

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 21, 2026 Session

FILED

07/23/2026

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. TERRENCE DEWAYNE LEWIS, JR.

**Appeal from the Criminal Court for Hamilton County
No. 312383 Barry A. Steelman, Judge**

No. E2025-00451-CCA-R3-CD

Defendant, Terrence Dewayne Lewis, Jr., was convicted of two counts of first degree felony murder, and one count each of especially aggravated robbery, aggravated burglary, and second degree murder. The trial court ordered all sentences to run concurrently for an effective life sentence. On appeal, Defendant argues: (1) the trial court erred by admitting expert testimony; (2) the trial court erred by admitting the DNA testing of the swab from Defendant's shoe; (3) the State committed prosecutorial misconduct in its closing argument; (4) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to timely disclose discovery materials; (5) the trial court erred by admitting the video recording of the high speed police pursuit and other evidence at trial; (6) the trial court erred by limiting the cross-examination of Detective James Goehring; and (7) that cumulative error entitles him to a new trial. Following a review of the entire record, the briefs of the parties, the arguments of counsel, and the applicable law, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, P.J., and TIMOTHY L. EASTER, J., joined.

Joshua P. Weiss, Chattanooga, Tennessee, for the appellant, Terrence Dewayne Lewis, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Elizabeth Evan, Assistant Attorney General; Coty Wamp, District Attorney General; and Andrew Coyle and Charlene D. Davis, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Pre-Trial Conference Re: Discovery - February 2, 2023

At a hearing on Defendant's "motion for specific discovery," the State informed the trial court that it had complied with "most of" Defendant's fourteen requests, but was still looking into "some of the remaining pieces of discovery that [trial counsel] has requested." Upon questioning by the trial court, the State said it did not anticipate "resisting" any of the discovery requests and that they were trying "to see if any of those items are with the Chattanooga Police Department."

Trial counsel noted his frustration with the discovery process and told the trial court:

[Defendant] was indicted in November of 2021, and every three or four months, it's a slow leak of discovery. It's a little bit of evidence here and a little bit of evidence here, and here we're getting closer to the eve of trial and there are still documents and - - essential material documents that I need in order to file my motions that I still don't have.

I'll give the court an example. [Defendant] is - - a search warrant was conducted at his house. There was a pair of Nike shoes found there. The State, I believe, is going to say that those shoes have the decedent's, the victim's blood on them. In addition to that, they're going to say that that shoe left a footprint in the - - at the crime scene.

The search was conducted allegedly pursuant to a search warrant. I have a copy of the affidavit for the search warrant. I don't have the search warrant. I have checked the Court's file. It's not in the Court's file. Unless I'm, to call every judge and magistrate to find out who issued it, I can't file a - -

When the trial court noted that the magistrate should have retained a copy of the search warrant, trial counsel asserted it was not his "job" to "go out and find the search warrant for each [affidavit]. There's about 13 different search warrants here." Trial counsel further asserted that the State "should have to actually produce the warrant itself." The trial court pointed out that trial counsel had not requested copies of the search warrants in his discovery request. Trial counsel then said that he "meant to." He also said he had received a copy of the search warrant for the red Kia Sportage.

Trial counsel told the court he had not received the Tennessee Bureau of Investigation (“TBI”) forensic report with ballistics information from the firearm taken from Defendant which was alleged to have killed the victim. Trial counsel said, “I have no NIBIN,¹ any statistical data information that shows that.” He noted that the gun was an essential piece of information in Defendant’s case. Trial counsel also informed the court evidence concerning a shoe print was missing. He had received a voluminous amount of discovery from the State the previous Saturday which contained “hundreds of videos” he had trouble downloading due to the volume, and noted that some of the videos appeared to be over two years old requiring him to compare the old discovery to this new discovery “because some of it seems to be redundant.” Trial counsel also reported that he had not received a copy of the search warrant executed on Defendant’s social media accounts. He had also requested information on the search warrant executed on Co-defendant Marcus McMillan’s account and had not received it. Trial counsel explained that he could be ready for trial in March 2023, “[i]f the Court wants to exclude any evidence produced after today, I can be ready for trial; but if the State’s going to intend to introduce other evidence, then there’s, respectfully, there is no possible way I could be ready for trial.”

The State informed the trial court that a NIBIN report had been created by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to determine whether the shell casings matched “or at least establishe[d] a lead that might connect it to some other crime or where the same gun was used,” and that report had been provided to trial counsel. The gun had been sent to the TBI for further testing which had not been completed at the time of the hearing.

The trial court directed the State to provide trial counsel with a list of property taken from both Defendant and Co-defendant McMillan when they were booked into the jail and to determine what kind of summary could be provided concerning cellphone data and social media accounts. The parties agreed to meet prior to the next hearing to see if they could resolve the discovery issues prior to trial.

Scheduling Conference – March 27, 2023

The purpose of the scheduling conference was to determine whether trial counsel had the opportunity to review the evidence provided at the previous hearing. The State noted that the firearms analysis was back from the TBI and had been provided to trial counsel.² The prosecutor further informed the trial court:

¹ Nation Integrated Ballistic Information Network.

² Defendant had three separate murder cases, including the present case, pending at the time.

The evidence that we have thus far in that case is part of a *Brady* situation. I've provided that information to counsel for review as well, as well as the complaints that were referenced in the NIBIN.

So I think all of that has been turned over. If I have any updates as far as that particular case, I'll provide it to the defense. But my understanding is that at the conclusion of the last court date, we were going to have an opportunity for everyone to review the evidence and then pick the trial date in relationship to this particular case that we're before the Court today.

Trial counsel said he had received discovery and was in the process of reviewing it. He did not understand some of the reports and findings by the TBI and might be requesting an expert. Trial counsel further noted that "some of the evidence just was received in the last few days, and I'm going through that now." He requested to set a court date, "subject to the [c]ourt's approval[.]" The case was then set for trial on July 10, 2023.

Motions Hearing – May 1, 2023

In addition to motions in limine to exclude evidence, Defendant filed a motion to suppress evidence of the high-speed pursuit of Defendant by law enforcement, and made an oral motion to suppress data from Defendant's cell phone. As to the pursuit, Detective James Goehring of the Chattanooga Police Department ("CPD") testified that the body of the victim, Randy Williams, was discovered December 2, 2020, at an address on Lightfoot Mill Road. The victim's car, a gold Kia Sorrento, was not there and had been reported stolen. A woman who lived on McBrien Road had also reported that her license plate had been removed from her car. On December 6, 2020, Detective Goehring responded to the scene of an accident that occurred during a high-speed police pursuit. He discovered the stolen Kia Sorrento bearing the license plate from the car on McBrien Road. Defendant and Co-defendant McMillan were still in the vehicle.

On cross-examination, Detective Goehring testified that three guns were recovered from the Sorrento after the accident, two of which "had no correlation" to the present case. The gun related to this case was a Glock 22 .40 caliber handgun ("Glock 22") which was the same gun that left shell casings at the murder scene on Lightfoot Mill Road. Detective Goehring was not aware of anyone who had seen Defendant in the gold Sorrento prior to the pursuit. On redirect examination, Detective Goehring learned during his investigation that Defendant usually drove his mother's red Kia Sportage; the victim's debit card was found inside that vehicle.

Trooper Adam Malone³ of the Tennessee Highway Patrol (“THP”) testified that on the night of December 6, 2020, he was traveling southbound on Lee Highway when he passed a Kia Sorrento. The license plate reader attached to his patrol vehicle alerted him that the license plate on the vehicle was stolen, which he verified through dispatch. Trooper Malone initiated a traffic stop, and the vehicle came to a stop “for maybe a couple of seconds, and after that, the vehicle took off and a pursuit ensued after that.” The vehicle eventually crashed when it ran a stop sign at the intersection of St. Marks Avenue and Brainerd Road and struck two other vehicles. Trooper Malone determined that Defendant was driving the vehicle and Co-defendant McMillan was the passenger. Co-defendant McMillan fled the vehicle on foot, was pursued, and eventually detained by Trooper Malone. Defendant was unable to exit the vehicle due to its position to the other vehicles, and was also taken into custody. The video of the pursuit was then played for the trial court.

On cross-examination, Trooper Malone testified that he and other officers performed an “inventory search” of the Kia. He recalled one firearm being found in the vehicle, and he thought one was found on Defendant’s person, but he was “not clear” on that because he did not personally take Defendant into custody.

The trial court found the police pursuit video relevant because “[Defendant] was in the motor vehicle that belonged to [the victim] within a number of days from the time of the homicide, four days from the time that the body was discovered; and then also within that vehicle was a firearm on [Defendant’s] person that was connected to the crime scene via a scientific analysis which linked it to shell casings found at the crime scene where the body was found,” and the State was required to prove identity at trial. The court further found that the jury could consider Defendant’s flight from the officers together with “all the other evidence.” The trial court concluded that the probative value of the video was “not substantially outweighed by the danger of unfair prejudice.”

The trial court also found that under Tennessee Rule of Evidence 404(b), the video was relevant to establish identity. The court determined the video was admissible for context and completeness of the story stating:

I think it would be misleading, because the jury might surmise that [Defendant] was stopped in a lawful traffic stop and given a speeding ticket and the vehicle searched, or that [Defendant] may have turned himself in and brought that evidence in . . . I do think it’s potentially misleading to the jury not to tell the jury - - or not to let the jury know exactly how [Defendant]

³At this hearing, Trooper Malone was referred to as Josh Ryan Malone. However, at trial, he referred to himself as Adam Malone and spelled his first name. We will refer to him as Adam Malone.

came to be found in possession of those items, both the car and the gun, because it was an evading.

The trial court concluded the video was relevant to rebut Defendant's statement to police that he was fleeing because he was out on bond. The court stated that, "while the flight is prejudicial," the probative value of the video outweighed any prejudice.

Motions Hearing – June 26, 2023

Defendant also filed a motion to exclude ballistics evidence and expert testimony by TBI Special Agent Ladd Kuykendall. Special Agent Kuykendall testified that he had a "[B]achelor of [S]cience degree in biology with a minor in chemistry[.]" He further explained: "To be hired or to be even considered for one of the positions there within the lab at large, you have to have at least a natural science degree with at least 24 semester hour of chemistry - - semester hours of chemistry, which I meet that requirement."

