instruction cannot be deemed harmless beyond a reasonable doubt. Self-defense was the essence of the defense theory, and imposition of a duty to retreat almost entirely negated that theory.

Indeed, the State itself made use of this instruction in closing argument. In its initial closing, as the next-to-last paragraph in its argument, the prosecutor directly advised the jury that it should consider that the defendant "had a duty to retreat" as would be set out in the instructions. Vol. 20/1399. Given the centrality of self-defense to this case, and having relied on that instruction in closing argument, the State cannot be heard to assert that the error was harmless beyond a reasonable doubt.

3. The right to a jury trial was violated.

Finally, as a separate and independent argument, Mr. Black preserves the argument that it violates his state and federal right to a jury trial for the trial court (rather than a jury of his peers) to make factual determinations, such as whether he was engaged in unlawful activity with a nexus to the need to engage in self-defense, that directly

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impact the determination of his guilt or innocence. *But see Perrier* (imposing duty on trial court to make such a finding).

VII. THE TRIAL COURT ERRED IN REFUSING TO GIVE A MODIFIED SEQUENTIAL INSTRUCTION.

A. Summary of Applicable Law.

Tenn. Code Ann. § 39-13-202 states: "First degree murder is … (1) A premeditated and intentional killing of another…." Tenn. Code Ann. § 39-13-210 provides: "Second degree murder is … (1) A knowing killing of another." Tenn. Code Ann. § 39-13-211 states: "Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner."

B. Application of Law to Facts.

The jury instructions in this case defined second-degree murder as having two elements: (1) an unlawful killing that was (2) knowing. Vol. 21/1455. It defined voluntary manslaughter as having those two elements plus an additional element (state of passion). Vol. 21/1456-7. It also instructed the jury that (a) voluntary manslaughter was a lesser offense of second-degree murder; and (b) the jury was permitted to consider lesser-included offenses *only if* there was a unanimous decision that the defendant was not guilty beyond a reasonable doubt of the greater offense. Vol. 21/1459-1460. That is, before the jury was allowed to decide whether Mr. Black was guilty of voluntary manslaughter, under

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the trial court's instructions, it would first have to decide that he was not guilty of second-degree murder beyond a reasonable doubt.

This combination produces the anomalous result that a jury following the instructions can never properly convict of voluntary manslaughter, as it will always return instead a verdict for second-degree murder or a verdict of not guilty of either. Consider a jury that concludes, during deliberations, that there was an unlawful killing; that it was done knowingly; and that it was done in a state of passion produced by an adequate provocation. Pursuant to the instructions, the jury will begin by considering second-degree murder. Because the jury finds that the homicide was an unlawful killing and done knowingly, it will return a verdict of guilty on second-degree murder. The jury will never even be in a position to return a verdict of voluntary manslaughter because, pursuant to the instructions, it can do so only if it were to first decide that the defendant was not guilty of second-degree murder. Similarly, if the jury does not find the two elements of second-degree murder to have been proven, it cannot find that all three (two plus one) of voluntary manslaughter have been proven. It will acquit on both. There is no path that leads to a guilty verdict of voluntary manslaughter.

This claim of error is not an attack on the acquittal-first instruction itself. *See State v. Davis*, 266 S.W.3d 896, 905 (Tenn. 2008). The problem arises from the fact that here the acquittal-first instruction was combined with a so-called lesser-included offense that (contrary to the traditional meaning of a lesser included) actually has more elements rather than

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fewer elements. That combination produces the unfair and nonsensical result in this case. *See* Wayne R. LaFave, *et al*, 6 Criminal Procedure § 24.8(d) (4th ed.) ("An acquit-first instruction is problematic in a case in which the lesser offense depends upon a finding that the elements of the greater offense have been established"). As one panel of this Court recently phrased the problem:

> The problem occasioned by treating passion induced by provocation as an element that must be proved by the State is compounded by the acquittal-first jury instruction, which, completely appropriate in nearly every other situation, acts as a practical barrier to the jury's consideration of voluntary manslaughter as a lesser included offense of first or second degree murder. Once the jury finds that the defendant has committed a knowing killing, it *cannot* move on to consider voluntary manslaughter as a lesser included offense if it follows the pattern jury instruction.

State v. Brandon Scott Donaldson, No. E2020-01561-CCA-R3-CD, 2022 WL 1183466, at *24 (Tenn. Crim. App. Apr. 21, 2022) (*italics in original*).

