IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 14, 2023 Session

STATE OF TENNESSEE v. RANDALL A. MURPHY

Appeal from the Circuit Court for Williamson County
No. 2018-CR-13210, I-CR180123 Michael W. Binkley, Judge

No. M2022-00396-CCA-R3-CD

The Defendant, Randall Murphy, appeals his convictions by a Williamson County Circuit Court jury of aggravated kidnapping, reckless aggravated assault, aggravated assault, criminal impersonation of law enforcement, and domestic assault. The Defendant argues: (1) the trial court committed reversible error when it misstated the law and provided its personal opinion on the determinate element of the kidnapping offense; (2) the trial court expressed its personal opinion regarding the testimony of one of the State's key eyewitnesses; (3) the trial court improperly excluded evidence that the victim had consumed alcohol with her prescription medications at the time of the alleged offenses; (4) the trial court failed to give any weight to the applicable mitigating factors before imposing the maximum sentence for the aggravated kidnapping conviction; and (5) the cumulative effect of the trial court's errors entitles him to a new trial on all counts.[1] After review, we reverse and remand this case for a new trial on the aggravated kidnapping charge in Count 1 and affirm the remaining counts.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Remanded for New Trial

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which J. ROSS DYER and TOM GREENHOLTZ, JJ., joined.

Brennan M. Wingerter, Assistant Public Defender—Appellate Director (on appeal); Bo Ladner (at trial), Nashville, Tennessee, for the Defendant-Appellant, Randall A. Murphy.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Kim R. Helper, District Attorney General; and Jessica N. Borne, Assistant District Attorney General, for the Appellee, State of Tennessee.

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[1] We have reordered the Defendant's issues for clarity.

OPINION

On February 12, 2018, the Williamson County Grand Jury indicted the Defendant for especially aggravated kidnapping in Count 1, aggravated assault in Counts 2 and 3, criminal impersonation of law enforcement in Count 4, and domestic assault in Count 5.

The following is a brief summary of the trial evidence relevant to the issues on appeal. Andrea Arnold, the victim, testified that in December 2017, she and the Defendant had been dating intermittently for less than a year. She described their relationship as "[o]n again, off again" and "[i]ntense" because the Defendant routinely showed up at her home, even when she "asked him not to."

The victim said that on the night of December 22, 2017, she met the Defendant for dinner and a movie to determine whether their relationship could be saved. After they talked at dinner, the victim "didn't feel right" about the relationship. The victim drank a bottle of wine during the movie, and at the end of the movie, the victim went to the restroom and decided to leave the theater. When she exited the theater, she saw the Defendant was standing in front of her car. Although the victim hid behind some pillars with the hope the Defendant would leave, he eventually spotted her.

The victim said that she ended up in her car and that the Defendant ended up in his truck, and during a phone call, the Defendant suggested that they "go home." She explained that although she and the Defendant did not live together, they often stayed together at the victim's home. When the Defendant made the comment about going home, the victim realized that the Defendant was "still not understanding that her home [wa]s not his home." She decided to end the relationship, but "given the intensity" of their interactions that night, she concluded that it would be "safer to be around other people" when they broke up. The victim lived alone, but she believed, based on her conversations with the Defendant, that the Defendant lived with roommates, even though she had never met them. For that reason, she went to the Defendant's apartment rather than back to her home.

The victim did not know which unit belonged to the Defendant because she had never been inside his apartment before, although she had been to his apartment complex. She parked her car and left her purse and cell phone inside because she did not intend to stay long. She followed the Defendant to one of the apartments, and he let her inside. He locked the door behind them, and she realized that no one else was there. The victim observed that the apartment was mostly unfurnished and that two of the bedrooms were "completely empty." She said the Defendant's bedroom was at the end of a hallway, and he "push[ed] [her] down the hallway." The victim said she was "scared" because things "just didn't feel right." The Defendant shut the door to his bedroom and then locked it.

He then stuck out his hand, and she handed him her keys. The Defendant then told her she "just needed to go to sleep."

The victim said she tried to be "complacent" and accepted the Defendant's offer of a t-shirt in which to sleep. She hoped that she would be able to grab her keys, which the Defendant had put down, after he fell asleep. She lay down on his mattress, but the Defendant did not join her. Instead, the Defendant "stood by the door" and "hovered" over her, which made her feel "very uneasy."

The victim informed the Defendant that she was going to go to her home, and he said she could "go any time." She put on her clothes and picked up her keys, and the Defendant "pushed" her "into the wall," which caused her to hit her head and fall down on the mattress. The victim immediately realized she "was in a very dangerous situation" and did not know how she was going to escape.

The victim responded by announcing that they were "finished" and their relationship was "over[,]" but the Defendant did not allow her to leave. Instead, the Defendant "knelt down" on the mattress and moved toward her, but the victim used her legs to keep him away. The Defendant became angry, and the victim started to worry that she "wasn't going to leave under any circumstances." The Defendant told her she could not leave "because [she] was intoxicated [and] couldn't drive a car" and that she needed to "stop fighting him and just lay down and sleep it off." However, the victim insisted that she was not intoxicated that night. The victim offered to "call an Uber" to take her home, but the Defendant refused to let her use his phone, and the victim had left her phone in her car.

The victim said the Defendant suddenly "became violent." He "ripped" her shirt, and threw her "down, up, down, back and forth throughout the room." The victim said she ended up face-down on the mattress with the Defendant using his elbow to put her in a "choke-hold[.]" The victim said she "couldn't breathe" and "passed out." However, the victim denied having a seizure that night and asserted that she had never had a seizure in her life. When she regained consciousness, the Defendant began throwing her around again, and she ended up "in a pillow" with "his hand on [her] head" so she "couldn't breathe." The victim responded by "grabbing [the Defendant] in the groin and squeezing."

At that point, the victim said she was in "pure survival mode." She felt "completely helpless" and "had to basically become submissive and just endure . . . the pain." She said she was in physical pain because the Defendant had thrown her against a wall, choked her, and shaken her.

In an attempt to escape, the victim became submissive and began talking to the Defendant about what their relationship would look like "moving forward." The Defendant

tossed a Bible between them, and the victim picked it up and began thumbing through it. As she looked for a scripture passage to read, the Defendant "grabbed it immediately out of [her] hand," ripping some pages, and informed her that she "needed help."

The victim was unsure what type of help the Defendant meant, but she knew she needed medical treatment for her injuries. As they talked about what to do, the Defendant initially agreed to take her to the hospital where her father was a patient and then "turn himself in." However, the victim eventually agreed to "check [her]self into the psych ward" at the hospital so he would allow her to leave his apartment. At that time, the Defendant still had her car keys.

The victim got dressed, and before they left the room, the Defendant went over to his closet to get something. She saw the Defendant get "some sort of knife" out of a large bag as well as something that looked like a "crowbar that had . . . an orange handle on it . . . like something that you'd see in the movies where people would pop a lock on their car."

The Defendant then unlocked his bedroom door and led the victim to the front door of his apartment. The victim did not know why the Defendant would need a crowbar or a knife because "[i]t didn't align with what [they] had talked about." However, she acknowledged that she did not see anything in the Defendant's hands as he walked her out of the apartment. As the victim attempted to walk down the stairs to the parking lot, she felt intense pain in her ribs that prevented her from walking down the steps and required her to grab onto the Defendant's arm. She realized at that point that she had some broken ribs. The Defendant walked her over to the passenger side of her vehicle and opened the door. She immediately reached for her phone and purse that she had left on the seat, and the Defendant pushed her and grabbed them from her. The victim believed, at that point, that if she got into the car, she was going to "die."

The victim began backing away one step at a time while the Defendant was looking at something in her car. She scanned the area for people and cars and a place to hide and then "took off running." The victim ran through a puddle, and when she heard the Defendant running behind her, she began screaming for help. The Defendant jumped and tackled her to the ground and twisted her arm "in some military police officer way" that broke her elbow. The Defendant then zip-tied her wrists. When the victim started flailing her legs, the Defendant grabbed one of them. The victim told the Defendant to let her up because she was injured, and then she heard the voice of someone who had heard her screaming for help. When one of the witnesses asked what was going on and told the Defendant to get off of her, the Defendant replied that he was "law enforcement" and "she's sick and she needs help." The victim insisted that the Defendant was not law enforcement and begged for the witness to help her. Shortly thereafter, the police arrived on the scene. The victim said that she underwent surgery to put a metal plate in her elbow to fuse it

together, which left a scar and affected her mobility. She also said she received staples in her head, sustained cracked and bruised ribs, and sustained bruises, particularly around her neck.

