

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 22, 2026

STATE OF TENNESSEE v. KEVIN DRAGG**Appeal from the Criminal Court for Knox County**
No. 123015 Hector Sanchez, Judge

No. E2025-00877-CCA-R3-CD

The Defendant, Kevin Dragg, was convicted by a Knox County Criminal Court jury of possession of cocaine with intent to sell, deliver, or manufacture, a Class B felony; possession of a firearm with the intent to go armed during the commission of a dangerous felony, a Class D felony; unlawful possession of a firearm by a violent felon, a Class B felony; unlawful possession of a firearm after being convicted of a felony drug offense, a Class C felony; and possession of drug paraphernalia, a Class A misdemeanor. *See* T.C.A. §§ 39-17-417(a)(4), (c)(1) (Supp. 2021) (subsequently amended) (possession of cocaine), 39-17-1324(a) (Supp. 2021) (subsequently amended) (possession of a firearm with intent to go armed during the commission of a dangerous felony), 39-17-1307(b)(1), (2) (Supp. 2021) (subsequently amended) (possession of a firearm by a person who has been previously convicted of a felony crime of violence or a felony drug offense), 39-17-425 (2025) (possession of drug paraphernalia). The trial court imposed an effective twenty-six-year sentence. On appeal, the Defendant contends that: (1) the trial court erred in denying the motion to suppress evidence obtained by bounty hunters who apprehended the Defendant for failing to appear on other charges; (2) the trial court erred in instructing the jury on the count of being a violent felon in possession of a firearm and that the evidence, when considered under a correct statement of the law, is insufficient to support this conviction; and (3) he is entitled to a new trial due to the combined effect of repeated prosecutorial misconduct. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and STACY L. STREET, JJ., joined.

Jeffrey C. Collier and Travis E. Dorman (on appeal and at motion for a new trial), Knoxville, Tennessee; and Greg Isaacs and Ashlee Mathis (at trial), Knoxville, Tennessee, for the appellant, Kevin Dragg.

Jonathan Skrmetti, Attorney General and Reporter; Ronald Coleman, Senior Assistant Attorney General, and Joshua R. Gilbert, *pro hac vice*, Legal Assistant; Charmé P. Allen, District Attorney General; and Ta Kisha Fitzgerald, Molly Martin, and Willie Lane, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant, who had been released on bond, failed to appear for court dates in two cases. Final forfeitures of the bonds were entered. While searching for the Defendant on January 21, 2022, bounty hunters conducted surveillance of the Defendant's girlfriend's car, which the Defendant was known to drive. After identifying the Defendant as the car's driver, the bounty hunters saw him engage in apparent drug sales from the car. They communicated with Knoxville Police Department (KPD) personnel and advised them of the Defendant's location and their plan to arrest the Defendant on the failure to appear warrants. With KPD officers en route to arrest the Defendant on unrelated charges, the bounty hunters surrounded the Defendant's car, removed the Defendant from the car, and detained him in handcuffs. The bounty hunters took possession of a bag of suspected crack cocaine that the Defendant held and a handgun in the Defendant's pocket and placed the items on top of the car the Defendant had driven. The bounty hunters did not take possession of a suspected marijuana blunt the Defendant held and other evidence that the police later seized from the Defendant and the car. KPD officers arrived at the scene, took the Defendant into police custody, and searched the car. The Defendant's convictions in the present case relate to the items seized by the bounty hunters and the police.

Motion to Suppress

The Defendant filed a motion to suppress the evidence seized during the January 21, 2022 search of the car the Defendant drove and of his person. He alleged that the bounty hunters failed to comply with the statutory requirements for bounty hunters taking a person into custody. *See* T.C.A. § 40-11-318 (2025). The Defendant also alleged that the bounty hunters violated his Fourth Amendment right to be free from unreasonable searches and seizures by searching the car, which was owned by a third party, and because the bounty hunters acted as State agents.

At the hearing on the motion to suppress, Randall Crisp, a certified professional bondsman, testified that he was asked to assist a bonding company in taking the Defendant

into custody on a *scire facias* related to two warrants charging a drug offense and a firearm offense. Mr. Crisp said the bonding company provided him with certified copies of the warrants, the *scire facias*, and the bail contract. He said the bail contract was co-signed and co-indemnified by Crystal Hicks, whom he discovered through records checks lived with the Defendant. Mr. Crisp said the records checks showed that Ms. Hicks was the registered owner of a white Kia car, which the Defendant “had reportedly been driving.”

Mr. Crisp testified that, on January 21, 2022, he, Jeremy Hancock, and three unnamed individuals, all of whom were professional bondsmen, located the white Kia and conducted surveillance in an effort to find the Defendant. Mr. Crisp explained that the Kia’s windows were tinted and that they were unsure if the Defendant was driving the car. Mr. Crisp said they notified the sheriff’s department’s leads unit to verify that the warrants were active and to advise the unit of the bounty hunters’ actions.

Mr. Crisp testified that the Defendant got out of the Kia at a business and “appeared to [be] conducting drug sales.” Mr. Crisp said he wanted to take the Defendant into custody but was unable to do so at this point because “we couldn’t establish an effective perimeter” before the Defendant entered the Kia and resumed driving. Mr. Crisp said that he and Mr. Hancock continued to follow the Defendant and that “we call[ed] personal identification or PID” for “emergency services” due to safety concerns and for “deconfliction” because multiple government agencies may be looking for an individual. Mr. Crisp testified that law enforcement never asked him to search the Defendant.

Mr. Crisp said, “[T]he decision was made . . . to execute the arrest warrant, which we had in hand.” Mr. Crisp said that the Defendant had not backed into the parking place “this time” and that he thought they could establish a perimeter. Mr. Crisp said that Mr. Hancock “pulled in behind” the Defendant and that Mr. Crisp “pulled in from the driver’s side” and got out of his car. Mr. Crisp said that he could see the Defendant through the Kia’s windshield and that the Defendant was “engaged in what appeared to be drug sales” with a pedestrian through the open passenger-side window.

