IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	KNOX COUNTY
v.	)	NO. E2012-00431-SC-R11-CD
	)	
LARRY JERELLER ALSTON,	)	
KRIS THEOTIS YOUNG, and	)	
JOSHUA EDWARD WEBB,	)	
	)	
Appellants.	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT
OF THE COURT OF CRIMINAL APPEALS

BRIEF OF THE STATE OF TENNESSEE

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

The Knox County Grand Jury returned an indictment charging the defendants with especially aggravated kidnapping, aggravated robbery, aggravated burglary, and possession of a firearm during a dangerous felony. (I, 1-3.)[1] The defendants were tried before a Knox County Criminal Court jury with the Honorable Mary Beth Leibowitz presiding. (I, 50-62.) The jury found the defendants guilty of the charged offenses. (I, 58-62.)

Following trial, the defendants filed motions to dismiss the charges of especially aggravated kidnapping, possession of a firearm during a dangerous felony, and aggravated burglary, arguing that they violated due process because they were all part of the aggravated robbery. (I, 63-78; II, 96-111.) The trial court entered an order granting the motions as to the especially aggravated kidnapping and the aggravated burglary. (II, 134-36.) Following entry of this order, the defendants filed second motions to dismiss the possession of a firearm during a dangerous felony charge because the dismissal of the aggravated burglary and especially aggravated kidnapping charges destroyed the predicate for the possession-of-a-firearm charge. (II, 137-45.) The trial court orally granted the motions. (VII, 419-20.) The trial court

[1] The record on appeal consists of seven numbered volumes. Volumes I and II contain the technical record, Volumes III through VI contain the trial transcript, and Volume VII contains the sentencing hearing transcript. There are four unnumbered volumes of exhibits. References to the record will be by volume followed by page number or exhibit number.

sentenced each of the defendants to 12 years at 30 percent as Range I standard offenders on the aggravated robbery charges. (II, 147-49.)

The State timely filed a notice of appeal. (II, 150.) The Court of Criminal Appeals reinstated the convictions for especially aggravated kidnapping and aggravated burglary and affirmed the convictions for aggravated robbery, but dismissed the convictions for firearm possession on different grounds from the trial court. *State v. Alston, et al.*, No. E2012-00431-CCA-R3-CD, 2013 WL 2382589, at *1 (Tenn. Crim. App. May 30, 2013), *perm. app. granted* (Tenn. Jan. 17, 2014) ("*Alston I*"). This Court granted permission to appeal and remanded for the Court of Criminal Appeals to reconsider its harmless-error analysis on the especially aggravated kidnapping issue in light of *State v. Cecil,* 409 S.W.3d 599 (Tenn. 2013). *State v. Alston, et al.*, No. E2012-00431-CCA-R3-CD, 2014 WL 585859, at *1 (Tenn. Crim. App. Feb. 13, 2014), *perm. app. granted* (Tenn. June 20, 2014) ("*Alston II*"). The Court of Criminal Appeals affirmed its earlier holdings. *Id.* This Court once again granted permission to appeal.

STATEMENT OF THE FACTS

State's Proof

Carolyn Sue Maples lived at 2118 Chicago Avenue in Knoxville with her husband, Harvey Haun, and grandson. (V, 232-33.) By April 15, 2010, Mr. Haun had been hospitalized with throat cancer for several weeks. (V, 234.) That day, at about 1:45 p.m., Ms. Maples left her house to pick up her daughter and grandson for a visit to Mr. Haun in the hospital. (V, 238.) She locked her front door, took her purse, and walked out to her car, which was parked in the street. (V, 239-41.) As she was walking to her car, she saw three men—Kris Theotis Young, Larry Alston, and Joshua Webb—approach. (V, 240, 268-69.)

Ms. Maples walked around the front of her car, opened the door, and was about to get in when Mr. Young asked her if she knew a certain girl. (V, 241-43.) Ms. Maples said that she did not and began to enter her car. (V, 243.) The next thing she knew, Mr. Young and Mr. Alston were holding guns to her head. (V, 244.) They commanded her to give them her car keys, hand over her purse, open the front door, and get in the house. (V, 244-45.) She relinquished her purse. (V, 245.) The men pushed her from her car to her house and gave her back the key to open the door, while they stood directly behind her. (V, 246.)

When Ms. Maples opened the door, the men did not release her but instead forced her inside. (V, 247.) They shoved her onto a couch and told her not to move or do anything. (V, 247.) Mr. Young stayed with her while Mr. Alston and Mr. Webb ransacked the house. (V, 247-48.) Ms. Maples watched as Mr. Alston ransacked her

bedroom while Mr. Webb ransacked the kitchen. (V, 251-52.) The men dumped her purse out on the coffee table and took her ATM card and $140. (V, 249.) They demanded her ATM PIN, which she gave. (V, 249.)

Both Mr. Young and Mr. Alston carried pistols. (V, 250-54.) Mr. Webb had a sawed-off shotgun, which he pulled out and displayed when he was going into the kitchen. (V, 250-51.)

One of Ms. Maples' neighbors saw the scene unfold on the street and called the police. (III, 69-82.) Officer Amanda Bunch of the Knoxville Police Department was the first officer who responded to the scene. (Exs. 89, 94; III, 87-88, 92.) She arrived, parked some distance away, and approached the house on foot. (III, 91-92.) She hid behind a tree where she could observe the backyard and front of the house. (III, 92.) She observed movement in the house, but she could not discern exactly what was happening. (III, 93.) Officer John Stevens and Officer Tim Riddle arrived and took up observation positions. (III, 94; IV, 116-20, 139, 142-44.)

Mr. Young picked up a television and started to carry it outside. (III, 94-95; IV, 108, 121; V, 256.) He saw that police had arrived. (V, 256.) He cursed, dropped the television, and ran back toward the kitchen. (V, 256.) Officer Bunch yelled to the other officers that a suspect was running to the back of the house. (III, 95.) She moved to the driveway, where she could take cover behind a Jeep and be close to the house. (III, 95.) She saw movement behind the front door and realized that it was Ms. Maples. (III, 96.) Officer Bunch motioned for her to come out, and Ms. Maples did. (III, 96; IV, 122-23; V, 256-57.) Ms. Maples had not felt free to leave up until

that point. (V, 257.) Officer Bunch asked Ms. Maples how many people were still inside the house and then had her hide behind a large tree across the street. (III, 96; V, 258.)

After Ms. Maples made her break to safety, Officer Riddle and Officer Stevens saw Mr. Alston trying to run out the back door. (IV, 123, 126, 145.) The officers stopped him and took him into custody. (IV, 124, 146.) Officer Stevens secured Mr. Alston in the back of his patrol car. (IV, 125-26.) A search of Mr. Alston revealed $110 and Ms. Maples' ATM card. (IV, 146.)

With one of the subjects in custody and two still hiding in the house, Officer Riddle called for a K-9 unit. (III, 97; IV, 122.) The K-9 officer, Officer Dean Ray, arrived on the scene and released his dog, Nitro, into the house. (III, 97; IV, 154, 159-61.) He and Officer Bunch rushed in after Nitro had cleared the house. (III, 97-98; IV, 160.) After Nitro entered the house, Mr. Webb and Mr. Young came out the back door with their hands up. (IV, 126-27.) When Officer Bunch got to the back door, she saw the two subjects face down on the deck. (III, 98.) She took Mr. Webb into custody. (III, 98-99.) When she searched him, she found a pill bottle belonging to Ms. Maples. (Ex. 63; IV, 103-04.)

After all had calmed down, Ms. Maples was able to go back in her house. (V, 259.) Her attackers had left behind their guns, had torn her phone out of the wall, and had removed the phone's battery. (V, 260-63.)

ARGUMENT

I. A *WHITE* INSTRUCTION IS NOT NECESSARY WHEN A KIDNAPPING ACCOMPANIES A BURGLARY.

This Court has asked the parties to address whether a *White* instruction is necessary where a kidnapping accompanies a burglary. It is not necessary because burglary—a property crime complete upon entry into a habitation—is not among those felonies such as rape or robbery for which some period of confinement is inherent to the commission of the offense. Because there is no danger of an incidental kidnapping during a burglary, the due-process concerns in *White* are not implicated and the *White* instruction is not required.

This issue presents a question of law, which this Court reviews *de novo*. *Cullum v. McCool*, 432 S.W.3d 829, 833 (Tenn. 2013).

False imprisonment, the definitional "building block" of kidnapping offenses, is committed when a person "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." *State v. Cecil*, 409 S.W.3d 599, 604 (Tenn. 2013) (citations omitted). False imprisonment is meant to address any situation where there is an interference with another's liberty. *Id.* at 604-05 (citations omitted).

In *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991), this Court considered "the propriety of a kidnapping conviction where detention of the victim is merely incidental to the commission of another felony, such as robbery or rape," and "what legal standard should be applied in deciding whether a separate conviction for kidnapping can be sustained." *Id.* at 300. At the time, kidnapping was defined as a

"false imprisonment . . . [u]nder circumstances exposing the other person to substantial risk of bodily injury." *Cecil*, 409 S.W.3d at 605 (citing Tenn. Code Ann. § 39-13-303(a)(1) (1990) (amended 2008)). False imprisonment was defined then as it is today—the unlawful removal or confinement of another so as to interfere substantially with the other's liberty. *Id.* (citing Tenn. Code Ann. § 39-13-302(a) (1990)). As this Court in *Anthony* observed, "[l]iterally construed, the offense of kidnapping defined in these statutes at times could . . . overrun several other crimes, notably robbery and rape, and in some circumstances assault, because detention and sometimes confinement, against the will of the victim, frequently accompany these crimes." *Id.* (citing *Anthony*, 817 S.W.2d at 303). While directing courts to construe the kidnapping statutes narrowly so as to be fundamentally fair and consistent with due process rights, the Court defined the relevant test as:

> whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.

Id. at 605-06. The Court emphasized that "[t]he test is not whether the detention was an 'integral part or essential element' of the [accompanying offense], but whether it was 'essentially incidental' to that offense." *Id.* at 606 (citing *Anthony*, 817 S.W.2d at 307). This holding was based not on double-jeopardy principles, but on due process, with particular consideration given to Article I, Section 8, of the Tennessee Constitution. *Id.* at 605.

In *State v. Dixon,* this Court modified the "essentially incidental" due-process analysis. *Cecil,* 409 S.W.3d at 606 (citing *State v. Dixon,* 957 S.W.2d 532 (Tenn. 1997)). In *Dixon,* this Court observed that "*Anthony* and its progeny . . . are not meant to provide the rapist a free kidnapping merely because he also committed rape," and described the "essentially incidental" standard as designed to "only prevent the injustice which would occur if a defendant could be convicted of kidnapping where the only restraint utilized was that necessary to complete the act of rape or robbery." *Id.* (citing *Dixon,* 957 S.W.2d at 534-35). This Court further stated that "any restraint in addition to that which is necessary to consummate rape or robbery may support a separate conviction for kidnapping." *Id.* (citing *Dixon,* 957 S.W.2d at 535). Accordingly, the two-part *Dixon* test addressed: (1) whether the movement or confinement of the victim was beyond that necessary to consummate the accompanying crime; and (2) whether the additional movement or confinement prevented the victim from summoning help, lessened the defendant's risk of detection, or created a significant danger or increased the victim's risk of harm. *Id.* (citing *State v. Richardson,* 251 S.W.3d 438, 442-43 (Tenn. 2008)).

In *State v. White,* this Court revisited the issue and determined that the separate due-process test articulated first in *Anthony* and subsequently refined in *Dixon* and its progeny was not the most workable manner of addressing a kidnapping conviction that accompanied a separate offense. *Cecil,* 409 S.W.3d at 606 (citing *State v. White,* 362 S.W.3d 559, 578-79 (Tenn. 2012)). After overruling *Anthony* and the entire line of cases that included a separate due-process analysis in appellate review,

this Court adopted a standard under which trial courts have an obligation to fully instruct the jury on the statutory language of the kidnapping statutes, holding 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," with the appellate courts assessing the sufficiency of the convicting evidence as the ultimate component of due-process protections. *Id.* at 606-07 (citing *White,* 362 S.W.3d at 577-78).

The animating concern behind all of these tests, however formulated, is that some felonies against the person involve an inherent period of detention, thus creating a thorny due-process issue with regard to kidnapping. *See Anthony*, 817 S.W.2d at 304. One cannot rob someone without detaining that person. One cannot rape someone without detaining that person. At least some forms of assault inherently involve some period of detention.

By contrast, the elements of burglary do not, under any circumstances, *require* anyone to be detained. Aggravated burglary occurs when a person enters the habitation of another, without consent, with intent to commit a felony, theft, or assault. Tenn. Code Ann. §§ 39-14-402, -403. Aggravated burglary is a property offense, and the crime is complete upon entry into the habitation. *State v. Cowan,* 46 S.W.3d 227, 234 (Tenn. Crim. App. 2000). As the Court of Criminal Appeals pointed out, the victim of aggravated burglary need not even be present at the habitation when the offense is committed. *Alston I*, 2013 WL 2382589, at *10. Once inside, if a burglar confines victims, he does so as a matter of convenience—to prevent them from

summoning help—not to complete the offense of burglary, which he has already completely committed. Or, as in this case, a would-be burglar can detain someone in advance of committing a burglary, but the detention that precedes the burglary is not part of the burglary.[2] The burglary only occurs once the burglar enters the habitation. The detention that precedes it is a kidnapping.

Both before and after *White*, several panels of the Court of Criminal Appeals concluded that a kidnapping accompanying a burglary does not present due-process problems. *See, e.g., State v. Shelby*, No. M2006-02582-CCA-R3-CD, 2011 WL 795834, at *4 (Tenn. Crim. App. Mar. 8, 2011), *perm. app. denied* (Tenn. June 2, 2011).[3] In *Shelby*, the court first considered the instances in which this Court and other panels of the Court of Criminal Appeals declined to extend the *Anthony* rule. *Id.* Then, the court noted that "[w]hile every robbery or rape involves some detention of the victim, not every burglary involves kidnapping," and that "the offense of aggravated burglary is narrowly defined by statute and its elements are clearly defined . . . Aggravated burglary is a property offense, and the crime is complete upon entry into the habitation." *Id.* The court held that the defendant completed the offense of

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[2] The defendants do not argue that the detention leading up to the burglary was part of the burglary. Instead, they argue that the detention was part of an ongoing aggravated robbery that continued until the defendants had deprived the victim of whatever they desired in her home. (Def.'s R. 11 App. 28-31.)

[3] *See also State v. Tate*, No. W2012-00462-CCA-R3-CD, 2013 WL 6706091, at *11 (Tenn. Crim. App. Dec. 18, 2013) ("where the offenses of conviction are narrowly defined by statute and require proof of different elements, as in this case, there is no due process violation"), *perm. app. denied* (Tenn. June 20, 2014); *State v. Zonge*, 973 S.W.2d 250, 256 (Tenn. Crim. App. 1997) (finding that *Anthony* did not apply to aggravated burglary and kidnapping together because proof of aggravated burglary did not necessarily prove unlawful confinement of a victim) (citing *State v. Oller*, 851 S.W.2d 841, 842-43 (Tenn. Crim. App. 1992)).

aggravated burglary the moment he entered the victim's home with the intent to commit a theft. *Id.*

The Supreme Court of Ohio has held similarly that "[m]erger was not required for the aggravated burglary and kidnapping . . . Aggravated burglary and kidnapping are not allied offenses of similar import." *See State v. Monroe*, 827 N.E.2d 285, 299 (Ohio 2005). So has the Supreme Court of New York, finding that an abduction was discrete from a burglary because the burglary had been fully completed when the defendant forced the victim into a car and drove with her for 30 minutes. *People v. Chronis*, 619 N.Y.S.2d 156, 157 (1994).

In the same way that this Court declined, pre-*White*, to expand the scope of the *Anthony* due-process analysis to separate convictions outside of the kidnapping context, *State v. Ralph*, 6 S.W.3d 251, 254-55 (Tenn. 1999), this Court should decline to extend *White* protection to kidnappings accompanied by a burglary. Not only does the law disfavor such expansion—as shown above—public policy disfavors it. It surely offends the public conscience to have any incentive in the law for criminals to be more ambitious in their law-breaking. If the law allows the possibility that a detention of victims during a burglary might be found to be part and parcel of the burglary, it would incentivize burglars to detain victims during burglaries. After all, the burglars would have much to lose by letting the victims run free to call the police. The incentive should instead be for burglars, upon breaking into an occupied habitation, to immediately abandon the burglary, knowing that they will either be

charged with kidnapping if they detain the occupants, or caught if they go through with the burglary and let the occupants go free.