Edward Clayton Fox testified that he was awake at a nearby apartment when he heard someone "screaming for help." He exited his apartment and heard "some muffled kind of yelling" that sounded like someone saying, "[B]etter shut the fuck up." When he searched for the individuals causing the disturbance, he saw the Defendant on top of the victim, who was "clearly hurt." He observed the Defendant "shaking" the victim and "speaking at her very angrily."

Fox asked the victim if she was okay and pulled out his cell phone. The victim screamed for help and asked Fox to get the Defendant off of her. Fox immediately called 9-1-1 on his phone, and the Defendant zip-tied the victim's wrists together. Fox said the Defendant then told him something like, "[T]here's no reason for you to call the police; I'm an officer. I'm detaining this woman." Fox knew the Defendant was not telling the truth because "nothing about it looked right." The Defendant then said, "I'm law enforcement, . . . she's sick and she needs help," and the victim objected and begged for someone to help her.

When Fox began detailing the circumstances to the 9-1-1 dispatcher, the Defendant immediately began contradicting everything Fox said. The Defendant then pulled out his phone and looked "as if he was talking to dispatch." Fox said that when other witnesses arrived on the scene, the Defendant repeatedly told them that he was "an officer," which resulted in "a lot of them" leaving.

Chris Hinson, who exited his apartment after hearing a woman screaming for help, testified that he saw the Defendant "on top of" the victim in the parking lot. He said the Defendant's knee was on the victim's chest, and the Defendant was holding her down. Hinson also noted that the victim's hands were zip-tied. Henson observed that Fox was a few feet away, and he heard the victim saying, "[P]lease help me, get him off . . . me." At the time, Hinson said the victim was incapable of moving and was "in dire need of assistance." When Hinson asked why the victim's hands were zip-tied, the Defendant replied, "I'm a cop, asshole." Because Hinson was unsure about what was happening, he waited with Fox until the police arrived.

Officer Kenneth Gibbs of the Franklin Police Department testified that when he arrived at the scene, the Defendant was "squatting" on top of the victim. The Defendant's right knee was on the victim's throat, his left knee was on her abdomen, and he was holding her hands against her chest. Officer Gibbs approached the Defendant, grabbed his shoulders, ordered him to get "off of" the victim, and then handed the Defendant to his

partner. He noted that the Defendant appeared uninjured and had the victim's car keys in his pocket.

When Officer Gibbs took the victim to his patrol car, he discovered that the victim's wrists were zip-tied so tight that he was afraid he would cut the victim if he used his pocketknife to remove it. He noted that the victim was "beat up pretty bad," her left elbow was bleeding, and she had a cut on her head. She also had a "lot of scrape marks and cut marks" as well as some "bruise[s] and abrasions.

Detective Sergio Guerra with the Franklin Police Department testified that a "small droplet of blood" was found on a sheet on the mattress in the Defendant's bedroom. Although officers found a large, blue U.S. Coast Guard duffle bag containing tactical gear in the closet, they never found a knife or crowbar.

The Defendant testified that around 1:30 p.m. on the afternoon of December 22, 2017, he went to the victim's house, and they each had a drink while the victim talked to her mother on the phone about her father being admitted to the hospital. He said that during this conversation, the victim took "a couple of pills" from her pill case. After the victim hung up, she told the Defendant that the phone conversation had made her upset. The Defendant said that over the next three hours, the Defendant consumed one vodka tonic, and the victim consumed two.

Around 5:00 p.m., the Defendant went to a bar, and the victim surprised him by showing up there around 8:00 p.m. They sang Karaoke and played darts for thirty minutes to an hour. Although the victim left the bar without the Defendant, she later sent him a text message, inviting him to a movie. The Defendant met the victim at the theater, where the victim ordered a bottle of wine, and they ate some food. He said the victim got irritated with their waiter, and she went to the bathroom at the end of the movie. When the victim did not return to the movie and did not respond to his text messages, the Defendant waited for her outside the theater.

The Defendant noted that the victim had started her car remotely and then saw the victim hiding behind some of the theater's pillars. He texted her about what was going on and walked to his truck. The victim went to her car, and they decided to go home, which he understood to be her house. He said the victim "led the way" in her car, and he drove behind her because the victim "was kind of swerving." The Defendant said that at that time, he rented a single bedroom in an apartment but that the other bedrooms had not been occupied for the last two weeks. He explained that he usually stayed with the victim at her home and only stayed in his apartment when they were not getting along. Although the victim had never stayed at his apartment, she had been to the complex before. The Defendant said that when they arrived at his apartment, they went inside, and he locked the

door. He showed her his bedroom and went to get a glass of water. When he returned to his room, the victim gave her car keys to him, and he put them on the couch.

The Defendant said they went to sleep, but he woke up when the victim began "biting" him and "grabbing" his "private area." He pushed her away from him, turned on the light, and asked her what she was doing. The Defendant said the victim began screaming at him and threw some things at him, including a shoe and then began to "convulse" and started "flopping like a fish on the bed" for approximately ten seconds. The Defendant became worried and believed that the victim was having a seizure. He said that when this episode ended, the victim opened her eyes, looked at him, and asked him why he was not in the bed with her.

The Defendant "didn't know what else to do," so he got his grandmother's Bible from the closet, but the victim snatched it away from him and began "ripping pages out of it." He took the Bible away from her and told her she needed to go to the hospital. Although the Defendant knew the victim needed medical assistance after her seizure episode, he did not call 9-1-1 at that time. The victim eventually said she would go to the hospital if the Defendant agreed to turn himself into the police because he had pushed her. The Defendant obtained the zip-tie from his United States Coast Guard gear bag, which was in his closet, and then promised to restrain himself with the zip-tie at the hospital as "an act of good faith." He put this zip-tie in his back pocket.

The Defendant got dressed. Because the victim had urinated on herself during her seizure, he gave her a pair of his boxers to wear. The victim got dressed, and he picked up her car keys. The Defendant started the victim's car with the remote, and she walked behind him outside. He claimed during the time together in the apartment, the victim never said she was in pain and never told him she wanted to leave. The Defendant said he opened the passenger-side door of the victim's car for her, and the victim "pause[d]" before she sat down. The victim suddenly picked up a "stainless steel coffee cup" containing vodka tonic, threw it at his head, and ran away.

The Defendant said he was "in shock," but he "took off after her." He "kind of jogged" to catch up with her and asked her what was going on. As soon as he approached her, the victim took a swing at him, and the Defendant "reacted" by grabbing the victim's arm and taking her "down to the ground." He acknowledged that he was still intoxicated at the time and that the victim appeared to be intoxicated. He claimed his "takedown" was an instinctive reaction from his training in the Coast Guard and that he took her down "[a]s easy as [he] possibly could." The Defendant asserted he did not intend to hurt the victim and did not realize that she had gotten hurt. He acknowledged that he may have used more force than he intended because he had been drinking.

The Defendant said that when he got the victim on the ground, he "rolled her over" to make sure she was okay, and the victim started "flailing all over the place." He realized he had "no choice . . . but to call 911" because things had "gone too far." The Defendant also decided that, because he did not want the victim to get hurt and did not want her to keep hitting him, restraining the victim with the zip-tie was "maybe . . . the best solution[.]" He zip-tied the victim's wrists together in front of her body. The Defendant realized that onlookers had started gathering, and he called 9-1-1. At the time, he said he did not know that the victim had a broken arm because he had only observed a cut on her elbow. He did not know that the victim had any other wounds and did not know she was injured. The Defendant claimed he did not discover the full extent of the victim's injuries until he was in jail.

The Defendant did not recall telling the onlookers that he was a police officer or cop but acknowledged that he may have told them he was "prior service law enforcement officer." He said that when the Franklin police officers arrived at the scene, he had his knee on the victim's stomach, but his "body weight was actually on the . . . pavement." He said he had already started emptying his pockets on the pavement at the time one of the officers detained him. The Defendant said he was "a veteran of the United State Coast Guard" and during his four-year Coast Guard service, he received law enforcement training, which included instruction on handcuffing, self-defense, and takedown techniques. The Defendant asserted that he received the zip-tie during his training for "alien migrant interdiction operations," which at times included arrests of large numbers of people. He denied possessing a knife or a crowbar in the duffle bag in his closet.