Mr. Crisp testified that he went to the driver’s side window, noticed the door was locked, and knocked on the window. He said the other bondsmen also approached various points outside the Kia. Mr. Crisp said he identified himself and advised the Defendant that he had warrants for the Defendant’s arrest. Mr. Crisp said the Defendant unlocked and opened the door but remained in the driver’s seat. Mr. Crisp saw a marijuana blunt in the Defendant’s right hand and a plastic bag of apparent crack cocaine on top of the center console, which the Defendant appeared to be sealing. Mr. Crisp said he handcuffed the Defendant, “removed the plastic bag from his hand,” and placed the bag on the Kia’s roof. Mr. Crisp said he took the bag from the Defendant for the Defendant’s safety because, in

his experience, people being arrested sometimes ingested drugs. Mr. Crisp agreed that he had not placed the bag of suspected drugs on top of the car to assist law enforcement in arresting the Defendant. Mr. Crisp said he did not search the car in which the Defendant was seated and reiterated that he took the bag of suspected drugs from the Defendant's hand. Mr. Crisp agreed that no one gave him permission to search the Kia. Mr. Crisp said that Mr. Hancock asked the Defendant if he had a gun and that the Defendant reached for his front right pocket. Mr. Crisp said he placed his hand on the pocket, felt the imprint of a gun, and removed the gun. He said his partner removed the bullets from the gun and placed the gun on the Kia's roof. Mr. Crisp agreed that the Defendant had not given him permission to search the Defendant's person. Mr. Crisp agreed that he did not remove the marijuana blunt from the Defendant's hand and explained that the police were arriving and that "[t]here was a little bit of chaos at the moment." Mr. Crisp said he was about to ask the Defendant to get out of the Kia when several KPD officers approached. Mr. Crisp said he "released [the Defendant] to KPD's custody."

Mr. Crisp testified that he was not "taking [the Defendant] into custody at the direction of" KPD or the sheriff's department. A body camera video recording of the incident was received as an exhibit and played for the trial court. The recording showed the police arriving at the scene, where the Defendant was seated in a car while handcuffed and smoking a cigar or blunt. Individuals whom Mr. Crisp identified as himself and his associates stood outside the car where the Defendant was seated when the officers arrived. The car's driver's door was open. After the Defendant was removed from the car, the officers searched it.

Mr. Crisp acknowledged that he had not shown the Defendant a copy of the "underlying criminal process," which he said was inside "our van." Mr. Crisp said he identified himself verbally but did not show his "pocket card" to the Defendant. Mr. Crisp agreed that he and Mr. Hancock notified law enforcement twice that they had located the Defendant, that their authority was to take the Defendant into physical custody pursuant to the *scire facias*, and that they had no authority to conduct a search or to arrest the Defendant for new charges. When explaining why they took the Defendant into custody immediately upon engaging with him, Mr. Crisp said that "sound tactics" did not include blocking in a fugitive and waiting until the police arrived. Mr. Crisp agreed that the Defendant had not tried to flee and had not acted in an aggressive or dangerous manner.

Mr. Crisp acknowledged a document as his affidavit related to the incident, although the copy received as an exhibit was unsigned and unsworn. Mr. Crisp said he prepared multiple copies of the document and that he had sworn to and signed another copy. The document was largely consistent with Mr. Crisp's testimony. However, in the document, Mr. Crisp stated (1) that he removed the Defendant from the car "due to his size and history

of fleeing” after handcuffing him and before taking the suspected drugs and the gun from the Defendant and (2) that he “observed an officer remove Defendant from the vehicle.”

KPD Officer Jonathan Gomez testified that “during this timeframe” of the Defendant’s arrest, he received a call that representatives of a bonding company had located the Defendant at a business. Officer Gomez said he went to the location, where he saw bondsmen surrounding a car with the Defendant inside and a gun and a bag of suspected crack cocaine on top of the car. Officer Gomez approached the Defendant, who was smoking a marijuana blunt and talking on his cell phone. Officer Gomez said he took the blunt and the cell phone from the Defendant, removed him from the car, and placed him in custody. Officer Gomez said the gun, the suspected crack cocaine, the marijuana, and the cell phone “were confiscated.” He said other officers searched the car and found ten grams of suspected marijuana.

Officer Gomez agreed that he never authorized Mr. Crisp to arrest the Defendant or to search the Defendant’s person or car. When shown his report from the arrest, Officer Gomez acknowledged that he had stated the suspected crack cocaine was found “in the middle of the console,” which he explained was information he received from “the bondsmen.” The police report was received as an exhibit.

After receiving the hearing evidence, the trial court denied the motion to suppress in a written order.

Trial

At the trial, Randall Crisp testified that he was employed as a bail bondsman and that he was a retired KPD officer. He said that, on January 21, 2022, he was assisting a bonding company other than his employer by “tracking some of their forfeitures,” meaning locating individuals who had failed to appear for court dates, and for whom arrest warrants had been issued.

Mr. Crisp said that he and other bounty hunters searched for the Defendant after having verified the validity of arrest warrants for the Defendant related to his failure to appear in court. They saw a car in which they thought he might be traveling and followed it. Mr. Crisp said the Defendant got out of the car while it was parked at a business. Mr. Crisp said the Defendant “made contact with two or three individuals” and returned to the car. Mr. Crisp said “we” contacted KPD and advised the police that they had located the Defendant and specified the Defendant’s location. Mr. Crisp said they were advised that KPD had arrest warrants for the Defendant for unrelated charges. Mr. Crisp said that the Defendant drove to another business and parked. Mr. Crisp said he and his colleagues were

concerned that the Defendant might leave quickly and that they decided to arrest the Defendant, rather than waiting for the police to arrive.

Mr. Crisp testified that the bounty hunters parked in a way that blocked the Kia and that Mr. Crisp and other bounty hunters approached the Kia on foot. Mr. Crisp said a pedestrian approached the Defendant, and he said the bounty hunters had seen pedestrians approach the Defendant earlier during their surveillance. Mr. Crisp saw a baggie in the Defendant's hand and "an exchange" between the Defendant and the pedestrian. Mr. Crisp said that he walked toward the driver's side door and that the pedestrian left quickly. Mr. Crisp said that he knocked on the driver's window and tried to open the door, but it was locked. He said that the Defendant unlocked the door and pushed it "to where . . . the latch was open" and that Mr. Crisp opened the door. Mr. Crisp saw that the Defendant was smoking a marijuana blunt and that the Defendant was sealing a baggie of apparent crack cocaine over the center console. Mr. Crisp said that, when his partner, Mr. Hancock, asked the Defendant if he had any weapons, the Defendant reached for his right pocket. Mr. Crisp felt the outline of a gun through the Defendant's sweatpants and removed it. Mr. Crisp placed the gun and the bag of apparent crack cocaine on the Kia's roof after his partner "made [the gun] safe." Mr. Crisp said he was not concerned with collecting evidence or "trying to make a case" and that he collected the items due to safety concerns. He said the police officers stepped in within seconds and removed the Defendant from the car. Mr. Crisp said the officers collected the gun and the suspected drugs from the car's roof. A police body camera video recording excerpt, from which the audio had been redacted, was played for the jury. The recording depicted the Defendant's arrest by KPD officers.