Here, correctly predicting this problem, the defense filed a request that would have clarified that, if the jury believed the defendant had acted in a state of passion produced by adequate provocation, the correct verdict was not second-degree murder but rather voluntary manslaughter. R.84. Yet that request was denied. As a result, the jury was left with instructions that denied any logical outcome of voluntary manslaughter. In the context of this case, voluntary manslaughter should have been a viable outcome. The jury may well have concluded that Mr. Black, although he did not act in self-defense, was in a state of

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passion produced by the combination of the events in the bar with Mr. Lee's sudden and aggressive move towards his car, raising his hands threateningly (perhaps with something in them) and yelling at him: "What the fuck?" Even if this did not justify Mr. Black acting in self-defense, it certainly could have been considered adequate provocation to produce an irrational response. Consequently, voluntary manslaughter would have been a tenable outcome. On these instructions, however, it was practically eliminated. This error was not harmless beyond a reasonable doubt, and reversal is required. In the same way, this error violated Mr. Black's constitutional rights to due process. *See Nicholas v. Heidle*, 725 F.3d 516, 550 (6th Cir. 2013) ("Failure to give appropriate jury instructions can violate the right to due process where that failure is so fundamentally unfair as to deny a fair trial").

VIII. THE JURY INSTRUCTIONS INCORRECTLY DEFINED VOLUNTARY MANSLAUGHTER.

The jury instruction here provided that state of passion is a positive element of voluntary manslaughter and therefore must be proven beyond a reasonable doubt to justify a verdict of manslaughter rather than second-degree murder, and that nothing need be proven or disproven regarding state of passion for a second-degree murder conviction. This approach is neither sensible nor consistent with general principles of criminal liability as it turns what is essentially a mitigating factor into an affirmative element of the lesser offense.

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To understand the importance of this issue, consider the following possibility: Twelve jurors conclude that Mr. Black knowingly and unlawfully killed Mr. Lee, but also conclude that he was probably (but only probably, not beyond a reasonable doubt) acting in a state of passion caused by adequate provocation. Under these instructions a defendant that all jurors agreed was probably acting in a state of passion, and thus probably guilty of voluntary manslaughter instead of second-degree murder, would nonetheless be convicted of second-degree murder. **That is, under these instructions the jury would be required to return a verdict of guilt on a crime of which all the jurors believed she was probably not guilty.** It is not necessary (or indeed appropriate) to construe the homicide statutes in this way. Here, the presence of state of passion means that the defendant is not guilty of second-degree murder. It is thus a defense. Tenn. Code Ann. § 39-11-203 states that "a ground of defense … has the procedural and evidentiary consequences of a defense," even if it is not labeled as such. Properly interpreted, the statutory scheme sets out a framework where state of passion is a defense to second-degree murder (though not a defense to manslaughter) and therefore, if raised by the proof, its absence must be proven beyond a reasonable doubt.

A contrary instruction, as given here, produces absurdities. As the panel in *Donaldson* wrote, in discussing another case where the court was forced to find insufficient evidence of voluntary manslaughter due to this nonsensical interpretation:

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> Of course the State in presented no proof to support a conclusion that [the defendant] acted in a state of passion produced by adequate provocation. Why would it ever do so when it has charged the defendant with first degree murder?

2022 WL 1183466 at *23.

In situations where state of passion is "fairly raised" by the proof, then the jury should be charged that, if there is reasonable doubt as to whether there was state of passion, then it must acquit on the charge of second-degree murder. The jury instructions here provided the opposite, and this was error. For the reasons identified above, that error cannot be deemed harmless beyond a reasonable doubt. A new trial is required.

Further, this interpretation of the statutes, imposing a burden on the defense to prove state of passion beyond a reasonable doubt, produces a statutory scheme contrary to the due process rulings of the Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977).

IX. THE COURT ERRED IN INSTRUCTING THE JURY THAT, TO ESTABLISH MANSLAUGHTER, THE ELEMENT OF STATE OF PASSION HAD TO BE PROVEN *BY THE STATE.*

There is a further problem presented by the voluntary manslaughter instruction given in this case. The instruction stated that: "For you to find the defendant guilty of [manslaughter], **the state must have proven** beyond a reasonable doubt the existence of the following essential elements," including state of passion. Vol. 21/1456-1457

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(*emphasis added*). As instructed, the jury could therefore find state of passion only if *the State* proved it. Proof by the defense, either through questioning of the State's witnesses or the two witnesses called by the defense, was thus irrelevant. As the panel in *Brandon Scott Donaldson* wrote:

> And what of evidence of passion and provocation presented by the defendant? Where does consideration of this evidence fall when the burden lies with the State to present evidence to support those "elements" beyond a reasonable doubt?