The detention of victims inside habitations is arguably one of the most dangerous forms of detention. The victims are hidden from the eyes of passersby who might otherwise alert police or render assistance. When police do arrive at the scene, there is the potential for a hostage situation. In this case, police surrounded the victim's home while she was still inside with the armed defendants. While things ended well in this case, and a hostage situation did not materialize, it may not always be so if burglars have an incentive to detain victims.

To require *White* instructions for kidnappings accompanied by a burglary goes too far afield of the original conceptual basis that underlies *White* instructions—that some offenses necessarily and inherently involve some period of detention.

II. THE COURT OF CRIMINAL APPEALS PROPERLY FOUND THAT THE FAILURE TO GIVE A *WHITE* JURY INSTRUCTION WAS HARMLESS.

The defendant contends that the Court of Criminal Appeals erroneously held harmless the trial court's error in not giving a *White* jury instruction where the proof showed that a kidnapping followed an aggravated robbery. (Def.'s R. 11 App., 16-31.) This contention is meritless because like other cases in which the Court of Criminal Appeals properly found such instructional error harmless beyond a reasonable doubt, the felony that accompanied the kidnapping charge—and that gave rise to the due-process concern—was complete before the removal or confinement that served as the basis for the kidnapping charge

The failure to instruct the jury on a material element of an offense is a constitutional error subject to harmless-error analysis. *State v. Faulkner,* 154 S.W.3d 48, 60 (Tenn. 2005). The failure to give the jury instruction set forth in *White* is non-structural constitutional error. *Cecil,* 409 S.W.3d at 610. The existence of a non-structural constitutional error requires reversal unless the State demonstrates beyond a reasonable doubt that the error is harmless. *State v. Rodriguez,* 254 S.W.3d 361, 371 (Tenn. 2008). The touchstone of this inquiry is whether a rational trier of fact could interpret the proof at trial in different ways. *Cecil,* 409 S.W.3d at 610 (citing *White,* 362 S.W.3d at 579).

A. This Case is Most Similar to Cases Where This Court Has Found Harmless Error in Failing to Give a *White* Instruction.

The aggravated robbery indictment in this case charged the defendants with taking "from the person of Carolyn S. Maples, a purse and its contents." (I, 2.) The uncontroverted proof showed that the defendants forced the victim to hand over her purse and its contents in the street, by her car, thus completing the aggravated robbery as indicted. (V, 244-45.) It was only after this robbery was completed that the defendants, not content with their spoils, forcibly moved the victim back to her house. (V, 246.) They actually handed the victim back her keys to open the door to her house, underscoring that they had already deprived her of her property. (V, 246.)

This factual scenario, where the kidnapping followed a completed aggravated robbery *as indicted,* makes this case more akin to the two cases this Court cited in *Cecil* as examples of cases where the lack of a *White* instruction was harmless error. *See* 409 S.W.3d at 611 (citing *State v. Keller,* No. W2012-00825-CCA-R3-CD, 2013 WL

3329032, at *5 (Tenn. Crim. App. June 27, 2013), *perm. app. denied* (Tenn. Dec. 10, 2013); *State v. Hulse*, No. E2011-01292-CCA-R3-CD, 2013 WL 1136528, at *14 (Tenn. Crim. App. Mar. 19, 2013)). As the Court of Criminal Appeals correctly observed, both *Keller* and *Hulse* involved completed offenses followed by a kidnapping that was not necessary to commit the completed offenses. *Alston II*, 2014 WL 585859, at *3-4.

In this case, the distinct crime of aggravated robbery occurred when the defendants assailed the victim on the street as she was getting in her car. (V, 244-45.) The defendants put a gun to the victim's head and demanded her keys and purse, which she handed over. (V, 244-45.) The moment that occurred, the defendants had completely committed the aggravated robbery charged in the indictment. There was no reason whatsoever that the defendants needed to confine the victim and march her back to her house to accomplish the burglary, other than to prevent the victim from summoning help (in which they were successful) and to lessen their risk of detection (in which they were unsuccessful).

Even assuming the house contained the ultimate goal of the aggravated robbery, the defendants had the victim's house key. (V, 244-45.) They did not need her to accompany them back to the house. They could have had her simply point out which house was hers and which key opened it, and let her on her way. They could have had the victim open the door for them and then let her on her way. Nothing about the aggravated robbery required the victim's removal to her house and confinement inside. But it would not have been in the defendants' interest to let her

go, because she would have summoned police. The defendants had to commit the separate crime of especially aggravated kidnapping to prevent that from happening.

Had the jury been given the *White* jury instruction, they would have been instructed, among other things, that in determining whether the victim's removal or confinement went beyond that necessary to accomplish the accompanying felony, it should consider whether the removal or confinement prevented the victim from summoning assistance, although the defendants need not have succeeded in preventing the victim from doing so; whether the removal or confinement reduced the defendants' risk of detection, although the defendants need not have succeeded in this objective; and 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. *White*, 362 S.W.3d at 581.

Once the victim was inside the house, preventing her from summoning help, the defendants confined her to a small space while brandishing guns—a decidedly dangerous circumstance. (V, 247-51.) This danger to the victim only increased when the police surrounded the house, creating the potential for a hostage standoff. This was a kidnapping, separate from the completed aggravated robbery and completed aggravated burglary. There is no other way of interpreting this proof. The error to give a *White* instruction was harmless beyond a reasonable doubt.

B. The Defendants Committed Three Separate Offenses When They Committed Aggravated Robbery, Followed By an Especially Aggravated Kidnapping, Followed By Aggravated Burglary.

The defendants insist, relying upon a rejected finding by the trial court, that regardless of how the aggravated robbery was indicted, the entire chain of events from the stealing of the purse, to the kidnapping, to the ransacking of the victim's home constituted but a single aggravated robbery. (Def.'s R. 11 App. 28-31.)[4] However, the only reasonable interpretation of the facts establishes three distinct offenses.

Aggravated burglary occurs when a person enters the habitation of another, without consent, with intent to commit a felony, theft, or assault. Tenn. Code Ann. §§ 39-14-402, -403. A home, such as the victim's in this case, qualifies as a habitation. Tenn. Code Ann. § 39-14-401(1)(A).

Aggravated robbery is the intentional or knowing theft of property from another by violence or putting the person in fear, accomplished with a deadly weapon. Tenn. Code Ann. §§ 39-13-401, -402. A firearm is a deadly weapon. Tenn. Code Ann. § 39-11-106(a)(5)(A). Aggravated burglary is a distinct and separate offense from aggravated robbery. *See Cowan*, 46 S.W.3d at 234-35; *see also State v. Michael Dean Marlin*, No. M2011-00125-CCA-R3-CD, 2011 WL 5825778, at *14 (Tenn. Crim. App. Nov. 17, 2011), *no app. filed* (upholding dual convictions for aggravated robbery and aggravated burglary based on the same home invasion). Either of these offenses can be committed without necessarily committing the other. *Id.*

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[4] The defendants claim that the State conceded the factual finding made by the trial court at (II, 135). The State did no such thing and does no such thing here. The State conceded only that taking something from someone by placing him in fear by using a deadly weapon is an aggravated robbery. (II, 135.) The State did not and does not concede that the forced entry into the victim's home was merely part of the aggravated robbery that was completed on the street outside.

The notion that the defendants should get a "free" aggravated burglary because they waited until they got into the victim's house to dump out her purse and pick through their ill-gotten spoils defies reason. The State is unaware of any authority stating that a robbery is ongoing until a defendant has realized the full pecuniary potential of his victim by looting her home and person. Were it so, absurd and unintended results would follow. By the defendants' logic, one who puts a gun to someone's head on the street and obtains a set of car keys should then get a free aggravated burglary to gain access to the victim's garage, to get the car to which the keys belong, in order to realize the full monetary value of the robbery. This would be an untenable result.

Defendants should bear the risk of their robbery yielding little of value, and the law should not shift to victims the risk of defendants having license to tack a free burglary onto a low-yield robbery and only be on the hook for a single robbery. The defendants attacked the victim on the street and could have easily made off with her purse and the contents thereof. Instead, their avarice led them to violate the sanctity of her home. They should be punished for both, as the law contemplates. They should not be rewarded for their ambition and greed by being allowed to hide multiple crimes under the umbrella of a single aggravated robbery.

The defendants complain that the State is attempting to divide a single crime—aggravated robbery—into separate temporal and spatial units, without a "clear break," thus carving an aggravated burglary from an aggravated robbery. (Def.'s R. 11 App. 9-31); *see State v. Lowery*, 667 S.W.2d 52, 53-57 (Tenn. 1984) (citing

Lumpkins v. State, 584 S.W.2d 244 (Tenn. Crim. App. 1979)). In support of this contention, the defendants rely upon cases in which a defendant was convicted of both armed robbery and grand larceny based on a single criminal episode: *State v. Lowery*; *State v. Warren*, 750 S.W.2d 751, 754 (Tenn. Crim. App. 1988); and *State v. Keener*, 598 S.W.2d 836 (Tenn. Crim. App. 1980). These cases are distinguishable, however, from the case at hand in that larceny is a lesser-included offense of robbery. *Lowery*, 667 S.W.2d 52, 54 (Tenn. 1984). Aggravated burglary is not a lesser-included offense of aggravated robbery, nor is aggravated robbery a lesser-included offense of aggravated burglary. *State v. Samuel L. Giddens*, No. M2005-00691-CCA-R3-CD, 2006 WL 618312, at *13 (Tenn. Crim. App. Mar. 13, 2006), *perm. app. denied* (Tenn. June 26, 2006).

Another one of the cases the defendants cite dealt with multiple offenses that were not even lesser-included offenses of the other—they were simply multiple and indistinct occurrences of the same offense. *See State v. Pelayo*, 881 S.W.2d 7, 13 (Tenn. Crim. App. 1994) (multiple stabbings inflicted upon a victim in close temporal proximity could not support multiple convictions.) The defendants' reliance on this case is similarly misplaced, because aggravated robbery and aggravated burglary are not the same offense. *Giddens*, 2006 WL 618312, at *13.

In the above cases, the question of whether there was a "clear break" between the offenses is vital. Without a "clear break," a defendant convicted of two legally indistinct offenses might be subjected to double jeopardy. The same is not true of two legally distinct offenses. Tellingly, the defendants do not cite a single case where

convictions for an aggravated robbery and aggravated burglary, or two other legally distinct offenses, were found to be infirm due to the absence of a "clear break." And for good reason: "clear break" analysis does not apply to legally distinct offenses. For example, a single act of forced sexual penetration with a relative will support convictions for both rape and incest, two legally distinct offenses, without any "clear break" whatsoever. *See State v. Brittman*, 639 S.W.2d 652, 653-54 (Tenn. 1982) (upholding convictions for rape and incest based on a single act of intercourse). In precisely the same manner that prohibitions against rape and incest serve separate and independent functions, the prohibitions against aggravated robbery and aggravated burglary serve differing functions. The former protects people in their persons. The latter protects the sanctity of people's homes, whether they are physically present or not.

This would be a different case had the State attempted to charge the defendants with a count of aggravated robbery for stealing the victim's purse, and then another count of aggravated robbery for stealing the money and ATM card out of the purse once inside the victim's house. *See State v. Henderson*, 620 S.W.2d 484, 486 (Tenn. 1981) (robbery of the victim was completed at the service station where her purse was taken; removal of $55 later in the car did not support a second conviction for robbery). That would have been, in fact, an attempt to carve a single crime into separate and legally indistinct temporal and spatial units and would require a showing of a "clear break."

But that is not how the State charged the defendants. The State charged the defendants for their aggravated robbery of the victim on the street and then the aggravated burglary they conducted upon the victim's habitation after kidnapping her. The robbery and burglary are two separate crimes, with different conceptual foundations and different elements. They are legally distinct. The especially aggravated kidnapping occurred between the two but was not necessary for commission of either. Because of the distinctness of the three offenses, there is no worry about whether the jurors found the defendants guilty of kidnapping related to robbery or kidnapping related to burglary, as the defendants argue. (Def.'s Supp. Br., 8-9.) The kidnapping was not related to either the robbery or the burglary. It happened by itself, after the robbery was completed and before the burglary began.

CONCLUSION

The judgments should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent U.S. mail, first class postage prepaid to: Sherif Guindi, P.O. Box 438, Knoxville, TN 37901; Robert R. Kurtz, 422 S. Gay St., Ste. 301, Knoxville, TN 37902; and Mike Whalen, 905 Locust St., Knoxville, TN 37902, this the 12th day of September, 2014.

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Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Knoxville.

STATE of Tennessee
v.
Larry Jereller ALSTON, Kris Theotis Young, and Joshua Edward Webb.

No. E2012–00431–CCA–R3–CD. | Remanded by the Supreme Court Jan. 17, 2014. | Feb. 13, 2014. | Application for Permission to Appeal Granted by Supreme Court June 20, 2014.

Appeal from the Criminal Court for Knox County, Nos. 94647 A, B, & C; Mary Beth Liebowitz, Judge.

Attorneys and Law Firms

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Robert R. Kurtz (on appeal) and Vanessa Lemons (at trial), for the appellee, Kris T. Young.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which NORMA McGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

OPINION

JAMES CURWOOD WITT, JR., J.

***1** In this State appeal, the State challenged the Knox County Criminal Court's setting aside the jury verdicts of guilty of especially aggravated kidnapping, aggravated burglary, and possession of a firearm with intent to go armed during the commission of a dangerous felony and ordering dismissal of the charges. This court reversed the judgment of the trial court setting aside the verdicts and dismissing the charges of especially aggravated kidnapping and aggravated burglary, reinstated the verdicts, and remanded the case to the trial court for sentencing. We also determined that although the trial court erred by dismissing the firearms charge on the grounds named in its order, error in the indictment for that offense nevertheless required a dismissal of those charges. Finally, we affirmed the defendants' convictions of aggravated robbery. Upon the defendant's application for permission to appeal, the Tennessee Supreme Court remanded the case to this court for consideration in light of *State v. Cecil,* 409 S.W.3d 599 (Tenn.2013). Having reconsidered the case in light of the ruling in *Cecil,* we confirm our earlier holdings. The jury verdicts of especially aggravated kidnapping and aggravated burglary are reinstated, and those convictions are remanded to the trial court for sentencing. The trial court's dismissal of the firearms charge is affirmed on grounds other than those relied on by the trial court, and the convictions of aggravated robbery are affirmed.

On the afternoon of April 15, 2010, three armed men confronted the victim, Carolyn Sue Maples, in front of her Knoxville residence and demanded her purse before ordering Ms. Maples inside her house. A neighbor who witnessed the incident telephoned police, and the three defendants were apprehended a short time later just outside Ms. Maples' residence. The jury convicted the defendants as charged of especially aggravated kidnapping, aggravated burglary, aggravated robbery, and possession of a firearm with the intent to go armed during the commission of a dangerous felony. Following the jury verdicts, the trial court entered a written order setting aside the jury verdicts and dismissing the charges of especially aggravated kidnapping and aggravated burglary on grounds that they violated principles of due process as announced in *State v. Anthony,* 817 S.W.2d 299 (Tenn.1991), and its progeny. The trial court later set aside the jury verdicts for possession of a firearm with the intent to go armed during the commission of a dangerous felony and dismissed those charges on grounds that they could not stand in light of the dismissal of the especially aggravated kidnapping and aggravated burglary charges, which charges had acted as the predicate dangerous felonies for the firearms offenses.

The State appealed, and we reversed the trial court's setting aside the jury verdicts of especially aggravated kidnapping and aggravated burglary. In our ruling, we noted the change

in law ushered in by *State v. White,* 362 S.W.3d 559 (Tenn.2012), and concluded that the ruling in *White* applied, that the trial court erred by failing to provide the jury instruction promulgated by *White,* but that the error was harmless beyond a reasonable doubt. Upon application for discretionary appeal, our supreme court remanded this case for reconsideration in light of *State v. Cecil,* 409 S.W.3d 599 (Tenn.2013). That case expanded the court's ruling in *White,* which itself established a new methodology for addressing due process concerns when a kidnapping offense is charged along with another felony that necessarily includes a period of confinement or movement of the victim. Under that new methodology, the jury rather than the court must determine whether that period of confinement exceeds that which is necessary to accomplish the accompanying felony. *See State v. White,* 362 S.W.3d 559, 577–78 (Tenn.2012).

