IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. CYNTOIA DENISE BROWN

Appeal from the Criminal Court for Davidson County
No. 2005-A-215 J. Randall Wyatt, Jr., Judge

No. M2007-00427-CCA-R3-CD - Filed April 20, 2009

A Davidson County jury convicted the defendant, Cyntoia Denise Brown, of one count of first degree premeditated murder, one count of first degree felony murder, and one count of especially aggravated robbery, a Class A felony. The trial court merged the two first degree murder convictions and imposed a concurrent twenty-year sentence as a Range I, standard offender, for the defendant's especially aggravated robbery conviction. On appeal, the defendant asserts that: (1) the trial court erred by denying her motion to suppress her statement to police, which she argues was obtained in violation of her right against self-incrimination; (2) the trial court erred by denying her motions to exclude certain evidence, including: (a) testimony of witnesses from a mental health facility; (b) a "New Personality Profile" authored by the defendant; (c) testimony from a former fellow inmate; and (d) testimony by the defendant's mother regarding a conversation between her and the defendant, all of which she argues was irrelevant and prejudicial; (3) the trial court denied her the right to present a defense by excluding the testimony of a potential witness; (4) the trial court erred by allowing a State expert witness to testify beyond the scope of her expertise; (5) the trial court erred by admitting crime scene and autopsy photographs of the victim; (6) the trial court erred by ordering her to submit numerous handwriting and fingerprint samples to the State; (7) the evidence produced at trial was insufficient to support her convictions; and (8) the trial court improperly denied her motion to dismiss the case against her on double jeopardy grounds. After reviewing the record, we discern no error as to the defendant's stated issues. However, we conclude that the defendant's conviction for especially aggravated robbery must be reversed because she was not indicted for this offense but instead for aggravated robbery. Accordingly, we remand the case to the trial court for entry of a judgment of conviction for aggravated robbery and a sentencing hearing as to that offense. In all other respects, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part and Reversed in Part; Case Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Wendy S. Tucker (at trial and on appeal) and Richard McGee (at trial), Nashville, Tennessee, for the

appellant, Cyntoia Denise Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. (Torry) Johnson, District Attorney General; and Jeffrey P. Burks and Lisa A. Naylor, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Erin Dutton, the records custodian for Davidson County's 911 call center, testified regarding a 911 call that was placed at 7:19 p.m. on August 7, 2004. A recording of the call was played for the jury. The caller provided the operator with the address 2728 Mossdale Drive; when the operator asked "what's going on over there[,] ma'am," the caller replied "homicide." The operator attempted to ask the caller additional questions, but the caller hung up before responding to them.

Detective Scott Carter with the Metropolitan Nashville Police Department testified that he was sent to the Mossdale Drive residence on August 7, 2004, when he was still a patrol officer. He received no response when he knocked on the front door but he was able to open the house's garage door. He and his sergeant, Dhana Jones, who also arrived on the scene, went into the house. Upon entering a bedroom Detective Carter saw the victim, later identified as Johnny Allen, lying in a large pool of blood on the bed. Detective Carter said that the victim was lying "face down on the bed . . . his face was facing toward[] the wall" and that the victim's hands were beneath his face, his fingers "kind of partially interlocked." He said that some of the blood dripped onto the floor, forming a small pool. The officers called paramedics, who responded to the scene and checked the victim for a pulse, finding none. He said that the paramedics gave no other medical attention to the victim.

Detective Carter said that the police department's Identification Division, otherwise known as the "I.D. Unit," soon arrived and began searching for evidence at the scene. He testified that he saw a shell casing underneath the bed and "a bullet hole that went through . . . the wall that was next to the victim's head" on the left side of the bedroom. He said that the police found a bullet on a bed in the room on the other side of the wall. He also noted that the crime scene photographs introduced into evidence showed "some white residue on the pillow and to the back of his head," and while the photographs were taken after the paramedics checked for the victim's pulse, the position of the victim's body in the photographs was the same as when he and Sergeant Jones first discovered the victim.

On cross-examination, Detective Carter said that he arrived at the scene between 7:20 and 7:30 that evening, although he could not be sure of the exact time. He also said that he did not take the crime scene photographs, he was not present when all of the photographs were taken, and he was unsure how many officers came to the crime scene. He also admitted that he was not present when the paramedics worked on the victim's body. However, he insisted that he "believe[d]" that the

victim's body was in the same position when he arrived on the scene as it was in the crime scene photographs.

Metropolitan Nashville Police Department Detective Charles Robinson testified that he and his partner, Detective Derry Baltimore,[1] arrived at the victim's residence shortly after 11:00 p.m. on August 7, 2004. Around 1:20 the morning of August 8, the detectives left the crime scene and went to a convenience store, where they met with Samuel Humphrey and Humphrey's father. After talking with Humphrey, the detectives went to the Walmart on Hamilton Church Pike, where they found the victim's truck in the parking lot. The detectives and several patrol officers then went to room 302 of the InTown Suites, located on Murfreesboro Road near the Walmart, where they believed the defendant was staying. The officers knocked on the door and shouted "police." A short time later, a man, whom Detective Robinson said was later identified as Gary McGlothen, opened the door. The officer pulled McGlothen out the door, at which point the defendant ran out the door, shouting that "Cut," as she called McGlothen, "had nothing to do with this.[2] I'll tell you-all everything."

Detective Robinson then asked the defendant if any weapons were in the room. The defendant pointed the detectives to a closet, in which officers found a rifle and a shotgun. Detective Robinson found a notepad on which a handwritten three-page note entitled "new personality profile" had been written. He took the notepad and guns into evidence. He also looked through a handbag in the room to see if any weapons were inside. The detective found no weapon in the handbag but did find $172 in cash and a set of keys, including a key bearing a Ford emblem. He returned to the Walmart parking lot and used the Ford key to open the victim's truck. He then returned to the motel before returning to the Davidson County Criminal Justice Center, where Detectives Robinson and Baltimore interviewed the defendant, who had been taken into custody at the motel.

The detectives' interview of the defendant was recorded on videotape, and this recording was played for the jury at trial. At the beginning of the interview, the defendant gave her name as "Cyntoia Denise Mitchell" and her date of birth as January 29, 1985. Based on this information, the detectives had the defendant arraigned as an adult; however, once it was learned that she was actually sixteen years old, she was transferred to juvenile court.[3] Before questioning the defendant, Detective Robinson informed her of her Miranda rights as listed on a Miranda waiver form used by the

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[1]Detective Baltimore also testified at trial; however, because the substance of his testimony essentially mirrored that of Detective Robinson, Detective Baltimore's testimony will not be summarized here.

[2]Detective Robinson testified that McGlothen was arrested at the motel but was later released because the defendant did not "implicate him in any kind of way in this incident," and because there was no physical evidence linking him to the offense.

[3]The State later sought to had the defendant tried as an adult for these offenses. After a hearing, the defendant's case was transferred from juvenile court.

Metropolitan police. After the defendant signed the Miranda form, the detectives began questioning the defendant about the events which led to the victim's death. The defendant told police that at around 11:00 the night of Friday, August 6, she was walking near a Sonic Drive-In when the victim, a man whom the defendant had never met, pulled alongside her in a white Ford F-150 truck and asked her if she was hungry. The defendant then got into the victim's truck, and the two went to the drive-in. While the victim and the defendant waited for their food to arrive, the victim told the defendant that she did not need to be "stayin' on the streets" and, assuring the defendant that "he was a safe person," asked the defendant to spend the night at his house, to which the defendant agreed. According to the defendant, the carhop who brought them their food told the victim, "you back again," to which the victim replied, "yeah." The victim then drove the defendant to his house on Mossdale Road.

The defendant told the detectives that once she and the victim arrived at the victim's house, the victim showed her several guns, including two rifles. The defendant claimed that the victim also told her that he "was in the Army and that he was a sharp shooter or something like that." Eventually, the defendant and the victim got into bed together, with the victim on the left side of the bed and the defendant the right side. The defendant attempted to go to sleep, but the victim got up several times every five to ten minutes, going to the bathroom or to an adjacent bedroom. She also said that the victim touched her and whispered to her. The defendant said that she then saw the victim reaching underneath the bed, which led the defendant to believe that the victim was reaching for a gun. The defendant, fearing for her life, reached into her handbag, which was on a night stand to the right of the bed. She pulled out a .40 caliber handgun, which she had bought "from somewhere off the street" approximately three weeks before this incident, and shot the victim.

The defendant told the detectives that after shooting the victim, she grabbed the keys to the victim's truck, as well as two of the victim's guns, which she intended to pawn. She left the victim's house at 1:42 a.m. and drove his truck to the Walmart parking lot. She then got a ride from a "black guy in a black truck," who took her to the InTown Suites. The defendant denied Detective Baltimore's suggestion that the driver "trailed her" to the Walmart before taking her back to the motel. The defendant said that another man, whom she knew only as "Rick," then took her from the motel back to the Walmart, where she placed the 911 call on the victim's cellular telephone—a claim which the police later verified. This person then took her back to the motel.

During the interview, the defendant denied that she was a prostitute, denied having sex with the victim, and insisted that the victim, who was nude when found by police, was not nude when he got into the bed with her. Rather, she said that she went from "place to place" in an attempt to find people who would provide her with food and shelter. Thus, she felt comfortable sleeping in the same bed as the victim. She added that she shot the victim because people had beaten and raped her in the past and was "takin' no chances" in the future. When asked why she did not leave when the victim began acting suspiciously, she replied, "you just don't think like that in the heat of the moment. You think like that after the fact." The defendant said that the gun she used was her own;

she denied that she used one of the victim's guns, which the victim's girlfriend had reported missing, to kill the victim. She also acknowledged that she never saw a gun in the victim's hand and that the victim did not try to rape her. At the end of the interview, the defendant said that the man found inside her motel room at the time of her arrest was a person whom she had met in the motel parking lot shortly before the police arrived.

Detective Robinson testified that after the interview, the defendant told him that she had taken $172 from the victim's wallet. This amount matched the amount of cash recovered from the defendant's handbag. After the interview the detectives allowed the defendant to use the telephone. The detective said that the defendant made two phone calls; during one of the calls, she told the other person that she was "charged with murder and homicide . . . I don't know exactly which words she used, but she was giggling and laughing at the same time. She made a second phone call and was doing the same thing." At one point, the defendant handed the telephone to Detective Baltimore, who told the other person that the defendant had in fact been arrested for murder. The detectives also learned that the defendant spoke to Shocoha Armstrong during the other call.

Detective Robinson said that once he and Detective Baltimore learned that the defendant was a juvenile, they brought her to juvenile court for booking. During that process, the defendant asked Detective Baltimore for paper so that she could write something. The detectives provided the defendant with paper; she then wrote this note:

> I am not guilty, the reason what happened is sketchy is because I am in fear. I know it's my story against theirs and too much is pointing at me. What I need is reassurance from a lawyer in order to ensure my protection. I didn't committ [sic] this crime, I don't have the heart to.

The defendant's note also encouraged the police to search a vehicle outside room 328 linking two men named Sam and Rick to the crime. Detective Robinson said that he did interview Richard Reed, "Rick" in the defendant's note, and that he searched Reed's car, finding a real estate contract bearing the victim's printed name and signature.

Detective Robinson said that while the defendant insisted that she had "dropped" the gun she used to kill the victim, and that the gun could have been at the victim's house, the police never recovered the gun. He also noted that while several pieces of evidence, including a pillow case that appeared to contain gunpowder, were taken from the crime scene, no DNA tests were performed because "we didn't need the DNA testing with all of the other tests that we had."

On cross-examination, Detective Robinson acknowledged that the defendant interrupted him when he reached the section of the Miranda waiver which read "no promises . . . have been made."

Detective Robinson said that before he brought the defendant into the interview room, he told her, "let me go in here and sit down, and I hope you'll talk to me. . . . [I]f you do, I will let the District Attorney's Office know that you cooperated with us and they usually take that into consideration." The detective said that this statement was not recorded, and he denied telling the defendant anything else before the interview began. Detective Robinson also said that when he told the defendant that the police had found her fingerprints on the night stand next to the bed, when in fact no such fingerprints had been recovered, he was "exaggerating" the evidence, which he described as a commonly-used police interrogation technique. The detective acknowledged that during the hearing on the defendant's motion to suppress her statement, he had called this technique "lying." He also noted that during the interview, the defendant did not appear to be under the influence of drugs or alcohol. He said that based on his conclusion that the defendant was not under the influence, he did not have the defendant's blood or breath tested.