Special Agent Kuykendall testified that he completed an "extensive minimum of two-year training program" instituted at the TBI consisting of "upwards of a hundred training assignments, practical exercises, competency tests, proficiency tests, to ensure that we know exactly what we're doing before we get into casework." He further testified:

So certifications, I have armorer certifications, but as far as certifications specifically to firearms and tool mark identification, I do not hold any specific certifications. That is not required by the TBI. They are available through AFTE, that if we want to go and get certified within firearms and tool mark identification, we can; however, it is not required, because we take annual proficiency tests to show that we are still proficient in the job.

Continuing education, again, mentioned AFTE, which is the Association of Firearms and Tool Mark Examiners. They put on a meeting every year, and this is typically the source of our continuing education. We'll go there and take seminars and listen to presentations on research in the field of firearms and tool mark examination as well as other journal articles that are released. We try to keep up with that as much as possible.

I'll be honest: Sometimes I don't stay as abreast as I'd like because I'm in the lab, but we, we do have access to those and we try to keep up with them as much as possible.

Special Agent Kuykendall also completed yearly proficiency tests and noted that he was involved in training other agents in his unit. He said, "And I can speak to the error rate of

myself and my fellow firearms examiners within the TBI, we have an error rate of zero in our proficiency tests. No one has made errors in our proficiency tests.” Special Agent Kuykendall had testified eleven times as an expert in the field of firearms and tool mark identification.

Special Agent Kuykendall explained the process of firearms comparison and tool mark identification. He testified that comparisons are made based on individual characteristics of each gun, which are “imparted primarily from the manufacturing process where these parts are being made. The tools that are being used to shape the barrels and the slides are wearing down continually, and so the microscopic fingerprint that they’re leaving behind is changing every single pass that they make.” He examines a firearm by “test-firing” to have “known standards of comparison.” Then, he will “microscopically examine them to see what they look like, what patterns they leave behind, and then I compare those to the evidence. If I see a sufficient agreement within those patterns and those marks left behind in the gun, then I can conclude that they have the same source.” He then compares the test-fired bullets and casings to the evidence collected at a scene using “two microscopes combined with one optical piece” that “allow the image of both cartridge cases or bullets . . . to be overlapped so that markings that are left behind on the surface can be looked at as closely as possible.” Special Agent Kuykendall agreed that “tool mark examination” is a “recognized area of science.” In this case, he prepared a firearms report by examining the “fired cartridge cases, fired bullets” and three handguns.

On cross-examination, Special Agent Kuykendall testified that he had been working in tool mark identification since 2015 when he began his training. He agreed that his [B]achelor of [S]cience degree in biology, with a minor in chemistry, and master’s degree in public service management had nothing to do with tool mark identification. He further agreed that most of his education regarding tool mark identification had been learned “on the job.” He was familiar with a number of articles written over the past twenty to thirty years raising concerns with tool mark identification. He explained that “a lot of the criticism comes from the examiner making the determination, meaning that there’s not an instrument like a GC[-]MS⁴ looking at toxicology results that you plug in a sample, it tells you the result, and you’re, you’re the one looking at the data that it produces.” Depending on what examiners can see with different lighting, microscopes, and technology, and “whether someone’s new in science and someone has a lot of experience, the results may vary in that, say, a new examiner that’s not seen very many examples may not see the agreement that someone with a lot of experience may, and so that’s where the subjectivity comes into play.” He reiterated that the TBI has a required two-year training period and that every result is verified by a second examiner. Special Agent Kuykendall said disagreements between examiners did not happen very often, and “most of those

⁴ Gas chromatography - mass spectrometry.

disagreements happened while I was in training, but those proficiency tests, again, those errors, when - - those error rates being zero, the end result, after the review process is done, when it's sent off to those proficiency test providers for grading, we're getting the correct results."

Special Agent Kuykendall had "completed" approximately 700 cases, examining "thousands and thousands of cartridge cases and bullets." He estimated that "hundreds" of the cases involved a Glock weapon and "a lot of them were .40-caliber[.]" He detailed the seven "marks" that can occur on cartridge cases when fired from a gun. The marks can be used to determine whether a shell casing was fired from a particular weapon. For firearms identification, examiners "look at the firing pin impressions, firing pin aperture, shear[,] breechface marks and chamber marks" but not "extractor and ejector marks." He testified that if there are "enough marks and that sufficient agreement that we were discussing earlier, say, within firing pin aperture shear, [I] don't need to have chamber marks, necessarily, because I'm seeing it sufficiently reproduce on test-fires in that same area." Special Agent Kuykendall said that reviewing numerous marks from just the aperture would be sufficient for a match.

In this case, Special Agent Kuykendall matched the aperture marks because "that was the source that made the most marks." He testified: "Now, that doesn't mean there isn't agreements in those other sources. Once I saw the agreement in the aperture shear, I did not go further, because it was going to take a whole lot of extra time and redundancy to show that the marks that were being reproduced from the gun were on the cartridge cases." He noted that there was not a minimum number of marks required to match for him to draw a conclusion.

Trial counsel questioned Special Agent Kuykendall about a September 2016 article questioning the validity of firearms identification. Special Agent Kuykendall testified:

I would say that they didn't do a great job of looking at the studies, because four out of, I think, the nine studies they cited, they got the information incorrect, and I can show you each one of those that they got incorrect.

There were multiple responses from OSAT,⁵ from the FBI, from AFTE,⁶ refuting a lot of what they had to say against the firearms and tool mark identification unit, because there have been very many black study boxes - - and I've got five that I can reference now, if you'd like - - but they themselves

⁵ Officer Safety Awareness Training

⁶ Association of Firearms and Tool Mark Examiners

did not go through a peer review because they didn't catch - - four of the studies they got completely wrong that they mentioned in the study.

Concerning additional scientific studies and articles disputing the validity of tool mark identification, Special Agent Kuykendall testified:

The ones that come to mind are the NSA or the NAS⁷ report, and realistically, AFTE did address those problems, and they - - they gave thirteen recommendations, which only six of those recommendations actually apply to firearms and tool mark identification. And of those six, AFTE correctly pointed out that at that time in 2009, they were already - - we were already following these recommendations, and those recommendations weren't actually affecting the quality of our work, and the claims that the NSA - - the NAS, sorry, getting that backwards - - made about the validity of firearms identification even admitted in this report that they didn't have enough time to go through and look at the underpinnings of firearms examination.

So AFTE pointed this out. They made these critiques without actually looking at the scientific underpinnings of firearms and tool mark identification.

Special Agent Kuykendall agreed that the TBI crime lab tool mark identification results were not infallible, "but at the same time, we do our very best to make sure our end product is as high quality as possible based on the science available."

Trial counsel then referenced another study concerning a systematic challenge to the reliability and admissibility of firearms and tool mark identification stating that the Collaborative Testing Services ("CTS") showed that tool mark examiners made both misidentifications and missed identifications on CTS firearm identification tests in 2003. Special Agent Kuykendall agreed that there was an error rate in the proficiency tests, which were open to the public for anyone to take, of approximately one to one and a half percent. He noted that another test provider, Forensic Assurance, showed an error rate of less than one percent in the summer and winter of 2022. He reiterated that the TBI crime lab had a zero percent error rate on the proficiency tests.

Special Agent Kuykendall testified that TBI Special Agent Denver Hall reviewed the results of his analysis of the shell casings and the firearm in this case. He did not know if Special Agent Hall was aware of his findings prior to the review. Special Agent Hall

⁷ National Academy of Sciences

“physically took that evidence, looked at it under the microscope himself, and came to a conclusion, which his conclusions mirrored mine.”

Trial counsel argued that the science behind firearms and tool mark identification was not reliable under the *Daubert*⁸ and *McDaniel*⁹ factors and that no one could be an expert in the field, including Special Agent Kuykendall, because the science was not accurate. The State responded that “this area of practice of science has been identified and recognized for several years.” The State further pointed out that the articles relied on by the defense were from 2008 and that the TBI crime lab had been accredited since 1994 and met high standards.

The trial court reviewed the factors set forth in *McDaniel* and concluded that the firearms identification was relevant and that Special Agent Kuykendall had “specialized knowledge, skill, experience, training, and education in the subject field of firearms analysis and tool mark identification.” As to reliability of firearms analysis and tool mark identification, the trial court found:

The evidence has been admitted in the courts, in Tennessee Courts. This Court takes judicial notice of the fact that tool mark testimony has, has been admitted in this Court repeatedly in the now 17 years that I have presided here. I think at last count, this Court had tried upwards of 80 cases, near 90, during that time, and many of - - many of those have been cases involving homicide and ballistic testimony, and it’s been very common for the Court to hear that the imprint on a particular shell casing was made by a particular gun, based on the tool marks.

I think the fact that there are articles questioning the reliability of the testing would indicate the scientific evidence and the underlying methodology has been tested.

The witness Mr. Kuykendall testified about rates of error, so that would indicate the testing as well.

The witness Mr. Kuykendall has done at least testing in the field, independent of litigation, in his preparation to serve as a firearms examiner in the 100 or so cases that he was assigned to examine in order to establish proficiency.

⁸ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

⁹ *McDaniel vs. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997).

The trial court denied Defendant's motion in limine to exclude ballistics evidence and testimony.

A discussion was held concerning Defendant's motion to exclude evidence from Defendant's social media accounts. Trial counsel said the State had "partially complied" with his "rule 12(d)(2) motion. He also told the court that he had received new evidence from the State at 11:00 p.m. on June 15, 2026, but that he was not asking for a continuance. He complained that his case had "changed over and over and over again because discovery keeps getting released. The majority of discovery in this case was not released until March the 25th." He said the evidence he had received just eleven days prior was evidence that had been in the State's possession since December 2020.

When asked by the trial court what new evidence had been received, trial counsel indicated it was a photograph of a shoe print from the murder scene. He said:

So up until 11 days ago, I didn't think the State's evidence with regard to the footprint was all that strong because there wasn't really any pictures or analysis of it. And then, on June the 11th, I received it. And that evidence is, is unexplainable to me why it wasn't provided, you know, two and a half years ago or when discovery initiated.