Kevin Parnell testified that he was employed as a KPD officer on January 21, 2022. He said that, as a result of communication with a bonding company, he went to the scene where the Defendant was detained. Mr. Parnell said that the Defendant was inside a car and that the car door was open. Mr. Parnell identified a video recording of his interactions with the Defendant, which was received as an exhibit and played for the jury. The audio had been redacted from the recording. The recording showed Mr. Parnell's arrival at the scene and his approach to the Kia, in which the handcuffed Defendant was seated and the driver's door was open. An officer assisted the Defendant as he stood, and an officer escorted the Defendant away from the Kia. Officers searched the Kia's interior, and an officer took the gun, an ammunition clip, bullets, three cell phones, a baggie, and cash from the Kia's roof. An officer removed cash from the Kia's cup holders, removed a digital scale from the crevice between the driver's seat and the center console, and searched the console's closed compartment.

Mr. Parnell testified that the suspected crack cocaine was in the shape of a cookie, along with some smaller pieces, and that it had a gross weight of 38.8 grams. The suspected crack cocaine, digital scale, three cell phones, a .40-caliber Glock handgun, an ammunition magazine, and fourteen bullets were received as exhibits. Mr. Parnell said that, in his opinion based on his prior law enforcement experience, the green leafy substance collected as evidence was marijuana. The green leafy substance was received as an exhibit. Mr. Parnell said that \$3,849 was collected as evidence, with the currency including 149 \$20 bills and nine \$100 bills.

KPD Officer Jonathan Gomez testified that he took the Defendant into custody on January 21, 2022. Officer Gomez said he took a cell phone and the marijuana that the Defendant was smoking from the Defendant. Officer Gomez said he removed “a wad of cash” from the Defendant’s pockets. Officer Gomez placed the items on the Kia’s roof.

Tennessee Bureau of Investigation Special Agent Forensic Scientist Jacob White, an expert in forensic chemistry, testified that he examined the suspected crack cocaine collected at the time of the Defendant’s arrest and determined that it was 34.83 grams of cocaine base.

KPD Firearms Examiner Bethany Fine Simmons, an expert in firearm analysis, testified that she test-fired the handgun collected as evidence and determined that it was functional.

Knox County Criminal Court Clerk supervisor Stephanie Ogle identified previous judgments for the Defendant’s prior convictions as follow: December 17, 2002, robbery, a Class C felony; January 14, 2020, aggravated assault, a Class C felony; and January 14, 2020, possession of a Schedule VI controlled substance with the intent to manufacture, sell, or deliver, a Class E felony. The judgments were received as an exhibit.

KPD Detective Philip Jinks, an expert in narcotics investigations, testified that crack cocaine was typically “cooked” in a Pyrex measuring glass into a “cookie” that a distributor then cut into smaller pieces for sale. He said a user usually purchased about a 0.2-gram rock for around \$20. When shown the 34.83 grams of crack cocaine collected as evidence at the time of the Defendant’s arrest, Detective Jinks said it was consistent with his description of a crack cocaine cookie and rocks that had been broken from it. He said that 35 grams of crack cocaine could be sold in about 175 units of 0.2 gram rocks.

When shown the digital scale collected at the time of the Defendant’s arrest, Detective Jinks testified that it was significant because narcotics distributors often used digital scales to weigh small amounts of a substance before selling it. When asked about

the significance of the three cell phones collected at the scene, Detective Jinks said that drug dealers often kept multiple cell phones in order to evade detection by law enforcement. Detective Jinks said that drug dealers often possessed firearms due to the danger of robbery because they possessed large amounts of cash. In Detective Jinks's opinion, the significant amount of cash and the large bills the Defendant possessed indicated that the Defendant was a drug dealer. Detective Jinks opined that, based upon the quantity, packaging, and shape of the crack cocaine; the digital scale; the cash; the cell phones; and the handgun; the Defendant possessed crack cocaine with the intent to sell it.

After the State rested, the trial court granted the Defendant's motion for judgment of acquittal for the count of the indictment charging misdemeanor possession of marijuana. The court denied the motion as to the remaining counts.

The Defendant elected not to present evidence.

After receiving the proof, the jury found the Defendant guilty of the following charged offenses: possession of cocaine with the intent to sell, deliver, or manufacture; possession of a firearm during the commission of a dangerous felony; two counts of unlawful possession of a firearm by a convicted felon; and possession of drug paraphernalia.

The trial court conducted a bifurcated proceeding related to whether the Defendant would serve an enhanced sentence for his conviction for possession of a firearm during the commission of a dangerous felony, based upon proof of a qualifying prior felony conviction. *See* T.C.A. § 39-17-1324(f)(1), (2), (i)(1)(AA). The State presented a certified judgment of conviction for the Defendant's January 14, 2015 conviction for possession with intent to sell marijuana in a drug-free zone, a Class E felony. The jury found the Defendant not guilty of having the prior conviction.

After a sentencing hearing, the trial court imposed an effective twenty-six-year sentence. This appeal followed.

I

Denial of Motion to Suppress

The Defendant contends that the trial court erred in denying the motion to suppress evidence obtained by bounty hunters who apprehended the Defendant after he failed to appear on other charges. He argues (1) that the bounty hunters were state actors and that their search of the Defendant and the car he was driving and the seizure of evidence violated

his right to be free of unreasonable searches and seizures and (2) that no exception to the warrant requirement permitted the bounty hunters' warrantless searches of his person and the Kia. The State responds that the court did not err in denying the motion to suppress. We agree with the State.

Both the State and Federal constitutions protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. 1, § 7. Warrantless seizures are "presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the . . . seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997); *see Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

A trial court's findings of fact on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Jones*, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. The prevailing party is entitled to the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998); *see State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). A trial court's application of the law to its factual findings is a question of law and is reviewed de novo on appeal. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997). In reviewing a trial court's ruling on a motion to suppress, this court may consider the trial evidence as well as the evidence presented at the suppression hearing. *See State v. Henning*, 975 S.W.2d 290, 297-99 (Tenn. 1998); *see also State v. Williamson*, 368 S.W.3d 468, 473 (Tenn. 2012).

We begin our analysis with the question of whether the trial court erred in its determination that the bounty hunters were not state actors required to comply with the Defendant's State and Federal constitutional rights to be free from unreasonable search and seizures.