Detective Robinson acknowledged that through his investigation, he confirmed as true some of the things that the defendant said during the interview. Particularly, the police confirmed the defendant's information regarding the caliber of weapon used, the fact that the defendant did not know the victim before the day of the shooting, the fact that the victim picked up the defendant in his truck and took her to Sonic, and that the defendant made the 911 call reporting the victim's death. However, the detective said that the defendant's version of events, in which she did not plan to kill the victim and the shooting happened in a "split second," was not consistent with the evidence at the crime scene, particularly the position of the victim's body and hands, which led the police to conclude that the victim was asleep when he was shot. Detective Robinson said that the police did not perform a trajectory test because such a test "wouldn't be appropriate" in situations such as this one, where the bullet passed through the victim's skull and deflected.

Several other members of the Metropolitan Nashville Police Department also testified at trial. Officer Steven Stone of the crime scene unit testified that he took photographs at the crime scene and collected evidence for processing. He collected a .40 caliber shell casing and a spent bullet, along with clothing, a magazine pouch with a magazine of nine millimeter ammunition, and a pillowcase in a downstairs room that appeared to match the pillowcases from the victim's bed. He said that the magazine and ammunition were found on a table on the right side of the bed, while the victim was found lying on the left side of the bed. Officer Stone said that "[t]he hole in the wall would have been directly adjacent to him leading into the next room. And that's where the spent bullet was found." Officer Stone said that when he observed the victim's body, there appeared to be gunpowder residue on the pillowcase on which the victim's head had lain at the time the police discovered him. However, he did not collect the pillowcase himself.

On cross-examination, Officer Stone acknowledged that he did not perform a trajectory test in this case because "it was obvious when [he] looked at it that the trajectory was straight." He also admitted that he did not take any measurements between the hole in the wall and the ground. The officer also said that no usable prints were found on the magazine recovered from the victim's

bedroom.

Officer Warren Fleak with the I.D. Unit testified that he collected trace evidence from the victim's bedroom, the Walmart parking lot where the victim's truck was found, and the motel room in which the defendant was arrested. Officer Fleak said that he tested the rifle and shotgun found in the defendant's room for fingerprints but that no usable prints were found. He said that usable fingerprints were found on the victim's truck— specifically on the driver side door above the door handle. A later witness from the I.D. Unit, Linda Wilson, testified that the prints were the defendant's. On cross-examination, Officer Fleak said that the police did not collect the sheet and pillowcase on which the victim was found. He said that he believed that the medical examiner collected those items, although he was not certain if the items were in fact collected. On redirect examination, he said that the blood seen beneath the victim's hands in the crime scene photographs did not accurately reflect blood spatter patterns, noting, "There's nothing that you can really distinguish anything from due to the [blood] absorbing into the cotton fiber."

Officer Michael Baker, a Forensic Firearms and Toolmark Examiner, testified that he examined the shell casing and spent bullet recovered from the victim's residence. He said the shell casing and bullet were both consistent with a .40 caliber projectile, but it was not possible to test whether the shell casing and spent bullet "matched." He also tested a pillowcase found near the victim's head and determined that it had gunshot residue on it. Officer Baker's test of the pillowcase led him to conclude that the gun used to shoot the victim was held three to six inches from the pillow at the time it was fired.

Gary Biggs testified that he examined the victim's residence as part of his duties as an investigator with Forensic Medical, an agency hired by the Davidson County Medical Examiner. Biggs also took photographs of the crime scene, which were introduced into evidence. Biggs said that the victim's hands were "interlaced" when he arrived and begin his investigation. Biggs said that he did not move the victim's body before taking the pictures but he did move the body after taking the photographs because while it was obvious that the victim died of a gunshot wound, he still "check[ed] everything to see if there's other factors that cause the death other than the obvious." Biggs said that no such "other factors" existed in this case. He noted that based on the livor mortis, or postmortem settling of the blood, present in this victim, the victim had been dead at least twelve hours at the time his body was photographed. On cross-examination, Biggs said that he arrived at the house at 2:38 the morning of August 8. He acknowledged that he did not "make any measurements on the wall about where the hole went. He also testified that he was uncertain whether the blood on the victim's bed sheets, as depicted in the photograph, reflected blood spatter or the pattern of the sheet.

Richard Reed testified that he and Samuel Humphrey were roommates at the InTown Suites where the defendant was arrested for "three or four months," including early August 2004. He said that at around 5:00 on the afternoon of August 7, 2004, the defendant knocked on his door and asked

him for a ride to the Walmart, which he said was about a three-minute drive. The defendant also told Reed that she had put some keys in the back of his car, which he said was fairly easy to do, given that his car's back window had been "busted out." Reed drove the defendant to the Walmart parking lot, where she used a key to unlock a white Ford F-150 truck. She then took a cellular phone out of the truck and put it in her purse. The defendant asked Reed for jumper cables, which he did not have. Reed and the defendant then returned to the motel.

Reed said that the defendant told him that she had "shot somebody in the head for fifty thousand dollars and some guns." The defendant asked him for a ride to the victim's house to "help her clean it out," but Reed declined the offer. Reed did not believe the defendant's claims about killing a man, but once he and Humphrey saw a televised news report about the shooting, Humphrey went to the defendant's room to ask her about the shooting. After Humphrey returned from the defendant's room, he and Reed left their room and went to separate locations. On August 8, Reed spoke with Detectives Robinson and Baltimore at his motel room. On cross-examination, Reed acknowledged that he told the detectives, "I was so drunk yesterday, what time did I wake up? Uh, it was probably about 4:30, 5:00, in the afternoon." Reed said that he had worked at a bar from 6:30 or 7:00 the evening of August 7 until 3:30 the morning of August 8 and that he drank alcohol on the job. On redirect examination, Reed said that he gave police permission to search his car and that the police found a folder containing realtor papers under the front passenger seat. He said that he had never seen the folder before the police found it.

Glenn Ford, a Market Asset Protection Manager with Walmart, provided the surveillance video taken from cameras outside the Hamilton Church Pike Walmart the evening of August 6 and morning of August 7. The videotape, which was played for the jury, depicts a white Ford truck entering the store's parking lot at around 1:50 the morning of August 7. The truck went near the store's gas station before disappearing from view. A short time later, the video depicts a black SUV pulling into the parking lot. A person emerges from off camera and speaks to the SUV's driver before getting inside the SUV. The SUV then disappears from view.

Randall Jordan testified that at around 2:00 the morning of August 7, he drove into the parking lot of the Hamilton Church Pike Walmart in a dark 1999 Ford Expedition when the defendant stopped him. Jordan said that he asked the defendant, who "looked like a child" to him, what was wrong. The defendant asked if Jordan could take her home, which he agreed to do. Jordan asked the defendant why she was out "at this time of morning," which she did not answer. Jordan brought the defendant back to the InTown Suites. Jordan said that during the time the defendant was in his car, the defendant said nothing and appeared "blank. . . . [Y]ou [could] tell something was wrong but . . . I didn't know what it was."

Kathy Franz testified that on August 14, 2004, she worked as a nurse at a facility[4] at which she encountered the defendant. Franz said that one day, the defendant asked her to use the telephone. Franz told the defendant that she could not use the telephone, at which point the defendant grabbed her by the hair and by the face; after that, the two women struggled and "both wound up [on] the floor." According to Franz, the defendant told her, "I'm going to do you like I did him, but I'm not going to shoot you once in the back of the head. I'm going to shoot you three times and listen while your blood splatters on the wall." Eventually, four or five of the facility's staff physically restrained the defendant. Another of the facility's employees, Sheila Campbell, witnessed this episode and testified about it at trial. The substance of Campbell's testimony largely mirrored that of Franz's, although Campbell added that the defendant asked permission to phone her mother before the incident and that the incident left Franz with bruises and abrasions.

Nancy Liker testified that at the time of the victim's death, she and the victim had been romantically involved for eleven months and that theirs was an exclusive relationship. She said that they had plans to see each other Friday, August 6, but at some point that day she called the victim and told him that she was unable to make their date. At around 12:30 the afternoon of Saturday, August 7, she visited the victim's house, intending to use his computer. Upon pulling into the driveway, she saw that the victim's white Ford F-150 was not parked there. At the time, she figured that the defendant was busy with work and that nothing was wrong. Thus, although she had keys to his house, she did not go inside the house. Around 9:30 that evening, she learned from police that the victim was dead.

Shayla Bryant testified that in November 2004, while in jail, the defendant spoke to her and two other inmates, Lashonda Williamson and Sheila Washington, about the victim's death. The defendant told Bryant about the charges she was facing, and Bryant overheard a conversation between the defendant and Williamson in which the defendant "basically said this guy that she was talking to used to send her out to prostitute. And she was mad at him. And the man tried to rape her, so she shot him." Bryant told the defendant that she did not believe the defendant's account because the story "just seemed too perfect." Bryant testified that the defendant then "started laughing." Through notes, the defendant "basically said she shot the man just to see how it feel[s] to kill somebody." Bryant said that the defendant appeared "as jolly as she wanted to be" while discussing the victim's death. Bryant added, "it didn't look like she had any remorse. She didn't cry. . . . She was just there."

Bryant said that she and the defendant passed notes to each other through a hole in the wall between their cells. On cross-examination, she said that she flushed most of the defendant's notes down the toilet but that she kept one of the notes, which she eventually gave to police. The note read: "Everything is the truth, I swear on my life, except for 'I thought he was getting a gun' and the

[4] In her brief, the defendant identified the facility, which was not named at trial, as Western Mental Health Institute.

feelings of nervousness."

At the beginning of her testimony, Bryant acknowledged that she was awaiting trial for first degree murder.[5] She agreed that she "hope[d] to get some type of consideration" from the State in return for her testimony but that she was unaware of "any offers of leniency" regarding her testimony. However, on cross-examination she agreed that "the first words out of [her] mouth to Detective Robinson were something to the effect of, well, what the hell are you going to do for me," and that the bond in her murder case had been reduced from $50,000 to $5000 after she spoke to the police.

Bryant testified that she knew the defendant was a juvenile, but she said that "[t]hey didn't say we could not talk to her. We just couldn't be around together," a rule which Bryant admitted she broke. She said that the defendant began the conversation with the other inmates. Bryant acknowledged that she told Detective Robinson that the defendant claimed that she and the victim planned to go to a hotel the night they met, but that the victim "insisted on bringing her to his home." Bryant also told police that the defendant initially claimed that she shot the victim because she was afraid he would rape her and she thought he was reaching for a gun, but that the defendant changed her story after she told the defendant that the story was "too perfect."

Shocoha Armstrong, a friend of the defendant, testified that she spoke with the defendant when the defendant called her from a detective's office following her arrest. Armstrong said that during this conversation, the defendant talked about the charges against her; Armstrong added that while the victim was talking, "she was laughing, but I thought she was joking." Armstrong did not believe the defendant, so Armstrong asked the defendant to speak to a detective. A detective then spoke to Armstrong over the phone.

Armstrong said that she spoke with the defendant on approximately twenty occasions since her arrest. During some of these calls, the defendant talked about her boyfriend, whom she knew as "Cut" but who she later learned also went by the name "Cut Throat." According to Armstrong, the defendant said that "Cut" made her "leav[e] with other men," which Armstrong interpreted as prostitution. During other calls, the defendant told Armstrong that she was afraid of the victim and that she used her own weapon to shoot him, although the defendant did not say why she went to the victim's house or why she had a gun when she went there.

On cross-examination, Armstrong acknowledged that the defendant had a history of laughing in inappropriate situations, including when the defendant said that she had been raped. Armstrong also said that the defendant had told her that "Cut Throat," her boyfriend, had made her use drugs.

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[5]On cross-examination, defense counsel asked Bryant numerous questions about the facts of the case against her.

On redirect examination, Armstrong said that the defendant did not report the rape to the police "because the man that raped her was [Armstrong's] cousin's boyfriend. And [the defendant] didn't want nobody in the family to be mad . . . about him raping her." Armstrong said that the defendant called her shortly after the rape occurred, but Armstrong said that while the defendant was upset and crying at the time, "at that time she didn't feel what she was crying for. . . . I didn't find out until later when we was at the house when she started crying and she t[old] me what the situation was."

Thomas Vastrick, a forensic document examiner, testified that he took handwriting samples from the defendant, which involved the defendant writing the same words and phrases three times. Vastrick then compared the defendant's handwriting samples to both the handwriting on the note obtained from Bryant and the handwriting on the "new personality profile" found in the defendant's motel room. Vastrick testified that he "was able to determine that the questioned writings" in both the note from the jail cell and the new personality profile were written by the defendant. On cross-examination, Vastrick said that the defendant appeared to be writing "naturally" while giving her handwriting samples and did not appear to "fake her handwriting" while giving the samples.