***2** In *Anthony,* our supreme court, utilizing principles of due process, determined that a period of confinement technically meeting the definition of kidnapping frequently accompanies such crimes as robbery and rape and concluded that a separate kidnapping conviction cannot be supported when "the confinement, movement, or detention [was] essentially incidental to the accompanying felony."*State v. Anthony,* 817 S.W.2d 299, 305 (Tenn.1991). The decision required reviewing courts to determine "whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction."*Id.* at 306. The court revisited the *Anthony* ruling several times in the ensuing two decades before finally overruling the case and all its progeny in *White.See State v. Bennie Osby,* No. W2012–00408–CCA–R3–CD, slip op. at 7–10 (Tenn.Crim.App.2012) (detailing history of *Anthony*).

In *White,* the supreme court held "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."*White,* 362 S.W.3d at 577. In so holding, the court concluded that "[t]he separate due process test articulated first in *Anthony,* and subsequently refined in *Dixon* and its progeny, is, therefore, no longer necessary to the appellate review of a kidnapping conviction accompanied by a separate felony."*Id.* at 578. Instead, the court held, the jury's finding beyond a reasonable doubt all the elements of kidnapping coupled with the reviewing court's "task ... of assessing the sufficiency of the convicting evidence" is sufficient to protect the defendant's due process rights. *Id.*

Although it overruled the line of cases that required a legal, as opposed to a factual, due process evaluation, the court retained the requirement that the State establish that the removal or confinement of the victim went beyond that necessary to accomplish the accompanying offense, classifying it as a question of fact to be determined by a jury "properly instructed under the law." *Id.* at 577. The court determined that the requirement that the removal or confinement be more than essentially incidental to the other offense informs the "definition for the element of the offense requiring that the removal or confinement constitute a substantial interference with the victim's liberty."*Id.* Having thus concluded, the court ruled that, to protect the defendant's due process rights, the jury should be instructed that it must determine that the removal or confinement of the victim was "significant enough, standing alone" to support a conviction of kidnapping before imposing one when an overlapping felony accompanies the kidnapping charge. *Id.* To this end, the supreme court developed a jury instruction to facilitate the jury's determination of whether the removal or confinement was essentially incidental to the accompanying offense. *See id.* at 580–81. The court found that the *White* jury had not been instructed on the "key" element of false imprisonment, that "substantial interference with the victim's liberty" required "a finding ... that the victim's removal or confinement was not essentially incidental to the accompanying felony offense,"*id.* at 580, and granted White a new trial on the basis of the "instructional error." *Id.*

***3** In *Cecil,* the supreme court deemed the holding in *White* applicable to those cases that were in some stage of the appellate process when *White* was filed on March 9, 2012. *See State v. Cecil,* 409 S.W.3d 599, 608 (Tenn.2013). The court also held that, when the due process issue identified by *White* is present, an appellate court's review of the sufficiency of the evidence in the absence of the jury instruction promulgated in *White* was insufficient to protect the defendant's right to due process. *See id.* at 609 ("Only when the jury is properly instructed can appellate review of the sufficiency of the convicting evidence satisfy the due process safeguard.") The court iterated that

> "[b]ecause the due process issue at stake is now deemed a factual issue to be determined by the trier of fact and not a legal issue to be determined by the trial court, *an appellate court*

> *that embarks upon determining the 'sufficiency of the evidence' on this issue despite the absence of the necessary, enabling instruction usurps the role of the trier offact.*"

Id. n. 9 (quoting Bennie Osby, slip op. at 12 n. 3) (emphasis in Cecil). The court confirmed that the absence of the White instruction results in instructional error that must be subjected to constitutional harmless error review. *See id.* at 610. By way of example, the court cited two cases in which this court had properly deemed the omission of the White instruction harmless beyond a reasonable doubt. *See id.* at 611 (citing *State v. Curtis Keller,* No. W2012–00825–CCA–R3–CD (Tenn.Crim.App., Jackson, June 27, 2013); *State v. Jonathan Kyle Hulse,* No. E2011–01292–CCA–R3–CD (Tenn.Crim.App., Knoxville, Mar. 19, 2013)). The common factor in these two cases was that the felony that accompanied the kidnapping charge and that gave rise to the due process concern was complete before the removal or confinement that served as the basis for the kidnapping charge.

In *State v. Curtis Keller,* Keller "and at least two accomplices kicked in the door of a house and terrorized its occupants because the defendant—an admitted drug dealer-believed that one of them owed him some money as a result of a prior transaction."*State v. Curtis Keller,* No. W2012–00825–CCA–R3–CD, slip op. at 2 (Tenn.Crim.App., Jackson, June 27, 2013). The defendant was charged with attempted especially aggravated robbery, especially aggravated burglary, employing a firearm during the commission of a dangerous felony, two counts of especially aggravated kidnapping, three counts of aggravated assault, and one count of being a felon in possession of a handgun. This court determined that the trial court's failure to provide the *White* instruction was error but that the error was harmless beyond a reasonable doubt. We observed, "The evidence presented by the State fully established that the victims' kidnappings were separate from—not 'incidental' to—the commission of the aggravated assaults upon them."*Id.* at 5. "[A]fter the victims had been subjected to threats of deadly force, they were further removed and confined with the intention that they be used as hostages in support of the defendant's efforts to rob" a third party. *Id.* We concluded that "the movement and confinement of the victims was not done for purposes of accomplishing assaults upon them. It was done to further the defendant's attempt to rob a third party, by applying the ultimate pressure on him to surrender his money."*Id.* at 6. Noting that "[n]o reasonable jury that examined the evidence in this case would have concluded otherwise," we deemed the instructional error harmless beyond a reasonable doubt. *Id.*

***4** In *State v. Jonathan Kyle Hulse,* the victim drove Hulse, the friend of a friend, home and helped him carry in his groceries before he "he pulled her into the house by her hair, beat her, and raped her."*State v. Jonathan Kyle Hulse,* No. E2011–01292–CCA–R3 -CD, slip op. at 4 (Tenn.Crim.App., Knoxville, Mar. 19, 2013). A witnesses testified that she went outside to investigate a noise and observed the naked victim trying to get under her trailer and a naked Hulse standing some 15 feet away. *Id.* at 2. The victim reported that the defendant dragged her inside his residence and, once inside, threatened her with a knife, raped her, attacked her with a box cutter, beat her savagely, and cut her hair before she was able to escape towards a neighboring trailer. The defendant gave chase, and at one point, he grabbed the victim by the ankles and dragged her down, striking her head on the concrete. *Id.* at 10. Hulse was convicted of aggravated rape and especially aggravated kidnapping. We concluded that the trial court erred by failing to provide the *White* instruction but judged the error harmless beyond a reasonable doubt because the evidence established that

> the [d]efendant's chasing the victim was not in order to accomplish the rape, which had already occurred, nor was it inherent in the then-completed aggravated rape. His chasing her kept her from retrieving her car keys, which he had taken from her and thrown inside his trailer. The facts also support a conclusion that the [d]efendant's actions created significant danger or risk of harm. He chased the victim with the boxcutter, having already demonstrated his intent and willingness to cut her and having threatened her life. As the victim reached Ms. Upright's trailer, the [d]efendant grabbed her ankles, causing her to sustain significant injuries to her head, and pulled her down the sidewalk, preventing her from summoning help. A jury could find that Ms. Upright's investigation of the noise she heard outside was a fortuitous intervening circumstance that frightened the [d]efendant into abandoning his further removal or

> confinement of the victim after the rape. The only reasonable conclusion to be drawn from the evidence is that the [d]efendant's actions were well beyond that necessary to consummate the rape.

Id. at 17.

With these cases in mind, we reconsider the facts of this case in light of the ruling in *Cecil.*In this case, Ashley Dawn Hill testified that on April 15, 2010, she saw two black men with dread locks and a white man with glasses walking down the middle of the street toward the victim's residence. Shortly thereafter, she saw the men approach the victim and say, " 'Excuse me.' " Ms. Hill looked down momentarily and then heard the victim scream. Ms. Hill testified that when she looked up, she saw one of the black men grab the victim's purse. The victim got out of her car and ran toward her house, "and they followed her into the house." At that point, Ms. Hill telephoned 9–1–1.

***5** Carolyn Sue Maples testified that on April 15, 2010, she went outside to get into her car to go pick up her daughter and grandchild so that they could visit her husband in the hospital. Ms. Maples recalled that when she exited her house, she saw three men, two black and one white, walking toward her. She said that she walked to the car, opened the door, and, just as she began to get in, the "big" black man asked if she knew a particular girl. Ms. Maples responded that she did not and turned to get in the car. She said, "The next thing I know there were guns to my head."

Ms. Maples testified that the two black men pointed guns at her and that one of the men demanded first that she give him her purse and then that she " 'get to the house.' " She said that "the big one" took her purse as she got out of the car. The men then "pushed [her] to go open the door to the house." Once inside the house, the men pushed her onto the couch and began ransacking her home. She recalled, "They wanted my money; they wanted my jewelry; they wanted anything I had." She said that the men took $140 from her wallet along with her bank card. "The big one" demanded that she provide her "bank number" so that they could access her account. Ms. Maples recalled that the white perpetrator had "a sawed-off shotgun ... stuffed down in his pants," and the two black men had pistols.

As Ms. Maples remained confined to the couch, "[t]he big one" took two flat screen televisions and walked toward the door. At that point, the man said, " 'Oh, f* * *, there's the law' " and then "took off towards the one in the kitchen." When the man ran away, Ms. Maples was able to escape through the open front door. The three defendants were apprehended as they attempted to flee from Ms. Maples' home.

At the conclusion of the State's proof, the defendants moved the trial court to dismiss the charges of especially aggravated kidnapping on grounds that the evidence did not establish that the removal and confinement of the victim was more than that necessary to accomplish the aggravated robbery of the victim. The trial court determined that the motion was premature and concluded that the issue whether a separate kidnapping conviction "could stand under the due process evaluation was an issue to be taken up not by the jury but by the court but only after the jury's verdict."The court took the motion under advisement. Post trial, the defendants argued that the aggravated robbery of the victim was a continuing offense that began when they first demanded her purse at gunpoint and continued until they were apprehended by police. The State, *citing the language of the indictment,* argued that the aggravated robbery of the victim was complete upon the taking of her purse. Persuaded by the defendant's theory that the aggravated robbery was a continuing offense and that the removal of the victim to her house and her confinement therein was incidental to that offense, the trial court set aside the jury verdicts and entered an order dismissing the charges of especially aggravated kidnapping, concluding, "The movement into the house was an essential part of the continuing aggravated robbery of the victim, thus it is an uncompleted event until broken by the arrival and announcement of police."The court ruled that due process principles, as described in *Anthony* and its progeny, mandated setting aside the especially aggravated kidnapping verdicts and entering orders of dismissal.

***6** As we observed in our earlier opinion, *Anthony* and all its progeny were overruled by *White* and concluded that, because this case was in the appellate process at the time *White* was decided, *White* was applicable. Having so concluded, we determined that the trial court's failure to provide the *White* instruction in this case was error but that the error was harmless beyond a reasonable doubt because the evidence established that the aggravated robbery of the victim was complete before she was ordered inside her house and held there at gunpoint. Nothing in *Cecil* alters this holding.

The evidence clearly established that the three defendants accosted the victim in front of her home and demanded her

purse at gunpoint and that one of the defendants immediately took the victim's purse. The aggravated robbery indictment alleged that the defendants "did unlawfully, knowingly, by putting Carolyn S. Maples in fear, take from the person of Carolyn S. Maples, *a purse and its contents,* said taking accomplished with a deadly weapon."(emphasis added). Thus, as soon as the defendants obtained possession of the victim's purse and, by extension, its contents at gunpoint, the aggravated robbery *as charged in the indictment* was complete. The defendants were not charged with robbery —aggravated, attempted, or otherwise—for the subsequent taking of items inside the victim's house. The defendants' argument that the true object of the robbery was drugs and other items inside the house cannot alter the charged offense in this case. As soon as the defendants exercised control over the victim's purse by threatening her at gunpoint, the defendants were guilty of the aggravated robbery charged in the indictment. That offense did not continue. Only after they completed the aggravated robbery as charged in the indictment did the defendants order the victim into her home and hold her there at gunpoint. As was the case in *Keller* and *Hulse,* the evidence clearly and overwhelmingly established that the removal of the victim from her driveway and her confinement within the house went far beyond that necessary to accomplish the single aggravated robbery as that offense was narrowly charged in the indictment. No reasonable and properly instructed jury could have concluded otherwise.

Having reconsidered the facts of this case in light of *Terrance Antonio Cecil,* we again conclude that the trial court erred by setting aside the jury verdicts of especially aggravated kidnapping and dismissing those charges. Thus, the judgment of the trial court is reversed, the jury verdicts are reinstated, and the case is remanded for sentencing. We also reiterate our previous holdings regarding the jury verdicts of aggravated burglary and possession of a firearm with the intent to go armed during the commission of a dangerous felony and the convictions of aggravated robbery.

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SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Knoxville.

STATE Of Tennessee
v.
Larry Jereller ALSTON, Kris Theotis Young, And Joshua Edward Webb.

No. E2012–00431–CCA–R3–CD. | Feb. 27, 2013 Session. | May 30, 2013.
| Application for Permission to Appeal Granted by the Supreme Court Jan. 17, 2014.

Appeal from the Criminal Court for Knox County, Nos. 94647 A, B, & C; Mary Beth Liebowitz, Judge.

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Robert R. Kurtz (on appeal) and Vanessa Lemons (at trial), Knoxville, Tennessee, for the appellee, Kris T. Young.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

OPINION

JAMES CURWOOD WITT, JR., J.

***1** In this appeal as of right, the State challenges the Knox County Criminal Court's setting aside the jury verdicts of guilty of especially aggravated kidnapping, aggravated burglary, and possession of a firearm with intent to go armed during the commission of a dangerous felony and ordering dismissal of the charges. Because the trial court erred by setting aside the verdicts and dismissing the charges of especially aggravated kidnapping and aggravated burglary, the jury verdicts are reinstated, and the case is remanded to the trial court for sentencing. Although the trial court erred by dismissing the firearms charge on the grounds named in its order, error in the indictment for that offense nevertheless requires a dismissal of those charges. Finally, the defendants' convictions of aggravated robbery and the sentences that accompany them are affirmed.

On the afternoon of April 15, 2010, three armed men confronted the victim, Carolyn Sue Maples, in front of her Knoxville residence and demanded her purse before ordering Ms. Maples inside her house. A neighbor who witnessed the incident telephoned police, and the three defendants were apprehended a short time later just outside Ms. Maples' residence.

At trial, Ashley Dawn Hill testified that on April 15, 2010, at approximately 1:45 p.m., she was sitting on the front porch of her Chicago Avenue residence when she saw two black men with dread locks and a white man with glasses walking down the middle of the street toward the victim's residence. At one point before they reached the victim's residence, the men attempted to stop a car, but the car would not stop. Ms. Hill said that she went inside her house briefly, and when she returned to the porch, she saw the victim walk around her car, which was parked in front of her house, to get in. At that point, the men approached the victim and said, " 'Excuse me .' " Ms. Hill looked down momentarily and then heard the victim scream. Ms. Hill testified that when she looked up, she saw one of the black men grab the victim's purse. The victim got out of her car and ran toward her house, "and they followed her into the house ." At that point, Ms. Hill telephoned 9–1–1.

Carolyn Sue Maples testified that on April 15, 2010, she lived at 2118 Chicago Avenue with her husband Harvey Hahn, who was in the hospital being treated for throat cancer. On that date, at approximately 1:45 p.m., Ms. Maples went outside to get into her car to go pick up her daughter and grandchild so that they could visit her husband in the hospital. Ms. Maples recalled that when she exited her house, she saw three men, two black and one white, walking toward her. She said that she walked to the car, opened the door, and, just as she began to get in, the "big" black man asked if she knew a particular

girl. Ms. Maples responded that she did not and turned to get in the car. She said, "The next thing I know there were guns to my head."