2022 WL 1183466 at *23. This violates common sense and the Constitution, as by their terms these instructions precluded the jury from full consideration of some of the most crucial evidence. *State v. Brown*, 836 S.W.2d 530, 553 (Tenn. 1992). A new trial is required.

X. THE CUMULATIVE EFFECT OF THESE ERRORS REQUIRES A NEW TRIAL

The cumulative effect of the errors here served to violate Mr. Black's state and federal right to due process. The result of this trial simply cannot be regarded as reliable. Consequently, even if the above-identified errors do not require reversal separately, when considered in combination a new trial is required as a matter of due process. *See State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010); *United States v. Fields*, 763 F.3d 443, 468 (6th Cir. 2014).

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Conclusion

For the foregoing reasons, the judgment of conviction should be vacated and a new trial awarded.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I, Jonathan Harwell, hereby certify that the foregoing brief complies with the requirements of Tenn. Supreme Court Rule 46 governing e-filing. It has been prepared in 14-point Century Schoolbook font and contains a total of 20,367 words in the main text (excluding tables and certificates). A motion to exceed the word limit is being filed herewith.

JONATHAN HARWELL

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Appendix 3

IN THE COURT OF CRIMINAL APPEALS FOR TENNESSEE AT KNOXVILLE

STATE OF TENNESSEE	)	
	)	Knox Crim. 119789
v.	)	
	)	E2022-01741-CCA-R3-CD
LANDON HANK BLACK	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE KNOX COUNTY CRIMINAL COURT

REPLY BRIEF OF THE APPELLANT

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February 2024

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I. THE STATE HAS NOT JUSTIFIED THE PROSECUTION'S IMPROPER ATTACKS ON DEFENSE COUNSEL.

A. Introduction.

In his brief-in-chief, Mr. Black raised a cumulative issue relating to separate attacks by the prosecution, during presentation of evidence and in closing argument, on the integrity of defense counsel. *See Brief* at 52-58. The State, though, sees nothing amiss.

B. Counsel's Presence at Meeting.

As to the prosecution's insistence on informing the jury that defense counsel Chloe Akers had been present at the meeting between investigators and Mr. Black's father, the State contends that the prosecutor was not actually insinuating anything improper by defense counsel, only explaining the actions of Mr. Black. *State's Brief* at 28. However, the question is not whether it was permissible to show that Mr. Black was aware of the warrant and that he took evasive steps in response. The question is whether it was permissible to suggest that *defense counsel* had a role in this evasion.

On this point, the State does not explain why the prosecutor tried so hard, over vociferous objection, to inform the jury of Ms. Akers' presence at the meeting. It cannot explain why it was necessary or even relevant to identify Ms. Akers (instead of Mr. Black's father or unnamed other parties). It cannot explain why, in opening statement, the prosecutor directly linked the meeting not just with Mr. Black's father but with Ms. Akers (again identified by name) to Mr. Black's shutting off his phone. Vol. 7/292.

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The only reasonable inference is that the State sought to put this information into evidence -- over an objection to prejudice and confusion, with defense counsel identifying the problem, "there's only one reason he wants to muck this up with Chloe Akers' name in it," Vol. 18/1196 -- for the *purpose* of connecting defense counsel with Mr. Black's efforts to avoid the authorities. In these circumstances, that was an unfair implication and improper evidence. It could have served to poison the jury not just against the defendant but against his chosen counsel. Tellingly, in contending that this implication of wrong-doing by counsel was never made, the State does not even try to argue that such an implication would have been proper.

C. Testimony Regarding Defense Counsel's Interactions with Witnesses.

As to the testimony that witnesses met with defense counsel, the State asserts that claims of error were not preserved. As to the testimony of Justice Hall, this is incorrect. There was an objection noting that this was "work product." Vol. 13/883. The trial court cut argument short by ruling that this was permissible, but in context it is clear that the defense objected to the use of counsel's zealous advocacy on behalf of their client as substantive evidence against him. As to the testimony of Taylor Hodge and Carrie Phillips, the State is correct that there was no contemporaneous objection. Standing alone, those issues are reviewed for plain error. Mr. Black asserts that the plain-error factors have been met here. More importantly, though, those errors do not stand alone. Erroneous admissions of these portions of the testimony of Mr. Hodge

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and Ms. Phillips are part of the context of the case and must be considered when evaluating the prejudice of the other issues. That is, when the prosecutor offered wholly inappropriate closing argument attacking defense counsel and suggesting improper influencing of witnesses, he did so against the backdrop of already-introduced evidence of conversations between defense counsel and the witnesses.[1] In other words, the innocuous-seeming testimony regarding the meetings was the set-up; the improper closing argument was the payoff.