The State responded that the footprint analysis was prepared by the TBI and included in their file notes. She said that "those things are not received by the State, by our office, or even the defense, unless upon request." The State further pointed out that trial counsel never requested the bench notes or photographs from any TBI agent. "We provided it when we received it, and so that was immediately sent over to [trial counsel] in regards to the case." The prosecutor further pointed out: "Those are not things that we would normally receive or request in the course of preparation for trial, and so that's why it was sent following our meeting with the agents in the case."

The trial court advised trial counsel, "If you feel like that you are prejudiced in any way as a result of the incoming evidence, then I'll hear you with regard to whether or not - - what to do about the prejudice. There are various remedies, including a continuance of the trial date, including suppression of the evidence things of that nature." The court noted it would like to keep the trial date, and trial counsel responded that he had no intention of requesting a continuance.

Trial

A. State's Proof

In the early morning hours of December 2, 2020, Kendrick Rogers, the victim's roommate, arrived at their residence on Lightfoot Mill Road and discovered the victim, Randy Williams, deceased, and called 911. CPD Investigator Charles Bramlett, who was working as a patrol officer at the time, was dispatched to the scene. He and another officer entered the residence which had been completely ransacked and saw that the victim appeared to have a gunshot wound.

Detective James Goehring of the CPD Violent Crime Division and lead investigator arrived at the scene and saw that the front door appeared to have been struck by gunfire. When Detective Goehring learned from Mr. Rogers that the victim's 2005 gold Kia Sorento was missing, he entered that information into the National Crime Information Center database. He also collected three cell phones from the scene and obtained a passcode for the victim's phone.

CPD Crime Scene Investigator Greg Mardis processed the victim's house and noted that "[p]retty much it was – everything was opened, turned over, dumped through the whole house." In one bedroom, the television had been removed from the wall and placed on the bed. In the second bedroom, everything had been pulled out of the closet. The bottoms of the victim's feet were clean but there were shoeprints in the blood on the floor.

Investigator Mardis and Detective Goehring found "two .40 caliber Smith and Wesson spent shell casings" at the threshold of the metal front door to the residence, which had a bullet hole, and two .40 caliber bullets inside in the bathroom and hallway. There were also some bullet holes in the living room wall. There was a shoeprint on the wall in the bedroom where "someone had kicked the wall in order to break the drywall, so that they could tear into it." The shoeprint on the wall differed from the shoeprints in the blood on the floor. Investigator Mardis and Investigator Tracy McGhee collected a black glove from the east part of the yard.

Prior to the testimony of THP Trooper Malone, the trial court gave the following instruction:

Members of the jury, the Court anticipates that you're going to see evidence of evading arrest with a motor vehicle, and if you find from the proof that the defendant has committed an act other than that for which he is on trial, that is a bad act, you may not consider - - like evading arrest - - you may not

consider such evidence to prove his disposition to commit the crimes such as those for which he is on trial.

However, the evidence may be considered for you - - or by you for the limited purpose of determining whether it provides the complete story of the crime, that is such evidence may be considered by you with a prior act - - that means the act prior to this trial - - and the present alleged crime which is at issue in this trial, are logically related or connected or are part of the same transaction so that proof of the other tends or is necessary to prove the one charged or is necessary for a complete account thereof.

Trooper Malone testified, consistent with his testimony at the suppression hearing that on the night of December 6, 2020, he encountered the victim's Kia Sorrento, and the license plate reader attached to his patrol vehicle alerted him the license plate on the vehicle was stolen. Trooper Malone initiated a traffic stop, and the vehicle briefly came to a stop, then took off, and a high-speed pursuit ensued. The video of the high-speed pursuit from Trooper Malone's patrol vehicle was exhibited to his testimony and played for the jury. Trooper Malone noted that speeds during the pursuit reached seventy to eighty miles per hour, and Defendant turned the headlights of the Kia off at one point, a common tactic to evade law enforcement. The vehicle eventually crashed, and both Defendant and Co-defendant McMillan were taken into custody.

THP Trooper Steven Richardson responded to the scene of the crash to assist the CPD . When he ordered Defendant to show his hands, he noticed a handgun in Defendant's hoodie pocket. Trooper Richardson removed the loaded gun, a Glock 22, from Defendant's pocket and placed it on top of the car. After Defendant was taken into custody, a second loaded gun, a black Taurus,¹⁰ was found in the backseat on the driver side of the vehicle. A copy of Trooper Richardson's body camera footage was also entered as an exhibit and played for the jury. A third gun was found at the scene after the vehicles had been towed away.

Detective Goehring initially had few leads in the days after the murder. He eventually learned that the victim's vehicle had been involved in a high-speed police pursuit on December 6, 2020, and he responded to the location. Defendant and Co-defendant McMillan had already been taken into custody when he arrived. They were then transported to the "police service center" for processing. Detective Goehring noted that he had recovered two .40 caliber shell casings at the scene, and nine-millimeter "projectiles"

¹⁰ The Taurus was not used in the murder, and Defendant did not object to Trooper Richardson's testimony about the weapon until video from his body camera was later played.

were recovered from the victim's body which led him to believe that two individuals were involved in the victim's murder.

On December 7, 2020. Detective Goehring went to McBrien Road and spoke with Mary Rojas, who lived in the same apartment complex as Defendant and his mother. Ms. Rojas had previously reported on November 30, 2020, that the license plate had been stolen from her car. The plate was later discovered on the victim's Kia Sorento. Ms. Rojas then allowed her vehicle to be processed for fingerprints.

On cross-examination, Detective Goehring agreed that the victim's death could have occurred anywhere between December 1-2, 2020. He further agreed there was no physical evidence or surveillance videos linking Defendant to the murder scene. When trial counsel asked Detective Goehring whether he interviewed Defendant, the State objected. At a bench conference out of the hearing of the jury, trial counsel said he wanted to question Detective Goehring about what he did because of the interview. The State responded that the testimony was hearsay and "any information is self-serving within that statement." The trial court ruled that anything Defendant said in the interview was hearsay; however, it was admissible if the "State want[ed] to get it in[.]" Trial counsel responded:

But it's not - - we don't need to get to hearsay exceptions because I'm not saying it is under an exception. It's not hearsay and it's not hearsay because it's not being offered to the truth of the matter asserted. It's - - I want to know what he did in his investigation as he followed up.

Defense counsel also asserted that he wanted to ask Detective Goehring if Defendant told him he had purchased the Kia Sorento and what Detective Goehring did to confirm the purchase. The trial court then said: "But you can't get any statement that [Defendant] made to the detective in that way. That's a statement by [D]efendant and it's allegedly - - and the State would that it's relevant hearsay, but that it's self-serving hearsay." The trial court further noted: "And it's a statement offered for the truth of the matter asserted. He's not testified, he's not subject to cross-examination. If the State doesn't want it admitted, you can't get it in."

Detective Goehring requested Agent Chris Moon of the Bureau of Alcohol, Tobacco, Firearms and Explosives to "dump some phones for him" using a Cellebrite program. Agent Moon performed the extraction on the victim's phone and compiled the information into a PDF document. He attempted an extraction from a second phone, but it was locked.

Chief Medical Examiner Dr. James Metcalf of the Hamilton County Medical Examiner's Office performed the victim's autopsy and determined that he died from three

gunshot wounds. One gunshot wound below the right collarbone had stippling around it indicating that it was fired from “intermediate range.” Dr. Metcalf did not believe that the wound was sustained from being shot through the door - “possibly if the muzzle of the gun was right up against the door, but - - or shooting through a hole in the door that was already there[.]” A nine-millimeter bullet was recovered from the wound. Dr. Metcalf opined that the other two gunshot wounds were fired from an indeterminate range. He also recovered a second nine-millimeter bullet from one of the wounds. A third bullet struck several vital organs, but that bullet was not recovered. Dr. Metcalf observed a fourth superficial wound to the victim’s left shoulder containing a metal fragment, which appeared to be from the hole in the front door of the residence. He noted that “at least the hole in the door was related to one of the projectile injuries.” He testified that the approximate time of death was between twenty-four to thirty-six hours before the victim was discovered.

Investigator Tracy McGhee executed a search warrant on December 9, 2020, of a red Kia Sportage owned by Defendant’s mother. He found a black wallet in the front driver side door pocket. The wallet contained Defendant’s identification and social security card. He also found in the door pocket another identification card for Defendant, some receipts, and a Tennessee Way2Go debit card and a Visa debit card with the victim’s name on them. Investigator McGhee also collected three black gloves from the glove box and a surgical mask. There was an additional pair of black gloves in the front passenger side door pocket.

On December 9, 2020, CPD Crime Scene Investigator Michele Johnson processed Defendant’s and his mother’s apartment on McBrien Road after a search warrant was executed at the residence. She collected shoes from the “east bedroom” along with a duffle bag, a pair of gloves, and some “literature.” She collected a total of twelve pairs of shoes, the majority of which were men’s size eleven and a half. She noted that “each item” was placed separately in a paper bag. Investigator Johnson later tested the shoes and the left shoe of a pair of size eleven and a half black Nike tennis shoes tested positive for the presence of blood on the upper portion of the shoe. She described the testing process: “We use a sterile cotton swab, put distilled water on it, and then rub it on the area that we suspect of having blood, and then we put it in a box and then put it in a paper bag and seal it.” Investigator Johnson then transferred the swab and other items she tested to Investigator Mardis who submitted them “to property and evidence.” The evidence was then taken to the TBI Crime Lab by Investigator Sam Booker and received by TBI Agent Allison Fowler.

On cross-examination, Investigator Johnson testified that she followed all procedures to avoid contamination in testing the evidence. She said that the evidence was placed on a stainless-steel table with butcher paper “to make sure it’s a non-contaminated surface, and then we’ll place the items on that paper.” She noted that the shoes were laid out individually on the paper. She noted that she used a “sterile swab.” When asked about the chain of custody, Investigator Johnson testified:

The chain of custody is done after they're submitted to the property and evidence division.

Now, as far as me giving the shoes to Investigator Mardis, that transfer sheet is our chain of custody. It shows where I gave custody of those shoes to Investigator Mardis. That's our chain of custody.

TBI Agent Carrie Schmittgen examined the swab of blood from the black Nike shoe, along with other evidence, and determined that the blood matched the victim's DNA profile. On cross-examination, she agreed that she did not know how the swab was handled and collected before she received it but noted that if the item had not been submitted in a properly sealed package, the TBI would have rejected it for testing.