"Constitutional procedural protections generally shield persons only from acts of the government." *State v. Sanders*, 452 S.W.3d 300, 307 (Tenn. 2014). "A private party acting for a reason independent of a governmental purpose does not implicate the Fourth Amendment." *State v. Cowan*, 46 S.W.3d 227, 232 (Tenn. Crim. App. 2000); *See State v. Burroughs*, 926 S.W.2d 243, 246 (Tenn. 1996). Exceptions to the general rule for actions by private parties exist for (1) criminal informants and (2) individuals acting as an "agent or instrument" of the government in conducting a search or seizure. *Burroughs*, 926

S.W.2d at 245. In the case of the latter, the actions of the individual who conducted a search or seizure are viewed through the lens of the “legitimate independent motivation” test, which involves consideration of (1) whether the State had knowledge of the search and (2) the acquiescence and intent of the individual who conducted the search. *Id.* at 246. For a private party to be considered a state actor for purposes of a search or seizure, both *Burroughs* prongs must be satisfied. *State v. Michael Wojnarek*, No. M2022-00326-CCA-R3-CD, 2023 WL 3331623, at *4 (Tenn. Crim. App. May 10, 2023) (citing *United States v. Poe*, 556 F.3d 1113, 1121 (10th Cir. 2009)).

In denying the motion to suppress, the trial court made the following findings:

[T]his Court cannot find that bounty hunter Randall Crisp and his associates were acting as state actors when they arrested the Defendant and removed narcotics which were in plain view from the vehicle and a firearm from his person. In applying the *Burroughs* factors to the facts here, the government only gained knowledge of the plan to arrest Defendant just moments before Crisp and his associates effectuated the arrest. The testimony established that Crisp and his associates originally intended to wait for KPD to effectuate the arrest, but ultimately chose to move in on the Defendant and take him into custody when it appeared that he was preparing to go mobile again. Furthermore, the intent of Crisp and his associates who were performing the arrest was not to build a drug or firearms investigation or case. Based on the testimony at the hearing, the intent of the bounty hunters was to locate and arrest the Defendant on outstanding process after they contracted to do so with K-Town Bonding Company. Therefore, this Court cannot find that Crisp and his associates were operating as state actors when they arrested Defendant and removed contraband from his immediate control.

The Defendant argues that the trial court erred in concluding that the bounty hunters were not state actors whose actions were limited by the Defendant’s Fourth Amendment and Article I, section 7 rights. *See* U.S. Const. amend. IV; Tenn. Const. art. 1, § 7. He urges this court to place significance on the fact that the bounty hunters made two calls to the police before, rather than after, they arrested the Defendant and seized items from him. He distinguishes his case from the facts of *Poe* and *Wojnarek*, in which the police were not notified until after bounty hunter and bondsman searches, respectively. *See Poe*, 556 F.3d at 1124; *Michael Wojnarek*, 2023 WL 3331623, at *5. The Defendant also argues that, given Mr. Crisp’s prior law enforcement career, “[i]t strains credulity” that he had no substantive conversations with law enforcement about the Defendant and that he did not want to assist his former colleagues in arresting the Defendant.

The first question raised by the Defendant's argument is whether the police notification itself is a threshold which, once crossed, conferred state actor status on the bounty hunters. The Defendant cites *Michael Wojnarek*, a probation revocation case, in which this court considered whether the trial court erred in considering evidence obtained by bail bondsmen who went to a motel looking for an individual who was living there with the probationer, knocked on the door of the motel room which the probationer and the other individual had been occupying, went inside the room with a motel employee when the probationer answered the door, saw drugs and weapons in the room, and notified law enforcement. *Michael Wojnarek*, 2023 WL 3331623, at *1. At the revocation hearing, the State introduced the testimony of a bail bondsman about his observations of drugs and weapons in the motel room in which the probationer was present. *Id.* The probationer argued on appeal that the trial court erred "by considering evidence obtained by the bail bondsmen in violation of the Fourth Amendment." *Id.* at *3. This court held that, because "the exclusionary rule has only limited application in a revocation proceeding," the probationer was "not entitled to the benefit of the exclusionary rule in this revocation proceeding." *Id.* at *4 (citing *State v. Hayes*, 190 S.W.3d 665, 671 (Tenn. Crim. App. 2005)). In dicta, the court commented that, even if it were to consider the merits of the argument, the probationer would not be entitled to relief. *Id.* The court recited the *Burroughs* legitimate independent motivation test and commented that the probationer would fail in the merits of his argument because "there was no evidence that the law enforcement officers knew anything about the search until the bail bondsmen contacted them" and that the bondsmen's primary purpose had been to locate the other individual and return her to custody. *Id.* at *5. In its commentary, the *Michael Wojnarek* court cited *Poe*, which involved evidence used against an accused when the evidence had been obtained by bounty hunters while apprehending the accused for absconding from bail in another case. *Poe*, 556 F.3d at 1117; *Michael Wojnarek*, 2023 WL 3331623, at *4-5. The *Poe* court concluded that the government had not acquiesced in the bounty hunters' actions because they were notified afterward and that the bounty hunters' primary purpose had been to capture the absconded bailee, rather than to assist the government. *Poe*, 556 F.3d at 1123-24. Again, to the extent that the Defendant relies upon *Michael Wojnarek*, its language regarding the merits of the Fourth Amendment claim, including its legitimate independent motivation analysis, is dicta. Likewise, *Poe* is a Tenth Circuit case and, as such, is merely persuasive authority in this court. We conclude that Tennessee has not recognized police knowledge of an impending search as a bright line threshold for determining whether a private party is acting as a state actor for Fourth Amendment purposes.

Returning to the present case, the trial court credited Mr. Crisp's testimony about the calls to law enforcement, first verifying that the arrest warrants for the Defendant were still active, and later informing them that the bounty hunters had located the Defendant and were about to attempt an arrest. Mr. Crisp explained that the first call was to verify that

the warrants were still good and that the second call was a safety measure for “deconfliction” because multiple government agencies might be looking for the Defendant. Mr. Crisp said no law enforcement agent asked him to search the Defendant’s person. Mr. Crisp also explained that he took the bag of suspected crack cocaine from the Defendant to prevent the Defendant from ingesting it and that, after the Defendant reached for his pocket when Mr. Crisp’s partner asked if the Defendant had a weapon, Mr. Crisp felt the outside of the pocket and removed the gun from the pocket for safety reasons.