II. THE STATE HAS NOT JUSTIFIED THE PROSECUTOR'S CLOSING ARGUMENTS.

A. Introduction.

In his brief-in-chief, Mr. Black argued that the prosecutor repeatedly violated the rules governing closing arguments. *See Brief* at 67. He noted that some of these issues were fully preserved, while there was no objection to the others. As to this second group, he contended that the plain error factors had been established. *Brief* at 67 n.12.

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[1] The prosecutor's attacks on defense counsel in closing argument are discussed further below.

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B. The Inflammatory Appeal to Consider the Decedent's Family and Pejorative Reference to the Defendant were Improper.

Two of the State's arguments deserve brief responses.[2] The State defends the prosecutor's question to the jury "how would you like to be that family in Iowa [*i.e.*, the decedent's family]?," by claiming that it was merely a "rhetorical device" and "not a sincere question." *State's Brief* at 39. Of course it was a rhetorical device, not a sincere question! But far from being a justification, that is exactly why it was improper. The prosecutor was making an emotional point rather than a substantive argument.

Secondly, the State contends that the prosecutor did not call Mr. Black a "coward" but instead only characterized the act of shooting as

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[2] As noted by the State, the Supreme Court considered a closing argument in *State v. Enix*, 653 S.W.3d 692, 701 (Tenn. 2022), where the prosecutor called the defendant a "coward." The State does not mention, though, that it was the same prosecutor as here. *See also State v. Tyler Ward Enix*, No. E2020-00231-CCA-R3-CD, 2021 WL 2138928, at *16 (Tenn. Crim. App. May 26, 2021) (other arguments of the same prosecutor characterized as being "straight out of left field"); *State v. Brandon Scott Donaldson*, No. E2020-01561-CCA-R3-CD, 2022 WL 1183466, at *18 (Tenn. Crim. App. Apr. 21, 2022) (same prosecutor criticized for "clearly violat[ing] three and, arguably, all five of the categories" limiting proper argument, including by "calling the defendant names and providing other obviously improper commentary during closing argument."); *State v. Joseph Anthony Rivera*, No. E2014-01832-CCA-R3-CD, 2016 WL 2642635, at *45 (Tenn. Crim. App. May 6, 2016) (same prosecutor; Court found two instances of improper argument).

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being "cowardly." *See State's Brief* at 33. Yet the prosecutor directly stated, voicing what he presented as Mr. Black's own thoughts: "I'm going to do a drive-by like a coward…." Vol. 20/1393. If there is difference between calling someone "a coward" and calling him "like a coward," the significance of that difference escapes the appellant.

C. The Unpreserved Errors Meet the Plain Error Test. In the Alternative, They Serve as Context for the Preserved Errors.

There is no doubt that some of the statements did not receive contemporaneous objection. Mr. Black contends on appeal that these unpreserved errors qualify as plain error. As above, though, even if they did not rise to that heightened standard, they should also be considered as context for the preserved errors. No error occurs in a vacuum. Here, the improper effect of the preserved issues (as discussed below) was magnified by the prosecutor's other attempts to argue guilt on the basis of something other than the properly introduced evidence at trial. *See State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003) ("to do substantial justice, our review is extended to the entirety of the prosecutor's closing argument").

D. The State Shifted the Burden of Proof.

The State agrees that Mr. Black has preserved an objection to the burden-shifting argument relating to Alan Ford. It says this argument was proper because the prosecutor was merely responding to defense arguments, "suggest[ing] that this missing evidence about which the defendant complained was equally available to both parties." *State's*

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Brief at 41. This mischaracterizes how this issue played out at trial. The defense position as to Alan Ford was not merely, or even primarily, that Alan Ford had valuable information that the jury never heard. The defense argument was instead more pointed. The defense contended that the State had engaged in misdirection or deception in its presentation of the case. It noted that the prosecutor, in opening argument, had explained that they did not know the identity of the person with the "man bun." Vol. 20/1404. In reality, defense counsel contended, the State knew his name (Alan Ford), knew how to contact his mother (although it had not made much effort to actually speak to him), but had instead inexplicably chosen to act like his identity was unknown. In this context, where the focus was not so much on what Mr. Ford would have had to say as the fact that the State's investigation and presentation of the case had been shown to be deceptive and incomplete, the prosecutor's reference to the defense power of subpoena was not a reciprocal response. It did not answer the defense charge, but instead merely interjected another (and impermissible) issue into the case.