TBI Special Agent Ladd Kuykendall testified as an expert in firearms identification over Defendant's continued objection. Special Agent Kuykendall tested the three pistols, two fired .40 caliber cartridge casings, three items from the autopsy, and bullets in this case and prepared a report. He compared the .40 caliber cartridge casings recovered from the scene to each other and "found that there were a lot of corresponding marks." He also compared them to six "test fires" from the "Glock 22 .40 Smith & Wesson caliber pistol" recovered from Defendant's hoodie pocket after the accident. The other two pistols recovered were nine-millimeter. He found "sufficient agreement between the marks left behind by the gun and marks left behind on these cartridge cases." Special Agent Kuykendall said, "My conclusions were that the marks that were present on these two cartridge cases were the same marks that I saw on the test fires from this pistol." He further concluded that the "two shell casings were fired in the Glock 22 .40 caliber pistol."

Special Agent Kuykendall also examined the two bullets from the scene. He was unable to determine whether the bullets came from the Glock 22 because they were too damaged. However, he testified that they shared the same class characteristics as the Glock 22. He examined two additional bullets from the autopsy and concluded that the bullets came "from an unknown 9[millimeter] caliber or .38 caliber class most consistent with 9[millimeter] caliber firearm." He could not definitively say that they were fired from the nine-millimeter guns recovered from the Kia Sorrento. Special Agent Kuykendall testified that while the markings on the two bullets matched each other, they did not match any of the weapons recovered from Defendant and Co-defendant McMillan because they had five right rifling patterns on them and both pistols in this case had right rifling. Special Agent Kuykendall's findings were verified by another examiner using a "three-tier review process."

On cross-examination, Special Agent Kuykendall testified that for identification of the two shell casings from the scene, he used “the multiple striations or cut marks or scratch marks made by the firing pin aperture.” He explained:

Breech face marks were there. They were present. I didn’t use it for identification because again, the marks that I use for identification were the most numerous marks. And the reason I didn’t use ejector extractor marks is because those marks can be imparted by simply racking the slide and feeding unfired ammunition. So I don’t necessarily want to use those marks because it doesn’t denote that they were fired in this gun. It just means that they were extracted and ejected from this gun. The marks that I used were strictly from the firing process

I used the marks or the agreement that I saw in the marks from the aperture shear because they left the most numerous marks. It eclipses any of the amount of marks from other sources.

Special Agent Kuykendall testified that while no minimum number of marks was required for a match, he and his lab “do not make identifications on a small amount. There has to be a sufficient amount there. And that does vary from firearm to firearm because they leave different amounts of marks.” Special Agent Kuykendall explained that two different Glock .40 caliber handguns would not leave the same marks even if manufactured the same day on the same equipment.

Defendant then moved to exclude the testimony of Special Agent Yawn concerning “shoe print identification” arguing that the science was invalid, that Special Agent Yawn was not qualified to testify, and that her testimony would be irrelevant and unduly prejudicial. In a jury-out hearing, Special Agent Paige Yawn testified that she was a forensic scientist in the microanalysis unit of the TBI and that she had previously been qualified as an expert in the fields of microanalysis, ignitable liquid testing or fire debris analysis, forensic toxicology, and blood alcohol analysis. In the area of footwear examination, her “in-house training program consisted of reading of various textbooks as well as peer reviewed journal articles.” She also gave presentations on the “topics of shoe and tire manufacturing” and performed “practical exercises in photography, location, collection, documentation, enhancement, as well as comparison of shoe and tire impressions.” She had completed approximately 33 mock cases, which were compromised of former external proficiency tests, as well as cases created by her training officer. At the end of her training, one of those mock cases was taken forward to a mock trial, which was also successfully completed.

In addition to her in-house training, Special Agent Yawn also completed three 40-hour training courses through forensic ITC services, an external training provider “taught by a renowned expert in the field of shoe and tire impressions.” Those courses focused on documentation and collection of shoe and tire impressions, as well as the comparison of shoes and tires. She admitted that she had not yet had the opportunity to testify in shoe or tire impression comparisons.

Special Agent Yawn testified that as a footwear examiner she looks at the “unknown,” the characteristics that are present, and compares “those characteristics to that of a known shoe from a known source.” She noted that as a shoe makes contact with a surface, it leaves an impression which can “then be located, collected, and later compared to a known shoe from a known source.” She testified that when “given sufficient quality and quantity of characteristics, that shoe can potentially be associated with that impression.” The methodology for used footwear examination is known as “ACEV” which “stands for analysis, comparison, evaluation, and verification. It’s the same process used by latent print examiners to perform their testing on latent fingerprints.” She then detailed each step of the ACEV process. Special Agent Yawn testified that the footwear evidence is then sent to a second person for verification and “those two are compared.” She said that there are six “degrees of association” used in footwear examination and “then a seventh would be an inconclusive result.”

When asked if the ACEV method of testing had been previously tested and validated in the scientific community, she testified:

So there have been studies back for decades that show the validity of the science of forensic shoe and tire examination. The first case in the court system occurred back in the late 1700s in Scotland in the *Richardson* case where a boot heel was identified as being a source of an impression and that suspect was arrested. It’s been accepted in the United States court system since the 1930s and had upheld - - the testimony has been upheld all throughout the country including here in Hamilton County and all throughout the world, Canada, Europe. It’s been challenged in *Daubert* hearings throughout the country, those have been upheld, as well as several *McDaniel* hearings here in Tennessee.

Special Agent Yawn testified that there was no general rate of error within the field of footwear examination and “the reason for that is that we don’t know the ground truth of our testing.” She further testified:

[W]e don’t know the true answer of casework before we actually do our examination, and sometimes if the association is very low, I still don’t know

the ground truth of that case because I can't make a more conclusive opinion. So that makes calculation of error as a discipline very, very complicated. Error rate is too dependent on the examiner itself, what their training, experience, as well as the actual evidence being looked at.

There have also been several studies in the past three years or so that have shown rate of error based on decision analysis studies where they have sent out comparisons to various examiners, have them perform comparisons, and then send the results back to the agency doing the study. Those studies have shown a rate of error or false positive rate around 0.2 percent, and that was a study performed by the FBI. For false negative rate, it's around 6 percent. False negative rate just means that someone mistakenly excluded a shoe when they shouldn't have. False positive rate being when someone identified a shoe when they shouldn't have.

Special Agent Yawn used the ACEV method in this case to analyze evidence received from the CPD and prepared a report.

On cross-examination, Special Agent Yawn testified that her training in footwear examination began in late 2019. She completed two forty-hour courses through forensic ITC services in March 2020. She did not list any of her in-house training on her Curriculum Vitae. She had also conducted a study in footwear examination and had written a paper that she had not yet published but her "trainer" had reviewed. In the study, she and five of her colleagues purchased six pairs of shoes of the same make and model, and they "wore those shoes in the exact same environment for the exact same amount of time just to minimize as much variability" as possible. Then, each week for twelve weeks, Special Agent Yawn "collect[ed] those shoes, look[ed] at the characteristics that were present, ma[d]e test impressions of those shoes to show those individual characteristics[.]" She testified: "Throughout that 12-week period, I saw the shoes being uniquely individualized, and at the end of that 12-week period, I was able to distinguish each shoe[.]" Special Agent Yawn agreed that her job as a footwear examiner was to determine whether a footprint impression recovered from a scene matches or could be associated with a suspect's shoe.

Special Agent Yawn testified that there are no set number of randomly acquired characteristics on both the "footwear impression" and the "known shoe" to declare a match; "[t]hat's based upon the characteristics we see, the size, the shape of those individual characteristics, that would determine how many the examiner would be comfortable with for identifying the shoe." She was familiar with a 2009 report by the National Academy of Sciences which concluded that there was no consensus regarding the individual number of characteristics needed to make a positive identification. The committee was also not aware of any data about the "variability of class or individual characteristics or about the

validity or reliability of the method.” She agreed that the report was correct in that there is no set number of characteristics required to make an identification. She also argued that there have been multiple studies since that NAS report showing the validity of class and individual characteristics as being a valid science in identifying a shoe.

Special Agent Yawn was also aware of a September 2016 report by the President’s Council of Advisors on Science and Technology (“PCAST”) indicating that the science of footwear examination needed more research, “specifically in black box studies, which have been done since that PCAST report has come out.” She disagreed with statements in the report indicating that footwear examination was not scientifically valid and lacking in scientific foundation. She agreed “there is some subjectivity that comes into play as far as how comfortable that examiner is with what characteristics they see as far as what results are going to get reported out.” However, she argued that the “subjectivity is lessened by the fact that we do have a blind verification, so a second person does have to come to that same conclusion.” She also argued that the subjectivity is minimized as much as possible because they follow a systematic method of ACEV.

Special Agent Yawn testified she was also aware of a study in the Forensic Science International Journal in August 2022 paid for by the Department of Justice, but she had not yet read it. Even though the study was critical of footwear examination, she asserted, “[A]gain, I do believe that with the blind verification process, it is minimized as far as the subjectivity in question.” She explained that low quality impressions are more complicated and that the error rate is increased based on the difficulty and low quality of an impression.

In this case, Special Agent Yawn compared the shoe print impressions of a black Nike Air Force 1 tennis shoe to a shoe print impression on drywall. She concluded that there were limited class characteristics meaning that “there were similar class characteristics that were observed in the impression, however, the quality and quantity of the impression that was present was not sufficient to make a more definitive conclusion.” Special Agent Yawn clarified that highest degree of matching did not occur but there were observable randomly acquired characteristics, “just not enough to bump that up to an identification.” She testified, “I can’t even say it was the same make and model that made that impression.”

The trial court concluded that Special Agent Yawn’s testimony was both relevant and probative because it showed the steps taken by the State to evaluate the evidence and decide whether there was a match to the shoe found at Defendant’s residence. The trial court further found:

The fact that there wasn't a match doesn't necessarily exclude it. The fact that she can or can't say either way doesn't necessarily exclude it because it still shows that the State did the work to try to make the determination and therefore the Court finds that it's relevant as to the facts and circumstances related to the investigation of this case. So I do find that it's relevant for that reason.