Ms. Maples testified that the two black men pointed guns at her and that one of the men demanded first that she give him her purse and then that she " 'get to the house.' " She said that "the big one" took her purse as she got out of the car. The men then "pushed [her] to go open the door to the house." Ms. Maples testified that she was so scared that she had difficulty opening the door. Once inside the house, the men pushed her onto the couch and began ransacking her home. She recalled, "They wanted my money; they wanted my jewelry; they wanted anything I had." She said that the men took $140 from her wallet along with her bank card. "The big one" demanded that she provide her "bank number" so that they could access her account. Ms. Maples recalled that the white perpetrator had "a sawedoff shotgun ... stuffed down in his pants," and the two black men had pistols.

2 As Ms. Maples remained confined to the couch, "[t]he big one" took two flat screen televisions and walked toward the door. At that point, the man said, " 'Oh, f * *, there's the law' " and then "took off towards the one in the kitchen." When the man ran away, Ms. Maples was able to escape through the open front door. When she got outside, "the lady cop" told her to "[g]o somewhere and ... get where nobody can see you." She noted that the men had left the house in disarray. She identified all three defendants at trial, designating Mr. Young as "the big one."

Knoxville Police Department ("KPD") Officer Amanda Bunch testified that at approximately 1:41 p.m., she was diverted from another call to respond to Chicago Avenue to investigate a report that "three males force[d] a lady back into her house at gunpoint."Officer Bunch recalled that she deactivated her emergency equipment as she pulled onto Chicago Avenue, parked her car a safe distance from the given address, and proceeded toward the house on foot. She took a position behind a tree and waited for backup to arrive. Officer Bunch testified that two other officers arrived nearly simultaneously to one another and that, at that point, the front door opened and a black male carrying a television set began to exit. From her position behind the tree, Officer Bunch saw the individual drop the television and run back into the house. She said that the other two officers went to the back of the house while she took a closer position in the driveway of the residence. When someone approached the front door a second time, Officer Bunch shouted, "[G]et on the ground." The victim shouted, "[I]t's me," and Officer Bunch motioned for the victim to come into the driveway.

Officer Bunch testified that other officers placed one subject in custody at the back of the house. Officer Dean Ray arrived with his police dog, and officers went to the house and released the dog inside. She said that the dog drove the other two suspects onto the back deck, where they were placed into custody. She handcuffed the white male, identified as Mr. Webb, and performed a search of his person. Officer Bunch testified that she discovered "[t]wo five-dollar bills, a lighter, his wallet, ... a gold kind of bracelet chain type thing, and ... a pill bottle."The victim's name was on the pill bottle.

KPD Officer Tim Riddle responded to the call on Chicago Avenue to assist other officers. He said that when he arrived he observed Officer Bunch behind a tree, so he also "took cover next to a tree just in case someone come (sic) out shootin'." From his position, Officer Riddle could see both the front and rear exits of the home. As he looked toward the house, Officer Riddle observed a black male "carrying out some materials." When the officers "began to give verbal commands," the individual dropped what he was carrying and went back into the house. Shortly thereafter, he saw an elderly, white woman run from the front door and a black male "trying to run out the back door."The black male was apprehended by Officer John Stevens, who had taken a position in the back alley. Officer Riddle radioed for K–9 assistance. The K–9 Officer arrived, warned occupants of the house that the dog was going to be released, and then "a white male and a black male comes out the back door and gives up."Officer Riddle placed the second black male, identified as Mr. Young, into custody.

*3 KPD Officer John Stevens also responded to the call of "a home invasion in progress, that there was three suspects at the time, all armed, and had forced a ... victim back into her residence on Chicago Avenue."When he arrived, he took a position that allowed him to "observe the rear exit of the residence."Officer Stevens recalled that Mr. Alston was the first to exit, followed quickly by Messrs. Webb and Young. Mr. Alston, he said, cooperated with officers' commands and got down to the ground immediately. Officer Stevens placed Mr. Alston in custody and searched his person. Mr. Alston had $110 in cash and the victim's automatic teller machine ("ATM") card on his person.

KPD Forensic Officer Russ Whitfield took photographs and collected evidence at the Chicago Avenue scene. Among the

items he collected were a loaded Ruger pistol, a loaded High Point nine millimeter pistol, and a loaded Stevens .20 gauge pump-action, sawed-off shotgun. All of the weapons were swabbed to collect DNA.

At the conclusion of this proof, the State rested, and the defendants moved the trial court to dismiss the charges of especially aggravated kidnapping and aggravated burglary based upon due process principles as announced in *State v. Anthony,* 817 S.W.2d 299 (Tenn.1991), and its progeny. The trial court reserved ruling on the motion until after the jury rendered its verdicts. The defendants elected to present no proof.

Based upon the proof presented by the State, the jury convicted all of the defendants as charged of especially aggravated kidnapping, aggravated burglary, aggravated robbery, and possession of a firearm with the intent to go armed during the commission of a dangerous felony. Following the jury verdicts, the trial court entered a written order setting aside the jury verdicts and dismissing the charges of especially aggravated kidnapping and aggravated burglary on grounds that they violated due process principles. The trial court later set aside the jury verdicts for possession of a firearm with the intent to go armed during the commission of a dangerous felony and dismissed those charges on grounds that they could not stand in light of the dismissal of the especially aggravated kidnapping and aggravated burglary charges.

In this timely appeal, the State challenges the trial court's order setting aside the jury verdicts of guilty and dismissing the charges of especially aggravated kidnapping, aggravated burglary, and possession of a firearm with the intent to go armed during the commission of a dangerous felony.

I. Jurisdiction

Initially, the defendants contend that this court lacks jurisdiction to consider the State's appeal because "double jeopardy concerns" prohibit a retrial after the entry of a judgment of acquittal. The State asserts that the rules of appellate procedure specifically provide for a State appeal under the circumstances of this case and that double jeopardy principles do not bar a State appeal in this case because the trial court did not set aside the verdicts because of an insufficiency of the evidence.

*4 American courts have long recognized that the government "cannot appeal in a criminal case without express [legislative] authorization."*United States v. Martin Linen Supply Co.,* 430 U.S. 564, 568, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) (citing *United States v. Wilson,* 420 U.S. 332, 336, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); *United States v. Sanges,* 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1892)). As a result, "[w]hen a statute affords a state or the United States the right to an appeal in a criminal proceeding, the statute will be strictly construed to apply only to the circumstances defined in the statute."*State v. Meeks,* 262 S.W.3d 710, 718 (Tenn.2008) (citing *Carroll v. United States,* 354 U.S. 394, 400, 77 S.Ct. 1332, 1 L.Ed.2d 1442 (1957); *State v. Adler,* 92 S.W.3d 397, 400 (Tenn.2002)). As our supreme court explained, at common law the State had no right to appeal in a criminal case under any circumstances. *Meeks,* 262 S.W.3d at 718. Later, many state legislatures and Congress granted to the prosecution limited rights of appeal via specific constitutional or statutory provisions. *See Sanges,* 144 U.S. at 312 (1892) ("[T]he State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."); *see also Martin Linen Supply Co.,* 430 U.S. at 568; *Wilson,* 420 U.S. at 336. Even where the right of appeal was granted to the prosecution, courts continued to emphasize that such provisions must be construed or applied narrowly to avoid a general grant of jurisdiction for State appeals. *Meeks,* 262 S.W.3d at 718;*see also Arizona v. Manypenny,* 451 U.S. 232, 246, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981). Indeed, " 'appeals by the Government in criminal cases are something unusual, exceptional, not favored,' at least in part because they always threaten to offend the policies behind the double jeopardy prohibition."*Will v. United States,* 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) (quoting *Carroll,* 354 U.S. at 400; citing *Fong Foo v. United States,* 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962))."Both prudential and constitutional interests contributed to this tradition. The need to restrict appeals by the prosecutor reflected a prudential concern that individuals should be free from the harassment and vexation of unbounded litigation by the sovereign."*Manypenny,* 451 U.S. at 246. When construing the right of the State to appeal in a criminal case, reviewing courts must do so with an understanding that the granting authority, the legislature, "clearly contemplated ... that [the prosecution] would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions."*Will,* 389 U.S. at 98 n. 5.

In this instance, the State seeks an appeal as of right pursuant to Tennessee Rule of Appellate Procedure 3, which provides, in pertinent part, as follows:

> In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) *setting aside a verdict of guilty and entering a judgment of acquittal;* (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, post-conviction proceeding, or from an order or judgment entered pursuant to Rule 36, Tennessee Rules of Criminal Procedure.

***5** Tenn. R.App. P. 3(c) (emphasis added). The language of this rule clearly contemplates a State appeal when the trial court sets aside a jury verdict of guilty and enters a judgment of acquittal.

Here, the trial court set aside the jury verdicts of guilty as to the charges of especially aggravated kidnapping and aggravated burglary on grounds that they violated principles of due process. The defendants, despite espousing the opposite position in the trial court, contend that the trial court's ruling was one that the evidence was insufficient to support the verdicts. The State, similarly championing a position opposite that taken in the trial court, contends that the rulings did not constitute a comment on the sufficiency of the convicting evidence. In our view, it is unnecessary to determine whether trial court's ruling amounted to a decision regarding the sufficiency of the convicting evidence because, as we discuss below, the State would be permitted to appeal the ruling regardless.

The defendants assert generally that principles of double jeopardy prohibit a State appeal and the grant of a new trial following the trial court's grant of a judgment of acquittal, but they fail to recognize the important distinction between judgments of acquittal granted before the case has been passed on by the jury and those granted following a jury verdict of guilty.

To be sure, when the trial court grants a judgment of acquittal after the trial commences but before the jury has rendered a verdict, a State appeal is barred because reversal of the trial court's judgment would subject the defendant to a successive prosecution in violation of the double jeopardy clause. *See Smith v. Massachusetts,* 543 U.S. 462, 467, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005); *Schiro v. Farley,* 510 U.S. 222, 230, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994); *Smalis v. Pennsylvania,* 476 U.S. 140, 145, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986); *Richardson v. United States,* 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *United States v. DiFrancesco,* 449 U.S. 117, 132, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *Sanabria v. United States,* 437 U.S. 54, 64, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); *Martin Linen Supply Co.,* 430 U.S. at 573; *United States v. Sisson,* 399 U.S. 267, 290, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970); *Fong Foo,* 369 U.S. at 143. Indeed, in *Evans v. Michigan,* submitted to this court as supplemental authority by the defendants, the Court reiterated that the prosecution cannot appeal a judgment of acquittal entered prior to the jury's rendering a verdict of guilty.*Evans v. Michigan,* — U.S. ——, —— – ——, 133 S.Ct. 1069, 1080–81, 185 L.Ed.2d 124 (2013).

Judgments of acquittal granted following the jury's verdict of guilty, however, are treated differently. The case law "establish[es] that the primary evil to be guarded against is successive prosecutions: 'The prohibition against multiple trials is the controlling constitutional principle.' " *Schiro,* 510 U.S. at 230 (quoting *DiFrancesco,* 449 U.S. at 132). An appeal from a judgment of acquittal granted after the jury verdict does not violate double jeopardy principles because the remedy, should the State's appeal prove meritorious, would not be the grant of a new trial but instead reinstatement of the previously-rendered jury verdict. *Smith,* 543 U.S. at 467; *Martin Linen Supply Co.,* 430 U.S. at 569–70. As the Court explained,

> ***6** Our cases have made a single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury: When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a

> prosecution appeal to reinstate the jury verdict of guilty.

Smith, 543 U.S. at 467 (citing *Wilson,* 420 U.S. at 352–53);*see also Martin Linen Supply Co.,* 430 U.S. at 569–70 ("[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended. Thus a postverdict dismissal of an indictment after a jury rendered a guilty verdict has been held to be appealable ... because restoration of the guilty verdict, and not a new trial, would necessarily result if the Government prevailed."). The Court noted that "[t]he absence of a threatened second trial mitigates the possibility of governmental jury shopping and substantially reduces the expense and anxiety to be borne by the defendant."*Martin Linen Supply Co.,* 430 U.S. at 570 n. 7. The ruling in *Evans* does not alter the exception so succinctly described in *Smith;* indeed, it reaffirms it in a footnote. *Evans,* 133 S.Ct. at 1081 n. 9 ("If a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial.").

Thus, even if the trial court's ruling setting aside the verdicts of guilty on due process grounds could be classified as a determination of the sufficiency of the convicting evidence, the State would still be entitled to appeal the ruling because it occurred after the jury had passed on the question of the defendants' guilt or innocence and rendered verdicts of guilty.

The defendants also mistakenly argue that the only remedy available to the State vis-a-vis the trial court's order setting aside the jury verdicts and ordering dismissal of the especially aggravated kidnapping charges is the grant of a new trial. As we will discuss more fully below, the trial court erred not only by setting aside the verdicts and ordering dismissal of the especially aggravated kidnapping charges on due process grounds but also by failing to instruct the jury as provided by *State v. White,* 362 S.W.3d 559 (Tenn.2012). Because we conclude that the jury instruction error was harmless beyond a reasonable doubt, the appropriate remedy is reinstatement of the especially aggravated kidnapping verdicts. *See State v. Richardson,* 251 S.W.3d 438, 439 (Tenn.2008), *overruled on other grounds by State v. White,* 362 S.W.3d 559 (Tenn.2012) (reinstating kidnapping convictions vacated by intermediate appellate court); *State v. Fuller,* 172 S.W.3d 533, 534 (Tenn.2005), *overruled on other grounds byWhite,* 362 S.W.3d at 578 (same); *State v. Deirice Cates,* No. E2006–02553–CCA–R3–CD, slip op. at 1 (Tenn.Crim.App., Knoxville, Jan. 28, 2008) (reversing trial court's dismissal of two counts of especially aggravated kidnapping and remanding for reinstatement).

*7 Based on the foregoing, the State enjoys the right to appeal, and we have jurisdiction to entertain that appeal.

II. Propriety of the Trial Court's Action

Having concluded that we have jurisdiction of this State appeal, we turn to the propriety of the trial court's order setting aside the jury verdicts of guilty of especially aggravated kidnapping, aggravated burglary, and possession of a firearm with the intent to go armed during the commission of a dangerous felony and the concomitant dismissal of those charges. The State contends that the trial court committed error, and the defendants assert that it did not. We examine each offense in turn.

A. Especially Aggravated Kidnapping

At the conclusion of the State's proof, the defendants moved the trial court to dismiss the charges of especially aggravated kidnapping on grounds that the evidence did not establish that the removal and confinement of the victim was more than that necessary to accomplish the aggravated robbery of the victim. The trial court, citing *State v. Cozart,* 54 S.W.3d 242, 247 (Tenn.2001), *overruled on other grounds byWhite,* 362 S.W.3d at 578, determined that the motion was premature and concluded that the issue whether a separate kidnapping conviction "could stand under the due process evaluation was an issue to be taken up not by the jury but by the court but only after the jury's verdict."The court took the motion under advisement. After the jury returned verdicts of guilty as charged for all the defendants, the court set aside the jury verdicts and entered an order dismissing the charges of especially aggravated kidnapping, concluding, "The movement into the house was an essential part of the continuing aggravated robbery of the victim, thus it is an uncompleted event until broken by the arrival and announcement of police."The court ruled that due process principles, as described in *State v. Anthony,* and its progeny, mandated setting aside the especially aggravated kidnapping verdicts and entering orders of dismissal.

In *State v. Anthony,* our supreme court, utilizing principles of due process, determined that a period of confinement technically meeting the definition of kidnapping frequently

accompanies such crimes as robbery and rape and concluded that a separate kidnapping conviction cannot be supported when "the confinement, movement, or detention [was] essentially incidental to the accompanying felony."*State v. Anthony,* 817 S.W.2d 299, 305 (Tenn.1991). The decision required reviewing courts to determine "whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction."*Id.* at 306.The court revisited the *Anthony* ruling several times in the ensuing two decades before finally overruling the case and all its progeny in *White.See State v. Osby,* —— S.W.3d ——, No. W2012–00408–CCA–R3–CD, slip op. at 7–10 (Tenn.Crim.App.2012) (detailing history of *Anthony*).