E. The State Wrongly Accused Defense Counsel of Deception.

As to another fully-preserved issue, the State concedes that it was "intemperate" for the prosecutor to accuse defense counsel of using a "phony frame" to "convince" the witnesses of the defense theory. *See*

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State's Brief at 42-43.[3] The State contends that, however, that it was "brief and incomplete," as defense counsel objected prior to the end of the prosecutor's sentence, thus eliminating any prejudice. There is an irony here. The State relies frequently on the absence of an objection to a closing argument, suggesting that because defense counsel did not respond promptly in the moment the challenged argument must not have been obviously provocative or persuasive. Here, though, the State wishes to take advantage of the fact that the argument was so manifestly inflammatory that it prompted an immediate reaction by defense counsel. It should not be able to have it both ways.

Beyond that point, the State notes that the trial court did respond. *State's Brief* at 43. But the court did not sustain the objection or issue any kind of curative instruction; rather it simply encouraged the prosecutor to move on. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976) (appellate court should consider "The curative measures undertaken by the court and the prosecution").[4] Nothing was done, despite appropriate objection, to lessen the force of this improper argument.

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[3] The State suggests that the prosecutor did not use the word "trick." *See State's Brief* at 43 n.4. On the contrary, shortly after accusing defense counsel of using a "phony" frame, the prosecutor returned to this theme: "And what is it you think that he was shown [by defense counsel], the trick? Obviously, the frame of the gun to help his cousin." Vol. 20/1441.

[4] The prosecutor did not do anything to mitigate the error. Indeed, he soon repeated the same allegation, claiming a "trick." Vol. 20/1441.

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F. These Improper Arguments Were Not Harmless. The Evidence of Second-Degree Murder Was Not Overwhelming.

Finally, the State repeatedly contends that any errors in closing argument were harmless because of the evidence: "Video surveillance captured the defendant's act of shooting Mr. Lee and the events leading up to it, and the defendant confessed to his cousin that he was the shooter before then leaving the state." *State's Brief* at 33-34; at 40 (same). Yet while there was undisputed evidence that Mr. Black shot Mr. Lee and told his cousin that he did so, that does not address the primary questions for the jury here: did he act in self-defense? And, if not, did he act in a state of passion produced by adequate provocation? Merely repeating that he was proven to be the shooter does not establish harmlessness as to second-degree murder. In reality, this was a closely-fought case where there was a sharp dispute between the defense theory of the case and that of the State, and evidence offered by each side in support. As the prosecutor likely perceived, this was a case in which any additional weight on either side, fair or foul, could serve to tip the balance.

III. THE PROSECUTOR DELIBERATELY IMPLIED, OR WOULD HAVE BEEN UNDERSTOOD BY THE JURY TO IMPLY, THAT MR. BLACK'S REFUSAL TO PROVIDE HIS SIDE OF THE STORY SHOULD BE HELD AGAINST HIM.

A. Introduction.

In his brief-in-chief, Mr. Black argued that the State had infringed upon his right to remain silent by questioning a defense expert witness

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about the fact that he had not spoken to the defendant and thus had not received information from him about events leading up to the shooting. *See Brief* at 67-70. The State acknowledges the governing law, *see State v. Jackson*, 444 S.W.3d 554, 588 (Tenn. 2014), agreeing that it is improper for the State to raise (either intentionally or through comments likely to be so interpreted by the jury) the inference that the defendant has kept silent because he has something to hide. *See State's Brief* at 45-46. It claims, however, that there was no such implication here.

B. There is No Precedent Supporting the State.

The State has not found any authority justifying a strategy akin to that present in this case. The only case even cited by the State, *State v. Fritts*, 626 S.W.2d 713, 716 (Tenn. Crim. App. 1981), deals with exclusion of expert opinion evidence as to the value of a stolen automobile engine. It has nothing to do with any issue regarding a defendant's right to silence. It certainly does not approve using cross-examination of an expert as a back-door to raise suspicions as to why the defendant has not spoken up.

C. This was Improper Comment.

The State's substantive position is that the jury would not have interpreted the prosecutor's questioning to be a comment on the defendant's right to silence. *See State's Brief* at 45-46. The State gives no explanation for why the prosecutor honed in, again and again, on the expert's failure to speak to the defendant himself (rather than his failure to speak to other possible witnesses). Vol. 19/1350-1353. The most

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obvious explanation for this recurring motif in the cross-examination was not that the prosecutor wished to attack (or only wished to attack) the bases of opinion of the expert, but that he wanted the jury to be aware that the defendant had not shared his side of the story even with his own witness, much less with the jury.

Crucially, as the prosecutor first began to tread into this area, he mistakenly (perhaps in something of a Freudian slip) departed from the guise that he was only concerned with exploring the basis for the expert's opinions. He asked the witness: "And don't you think the jury, obviously, would want to hear --," Vol. 19/1349-1350, before stopping himself and asking a different question. This illuminating remark, whether intended to plant an impermissible seed or merely the prosecutor mistakenly saying the quiet part out loud, gives away the whole game. In the words of *Jackson*, it shows his "manifest intent." 444 S.W.3d at 588. Reversal is required.