I also find that this witness, through her testimony, has established that she has specialized knowledge, skill, and experience and training as a result of her work with the Tennessee Bureau of Investigation and her training that she is experienced not only there, but in these training courses, two 40-hour courses, and then through her experience, her training there has involved working with another person who is an experienced person in the field there at the TBI.

She also mentioned at one point that one of her training courses was taught by a renowned expert in the field. So that is consistent with the fact that the Courts, through many, many, many years have recognized the facts that this is scientific in nature and that it's good science.

* * *

[R]elated to the *Daubert* issue, the Court must find, pursuant to the *McDaniel* case, that the evidence must be relevant to a fact in issue.

Certainly there was a footprint found on drywall that is at issue in this case in the crime scene.

Second: "The expert must be qualified by specialized knowledge, skill, experience, or training or education in the field of expertise," and the Court finds that the expert is from the testimony given.

"The testimony in question must substantially assist the trier of fact understand the evidence or to determine a fact in issue."

I know [trial counsel] argues that the fact in issue is not relevant, but the Court does find that it is relevant and probative to show the investigation that was conducted in this case to try to evaluate all the evidence.

And finally: "The underlying facts or data to support the expert's opinion must be trustworthy," and by trustworthy, the primary consideration is

whether the testimony is reliable, as pursuant to *McDaniel*, and to that end, our Supreme Court has set forth a list of nonexclusive criteria and that is: Whether the scientific evidence and underlying methodology has been tested. It has. While there's been some dispute about the reliability of it, as evidenced by the arguments made by [trial counsel], it has been tested.

"Whether the evidence has been subject to peer review." It has. The witness testified that she had educated herself through the reading of peer review publications about potential error rates. She explained the difficulty of coming up with those in this field because of the subjectivity involved.

"Whether the evidence is generally accepted in the scientific community." While there are criticisms of it and some concerns about it, as noted by [trial counsel], it is generally accepted.

"And whether the expert's research in the field has been conducted independent of litigation." It has.

So for those reasons, the Court finds that the testimony of Agent Yawn will be admitted.

The trial resumed and Special Agent Yawn was recognized as an expert in "footwear examination and shoe impression analysis." For the jury, she again reviewed the process for examining shoe impressions in preparation for comparison and reaching a conclusion. Special Agent Yawn prepared a microanalysis report on February 22, 2022, on the comparison of the shoe impressions received from the CPD in this case. She compared multiple pieces of drywall as well as a pair of black Nike Air Force 1 tennis shoes. There was a shoe impression on one piece of drywall that was broken in the middle of the impression. She later received the shoes and "took note of the tread design" and the make and model of the shoes. She then made a "test impression" of the shoes "just based on the similarities that [she] saw between the tread design of the shoes and the impression itself." She described the test impression process and concluded that there was not "enough detail" to look for identifying characteristics "as the size of that impression and the detail that was present was very limiting." She "reported a limited association of those class characteristics, and what that means is that there were some similarities in the class characteristics, those being size, shape, tread design." However, due to the lack of detail and "amount of impression" present, she was unable to "make a more definitive conclusion." There were similarities between the test impression and the shoe impression in the drywall such that she could not exclude the shoe as the source of the impression on the drywall.

On cross-examination, Special Agent Yawn agreed she had not published any studies on the subject. She was not certified in footwear impressions; however, she was qualified to apply for certification. This was her first time testifying as a footwear examiner. She agreed there was no calculable error rate for footwear impression analysis. She noted that the TBI takes a systematic approach to footwear impression analysis and there is a “blind verification” of each impression examined. The “blind verification process requires that a second qualified examiner look at the evidence and make their own independent conclusion as to the results.”

Special Agent Yawn did not receive a chain of custody log with the shoes or drywall and that “the chain of custody will begin once we receive the evidence from the outside agency.” She said that she “absolutely” could not say that the shoes created the shoe impression on the drywall. There was also no “high degree of association” between the shoes and the impression on the drywall. She agreed there was “a limited association” between the two in this case and she could not exclude the right shoe as having made the impression.

B. Defendant’s Proof

Alexander O’Kelly testified as a “hostile” witness. He did not recall whether he was still living with the victim and Mr. Rogers at the residence on Lightfoot Road at the time of the murder. He denied knowing why the victim was killed or if Mr. Rogers knew what happened. Mr. O’Kelly denied telling Detective Goehring that Mr. Rogers was supposed to have been killed. He said he was “under the influence” and recovering from injuries sustained from a car accident when he spoke with Detective Goehring. Mr. O’Kelly denied being scared to testify because of Mr. Rogers. He did not know if he told Detective Goehring that Mr. Rogers knew the person who killed the victim or that Mr. Rogers kept methamphetamine inside the residence on Lightfoot Mill Road. Mr. O’Kelly denied knowing if he told Detective Goehring the victim was killed to send a message.

Dakota Bush testified that she and Defendant were friends, and she accompanied him on one occasion to purchase a vehicle. She did not recall the date or year but said it was “cold.” Ms. Bush testified that on the day of the purchase, Defendant picked her up from her mother’s house, he “met up with the dude named Frank,” they completed the transaction and Defendant drove the car away and took her back to her home. She only knew “Frank” from social media and did not see the actual transaction for the vehicle. Although Defendant took her home in the vehicle, Ms. Bush could not remember any details about the vehicle other than the color was “[l]ike gold.” She identified pictures of the victim’s gold Kia Sorento as the vehicle Defendant purchased from “Frank.”

Based on this evidence, the jury convicted Defendant of two counts of first degree felony murder, especially aggravated robbery, aggravated burglary, and second degree murder. Following a sentencing hearing, the trial court ordered all sentences to run concurrently for an effective life sentence. Defendant now appeals.

Analysis

I. Admission of Expert Testimony

Defendant argues that the trial court erred in permitting Special Agent Yawn to testify as an expert in footwear examination and shoe impression analysis (“footwear examination”) and that the science was invalid. He further argues that the trial court erred by permitting Special Agent Kuykendall to testify as an expert in firearms and tool mark analysis and that the science was unreliable.

“Questions regarding the qualifications, admissibility, relevancy, and competency of expert testimony are matters left within the broad discretion of the trial court.” *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002). Accordingly, a trial court’s evidentiary ruling on the admissibility of an expert’s testimony will not be overturned absent an abuse of discretion. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). A court abuses its discretion when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

An expert witness may express his opinion based on “scientific, technical, or other specialized knowledge.” Tenn. R. Evid. 702. Before the trial court permits such testimony, the witness’s proponent must show (1) that the witness is “qualified as an expert by knowledge, skill, experience, training, or education,” and (2) that his opinion will “substantially assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* An expert may rely upon matters not in evidence to arrive at his opinion if those facts are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Tenn. R. Evid. 703. However, if the underlying facts upon which the expert bases his opinion lack trustworthiness, the trial court must exclude the expert’s testimony. *Id.*

In *Daubert*, the United States Supreme Court held that Federal Rule of Evidence 702 requires that a trial court “ensure that any and all scientific testimony . . . is not only relevant, but reliable.” 509 U.S. at 589. Rigid application of these factors is unnecessary. *State v. Copeland*, 226 S.W.3d 287, 302 (Tenn. 2007).

In *McDaniel*, our supreme court identified a list of non-exclusive factors for a trial court to consider when determining the admissibility and reliability of expert testimony. Those factors include: (1) whether the scientific evidence has been tested and the accompanying methodology with which it was tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether the potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert conducted the research in the field independent of litigation. *McDaniel*, 955 S.W.2d 257 at 265. While our supreme court later rejected the argument that *McDaniel* applied only to scientific testimony, the court held that “the *McDaniel* factors *may* apply, subject to the discretion of the trial court, ‘as reasonable measures of the reliability’ of all expert testimony described in Rule 702.” *Stevens*, 78 S.W.3d at 834.

Footwear Examination

In denying Defendant’s objection to Special Agent Yawn’s testimony regarding footwear examination, the trial court analyzed the factors under both *Daubert* and *McDaniel* and concluded that Special Agent Yawn’s testimony was both relevant and probative and that she had specialized knowledge, skill, and experience and training as a result of her work with the TBI. The court noted her experience, training courses, and work with others in the field at the TBI. The trial court also pointed out that “the Courts, through many, many, many years have recognized the facts that this is scientific in nature and that it’s good science.” The court noted that while there had been some dispute about the reliability of footwear examination, “as evidenced by the arguments made by [trial counsel], it has been tested,” subject to peer review, and “is generally accepted.”

Special Agent Yawn testified in detail about her training, including external training taught by a “renowned expert in the field of shoe and tire impressions.” She had given presentations on the topics of shoe and tire manufacturing, and performed practical exercises in photography, location, collection, documentation, enhancement, as well as comparison of shoe and tire impressions. Special Agent Yawn had also conducted a study in footwear examination and had written a paper that had been reviewed but not yet published. An expert “may acquire the necessary expertise through formal education or life experiences.” *State v. Reid*, No. M1999-00803-CCA-R3-DD, 2001 WL 584283, at *25 (Tenn. Crim. App. May 31, 2001). Thus, we conclude that the trial court did not abuse its discretion in finding Special Agent Yawn to be properly “qualified as an expert by knowledge, skill, experience, training, or education” pursuant to Tennessee Rule of Evidence 702.

Additionally, the science of footwear examination meets the requirements of *Daubert* and *McDaniel*. Defendant relies on two reports he read during cross-examination in the pretrial hearing, the NAS and PCAST, to argue that the science of footwear

examination is invalid. However, although Special Agent Yawn agreed with some statements from the two reports, she disagreed with other statements. She explained that the statements in the two reports questioning the validity of footwear examination did not invalidate the science of the TBI's methodology, which included blind verification.

Special Agent Yawn testified to the methodology used for footwear examination known as the ACEV process, and she detailed each step of the process, noting that the ACEV method has been previously tested and validated in the scientific community. Special Agent Yawn testified that the first case in the court system occurred in the late 1700s in Scotland and that footwear examination had been accepted since the 1930s throughout the United States, including Hamilton County. It had been challenged in *Daubert* hearings throughout the country and upheld, as well as upheld in several *McDaniel* hearings in Tennessee.