The Defendant asserted that the victim seemed so intoxicated that she did not know what she was doing. Although the Defendant admitted he was also intoxicated, he claimed he was "within [his] faculties" and "understood some of the things [he] was doing." The Defendant acknowledged that he could not remember everything he told the detective and insisted that there were "certain things that [he] didn't want to say" during his interview because he did not want them used against the victim.

During the State's rebuttal, Detective Guerra testified that the Defendant never stated during his interview that the victim threw a shoe at him, attacked him in the parking lot, urinated on herself in his bedroom, or had a seizure. He said he found no evidence of urination on the mattress in the Defendant's bedroom.

At the conclusion of trial, the jury convicted the Defendant of the lesser-included offense of aggravated kidnapping in Count 1, the lesser-included offense of reckless aggravated assault in Count 2, aggravated assault in Count 3, criminal impersonation of law enforcement in Count 4, and domestic assault in Count 5.

At the sentencing hearing, the court imposed the maximum sentence of twelve years for the aggravated kidnapping conviction in Count 1, two years for the reckless aggravated assault conviction in Count 2, three years for the aggravated assault conviction in Count 3, and eleven months and twenty-nine days for the misdemeanor criminal impersonation of law enforcement conviction and domestic assault conviction in Counts 4 and 5. The court then merged Count 2 with Count 1 and merged Count 5 with Count 3 and then ordered the sentences served concurrently for an effective sentence of twelve years in prison at one hundred percent.

Thereafter, the Defendant timely filed a motion for new trial, arguing in pertinent part, that the trial court erred in ruling that the defense was not allowed to elicit or reference the multiple narcotic medications used by the victim or the effects these medications might have had on the victim's mental state at the time of the incident in this case; that the trial court erred in commending a witness for his testimony and for his actions the night of the incident; that the trial court erred when, in response to a question from the jury about the interpretation of the language regarding "kidnapping," the court stated its opinion on the definition and the appropriate course of action in convicting the Defendant; and that he was denied a fair trial by a combination of the foregoing errors. After the hearing, the trial court entered a written order denying relief.

Following entry of this order, the Defendant timely filed a notice of appeal.

ANALYSIS

I. Supplemental Jury Instructions. The Defendant argues that the trial court's supplemental instructions, which were given in response to the jury's questions during deliberations about the determinant element of the kidnapping offense, misled the jury on the applicable law and included the trial court's personal opinion that only a very limited view of the facts and circumstances would be relevant to the jury's assessment of the evidence. Specifically, the Defendant asserts that the trial court erred by "launch[ing] into an extensive verbal explanation of its 'opinion' on the pattern instructions for kidnapping offenses" and by stating that "only one of the six factors [were] relevant when evaluating the kidnapping offense." He also asserts that because the trial court failed to follow the correct procedure for giving a supplemental instruction, repeatedly provided inaccurate statements of law regarding the White factors, and gave its extensive opinion from the bench during the jury's deliberations, there is no way to guarantee that the jury followed the original instructions that were accurately provided. The Defendant claims that because the trial court's instructional error was prejudicial, he is entitled to a new trial on the offense of aggravated kidnapping in Count 1. In response, the State asserts that when the trial court's supplemental jury instruction is viewed within the context of the entire jury charge, it is not inaccurate or misleading and does not constitute extraneous influence by the trial

court. After carefully evaluating the record, we conclude that the trial court's supplemental instructions were prejudicially erroneous because they failed to fairly submit the legal issues and misled the jury as to the applicable law.

In State v. White, 362 S.W.3d 559, 578 (Tenn. 2012), the Tennessee Supreme Court held, "[T]rial courts must ensure that juries return kidnapping convictions only in those instances in which the victim's removal or confinement exceeds that which is necessary to accomplish the accompanying felony." The court explained that "[w]hen jurors are called upon to determine whether the State has proven beyond a reasonable doubt the elements of kidnapping, aggravated kidnapping, or especially aggravated kidnapping, trial courts should specifically require a determination of whether the removal or confinement is, in essence, incidental to the accompanying felony or, in the alternative, is significant enough, standing alone, to support a conviction." Id. The court emphasized that "whether the evidence, beyond a reasonable doubt, establishes each and every element of kidnapping, as defined by statute, is a question for the jury properly instructed under the law." Id. at 577.

Trial courts have a duty to give a "'complete charge of the law applicable to the facts of a case.'" State v. James, 315 S.W.3d 440, 446 (Tenn. 2010) (quoting State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). When reviewing challenged jury instructions, we must look at the entire jury charge as a whole in determining whether prejudicial error has been committed. In re Estate of Elam, 738 S.W.2d 169, 174 (Tenn. 1987); see State v. Forbes, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995) (citing State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994)). An erroneous or inaccurate jury instruction, rather than an omitted instruction, may be raised for the first time in a motion for new trial. State v. Lynn, 924 S.W.2d 892, 898-99 (Tenn. 1996) (citing Tenn. R. Crim. P. 30(b)).

Because questions regarding the sufficiency of jury instructions are a question of law, the standard of review is de novo with no presumption of correctness. State v. Clark, 452 S.W.3d 268, 295 (Tenn. 2014). An instruction is "'prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.'" State v. Majors, 318 S.W.3d 850, 864-65 (Tenn. 2010) (quoting State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005)); see State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997) (citing Forbes, 918 S.W.2d at 447; Graham v. State, 547 S.W.2d 531, 544 (Tenn. 1977)). Even if a trial court errs in instructing the jury, the error may be harmless. State v. Williams, 977 S.W.2d 101, 104-05 (Tenn. 1998). An instructional error is harmless unless, when "considering the whole record," the error "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); see State v. Rodriguez, 254 S.W.3d 361, 372 (Tenn. 2008).

A trial court has the authority to respond to jury questions with supplemental instructions. State v. Bowers, 77 S.W.3d 776, 790 (Tenn. Crim. App. 2001) (citing Forbes, 918 S.W.2d at 451). The "appropriate course of action" for the trial court in responding to a question from the jury is "to bring the jurors back into open court, read the supplemental instruction . . . along with a supplemental instruction emphasizing that the jury should not place undue emphasis on the supplemental instructions, and then allow the jury to resume its deliberations." Id. at 791. The failure to follow the proper procedure is subject to harmless error analysis, and reversal is not required if the defendant has not been prejudiced. Id.; State v. Tune, 872 S.W.2d 922, 929 (Tenn. Crim. App. 1993).

When a trial court repeats instructions or gives supplemental instructions, the instructions must be:

> (1) appropriately indicated by questions or statements from jurors, or from the circumstances surrounding the deliberative and decisional process, (2) comprehensively fair to all parties, and (3) not unduly emphatic upon certain portions of the law to the exclusion of other parts equally applicable to the area of jury misunderstanding or confusion.

Berry v. Conover, 673 S.W.2d 541, 545 (Tenn. Ct. App. 1984); see State v. Richard William Phillips, No. E2021-01070-CCA-R3-CD, 2022 WL 17694167, at *2 (Tenn. Crim. App. Dec. 15, 2022), perm. app. denied (Tenn. Apr. 17, 2023).

Here, the Defendant was charged in Count 1 with especially aggravated kidnapping as well as the lesser-included offenses of aggravated kidnapping, false imprisonment, and attempted false imprisonment. As a result, the trial court provided the following White instruction during the jury charge for the especially aggravated kidnapping offense and its lesser-included offenses:

> To find [the Defendant] guilty of this offense, you must also find beyond a reasonable doubt that the removal or confinement was to a greater degree than that necessary to commit the offense of Aggravated Assault as charged in counts 2 and 3, and Domestic Assault as charged in count 5. In making this determination, you may consider all the relevant facts and circumstances of the case, including but not limited to the following factors:
>
> A. the nature and duration of [the victim's] removal or confinement by [the Defendant];

B. whether the removal or confinement occurred during the commission of the separate offense;

C. whether the interference with [the victim's] liberty was inherent in the nature of the separate offense;

D. whether the removal or confinement prevented [the victim] from summoning assistance, although [the Defendant] need not have succeeded in preventing [the victim] from doing so;

E. whether the removal or confinement reduced [the Defendant]'s risk of detection, although [the Defendant] need not have succeeded in this objective; and

F. whether the removal or confinement created a significant danger or increased [the victim]'s risk of harm independent of that posed by the separate offense.