Dr. Amy McMaster, a forensic pathologist, testified that she performed the autopsy on the victim in this case. She testified that the victim died of a single gunshot wound to the head. Dr. McMaster said that the entrance wound "was located in the middle of the back of the head, four inches below the top of the head," and that the exit wound "was in the forehead, in the midline of the forehead, one and a half inches below the top of his head." She said that"[t]here was no evidence on the body that would allow [her] to conclude . . . where the gun was held in relation to the head at the time [the gun] was fired." Particularly, she noted that soot, or burned gunpowder, and stippling, or unburned gunpowder, were often present on a decedent's body when the decedent was shot at close range, and this victim did not have soot or stippling on his body. However, Dr. McMaster noted the presence of "stellate or a star-shaped or tears or lacerations that radiate from the edges of the [entrance] wound," which she said was consistent with a person being shot at close range. She also noted that the amount of such tearing also depended on they type of gun and ammunition used and the length of the barrel of the gun, and that such "barriers" as clothing, hair, or a hat could "obscure or mask the appearance of soot or gunpowder stippling."

Dr. McMaster testified that the victim had no defensive wounds. She then explained lividity, or livor mortis, the settling of blood in a person's body after the person's death. Dr. McMaster said that the type of lividity present in this victim, "fixed" lividity, occurred "somewhere around twelve to twenty-four hours or longer" after a person's death. She said that based upon the lividity patterns present in this victim, the victim "was lying on his right side for some period of time after his death." She also said that the victim's wound was "an immediately fatal wound." She added, "Because of the nature of the wound, I would not expect [the victim] to have any type of voluntary movement or to be able to move his extremities or his body in any way" after being shot. Thus, Dr. McMaster said that in her professional opinion, the victim's hands were clasped at the time of his death, as they were in the crime scene photographs taken by police after the incident.

On cross-examination, Dr. McMaster said that the medical examiner's office "could have" received the sheet from the victim's bed on which he was lying at the time of his death, but that evidence was not documented on her evidence list. She said that while the victim had EKG leads on his back when the crime scene photographs were taken, their presence did not indicate attempts at "medical intervention." Rather, she said that the EKG leads were there to establish that the victim was dead. She said that the victim's fatal wound could not have been self-inflicted. On redirect examination, Dr. McMaster said that even had she examined the sheet on which the defendant was discovered, the sheet would not have changed her opinion regarding the placement of the victim's hands at the time of his death.

Kevin Carroll, an internal affairs investigator with the Davidson County Sheriff's Office, testified that all inmate telephone calls from the county's jails are recorded, and that his review of the records of those calls indicated that the defendant placed a call on October 29, 2005. The defendant's maternal grandmother and adoptive mother, Ellenette Washington, testified that she received this call. During Washington's testimony, a recording of the conversation was introduced into evidence; during the conversation, the defendant told Washington that "I killed somebody. . . . I executed him." On cross-examination, Washington acknowledged that she had visited the defendant in jail "just about every weekend" since the defendant was arrested and that the defendant had told her consistently that she shot the victim because she was afraid that the victim would rape her or otherwise hurt her. Regarding the defendant's "execute" comment, Washington said that the defendant "has a way of taking things out of context. . . . [S]he may say one thing, but actually mean something different." Washington insisted that the defendant's comment was not a confession but rather an expression of helplessness.

The defendant, who did not testify, presented two witnesses on her behalf. Galina Osborne testified that in August 2004, she encountered the defendant and the victim while working at a Sonic Drive-In. When she first saw the victim, he was driving a white Ford F-150 truck. Osborne said that she waved at the victim because "he didn't have his lights on" and "it was getting dark." The victim stuck his head out the window, Osborne informed him that his truck's headlights were not on, and the victim thanked Osborne before driving away. Approximately thirty minutes later, the victim returned in his truck, with the defendant in the passenger seat. Osborne brought their order to the victim's truck, at which time Osborne joked that the meal would cost $99. She said that the victim replied, "that seems really expensive," to which Osborne replied, "but she's worth it." The victim replied, "I don't know. We'll see." Osborne then tended to other customers. She said that the victim appeared "[k]ind of cocky" during the exchange, while the defendant "looked really comfortable." On cross-examination, Osborne said that her comments to the victim were based on her belief that the defendant was his friend or a member of his family. On redirect examination, Osborne said that her trial testimony mirrored a statement she had given to police in August 2004, although in that statement she had also told the police that she believed the victim was flirting with her.

The defendant's other witness, Sandra Liggett, testified that she met the victim at a restaurant in February 2004. Liggett began attending the same church as the victim, and the two also exchanged e-mails and telephone calls. In March 2004, the two agreed to attend a movie together. The victim picked up Liggett at her friend's residence as planned, but instead of going to a movie theater, the victim asked Liggett if he could show her his house. Liggett, knowing the victim was a realtor and believing that he was a "nice guy," agreed. The victim showed her several rooms in his house before leading her into his bedroom. The victim told her that "he wanted to get something out of the way first," then he kissed her. Liggett told the victim, "this is wrong. I don't want to do this." The victim gave Liggett a "hard stare," which she described as "scary." She asked the victim to bring her to her car, at which point the victim kissed her again and began pulling off Liggett's clothes. Eventually, the victim and Liggett had sexual intercourse. Although she did not welcome the victim's advances, Liggett "just decided that it was best to do it" because she was "too scared to fight him." Liggett then asked the victim to return her to her car, which he did.

Liggett said that he did not report this incident to the police because she did not believe that anyone would believe her. She said that she wanted to "deal with this" on her own and did not want to testify at this trial, but she did testify after being subpoenaed. On cross-examination, Liggett said that she did not assist the victim in taking her clothes off. She said that the victim did not threaten her in any way, did not display a weapon, and did not pin her on the bed. She testified that while she did not report the incident to a doctor, she did later ask to be tested for sexually transmitted diseases.

After receiving the evidence, the jury convicted the defendant of one count of premeditated first degree murder, one count of first degree felony murder, and one count of especially aggravated robbery.[6] The trial court merged the two first degree murder convictions and imposed concurrent sentences of life in prison for the murder conviction and twenty years as a Range I, standard offender for the especially aggravated robbery conviction.[7] The defendant subsequently filed a timely notice of appeal.

ANALYSIS

I. Admissibility of Defendant's Interview with Police

[6] As will be explained below, the record indicates that the indictment charged the defendant with aggravated robbery rather than especially aggravated robbery. Because a criminal defendant cannot be convicted of an offense not charged in the indictment or charging instrument (apart from lesser included offenses, a situation which does not apply here), we reverse the defendant's especially aggravated robbery conviction and remand the case to the trial court for entry of a judgment of conviction for aggravated robbery, as charged in the indictment.

[7] The defendant does not challenge the lengths and manner of these sentences on appeal.

The defendant first contends that the trial court erred by not granting her motion to suppress her interview with police. The defendant attacks the validity of the waiver of her constitutional rights, which she gave at the beginning of the interview, arguing that the waiver was not knowingly, intelligently, and voluntarily given. In support of that argument, she asserts that (1) the waiver was the result of police coercion and (2) the application of the "totality of circumstances test" applicable to juvenile defendants also establishes that her waiver was ineffective. The State argues that the trial court properly found that the defendant's waiver of her constitutional rights was knowingly, intelligently, and voluntarily given.

Preliminary Hearing Testimony

Detective Robinson testified at the preliminary hearing, with the substance of his testimony largely mirroring that of his later trial testimony. Of note, he said that he and Detective Baltimore reviewed the Miranda waiver form twice during the interview: once at the beginning of the interview, and a second time after the defendant spilled a soft drink on the first form. He said that the defendant signed both forms and that the first form was "discarded" after the defendant spilled her drink on it. Detective Robinson said that the defendant did not appear to be injured, intoxicated, or tired during the interview. He added that the defendant neither appeared to require medical attention nor asked for said attention during the interview, although he admitted that he did not ask the defendant if she was having any difficulties. Detective Robinson denied that the police threatened or coerced her from the time the police arrived at her motel room through the end of the interview, a period of time which the detective estimated at two hours.

On cross-examination, Detective Robinson admitted that when he told the defendant that the police had found her fingerprints on a night stand in the victim's bedroom, he was not being truthful. However, he said that "we say stuff sometimes just to get people to try to tell us more about what happened." He said that as many as six armed police officers arrived at the defendant's motel room to arrest her. He denied that the police made any statements to the defendant when she and McGlothen were arrested; he specifically denied telling the defendant, "I know what you did."

Detective Robinson said that as he was leading the defendant into the interview room, he told the defendant, "we're going to go across the hall and talk. . . . I hope you will talk to me. . . . [I]f you do, I'll be sure to let the District Attorney know that you cooperated with us. And they usually take that into account." The detective said that he and Detective Baltimore said nothing else to the defendant other than this statement, which was not recorded. Detective Robinson denied that the defendant replied "yes" when he asked the defendant whether any promises had been made to her. Instead, the detective said that when the defendant asked him about that part of the Miranda waiver, the detectives "explained to her that we would tell the District Attorney that she cooperated. . . . [A]nd that was it."

The videotape of the interview was played in court during the suppression hearing. Upon viewing the tape, Detective Robinson acknowledged that the defendant did put her head down on the table during part of the interview, but he insisted that the defendant did not appear tired to him and did not appear to be under the influence of drugs or alcohol. He also insisted that the only time he "lied" to her during the interview was when he told the defendant that her fingerprints had been found on the night stand in the victim's bedroom.

Jennifer Martin, a juvenile justice case manager with the Department of Children's Services, testified that she supervised the defendant from January 2002 through March 2003, when the defendant was placed at DCS's Woodland Hills Youth Development Center. Martin acknowledged that Woodland Hills is a "secure youth development center" and said that children placed at the facility attended a "fully accredited high school." She said that the defendant "had been tested and determined gifted, so she was in the gifted program." Martin said that after the defendant completed her placement at Woodland Hills, she was released to the custody of her adoptive mother, initially on a thirty-day home pass and then on a "permanent" basis, during which time DCS still maintained "intensive supervision" over her.

Martin said that the defendant had no problems following directions during her placement at Woodland Hills. Martin said that the defendant "is a very smart girl." She noted, however, that the defendant "had numerous fights," including one in which she threw a chair across a room and others in which she assaulted both workers and fellow students. Martin further described the defendant as "very manipulative . . . . If she doesn't like what she's being asked to do, she'll choose [not] to do it."

On cross-examination, Martin acknowledged that she had not seen the defendant since April 2003, over a year before the defendant's arrest. Martin said that she was unaware that the defendant had been raped or physically assaulted since her release from Woodland Hills. When asked about McGlothen, Martin said that "if he had her on the street, I would have to say that it was by her choice." She added, "Her mother was extremely involved with her program and visiting and coming to all staff [meetings] . . . [the defendant] chose to leave a very stable, loving home to be on the streets."

Lawanda Chrismon, a DCS juvenile justice case manager, testified that she supervised the defendant following her release from Woodland Hills. Chrismon said that she met with the defendant at least once per month until sometime late in 2003, when the defendant's case was transferred to another case manager. She said that she was unaware of the defendant being unable to follow the probationary rules she was required to follow. Chrismon said that the defendant did not return to DCS's physical custody after her release from Woodland Hills.

Testifying for the defense, Ramona Johnson said that she worked as a booking officer at the

Davidson County Criminal Justice Center the morning of August 8, 2004, when the defendant was brought there following her arrest. She said that the defendant did not appear to be under the influence of drugs or alcohol when she was first brought to the jail, but after Johnson began booking the defendant, she noticed that the defendant had slurred speech and her voice "drag[ged]." Johnson said that the defendant exhibited "a nonchalant attitude, real[ly] cold and real[ly] distant." Johnson noted that she had seen the defendant since her arrest, and that the defendant now seems "very much aware. She's more in tact now of things that are going on." On cross-examination, Johnson acknowledged that the defendant had no trouble understanding her when she told the defendant something and that the defendant was smart and articulate. Johnson also said that the defendant "can be manipulative when she wants to get things her way."

Dr. William Bernet, a forensic psychiatrist, testified that he conducted a psychiatric evaluation on the defendant before her September 2004 transfer hearing, and that he had met with the defendant twice after her initial evaluation. Dr. Bernet testified that, based upon the defendant's statements to him and his review of the recorded interview with police, at the time the police interviewed her, "she had a cannabis intoxication, which refers to mari[j]uana intoxication" and was suffering from cocaine withdrawal. Particularly, Dr. Bernet said that on the videotape, the defendant was seen "put[ting] her head down and . . . talk[ing] in a slurred way. And also, at other times, she talks in a slow way. And usually when people are talking in a slow way, they are both thinking and talking in a slow way." He also "thought she had the sort of dazed looks at times" and observed that the defendant knocked over a can of soda. Dr. Bernet said that in his meetings with the defendant, she "never did any of those things." He said that the defendant had " a serious substance abuse problem for years since she was around thirteen years old."