***8** In *White,* the supreme court held "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."*White,* 362 S.W.3d at 577. In so holding, the court concluded that "[t]he separate due process test articulated first in *Anthony,* and subsequently refined in *Dixon* and its progeny, is, therefore, no longer necessary to the appellate review of a kidnapping conviction accompanied by a separate felony."*Id.* at 578.Instead, the court held, the jury's finding beyond a reasonable doubt all the elements of kidnapping coupled with the reviewing court's "task ... of assessing the sufficiency of the convicting evidence" is sufficient to protect the defendant's due process rights. *Id.*

Although it overruled the line of cases that required a legal, as opposed to a factual due process evaluation, the court retained the requirement that the State establish that the removal or confinement of the victim went beyond that necessary to accomplish the accompanying offense, classifying it as a question of fact to be determined by a jury "properly instructed under the law." *Id.* at 577.Given this holding, the court determined 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. at 578.The court determined that the requirement that the removal or confinement be more than essentially incidental to the other offense informs the "definition for the element of the offense requiring that the removal or confinement constitute a substantial interference with the victim's liberty."*Id.* Having thus concluded, the court ruled that, to protect the defendant's due process rights, the jury should be instructed that it must determine that the removal or confinement of the victim was "significant enough, standing alone" to support a conviction of kidnapping before imposing one when an overlapping felony accompanies the kidnapping charge. *Id.* The supreme court also developed a jury instruction to facilitate the jury's determination of whether the removal or confinement was essentially incidental to the accompanying offense. *See id.* at 580–81.The court found that the *White* jury had not been instructed on the "key" element of false imprisonment, that "substantial interference with the victim's liberty" required "a finding ... that the victim's removal or confinement was not essentially incidental to the accompanying felony offense," and granted White a new trial on the basis of the "instructional error." *Id.*

***9** In this case, tried in 2011 before the filing of *White,* the trial court did not provide the instruction envisioned by our supreme court, despite the defendants' specific request for a similar instruction. [1] Because this case was in the appellate pipeline when the supreme court issued its opinion in *White,* we will use that ruling to analyze the issue presented. *See Osby,* —— S.W.3d at ——, slip op. at 10.

The trial court engaged in the analysis deemed unnecessary by *White* and concluded, based on that line of cases expressly overruled by *White,* that the especially aggravated kidnapping verdicts should be set aside and the charges dismissed. Pursuant to *White,* the trial court, having determined that a question existed whether the removal and confinement of Ms. Maples was sufficient to support a separate conviction of especially aggravated kidnapping, should not have set aside the jury verdicts and dismissed the charges but instead should have submitted the issue to a properly instructed jury. *See Osby,* —— S.W.3d at ——, slip op. at 11–12 (explaining that the *White* instruction must be given when the issue is fairly raised by the proof). Consequently, based upon the ruling

in *White,* both the action of setting aside the verdicts and ordering dismissal of the charges and the failure to give the *White* instruction were erroneous.

We must next determine whether the error requires that the case be remanded for a new trial or can be classified as harmless beyond a reasonable doubt, in which case the jury verdicts should be reinstated. *See id.,* slip op. at 12 (citing *White,* 362 S.W.3d at 580;*see also id.* n. 20). The proof established that the three defendants accosted the victim in front of her home and demanded her purse at gunpoint. One of the defendants took the victim's purse as she exited her car. At that point, the aggravated robbery *as charged in the indictment* was complete. [2] The defendants' argument that the true object of the robbery was drugs and other items inside the house does not alter the fact that the defendants were charged with aggravated robbery for taking the victim's purse and its contents by the use of a deadly weapon. After they exercised control over the victim's purse, the defendants could have done nothing more and still been guilty of aggravated robbery. Instead, the defendants ordered Ms. Maples into her home, where they set about collecting more items to steal. Under these circumstances, the evidence clearly and overwhelmingly established that the removal of the victim from her driveway and her confinement within the house went far beyond that necessary to accomplish the aggravated robbery.

That the defendants may have intended to take other items from inside the victim's home, including pills, does not alter our analysis. Nor are we persuaded that the aggravated robbery charged in the indictment was not complete because the defendants arguably committed a second, uncharged aggravated robbery while inside the victim's home. In sum, the trial court erred by setting aside the jury verdicts of especially aggravated kidnapping and entering orders of dismissal and by failing to provide a *White* instruction to the jury. Because the instructional error was harmless beyond a reasonable doubt, however, we reinstate the jury's especially aggravated kidnapping verdicts and remand them to the trial court for sentencing.

B. Aggravated Burglary

***10** As in the case of the especially aggravated kidnapping charges, the defendants asked the trial court to dismiss the charges of aggravated burglary at the conclusion of the State's proof, arguing that "the burglary is part and parcel of the robbery."The trial court, apparently under the mistaken impression that the burglary conviction might have to be merged into the aggravated robbery conviction, reserved ruling on the motion until after the jury rendered its verdicts. In its written order, the trial court ruled, as it had with the verdicts of especially aggravated kidnapping, that principles of due process as described in *Anthony* required setting aside the jury verdicts of aggravated burglary and dismissing the charges because the State failed to establish "a 'clear break' " between the aggravated robbery and the aggravated burglary.

Even before *Anthony* and its progeny were overruled by *White,* their precedent had been expressly limited to those cases involving the propriety of a separate conviction of kidnapping. *See, e.g., State v. Ralph,* 6 S.W.3d 251, 255 (Tenn.1999) ("[W]e are convinced that the principles of due process offended in *Anthony* by the separate convictions of kidnapping and robbery are not offended by separate convictions for burglary and theft in this case."); *State v. Barney,* 986 S.W.2d 545, 548 (Tenn.1999), *abrogated on other grounds by State v. Watkins,* 362 S.W.3d 530, 550 (Tenn.2012) ("[T]he 'essentially incidental' test, as developed in Anthony and its progeny, is not helpful in the context of sexual offenses[.]"); *State v. Cowan,* 46 S.W.3d 227, 234 (Tenn.Crim.App.2000) ("We decline to extend [*Anthony's*] application ... to separate convictions for attempted first degree murder, aggravated burglary and attempted especially aggravated robbery."); *State v. John Brunner,* No. W2008–01444–CCA–R3–CD, slip op. at 11 (Tenn.Crim.App., Jackson, July 17, 2009) (declining to apply *Anthony* to separate convictions of second degree murder and domestic violence); *State v. Floyd Perrow,* No. M2003–00319–CCA–R3–CD, slip op. at 11 (Tenn.Crim.App., Nashville, Jan. 24, 2008) (declining to apply *Anthony* to separate convictions of aggravated burglary, aggravated rape, and aggravated assault); *State v. Reginol L. Waters,* No. M2001–02682–CCA–R3–CD, slip op. at 15 (Tenn.Crim.App., Nashville, Jan. 30, 2003) (rejecting defendant's argument that, pursuant to *Anthony,* "the offense of aggravated burglary was essentially incidental to the offenses of aggravated rape and aggravated robbery").

As our supreme court explained in *Anthony,* the rationale for the court's holding was that a period of confinement that satisfies the elements of kidnapping frequently accompanies such crimes as robbery and rape but that due process principles prohibited the imposition of a kidnapping conviction when "the confinement, movement, or detention [was] essentially incidental to the accompanying

felony."*Anthony,* 817 S.W.2d at 305. The same danger does not exist between the crimes of aggravated robbery and aggravated burglary. The offenses of aggravated burglary and aggravated robbery "are narrowly defined by statute and each contains different elements."*Cowan,* 46 S.W.3d at 234. Aggravated burglary is a property crime that is complete upon the unauthorized entry into a habitation. *See*T.C.A. § 39–14–402(a)(1); –403(a) (2006); *see also Cowan* 46 S.W.3d at 234. The victim of aggravated burglary need not even be present when the offense is committed. Aggravated robbery as charged, on the other hand, is a crime against the person complete upon the taking of property from another by putting in fear and use of a deadly weapon. *See*T.C.A. § 39–13–401(a); –402(a)(1); *see also Cowan,* 46 S.W.3d at 234. A perpetrator need not make any entry into a habitation to complete the offense of aggravated robbery. Unlike the "modern, broadly-drawn kidnapping statutes" at issue in *Anthony,* there is no danger that the offenses of aggravated burglary or aggravated robbery "could literally overrun several other crimes."*Anthony,* 817 S.W.2d at 303.

***11** Accordingly, no due process issue attends the imposition of separate convictions of aggravated burglary and aggravated robbery. Therefore, the trial court erred by setting aside the jury verdicts of aggravated burglary and dismissing those charges based upon the due process principles announced in *Anthony* and its progeny. Furthermore, because no issue of due process exists, no jury instruction like the one promulgated in *White* was required before the jury could impose convictions of aggravated robbery and aggravated burglary.

The defendants' reliance on *State v. Lowery* and *State v. Black* in support of their contention that convictions of aggravated burglary and aggravated robbery violate principles of double jeopardy is inapt. In *Lowery,* our supreme court ruled that an accused could not be "convicted of both robbery with a deadly weapon under T.C.A. § 39–2–501 (formerly § 39–3901) and of grand larceny under T.C.A. § 39–3–1101 (formerly § 39–4202) based upon a single criminal episode,"*State v. Lowery,* 667 S.W.2d 52, 53 (Tenn.1984), because "larceny is a lesser included offense of robbery,"*id.* at 53.Essentially, larceny was an element of robbery. In *Black,* our supreme court affirmed convictions "of armed robbery and ... assault with intent to commit murder in the second degree" despite that the offenses "occurred at substantially the same time and in the course of a single 'criminal episode', or 'transaction' " because they were "not identical offenses." *State v. Black,* 524 S.W.2d 913, 920 (Tenn.1975), *abbrogated by State v. Watkins,* 362 S.W.3d 530, 548–49 (Tenn.2012). Neither case stood for the proposition, as the defendants contend, that an accused could not be convicted of separate crimes for offenses committed during a single criminal episode. Nothing in these cases suggests that separate convictions of aggravated burglary and aggravated robbery arising out of the same criminal episode violate principles of double jeopardy or any other tenet of the law.

Moreover, neither *Lowery* nor *Black* remains viable precedent in light of our supreme court's ruling in *Watkins.*There, our supreme court rejected all facets of the *Denton* analysis for double jeopardy questions, parts of which were relied on in both *Lowery* and *Black,* and adopted in its place "the *Blockburger* same elements test currently utilized by the federal courts and the vast majority of our sister states."*Watkins,* 362 S.W.3d at 556. Utilizing the *Blockburger* test, separate convictions of aggravated burglary and aggravated robbery do not offend double jeopardy principles because our legislature has clearly "expressed an intent to permit multiple punishment" for these offenses, *id.* at 556, and because "each offense includes an element that the other does not,"*id.* at 557.

Because separate convictions of aggravated burglary and aggravated robbery do not violate principles of due process or double jeopardy, the trial court erred by setting aside the jury verdicts of aggravated burglary and dismissing those charges. Those verdicts are reinstated and remanded to the trial court for sentencing.

C. Firearms Convictions

***12** In its order setting aside the jury verdicts and ordering dismissal of the especially aggravated kidnapping and aggravated burglary charges, the trial court declined to set aside the verdicts of possession of a firearm with the intent to go armed during the commission of a dangerous felony, concluding that "unlawful possession of a weapon is a separate and distinct offense."Later, upon a motion from the defendants, the trial court set aside the jury's verdicts and dismissed the firearms charges after finding that they could not stand in light of the dismissal of the predicate felony of aggravated burglary.

Because we have reversed the trial court's order setting aside the jury verdicts of aggravated burglary and reinstated the verdicts, the trial court's basis for dismissing the firearms

charges no longer applies. That being said, we note that the State failed to allege a predicate felony in the indictment for possession of a firearm with the intent to go armed during the commission of a dangerous felony. Although neither party raises the issue, "the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee to the accused the right to be informed of the nature and cause of the accusation,"*State v. Hill,* 954 S.W.2d 725, 727 (Tenn.1997), and the failure of an indictment to provide constitutionally adequate notice results in a void indictment requiring dismissal. Thus, we examine the issue to determine whether the failure to name a predicate felony in the indictment for possession of a firearm with the intent to go armed during the commission of a dangerous felony results in a void indictment, thereby rising to the level of plain error.

Before an error may be recognized as plain, it "must be 'plain' and it must affect a 'substantial right' of the accused."*State v. Adkisson,* 899 S.W.2d 626, 639 (Tenn.Crim.App.1994). Authority to correct an otherwise "forfeited error" lies strictly "within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings .' " *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (citations omitted).

In *State v. Smith,* our supreme court adopted *Adkisson's* five-factor test for determining whether an error should be recognized as plain:

> (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."

Smith, 24 S.W.3d 274, 282–83 (Tenn.2000) (quoting *Adkisson,* 899 S.W.2d at 641–42)."[A]ll 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.

***13** As a general rule, "an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy."*Id.* (citing *State v. Byrd,* 820 S.W.2d 739, 741 (Tenn.1991); *VanArsdall v. State,* 919 S.W.2d 626, 630 (Tenn.Crim.App.1995); *State v. Smith,* 612 S.W.2d 493, 497 (Tenn.Crim.App.1980)).Tennessee Code Annotated section 40–30–202 provides:

> The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in a manner so as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment. In no case are the words "force and arms" or "contrary to the form of the statute" necessary.

T.C.A. § 40–30–202 (2006)."[T]he touchstone for constitutionality is adequate notice to the accused."*Hill,* 954 S.W.2d at 729

The indictment in this case alleged that the defendants possessed a firearm with the intent to go armed during the commission of a dangerous felony but did not allege any of the enumerated dangerous felonies in Code section 39–17–1324. *See*T.C.A. § 39–17–1324(i)(1). The statute requires that the underlying dangerous felony be included as a separate count in the same indictment, *see id.* § 39–17–1324(d) ("A violation of subsection (a) or (b) is a specific and separate offense, which shall be pled in a separate count of the indictment or presentment and tried before the same jury and at the same time as the dangerous felony."), but it is silent on whether the predicate dangerous felony must be named in the count charging a violation of Code section 39–17–1324. We believe that, to satisfy the requirements of *Hill* and Code section 40–30–202 in this case, it must.

In *State v. Michael L. Powell and Randall S. Horne,* this court, citing *State v. Christopher Ivory Williams,* noted that the State's failure to allege a predicate felony in an indictment for a violation of Code section 39–17–1324 "present[ed] a close question" but ultimately concluded that it was "not necessary to determine whether the indictment was adequate to charge the firearms offenses" given other issues attendant to that conviction. *State v. Michael L. Powell*

and Randall S. Horne, No. E2011–00155–CCA–R3–CD, slip op. at 18 (Tenn.Crim.App., Knoxville, May 10, 2012). In *Christopher Ivory Williams,* this court addressed Williams' claim "that because the felony murder count did not specify the underlying felony, it failed to place him on notice of the appropriate mens rea for the underlying offense and failed to fulfill the requirements set out in *State v. Hill,* 954 S.W.2d 725, 727 (Tenn.1997)."*State v. Christopher Ivory Williams,* No. W2009–01638–CCA–R3–CD, slip op. at 9 (Tenn.Crim.App., Jackson, May 9, 2011). We observed that although "the State intended to prove that the killing was committed in the perpetration of kidnapping or robbery ... neither of these underlying offenses were specifically stated in the felony murder count of the indictment."*Id.,* slip op. at 12.Noting that "the underlying felonies listed in section 39–13–202(a) have differing mens rea" and that "[p]roof of the intent to commit the underlying felony, and at what point it existed, [are] question[s] of fact to be decided by the jury after consideration of all the facts and circumstances," we concluded that the failure to include a predicate felony in the felony murder indictment "failed to provide Williams with notice of the underlying offense and its mens rea, which resulted in an invalid indictment and precluded a lawful felony murder conviction."*Id.*

***14** Generally, an indictment for a violation of Code section 39–17–1324 that does not name the underlying dangerous felony does not provide the defendant with adequate notice of the crime charged. This is so even when the indictment, as does the one in this case, tracks the statutory language of Code section 39–17–1324 and names the statute itself. These statutory references are insufficient because Code section 39–17–1324 provides 11 options for dangerous felonies that would support conviction. The failure of the indictment to name the underlying dangerous felony leaves the defendant with inadequate notice of the charges against him. Only " 'where the constitutional and statutory requirements outlined in *Hill* are met," will " 'an indictment that cites the pertinent statute and uses its language" be deemed "sufficient to support a conviction.' " *State v. Carter,* 988 S.W.2d 145, 149 (Tenn.1999) (quoting *State v. Ruff,* 978 S.W.2d 95, 100 (Tenn.1998)).