Although Special Agent Yawn testified that there was no general rate of error within the field of footwear examination, she explained that studies have shown a “rate of error or false positive rate around 0.2 percent, and that was a study performed by the FBI.” The rate for false positive results was around six percent. Special Agent Yawn clarified that those error rates were not “indicative of the whole discipline as a whole as I do believe examiner and type of evidence plays a big role in that error rate.” She further testified that error could be looked at through training and the “participation and proficiency tests.” Special Agent Yawn also testified about the process of footwear examination she and her colleagues undertook in this case. We conclude that the trial court did not abuse its discretion in finding the science of footwear examination to be valid under the standards set forth in *Daubert* and *McDaniel*.

Defendant also argues that the trial court should have excluded Special Agent Yawn's testimony under Tennessee Rule of Evidence 403 because it was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice. However, as pointed out by the State, although Defendant objected to the testimony at trial under Rule 403, he failed to raise the issue in his motion for new trial. Thus, the issue is waived. “Grounds not raised in a motion for new trial are waived for purposes of appeal.” *State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018); Tenn. R. App. P. 3(e). Furthermore, Defendant did not include this issue in his statement of issues on appeal. “An issue must be included in the State of Issues Presented for Review as required by Tennessee Rules of Appellate Procedure 27(a)(4) to be properly before this court.” *State v. Burgins*, No. E2021-00602-CCA-R3-CD, 2022 WL 1693582, at *11 (Tenn. Crim. App. May 26, 2022) (internal quotation marked omitted). Defendant has not acknowledged waiver nor sought plain error review, and we decline to address it sua sponte. *State v. Gardner*, 716 S.W.3d 388, 417 (Tenn. Crim. App. 2024).

Firearms Analysis and Toolmark Identification

In denying Defendant's motion to exclude Special Agent Kuykendall's testimony concerning firearms analysis and tool mark identification, the trial court reviewed the *McDaniel* factors and concluded the testimony was relevant and that Special Agent Kuykendall had "specialized knowledge, skill, experience, training, and education in the subject field of firearms analysis and tool mark identification." The court found that firearms analysis and tool mark identification were reliable and took judicial notice that it had been admitted "in this [c]ourt repeatedly in the now 17 years that I have presided here." The court pointed out that "the fact that there are articles questioning the reliability of the testing would indicate the scientific evidence and the underlying methodology has been tested." The court also noted that Special Agent Kuykendall testified concerning the rates of error and he had done testing in the field, "independent of litigation, in his preparation to serve as a firearms examiner in the 100 or so cases that he was assigned to examine in order to establish proficiency."

Special Agent Kuykendall testified that he had completed an "extensive minimum of two-year training program" instituted at the TBI consisting of "upwards of a hundred training assignments, practical exercises, competency tests, proficiency tests, to ensure that we know exactly what we're doing before we get into casework." He also had armorer certifications and took annual proficiency tests as well as yearly continuing education classes and was involved in training other agents in his unit. He had testified eleven times as an expert in the field of firearms and tool mark identification and had been working in tool mark identification since 2015 when he began his training. He had also "completed" approximately 700 cases, examining "thousands and thousands of cartridge cases and bullets." He estimated that "hundreds" of the cases involved a Glock handgun and "a lot of them were .40-caliber[.]" As noted above, an expert "may acquire the necessary expertise through formal education or life experiences." *Reid*, 2001 WL 584283, at *25. We conclude that the trial court did not abuse its discretion by allowing Special Agent Kuykendall to testify as an expert in the field of firearms analysis and tool mark identification.

Additionally, the science of firearms analysis and tool mark identification meets the *Daubert* and *McDaniel* requirements and is reliable. Special Agent Kuykendall thoroughly explained the process of firearms comparison and tool mark identification and the steps he took using this process to examine the "fired cartridge cases, fired bullets," and three handguns in this case. He matched the aperture marks on the .40 caliber shell casings to the Glock 22 because "that was the source that made the most marks." Special Agent Kuykendall said that reviewing numerous marks from just the aperture would be sufficient for a match and would not require him to look for other marks such as breechface marks and chamber marks. He noted he did not test further, "because it was going to take a whole

lot of extra time and redundancy to show that the marks that were being reproduced from the gun were on the cartridge cases.” His findings in this case were reviewed by Special Agent Hall who “physically took that evidence, looked at it under a microscope himself, and came to the same conclusion as Special Agent Kuykendall.

Special Agent Kuykendall also testified about error rates in the field, and he was questioned about several articles disputing the validity of firearms analysis and tool mark identification. He pointed out the errors in those articles and his disagreements with the studies. He further described his testing in this area through his employment with the TBI, independent of this case. Special Agent Kuykendall testified that “tool mark examination” is a “recognized area of science.” We conclude that based on Special Agent Kuykendall’s testimony, the trial court did not abuse its discretion in finding firearms analysis and toolmark identification to be a reliable science. *See State v. Davidson*, 509 S.W.3d 156, 208-09 (Tenn. 2016) (finding the methodology behind ballistics testing to match a firearm to a particular bullet to be reliable); *State v. Smoot*, No. E2017-00367-CCA-R3-CD, 2018 WL 4699046, at *16 (Tenn. Crim. App. Oct. 1, 2018) (noting that the *McDaniel* factors are “non-exhaustive” and the agent’s findings concerning firearm and tool mark identification were reviewed by another agent and defendant was given the opportunity to cross-examine the agent “regarding any weaknesses in his opinions, and the weight of [the agent’s] testimony was a matter to be determined by the jury.”). Defendant is not entitled to relief on this issue.

II. Admission of DNA Testing from the Swab of Defendant’s Shoe

Defendant contends that the DNA swab performed by CPD Investigator Johnson on the Nike shoe taken from Defendant’s apartment was unreliable due to violations of the chain of custody requirements. Defendant concedes that he did not specifically object at trial regarding the chain of custody as to the swab and asks that we review this waived issue for plain error.

Although waived issues may, in limited circumstances, be reviewed for plain error, such review is reserved for errors that satisfy the five-factor test set forth in *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) and adopted by our supreme court in *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000); *see also State v. Dotson*, 450 S.W.3d 1, 49 (Tenn. 2014). “When conducting plain error review, this Court will grant relief only when the following five prerequisites are satisfied: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice.” *Adkisson*, 899 S.W.2d 626 at 641-42.

Tennessee Rule of Evidence 901 requires authentication or identification of non-testimonial evidence entered at trial. Tenn. R. Evid. 901. It is “well-established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody.” *State v. Singh*, 684 S.W.3d 774, 783 (Tenn. Crim. App. 2023) (citing *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000)). The purpose of the rule is “to insure ‘that there has been no tampering, loss, substitution, or mistake with respect to the evidence.’” *State v. Daniels*, 656 S.W.3d 378, 389-90 (Tenn. Crim. App. 2022) (quoting *Scott*, 33 S.W.3d at 760).

Each person who has custody or control of the evidence between the time it is obtained and the time it is introduced into evidence or subjected to scientific analysis is a “link” in the chain of custody. *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008). As to the State’s burden of proof, our supreme court has stated:

Each link in the chain testifies about when, where, and how possession or control of the evidence was obtained; its condition upon receipt; where the item was kept; how it was safeguarded, if at all; any changes in its condition during possession; and when, where and how it left the witness’s possession.”

Id. (citations omitted).

However, it is not necessary that the State prove the identity of tangible evidence beyond all possibility of doubt. *Id.*; *State v. Holloman*, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992). Nor is the State required to establish facts which exclude every possibility of tampering. *Singh*, 684 S.W.3d at 783 (quoting *Cannon*, 254 S.W.3d at 296). Instead, the evidence may be admitted when the circumstances surrounding the evidence reasonably establish its identity and integrity. *Cannon*, 254 S.W.3d at 296; *Holloman*, 835 S.W.2d at 46. One manner of establishing the identity and integrity of evidence is through “the routine practice of an organization, whether corroborated or not and regardless of the presence of eye-witnesses[.]” Tenn. R. Evid. 406(a). Such proof is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the habit or routine practice.” *Id.* A trial court’s finding that the State has established a sufficient chain of custody of a blood sample, or other tangible evidence, is reviewed for an abuse of discretion. *Singh*, 684 S.W.3d at 784 (citing *State v. Watkins*, 648 S.W.3d 235, 271 (Tenn. Crim. App. 2021)).

In this case, because the record clearly establishes that Defendant failed to object to the admission of the DNA swab as to the chain of custody, the first factor is established. However, as to the second factor, Defendant has not shown that a clear and unequivocal rule of law was breached. Investigator Johnson identified the swab she took from one of

the Nike shoes and explained how she took the swab, tested it, and then put it in a box and bag and sealed it. There was no other evidence in the room or on the sterile table where she collected the swab. Investigator Johnson then gave the sealed evidence to Investigator Mardis who transferred it to Investigator Booker who took it to the TBI lab with several other pieces of evidence. TBI Special Agent Fowler testified that she received the evidence, including the swab from the shoe, from Investigator Booker. TBI Special Agent Schmittgen then performed a DNA test on the swab which tested positive for the victim's DNA. Although Special Agent Schmittgen did not know how the swab was handled and collected before she received it, she noted that had the evidence not been submitted in a properly sealed package, the TBI would have rejected it for testing. This testimony was sufficient to establish that the chain of custody requirements were met.

We disagree with Defendant's assertion that Investigator Johnson's swabbing of the shoe created a "fundamental gap" in the chain of custody and are unaware of any prohibition against swabs being taken by local law enforcement rather than a TBI agent. In this case, the circumstances surrounding the DNA swab reasonably established its identity and integrity. *Cannon*, 254 S.W.3d at 296; *Holloman*, 835 S.W.2d at 46. Our plain error inquiry ends here. Our supreme court has observed that if a proponent fails to establish any of the five factors for plain error, "we will not grant relief, and complete consideration of all five factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *State v. Knowles*, 470 S.W.3d 416, 425 (Tenn. 2015) (citing *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010)); see also *State v. Pewitte*, --- S.W.3d ---, No. W2024-01128-CCA-R3-CD, 2025 WL 3510902, at *5 (Tenn. Crim. App. Dec. 8, 2025) *perm. app. denied* (May 21, 2026); *State v. Johnson*, No. E2024-01862-CCA-R3-CD, 2026 WL 1758638 (Tenn. Crim. App. June 18, 2026), *no perm app. yet filed*. Defendant is not entitled to relief on this issue.