Unless you find beyond a reasonable doubt that [the victim]'s removal or confinement exceeded that which was necessary to accomplish the alleged Aggravated Assault and Domestic Assault and was not essentially incidental to it, you must find [the Defendant] not guilty of Especially Aggravated Kidnapping.

During deliberations, the jury sent two written questions to the trial court, asking it to "explain" the above White instruction and the definition of the term "confinement" that was given immediately after the White instruction. The trial court reviewed the instruction with the State and defense counsel, asserting that the instruction would be clearer if it provided that "the removal or confinement . . . took more time than necessary to commit the offense." Although the State agreed with the trial court's interpretation, defense counsel replied that the White instruction intentionally used the phrase "to a greater degree" rather than "that the confinement took longer" and that the instruction specifically directed the jury to consider the factors "A through F" when determining whether the "removal or confinement was to a greater degree than that necessary to commit the offense." Defense counsel also noted that "time is one factor listed" but there were "a lot of other things to consider" in the other factors.

The trial court insisted that the "real issue" for the jury was determining the meaning of the phrase "to a greater degree," which it interpreted as whether the confinement took "longer than necessary . . . to commit the offense[.]" The court stated that the jury did not have to consider the other factors if it did not want to because those factors were

"suggested." After the court stated that it thought "we're saying the same thing" and that "we're talking about a time element here," defense counsel replied his "only concern" was that he "didn't want the jury to discount the other factors that are listed" in the White instruction." The trial court stated that it understood what defense counsel was saying and respected that. It then said it believed the other factors were "examples of how the time may be lengthened or shortened . . ." When the court asked defense counsel if he agreed, defense counsel responded, "I understand what you're saying, Judge."

Once the jury returned to the courtroom, the trial court paraphrased the first sentence of the White instruction: "To find [the Defendant] guilty of this offense—we're talking about aggravated kidnapping—you must also find beyond a reasonable doubt that the removal or confinement was to a greater degree than that necessary to commit the offenses of aggravated assault as charged in counts two and three, and domestic assault as charged in Count 5."

The trial court asked if the "problem" was whether "[r]emoval or confinement was to a greater degree than that necessary," the jury responded "in the affirmative." Thereafter, the trial court provided the following statement to the jury:

> Okay. So let's look at it. This is what I believe it means, if you look at what we're talking about, kidnapping requires, y'all, removal or confinement. That's something we know. Okay, now, that is a time element offense. Kidnapping is restriction of someone's movement, generally. So this is saying, in my opinion; was the confinement or removal, did that take longer than the actual commission of the crime? You see what I'm saying? No? Well, okay. All right.

The trial court then suggested that the jury ask "the real question," which prompted the following exchange:

> Juror: So is it that injury happened after the confinement or during or is it all one big gathered confinement with injuries? Does the timeline of which injuries that were aggravated—does that make a difference when they happened in the course of this event? I don't—
>
> Trial Court: I don't think so. I don't believe it matters at all.
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> Juror: The sequence of events?
>
> Trial Court: No.

Juror: Okay.

Trial Court: I think what you have to figure out—and I want to be very careful here—I don't want to go too far. In looking at the charge, that's your baseline. That's what you really need to go back to, but understand what aggravated kidnapping is, and in order to do that, you look at the elements of what's required under the law. Okay. And I think it's saying that look, kidnapping, confinement, y'all got to figure out, you know, how much time is needed for confinement to make it aggravated kidnapping? Figure it out? Okay, figure it out. But what it's saying is—I think I'm going to repeat what I said—there are crimes that take a while to commit, there are some that don't take any time at all. With aggravated kidnapping[,] staying confined is an important element—that time. I think what they're trying to do is to compare[,] look if you hit somebody[,] aggravated assault, (indicating by hitting Judge's bench) that's aggravated assault if you hurt them and they're bleeding. How much time did that take? One second. Could take a little bit longer. Okay, I think what they're trying to avoid—I think and I'm talking way too much—is this well, you know, if we have aggravated assault, and they were held down for that one second of aggravated assault[,] is that kidnapping because they're confined for a second[?]

Juror: You're saying that one point is up for us to decide?

. . . .

Trial Court: Yes. And I would go back and read the definition of aggravated kidnapping. I know it's awful. I could give you exactly what I think, but I can't do that, what I think is not important. You are the finders of fact. Okay. So read that, figure it out, and then just remember the example I gave you. I think that's what they're trying to tell you in this really convoluted phrase and paragraph. I think that's what they're trying to say.

Thereafter, the State agreed with the trial court's aforementioned explanation, and defense counsel stated, "I think that makes sense."

A juror re-read the first sentence of the White instruction and then said, "I don't get it." Then the following exchange occurred:

> Trial Court: Okay. I'll try it again. Okay. The words are—
>
> Juror: The greater than part, what does it mean by greater than the aggravated assault[?]
>
> Trial Court: That's what I just talked about. It's hard—I wish the word—let me just tell you. So I'll try this.
>
> Juror: Does it mean it has to be worse than what the aggravated assault—
>
> Trial Court: It's a time element.
>
> Juror: It's only time.
>
> Trial Court: That's my opinion.

Both the State and defense counsel agreed with the trial court's explanation. The juror then replied, "Okay," and the trial court stated:

> Trial Court: Okay. Are we sure? Because that's the example. Let's do this, y'all. That the confinement—we know what that is—was it to a greater degree. Why don't we just say—but I'm not going to do it—suggest[] this; confinement took longer—the overall confinement took longer than it would take to commit aggravated assault, domestic assault, whatever it may be. You see what I'm saying?
>
> Juror: I got it.

When the trial court asked counsel for both parties if it had said anything wrong, the State said, "No, Your Honor[,]" and defense counsel replied, "I don't think so, Judge," but then stated, "The rest of the paragraph, I just want to make sure while we are all here that the rest of that paragraph is understood." At that point, the trial court told the jury:

> . . . [Y]'all the rest of that paragraph at the bottom? It says in making this determination, you may, don't have to, consider all the relevant facts and

> circumstances of the case. Sure. Sure you do, that's your prerogative. And then it says next—including, but this isn't an exhaustive list—the following factors. These are suggestions and ideas to hone in on, in my opinion, the time factor. I think.

The trial court then paraphrased the last sentence of the White instruction, stating: "Unless you find beyond a reasonable doubt that [the victim]'s removal or confinement exceeded—took more time—than was necessary to accomplish the alleged aggravated assault and domestic assault and was not essentially incidental to it, you must find [the Defendant] not guilty of especially aggravated kidnapping."

When the court asked if there were questions about this last sentence, the foreperson replied, "How you answered the first one helps me tremendously understanding this one." The trial court then asked counsel for both parties if it had made "a misstatement" in the counsels' opinion, and the State and defense counsel both replied, "No."

A. Misstatement of Law. First, the Defendant contends that the trial court's lengthy supplemental instructions, which focused on only one of the six factors relevant to kidnapping charges, constitute "reversible prejudicial error" because they "failed to fairly submit the legal issue and misled the jury on the law it was supposed to apply." See White, 362 S.W.3d at 580-81. He asserts that although two different jurors were struggling with how to properly weigh the White factors, the trial court instructed the jury to focus "only on time" when assessing the proof, which is referenced in only one-half of the first factor regarding the "duration of the victim's removal or confinement." Consequently, the Defendant argues that the jury was "effectively instructed to ignore the five other White factors—and any other facts or circumstances—that were relevant to its deliberations." The Defendant claims that the trial court's error was prejudicial because it provided a wholly inaccurate statement of the law and that the court's error was "compounded by the fact that it happened over nearly 10 pages of the transcript in response to the jury's questions during deliberations, which overshadowed and ultimately replaced the 10 pages of correct, written instructions that had previously been read to the jury as part of the original charge." The Defendant claims that because the record shows this erroneous supplemental instruction directly affected the jury's verdict, he is entitled to a reversal of his aggravated kidnapping conviction and a new trial on this count.

Here, the Defendant argues that the above exchange shows that the jury relied on the trial court's supplemental instruction rather than the pattern instruction or the original written instruction. He asserts that the trial court's definition of "greater degree," which focused only on the length of time to commit the offenses, was "not at all consistent with the law, the pattern instruction, or the original written charge."

The Defendant specifically takes issue with the following portion of the trial court's supplemental instruction, which instructed the jury to focus on whether the victim's removal or confinement exceeded the time needed to accomplish the alleged aggravated assault and domestic assault:

> Juror: Does it mean it has to be worse than what the aggravated assault—
>
> Trial Court: It's a time element.
>
> Juror: It's only time.
>
> Trial Court: That's my opinion.