That the charge of possession of a firearm with the intent to go armed during the commission of a dangerous felony was part of a four-count indictment that included the charge of aggravated burglary that the State intended to serve as the predicate felony does not save that count in this case. "Each count must be a complete indictment within itself, charging all the facts and circumstances that make the crime."*State v. Lea,* 41 Tenn. 175, 177–78 (Tenn.1860). Indeed, for purposes of protection against double jeopardy, one of the concerns addressed by the *Hill* requirements, the Supreme Court has held that "[e]ach count in an indictment is regarded as if it was a separate indictment."*Dunn v. United States,* 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932). Only "if it is reasonably clear from the averments of the second count that this is connected with and a part of the preceding count by the use of the language therein" will "such a count ... be considered good."*State v. Youngblood,* 199 Tenn. 519, 287 S.W.2d 89, 91 (Tenn.1956); *see also State v. Cureton,* 38 S.W.3d 64, 82 (Tenn.Crim.App.2000) (holding, post-*Hill,* that where all counts in an indictment referred to the same victim, the same offense date, and were related to each other, the counts could be read together for purposes of providing notice to the defendant); *State v. James Ruben Conyers,* No. M2002–01007–CCA–R3–CD, slip op. at 19 (Tenn.Crim.App., Nashville, Sept. 5, 2003) (holding that a count charging attempted first degree murder that was otherwise invalid for failure to name a victim could be read together with the other counts of the indictment to supply the name of the victim because the defendant was charged via a single-page indictment with three offenses committed against the same victim on the same date); *State v. Joseph and Evangeline Combs,* Nos. E2000–02801–CCA–R3–CD, E2000–02800–CCA–R3–CD (Tenn.Crim.App., Knoxville, Sept. 25, 2002).

In this case, the first three counts of the indictment charging especially aggravated kidnapping, aggravated robbery, and aggravated burglary appear on the first page of the indictment, and the fourth count charging possession of a firearm with the intent to go armed during the commission of a dangerous felony appears alone on a second page. Nothing in the fourth count connects it specifically to the aggravated burglary or suggests that aggravated burglary, as opposed to especially aggravated kidnapping, serves as the predicate felony. Pursuant to Code section 39–17–1324, either felony could have served as the predicate for the firearm offense. Under these circumstances, the separate counts of the indictment cannot be read together to save the fatally defective omission in count four. As a result, we affirm the trial court's dismissal of the defendants' charges of possession of a firearm with the intent to go armed during the commission of a dangerous felony on grounds different than those relied on by the trial court.

III. Conclusion

*15 The trial court erred by setting aside the jury verdicts of especially aggravated kidnapping and aggravated burglary and dismissing those charges. Thus, the judgment of the trial court is reversed, the jury verdicts are reinstated, and the case is remanded for sentencing. The trial court also erred by dismissing the charges of possession of a firearm with the intent to go armed during the commission of a dangerous felony on the grounds stated in its order. Because, however, the failure of the indictment for that offense to specify the predicate dangerous felony rendered that count of the indictment fatally defective, we affirm the trial court's dismissal of the charges of possession of a firearm with the intent to go armed during the commission of a dangerous felony. The defendants do not challenge their convictions of aggravated robbery, and, as such, those convictions, and the sentences that accompany them, are affirmed.

Footnotes

1 The defendants asked the trial court to provide the following special instruction:

> If you find that the defendants moved Carolyn Maples from the driveway to the interior of her home, you must then first determine if that movement was necessary to accomplish the robbery in this case. If you find that the movement of Ms. Maples was necessary to accomplish the robbery in this case, then you should find the defendants not guilty of the charge of especially aggravated kidnapping and all its lesser included offenses.

2 The indictment alleged that the defendants "did unlawfully, knowingly, by putting Carolyn S. Maples in fear, take from the person of Carolyn S. Maples, a purse and its contents, said taking accomplished with a deadly weapon."

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2006 WL 618312
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Court of Criminal Appeals of Tennessee, at Nashville.

STATE of Tennessee
v.
Samuel L. GIDDENS, Jr.

No. M2005–00691–CCA–R3–CD. | Assigned on Briefs Jan. 25, 2006. | March 13, 2006. | Application for Permission to Appeal Denied by Supreme Court June 26, 2006.

Appeal from the Criminal Court for Davidson County, No.2002–B–1184; J. Randall Wyatt, Judge.

Attorneys and Law Firms

Jay Norman (at trial) and David M. Hopkins (on appeal), Nashville, Tennessee, for the Appellant, Samuel L. Giddens.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor (Torry) S. Johnson III, District Attorney General; Kathy Morante and Michael Rohling, Assistant District Attorneys General, for the Appellee, State of Tennessee.

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., Joined.

OPINION

ROBERT W. WEDEMEYER, J.

***1** A Davidson County Jury convicted the Defendant of reckless homicide, attempted especially aggravated robbery, and aggravated burglary. The trial court sentenced the Defendant to an effective sentence of fourteen years. On appeal, the Defendant contends that: (1) the evidence at trial is insufficient to support the jury's verdict; (2) the trial court improperly instructed the jury on the issue of criminal responsibility; (3) the Defendant's convictions for attempted especially aggravated robbery and aggravated burglary violate principles of double jeopardy; (4) the trial court erred when it allowed a witness to testify as to the alleged statement made by a co-defendant; and (5) the trial court improperly enhanced the Defendant's sentences and improperly imposed consecutive sentences. Finding there exists no reversible error, we affirm the judgements of the trial court.

I. Background

The Defendant, along with co-defendant John W. Brewer, III, was indicted for one count of first degree premeditated murder (Count 1), one count of felony murder (Count 2), two counts of especially aggravated robbery (Counts 3 and 4), two counts of attempted first degree murder (Counts 5 and 7), one count of attempted especially aggravated robbery (Count 6), one count of aggravated burglary (Count 8), one count of possession with the intent to sell over .5 grams of a Schedule II substance (Count 9), and one count of unlawful possession of a Schedule VI substance (Count 10).

The trial court severed the Defendant's case from the co-defendant's case, and, at the completion of the Defendant's trial, the trial court granted a motion for judgment of acquittal as to Count 1, Count 5, and Count 7. The trial court found that the evidence was insufficient to support the charged offenses of especially aggravated robbery (Counts 3 and 4), but it allowed the jury to decide whether the Defendant had committed the lesser offenses of attempted especially aggravated robbery, attempted robbery, and attempted theft. Upon motion of the State, Count 9 and Count 10 were dismissed.

The jury found the Defendant not guilty of felony murder but found him guilty of the lesser-included offense of reckless homicide. The jury also found the Defendant not guilty of the attempted especially aggravated robbery as alleged in Count 3, but it found him guilty of attempted especially aggravated robbery as alleged in Count 4. The jury was unable to reach a verdict on Count 6, but it did convict the Defendant of Count 8, aggravated burglary.

The trial court sentenced the Defendant to four years for the homicide conviction, ten years for the attempted especially aggravated robbery conviction, and five years for the burglary conviction. It ordered that the Defendant's first two sentences run consecutively, for an effective sentence of fourteen years.

II. Facts

The following evidence was presented at the Defendant's trial: James Davis, Jr., an officer with the Nashville Police Department Patrol Division, testified that, on the day of the crime, he was called to 501 Pappas Court, and, when he walked into the apartment, he saw a gentleman, he later learned was Kelvin Johnson, sitting in a chair holding a bloody cloth against his stomach. This man told Officer Davis that he had been shot and said that other individuals were in the living room, where Officer Davis found a man sitting on a chair against the wall who said that he had been shot in the back or butt area. Officer Davis recalled that blood was on the floor, and the living room "was kind of ransacked." He testified that he scanned the living room area and saw two black men, one lying on top of the other, on the floor, and later he learned that the Defendant was on the bottom of these two men and that the victim, Larry Gamble, was on the top. Officer Davis also saw a handgun that lay to the left of these men and a magazine clip for a semi-automatic that lay on the living room coffee table. Officer Davis testified that the paramedics arrived, and they could not find a pulse for Gamble, but, after the paramedics rolled Gamble off of the Defendant, they found the Defendant's pulse. He testified that no one else moved the deceased's body before other officers arrived to photograph the crime scene. Officer Davis acknowledged that the paramedics had to move things around in the apartment in order to treat the wounded men.

*2 On cross-examination, Officer Davis testified that he did not examine the handgun that lay on the floor, he could not recall if the handgun had a clip in it, and this handgun was four to six feet away from the clip on the coffee table. Officer Davis acknowledged that he observed a stocking cap on the floor near these two bodies, but he did not see this cap on the Defendant.

Kelvin Johnson testified that he lived in a house at 501 Pappas Court, and that, on the day of the crime, he was in the house with Charles Duane Thomas, Larry Gamble, his mother, and his two nieces. He recalled that he was sitting on the floor, Gamble was sitting on a love seat, Charles Duane Thomas was sitting on a couch, and his mother and two nieces were in a different room. Johnson said that he heard a knock at the side door and that when he opened the door, he saw a man that he later learned was Brewer on his porch. Brewer asked Johnson if he "could get a twenty-five," a term Johnson understood to mean half a gram of cocaine. Johnson replied that they had "none of that here." Johnson testified that he saw another man standing in his driveway, that he later learned was the Defendant, and asked Brewer who was in the driveway. Johnson testified that Brewer then pulled out a gun, pointed it at Johnson, and said "get down, ... you know what this is." Johnson got down, and the Defendant pulled out a gun and came up to the porch. Johnson said that Brewer demanded money, and Johnson gave him the contents of his pockets. Johnson told Brewer and the Defendant that there were a lot of people inside the house, and then Brewer told Johnson to keep quiet or Brewer would kill everyone in the house. Johnson said that Brewer lifted Johnson up and placed a gun in Johnson's side, the Defendant put a gun to the back of Johnson's head, and all three of them entered the house.

Johnson testified that the Defendant had a hood or something over his face. When they entered the living room, Brewer pushed Johnson down on the floor and told everyone else not to move or he would kill everyone in the house. Johnson said that Brewer started asking where the drugs and money were located and asked the Defendant to search Charles Duane Thomas. Johnson testified that, while the Defendant searched Charles Duane Thomas, Brewer moved his gun back and forth between Johnson and Gamble. Johnson said that Gamble jumped up across the table to get the gun away from the Defendant, and, then, Brewer started shooting his gun. Johnson tried to grab Brewer, and Brewer then shot Johnson. Johnson recalled that he fell back, heard three more shots, and, when he looked up again, Brewer appeared to be out of bullets. Johnson testified that he reached for Brewer, but Brewer went running through the kitchen and went out the back door. Johnson explained that he followed but could not catch Brewer. He said that he got a t-shirt, put it on his stomach, called 911, came back to the den, and collapsed on a chair. He recalled that the police came thirty minutes later and that he was not aware of any property the intruders took from his house. Johnson suffered serious wounds from this incident and spent nearly two weeks in the hospital. He testified that he had no prior dealings with the Defendant and Brewer, who was also known as "St. Louis." Johnson said that he has a felony conviction for selling drugs and is presently serving a sentence at Drug Court.

*3 On cross-examination, Johnson testified that he had sold drugs from the residence before and admitted that his residence had a reputation as a place where people sold drugs. Johnson did not think that any drugs were inside his residence on the night of the crime. He admitted that he never heard

the Defendant threaten to kill anyone, and Brewer is the only person that he saw shoot his gun. He explained that Gamble had been known to carry a three-fifty-seven magnum gun and a nine millimeter, and the magazine clip found on the coffee table was placed there before the night of the crime. He testified that he did not see Gamble smoke any marijuana on the night of the crime. Johnson thought, but was unsure, that the stocking cap at his house belonged to the Defendant.

On redirect examination, Johnson testified that, on the night of the crime, he never saw the three-fifty-seven magnum or nine millimeter that Gamble usually carried, but Gamble may have put the gun under the couch pillow before going to sleep. Johnson said that the Defendant did not seem surprised when Brewer said he was going to kill everyone in the house.

Charles Duane Thomas testified that he had previously identified the Defendant. He said that, on the night of the crime, he was living at 501 Pappas Court and that he was awakened by the Defendant, who had a hood covering his head, standing over him. Thomas said that the Defendant told Thomas to get on the ground, and Thomas complied and could see Gamble and could hear two other people who were outside his range of vision. He explained that a man who he could not see patted him down and took his wallet. When asked if this man actually took anything, Thomas responded that he did not know if any money was taken, but money lay scattered all over the floor. He recalled hearing the other intruder yell, "where's the money at? Save their live, save their life," and seeing Gamble jump up and grab the Defendant. Thomas saw a gun on the floor after the Defendant and Gamble finished wrestling with each other. Thomas testified that he saw the Defendant's face after the Defendant finished struggling with the victim and fell down. Thomas did not think that there were any drugs at the residence on the night of the crime, but he stated that he, Johnson, and Gamble sold drugs out of the house on previous occasions, and people in the neighborhood knew that drug-dealing occurred at the residence. Thomas did not have a gun on the night of the crime, and the intruders were the only people that he saw with the guns. He testified that, after the Defendant struggled with Gamble and fell to the ground, Thomas asked the Defendant who he was with, and the Defendant replied "St. Louis."

On cross-examination, Thomas testified that Gamble was his best friend and that Gamble owned a three-fifty-seven magnum and a nine millimeter, but, on the night of the crime, he did not see Gamble's guns. Thomas admitted that he last sold drugs in 1999 and that Gamble sold drugs. Thomas recalled hearing three gun shots on the night of the crime, but he admitted that he could have heard more, and he was unsure whether the gun shots all came from the same gun. Thomas acknowledged that he did not know where the gun found on the floor had come from.

*4 Duane Green, an officer with the Nashville Police Department, testified that, on the night of the crime, he was dispatched to the Vanderbilt Hospital because there was a shooting on Pappas Court. He testified that, when a nurse took off the Defendant's clothes, she found some crack cocaine and marijuana in the Defendant's pockets and gave the drugs to Officer Green. On cross-examination, Green acknowledged that he initially said that the drugs belonged to Johnson because Green was confused about from whose clothes the drugs had come. He said that he was present when the doctors took off the Defendant's clothes and found the drugs in the Defendant's pockets.

Joe Williams, a detective with the Nashville Police Department, homicide division, testified that he was called to the crime scene where he was appointed as the lead detective. When he first arrived on the scene, he saw blood on the front side door and a blood trail that passed through the kitchen and lead to the living room, and, in the living room, he saw Gamble lying by the front door. He explained that a black gun with a brown handle lay near Gamble, that blood was everywhere, and that furniture was moved all around the living room in a state of disarray. Next, Detective Williams went to the hospital where he spoke with Thomas, who told him about the incident, and, the detective then tried to speak with the Defendant, but the Defendant declined, stating that he was in too much pain.

Detective Williams testified that, when Thomas was released from the hospital, Thomas picked the Defendant out of a photographic line-up of different individuals and identified him as the man at the crime scene who was found lying beneath Gamble. The detective testified that the bullets from Gamble's body were retrieved during Gamble's autopsy, and they were entered into evidence during Detective Williams's testimony. Williams testified that a witness, who was in a car that picked up Brewer near the crime scene on the night of the crime, told him that Brewer was the other individual involved in the incident and told him what had happened at the house.

On cross-examination, Detective Williams acknowledged that the bullets removed during Gamble's autopsy were twenty-two (.22) caliber bullets, and the bullet removed from

the Defendant was of the thirty-eight (.38), three fifty-seven magnum (.357) class. When asked if the handgun found at the crime scene had a clip in it, the detective said that he thought that the gun's clip was located on the coffee table. He acknowledged that he did not know that one of the witnesses testified earlier that the clip had been on the coffee table before the crime occurred and that the gun found lying on the floor at the crime scene did not contain a clip. Williams acknowledged that the bullet that was recovered from the Defendant's body did not come from the gun that was in the house on the night of the crime and did not come from the gun used to shoot and kill Gamble. He testified that, after searching the house, the police did not find another gun. On redirect examination, Williams testified that the police did not recover the twenty-two (.22) gun used to kill Gamble. On recross-examination, Williams testified that, after conducting the police investigation, he believed that Brewer possessed the twenty-two (.22) gun used to kill Gamble.