III. Prosecutorial Misconduct

Defendant next argues that the State committed misconduct during closing argument by telling the jury that "we're going to end back with [Defendant] in his car with one of the murder weapons in his front pocket" and by repeatedly referring to the Glock 22 as "the murder weapon." He contends this statement was false and a misstatement of the evidence presented at trial.

Closing arguments are valuable tools for both the prosecution and the defense, and the Tennessee Supreme Court has historically allowed wide latitude to counsel in arguing their cases during closing arguments. *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998). "Trial judges in turn are accorded wide discretion in their control of those arguments." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. 2003) (quoting *State v. Zirkle*, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995)). In order to properly bring an issue regarding

closing argument forward on appeal, the complaining party must have objected to the argument contemporaneously. *State v. Robinson*, 146 S.W.3d 469, 518 (Tenn. 2004); *see State v. Green*, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997).

In *Judge v. State*, this court determined five factors to consider to determine whether there has been prosecutorial misconduct in closing arguments: (1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). Courts also “take[] into account whether the improper remark of the prosecutor was made in response to the defendant’s comments or argument.” *Id.*; *see also* Tenn. R. Crim. P. 29.1(c)(2) (“The state’s final closing argument is limited to the subject matter covered in the state’s first closing argument and the defendant’s intervening argument.”).

In *State v. Goltz*, the Tennessee Supreme Court outlined “five general areas of prosecutorial misconduct” that can occur during closing arguments: (1) intentionally misstating the evidence or misleading the jury as to the inferences it may draw; (2) expressing a personal belief or opinion as to the truth or falsity of the evidence or the defendant’s guilt; (3) using arguments calculated to inflame the passions or prejudices of the jury; (4) injecting broader issues than guilt or innocence of the accused; and (5) intentionally referring to or arguing facts outside the record that are not matters of common public knowledge. *Goltz*, 111 S.W.3d at 5.

In *Johnson v. State*, No. M2015-00258-00258-CCA-R3-PC, 2015 WL 9581560, at *17-18 (Tenn. Crim. App. Dec. 30, 2015), a post-conviction case, the petitioner argued that trial counsel should have objected when the prosecutor stated in closing argument that the victim “raised her arm to defend herself when she was shot” and was “on her knees begging for her life when she was shot.” The petitioner argued these statements were improper because there were no eyewitnesses to the shooting. *Id.* This court concluded that both statements by the prosecutor were reasonable inferences drawn from the evidence which included the trajectory of the bullet, stippling on the victim’s arm, and blood spatter on the victim’s pants suggesting that she was on her knees. *Id.* Here, as in *Johnson*, the State’s reference to the Glock 22 as the murder weapon was a reasonable inference based on the evidence presented at trial. The weapon was found on Defendant’s person after he was involved in a high-speed police pursuit while driving the victim’s stolen vehicle. Special Agent Kuykendall determined the weapon had fired the two shell casings found at the threshold of the victim’s door, and there was a shot that had been fired through the door. There were also two .40 caliber bullets found in the hallway and bathroom sharing the same class characteristics as the Glock 22 even though Special Agent Kuykendall could not determine if they were fired from that specific Glock because they were too damaged.

Although nine-millimeter bullets were recovered from two of the victim's wounds during the autopsy, there was a third devastating gunshot wound from which no bullet was recovered. Dr. Metcalf testified that a fourth superficial wound to the victim's left shoulder containing a metal fragment appeared to be from the hole in the front door of the residence. He noted that "at least the hole in the door was related to one of the projectile injuries." A permissible inference would be that one of the .40 caliber cartridge casings found at the door was from the bullet that caused the wound that struck several vital organs, causing the victim's death.

We conclude that the trial court did not abuse its discretion in overruling Defendant's objection to the State's reference to the Glock 22 as the murder weapon. Defendant has not shown any error which prejudiced him. "[P]rosecutorial misconduct does not amount to reversible error absent a showing that it has affected the outcome of the case to the prejudice of the defendant." *State v. Reid*, 164 S.W.3d 286, 321 (Tenn. 2005). In closing arguments, the State told the jury that what the attorneys said during the trial was not evidence and that only information from the stand was evidence. The trial court also instructed the jury that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them." The jury is presumed to follow the trial court's instructions and Defendant has provided no argument or evidence that the jury here did otherwise. *Henley*, 960 S.W.2d at 581.

Additionally, the evidence against Defendant is overwhelming, and Defendant cannot show that the State's comment about the Glock 22 affected the verdict. *See Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965). The proof shows that when Defendant was arrested after fleeing from the police in the victim's stolen vehicle, he was in possession of a Glock 22 which had fired bullets into the victim's residence. The victim's debit cards were found in the vehicle Defendant normally drove, and the victim's DNA was found on one of Defendant's shoes. Any reference to the Glock 22 as the murder weapon was clearly harmless. Defendant is not entitled to relief on this issue.

IV. Brady Violation

Defendant contends that the State's disclosure of *Brady* material in this case "reflect[ed] a systematic pattern of delay, disorganization and misrepresentation by the prosecution." He further contends that at each stage of discovery, "the State produced incomplete or mislabeled evidence, failed to identify what it actually intended to use at trial, and misled the trial court and defense about the scope and status of its disclosures."

The Due Process Clause of the Fourteenth Amendment and article I, section 8 of the Tennessee Constitution guarantee every criminal defendant a fair trial. *See Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). As part of that guarantee, the State has an obligation to provide the defense with evidence that tends to exculpate the accused or mitigate potential punishment. *See Brady*, 373 U.S. at 87.

Under *Brady*, the prosecution violates due process when it suppresses evidence favorable to the defendant that is material to guilt or punishment, regardless of the State's good or bad faith. *Id.* Tennessee courts have recognized that this duty is broad; it covers all favorable information, even information that may ultimately be inadmissible at trial. *State v. Marshall*, 845 S.W.2d 228, 232–33 (Tenn. Crim. App. 1992). At the same time, the State is not required to disclose information already known or accessible to the defendant, nor information outside the State's possession or control. *Id.* at 233.

Here, to establish a *Brady* violation, Defendant must show: (1) the defense requested the information (unless it was clearly exculpatory); (2) the State suppressed the information; (3) the information was favorable to the defense; and (4) the information was material. *State v. Edgin*, 902 S.W.2d 387, 390 (Tenn. 1995). Defendant bears the burden of proving these elements by a preponderance of the evidence. *Dotson*, 450 S.W.3d at 94 (citing *Edgin*, 902 S.W.2d at 389).

“Favorable” evidence includes not only traditional exculpatory proof but also information that could be used to impeach the State's witnesses. *Johnson*, 38 S.W.3d at 55-56. Evidence is favorable if it offers meaningful assistance to the defense, for example, by corroborating the defendant's account, undermining a material aspect of the State's proof, or challenging the credibility of a key witness. *Id.* at 56-57 (citing *Commonwealth v. Ellison*, 379 N.E.2d 560, 571 (Mass. 1978)). In *Johnson*, our supreme court also cited with approval the view that evidence is favorable if it provides grounds to question the reliability or thoroughness of the police investigation or otherwise strengthens the defense against prosecutorial attacks. *Id.* (citing *Mazzan v. Warden*, 993 P.2d 25, 37 (Nev. 2000)).

Evidence is “material” if there is a reasonable probability its disclosure would have changed the result of the proceedings. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.”

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678).

On appeal, a trial court's findings of fact concerning issues such as whether the defendant requested the information or whether the State withheld it are reviewed de novo with a presumption of correctness unless the evidence preponderates otherwise. *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004). Conclusions of law, such as whether the information was favorable or material, are reviewed de novo with no presumption of correctness. *Id.*

In this case, Defendant does not allege that the State withheld favorable evidence; he asserts that the evidence was not timely provided. However, "[t]ardy disclosure of *Brady* material is generally not reversible error unless the defendant can show that he was denied a fair trial." *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988); *United States v. Shelton*, 588 F.2d 1242 (9th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2822 (1979). "A delay in disclosing *Brady* material requires only if 'the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial.'" *State v. Noland*, No. E2000-00323-CCA-R3-CD, 2000 WL 1100327, at *8 (Tenn. Crim. App. Aug. 3, 2000) (quoting *Shelton*, 588 F.2d at 1247).

Here, Defendant has not shown that he was prejudiced by the alleged untimely disclosure of *Brady* material by the State. The only specific evidence he alleges was untimely is the footprint analysis report prepared by Special Agent Yawn, which was produced well before trial, as soon as the prosecutor received it. While the report was somewhat favorable to Defendant because it could not conclusively match his shoe prints to the crime scene, it was not exculpatory because it could not exclude his prints from the scene. Defendant has not demonstrated nor has he alleged that the untimely disclosure of the report or any other evidence hindered preparation of his defense.

We acknowledge that the discovery process was addressed by trial counsel in several pretrial hearings, and he expressed his frustration with the process. However, in a final pretrial hearing, trial counsel informed the trial court that he had received new discovery in the form of a photograph of a footprint from the murder scene and the analysis but was not asking for a continuance. The trial court then told trial counsel,

[I]f you feel like you are prejudiced in any way as a result of the incoming evidence, then I'll hear you with regard to whether or not - - what to do about the prejudice. There are various remedies, including a continuance of the trial date, including suppression of the evidence things of that nature.

The trial court noted that it would like to keep the trial date, and trial counsel responded that he had no intention of requesting a continuance. He did not request any further hearing on the matter. *See United States v. Davis*, 306 F.3d 398, 421 (6th Cir. 2002) (finding no *Brady* violation where the material was disclosed at trial and the defendant refused an opportunity to postpone the trial). Defendant has not demonstrated any *Brady* violation by the State, and he is not entitled to relief on this issue.

V. Admission of Evidence

Defendant contends that the trial court erred by admitting several pieces of evidence at trial including the PDF of the cell phone SIM extraction performed by Agent Moon on the victim's phone, a black Taurus handgun found in the victim's stolen vehicle after the high-speed police pursuit, a black glove found at the murder scene, and the video of the high-speed pursuit.

Generally, relevant evidence is admissible. Tenn. R. Evid. 402. Relevant evidence is evidence that has "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." *Id.* 401. However, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" *Id.* 403. Unfair prejudice means "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978) (quoting Fed. R. Evid. 403, Advisory Comm'n Comment).