The Defendant also finds problematic the following statement of the trial court, wherein the court's reminder about the substance of the White instruction consists of just a few sentences and is accompanied by the court's opinion that the jury should focus on the time factor:

> It says in making this determination, you may, don't have to, consider all the relevant facts and circumstances of the case. Sure. Sure you do, that's your prerogative. And then it says next—including, but this isn't an exhaustive list—the following factors. These are suggestions and ideas to hone in on, in my opinion, the time factor. I think.

The Defendant argues that "[t]he rest of the [White] statutory factors were overshadowed by the trial court's focus on the one factor of time and its opinion that 'only time' mattered." He also claims that the trial court's "one brief nod" to "all the relevant facts and circumstances of the case" and the trial court's "one vague reference" to "the following factors," which were not restated for the jury, "could not possibly overcome the substantial harm done by the trial court's otherwise erroneous instructions."

With regard to this issue, the State argues that even if the trial court's supplemental instructions were inaccurate and misleading, "any error was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming, and all of the other White factors favored the State." The State then engages in a meticulous analysis of the sufficiency of the evidence for the aggravated kidnapping offense for the purpose of showing the harmlessness of this error.

In response, the Defendant claims the State's sufficiency analysis "usurps the role of the jury and ignores the correct appellate procedure for reviewing erroneous White instructions." He claims that the jury was clearly "struggling to interpret the facts,

indicating that the proof could have gone either way" and that "[b]ecause the jury did not understand the pattern White instruction and did not receive an accurate supplemental instruction, the trial court's error is not harmless beyond a reasonable doubt."

In this case, the trial court clearly failed to follow the proper procedure for providing the supplemental instructions to the jury, and this procedural error was compounded by the inaccurate substance of the supplemental instructions, which failed to fairly submit the legal issues and misled the jury as to the applicable law. The trial court's supplemental instructions focused only on time, which represented only a portion of the first White factor, and encouraged the jury to ignore the other five factors, as well as any other facts or circumstances that were relevant to the jury's deliberations. Cf. State v. Cecil, 409 S.W.3d 599, 613 (Tenn. 2013) ("Because the question of whether the removal or confinement of the victim was essentially incidental to the accompanying offense of assault is one for the jury to decide as a matter of fact, and the proof in this case could be interpreted in different ways, we cannot conclude that the absence of the White instruction was harmless beyond a reasonable doubt."). The record shows that the jury was struggling to determine whether the removal or confinement in this case "was to a greater degree" than that necessary to commit the offense of aggravated assault and domestic assault. While the trial court could have simply re-read all or part of the White pattern jury instruction in response to the jury's questions, the trial court inexplicably provided lengthy supplemental instructions that failed to provide an accurate statement of the law to be applied, created confusion for the jury, and generated a bias in favor of the State. Upon hearing the trial court's supplemental instructions, it is clear the jury was convinced that it would have to find the Defendant guilty of some form of kidnapping if the removal or confinement lasted one second longer that the aggravated assault or the domestic assault. Because the record shows that the supplemental instructions in this case were prejudicially erroneous, we must reverse and remand this case for a new trial on the aggravated kidnapping charge.

B. Trial Court's Personal Opinion. The Defendant also argues that the trial court's supplemental jury instructions constituted extraneous prejudicial information because they included the court's opinion about which facts the jury should consider in determining whether the Defendant had committed a kidnapping charge. He claims that the trial court's example of "hitting [the] Judge's bench" to show an assault that occurs in "one second" suggested to the jury that any facts beyond a "one second" assault would always meet the definition of kidnapping. The Defendant contends that the trial court's supplemental instructions demonstrated the court's personal opinion that only a very limited view of the facts and circumstances would be relevant to the jury's assessment of the evidence and that although the court reminded the jury that the facts were up to them to decide, the record shows the jurors "clearly wanted to know what the judge himself thought were important, and [the judge] told them very clearly it was his opinion that 'only time' mattered."

The Defendant points to the following supplemental instruction at the most problematic on this issue:

> With aggravated kidnapping[,] staying confined is an important element—that time. I think what they're trying to do is compare look if you hit somebody aggravated assault, (indicating by hitting Judge's bench) that's aggravated assault if you hurt them and they're bleeding. How much time did that take? One second. Could take a little bit longer. Okay, I think what they're trying to avoid—I think and I'm talking way too much—is this well, you know, if we have aggravated assault, and they were held down for that one second of aggravated assault[,] is that kidnapping because they're confined for a second[?]

The Defendant asserts that "the judge's example illustrated for the jury, through extraneous prejudicial information, what the judge personally believed the White instruction was intended to do: prevent a kidnapping conviction only when the victim is held down 'for that one second of aggravated assault'" because "[a]nything else, in the judge's self-proclaimed correct opinion, would be a substantial interference with the victim's liberty sufficient to support a kidnapping conviction." The Defendant notes that although the trial court reminded the jurors that they were the finders of fact and that what the court thought was "not important," the trial court also told the jury to "remember the example I gave you." The Defendant insists that when the jury compared the court's example of a "one second" assault with the substantially more complex facts of the instant case, "the jury was compelled to find that there was a substantial interference with [the victim]'s liberty in this case." He adds that "[i]f it truly were as simple as the trial court made it seem, there would be no need for the White instruction and its multi-factor, non-exhaustive list of factual considerations" and "juries could easily be instructed that any removal or confinement beyond a mere second or two would always be sufficient for a kidnapping conviction in addition to an assault or other offense against the same victim." Ultimately, the Defendant maintains that because the trial court's opinion on the White instruction was "inextricably intertwined with the jury's evaluation of the facts and evidence," the trial court's supplemental instructions "cannot be construed as anything other than an improper assertion of extraneous information from the trial court."

Although the State suggests that the Defendant waived this issue by failing to make a contemporaneous objection, by failing to clearly raise this issue in his motion for new trial, and by failing to cite authority that a trial court's erroneous explanation of the law constitutes extraneous influence, we conclude that the Defendant appropriately preserved this issue for our review.

Initially, we reiterate that a criminal defendant has the constitutional right to a trial "by an impartial jury." U.S. Const. amend. VI; Tenn. Const. art. I, § 9; see Tenn. Const. art. VI, § 9 ("Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."). A jury must render its verdict "based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge." State v. Adams, 405 S.W.3d 641, 650 (Tenn. 2013) (citing Caldararo ex rel. Caldararo v. Vanderbilt Univ., 794 S.W.2d 738, 743 (Tenn. Ct. App. 1990)). Consequently, a trial court must be "very careful not to give the jury any impression as to [its] feelings" or to "make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 407 (Tenn. 1989).

"When a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable." Adams, 405 S.W.3d at 650 (citing State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984)). "[E]xtraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case." Id. (citing Robinson v. Polk, 438 F.3d 350, 363 (4th Cir. 2006); Blackwell, 664 S.W.2d at 688-89; 27 Charles Alan Wright et al., Federal Practice and Procedure § 6075 (2d ed. 2012)). On the other hand, "[a]n improper outside influence is any unauthorized 'private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.'" Id. at 650-51 (quoting Remmer v. United States, 347 U.S. 227, 229 (1954)) (citing Blackwell, 664 S.W.2d at 689; Wright, Federal Practice and Procedure § 6075). "A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence" and once this is done, "a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless." Id. at 651.

Here, the Defendant argues that the trial court's supplemental jury instructions constituted extraneous prejudicial information because they included the court's opinion about which facts the jury should consider in determining whether the Defendant had committed a kidnapping charge. Our review of the record shows that the court's supplemental instructions were prejudicially erroneous because they failed to fairly submit the legal issues and misled the jury as to the applicable law, not because they constituted extraneous prejudicial information or any sort of improper outside influence. While the trial court came perilously close to invading the province of the jury by emphasizing "the time element" and providing its misguided example including facts that might have been related to the evidence presented at the trial, the trial court's error stemmed from the fact that it failed to provide the applicable law in its supplemental instructions. As such, while

we disagree that the instructions constituted extraneous prejudicial information in the form of the court's personal opinion about what facts should be considered, we agree that the instructions were prejudicially erroneous for the reasons we have stated above.