Dr. Bernet said that he diagnosed the defendant with borderline personality disorder. He described the effects of this disorder as follows:

> [It] is a mental condition that affects on an ongoing basis and on a pervasive basis how a person thinks about reality and how a person relates to other people. Individuals who have this condition . . . have very unstable, very intense, but unstable relationships with other people, meaning they go from one extreme to the other. They might glorify or idealize a person, but, on the other hand, they demonize a person . . . or go from loving to hating people. And they form very maladaptive relationships, which I think is something [the defendant has] done over the years. . . . [T]he other feature of borderline personality disorder is . . . some kind of a mood instability where people have violent mood swings and they go back and forth . . . in terms of their affect. Actually, I think that's illustrated by her anger/calm. It's probably a reflection of her borderline personality problem.

Dr. Bernet said that people with this personality disorder would tend to brag about their accomplishments more often than would most people "in terms of trying to impress people, and in

trying to form attachments . . . in an inappropriate manner."

Dr. Bernet also said that the defendant suffered from psychosexual stressors, which resulted from her having "poor relationships with family members and . . . a pattern of being repeatedly being taken advantage of by men." He said that the defendant had a history of "destructive, difficult, intense relationships" with "domineering person[s] in which she couldn't really extricate herself." He said that the defendant's relationship with McGlothen was typical of her relationship history. Dr. Bernet added that the defendant was "the kind of person who would be . . . both easily intimidated by men and wanting to give into men."

Dr. Bernet said that the defendant scored a 35 out of 100 on the Global Assessment Functioning scale. He said that a 35 scale indicated that the defendant had "some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or moving." Dr. Bernet said that while the defendant had a relatively high IQ of 120, "being bright doesn't protect you from having really serious problems."

Dr. Bernet said that in his professional opinion, given the defendant's diagnoses, she did not knowingly or intelligently waive her Miranda rights. Regarding whether her waiver was voluntary, he observed that "this is a softer issue, because I don't think it was as though anybody was twisting her arm. But I don't think there [were] psychological factors and the substantive factors . . . that interfered with her acting in a totally voluntary manner."

Dr. Bernet said that his conclusion was based in part on what the defendant told him regarding the detectives' "promises" to her before the interview. Specifically, he noted, "I think she was influenced in a lot of different ways . . . . Part of it was she believed that it was in her best interest, that she would get a better deal if she were talk to the detectives." He said that the during the reading of her Miranda rights, the defendant "clearly was having difficulty with this issue of whether anything had been promised to her." His conclusion was also based upon the defendant's performance in tests called the Instruments for Assessing, Understanding, and Appreciation of Miranda Rights, which he described as follows:

> This test is not the kind of thing that has sort of a mathematical number, that if you're a certain number, you're competent, and another number you're not. . . . But it is a systematic way of finding out whether the person understands literally what the words mean, but, then . . . truly understanding how this plays out in practice. . . . And the way [the defendant] scored was consistent with what she told me in her narrative, which is following. She's a great, bright kid. And she understands the words.

Dr. Bernet said that the defendant "understands you have a right to remain silent. If you say that sentence, she understands what that sentence means." However, he said that based on the test, which the defendant took about a year after her arrest, he concluded that the defendant had some "basic misunderstandings" about the implications of the Miranda warnings. One such misunderstanding was that she would be "better off in the end if [s]he talks to the investigators." Another misunderstanding the defendant had was that she "really [had] an obligation to talk to the investigators" and that she would "get into trouble" if she did not talk to them. In short, while the defendant understood the literal meaning of the words in the Miranda warning, her score on that part of the test dealing with the interpretation of one's Miranda rights was "very, very low. . . . [S]he was three standard deviations below the score of other teenagers of the same age who were in legal trouble."

On cross-examination, Dr. Bernet said that the defendant's IQ was "probably somewhere in the ninetieth percentile of the population." He opined that while the defendant's ability to understand the Miranda waiver was "probably somewhat impaired at the time this document was executed," he did not think that her ability to understand the waiver was "totally wiped out." Dr. Bernet said that the defendant had received Miranda warnings before when she had been arrested, but he was unaware of how many times the defendant had been read her rights. He admitted that he did not remember whether he discussed with the defendant her previous exposure to Miranda warnings. He also admitted that nobody, including the defendant, had alleged to him that the detectives had abused or threatened her during the interview. Dr. Bernet said that he did not know why the defendant gave the police an incorrect last name and date of birth. He also noted that while the defendant appeared to slur her speech and put her head down during part of the interview, "by and large, [she] was coherent" during the interview.

Dr. Bernet acknowledged that while it was "theoretically" possible that her giving a statement to police was motivated by her desire to "plant a defense," he said that he did not have "any information to support that that actually happened." He also noted that the detectives "reinforced her false belief . . . that she had an obligation to talk to them. . . . [T]hey reinforced that by telling her if you talk to us it's going to be in your benefit, because we're going to tell the D.A." He said that while there were some issues with the defendant's initially agreeing to talk to the detectives, once she began the interview, "she certainly was trying to make the statement be self-serving." He particularly noted that "there's some things she says in the statement [that] are not correct."

Dr. Bernet also testified that there "were times when she claimed that her adoptive father abused her and other times when she said he did not." He acknowledged that in his report, he wrote that the defendant had admitted to fabricating allegations that her father had abused her because she was upset over her father's accidentally killing her dog. He said that the defendant also recanted these previous allegations because such allegations potentially would interfere with her leaving DCS custody and being placed with her adoptive mother.

Dr. Bernet acknowledged that the defendant told him that the police had told her that "if you cooperate, then [we] can talk with the D.A. and get you a lighter sentence. But, if you don't cooperate . . . you're going to get life," while in fact the police said no such thing during the interview. He also acknowledged that the detectives told the defendant during the interview that she needed to tell the truth, and that the defendant was capable of understanding the concept of truth.

Standard of Review

"[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Id. Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998); State v. Perry, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999). However, the prevailing party "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. Furthermore, an appellate court's review of the trial court's application of law to the facts is conducted under a de novo standard of review. State v.Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted).

Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution protect a person against compelled self-incrimination. The Supreme Court has held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). Specifically, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. A defendant may waive those rights, but such waiver must be made "voluntarily, knowingly, and intelligently." Id. The State has the burden of proving the waiver by a preponderance of the evidence. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997).

In determining whether a defendant has validly waived his Miranda rights, courts must look to the totality of the circumstances. State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). In cases involving juveniles, the "totality of circumstances" test requires consideration of the following factors:

> (1) consideration of all circumstances surrounding the interrogation including the juvenile's age, experience, education, and intelligence;

(2) the juvenile's capacity to understand the Miranda warnings and the consequences of the waiver;

(3) the juvenile's familiarity with Miranda warnings or the ability to read and write in the language used to give the warnings;

(4) any intoxication;

(5) any mental disease, disorder, or retardation; and

(6) the presence of a parent, guardian, or interested adult.

State v. Callahan, 979 S.W.2d 577, 583 (Tenn. 1998). "While courts shall exercise special care in scrutinizing purported waivers by juvenile suspects, no single factor such as mental condition or education should by itself render a confession unconstitutional absent coercive police activity." Id.

Totality of Circumstances

Applying the facts of this case to the factors outlined in Callahan, the record reflects that at the time of the interview, the defendant was sixteen years old and had tested as academically gifted. At the suppression hearing, both Dr. Bernet and the DCS employees testified that the defendant was very bright and had a history of being manipulative. In its order denying the defendant's motion to suppress, the trial court found that the defendant was "highly intelligent and exhibit[ed] a high sense of awareness and 'street smarts' for someone her age." In our view, these findings were supported by the record.

The trial court found, based on Dr. Bernet's testimony, that the defendant suffered from dysthymic disorder and borderline personality disorder and had a rather low score on the Global Assessment of Functioning test. Additionally, while Dr. Bernet said that the defendant understood the literal meaning of the language contained in the Miranda warnings, she was unable to understand the implications of her Miranda rights and the implication of waiving those rights. However, we agree with the trial court that the defendant had been involved with the juvenile court system since November 2000, meaning that she had previous exposure to Miranda warnings. Furthermore, in this case, the defendant was read her Miranda rights twice and read a portion of the Miranda waiver to Detective Baltimore after being advised to do so, and after the detectives explained to her the implications of the waiver's "no promises have been made" provision, she did not challenge that section of the waiver any further.

Regarding the intoxication factor, Dr. Bernet testified that based upon the defendant's statements to him and his viewing of the recorded police interview, he concluded that the defendant exhibited signs of marijuana intoxication and cocaine withdrawal during the interview. He also stated that the defendant exhibited slurred speech during the interview. However, Dr. Bernet also testified that the defendant was coherent for most of the interview. Ramona Johnson testified that

the defendant had slurred speech and exhibited a "nonchalant" attitude while she booked the defendant after her interview with the detectives. Our review of the interview videotape leads us to agree with the trial court, who found that while the defendant did appear tired during the early stages of the interview, during the latter stages of the interview the defendant "not only actively participated in the interview, but [also] engaged the [d]etectives." The detectives also testified that the defendant did not appear impaired by drugs or alcohol. As such, we cannot conclude that the evidence preponderates against the trial court's finding that the defendant's "general demeanor and her interaction with Detectives Robinson and Baltimore on the videotape are not indicative of impairment or chemical intoxication."

Finally, the defendant did not have a parent, guardian, or interested adult present when she was advised of her Miranda rights. However, "the admissibility of a juvenile's confession is not dependent upon the presence of his parents at the interrogation." State v. Carroll, 36 S.W.3d 854, 864 (Tenn. Crim. App. 1999). Additionally, the defendant gave the detectives a false date of birth which led them to believe that she was eighteen years old at the time of the interview. As such, this factor does not weigh in the defendant's favor.

In reviewing the record in light of the Callahan factors, we note that while Dr. Bernet testified that the defendant possessed some psychological disorders, the defendant's intelligence, her previous exposure to the juvenile court system and Miranda warnings, and the fact that the defendant was coherent for and an active participant in most of the interview, lead us to conclude that the defendant was able to comprehend the implications of her Miranda rights and knowingly, intelligently, and voluntarily waive those rights. This conclusion, coupled with our conclusion below that the detectives did not coerce the defendant into participating in the interview, lead us to conclude that the record does not preponderate against the trial court's finding that her statement was admissible.

Coercion

We now examine the defendant's assertion that her confession was involuntarily given because it was the product of coercion in the form of promises of leniency from Detectives Robinson and Baltimore. The Supreme Court has held that a confession which is the product of coercive State action is involuntary. See, e.g., Colorado v. Connelly, 479 U.S. 157, 163-64, 107 S. Ct. 515, 520 (1986). "The test of voluntariness for confessions under article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996) (citing State v. Stephenson, 878 S.W.2d 530, 544 (Tenn.1994)). A confession may be considered voluntary if it is not the product of "'any sort of threats or violence, . . . any direct or implied promises, however slight, nor by the exertion of any improper influence.'" State v. Smith, 42 S.W.3d 101, 109 (Tenn. Crim. App. 2000) (quoting Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187 (1897)). However, "[a] defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense." State v. Berry, 154 S.W.3d 549, 577 (Tenn. 2004) (citing Smith, 933

S.W.2d at 455). Rather, the essential question is "'whether the behavior of the [s]tate's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . .'" State v. Kelly, 603 S.W.2d 726, 728 (1980) (quoting Rogers v. Richmond, 365 U.S. 534, 544, 81 S. Ct. 735, 741 (1961)). As relevant to this determination, our supreme court has held, "'The Fifth Amendment does not condemn all promise-induced admissions and confessions; it condemns only those which are compelled by promises of leniency.'" Id. (quoting Hunter v. Swenson, 372 F. Supp. 287, 300-01 (D.C. Mo. 1974) (emphasis added)).

One of the main factors in determining whether promises of leniency compelled a suspect's confession is whether law enforcement officials or other State agents made specific promises of leniency (i.e., treatment or a reduced sentence) in return for the suspect's statements or threatened the suspect with prosecution (or a more severe sentence) should he not cooperate. Two cases in which a person suspected of a sexual offense against a child made a statement to a social worker illustrate this point. In State v. Smith, a Department of Human Services (DHS) social worker told the defendant, a man being investigated on suspicion of child rape, that "the best thing was to tell the truth and get into counseling so in the end his family could be reunited." 933 S.W.2d at 456. The social worker in Smith explained that she told the defendant that her experience with the District Attorney's office was that "more than likely the D.A. will not prosecute if [the defendant] gets into treatment," although she could not guarantee that the defendant would not be prosecuted if he sought treatment. Id. She also told the defendant that if he "did not admit the abuse, he would definitely be prosecuted." Id. Six weeks later, the defendant made incriminating statements to a counselor. Id. at 453. The defendant was convicted of two counts of aggravated sexual battery. Id. On appeal, our supreme court looked with "the strongest disapproval" upon the social worker's encouraging the defendant "to seek counseling for the purpose of eliciting incriminating statements for use in a subsequent prosecution" but ultimately concluded that the social worker's statements did not render the defendant's statements involuntary. Id. at 458. The court particularly noted that the social worker's statements to the defendant "were obviously equivocal, and she made it clear to [the defendant] that she could not promise freedom from prosecution." Id. at 456. The court also noted that "[a]dvice to an individual concerning the consequences of a refusal to cooperate is not objectionable" and that the six-week delay between the social worker's statement to the defendant and the defendant's statements to the counselor "further belie[d] [the defendant's] contention that [the social worker] compelled his statements to the counselor." Id.