The bounty hunters’ calls to law enforcement were brief and for the purposes of confirming with the sheriff’s department that the warrants were active and ensuring safety with KPD before attempting to arrest the Defendant. The trial court found that the police became aware of the bounty hunters’ plan to arrest the Defendant “just moments before” the arrest occurred. The evidence does not preponderate against this determination. We note, as well, that the police knew only that the bounty hunters were about to attempt to arrest the Defendant. No evidence shows that the bounty hunters anticipated and planned to seize evidence of criminal activity in the process and that they broadcast any such intent to the police. Likewise, no evidence shows that the police asked or encouraged the bounty hunters to obtain evidence of a crime for the police.

The second factor which must be considered is the government’s acquiescence and intent in the bounty hunters’ conducting the search. *See Burroughs*, 926 S.W.2d at 246. The trial court found that the bounty hunters were not trying to gather evidence for new charges against the Defendant and that their intent was to locate and arrest the Defendant on the outstanding bond revocation warrant as part of the bounty hunters’ business arrangement with a bonding company. The evidence does not preponderate against the court’s findings. We have considered the Defendant’s argument that Mr. Crisp surely wanted to assist his former law enforcement colleagues in obtaining evidence for new charges against the Defendant. However, the court accepted Mr. Crisp’s testimony as credible, and no evidence suggests the bounty hunters acted with any motivation or intent other than to arrest the Defendant pursuant to the bond revocation warrant. Mr. Crisp explained that he merely took the bag of suspected crack cocaine to ensure the Defendant’s safety because, in Mr. Crisp’s experience, detainees sometimes swallowed drugs. Mr. Crisp also explained that he took the gun and that his partner cleared the ammunition from the gun to ensure the safety of everyone present.

Having reviewed the trial court’s findings on the *Burroughs* factors, we conclude that those findings support the court’s conclusion that the bounty hunters were not state actors. It follows, then, that because the bounty hunters were private citizens and not state actors, their actions in seizing the drugs and handgun from the Defendant were not subject

to constitutional limits on unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. 1, § 7.

The Defendant is not entitled to relief on this basis.

II

The Defendant contends that the trial court erred in instructing the jury on the count of being a violent felon in possession of a firearm. He argues that the court incorrectly instructed the jury that robbery, one of the Defendant's two prior felony convictions about which the jury was instructed, was a crime of violence. He notes that at the time, the relevant statute listed aggravated assault but not robbery as a crime of violence and a jury finding as to whether the robbery had been committed by the use of violence was required. The Defendant argues that the court's erroneous instruction usurped the jury's role as the finder of fact as to the violent felon in possession of a firearm conviction. He further argues that the evidence is insufficient to support his conviction for being a violent felon in possession of a firearm due to the combined failures of the State in not presenting proof showing the circumstances of the prior robbery and of the court in usurping the jury's fact-finding role. The State responds that the Defendant is not entitled to relief because the jury was not misled by the court's instruction and the court correctly instructed the jury because the other offense charged, aggravated assault, was a crime of violence. Alternatively, the State argues that any instructional error was harmless beyond a reasonable doubt. As to the Defendant's insufficiency-of-the-evidence claim related to the allegedly flawed jury instruction, the State argues that the issue is waived because the Defendant failed to brief it adequately and that, in any event, the evidence was overwhelming.

Addressing first the State's argument that the Defendant's sufficiency argument is waived due to inadequate briefing, we conclude that the Defendant has adequately addressed the issue as a component of his jury instruction issue. We will consider the merits of the sufficiency issue, as a function of the jury instruction question.

A criminal defendant has "a right to a correct and complete charge of the law." *State v. Hanson*, 279 S.W.3d 265, 280 (Tenn. 2009) (citing *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000)). As a result, a trial court has a duty "to give proper jury instructions as to the law governing the issues raised by the nature of the proceeding and the evidence introduced at trial." *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013) (citing *State v. Dorantes*, 331 S.W.3d 370, 390 (Tenn. 2011)); *see State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975). An erroneous jury instruction, though, may deprive the defendant of the constitutional right to a jury trial. *See Garrison*, 40 S.W.3d at 433-34. A jury instruction, though, is "prejudicially erroneous only if the . . . charge, when read as a whole, fails to

fairly submit the legal issues or misleads the jury as to the applicable law.” *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005).

At the time of the offense, the relevant statute provided, “A person commits an offense who unlawfully possesses a firearm, as defined in § 39-11-106, and . . . [h]as been convicted of a felony crime of violence, an attempt to commit a felony crime of violence, or a felony involving use of a deadly weapon.” T.C.A. § 39-17-1307(b)(1)(A) (Supp. 2021) (subsequently amended). The offense defined under Code section 39-17-1307 was elevated from a Class E felony to a Class B felony if a defendant had a prior conviction for a felony crime of violence. *Id.* at (b)(3). The definitional statute provided:

“Crime of violence” includes any degree of murder, voluntary manslaughter, aggravated rape, rape, rape of a child, aggravated rape of a child, aggravated sexual battery, especially aggravated robbery, aggravated robbery, burglary, aggravated burglary, especially aggravated burglary, aggravated assault, kidnapping, aggravated kidnapping, especially aggravated kidnapping, carjacking, trafficking for commercial sex act, especially aggravated sexual exploitation, felony child abuse, and aggravated child abuse[.]

Id. § 39-17-1301(3) (Supp. 2021) (subsequently amended). Thus, the statute which defined the term “crime of violence” listed especially aggravated robbery and aggravated robbery, but it did not list robbery.¹ *Id.*

The trial court gave the following relevant instruction:

[The] 3rd Count charges the defendant with unlawful possession of a firearm by a convicted felon: Any person, having been convicted of one of certain specified felonies, who possesses a firearm is guilty of a crime.

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

(1) that the defendant had been convicted of Robbery and Aggravated Assault;

and

¹ The present statute lists robbery as a crime of violence. *See* T.C.A. § 39-17-1301(3) (2025).

(2) that the defendant, after such felony convictions, possessed a firearm;

and

(3) that the defendant acted either intentionally, knowing or -- knowingly or recklessly;

and

(4) that the convictions were for felony crimes of violence, an attempt to commit a felony crime of violence, or a felony involving the use of a deadly weapon. Robbery and Aggravated Assault are felony crimes of violence.

If you find from the proof that the defendant has been convicted of other crime -- another crime or crimes other than that for which he is presently on trial, you may not consider such evidence as proof of his disposition to commit the crime for which he is on trial.

The court did not give a jury instruction which defined “crime of violence.”