II. Trial Court's Comment to State's Eyewitness. The Defendant asserts that the trial court improperly expressed its opinion in favor of the State and against the Defendant when it told Edward Clayton Fox, one of the State's eyewitnesses, "Thank you for your courage that evening." The Defendant claims the trial court's comment went far beyond a "thank you" to a witness, which likely would have been harmless, and amounted to the court "explicitly thanking one of the State's key eyewitnesses for the actions he took to intervene on behalf of [the victim] during the incident in question." In response, the State asserts that the Defendant has waived this issue and that the trial court's comment does not warrant plain error relief. We agree with the State.

At trial, the State presented testimony from the two eyewitnesses who responded to the victim's screams and saw the Defendant repeatedly slamming the struggling and bound victim down in the parking lot. One of these eyewitnesses, Edward Clayton Fox, testified that, "to [his] horror," several other witnesses returned to their apartments after the Defendant claimed he was "an officer." Fox also stated that he was afraid that the Defendant was going to attack him for calling 9-1-1. On cross-examination, defense counsel asked if Fox had been under the influence of alcohol or drugs the night of this incident, and Fox replied, "No sir. I celebrated nine years sober last November." Just prior to excusing this witness at the conclusion of his testimony, the trial court made the following remark to Fox:

> All right. That means you're free to go. Let me say one thing[,] just an observation. I respect anyone who deals day[-]to[-]day with the addiction of alcohol. So I congratulate you as well. Also, just an observation[,] means nothing one way or the other, thank you for your courage that evening. It's hard to find. Thank you, sir. All right, you're dismissed.

Although the Defendant claims that he properly preserved this issue by raising it in his motion for new trial, we agree with the State that the Defendant waived this issue by failing to make a contemporaneous objection to the trial court's comment and by failing to request a curative instruction. See 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."); State v. Vance, 596 S.W.3d 229, 253-54 (Tenn. 2020) (rejecting argument that plenary review is available when no contemporaneous objection is made, but "the objection is raised in the motion for new trial"). Accordingly, the Defendant is not entitled to relief unless he has established plain error.

The plain error doctrine states that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. App. P. 36(b). In order for this court to find plain error,

> "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'"

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Id. at 283. "It is the accused's burden to persuade an appellate court that the trial court committed plain error." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing United States v. Olano, 507 U.S. 725, 734 (1993)). "[P]lain error must be of such a great magnitude that it probably changed the outcome of the trial." Adkisson, 899 S.W.2d at 642 (citations and internal quotations marks omitted).

In Tennessee, a judge is constitutionally prohibited from commenting on the credibility of witnesses or the evidence in a case. See Tenn. Const. art. VI, § 9 ("Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law"); see also U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"). However, "'not every comment on the evidence made by a judge is grounds for a new trial.'" State v. Hester, 324 S.W.3d 1, 89 (Tenn. 2010) (quoting Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 134 (Tenn. 2004)). This court must consider the trial court's comments in the overall context of the case when determining whether the comments were prejudicial. Id. (citing Mercer, 134 S.W.3d at 134); State v. Caughron, 855 S.W.2d 526, 536-37 (Tenn. 1993).

While conceding that the trial court's comments "exhibited the judge's personal belief that some aspect of the witness's conduct on the night of the crimes warranted commendation," the State asserts that the record clearly shows the court's comments did not adversely affect the Defendant's right to a fair trial. These comments effectively amounted to the court congratulating Fox on his sobriety and thanking him for "[his] courage that evening," although the court recognized that its observation "mean[t] nothing one way or the other[.]" We conclude that the trial court's comments were clearly

inappropriate because they bolstered the credibility of Fox's testimony. However, because the Defendant has failed to show that a substantial right was adversely affected or that consideration of the error is "necessary to do substantial justice" based on these comments, the Defendant is not entitled to plain error relief.

III. Exclusion of Evidence. The Defendant contends that the trial court erred in preventing him from cross-examining the victim about the effects of mixing her prescription medications, Adderall and Xanax, with alcohol because the victim was not a medical expert. He claims that "[t]his evidence was highly relevant to [the victim]'s credibility, . . . was capable of being established through her own lay testimony, and . . . would have made it more likely that she was impaired" or that the victim had a seizure on the night in question, as the Defendant claimed. The State responds that because the victim was not a medical expert, her opinion about the potential side effects of mixing her prescriptions with alcohol was inadmissible, and the trial court did not err in prohibiting this line of questioning by the defense. We conclude that although the trial court likely erred in precluding this line of cross-examination, this error was harmless beyond a reasonable doubt.

During a pre-trial motion hearing, the State explained that it had filed a motion in limine to preclude counsel or any witnesses from stating that the victim suffers from a diagnosed mental health issue of bipolar disorder or schizophrenia. Defense counsel asserted that it only intended to ask the victim what medications she was taking at the time of the incident and whether she felt her medications affected her state of mind. He argued that because the victim was taking Adderall and Xanax and had admitted to drinking the night of the incident, his inquiry was relevant to "not just in what happened, but the way that [the victim] remembered it . . ." The trial court stated that it saw "no relevance at all" with this evidence because "medications are designed to help prevent an issue that someone may have." Defense counsel countered that "these particular medications [were] not intended to be mixed with alcohol," and when the trial court questioned how the defense would prove that evidence, defense counsel replied that he would like to be able to ask the victim about it. The trial court held that the victim was not qualified to testify about the effects of mixing alcohol with her prescription medications and that this evidence was irrelevant. When the court indicated that it would grant the State's motion in limine, defense counsel stated, "[J]ust to be clear, are you saying that we're not allowed to ask [the victim] anything about any medication that she's on or that she was taking that day? Or just about [her] mental health diagnosis?" When the court again questioned what issue the medication would be relevant to, defense counsel replied, "[I]f we're asking what medication she was on and how much alcohol she had had to drink that night; I believe that's a question for the jury to determine how credible her memory would be." The State countered that this line of questioning was "not relevant to any aspect of the case that we're

trying for especially aggravated kidnapping, aggravated assault[,] and criminal impersonation." Thereafter, the following exchange occurred:

> Trial Court: Okay, first of all, any questions . . . touching on the mental health of the victim; [her] diagnosis condition, . . . whatever it is, cannot be asked. They're irrelevant to the issues at this trial. The way you framed them without any other evidence whatsoever, it cannot be allowed[.]
>
> Next, with regard to questions of prescription medication that she is taking. I find no issue that that question would be relevant to for the jury in deciding each one of the elements for which the Defendant is on trial. Do you, [defense counsel]?
>
> Defense Counsel: Well, Your Honor, up until the police arrived on scene, the only two witnesses are essentially the Defendant and the victim. And the victim is taking these medications, I do believe that could possibly affect her mental state at the time and also the way that she remembers what did and didn't happen.
>
> Trial Court: Okay. I don't—I don't agree respectfully. There'll be no questions with regard to any medications that she's taking, or did take that evening.

Following opening statements at trial, defense counsel made a motion, pursuant to Tennessee Rule of Evidence 617, to question the victim about the effects of mixing alcohol with her prescriptions. See Tenn. R. Evid. 617 ("A party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony."). Defense counsel stated that if the trial court still intended to grant the State's motion in limine, then he was asking for an opportunity to make an offer of proof so the defense could ask the victim about "any medication that she was on that may have affected her mental state at the time" of the incident. Defense counsel confirmed that he would not be offering expert testimony on this issue, and the trial court held that even if this evidence was relevant, it would "require the testimony on someone with superior knowledge of how medications may or may not inter[act] with [alcohol], and particularly with this person." Defense counsel clarified that he wished to cross-examine the victim about whether mixing her prescriptions with alcohol causes any memory impairment for her. The State asserted that defense counsel was inappropriately asking the victim to draw a "medical conclusion" but

acknowledged that questions regarding whether the victim was taking any medications or was able to recall the events of the night in question might be relevant. The trial court agreed that the defense could ask the victim whether she recalled the events of that evening but if the victim responded affirmatively, then the defense could not keep "pounding her" with questions. The court stated that the defense could not ask the victim about the effects of mixing alcohol with her prescriptions because the victim did not have "any . . . knowledge . . . of how these chemicals inter[acted] with her weight, what she ate that evening or in any other way[.]" The State agreed, asserting that there was nothing in the victim's medical records indicating that she suffered from a mental health diagnosis, just that the victim was prescribed Xanax and Adderall. The State also noted that it was unsure whether the victim even took those prescriptions the night of the incident. Defense counsel explained that he only wanted to ask the victim "what she was taking and how that affects her, if she feels that she's impaired or not [when she mixes alcohol with her prescriptions][,]" and he acknowledged that if the victim said "no" there was "not much else" he could do. Ultimately, the trial court allowed the Defendant to make an offer of proof to preserve this issue for appeal.