Conversely, in State v. Phillips, 30 S.W.3d 372, 374 (Tenn. Crim. App. 2000), two DCS case managers "intensively" interviewed the defendant, who was the focus of an investigation. During the one-hour interview, the two case managers repeatedly told the defendant that if he admitted to engaging in sexual conduct with the alleged victim, they would arrange for the defendant to receive counseling, but if he did not cooperate, he would be prosecuted. See id. at 375-76. The workers also told the defendant that the police had recovered a DNA sample from the victim, a fact which the workers knew to be false. Id. at 374. The defendant admitted to the alleged sexual abuse, but he later filed a motion to suppress his statements to the DCS workers, which the trial court granted. Id.

at 375. This court affirmed the trial court's ruling that "sufficient coercion and promises of leniency by the state actors [existed] to overbear the defendant's will and render his statements involuntary," based upon misrepresentations by the investigators, numerous steadfast denials by the defendant, statements that law enforcement officials would be involved if the defendant did not confess, and promises of treatment for the defendant and the alleged victim if he confessed. Id. at 377.

In this case, unlike in Smith and Davis, the police did not threaten the defendant with incarceration or a severe sentence if she refused to cooperate. Also, the detectives only made generalized promises that if the defendant was truthful, they would tell the District Attorney that she had cooperated. At no point did the detectives specifically tell the defendant that she would receive a lenient sentence or other consideration were she to cooperate. The detectives' general promises in this case are akin to those made by a police officer in State v. Johnson, 765 S.W.2d 780 (Tenn. Crim. App. 1988). In that case, a police officer, after advising a suspect of his Miranda rights, informed the suspect that the police have "a working arrangement with people. That we'd help them if they'd help us . . . we would try to help [the suspect] when [he] got to court if he would help us." Id. at 782. In Johnson, we held that the officer's "rather vague statement . . . was not such as would render [the] defendant's confession involuntary." Additionally, unlike in Davis, where the DCS workers repeatedly told the suspect that it was in his best interest to cooperate, in this case the detectives only talked to the defendant about cooperating twice: before the recorded interview began and at the beginning of the interview after the defendant raised the issue during the reading of her Miranda rights. Furthermore, the record reflects that during the interview, which lasted approximately forty-five minutes, the detectives were not overly aggressive or threatening when talking with the defendant. Accordingly, we conclude that the statements by Detectives Baltimore and Robinson that they would tell the District Attorney if the defendant cooperated did not compel the defendant's statement to them; as such, the detectives' actions did not rise to the level of coercive conduct that rendered the defendant's statement involuntary and inadmissible. The defendant is therefore denied relief on this issue.

II. Admissibility of State's Evidence

On February 6, 2006, before trial, the State filed a notice, pursuant to Rule 404(b) of the Tennessee Rules of Evidence, of its intent to introduce certain evidence at trial. This evidence included: (1) testimony by Western Mental Health Institute employees Sheila Campbell and Cathy Franz that the defendant attacked and threatened to kill Franz, telling Franz that she would kill her the way she killed the victim; (2) a handwritten "New Personality Profile" taken from the defendant's motel room; (3) testimony from Shayla Bryant, who testified that while she and the defendant were inmates at the same Davidson County jail, the defendant admitted to killing the victim; and (4) testimony from the victim's mother regarding a telephone conversation in which the defendant said that she "executed" the victim. The defendant filed motions to exclude the evidence; after a hearing, the trial court denied the defendant's motions and permitted the State to introduce the evidence. The defendant argues that the evidence should have been excluded given that it was

irrelevant and highly prejudicial. The State contends that the trial court properly denied the defendant's motions to exclude the evidence. After carefully reviewing the record, we conclude that the trial court properly found that the challenged evidence was admissible.

Tennessee Rule of Evidence 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, relevant evidence is admissible, while irrelevant evidence is inadmissible. Tenn. R. Evid. 402. However, 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." Tenn. R. Evid. 403. "The admissibility of evidence under Rule 403 of the Tennessee Rules of Evidence is a matter within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Biggs, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006) (citing State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997)).

The defendant also argues that the challenged evidence is inadmissible pursuant to Rule 608 of the Tennessee Rules of Evidence. Rule 608 provides that the credibility of a witness "may be attacked or supported by evidence in the form of opinion or reputation," but that "the evidence may refer only to character for truthfulness or untruthfulness[.]" Tenn. R. Evid. 608(a). The rule further provides, in pertinent part:

> (b) Specific instances of conduct. Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness . . . be inquired into on cross-examination of the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. . . .
>
> (c) Juvenile conduct. Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case . . . .

Tenn. R. Evid. 608(b), (c). However, as will be explained below, we conclude that the challenged evidence was introduced for purposes other than to attack the defendant's character for truthfulness. As such, Rule 608 is inapplicable to our consideration of the defendant's appeal.

Testimony Concerning Incident Between Defendant and Cathy Franz

In her "Motion in Limine Regarding Any Alleged Prior Bad Acts," and in the hearing on the motion, the defendant argued that evidence of her altercation with Franz, and her statements during the altercation, were inadmissible under Rule 404(b) and 608 of the Tennessee Rules of Evidence. At the hearing on the motion, the defendant argued that the defendant's statements made during the attack were irrelevant, given that she conceded that she shot the victim, thus making the defendant's statement that she killed the victim unnecessary for proving that fact. She also argued that Franz and Campbell's testimony was unfairly prejudicial, given that the altercation and her threat to kill Franz were unrelated to the victim's death. The State argued that the defendant's statement was relevant to establishing that the defendant killed the victim and that the defendant's threat against Franz, as well as testimony regarding the altercation itself, was admissible because it placed the defendant's statement to Franz that she had killed the victim in context.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when otherwise inadmissible evidence is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or common scheme or plan. State v. Tolliver, 117 S.W.3d 216, 230 (Tenn. 2003); State v. McCary, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Rule 404(b) states that a jury-out hearing regarding the admissibility of specific instances of conduct must be held "upon request." Tenn. R. Evid. 404(b)(1). In order to determine the admissibility of a prior bad act, the trial court should consider the following three factors: (1) whether a material issue exists supporting admission of the prior act; (2) whether proof of the prior act is clear and convincing; and (3) whether the probative value of the evidence is not outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404(b)(2)-(4). If these three thresholds are met, the evidence may be admitted. We review a trial court's ruling on evidentiary matters under Rule 404(b) for abuse of discretion, provided the trial court has substantially complied with the procedural prerequisites of the rule. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). However, if the trial court did not substantially comply with the procedure, its decision is not entitled to deference by the court, and "the determination of admissibility will be made by the reviewing court on the evidence presented at the jury out hearing." Id. at 653.

Although the trial court held a hearing regarding the defendant's motion in limine, the trial court did not follow the procedural guidelines established in Rule 404(b) for determining whether testimony of prior bad acts is admissible. Specifically, in the trial court's order denying the defendant's motion regarding the attack on Franz and the statements made during the attack, the trial court did not consider the three required factors established in Rule 404(b)(2)-(4). Rather, it found only that the evidence was admissible because the defendant's statements, while hearsay, were admissible under the "party opponent" hearsay exception provided in Tennessee Rule of Evidence

803(1.2)(A).[8] Therefore, we must review the evidence presented at the hearing in light of Rule 404(b)'s requirements to determine whether the trial court's denial of the defendant's motion was proper. We also must examine the evidence in light of Tennessee Rule of Evidence 402, which states that "[e]vidence which is not relevant is not admissible."

In this case, proof of the altercation and the defendant's statements during the altercation were clear and convincing, as both Franz, the assaulted nurse, and Campbell, her colleague who witnessed the altercation, testified regarding the incident. Additionally, that portion of the incident in which the defendant stated that she shot a man once in the back of the head was relevant to a material issue in the case, namely the defendant's assertion that she acted in self-defense in shooting the victim. The state was required to establish the elements of first degree murder beyond a reasonable doubt, and this statement was relevant to establishing that the defendant acted with premeditation and negating the defendant's self-defense claim. As such, the statement's probative value was not outweighed by the danger of unfair prejudice. The remainder of the statement, which the defendant argues did not directly relate to a material issue in the case, was relevant to establish the context in which the statements were made and eliminate the possibility of jury confusion. As such, those parts of Franz's and Campbell's testimony were not unduly prejudicial to the defendant. We therefore conclude that Franz's and Campbell's testimony was admissible under Rule 404(b).

"New Personality Profile"

The State also sought to admit a document entitled "New Personality Profile," which was handwritten on three pages and discovered in the defendant's motel room upon her arrest. The first two pages of the document read:

* Serious outlook on life
* Stay on toes in every situation
* Analyze character to define type ("mojo")
* Recognize the cruelty of the game; life isn't gravy outside of home; be expecting of any & everyone, we're all human, therefore prone to get upset & flip out
* Show no weaknesses, f— what happens in this world, its constantly changing, if you stay stuck on a focal point in your life, you'll fall behind the population, remain at least 5 steps ahead of those who surround you. Never stray from your motive. IT's all about making it.
* IF AT FIRST YOU DON'T SUCCEED, invent new approaches, move on

[8]The defendant does not challenge this portion of the trial court's ruling on appeal.

from there. No time to waste backtracking.

* Turn your strife into strive, make advancements in your life. Get money, f— everything else; keep 1, maybe a few sources of pleasure in life. Aside from that STRICTLY BUSINESS. Everything else is bullsh—ing, (falling off/behind)

* Induce seriousness, don't be a bitch or sensational, but when you have to, straighten whoever. Stand your grounds, don't let nobody push you down, their reaction will be to move ahead of you ("no-no")

* Stand firm in a quality belief, don't be fooled to change it unless it suits YOU. Don't let anybody live your life for you. You are your own person; don't cheat yourself in life.

* Mold your negative happenings into strength. Induce home (military) mentality. ONLY THE STRONG SURVIVE. The world is breaking down its people, fight back, perservere [sic], and stand tall.

* Low-key. I don't need too many people too much about me. F—everybody, but f— with a few. We all get on shiest [sic] from time to time.

* Get with the program, f— the past, wake up to the present.

* This is all a fight; the war never broadcast in order to alert the people, the war on our own fellow Americans. How can we go against another country when we're battling among ourselves. Love is hard to find babygirl, think of it as a gift from God, when He's ready it'll come. Trying to find it will only lead you to getting let down. It's a jungle, be the owl, looking down over it all, observing the other breeds, keeping you on top. 10 steps ahead.

The third handwritten page contained the name "Shaniera Renee Hicks" and listed various personal, academic, and professional information, none of which reflected the defendant's actual personal history. The document was not signed or dated and did not mention the defendant or the victim.

During a pretrial hearing regarding the document's admissibility, defense counsel argued that "[t]here is nothing in this document that could even be arguably relevant to this case. It doesn't mention anything about the case. It doesn't mention [the defendant]. It doesn't mention the victim." Defense counsel argued that even if the document were relevant, its "slight probative value [would] be outweighed by prejudice."[9] The prosecuting attorney replied that the document was relevant in that it supported the State's theory that the defendant "executed the victim and intended . . . to become another person. . . . [I]t's an escape plan is what this is. . . . It's indicative of—if not

[9]The defendant also argued that the document was inadmissible because it could not be authenticated as the defendant's writing. The State noted that as of the date of the hearing, the handwriting on the document had not been identified as the defendant's. However, the State's handwriting expert later identified the handwriting as the defendant's, and the defendant does not raise an authentication-based challenge to the document on appeal.

premeditation, it's indicative of intent to get away with this crime. She's becoming a new person . . . ." In a written order, the trial court found that the personality profile was "relevant in considering whether the killing of the victim was premeditated," and that the probative value of the document outweighed the potential for prejudice, confusion of the issues, or misleading the jury.

After reviewing the evidence, we conclude that the trial court did not abuse its discretion in admitting the "New Personality Profile" into evidence. Although the "New Personality Profile" does not mention the defendant or victim by name, the document, written by the defendant, was indicative of an aggressive attitude and a desire to move past her personal difficulties by adopting a new identity, fighting if necessary to succeed and making money by any means necessary. As the State notes in its brief, "[o]ne of the most difficult issues the jury faced was to ascertain the defendant's mental state at the time she shot the victim." At trial, the defendant argued that she fearfully shot the victim in self-defense. This document was relevant to rebuffing that assertion and establishing the State's theory that the victim acted intentionally and with premeditation in shooting the victim, took his guns and money after the shooting, and acted to conceal her involvement in the crime. Given the document's relevancy, its probative value outweighed its potential for unfair prejudice to the defendant. As such, the trial court properly found that the document was admissible at trial.