In *State v. Curry*, 705 S.W.3d 176 (Tenn. 2025), our supreme court considered whether robbery could qualify as a crime of violence to enhance a conviction under Code section 39-17-1307(b)(1)(A) from a Class E to a Class B felony. The court determined, first, that robbery could include violence and, second, that the question of whether a prior robbery conviction was a crime of violence under Code section 39-17-1307(b)(1)(A) was one of fact for the jury’s determination.² *Curry*, 705 S.W.3d at 191 (holding that because

² In recognition of *Curry*, the Committee on Pattern Instructions (Criminal) incorporated the following instruction for prior robbery convictions to be used for offenses under Code section 39-17-1307(b)(1)(A) which occurred before robbery was added to Code section 39-17-1301(3) as an enumerated prior violent felony:

[In this case, the State has alleged as the felony crime of violence the defendant’s alleged robbery conviction occurring on _____. You are instructed that robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear. In order to conclude that the robbery conviction is “a conviction for a felony crime of violence,” you must unanimously find that the alleged robbery was, in fact, accomplished by violence. “Violence” means evidence of physical force unlawfully exercised so as to damage, injure or abuse. Physical contact is not required to prove

robbery could be committed with or without violence, the State must present sufficient evidence from which the jury must determine whether, beyond a reasonable doubt, the prior robbery was committed by violence); see T.C.A. § 39-13-401 (2025) (“Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.”). The trial court in *Curry* had summarily instructed the jury that robbery was a crime of violence, rather than defining the term “crime of violence” and submitting the question to the jury based upon the State’s proof. See *id.* at 181. The State’s only proof about the prior robbery consisted of the certified judgment of conviction, which noted that the charged offense had been aggravated robbery and that the conviction offense was robbery. *Id.* at 190. The supreme court held that this proof was insufficient evidence to show that the prior robbery involved violence. Because the evidence was insufficient to support the Class B felony unlawful weapon possession conviction based upon the defendant’s commission of a prior crime of violence, the supreme court reduced the conviction to a Class E felony. *Id.*

The present case was tried before the supreme court’s *Curry* decision. In his amended motion for a new trial, the Defendant challenged both the jury instruction as being contrary to *Curry* and the sufficiency of the evidence due to the nature of the instruction the court gave. The *Curry* rule applies retroactively to the Defendant’s case because the Defendant preserved the issue and his conviction was not yet final at the time *Curry* was decided. See *State v. Minor*, 546 S.W.3d 59, 70 (Tenn. 2018).

In the present case, the jury instruction given was consistent with the instruction given in *Curry*, in that they both failed to define the term “crime of violence” and summarily instructed the jury that robbery was a crime of violence. One significant distinction exists, however. The court instructed the jury in the present case that two crimes – aggravated assault and robbery – were crimes of violence, whereas in *Curry*, only one crime – robbery – was at issue. Aggravated assault is statutorily enumerated as a crime of violence. T.C.A. § 39-17-1301(3). Thus, the jury in the present case was instructed about one offense which was a statutory crime of violence and one which was not. To the extent that the court did not require a jury finding as to whether the offense underlying the Defendant’s prior robbery conviction was a crime of violence, it erred.

Like *Curry*, the proof in the present case about the prior robbery consisted solely of a certified copy of the judgment of conviction and did not include any evidence about whether the prior robbery involved violence. Had robbery been the only prior felony

violence. [Unlawfully pointing a deadly weapon at an alleged victim is physical force directed toward the body of the victim.]]

conviction submitted to the jury in the present case, we would be constrained by *Curry* to reverse the conviction of a Class B felony. *See Curry*, 705 S.W.3d at 190. Because, however, the prior aggravated assault was also instructed and is a statutorily designated crime of violence, the inquiry does not end here.

The trial court in the present case correctly instructed the jury that aggravated assault was a crime of violence. *See* T.C.A. § 39-17-1301(3). Thus, sufficient evidence existed on this basis to support the Defendant's conviction of Class B felony unlawful weapon possession by a violent felon. *See id.* § 39-17-1307(b)(1)(A). The Defendant argues that the trial court "made the robbery conviction an essential element of the . . . firearm charge" because it instructed the jury that it must find that the Defendant had prior convictions for robbery and aggravated assault and that both were crimes of violence. The Defendant argues that the court's "use of the conjunction 'and' makes the prior robbery conviction an inseverable part of the firearm conviction" such that the erroneous instruction was reversible error.

Recognizing that all errors are not equal, our supreme court has established three categories of error – structural constitutional error, non-structural constitutional error, and non-constitutional error. *State v. Powers*, 101 S.W.3d 383, 397 (Tenn. 2003); *State v. Garrison*, 40 S.W.3d 426, 433-34 (Tenn. 2000); *State v. Harris*, 989 S.W.2d 307, 314-15 (Tenn. 1999). The distinctions between these categories dictate the standards to be applied when determining whether a particular error is harmless. *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008).

Our supreme court has said, "The misstatement of an element in jury instructions is subject to constitutional harmless error analysis." *Faulkner*, 154 S.W.3d at 60 (citing *Pope v. Illinois*, 481 U.S. 497, 501-03 (1987)). Such an error is a non-structural constitutional error for which reversal is required unless the reviewing court determines that the instructional error was harmless beyond a reasonable doubt. *State v. Hollis*, 342 S.W.3d 42, 51-52 (Tenn. Crim. App. 2011); *State v. Page*, 81 S.W.3d 781, 789 (Tenn. Crim. App. 2002). When determining whether a non-structural constitutional error is harmless, we must consider "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Rodriguez*, 254 S.W.3d at 371 (citations omitted); *see State v. Qualls*, 482 S.W.3d 1, 18 (Tenn. 2016) ("If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . [the appellate court] should not find the error harmless.").

In the present case, the trial court's instruction correctly informed the jury that aggravated assault was a crime of violence. On this basis alone, a rational jury could

conclude that the Defendant had been convicted of a prior violent felony. To the extent that the Defendant argues that the court's instruction was erroneous, in part, because it used the conjunction "and" in instructing the jury that it must find, "Robbery and Aggravated Assault are felony crimes of violence," this misstatement had the effect of raising the State's burden of proof. Having considered the charge as a whole, we conclude that the court's erroneous instruction that robbery was also a crime of violence, which had the effect of foreclosing the jury's opportunity to consider whether the State had presented sufficient evidence that the prior robbery was committed by violence, was harmless beyond a reasonable doubt. *See Faulkner*, 154 S.W.3d at 58; *Hollis*, 342 S.W.3d 51-52.