*5 Robert Anderson, an officer with the Nashville Police Department, homicide division, testified that he was called to Vanderbilt Hospital to speak with the people involved with the incident. He testified that the Defendant told him the Defendant went to the residence to buy drugs, and, when the Defendant was outside with Johnson, a masked black male took them inside the residence at gun point and demanded money. The Defendant said that he heard gun shots and took out a "blue steel" three fifty-seven (.357) magnum but did not recall if he fired the gun. On cross-examination, Anderson could not recall if a three fifty-seven (.357) gun was recovered during the investigation.

Sergeant Orr, with the Nashville Police Department, testified that he examined a 1992 Oldsmobile Cutlass and developed and collected "latent prints" from the vehicle's interior and exterior. While examining the vehicle, Sergeant Orr noticed that the license plate lettering was covered up with mud, which he thought was unusual, and he processed the area around the license plate for prints. He also processed the trunk area because he believed that someone may have put his hand on the trunk area while smearing mud on the license plate. He took the license plate off the car, and, during his testimony, it was entered into evidence. Sergeant Orr also collected a blue Nautica jacket and roll of duct tape from the vehicle. On cross-examination, Sergeant Orr testified that he just collected the "latent prints," and a "latent examiner" identified the prints.

Dr. Bruce Levy, the Davidson County Medical Examiner, testified as an expert in the field of forensic pathology. Dr. Levy explained that he didn't see any evidence of close range fire around Gamble's wounds, meaning that, when the gun was fired, the gun was more than two feet away from Gamble. He explained that Gamble's wound on the right side of Gamble's back was fatal. Dr. Levy testified that toxicology reports indicated that Gamble's blood tested positive for the presence of marijuana used within several hours of Gamble's death. Dr. Levy stated that, in his opinion, Gamble died as a result of gunshot wounds, and the manner of death was homicide. On cross-examination, Dr. Levy acknowledge that nothing in the autopsy report indicated that any tests were performed to determine if any gun powder or other foreign substances were found on Gamble's hands. Dr. Levy testified that the caliber of the bullet had no bearing on the size of the hole that the bullet created when penetrating the skin. He acknowledged that a ballistics expert would be able to tell the caliber of the bullet recovered from the autopsy.

Wayne Hughes, a firearms and toolmark examiner with the Nashville Forensics and Firearms Division of the Police Department, testified as an expert in the field of ballistics and firearms examination and identification. He explained that he examined two twenty-two (.22) class bullets that were retrieved from Gamble's body during the autopsy. Hughes determined that the bullets were discharged by the same gun. He examined a Bursa semi-automatic pistol that was taken from the crime scene and determined that this pistol did not fire the two twenty-two (.22) bullets. Hughes also examined a thirty-eight (.38), three fifty-seven (.357) caliber bullet and determined that this bullet could not have been discharged from the same gun as the first two bullets that he examined. Hughes testified that he wrote a report detailing his observations, and the report was entered into the evidence.

*6 On cross-examination, Hughes testified that he could tell that the two twenty-two (.22) class bullets came from the same gun because they had similar markings on them. He testified that he was unaware that the three fifty-seven (.357), thirty-eight (.38) bullet that he tested was retrieved from the Defendant's body. He explained that the Bursa pistol could not fire a three fifty-seven (.357) or thirty-eight (.38) bullet.

Charles Lee Freeman, Jr., with the Nashville Police Department, in the homicide division, testified that he participated in this investigation. He said that a couple who lived up the street from the crime scene saw somebody running down the street when the shooting occurred. He said that he canvassed Pappas Court, and a white car was parked at the corner of Pascal Court and Combs Drive, which is about

one hundred yards from 501 Pappas Court. He asked people on the street if they knew to whom the vehicle belonged, and the people stated that they had never seen the car before. He testified that the vehicle was suspicious because nobody seemed to know who it belonged to, and mud was smeared all over the license plate. Using the identification number in the front windshield, Officer Freeman determined that the car was registered to the Defendant.

Lorita Marsh testified that she is an identification analyst with the Nashville Police Department, and that she examined fingerprints collected from the vehicle that Officer Orr processed. She determined that a fingerprint on a Compact Disc ("CD") taken from the vehicle belonged to the Defendant. Marsh identified two palm prints collected from the trunk of the vehicle, one belonging to the Defendant an one belonging to co-defendant Brewer.

At the conclusion of the State's proof, the Defendant moved for a judgment of acquittal as to the charges of especially aggravated robbery because the State failed to produce any evidence at trial that a theft had occurred. The trial court granted the Motion for Judgment of Acquittal on the indicted offenses, but it allowed the jury to consider the lesser-included offenses of attempted especially aggravated robbery. The Defendant objected to the trial court's decision.

Based upon this evidence, the jury found the Defendant guilty of the reckless homicide of Larry Nathaniel Gamble, the attempted especially aggravated robbery of Charles Duane Thomas, and the aggravated burglary of the habitation of Kevin Orlando Johnson. The trial court sentenced the Defendant as a Range I offender to four years for reckless homicide, ten years for attempted especially aggravated robbery, and five years for aggravated burglary. The trial court ordered that the Defendant's four and ten year sentences be served consecutively, and his five year sentence be served concurrently, for an effective sentence of fourteen years with a 30% release eligibility, and that his sentences from this case be served consecutively to a nine-year sentence that the Defendant was serving from Williamson County.

III. Analysis

*7 On appeal, the Defendant contends that: (1) the evidence at trial is insufficient to support the jury's verdict; (2) the trial court improperly instructed the jury on the issue of criminal responsibility; (3) the Defendant's convictions for attempted especially aggravated robbery and aggravated burglary violate principles of double jeopardy; (4) the trial court erred when it allowed a witness to testify as to the alleged statement made by a co-defendant; and (5) the trial court improperly enhanced the Defendant's sentences and improperly imposed consecutive sentences.

A. Sufficiency of the Evidence

On appeal, the Defendant asserts that the evidence is insufficient to sustain his convictions. In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews,* 805 S.W.2d 776, 779 (Tenn.Crim.App.1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs,* 995 S.W.2d 102, 105 (Tenn.1999); *Liakas v. State,* 199 Tenn. 298, 286 S.W.2d 856, 859 (Tenn.1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. *Liakas,* 286 S.W.2d at 859."A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."*State v. Grace,* 493 S.W.2d 474, 476 (Tenn.1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 405 S.W.2d 768, 771 (1966) (citing *Carroll v. State,* 212 Tenn. 464, 370 S.W.2d 523 (1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *State v. Goodwin,* 143 S.W.3d 771, 775 (Tenn.2004)(citing *State v. Smith,* 24 S.W.3d 274, 279 (Tenn.2000)). It is well-settled law in Tennessee

that "the testimony of a victim, by itself, is sufficient to support a conviction."*State v. Strickland,* 885 S.W.2d 85, 87 (Tenn.Crim.App.1993); *State v. Williams,* 623 S.W.2d 118, 120 (Tenn.Crim.App.1981). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *Id.; see State v. Carruthers,* 35 S.W.3d 516, 557–58 (Tenn.2000).

1. Aggravated Burglary

***8** The Defendant asserts that the evidence is insufficient to sustain his conviction for aggravated burglary because the record does not support the conclusion that the Defendant entered the home of Kelvin Orlando Johnson with the intent to commit a felony, because the record contains no evidence that the Defendant made demands for drugs or money or that the Defendant entered the home with the intent to commit a felony, theft, or assault.

To establish that the Defendant committed an aggravated burglary, the State must prove beyond a reasonable doubt that the Defendant entered a habitation "without the effective consent of the property owner" with the intent to commit a felony, theft, or assault. Tenn.Code Ann. §§ 39–14–402,–403 (2003). In the case under submission, the evidence, when viewed in the light most favorable to the State, proves that Thomas identified the Defendant a perpetrator of these crimes. Thomas described how the Defendant was disguised in a mask and armed with a gun when he entered their home with the co-defendant, "St. Louis," who made demands for drugs and money. When the police arrived at the crime scene, they found the Defendant underneath Gamble's body in close proximity to the mask. In addition, the Defendant's car was parked about one hundred yards away from the crime scene with mud smeared over the license plate number, which could reasonably be construed as an attempt to obscure the license plate number. The Defendant's fingerprints were found on the car and on an item taken from the car. Given the location of the Defendant's car and the testimony from the victims of these crimes, the jury could properly infer that the Defendant planned to rob the victims when he entered the home on the night of the crime. The Defendant is not entitled to relief on this issue.

2. Attempted Especially Aggravated Robbery

The Defendant asserts that the evidence is insufficient to sustain his conviction for attempted aggravated robbery. Especially aggravated robbery "is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.... (1) Accomplished with a deadly weapon; and (2) Where the victim suffers serious bodily injury."Tenn.Code Ann. § 39–13–401, –403(a)(1)–(2) (2003)." 'Serious bodily injury' means bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty."Tenn.Code Ann. 39–11–106(a)(34) (2003). "Deadly weapon" means "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury."Tenn.Code Ann. § 39–11–106(a)(5). Criminal attempt requires that one act "with the kind of culpability otherwise required for the offense ... [and] with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part."Tenn.Code Ann. § 39–12–101(a)(2) (2003). Therefore, criminal attempt requires two material elements: (1) the culpability required for the attempted crime; and (2) an act in furtherance of the attempted crime. *Wyatt v. State,* 24 S.W.3d 319, 323 (Tenn.2000).

***9** Based on the evidence presented at trial, a rational trier of fact could have found the Defendant guilty of the attempted especially aggravated robbery of Charles Duane Thomas. As previously summarized, the evidenced established that the Defendant entered another's home while armed and wearing a mask with "St. Louis" who made demands for drugs and money. In addition, Thomas testified that the Defendant took his wallet from his pocket, and after the shooting occurred, money lay all over the livingroom floor. As a result of the crime that Brewer and the Defendant committed, both Kelvin Johnson and Larry Gamble suffered serious bodily injury. Gamble died and Johnson suffered serious gunshot wounds from this incident and spent nearly two weeks in the hospital. Based on this evidence, a reasonable jury could conclude that the Defendant is guilty of attempted especially aggravated robbery.

3. Reckless Homicide

The Defendant contends that the evidence is insufficient to sustain his conviction for reckless homicide. He asserts that nothing in the record indicates that he acted recklessly and that his reckless actions resulted in Gamble's death. He also contends that the State did not recover a weapon that could be identified as having been employed or possessed by the Defendant. The Defendant contends that the jury, in convicting the Defendant of the reckless homicide, rejected the State's theory of felony murder and implicitly rejected the State's theory that the Defendant was criminally responsible for Brewer's actions.

Reckless homicide is the "reckless killing of another." Tenn.Code Ann. § 39–13–215(a) (2003). Pursuant to Tennessee Code Annotated § 39–11–302 (2003):

> "Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

According to the testimony of Charles Thomas and Kelvin Johnson, the Defendant came up to the porch after Brewer pulled out a gun and told them to "get down," and the Defendant entered the home after hearing Brewer tell Johnson to be quiet or he would kill everyone in the house. The Defendant remained in the home while Brewer threatened to kill everyone in the house, and he wrestled with Gamble while the Defendant was armed and after the shooting of Gamble had occurred. The Defendant, by entering another's home armed with a gun, accompanied by a co-defendant who continually threatens to kill the occupants of the home, and by wrestling with another individual while armed, created a substantial and unjustifiable risk that a death would occur. Such actions could reasonably be viewed by the jury as a gross deviation from the standard of care that an ordinary person would exercise under the circumstances. Therefore, in our view, the evidence is sufficient to sustain the jury's verdict, and the Defendant is not entitled to relief on this issue.

B. Jury Instructions

1. Lesser–Included Offense

***10** Next, the Defendant contends that the trial court amended the charges of the indictment from especially aggravated robbery to attempted especially aggravated robbery during trial and that he was therefore convicted of a crime for which he was not charged, denied his constitutional rights to grand jury process, and denied sufficient notice to adequately prepare a defense against these charges. The State counters that attempted especially aggravated robbery is a lesser-included offense of especially aggravated robbery, and, therefore, the Defendant was properly put on notice of the charges he was called upon to defend, and the trial court did not improperly amend the indictment.

Tennessee Rule of Criminal Procedure 31(c) provides that "the Defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."The Supreme Court of Tennessee has held that, "an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not congruent with, all the elements of the lesser."*Howard v. State,* 578 S.W.2d 83, 85 (Tenn.1979). Since inchoate offenses such as attempt are considered lesser-included offenses of the crime charged, the crime of attempted especially aggravated robbery is a lesser-included offense of especially aggravated robbery. *See State v. Burns,* 6 S.W.3d 453, 466–67 (Tenn.1999); *State v. Mario Rogers,* No. W1999–01454–CCA–R3–CD, 2001 WL 721022, at *6 (Tenn.Crim.App., at Jackson, June 26, 2001)*no Tenn. R.App. P.11 application filed.*Since the crime of attempted especially aggravated robbery is a lesser-included offense of especially aggravated robbery, the Defendant was properly put on notice of the charges he was called upon to defend, and the trial court did not err when it granted the motion for acquittal for especially aggravated robbery but provided jury instructions regarding attempted especially aggravated robbery.

2. Natural and Probable Consequences

The Defendant contends that the trial court erred by failing to charge the jury on the natural and probable consequences rule. He asserts that the jury clearly rejected the State's theory that Gamble was killed in the perpetration of a felony by returning a verdict of guilty to only reckless homicide and not to felony murder, and, therefore, the jury should have been instructed as to the natural and probable consequences rule. The Defendant further argues that the trial court's error prevented the jury from properly deliberating and applying the correct standard to the Defendant's role in not only the reckless homicide but also in the attempted especially aggravated robbery and aggravated burglary, and the incomplete charge requires the reversal of all of his convictions. The State contends that trial court did not err when it chose not to charge the jury on the natural and probable consequences rule.

***11** The trial court provided the jury with following charge regarding criminal responsibility.

> [U]nder the doctrine of criminal responsibility the defendant may be criminally responsible as a party to the offenses charged in the indictment if the offenses were committed by the defendant's own conduct, by the conduct of another for which the defendant is criminally responsible, or both. Each party may be charged with the commission of this offense.
>
> A defendant is criminally responsible for an offense or offenses committed by the conduct of another if the defendant solicits, directs, aids, or attempts to aid another person to commit an offense, and the defendant acts with the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense....
>
> When one enters into a scheme with another to commit a robbery and a killing ensues, all defendants may be held responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the other. As long as the defendant intended to commit the robbery and a killing resulted during the robbery or attempt to commit the robbery, each defendant is responsible for the murder, regardless of whether he intended for the victim to die or participated in the act of the murder,....
>
> Before you find the defendant guilty of being criminally responsible for said offense committed by the conduct of another, you must find that all essential elements of said offense have been proven by the State beyond a reasonable doubt.

The natural and probable consequences rule "underlies the doctrine of criminal responsibility and is based on the recognition that aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put into motion."*State v. Howard,* 30 S.W.3d 271, 276 (Tenn.2000). The doctrine extends the scope of criminal liability to the target crime intended by a Defendant as well as to other crimes committed by a confederate that were the natural and probable consequences of the commission for the original crime. *State v. Carson,* 950 S.W.2d 951, 954–55 (Tenn.1997). Pursuant to Tennessee Code Annotated § 39–11–402, a person is criminally responsible for an offense committed by the conduct of another if:

> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

***12** In *Howard,* the supreme court established that criminal responsibility, based on the natural and probable consequences rule, requires a jury to find:

> 1) the elements of the crime or crimes that accompanied the target crime;
>
> 2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39–11–402; and
>
> 3) that the other crimes committed were natural and probable consequences of the target crime.

Howard, 30 S.W.3d at 276.In applying the rule in *Howard,* this Court held that "the natural and probable consequences rule instruction is required only for incidental crimes and not for the target crime."*State v. Winters,* 137 S.W.3d 641, 659 (Tenn.Crim.App.2003); *State v. Mickens,* 123 S.W.3d

355, 359 (Tenn.Crim.App.2003). Felony murder is also an exception to the natural and probable consequences rule because the defendant is statutorily responsible for all homicides committed during the course of the felony, whether or not the homicide was forseeable. *Winters,* 137 S.W.3d at 659;*See*Tenn.Code Ann. § 39–13–202 (2003).