Shayla Bryant's Testimony

On appeal, the defendant argues that "allowing Shayla Bryant to testify that she was in custody with [the defendant]," which "allowed [the jury] to learn that [the defendant] was in jail on these charges . . . [was] tantamount to requiring [the defendant] to wear inmate clothing at trial," which violated her right to a fair trial. The defendant also argues that Bryant's testimony should have been excluded because it had little probative value and was highly prejudicial, and she argues that Bryant was not a credible witness. The State argues that the probative value of Bryant's testimony far outweighed its potential for prejudice, and that "because there was virtually no possibility of the jury['s] being prejudiced against the defendant by merely learning that she had been incarcerated prior to trial, the trial court correctly allowed Ms. Bryant to testify." The State also asserts any issues regarding Bryant's credibility, in light of Bryant's incarceration at the time of her testimony, "went to the weight, not [the] admissibility of her testimony."

Due process requires that the accused in a criminal case be afforded the "physical indicia of innocence." Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973). The use of shackles during a trial, for example, has been specifically condemned absent certain safeguards (such as curative jury instructions) designed to assure that it would not influence the issue of innocence or guilt. Willocks v. State, 546 S.W.2d 819, 822 (Tenn. Crim. App. 1976); State v. Smith, 639 S.W.2d 677, 681 (Tenn. Crim. App. 1982). However, if a challenged practice is not inherently prejudicial and the defendant fails to show actual prejudice, the defendant's complaint must fail. Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 1347-48 (1986); Carroll v. State, 532 S.W.2d 934, 936 (Tenn. Crim. App. 1975)

However, the authorities cited above are not applicable to the present case. The defendant was not tried in shackles, handcuffs, or prison clothing, and there was no testimony at trial that the defendant was incarcerated while being tried. As such, this case is akin to those cases in which this court has held that no prejudice results from a jury's "incidental" sighting of the defendant in handcuffs or prison attire while the defendant is transported to or from the courthouse. See State v. Baker, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); see also State v. Charles Wade McGaha, No. E2006-01984-CCA-R3-CD, 2008 WL 148943, at *9 (Tenn. Crim. App. Jan. 16, 2008), perm. app. denied, (Tenn. June 23, 2008); State v. James Wesley Daniels, No. E2006-01119-CCA-R3-CD, 2007 WL 2757636, at *6 (Tenn. Crim. App. Sept. 24, 2007), perm. app. denied, (Tenn. Feb. 4, 2008). In Baker, this court noted, "Common sense must prevail in such instances where a jury or jurors inadvertently see a defendant dressed in prison clothing. Reason dictates that they must know a person on trial is either on bail or in confinement during the course of a trial." Baker, 751 S.W.2d at 164. As such, we conclude that Bryant's testimony that she and the defendant were in the same jail cell after the defendant's arrest did not prejudice the defendant.

We also disagree with the defendant's assertions that Bryant's testimony had little probative value and was highly prejudicial. Bryant's testimony that the defendant killed the defendant "to see how it [felt] to kill somebody," and the note the defendant passed to Bryant in jail, in which the defendant stated that she was lying when she said that the victim was reaching for a gun when she shot him, were relevant to establish that the defendant killed the victim with premeditation and to rebut the defendant's self-defense claim. The probative nature of Bryant's testimony therefore outweighed its potential for prejudice. We also agree with the State that the question of Bryant's credibility concerned the weight of her testimony, not its admissibility. Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Accordingly, we conclude that the trial court did not abuse its discretion in admitting Bryant's testimony.

Telephone Conversation Between Defendant and her Adoptive Mother

Finally, the defendant argues that the trial court erred by admitting a recorded telephone conversation between her and her adoptive mother, Ellenette Washington. On appeal, the defendant argues that the recording was irrelevant and highly prejudicial toward her. The defendant takes particular exception to those parts of the conversation in which she told her mother that she had "executed" the victim and in which she talked about being violent in jail and within a hospital setting. The State argues that the evidence was relevant to rebut the defendant's self-defense claim and establish that the defendant acted with premeditation in killing the victim.

After reviewing the record, we agree with the State. While the defendant asserts that the defendant's use of the word "executed" was a poor word choice that "in no way establishe[d] her mental state at the time of the shooting," we conclude that the defendant's use of the term, which she made during a conversation with her mother rather than in response to police interrogation, was

relevant in establishing the defendant's mental state at the time of the offense. Given the context in which she made that comment, the probative value of the statement was not outweighed by its potential for unfair prejudice. Regarding the other parts of the statement, we have concluded that the trial court did not err in admitting the testimony of either Franz, Campbell, or Bryant, so those sections of the conversation in which the defendant admitted to spending time in both jail and a mental health facility were not unfairly prejudicial to the defendant, as the jury had already been made aware that the defendant had spent time in those facilities. We therefore conclude that the trial court did not abuse its discretion in admitting the recording of the conversation between the defendant and her adoptive mother.

III. Trial Court's Denial of Potential Defense Testimony

The defendant next contends that the trial court erred in refusing to admit the testimony of Jessica Snider, a seventeen-year-old waitress with whom the victim left a note expressing his interest in her. The defendant argues that the trial court's exclusion of Snider's testimony denied the defendant her constitutionally guaranteed right to present a defense, while the State argues that the trial court properly excluded the testimony as irrelevant and not critical to her defense. We agree with the State.

In a jury-out hearing held before the defendant presented her proof, defense counsel informed the trial court that she intended to call two witnesses who would testify "about [the victim] and [his] dark side . . . . We have a right to present prior violent acts of the victim." After the prosecuting attorney expressed concerns over not knowing the substance of the witnesses' testimony before trial, the trial court ruled that it would hear the witnesses' testimony and then determine the admissibility of the witnesses' testimony. The first proposed witness was Sandra Liggett; the substance of her jury-out testimony mirrored that which she gave in front of the jury, outlined above. The trial court determined that Liggett's testimony was relevant to the defense and permitted Liggett to testify at trial.

The second proposed witness, Jessica Snider, testified that in November 2004, she was seventeen years old and working as a waitress at a Nashville restaurant when she waited on the victim. She said that the victim frequented the restaurant and that she and the other waitresses did not like serving him because "he would try to hit on you, try to take you out, just ma[k]e you just really uncomfortable a lot of the times." Snider said that one time, the victim left her his business card, on the back of which he had written a note. According to Snider, in the note, the defendant "basically said you're gorgeous. I'd love to take you out sometime. You can call me at the [number] listed on the front, whatever." Snider said that she told her parents about this incident; she said that her parents were "appalled." She also talked to the police about this incident after the victim's death. On cross-examination, Snider acknowledged that she never saw the victim outside the restaurant and that while he made her feel uncomfortable, he never threatened her in any way. She also acknowledged that in an earlier statement to police, she said that she was unaware whether the victim

had acted flirtatiously with any of the other waitresses at the restaurant.

After Snider testified, the trial court noted that unlike Liggett, who testified "about being in the same home, in the same bedroom, . . . the same setting, the same situation," and whose testimony "relate[d] to what . . . is [the defendant's] defense, which is self-defense," Snider's testimony "doesn't reach [that] level in terms of relevancy to what we're here about on this murder charge in this particular case." The trial court reserved its final ruling on the admissibility of Snider's testimony until after Galina Osborne and Liggett testified in front of the jury; after their testimony, the trial court, outside the jury's presence, announced that it would not permit Snider to testify:

> . . . Ms. Snider's testimony seems to illustrate primarily she didn't like serving this victim. She never ventured outside the restaurant with this victim. Never went on a date with him. And apparently, had never had any contact with him outside of work. So I don't think this is really relevant to anything other than possibly this man giving her attention that she didn't really appreciate. And so I don't believe . . . being particularly conscious of wanting to provide the defendant the opportunity to present a defense that this is really relevant. . . . I don't think it's in the same category as the testimony that Ms. Liggett gave.

Standard of Review

"The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense." State v. Brown, 29 S.W.3d 427, 432 (Tenn. 2000); see Taylor v. Illinois, 484 U.S. 400, 408, 108 S. Ct. 646, 652 (1988); Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925 (1976). However, this right is not absolute: "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence. . . ." Chambers v. Mississippi, 410 U.S.284, 302, 93 S. Ct. 1038, 1049 (1973). "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Brown, 29 S.W.3d at 432 (citations omitted). In determining whether a trial court's evidentiary ruling violates the defendant's constitutionally-protected right to present a defense, an appellate court must consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting the exclusion of the evidence is substantially important. Id. at 433-34.

The defendant argues that Snider's testimony was critical to the defense because it "was critical both to support Ms. Liggett's testimony and to establish [the victim's] dark side." The defendant emphasizes that the victim left a business card with both Liggett and Snider and that Snider's testimony would have established that the victim "intended to have sex with [the defendant], another young girl whom he picked up at a restaurant . . . ." However, we find the

defendant's arguments unpersuasive. Our supreme court has suggested that for evidence to be considered critical to the defense, the evidence must have some probative value and "exclusion of the evidence would undermine an element of a particular defense." See State v. Flood, 219 S.W.3d 307, 316-17 (Tenn. 2007). Snider's testimony meets neither of these standards. As the trial court noted, unlike Liggett and the defendant, Snider, while approached by the victim, never saw the defendant outside the restaurant, never went to the victim's house, and was never threatened with physical or sexual assault. Thus, while there were some similarities between Snider's, Liggett's, and the defendant's encounters with the victim, those similarities were not substantial enough for her testimony to be considered critical to the defense.

Regarding the third Brown factor, the interests supporting exclusion in this case are the interests behind Tennessee Rules of Evidence 401, 402, and 404(a), and 405. Rule 404(a) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with the character or trait on a particular, except" for certain cases, including "[e]vidence of a pertinent character trait of the victim of [a] crime offered by an accused . . . ." Tenn. R. Evid. 404(a)(2). Rule 405 provides in pertinent part that "[i]n cases in which character or a trait of character of a person is an essential element of a . . . defense, proof may . . . be made of specific instances of that person's conduct." Tenn. R. Evid. 405(b). In this case, the defendant argued that she killed the victim in self-defense after he made unwelcome sexual advances toward her. Accordingly, Liggett's testimony that she was raped by the victim while on a date with him was relevant under Rules 401 and 402 and permissible under Rules 404 and 405. Conversely, Snider's testimony, in which she said that she never saw the victim outside the restaurant and that the victim made no sexual advances or other threats toward her, was irrelevant under Rules 401 and 402 and inadmissible under rules 404 and 405. As such, we conclude that the interests behind Rules 401, 402, 404, and 405 were substantially important and supported exclusion. In light of this conclusion and our earlier conclusion that Snider's testimony was not critical to the defense, we conclude that the trial court's exclusion of Snider's testimony did not deny the defendant the right to present a defense.

IV. Scope of Dr. McMaster's Testimony

The defendant argues that the trial court erred by allowing Dr. McMaster, who was accepted as an expert in the field of forensic pathology, to testify regarding "matters that were well beyond her field of expertise . . . . Specifically, [the defendant] submits that [Dr.] McMasters [sic] should not have been allowed to testify that the deceased's body was in a certain position prior to being shot." The State contends that the expert's testimony did not exceed the scope of her expertise. After reviewing the record, we agree with the State.

The record reflects that the defendant filed a pretrial "Motion in Limine regarding Proposed Testimony of Medical Examiner." The trial court held a hearing on the defendant's motion, with the substance of Dr. McMaster's testimony at the hearing mirroring that of her later trial testimony.

At the close of the hearing, the defendant argued that because Dr. McMaster "has never had training in crime scene reconstruction" and was not an expert in blood spatter, her testimony regarding the position of the victim's body at the time he was shot would be inadmissible. In a written order, the trial court ruled that Dr. McMaster could testify regarding the position of the victim's body before being shot and his ability to move after being shot. The court found that "Dr. McMaster's testimony would substantially assist the trier of fact in comprehending the autopsy report and the photographs of the crime scene," as well as the "circumstances surrounding [the victim's] death." Finding that Dr. McMaster had "never received any formal training in blood spatter interpretation," the court ruled that she could "not testify as to her interpretation of the blood spatter and its relation to the manner of death." The trial court ruled that she could "testify as to her general expectations regarding the direction of any 'blood spray' as a result of the injury, but [she could] not attempt to reconstruct the crime scene through interpretation of the blood spatter."

Questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-264 (Tenn. 1997). Pursuant to Rule 702 of the Tennessee Rules of Evidence, an expert may testify "in the form of an opinion or otherwise," when the "scientific, technical, or other specialized knowledge" offered by the witness will substantially assist the trier of fact. Rule 703 of the Tennessee Rules Evidence requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." State v. Stevens, 78 S.W.3d 817, 834 (Tenn. 2002). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. Id. at 832. "A trial court abuses its discretion if it applies an incorrect legal standard or reaches an illogical or unreasonable decision that causes an injustice to the complaining party." Brown v. Crown Equip. Corp., 181 S.W.3d 268, 273 (Tenn. 2005) (citing Stevens, 78 S.W.3d at 832).

In this case, Dr. McMaster testified that the victim's wound was immediately fatal and that the victim could not have voluntarily moved after the being shot. On appeal, the defendant does not argue that this component of Dr. McMaster's testimony was beyond the scope of her expertise. In our view, then, the expert's testimony that the victim, before being shot, was lying in the same position as he was depicted in the postmortem photographs—on his side, with his hands clasped beneath his head—was a reasonable, informed opinion based upon testimony that was within her area of expertise. Such testimony substantially assisted the trier of fact in establishing the State's theory that the victim, contrary to the defendant's self-defense assertion, was not reaching for a gun at the time he was shot.

The defendant takes issue with Dr. McMaster's trial testimony regarding blood spray, but the defendant's assertions regarding such testimony are unfounded. On cross-examination, Dr. McMaster acknowledged that her opinion regarding the position of the victim's body was based in

part "on where the blood is in these pictures . . . including the blood spatter." She insisted that she had "no specialized training whatsoever in interpretation of blood spatter," but she acknowledged that as a medical examiner, she did have "some experience" with it. However, Dr. McMaster testified that she "only ma[d]e interpretations [regarding blood spatter] in a general framework." In our view, Dr. McMaster's testimony regarding blood spatter was within the limits established by the trial court. We therefore conclude that the trial court did not abuse its discretion in allowing Dr. McMaster to testify regarding the position of the victim's body before his death.

V. Admissibility of Selected Crime Scene and Autopsy Photographs

The defendant contends that the trial court should not have admitted three photographs taken of the victim at the crime scene and two of the autopsy photographs because they were particularly inflammatory. On appeal, the State contends that the trial court did not abuse its discretion in admitting the crime scene photographs because "the photographs were relevant to refute the defendant's claim of self-defense because they showed that [the victim's] hands were clasped and his fingers interwoven when the defendant shot him in the back of the head." Regarding the autopsy photographs, the State argues that the photographs were relevant to establish "the distance between the defendant and the victim when [the defendant] shot [the victim], which was reflected in the nature of the wound . . . ." We agree with the State.

The defendant takes issue with three crime scene photographs, introduced at trial as exhibits 3-C, 3-D, and 3-E, which depict the victim lying in his bed, his fingers interlocked beneath his head, with a substantial amount of blood visible near the wound in the victim's forehead, underneath his nose, and on his arms. The defendant filed a pretrial motion, pursuant to State v. Banks, 564 S.W.2d 947 (Tenn. 1978), for the court "to hold a pretrial hearing to determine the admissibility of photographs of the deceased in this case. At the pretrial hearing, the State argued why these photographs, and two others that it sought to introduce, were admissible:

> It's going to be our position in this trial that - - and the Court's already heard the pretrial motion, testimony of Dr. McMaster . . . that a victim could not voluntarily or involuntarily move after being subjected to the type of gunshot wound this victim was. . . . This series of photographs shows the victim's hands. And it's going to be our position that given the defendant's statement that he was she felt reaching for something, . . . these series [sic] of photographs belies that. So these photographs are relevant and they're probative. And . . . their probative value outweighs their prejudice for those reasons.

The defendant replied that these photographs were highly prejudicial and ultimately unnecessary, given the existence of several other photographs, to which he did not object, depicting the victim's interlocked hands beneath his head. The trial court ruled that

> [E]ven though [the photographs are] not pleasant to look at, they do show some things that have to do with the issues that we will have in this case, particularly the hands. . . . [In] some of these pictures from a distance[,] [y]ou can kind of see the hands, but I think that some of these pictures here give a closer view and show exactly the way the hands were position, interlocking pictures should be allowed to be considered by the jury.

However, the trial court excluded what it considered the two "worst" pictures, noting that they were "more inflammatory than . . . probative when you have these other pictures coming in."

The two autopsy photographs with which the defendant takes issue, introduced at trial as exhibits 42-A and 42-C, depicted the entrance and exit wounds to the victim's head. In a jury-out hearing, Dr. McMaster testified regarding the presence or absence of soot and stippling as it related to the distance between the weapon and the victim's head at the time the weapon was fired, with the substance of her testimony mirroring that of her later testimony in front of the jury. Dr. McMaster also testified regarding the shape of the entrance wounds, noting, as she did in her later jury testimony, that the stellate lacerations evident in the victim's entrance wound were consistent with a close range shot. The defendant argued that "these pictures of the gunshot wounds . . . [only] prove what nobody disputes," particularly, that the victim was shot at close range, and that the pictures were "extremely inflammatory." The trial court, noting that "the pictures give a better description of the wounds than the testimony would give," ruled that the photographs' probative value outweighed their potential prejudice. However, the trial court limited the State to introducing one photograph of the entrance wound and one photograph of the exit wound, thus excluding other autopsy photographs of the victim's wounds; the trial court described these other photographs as "basically duplicates."

As stated above, all relevant evidence is generally admissible, see Tenn. R. Evid. 402, 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," Tenn. R. Evid. 403 (emphasis added). Photographs of a deceased victim may be admissible "if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Banks, 564 S.W.2d at 951. However, if they are not relevant, they may not be admitted to inflame a jury and unfairly prejudice the jury against a defendant. Id. "The more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." Id. The term "unfair prejudice" has been defined as "[a]n undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Id. As with any other form of evidence, the decision to admit photographs of a deceased victim lies within the discretion of the trial court, and we will not overturn that decision absent a clear showing of an abuse of discretion. State v. Vann, 976 S.W.2d 93, 103 (Tenn. 1998). The modern trend is to vest more discretion in the trial court's rulings regarding admissibility. Banks, 564 S.W.2d at 949.

Regarding the crime scene photographs, we agree with the trial court that the photographs, especially 42-C and 42-D, were "a little bad because of the scene around the [victim's] mouth." However, as the trial court noted, the State had the burden of establishing the elements of premeditated murder in this case, as well as the burden of rebutting the defendant's theory that she shot the victim when he reached for a gun. Thus, these pictures, which showed the victim's hands interlocked beneath his head more clearly than the other photographs introduced into evidence, were particularly relevant and probative to the issues at hand, particularly in light of Dr. McMaster's testimony that the victim's wounds were immediately fatal and did not allow the defendant to move after being shot. Furthermore, the trial court excluded two crime scene photographs which it considered particularly inflammatory, which reflects that the trial court conscientiously performed the balancing test required by the Rules of Evidence and interpreted by Banks, Vann, and similar cases. Thus, we conclude that the trial court did not abuse its discretion in admitting the three crime scene photographs depicting the victim's face and hands from close range.

Similarly, the autopsy photographs, which depicted the victim's entrance and exit wounds at close range and do not show any other part of the victim's body, were relevant in establishing the State's theory that the victim was shot from close range. Dr. McMaster offered extensive testimony regarding the shape of the victim's entrance wound and the absence of soot and stippling from the wound, and the autopsy photographs were valuable visual aids that allowed the jury to better understand Dr. McMaster's testimony. Furthermore, given that the photographs do not show other parts of the victim's body and do not depict a large amount of blood, these photographs were far less gruesome and inflammatory than were the crime scene photographs. The trial court excluded other autopsy photographs that were unnecessarily cumulative, thus showing that the trial court properly performed the balancing test required by the Rules of Evidence. We therefore conclude that the trial court did not abuse its discretion in finding that the probative value of the autopsy photographs outweighed their prejudicial effects. The defendant is therefore denied relief on this issue.

VI. Defendant's Handwriting and Fingerprint Samples

The defendant contends that the trial court's ordering her to submit fingerprint and handwriting samples violated both her Fourth Amendment protection against unreasonable searches and seizures and her Fifth Amendment protection against self-incrimination. We disagree.

Fourth Amendment Concerns

Both the state and federal constitutions offer protection from unreasonable searches and seizures. See U.S. Const. amend. IV; Tenn. Const. art. I, § 7. However, in United States v. Dionisio, 410 U.S. 1, 9-10, 93 S. Ct. 764, 769 (1973), the Supreme Court held that Fourth Amendment protections do not apply to compelled production of "physical characteristics" that are "repeatedly exposed to the public." The Court, applying Dionisio, has held that compelled handwriting samples

are not subject to Fourth Amendment protection. See United States v. Mara, 410 U.S. 19, 21, 93 S. Ct. 774, 776 (1973); see also Dionisio, 410 U.S. at 15 ("fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.'") (citing Davis v. Mississippi, 394 U.S. 721, 727, 89 S. Ct. 1394, 1398 (1969)). While Dionisio and Mara applied specifically to grand jury actions compelling exemplars from suspects, we believe that the language of the two companion cases is broad enough to encompass actions by the trial court compelling fingerprint and handwriting samples of the defendant after her arrest. Thus, we conclude that the defendant's Fourth Amendment rights were not violated when she was compelled to give fingerprint and handwriting samples.

Fifth Amendment Concerns

Our supreme court has observed, "The Fifth Amendment privilege against self-incrimination protects an accused 'from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .'" State v. Cole, 155 S.W.3d 885, 898-99 (Tenn. 2005) (citing Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 1830 1966)). As relevant to this case, the Supreme Court held in Schmerber that the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting" or submission of writing samples "for identification" purposes. Schmerber, 384 U.S. at 764. "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Id.; see also Gilbert v. California, 388 U.S. 263, 266-67, 87 S. Ct. 1951, 1953 (1967) ("A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment's] protection.") (emphasis added). The defendant argues that her fingerprint and handwriting samples were testimonial in nature in that the state "wanted [her] handwriting sample specifically to put the words contained in several writings into [her] mouth . . . . [Her] handwriting [and fingerprint] exemplar[s] became testimonial as soon as [they were] used to incriminate her." However, Tennessee courts, like their federal counterparts, have repeatedly rejected the defendant's arguments and concluded that compelled hair, blood, voice, and fingerprint samples are non-testimonial real or physical evidence that do not merit Fifth Amendment protection. See Cole, 155 S.W.3d at 898-99; State v. Harris, 839 S.W.2d 54, 70 (Tenn. 1992); Powell v. State, 489 S.W.2d 538, 540 (Tenn. Crim. App. 1972). We therefore deny the defendant relief on this issue.

VII. Sufficiency of Evidence

Defendant's Especially Aggravated Robbery Conviction

The defendant next contends that the evidence produced at trial was insufficient to sustain her convictions for first degree murder and especially aggravated robbery. However, before

reviewing this issue, we must note that the record indicates a discrepancy between Count 3 of the indictment and the judgment of conviction for that offense. The cover sheet for the indictment purports that the defendant was charged with one count of especially aggravated robbery, and the judgments reflect that the defendant was convicted of especially aggravated robbery, as charged in the indictment. However, Count 3 of the indictment alleges that the defendant

> on the 7th day of August, 2004, in Davidson County, Tennessee and before the finding of this indictment, intentionally or knowingly did take from the person of Johnny M. Allen certain property, to wit: an automobile, firearms, and a wallet of value, by violence or putting Johnny M. Allen in fear and the victim, Johnny M. Allen, suffered serious bodily injury, in violation of Tennessee Code Annotated § 39-13-402, and against the peace and dignity of the State of Tennessee.

(emphasis deleted). This count enumerates the elements of the offense of aggravated robbery as defined in section 39-13-402. The offense of especially aggravated robbery, codified at section 39-13-403, adds the element of use of a deadly weapon.

Apart from lesser included offenses, a situation which is inapplicable here, a defendant cannot be convicted of an offense not charged in the indictment or other charging instrument. See State v. Trusty, 919 S.W.2d 305, 314 (Tenn. 1996), overruled on other grounds by State v. Burns, 6 S.W.3d 453 (Tenn. 1999). See also State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997) (both the United States and Tennessee constitutions guarantee an accused "the right to be informed of the nature and causes of the accusation") (citing U.S. Const. amend. VI, XIV; Tenn. Const. art. I, § 9). In this case, although the defendant was convicted of especially aggravated robbery, and while neither party has raised this issue, Count 3 of the indictment charges the defendant with aggravated robbery, listing the elements of that offense and referencing the statute in which aggravated robbery is proscribed. No amended indictment appears in the record. Therefore, we reverse the defendant's conviction for especially aggravated robbery, and we will review the defendant's sufficiency of evidence issue as it relates to the offense of aggravated robbery.