During this offer of proof, the victim testified that at the time of this incident she was prescribed 15 to 30 grams of Adderall each day and was prescribed Xanax as needed. The victim could not recall whether she had taken either of these medications the day of the offenses, although she asserted that she "typically, always" took Adderall. The victim stated that her physicians had not "verbally" advised her of the effect of combining alcohol with her medications. Although the victim acknowledged that her prescriptions contained a written warning about the effects of mixing alcohol with her prescriptions, she was unable to recall specifically what this written warning stated.

The Confrontation Clause provides a criminal defendant the rights to confront and cross-examine witnesses. See U.S. Const. amends. VI, XIV; Tenn. Const. art. I, § 9; State v. Williams, 913 S.W.2d 462, 465 (Tenn. 1996). A component part of this constitutional protection is the right to establish bias or to otherwise impeach the credibility of a witness. State v. Sayles, 49 S.W.3d 275, 279 (Tenn. 2001); State v. Howell, 868 S.W.2d 238, 252 (Tenn. 1993); see Tenn. R. Evid. 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."). However, the propriety, scope, manner, and control of cross-examination of witnesses generally remain within the discretion of the trial court, subject to appellate review for abuse of discretion. James, 315 S.W.3d at 460 (citing Caughron, 855 S.W.2d at 540; State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995)). When the defendant's right to cross-examine witnesses is unreasonably restricted, the trial court abuses its discretion. Davis v. State, 212 S.W.2d 374, 375 (Tenn. 1948).

A lay witness may provide testimony in the form of an opinion or inference if it is "rationally based on the perception of the witness" and is "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Tenn. R. Evid. 701(a). Lay opinion testimony should be based on admissible facts in evidence. State v. Boggs, 932 S.W.2d 467, 474 (Tenn. Crim. App. 1996). In order to be admissible, a lay opinion should be within the range of knowledge or understanding of ordinary laymen. Id. "If an opinion is based upon a lay witness's own observations, his or her conclusions require no expertise and are within the range of common experience, the opinion is admissible." State v. Samuel, 243 S.W.3d 592, 603 (Tenn. Crim. App. 2007). "The distinction between an expert and a non-expert witness is that a non-expert witness's testimony results from a process of reasoning familiar in everyday life and an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field." State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992), superseded by statute as stated in State v. Reynolds, 635 S.W.3d 893, 917 (Tenn. 2021). Conversely, expert testimony is governed by Tennessee Rule of Evidence 702, which provides, "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

Here, the trial court determined that only an expert was qualified to testify about the effects of mixing the victim's prescribed medications with alcohol. Because a witness may be cross-examined on any matter relevant to the issues in the case, including credibility, we conclude that the trial court abused its discretion in limiting defense counsel's examination of the victim on this issue. Defense counsel should have been allowed to ask whether the victim mixed alcohol with her prescriptions the night of the incident, and if so, whether this affected her memory of that night because these questions would have assisted the jury in assessing the victim's credibility. Such questions were based on the victim's own observations and were within the range of knowledge of an ordinary layman. See Samuel, 243 S.W.3d at 603 (reiterating that a lay witness may testify to his or her own physical condition or that of another individual so long as the witness first gives the detailed facts and then provides his or her opinion or conclusion). Moreover, such questions were "rationally based on the perception of the witness" and were "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Tenn. R. Evid. 701(a). However, we conclude that this error was harmless beyond a reasonable doubt because the victim's responses during the offer of proof failed to yield any evidence that would have changed the outcome of the trial.

IV. Sentencing. Additionally, the Defendant argues the trial court abused its discretion by ordering him to serve the maximum sentence of twelve years for his aggravating kidnapping conviction without giving any weight to the mitigating factors regarding his prior military service and his lack of a prior criminal history, other than traffic

offenses. See Tenn. Code Ann. § 40-35-113(13). The Defendant asserts that although the trial court acknowledged these "good" facts as part of the proof, the court did not include them in its sentencing analysis and did not assign them any weight when determining the appropriate sentence within the range. The State responds that the trial court properly exercised its discretion by imposing a maximum sentence for the aggravated kidnapping conviction based on its weighing of the applicable factors. We conclude that the trial court did not abuse its discretion in imposing the sentence in this case.

Here, the Defendant contends the trial court abused its discretion by ordering him to serve the maximum sentence of twelve years for his aggravating kidnapping conviction without giving any weight to the mitigating factors regarding his prior military service and his lack of a prior criminal history, other than traffic offenses. Pursuant to State v. Bise, 380 S.W.3d 682, 707 (Tenn. 2012), this court reviews "an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." The 2005 amendments to the sentencing act "served to increase the discretionary authority of trial courts in sentencing." Id. at 708. In light of this broader discretion, "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed." Id. at 706. The amendments to the sentencing act also "rendered advisory the manner in which the trial court selects a sentence within the appropriate range, allowing the trial court to be guided by—but not bound by—any applicable enhancement or mitigating factors when adjusting the length of a sentence." Id. Although the application of these factors is advisory, a court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114." Tenn. Code Ann. § 40-35-210(b)(5). In addition, the trial court must place on the record "[w]hat enhancing or mitigating factors were considered, if any," as well as "[t]he reasons for the sentence, in order to ensure fair and consistent sentencing." Id. § 40-35-210(e).

Pursuant to the 2005 amendments to the sentencing act, a trial court must consider the following when determining a defendant's specific sentence:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee;

(7) Any statement the defendant wishes to make on the defendant's own behalf about sentencing; and
(8) The result of the validated risk and needs assessment conducted by the department and contained in the presentence report.

Id. § 40-35-210(b). The defendant has the burden of showing the impropriety of the sentence on appeal. Id. § 40-35-401, Sentencing Comm'n Cmts. The trial court shall impose "a sentence justly deserved in relation to the seriousness of the offense[.]" Id. § 40-35-102(1). The court must also consider the defendant's potential for rehabilitation or treatment. Id. §§ 40-35-102(3)(C), -103(5). In addition, the court must impose a sentence "no greater than that deserved for the offense committed" and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Id. §§ 40-35-103(2), (4).

At the Defendant's sentencing hearing, the State presented testimony from Gina Iser, a Court Advocate for the Bridges Domestic Violence Center, who testified that the victim in this case stayed at the Bridges shelter from December 27, 2017 to mid-February 2018 and that the victim remained "very fearful" of the Defendant after she left the shelter.

The State also admitted the victim's medical records, the Defendant's personnel file from his service in the United States Coast Guard, the Defendant's jail incident reports, and the State's sentencing memorandum as exhibits to the hearing.

The defense presented Keith Crow, who testified that he volunteered at the Celebrate Recovery Program at the Williamson County Jail, where he had met the Defendant four years prior. Crow stated that the recovery program helped inmates who had "hurts, hang-ups, and habits" and that the Defendant had graduated from that program after receiving instruction for eighteen to twenty weeks. Crow said he still had contact with the Defendant, although he had not specifically talked to the Defendant about his convictions in this case, and was "impressed" with him because the Defendant had been consistently "accountable" and "remorseful" for his involvement in the incident with the victim. Crow admitted that he had not observed the Defendant's testimony during the trial in this case.

The Defendant also testified at the sentencing hearing, acknowledging that he had received an honorable discharge from the Coast Guard because of his "pattern of misconduct." He stated that during his service he received two alcohol-related non-judicial punishments but also came forward with information that a Lieutenant Commander had sexually assaulted a female Coast Guard member. The Defendant claimed that although he was told he would be protected "under the Whistleblower Act," he was targeted by the Lieutenant Commander until he was finally given an honorable discharge from the Coast

Guard. The Defendant maintained that there was no information in his personnel file about the information he shared in the sexual assault case because it was "under the Whistleblower's Act," and that any information concerning that matter would have to be obtained through the legal department at the United States Coast Guard headquarters. The Defendant acknowledged that he received alcohol and substance abuse treatment through the Coast Guard and met with someone in the Coast Guard once a week for another alcohol-related incident. He also admitted that he was discharged from the Coast Guard because he had received six non-judicial punishments, four of which occurred after he received a second chance from the land area commander.