IV. THE DEFENSE DID NOT WAIVE OBJECTION TO INVESTIGATOR THURMAN'S NARRATION OF THE VIDEOS OR THE TESTIMONY REGARDING SEX WITH JUSTICE HALL.

In his brief-in-chief, Mr. Black argued that the trial court had erred in allowing Investigator Thurman to narrate the State's theory of the case through the presentation of the videos. *See Brief* at 75. The State responds that this claim is waived. *See State's Brief* at 47-48. Yet defense counsel objected at length. Counsel summarized, prior to the testimony:

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> [E]ditorializing it and sort of reading into it when you weren't there and you don't have a basis of knowledge is what our objection is.

Vol. 10/494. Counsel then explained in greater detail what she meant by this objection. The trial court then ruled on the objection, stating that the State would be allowed questions such as "what does it appear to you that they're doing?" Vol. 10/495. The court ruled that, instead of exclusion, the defense's recourse would be through cross-examination. Vol. 10/495-496. In short, there was a precise objection followed by a considered ruling. Nothing else was necessary was preserve the issue.

Similarly, the State argues that Mr. Black has waived any objection to the testimony of Justice Hall that they had sex in the days after the homicide. *See State's Brief* at 51-52. The State must acknowledge that there was an actual objection lodged, so it is forced to contend that the objection was insufficiently specific in failing to cite Rule 404(b) or Rule 403. *See State's Brief* at 51-52. The State neglects to mention, however, that the trial court cut off defense counsel by overruling the objection even before counsel had finished. Vol. 13/892. And, in any event, the nature of any objection was perfectly clear from the context -- that this was being introduced to tarnish the defendant and the witness. That is all that is required. Tenn. R. Evid. 103(a)(1) ("stating the specific ground of objection if the specific ground was not apparent from the context"); *State v. Bradley Dwight Bowen*, No. M2022-01289-CCA-R3-CD, 2023 WL 6845805, at *8 (Tenn. Crim. App. Oct. 17, 2023).

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V. THE TRIAL COURT'S INSTRUCTIONS WRONGLY IMPOSED A DUTY TO RETREAT, IF POSSIBLE, BEFORE ENGAGING IN SELF-DEFENSE.

A. There Is A Nexus Requirement.

In his brief-in-chief, Mr. Black argued that the court's instructions had erroneously imposed a duty to retreat on him in the absence of a causal nexus between the alleged unlawful activity (possession of a firearm by a felon) and the need to engage in self-defense. *See Brief* at 79-86. The State's primary response seems to be that no nexus is necessary. In support of that position, it cites a single case, *State v. Brian Howard*, No. W2020-00207-CCA-R3-CD, 2021 WL 144235, at *5 (Tenn. Crim. App. Jan. 15, 2021). While that case did assume that being a felon-in-possession would impose a duty to retreat on a defendant, it did so only in the context of a sufficiency analysis. There is no indication that the appellant there ever raised any argument specifically regarding the nexus requirement.

The State goes beyond this to make a puzzling argument based on the decision in *State v. Perrier*, 536 S.W.3d 388, 394-401 (Tenn. 2017). It concludes, based on *Perrier*, that being a felon in possession of a firearm can constitute "unlawful activity." *See State's Brief* at 57. This is undoubtedly true, but it does not address the separate question of whether there must be a nexus between the unlawful activity and the need to engage in self-defense. The Court in *Perrier* explicitly noted this question and declined to answer it. 536 S.W.3d at 404-405. Its decision cannot be interpreted to provide the answer that it specifically refused to

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give. And beyond this discussion of *Perrier*, the State offers no substantive reason to reject this Court's repeated adoption of a nexus requirement.

B. No Nexus Was Established. A Status Offense Will Rarely Provide a Nexus.

The State's fall-back position is that the nexus requirement was met here. It contends, for example, that "it was the defendant's possession of the firearm that directly led to the shooting of Mr. Lee." *State's Brief* at 58. In doing so, the State misunderstands the nexus requirement. As this Court explained in *State v. Tyshon Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *26 (Tenn. Crim. App. Apr. 8, 2020), *rev'd in part on other grounds*, 656 S.W.3d 49 (Tenn. 2022), as a logical matter, the nexus requirement is very hard to meet if the unlawful activity is a status offense (*i.e.*, conduct that could be legal except for some pre-existing fact about the defendant). This Court recently reiterated this idea:

> [E]ven if the evidence did establish that Defendant was in possession of a weapon when he arrived at the scene, the evidence did not establish a "causal nexus" between this unlawful activity and Defendant's need to engage in self-defense…. As noted in *Tyshon Booker*, "status offenses" (such as being a felon in possession of a firearm) "will rarely qualify as unlawful activity because a person's status alone cannot provoke, cause, or produce a situation."