We have also considered the Defendant's sufficiency-of-the-evidence argument. In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

Viewed in the light most favorable to the State, the jury received sufficient evidence from which it could conclude beyond a reasonable doubt that the Defendant had been convicted of aggravated assault, a prior violent felony. *See* T.C.A. §§ 39-17-1307(b)(1)(A), 39-17-1301(3). Thus, it matters not whether the State also presented sufficient evidence that the prior robbery also involved violence. The evidence is sufficient to support the Defendant's Class B felony conviction of unlawful weapon possession after a violent felony conviction in Count 3.

III

Prosecutorial Misconduct

The Defendant contends that he is entitled to a new trial due to the combined effect of repeated prosecutorial misconduct related to a prosecutor's statements during voir dire, her opening statement, and her alleged failure to instruct a State's witness, Mr. Crisp, about the trial court's ruling regarding the inadmissibility of evidence of the Defendant's outstanding warrants in other cases and the Defendant's other criminal conduct. The State responds that the Defendant is not entitled to relief because the prosecutor's remark during

voir dire was addressed by the court's denial of defense counsel's motion for a mistrial and that the prosecutor's remark in her opening statement was not prosecutorial misconduct. The State also contends that the Defendant has waived our consideration of any prosecutorial misconduct claim related to the prosecutor's alleged failure to instruct Mr. Crisp about the court's ruling on evidence of the Defendant's other warrants and other criminal conduct. The Defendant argues in his reply brief that he has not waived any portion of the prosecutorial misconduct issue.

Although an exhaustive list of the bounds of prosecutorial impropriety cannot be defined, five general areas of prosecutorial misconduct have been recognized:

1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *See State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); *Lackey v. State*, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978); Tenn. Code of Prof'l Responsibility DR 7-106(c)(4).³
3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. *See Cauthern*, 967 S.W.2d at 737; *State v. Stephenson*, 878 S.W.2d 530, 541 (Tenn. 1994).
4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. *See Cauthern*, 967 S.W.2d at 737; *State v. Keen*, 926 S.W.2d 727, 736 (Tenn. 1994).
5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971).

³ The current corresponding Rule of Professional Conduct is Tennessee Supreme Court Rule 8, Rule of Professional Conduct 3.4(e)(3).

State v. Goltz, 111 S.W.3d 1, 6 (Tenn. 2003).

If improper argument occurs, a new trial is required only if the argument affected the outcome of the trial to a defendant's prejudice. *State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001). In determining whether prosecutorial misconduct affected the jury verdict to prejudice a defendant, this court has considered the conduct in light and in context of the facts and circumstances of the case, any curative measures taken by the trial court and the prosecutor, the prosecutor's intent in making the comment, the cumulative effect of the improper comment and any additional errors, the strength or weakness of the case, whether the prosecutor's comments were lengthy and repeated or isolated, and whether the comments were in response to defense counsel's closing argument. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); *see Goltz*, 111 S.W.3d at 5-6.

The alleged prosecutorial misconduct relates to the conduct of Assistant District Attorney General Ta Kisha Fitzgerald, one of the two prosecutors who tried this case. The first instance of alleged prosecutorial misconduct occurred during voir dire when the prosecutor was questioning a prospective juror who stated that he had "a bias against drug peddlers . . . and I may not give them a fair chance." The prosecutor stated that she wanted "a jury who is going to be fair[.]" She went on, "I believe [the Defendant's] guilty, but I want to – when I prove my case, I want it to be the people who can be fair to him. So if you don't think you can be fair to [the Defendant], if you want to just let us know, it's not a big deal." The prospective juror involved in the exchange was excused by peremptory challenge. At a bench conference, defense counsel moved for a mistrial on the basis that the prosecutor had expressed her personal belief about the Defendant's guilt. The trial court found that the prosecutor's statement "was to some degree improper" but that it did not rise to the level of manifest necessity for a mistrial. The court denied the motion for a mistrial but instructed the panel to disregard any statements of personal opinion by the attorneys as to the Defendant's guilt. Relative to the prosecutor's statements during voir dire, the Defendant raised an issue in the motion for a new trial related to the denial of the mistrial motion, which had been based upon alleged prosecutorial misconduct.

The remaining allegations of alleged prosecutorial misconduct relate to whether the prosecutor failed to abide by the trial court's ruling on the defense's motion in limine to exclude evidence of the Defendant's other crimes, wrongs, or acts. *See* Tenn. R. Evid. 404(b). The evidence in question consisted of the anticipated testimony of Mr. Crisp about his observations of the Defendant engaging in apparent drug sales on the night Mr. Crisp and the other bounty hunters arrested the Defendant and about the Defendant's outstanding arrest warrants.

The trial court found that the State had not presented clear and convincing evidence that the Defendant engaged in drug transactions during events which occurred during the bounty hunters' surveillance of the Defendant before he reached the scene where he was apprehended. Thus, the court ruled that the State could not present evidence of what occurred at those locations but could present evidence that they were tracking the Defendant in order to arrest him "based on the failure to appear warrant."

With regard to the drug activity that Mr. Crisp observed as he approached the Kia to arrest the Defendant, the trial court found that the State had presented clear and convincing evidence that the Defendant possessed drugs in a plastic bag "that he was resealing after he opened the door." The court noted that "30-some-odd grams of cocaine" were seized. The court found clear and convincing evidence that "the material issue exists that goes to intent" for the Defendant's charge of possession with intent to sell a controlled substance because the evidence related to "what he was doing immediately before his arrest was effectuated."

Relative to the Defendant's other charges, the trial court ruled that the State could present evidence that the bounty hunters were looking for the Defendant due a failure to appear but that it would "limit it to not mentioning the type of charges in which they were looking for [the Defendant]."

During the prosecutor's opening statement, she said, "So ladies and gentlemen, you're going to learn that back on January 21st, 2022, here in Knox County, that [the Defendant] had -- had missed court. And so the Judge when he missed court had issued a failure to appear. So he had outstanding warrants for his arrest." The prosecutor also said that Mr. Crisp was looking for the Defendant "because of these outstanding warrants." Defense counsel made no contemporaneous objection to this argument.