Standard of Review

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and

the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

The defendant was convicted of first degree premeditated murder and first degree felony murder. A conviction for first degree felony murder, as charged in the indictment, requires proof of a "killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery." Tenn. Code Ann. § 39-13-202(a)(2) (2003). A conviction for first degree premeditated murder requires proof that the defendant committed a "premeditated and intentional killing." Id. § 39-13-202(a)(1). The first degree murder statute explains the term "premeditation" as follows:

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

Tenn. Code Ann. § 39-13-202(d) (2003). The presence of premeditation is a question for the jury and may be established by proof of the circumstances surrounding the killing. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997). Our supreme court has noted that factors that demonstrate the existence of premeditation include, but are not necessarily limited to, the following: the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, declarations by the defendant of an intent to kill, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, and calmness immediately after the killing. Id. Additional factors cited by this court from which a jury may infer premeditation include "planning activities by the appellant prior to the killing, the appellant's prior relationship with the victim, and the nature of the killing." State v. Halake, 102 S.W.3d 661, 668 (Tenn. Crim. App. 2001) (citing State v. Gentry, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993)).

Aggravated robbery is defined in pertinent part as "robbery as defined in § 39-13-401 . . . [w]here the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-402(a)(2). "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the other person in fear." Id. § 39-13-401.

In this case, the defendant admitted carrying a handgun in her purse before she arrived at the

victim's house; once inside the victim's bedroom, she pulled the gun from her purse and shot the victim, killing him. The defendant argues that she acted in self-defense, but there was no evidence that the victim was armed at the time of his death, as no other weapon was found in the victim's bedroom and the victim's fingers were locked beneath his head when he was found by police. Furthermore, the defendant admitted to police that the victim did not try to force himself upon her and that he did not threaten her with a gun at any point during the evening. After the shooting, the defendant took two of the victim's guns and his wallet and left the scene in his truck, abandoning it in a Walmart parking lot. After the shooting, she admitted to Richard Reed that she had killed the victim for $50,000 and some guns, and she asked Reed for a ride back to the victim's house to "clean it out." The defendant's procurement of a weapon, using the weapon against an unarmed victim, and her relative calm after the shooting all support the jury's finding that the defendant acted with premeditation in killing the victim.

In addition to her actions after the killing and before her arrest, the defendant made several post-arrest comments about the killing which also supported the jury's finding that the defendant acted with premeditation. For instance, she told a nurse, Kathy Franz, that she shot "that man," meaning the victim, in the back of the head, and that she would kill Franz in a similar manner. The defendant also told her mother that she had "executed" the victim. Furthermore, Shayla Bryant, who met the defendant while in jail, testified that when the defendant initially said that she had killed the victim in self-defense, she (Bryant) replied that she did not believe the defendant's story, which led the defendant to tell Bryant that she had shot the victim "just to see how it [would] feel to kill somebody." Later, the defendant passed Bryant a note in which she wrote that everything in her account of the shooting was true except for the victim's reaching for a gun and her own feelings of nervousness after the shooting. This evidence, coupled with that outlined above, was sufficient for a jury to find the defendant guilty of first degree premeditated murder beyond a reasonable doubt.

Regarding the other two offenses for which the jury returned guilty verdicts, the evidence established that the defendant used a handgun to kill the victim before taking his guns, which the defendant intended to pawn, and cash. This evidence was sufficient to convict the defendant of aggravated robbery. Regarding the felony murder verdict, while the defendant accomplished the robbery after killing the victim, this sequence of events does not foreclose a guilty verdict for felony murder. The Tennessee Supreme Court has stated that "consideration of such factors as time, place, and causation is helpful in determining whether a murder was committed 'in the perpetration of' a particular felony." State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999) (citing State v. Lee, 969 S.W.2d 414, 416 (Tenn. Crim. App. 1997)); see also State v. Hinton, 42 S.W.3d 113, 119 (Tenn. Crim. App. 2000). "'The killing may preceded, coincide with, or follow the felony and still be considered as occurring 'in the perpetration of' the felony offense, so long as there is a connection in time, place, and continuity of action.'" Hinton, 42 S.W.3d at 119 (citing Buggs, 995 S.W.2d at 106). In this case, the defendant took the victim's guns and money immediately after she killed him. This proof establishes the sufficient connection of time, place, and continuity of action to show that the killing occurred in perpetration of the robbery; thus, the proof was sufficient for the jury to find the defendant guilty of felony murder. Concluding that the evidence produced at trial was sufficient

to sustain the defendant's convictions, we deny her relief.

VIII. Double Jeopardy Concerns/Transfer Hearing

In her final issue, the defendant argues that the trial court erred by denying her pretrial motion to dismiss the case against her on double jeopardy grounds. The defendant argues that the juvenile court "subjected her to an adjudication on these charges during what was supposed to be her transfer hearing and that the [c]riminal [c]ourt prosecution thus should have been barred." The State argues that the juvenile court did not adjudicate the defendant as delinquent at the transfer hearing, and therefore jeopardy did not attach at that time. We agree with the State.

The United States and Tennessee constitutions both contain double jeopardy clauses which provide that no person shall twice be put in jeopardy of life or limb for the same offense. U.S. Const. amend. V[10]; Tenn. Const. art. I, § 10. As relevant to this case, the United Supreme Court has held that the double jeopardy clause "protects against a second prosecution for the same offense after conviction." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969). In Breed v. Jones, 421 U.S. 519, 531, 95 S. Ct. 1779, 1786-87 (1975), the Supreme Court held that jeopardy attaches in a juvenile adjudicatory proceeding, thus making such a defendant's later trial in adult court violative of the prohibition against double jeopardy. The Tennessee Supreme Court reached a similar conclusion two years before the Breed opinion was filed. See State v. Jackson, 503 S.W.2d 185, 188 (Tenn. 1973). However, the Court in Breed also noted that "nothing decided [in Breed] forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding." Breed, 421 U.S. at 538 n.18 (emphasis added).

Tennessee Code Annotated section 37-1-134 establishes the procedures by which a juvenile may be transferred to criminal court to be tried as an adult. The juvenile may be tried as an adult if, after a hearing in which the juvenile is entitled to fundamental due process rights, the juvenile court "finds that there are reasonable grounds to believe that . . . the child committed the delinquent act as alleged," the child "is not committable to an institution for the developmentally disabled and mentally ill," and that "[t]he interests fo the community require that the child be put under legal restraint or discipline." Tenn. Code Ann. § 37-1-134(a)(4)(A)-(C) (2005). In determining whether the child is to be tried as an adult, the juvenile court is also required to consider:

(1) The extent and nature of the child's prior delinquency records

[10]The Fifth Amendment's prohibition against double jeopardy, which is applicable only to the federal government, is applicable to the states through the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492 (1964).

(2) The nature of past treatment efforts and the nature of the child's response thereto;

(3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(4) Whether the offense was committed in an aggressive and premeditated manner;

(5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and

(6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Id. § 37-1-134(b)(1)-(6). This court has stated that "[i]f the procedure of [the transfer statute] is substantially followed, jeopardy could not attach in the transfer proceeding." State v Davis, 637 S.W.2d 471, 474 (Tenn. Crim. App. 1982).

In Davis, following a transfer hearing the juvenile court entered two judgments against each of the two juvenile defendants. Id. at 473. The first judgments provided, pursuant to the transfer statute, that there were reasonable grounds to believe that the juveniles committed burglary. Id. Thus, the juvenile court ordered the juveniles transferred to criminal court to be tried as adults. Id. However, the second judgments adjudicated the juveniles as "delinquent." Id. The defendants were convicted in criminal court; on appeal, this court reversed their convictions, concluding that "the juvenile judge blended a transfer hearing with a hearing on the merits of the petition and double jeopardy resulted when the appellants were again tried in Criminal Court." Id. at 474.

In this case, the juvenile court issued a single judgment in which the court, pursuant to section 37-1-134, found the existence of "reasonable grounds to believe that the [d]efendant committed the acts alleged in the petition" and applied the facts of this case to the six factors provided in subsection (b):

> 1) that while the Defendant has a delinquency record, it is not extensive; 2) that there is a record of past treatment efforts, both by the Department of Children's Services and by the child's family. These efforts have been thwarted by the Defendant's lack of cooperation and repeated running from therapeutic placements; 3) the offense which was committed against a person, was extremely violent in nature, and resulted in the death of the victim; 4) the offense was committed in an aggressive manner by gunshot at close range to the back of the victim's head and was premeditated. The Defendant had a loaded gun in an open purse within easy reach of the crime scene; 5) the possible rehabilitation of this child would require a lengthy period of time and require the utmost cooperation of the Defendant . . . 6) the child's conduct would not be a criminal gang offense if committed by an adult. This factor weighs for the Defendant.

While the juvenile court's order did not adjudicate the defendant as a "delinquent child," the defendant, citing to the Ninth Circuit Court of Appeals' opinion in Rios v. Chavez, 620 F.2d 702 (9th Cir. 1980), nevertheless argues that she was "clearly . . . subjected to an adjudication at her transfer hearing." The defendant asserts that "the prosecution spent many hours proving her guilt on these charges. The tapes of the transfer hearing clearly reflect the prosecutor's intent to adjudicate [the defendant]." The defendant's argument is also based on her assertion that "[t]he tone of the hearing was certainly one of accusation, rising above the level of a mere probable cause hearing." The defendant also takes issue with the juvenile court's findings, listed above. The defendant particularly argues that "the juvenile court's order in this matter certainly adjudicates [her] at least as to the weapons charge . . . ."

In this case, we cannot conclude that "the juvenile judge blended a transfer hearing with a hearing on the merits of the petition" such that jeopardy attached at the transfer hearing. The audio recordings of the transfer hearing are incomplete, as one of the four audiotapes provided in the record is blank. One of the three State witnesses whose testimony was preserved on the tapes is Detective Robinson; the other two witnesses were a Montgomery County Juvenile Court employee who testified regarding the defendant's prior juvenile criminal record and a DCS employee who testified regarding the defendant's history of DCS placements and her treatment while in DCS custody. The testimony of two defense witnesses is preserved on the recordings: the defendant and Dr. Bernet. While the State questioned both Detective Robinson and the defendant regarding the defendant's involvement in the case, such actions did not evince the State's intention to "prov[e] her guilt," as the defendant insists. Rather, the State had the burden of establishing that "reasonable grounds" existed to believe that the defendant committed the offense and that "the offense was committed in an aggressive and premeditated manner." The State thus focused its proof accordingly. The testimony of the DCS worker and the juvenile court worker was relevant in establishing the required factors regarding the defendant's prior juvenile delinquency record, her past history of treatment, and her potential for rehabilitation; their testimony was unrelated to the instant offense. Finally, in the State's closing argument, the prosecuting attorney focused on the factors outlined in the transfer statute and did not insist that the defendant should be adjudicated delinquent.

We are limited in reviewing the defendant's arguments that the juvenile court subjected the defendant to an adjudication, as the juvenile court's comments after the parties concluded their closing arguments are inaudible on the recording. What evidence that does exist weighs against the defendant's assertions. In this case, unlike in Davis, the juvenile court issued only one judgment that did not adjudicate the defendant as delinquent. When viewed in context, the juvenile court's findings regarding the defendant's keeping a gun in her purse did not serve as an adjudication. See State v. Tiffany Michelle Taylor, No. M1999-02358-CCA-R3-CD, 2002 WL 799695, at *12 (Tenn. Crim. App. Apr. 29, 2002) (juvenile court's statements during transfer hearing that "[t]hose photographs speak for themselves" and that the defendant "slaughtered her mother just like you would slaughter an animal going to [the] smokehouse," when viewed in context of the rest of the juvenile court's findings, did not serve as an adjudication).

Finally, the defendant's reliance on Rios is misplaced, as the Ninth Circuit based its decision on its determination that the California statutes under which that defendant was transferred to criminal court necessarily required the juvenile court judge to "determin[e] that the minor had committed the offense charged." Rios, 620 F.2d at 702. The Ninth Circuit noted that its decision could be distinguished from other federal cases addressing "statutory juvenile justice schemes different than that in force in California," including Tennessee's. Id. (citing McGaha v. Tennessee, 461 F. Supp. 360 (E.D. Tenn. 1978)). This state's juvenile transfer statute requires no determination that a juvenile defendant committed the offense alleged, and the juvenile court made no such determination in the instant case. Rather, the juvenile court, pursuant to statute, found that reasonable grounds existed to believe that the defendant killed the victim. The defendant is therefore denied relief on this issue.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, we conclude that because the indictment did not charge the defendant with especially aggravated robbery, the defendant's conviction for that offense is reversed. The case is remanded to the trial court for entry of a judgment of conviction of aggravated robbery, the offense with which the defendant was charged in Count 3 of the indictment and for which the evidence was sufficient to sustain the defendant's conviction. The trial court is to conduct a new sentencing hearing as to that offense. In all other respects, the judgments of the trial court are affirmed.

_____

D. KELLY THOMAS, JR., JUDGE