State v. James Lee Simpson, No. M2021-01031-CCA-R3-CD, 2022 WL 16544456, at *16 (Tenn. Crim. App. Oct. 31, 2022). The shooting here was not caused by Mr. Black being a felon.

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C. The Error Was Not Harmless.

The State acknowledges that, if there was instructional error here, reversal is required unless it was harmless beyond a reasonable doubt. *See State's Brief* at 58-59. It contends, however: "No reasonable jury would have accepted the defendant's theory of self-defense here." *State's Brief* at 59. In doing so, it presents a one-sided view of the evidence. There was evidence that Mr. Black could have believed he was in imminent danger from Mr. Lee's course of conduct of aggressively approaching his car, yelling out, and then raising his arms. The defense raised the possibility that Mr. Lee had a weapon. Contrary to the State's argument on appeal, the State's own witness testified at trial that one portion of the video shows Mr. Lee with something in his hand. Vol. 11/643; Vol. 11/654-654 (referring to it as an "artifact"). He admitted that he could not say whether it was a gun or not. Vol. 11/644. There was testimony suggesting that, while a weapon had not been found at the scene, it could have been moved after the fact. And even if the decedent was not armed, the defendant may have nonetheless reasonably believed that he was a threat. This was a quintessential set of jury questions -- how to parse the conflicting testimony, how to interpret the video, how to assess the states of mind and actions of the parties. Yet this jury was given the wrong instructions to apply to its factual determinations, and thus could have found Mr. Black guilty even if it concluded that he reasonably believed he was in danger (if it thought he could have

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retreated by driving away safely). This error was not harmless beyond a reasonable doubt.

VI. THE COURT'S INSTRUCTIONS, AND REFUSAL TO GIVE A REQUESTED CLARIFICATION, LOGICALLY PRECLUDED ANY CHANCE OF A VERDICT OF VOLUNTARY MANSLAUGHTER.

A. Introduction.

In his brief-in-chief, Mr. Black raised interrelated issues regarding the murder and manslaughter instructions. *See Brief* at 86-89. He argued, first, that the combination of the murder/manslaughter instructions with the sequential consideration instruction made it logically impossible for the jury to ever return a verdict of guilty of voluntary manslaughter.

The State responds merely by pointing to precedent approving similar instructions. *See State's Brief* at 60-62. It does not offer any substantive rebuttal to the defendant's position. That is, it does not even attempt to explain how a jury -- without violating the specific requirements of the acquittal-first instruction, which was that it could move to a lesser offense only if it had a reasonable doubt as to the greater offense -- could ever return a verdict of voluntary manslaughter. This is because it is impossible. The only hope is that the jury disregards the instructions, but any assumption that the jury will do so is directly contrary to the legal truism that "The jury is presumed to follow its instructions." *State v. Young*, 196 S.W.3d 85, 111 (Tenn. 2006).

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B. This Error Violated Due Process and the Right to Present a Defense.

An instruction that precludes legal consideration of an otherwise-viable theory of defense -- here the jury could not have found voluntary manslaughter even if it concluded that Mr. Black was in a state of passion -- is a violation of both state law and of federal constitutional law. The Supreme Court has repeatedly observed "that an essential component of procedural fairness is an opportunity to be heard." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Here, any evidence supporting state of passion was rendered irrelevant to the jury's determination. *See also Cool v. United States*, 409 U.S. 100, 104 (1972); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) (the right to present witness in support of a defense would "be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"). The legislature has provided the crime of voluntary manslaughter; the jury instructions here made a verdict on that crime impossible. The Constitution rejects this kind of bait-and-switch. *See Falconer v. Lane*, 905 F.2d 1129, 1136 (7th Cir. 1990) (due process violation where "No matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses', the jury could nevertheless return a murder verdict in line with the murder instruction as given"); *People v. Garcia*, 28 P.3d 340, 345 (Colo. 2001) ("the jury instructions could have prevented the jury from considering provocation after having determined that Defendant was guilty of second-degree murder").

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C. The Court's Refusal to Give a Clarifying Instruction was Error.