The Defendant also acknowledged that he received a six-month probation through the criminal court system after he was charged with resisting arrest during a traffic stop. The Defendant admitted that at the time he committed the offenses against the victim, he knew that she had previously been a victim of domestic violence committed by someone else and that she was "so scared she couldn't leave the house." In response to questioning by the trial court, the Defendant said that he would not have hurt the victim if she had not punched him in the face first. The court commented on the record that it sounded like the Defendant was "not taking responsibility for [his] conduct" and was "not really remorseful." Defense counsel admitted a letter of support from the Defendant's mother, who was in poor health and lived in Maryland. Thereafter, the Defendant provided a statement of allocution, wherein he stated, in part, that he wanted "to ask for forgiveness for any harm that was caused" the night of the incident and that he "never had any intention of ever hurting" the victim.

Prior to imposing the sentence, the trial court also admitted and considered some statistical sentencing data from the Administrative Office of the Courts and the presentence investigation report. When defense counsel asserted that the Defendant's charge for resisting arrest, a Class B misdemeanor, was retired but not expunged, the trial court stated that the Defendant's minimal prior criminal record did not have an impact on his sentencing decision.

The Defendant, as a Range I, standard offender, was subject to a sentencing range of eight to twelve years at one hundred percent for his aggravated kidnapping conviction. See id. §§ 40-35-112(a)(2); -501(i). Prior to imposing the sentence in this case, the trial court stated that it had considered all the applicable factors in Code section 40-35-210(b). The court said it had reviewed the Defendant's educational background, his current physical and mental health, his past alcohol and drug use, his treatment for alcohol and drug offenses with the Coast Guard, his family information, and his employment information. The trial court also considered the Defendant's military record for his service in the Coast Guard as well as the victim's medical records, which showed that her broken elbow required surgery and that she had received treatment for her broken ribs and the gash

on her head from this incident. The trial court noted that its "biggest concerns" were whether the Defendant had "accept[ed] responsibility for his own conduct" and whether the Defendant was "remorseful." In considering the Coast Guard records, the court "put weight on" the Notification of Intent to Discharge by Reason of Misconduct, which explained the Defendant's various violations during his military service and outlined the factual basis for his honorable discharge from the Coast Guard. However, the court also recognized that the Defendant was only nineteen years old when he entered the Coast Guard and that "sometimes people don't display their best conduct at that age[.]" The trial court also considered the Defendant's jail records, which showed that the Defendant had infractions for engaging in unnecessary disturbances, refusing to follow orders, exhibiting verbal, physical, or written disrespect for a deputy or staff members, and participating in a fight; the court noted that these infractions helped the court get a better understanding of the Defendant and his conduct. The court also considered the Administrative Office of the Court's sentencing data, which itemized the sentences imposed by other judges for similar offenses.

In considering the purposes and principles of sentencing under Code sections 40-35-102, and -103, the trial court found that the Defendant would not be entitled to an alternative sentence based on the facts and circumstances of this case, the testimony that had been presented, and the evidence that had been introduced. The court recognized that the State's information and the sentencing data showed that kidnapping offenses had increased not only across the district but also across the state and that many of these kidnapping offenses were associated with domestic violence.

The trial court found that the facts of this case were "especially violent" because the Defendant "strangled and confined" the victim inside the apartment for a lengthy period of time, during which the victim "los[t] consciousness." It also noted that after the Defendant agreed to take the victim to the hospital, the Defendant "attacked" the victim in the parking lot "when she attempted to run away" and then "tackled [the victim] to the ground, and zip-tied her hands[,] which resulted . . . in permanent injury to her elbow, [and resulted in] broken ribs, [a] gash on her head, and other injuries." The court concluded that the "nature and characteristics of the [Defendant's] criminal conduct" were "awful" and the fact that the Defendant had "tak[en] advantage of someone who [was] weaker" was "deplorable." The court also held that the Defendant's "posing as a police officer to try to prevent help right away" was "awful."

The court applied enhancement factor (6), specifically noting that the "personal injuries inflicted upon the victim were horrendous" and the "subsequent mental and emotional impact of what occurred . . . [would] impact her in some way [for the rest of] her life." See id. § 40-35-114(6). The court also applied enhancement factor (10), that the Defendant "had no hesitation about committing a crime when the risk to human life was

high" because the victim "suffered broken bones" from the Defendant's "physical abuse." Id. § 40-35-114(10). The court additionally applied the "catch-all" mitigating factor (13) because the Defendant had no prior criminal history, other than traffic offenses. See id. § 40-35-113(13).

With regard to the Defendant's statement of allocution, the trial court determined that the Defendant's "statements were really excuses" that were "riddled with the failure to take full responsibility for the results of his conduct." The court also found that the Defendant was "not as credible" as the court expected him to be after hearing from Keith Crow at sentencing.

The trial court concluded that the most important factors in imposing a sentence in this case were that the victim "suffered violent injuries," was "hurt badly[,]" and suffered "emotional trauma" and that the Defendant, during his testimony at sentencing, had failed to take responsibility for his conduct and did not appear to show remorse for his actions in this case.

At the conclusion of the sentencing hearing, the trial court imposed the maximum twelve-year sentence for the aggravated kidnapping conviction and the minimum sentences for the other convictions. The court merged Count 2 with Count 1 and then merged Count 5 with Count 3 before ordering these sentences to be served concurrently, for an effective sentence of twelve years at one hundred percent.

Because the record established that the trial court imposed a within-range sentence reflecting a proper application of the purposes and principles of our Sentencing Act, we will review the sentencing decision under an abuse of discretion standard with a presumption of reasonableness. Bise, 380 S.W.3d at 707. Here, the Defendant maintains that the trial court abused its discretion by ordering him to serve the maximum sentence of twelve years for his aggravating kidnapping conviction without giving any weight to the mitigating factors regarding his prior military service and his lack of a prior criminal history, other than traffic offenses. However, the Defendant fails to acknowledge that under the 2005 amendments, "mere disagreement with the trial court's weighing of the properly assigned enhancement and mitigating factors is no longer a ground for appeal." See id. at 706. The sentencing hearing transcript shows that the trial court considered the applicable enhancement and mitigating factors before imposing the sentence in this case, and the Defendant does not challenge the application of any enhancement factor. The court specifically acknowledged that the Defendant had a minimal criminal history and that the Defendant had served in the military. Nevertheless, the trial court found that the Defendant's failure to accept responsibility for his actions and his lack of remorse, in addition to the "especially violent" circumstances of these offenses and the victim's serious injuries, outweighed the aforementioned mitigating circumstances. Because the

Defendant's twelve-year sentence was within the appropriate range and was consistent with the purposes and principles of the sentencing act, we conclude that the trial court did not abuse its discretion in imposing the sentence in this case, and the Defendant is not entitled to relief.

V. Cumulative Error. Lastly, the Defendant argues that he should receive a new trial on all charges because of the cumulative effect of the trial court's errors in providing inaccurate jury instructions, in excluding admissible evidence, and in vouching for an important State eyewitness. He claims that the trial court committed a "one-two punch" by first allowing the victim's memory, mental state, and behaviors to go unchallenged, despite proof that she was mixing prescription medications and alcohol the night of the incident, and then bolstering the State's eyewitness's testimony, which corroborated the victim's recollection of what happened that night and emphasized that the trial court believed both the victim and the eyewitness to be "credible and even commendable." Consequently, the Defendant argues that "there was no way for [him] to overcome the clear message from the judge to the jury that they should rule in favor of the State's witnesses." The State counters that the trial court did not commit multiple errors, but that even if it did, cumulative error relief is unjustified. We agree that the Defendant is not entitled to relief on this issue.

The cumulative error doctrine "is a judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, 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." Hester, 324 S.W.3d at 76. The cumulative error doctrine only applies when there has been more than one error committed during the trial proceedings. Id. at 77. We have already concluded that the Defendant is entitled to a reversal of his aggravated kidnapping conviction based on the trial court's prejudicially erroneous supplemental instructions. Although we also held that the trial court erred in preventing the Defendant from cross-examining the victim about the effects of mixing her prescription medications with alcohol, we ultimately concluded that this error was harmless. We do not find that any error regarding the cross-examination of the victim, when aggregated with the court's supplemental instructions error, has a cumulative effect so great as to require reversal of the Defendant's other convictions for reckless aggravated assault, aggravated assault, criminal impersonation of law enforcement, and domestic assault.

CONCLUSION

For the aforementioned reasons, we reverse and remand this case for a new trial on the aggravated kidnapping charge in Count 1 and affirm the remaining counts.

CAMILLE R. MCMULLEN, PRESIDING JUDGE