This court reviews a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *Id.* Mere disagreement with the trial court is insufficient to disturb the trial court's evidentiary decisions. *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). A trial court abuses its discretion when it "applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010).

Trial courts "have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996). Tennessee Rule of Evidence 404(b) permits the admission of evidence of criminal conduct if the evidence is relevant to a litigated issue such as identity, intent, or rebuttal of accident or mistake, and the probative value outweighs the danger of unfair prejudice. Tenn. R. Evid. 404(b) Advisory Comm'n Cmt.; *see State v. Parton*, 694 S.W.2d 299, 303 (Tenn. 1985); *State v. Hooten*, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987). However, "[e]vidence 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 “one of exclusion,” but evidence of other crimes, wrongs, or acts may be admitted for non-propensity purposes provided the court: (1) holds a jury-out hearing; (2) identifies a material issue other than conduct conforming with a character trait and states its reasons on the record; (3) finds clear and convincing proof of the other act; and (4) determines that the probative value is not outweighed by the danger of unfair prejudice. *See* Tenn. R. Evid. 404(b); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Sexton*, 368 S.W.3d 371, 402-04 (Tenn. 2012). In reviewing a trial court’s decision to admit or exclude evidence under Rule 404, an appellate court may disturb the trial court’s ruling only if there has been an abuse of discretion. *State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005). The trial court’s determination is entitled to deference when it has substantially complied with the procedural requisites of Rule 404(b). *DuBose*, 953 S.W.2d at 652.

As pointed out by the State and conceded by Defendant, he did not object to the admission of cell phone extraction or the black glove found at the murder scene. As to the Taurus handgun, Defendant did not contemporaneously object to Trooper Richardson’s testimony about the gun being found in the victim’s car at the scene of the crash after the high-speed police pursuit and only objected when video from Trooper Richardson’s body camera was played. He also raised this issue and the admission of the cell phone extraction in his motion for new trial, which was denied by the trial court. However, failing to contemporaneously object to an alleged error results in waiver even if the defendant later raises the issue in a motion for new trial. *State v. Thompson*, No. E2018-01481-CCA-R3-CD, 2019 WL 5298733, at *9 (Tenn. Crim. App. Oct. 18, 2019) (finding waiver when the defendant failed to object to improper closing argument but raised the issue in his motion for new trial); *State v. Lineberry*, No. 01C01-9412CC-00439, 1995 WL 441608, at *4 (Tenn. Crim. App. July 26, 1995) (finding waiver when the defendant raised an issue for the first time in his amended motion for new trial); Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”). Defendant requests that we review this issue for plain error.

Concerning the first plain error factor, the record clearly establishes that Defendant failed to object to the admission of the cell phone extraction or the black glove found at the murder scene and that he did not contemporaneously object to testimony concerning the Taurus handgun. However, as to the second factor, Defendant has not shown that a clear and unequivocal rule of law was breached. *Smith*, 24 S.W.3d at 282. In *State v. Sims*, No. E2018-01268-CCA-R3-CD, 2020 WL 5088737, 2020 WL 5088737, at *6 (Tenn. Crim. App. Aug. 28, 2020), a panel of this court held that where “the primary factual basis to be

resolved by the jury was the identity of the shooter[.]” the steps taken by law enforcement in investigating this case would be “of consequence to the determination of the action” if they made the defendant’s identity as the shooter “more probable or less probable than it would be without the evidence.” *Id.*; Tenn. R. Evid. 401; *see State v. Blanchard*, No. M2010-01186-CCA-R3-CD, 2011 WL 2533753, at *5 (Tenn. Crim. App. June 24, 2011) (stating that even if a detective’s testimony “was relevant to show how the investigation progressed to the defendant’s becoming a suspect[, t]he question remains . . . whether the explanation of the investigation was itself relevant to a material issue,” but concluding that any error was harmless). Admission of the evidence in this case was relevant to show the investigation conducted by law enforcement to establish Defendant’s identity as a suspect in the victim’s murder.

Additionally, as noted above, the evidence against Defendant was overwhelming. The introduction of the cell phone extraction, the black glove, and the Taurus handgun was not unfairly prejudicial. Defendant is not entitled to relief on this issue.

Regarding the admission of the video of the high-speed pursuit, Defendant filed a motion in limine to exclude the evidence. Following a hearing, the trial court found the video was relevant because “[Defendant] was in the motor vehicle that belonged to [the victim] within a number of days from the time of the homicide, four days from the time that the body was discovered; and then also within that vehicle was a firearm on [Defendant’s] person that was connected to the crime scene via a scientific analysis which linked it to shell casings found at the crime scene where the body was found,” and the State was required to prove identity at trial. The court further found that the jury could consider Defendant’s flight from the officers together with “all the other evidence.” The trial court specifically found that the video was admitted under Tennessee Rule of Evidence 404(b) to establish identity and that it was also relevant for context and completeness of the story. The trial court concluded that the probative value of the video was “not substantially outweighed by the danger of unfair prejudice.”

The trial court did not abuse its discretion by admitting the video of the pursuit. Defendant’s flight from police in the victim’s stolen car with a stolen license plate while in possession of one of the guns used in the homicide was relevant to show Defendant’s identity as a suspect in the victim’s murder and that he did not simply get pulled over for a traffic violation while driving the victim’s car four days after the murder. He actively fled from police when they attempted to stop him. Additionally, the trial court gave a limiting instruction to the jury prior to Trooper Malone’s testimony instructing them not to “consider such evidence to prove [Defendant’s] disposition to commit the crimes such as those for which he is on trial.” The court further instructed the jury to consider the video for the “limited purpose of determining whether it provides the complete story of the crime[.]” The jury is presumed to follow the trial court’s instructions and Defendant has

provided no argument or evidence that the jury did otherwise. *Henley*, 960 S.W.2d at 587. Defendant is not entitled to relief on this issue.

VI. Limited Cross-Examination of Detective Goehring

Defendant argues that the trial court erred by limiting his cross-examination of Detective Goehring about Defendant's statement of how he acquired the victim's Kia Sorento. The State submits that because Defendant failed to make an offer of proof regarding the evidence, he has waived the issue.

A defendant's constitutional right to confront witnesses includes the right to conduct a meaningful cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *State v. Brown*, 29 S.W.3d 427, 430-31 (Tenn. 2000). This includes the right to impeach their credibility, or otherwise establish that the witnesses are biased, which also includes any promises of leniency or other favorable treatment offered in exchange for testimony. *See State v. Smith*, 893 S.W.2d 908, 924 (Tenn. 1994). "The propriety, scope, manner, and control of cross-examination of witnesses, however, remain within the discretion of the trial court." *State v. Echols*, 382 S.W.3d 266, 285 (Tenn. 2012) (citations omitted). The trial court's restriction of cross-examination is reviewed for an abuse of discretion. *State v. Johnson*, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984) (citing *Monts v. State*, 379 S.W.2d 34 (Tenn. 1964), *overruled on other grounds by State v. Collier*, 411 S.W.3d 886 (Tenn. 2013)). "Appellate courts may not disturb [a trial court's] limits on cross-examination except when there has been an unreasonable restriction on the right." *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995) (first citing *State v. Fowler*, 373 S.W.2d 460, 466 (Tenn. 1963); and then *Johnson*, 670 S.W.2d at 636).

"Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

Tennessee Rule of Evidence 103 provides:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Tenn. R. Evid. 103(a).

Here, Defendant failed to make an offer of proof as to what additional cross-examination of Detective Goehring would have revealed. At trial, a bench conference was held out of the hearing of the jury, and trial counsel said that he wanted to ask Detective Goehring if Defendant told him he had purchased the Kia Sorento, and then ask what Detective Goehring did to confirm the purchase. The State objected on the grounds of hearsay and argued that “any information is self-serving within that statement.” The trial court sustained the State’s objection to any further cross-examination of Detective Goehring about Defendant’s statement. Trial counsel did not make an offer of proof by questioning Detective Goehring outside the presence of the jury. The failure to make an offer of proof precludes this court from reviewing the issue. *See State v. McCaleb*, 582 S.W.3d 179, 199 (Tenn. 2019) (holding the State’s failure to make an offer of proof regarding the excluded evidence precluded the trial court from making specific findings regarding the proposed testimony and precluded the appellate court from considering the issue); *State v. Sims*, 45 S.W.3d 1, 15 (Tenn. 2001) (determining failure to make an offer of proof regarding witness testimony waived confrontation issue); *State v. Hall*, 958 S.W.2d 679, 691 n.10 (Tenn. 1997) (“[G]enerally, if an offer of proof is not made, the issue is deemed waived and appellate review is precluded.”). Thus, this issue is waived.

Because Defendant has waived plenary review of this issue, his only potential avenue for relief is through the doctrine of plain error. *Dotson*, 450 S.W.3d at 54. However, he has neither requested plain error review nor analyzed the factors for such relief. *See State v. Enix*, 653 S.W.3d 692, 701 (Tenn. 2022). It has been consistently held that when a defendant neither acknowledges waiver nor requests plain error review, an appellate court should decline to conduct such review. *See State v. Ruiz*, 716 S.W.3d 439, 453 (Tenn. Crim. App. 2024) (“To be clear, a party seeking plain error relief must generally raise and argue the issue in the party’s briefing, just as the party would do with all other issues in the ordinary course of an appeal” (citation omitted)); *see also State v. Funk*, No. E2022-01367-CCA-R3-CD, 2023 WL 7130289, at *2-3 (Tenn. Crim. App. Oct. 30, 2023) (“Because the defendant bears the burden of showing an entitlement to plain error relief, a defendant’s failure to request this relief necessarily weighs against any such consideration

on our own.”), *no perm. app. filed*. Therefore, we respectfully decline to address the issue sua sponte. *Gardner*, 716 S.W.3d at 417. Defendant is not entitled to relief on this issue.

VII. Cumulative Error

Finally, Defendant contends that he is entitled to relief under the cumulative error doctrine. The cumulative error doctrine recognizes that there may be many errors that are harmless in isolation, but “have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.” *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant relief under the cumulative error doctrine, there must have been more than one actual error committed during the trial proceedings. *Id.* at 77. As we have found no error, Defendant is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

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s/ *Jill Bartee Ayers*
JILL BARTEE AYERS, JUDGE