To the extent that there is some kind of implicit exception in the sequential consideration instructions such that a jury is allowed to move on from second-degree murder because it believes the defendant acted in a state of passion, at the very least the jury should have been told about this exception. Here, the defense specifically requested an instruction, which the court declined to give, that would have made that explicit: "If you conclude that the evidence demonstrates that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner, then you shall return a verdict of guilty of voluntary manslaughter." R.84.

On appeal the State does not contend that this instruction would have been legally incorrect. It does not contend that its content was otherwise conveyed by the instructions. It does not contend that it was permissible for the jury to be left uncertain how it could ever find voluntary manslaughter, or uncertain of what to do if it found the elements of second-degree murder and also believed Mr. Black had acted in a state of passion. Indeed, it does not directly address this argument at all. By so doing, it has waived any contention that the instruction was properly denied.

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VII. THE JURY INSTRUCTIONS WRONGLY DEFINED SECOND-DEGREE MURDER AND VOLUNTARY MANSLAUGHTER.

A. It is Illogical to Treat State of Passion as an Element of Voluntary Manslaughter.

Mr. Black also argued that the jury's instructions improperly defined state of passion as an element of voluntary manslaughter rather than something to be disproven as part of second-degree murder, and indicated that it was only the State which could prove state of passion. *See Brief* at 89-92. Again, the State has offered little response other than citing to panel decisions approving the pattern instructions. *See State's Brief* at 67. It has not fully engaged with the logic of Mr. Black's position or of that given in the decision of *State v. Brandon Scott Donaldson*, No. E2020-01561-CCA-R3-CD, 2022 WL 1183466, at *24 (Tenn. Crim. App. Apr. 21, 2022).

The State says that it is natural for the State to have the burden of proving state of passion because it might have only indicted the defendant for voluntary manslaughter. *See State's Brief* at 67. That is not what happened here, where the defendant was charged with first-degree murder. But even then, the system posited by the State, where the State seeks to prove state of passion and the defendant seeks to disprove it, makes no sense. It could produce a truly absurd trial where the State would claim that a defendant was guilty of voluntary manslaughter because he acted pursuant to adequate provocation, and the defendant could respond that he was not guilty of voluntary

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manslaughter because the provocation was not adequate to provoke a state of passion (*i.e.,* the defendant himself contending that he was *not* reasonably provoked).

No other jurisdiction has this illogical approach. Even those jurisdictions that temporarily did have such an approach have specifically rejected it after identifying the problems involved. In *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988), for example, the court rejected the facile argument (identical to that offered by the State here) that because provocation can be characterized as an "element" of manslaughter, the Constitution requires that it be proven beyond a reasonable doubt by the prosecution. It instead imposed a burden on the State to disprove state of passion beyond a reasonable doubt. *Id.* at 146. Similarly, in Colorado, the Supreme Court rejected use of instructions that treated provocation as an affirmative element of the lesser offense, concluding that the State must disprove provocation to sustain the greater charge. *Garcia*, 28 P.3d at 346.

B. The Instructions Violate Due Process.

The State has sought to distinguish *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), as presenting a "substantively different" issue. *See State's Brief* at 66-67. Yet the problem identified here was outlined in those cases. In *Patterson*, the Court reiterated that the Constitution provides "limits" to the ability of the legislature to impose practical burdens on a defendant by creative re-definition of crimes, in particular by "labeling as affirmative defenses at

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least some elements of the crimes now defined in their statutes." 432 U.S. at 210. The Supreme Court has later explained that *Patterson* can be read as establishing "that the State lacked the discretion to omit 'traditional' elements from the definition of crimes and instead to require the accused to disprove such elements." *Jones v. United States*, 526 U.S. 227, 241–42 (1999). That reversal is exactly what has occurred here. Something that historically negated malice, and thus had to be disproven by the State, is now something that must be proven (by the defendant, as a practical matter) beyond a reasonable doubt to reach a lesser offense. *See also Mullaney*, 421 U.S. at 703-04 ("Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result"). Further, the discussion in *Patterson* went on to emphasize, twice, that an affirmative defense, if permissible, should have a "lower threshold" of "preponderance of the evidence" rather than proof beyond a reasonable doubt. 432 U.S. at n.13. Here, state of passion must be proved beyond a reasonable doubt, a standard never approved for use with affirmative defenses. This perverse set of burdens is contrary to due process, and violates the limits established by *Mullaney* and *Patterson*.

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CERTIFICATE OF COMPLIANCE

I, Jonathan Harwell, hereby certify that the foregoing brief complies with the requirements of Tenn. Supreme Court Rule 46 governing e-filing. It has been prepared in 14-point Century Schoolbook font and contains a total of 4,998 words in the main text (excluding tables and certificates).

JONATHAN HARWELL

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