During the State's direct examination of Mr. Crisp, he referred to the Defendant's having outstanding "warrants." Mr. Crisp said that his employer had an agreement with another bonding company to locate "some of their forfeitures" and that he received documentation from the other bonding company that included "certified copies of the warrants." Mr. Crisp also made two references to the bounty hunters having "verified the warrants" and "confirmed the warrants" with the sheriff's department before approaching the Defendant. Mr. Crisp said the bounty hunters received a call from KPD "indicating that they were actually actively looking for [the Defendant] as well." The defense did not object to the references to the Defendant having multiple outstanding "warrants" as being contrary to the trial court's prior ruling, although the defense later raised the issue in the amended motion for a new trial as one of evidentiary error, but not one of prosecutorial misconduct. On cross-examination of Mr. Crisp, defense counsel revisited the issue of the

Defendant's other charges when he asked Mr. Crisp, "Well, you testified earlier that you learned they were also looking for [the Defendant]; is that not correct?" Mr. Crisp responded, "That's correct. I know that they were looking for him on separate charges."

During the State's direct examination, Mr. Crisp also testified about following the car the bounty hunters thought the Defendant might be driving and watching it while trying to make a visual identification of the Defendant. Mr. Crisp said they saw the Defendant roll down the car's window several times, but they were unable to see the Defendant until the Defendant got out of the car at a business, where the Defendant "made contact with two or three individuals." Mr. Crisp explained that this location was not suitable for the bounty hunters to arrest the Defendant and that they followed him to another business, where Mr. Crisp approached the car and observed the following:

A pedestrian had approached him. We had seen this happen a few times. A pedestrian approached him and he – there was an exchange between him. He had a plastic baggie in his hand. I could tell he was smoking something. I didn't know what he was smoking at that moment, but I could see he was smoking something. There was an exchange between him and the person at the window.

Defense counsel did not object to this testimony as being contrary to the trial court's prior ruling but raised the issue in the amended motion for a new trial as one of evidentiary error but not as one of prosecutorial misconduct.

Upon review, we conclude that the Defendant did not waive the issue of prosecutorial misconduct as to the prosecutor's statement during voir dire. The Defendant moved for a mistrial after the prosecutor stated her personal opinion about the Defendant's guilt during voir dire, and the Defendant alleged in the motion for a new trial that the trial court's denial of the mistrial motion was error. The motion for a mistrial had been grounded in the prosecutor's alleged misconduct. However, as to the remaining allegations of prosecutorial misconduct, the Defendant failed to object contemporaneously to the prosecutor's opening statement and to the testimony of Mr. Crisp. The Defendant raised issues in the motion for a new trial alleging that the trial court erred in allowing Mr. Crisp to testify about matters which the court had previously ruled would be inadmissible. He did not raise an issue in the motion for a new trial about the prosecutor's opening statement.

"Before a defendant may raise an issue on appeal as the basis for seeking a new trial, the defendant must present the issue to the trial court in a timely, written motion for a new trial." *State v. Tony Lamons Gooch, III*, No. M2022-01395-CCA-R3-CD, 2024 WL 2814624, at *4 (Tenn. Crim. App. June 3, 2024) (quoting *State v. Christopher James Funk*,

Sr., No. E2022-01367-CCA-R3-CD, 2023 WL 7130289, at *2 (Tenn. Crim. App. Oct. 30, 2023)), *perm. app. denied* (Tenn. Nov. 20, 2024); *see* T.R.A.P. 3(e); Tenn. R. Crim. P. 33(b). Therefore, all issues not raised in a motion for a new trial are considered waived, except for sufficiency of the evidence and sentencing. *State v. Bough*, 152 S.W.3d 453, 460 (Tenn. 2004); *see* T.R.A.P. 3(e) (“[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the . . . misconduct of jurors, parties or counsel . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.”). Although the Defendant raised issues in the trial court related to the court’s ruling on the mistrial motion, he did not raise prosecutorial misconduct issues related to the opening statement and Mr. Crisp’s testimony. We will consider the issue related to the prosecutor’s statement during voir dire. Our consideration of the remaining allegations is waived.

Turning to the prosecutor’s statements during voir dire, she stated, “I believe [the Defendant’s] guilty[.]” It is beyond question that this was improper, and the trial court properly recognized it as such. *See* Tenn. Sup. Ct. R. 8, R.P.C. 3.4(e)(3). This rule is well-established in Tennessee. *See, e.g., State v. Henley*, 774 S.W.2d 908, 911 (Tenn. 1989); *Thornton*, 10 S.W.3d at 235; *Lackey*, 578 S.W.2d at 107. This court takes note that the prosecutor in the present case is an experienced assistant district attorney general who has tried numerous cases before a jury.

Indeed, this case is not the first time this court has been called upon to consider whether this prosecutor’s similar conduct was prosecutorial misconduct. In *State v. Alonzo Hoskins*, No. E2020-00052-CCA-R3-CD, 2021 WL 2964331 *19-20 (Tenn. Crim. App. July 15, 2021), *perm. app. denied* (Tenn. Dec. 8, 2021), the prosecutor repeatedly addressed the non-testifying defendant directly during rebuttal argument. Her statements to the defendant included, “You, [the Defendant], you, sir, are responsible for pulling out that gun, pointing that gun at [the victim] -- and that’s the sad thing, is that y’all could have taken the property without killing the man,” and “All you had to do was take his property. It’s not like he was going to tell if you stole from him, all right, ‘cause in order for him to tell, he’d have to tell on himself for being a dope dealer. Didn’t have to shoot him in the back.” *Id.* at *19. This court held that the prosecutor’s addressing the defendant directly and her statements were improper, but noted the curative instruction the trial court gave and held that the error was harmless. *Id.* at 19-20. In *Bendale Romero v. State*, E2018-00404-CCA-R3-PC, 2019 WL 2173545, at *6 (Tenn. Crim. App. May 20, 2019), a post-conviction case, this court considered an ineffective assistance of counsel claim related to his trial counsel’s failure to object to various instances of prosecutorial misconduct. In the context of analyzing the ineffective assistance of counsel claim, this court concluded that the prosecutor had improperly stated her personal opinion about the credibility of witnesses. *Bendale Romero*, 2019 WL 2173545, at *6.

In the present case, the trial court gave a curative instruction after the prosecutor's improper statements during voir dire. Although egregious, the comments were brief in the context of the voir dire process and the trial itself. The evidence of the Defendant's guilt was overwhelming. He was apprehended by bounty hunters and was in possession of a large amount of crack cocaine, weapons, multiple cell phones, and a large amount of cash. We conclude that, in the context of this case, the error was harmless. *See Judge*, 539 S.W.2d at 344; *see also Goltz*, 111 S.W.3d at 5-6.

The Defendant is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

s/ Robert H. Montgomery, Jr.
ROBERT H. MONTGOMERY, JR., JUDGE