In the case under submission, the Defendant was found guilty of the lesser included offense of reckless homicide under the indicted offense of felony murder, and, therefore, the natural and probable consequence instruction was not required. *See State v. Rucker,* No. E2002–01201–CCA–R3–CD, 2004 WL 2827004, at *1, 7 (Tenn.Crim.App., at Knoxville, May 20, 2003), *perm. app. denied* (Tenn. Dec. 9, 2004) (holding that the Defendant indicted for felony murder and convicted of criminally negligent homicide was not entitled to the natural and probable consequences instruction for the felony murder count). The Defendant was found guilty of the target crimes of attempted especially aggravated robbery and aggravated burglary. The Defendant was found guilty of the homicide during the commission of the target felonies, and, therefore, the failure to give the jury instruction on the natural and probable consequence rule was not error. The Defendant is not entitled to relief on this issue.

C. Double Jeopardy

The Defendant contends that the charges in the indictment violate his double jeopardy protections afforded by the Fifth Amendment to the United States Constitution and article I, section 10 of the Tennessee Constitution. Specifically, he asserts that he should not have been charged with the attempted especially aggravated robbery of Kelvin Johnson and the aggravated burglary of Kelvin Johnson's home. The Defendant asserts that the Defendant's actions were part of one, continuous act that "apparently" lasted for a short amount of time. The State counters that the Defendant's convictions for attempted especially aggravated robbery and aggravated burglary do not violate the Defendant's double jeopardy protections because each offense contains different elements.

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."U.S. Const. amend. V. Similarly, article I, section 10 of the Tennessee Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life of limb."Tenn. Const. art. I, § 10. In *State v. Denton,* 938 S.W.2d 373 (Tenn.1996), the Tennessee Supreme Court held that "whether two offenses are the 'same' for double jeopardy purposes depends upon a close and careful analysis of the offenses involved, the statutory definitions of the crimes, the legislative intent and the particular facts and circumstances."*Id.* at 379.In *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."*Id.* at 304.In *Denton,* the Tennessee Supreme Court noted that while appellate review must be guided by the *Blockburger* test, the test is not conclusive of legislative intent and the reviewing court must also examine: (1) whether there were multiple victims involved; (2) whether several discrete acts were involved; and (3) whether the evil at which each offenses is directed is the same or different." 938 S.W.2d at 378–79.

***13** Attempted especially aggravated robbery and aggravated burglary are not the "same" offenses for double jeopardy purposes because each offense requires proof of an element that the other does not. *State v. Pillow,* No. M2002–01864–CCA–R3–CD, 2004 WL 367747, at *13–14 (Tenn.Crim.App., at Jackson, Aug. 13, 2003)*perm. app. denied* (Tenn. June 21, 2004). Especially aggravated robbery requires a showing that the victim suffered a serious bodily injury during a robbery that was accomplished by the use of a deadly weapon. Aggravated burglary requires a showing that a defendant entered a habitation with the intent to commit a felony, theft or assault. In the case under submission, the Defendant's actions were discrete acts with different evil purposes. The Defendant entered the home with plans to commit a felony, and, once inside the home, the Defendant committed a separate offense while taking Thomas's wallet and wrestling with Gamble. Therefore, the Defendant is not entitled to relief on this issue.

D. Right of Confrontation

The Defendant contends that his rights were violated by Detective Williams' testimony because the state was improperly allowed to bolster its case with a double-hearsay statement, denying the Defendant his constitutional right of confrontation. He claims that the trial court erred by not declaring a mistrial or instructing the jury to disregard

Detective Williams' testimony regarding the co-defendant's statements made to other witnesses. The State counters that the since the Defendant never properly registered any objection, he has waived his claim.

Tennessee Rule of Evidence 103 provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ..."a timely objection or motion to strike appears of record, stating the specific ground of objection...." The Defendant made no objection to Detective Williams' testimony during the trial. In the absence of an objection to Detective Williams's statement at trial, we conclude that the Defendant has waived the issue for purposes of appeal. *See*Tenn. R. Evid. 103(a).

E. Sentencing

The Defendant contends that the trial court erred when it sentenced him. He asserts that the record does not support the conclusion by the trial court that the Defendant's criminal record is extensive and that the Defendant was on bond at the time he committed the offenses for which he was convicted. The State contends that the trial court properly sentenced the Defendant.

At sentencing, the trial court enhanced the Defendant's sentence for the following reasons: (1) the defendant had a previous history of criminal convictions; (2) the offenses involved more than one victim; (3) the Defendant was on supervised release when he committed the crime; and (4) the defendant had a previous conviction involving death. The Defendant offered no evidence of any mitigating factors. In its order addressing the Defendant's motion for new trial, the court reversed itself on the application of factors (2) and (3), relying apparently on our previous interpretation of *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), [1] but held that the Defendant's prior criminal record was sufficient to justify the sentences imposed. The trial court reasoned that the Defendant's two prior convictions for involuntary manslaughter and two prior felony drug convictions justified increasing the Defendant's sentence beyond the statutory minimum.

***14** When a defendant challenges the length, range or the manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct."Tenn.Code Ann. § 40–35–401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances."*State v. Ross,* 49 S.W.3d 833, 847 (Tenn.2001); *State v. Pettus,* 986 S.W.2d 540, 543 (Tenn.1999); *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts.*State v. Dean,* 76 S.W.3d 352, 377 (Tenn.Crim.App.2001); *State v. Butler,* 900 S.W.2d 305, 311 (Tenn.Crim.App.1994); *State v. Smith,* 891 S.W.2d 922, 929 (Tenn.Crim.App.1994). In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. *See*Tenn.Code Ann. § 40–35–210 (2003); *State v. Taylor,* 63 S.W.3d 400, 411 (Tenn.Crim.App.2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous.Tenn.Code Ann. § 40–35–401, Sentencing Comm'n Cmts.

In the case under submission, we conclude that there is ample evidence that the trial court considered the sentencing principles and all relevant facts and circumstances. Therefore, we review its decision *de novo* with a presumption of correctness. Accordingly, so long as the trial court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the factual record, this Court may not disturb this sentence even if we would have preferred a different result. *See*Tenn.Code Ann. § 40–35–210, Sentencing Comm'n Cmts.; *State v. Fletcher,* 805 S.W.2d 785, 789 (Tenn.Crim.App.1991). We note that the defendant bears the burden of showing that the sentence is improper. Tenn.Code Ann. § 40–35–401, Sentencing Comm'n Cmts.; *Ashby,* 823 S.W.2d at 169.

Attempted especially aggravated robbery is a Class B felony. Tenn.Code Ann. §§ 39–14–402, 403(b) (2003). The sentencing range for a Range I offender convicted of a Class B felony is eight to twelve years. Tenn.Code Ann. § 40–35–112(a)(2) (2003). Aggravated burglary is a Class C felony.

Tenn.Code Ann. §§ 39–13–402, 403. The sentencing range for a Range I offender convicted of a Class C felony is three to six years. Tenn.Code Ann. § 40–35–112(a)(3). Reckless Homicide is a Class D Felony. The sentencing range for a Range I offender convicted of a Class D felony is two to four years. Tenn.Code Ann. § 40–35–112(a)(3).

***15** In the case under submission, the evidence does not preponderate against the findings of the trial court. The record in this case supports the trial court's conclusion that the Defendant's criminal record is extensive. The Defendant's presentence report shows that the Defendant has two involuntary manslaughter convictions and convictions for assault, drug possession, possession of narcotic equipment, possession of drug paraphernalia, evading arrest, and driving with a suspended license. These offenses constitute an extensive criminal history that justified the trial court's decision to enhance the Defendant's sentences to four years for the reckless homicide, ten years for the attempted especially aggravated robbery, and five years for the aggravated burglary. Therefore, the Defendant is not entitled to relief on this issue.

The trial court did not abuse its discretion when it ordered that the Defendant's four and ten year sentences be served consecutively, and his five year sentence be served concurrently, and that his sentences from this case be served consecutively to a nine-year sentence that the Defendant was serving from Williamson County. According to Tennessee Code Annotated section 40–35–115(b) (2003), a court may run sentences consecutively if the court finds by a preponderance of the evidence that the defendant is an offender whose record of criminal activity is extensive. As previously discussed, the record in this case supports the trial court's conclusion that the Defendant's criminal record is extensive due to the Defendant's two prior convictions for involuntary manslaughter and two prior felony drug convictions. After reviewing the record, we conclude that the evidence does not preponderate against the trial court's finding that two of the three sentences imposed in this case should run consecutively and that all three sentences should be served consecutively to the prior sentence from Williamson County.

III. Conclusion

In accordance with the foregoing, we conclude that the trial court did not commit reversible error. Therefore, the judgments of the trial court are affirmed.

Footnotes

1 This interpretation, articulated in *State v. Gomez,* No.2002–012–09–CCA–R3–CD, 2004 WL 305787, at *1 (Tenn.Crim.App., at Nashville Feb. 18, 2004)*appeal granted* (Tenn. Oct. 14, 2004), was reversed by *State v. Gomez,* 163 S.W.3d 632, 651–51 (Tenn.2005), which held that *Blakely* did not establish a new rule of law and does not apply to Tennessee's sentencing scheme.

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Court of Criminal Appeals of Tennessee, at Nashville.

STATE of Tennessee
v.
Randy Lynn SHELBY.

No. M2006–02582–CCA–R3CD. | March 8, 2011. | Application for Permission to Appeal Denied by Supreme Court June 2, 2011.

Appeal from the Circuit Court for Montgomery County, No. 40500128; John H. Gasaway, III, Judge.

Attorneys and Law Firms

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Robert E. Cooper, Jr., Attorney General and Reporter; Lindsy Paduch Stempel, Assistant Attorney General; John Carney, Jr., District Attorney General; and Arthur F. Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

OPINION

DAVID H. WELLES, J.

***1** The Defendant, Randy Lynn Shelby, was convicted by a Montgomery County jury of two counts of aggravated burglary and one count of especially aggravated kidnapping. Following a sentencing hearing, he received an effective sixty-year sentence to be served at 100%. In this direct appeal, the Defendant's only challenge is to the sufficiency of the evidence supporting his conviction for especially aggravated kidnapping, arguing that the short period of confinement was incidental to the burglary and did not substantially interfere with the victim's liberty. After a review of the record, we affirm the judgments of the trial court.

Factual Background

This case arises from the Defendant's burglary of two homes during the early morning hours of November 28, 2004. On February 7, 2005, a Montgomery County grand jury returned a seven-count indictment against the Defendant, charging him with three counts of aggravated burglary (two counts based upon alternative theories), one count of attempted aggravated rape, one count of attempted first degree murder, and two counts of especially aggravated kidnapping.

Viewed in the light most favorable to the State, the proof at trial showed that, in the early morning hours of November 28, 2004, the victim Baker ("Mr.Baker") was at his North Ford Street home, along with his wife, four children, and thirteen-year-old cousin. Mr. Baker was in his master bedroom playing on the computer, and his cousin was in the living room watching television. Sometime between 3:00 and 3:30 a.m., Mr. Baker turned his head and saw an intruder in his house (later identified as the Defendant). According to both Mr. Baker and his cousin, who also viewed the intruder, the Defendant was wearing a white shirt and blue jeans and had a red bandana over his face and a rag in his hand. Upon seeing the the Defendant, Mr. Baker jumped up and grabbed a bowie knife he kept nearby and went after the man. The Defendant "bolted" from the residence, knocking over the kitchen table on his way out the back door. Mr. Baker then shut and locked the door and called the police. After examining the house, Mr. Baker noticed some "pry marks" around the back door. He was also later informed that the phone line and cable lines to his residence had been cut. Mr. Baker confirmed that he did not give the Defendant permission to be inside his home.

The Defendant then drove to the victim Schall's ("the victim") mobile home on Gip Manning Road. [1] On that evening, the victim was alone; her husband and young child were not at home. The victim went to her bedroom around 12:30 or 1:00 a.m. that evening and began watching a movie. About thirty minutes or so later, she fell asleep. After hearing several loud noises, the victim, who was lying on her back, was awakened by a man in her room (later identified as the Defendant). According to the victim, the Defendant, who was wearing a red bandana and armed with a box-knife, jumped on top of her. She began screaming, saying "take anything you want,

please don't hurt me. I have a son."The Defendant asked where her son was, but she refused to tell him.

*2 The Defendant then placed a rag over the victim's nose and mouth, which rag she believed was soaked in ether. The victim testified that she fought with the Defendant for approximately eight to ten minutes, [2] using her quilt to cover herself for protection. During the struggle, the victim was cut on her right thumb and chin. The Defendant then ordered the victim to turn over on her stomach. Believing she would be raped and killed, she acted like she was rolling over, but instead shoved the Defendant and fled from the residence.

After running outside, the victim hid behind her rental car, and it was about five minutes later when the Defendant emerged from inside the home. Believing it was her opportunity to escape, the victim began to run. The Defendant followed. She lost sight of the Defendant when she arrived at a neighbor's house. Jerry Mealer, the victim's neighbor, testified that, around 4:30 a.m. in the morning, he and his wife were awakened by the doorbell ringing and "pounding" on the front door. After hearing the terrified victim's cries for help, he let her come inside, and they called the police.

At trial, the victim elaborated that her attacker was Caucasian and was wearing blue jeans, a hooded sweatshirt, and tennis shoes. The victim confirmed that she did not give the Defendant permission to be inside her residence.

Upon subsequent examination of the house, the victim believed the intruder came in through the window in her son's play room—the screen was ripped and the window was open. The back door also "looked like a screw driver tried jimmying up the opening of the door[.]" Nothing was missing from the victim's residence. It was determined that the phone lines to the victim's home had been severed. Forensic paint analysis later placed the Defendant's truck near the scene of the victim's mobile home. The Defendant also gave inculpatory statements admitting his involvement in these crimes.

Only the two aggravated burglary counts and the especially aggravated kidnapping count were submitted to the jury for their consideration. Following deliberations on these three counts, the jury found the Defendant guilty as charged. *See*Tenn.Code Ann. §§ 39–13–305 (especially aggravated kidnapping),–14–403 (aggravated burglary). Thereafter, the trial court conducted a sentencing hearing. The Defendant, a career offender, received concurrent terms of fifteen years for each aggravated burglary conviction and sixty years for the especially aggravated kidnapping conviction, resulting in an effective sentence of sixty years at 100%. [3] He now appeals.

Analysis

On appeal, the Defendant challenges only the sufficiency of the convicting evidence supporting the offense of especially aggravated kidnapping. [4] Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. *See State v. Evans,* 108 S.W.3d 231, 237 (Tenn.2003); *State v. Carruthers,* 35 S.W.3d 516, 557–58 (Tenn.2000); *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Hall,* 8 S.W.3d 593, 599 (Tenn.1999).

*3 On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers,* 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. *See Evans,* 108 S.W.3d at 236; *Bland,* 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans,* 108 S.W.3d at 236–37; *Carruthers,* 35 S.W.3d at 557.

Relevant to this case, especially aggravated kidnapping "is false imprisonment ... [a]ccomplished with a deadly weapon or by display of any article used or fashioned to

lead the victim to reasonably believe it to be a deadly weapon[.]"Tenn.Code Ann. § 39–13–305(a)(1)."A person commits ... false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty."Tenn.Code Ann. § 39–13–302(a).

The Defendant challenges his conviction on two grounds: intent and substantial interference. As for his "intent," he contends that he had no intent to kidnap the victim, her confinement being only incidental to the burglary. This argument is actually a due process argument. *See State v. Anthony,* 817 S.W.2d 299 (Tenn.1991). He also argues that the short period of time during which the victim was confined did not amount to substantial interference with her liberty.

Whether a separate kidnapping conviction violates principles of due process is a question of law determined initially by the trial court. *State v. Fuller,* 172 S.W.3d 533, 535 (Tenn.2005) (citing *State v. Cozart,* 54 S.W.3d 242, 247 (Tenn.2001)). Appellate review of the trial court's determination is de novo with no presumption of correctness. *Griffin v. State,* 182 S.W.3d 795, 798 (Tenn.2006).

Due process principles are violated when a defendant is convicted of both a kidnapping and an associated felony when the victim's confinement was "essentially incidental" to the associated felony. *Anthony,* 817 S.W.2d at 306. Facts independent and separate of those necessary to convict the defendant of the associated felony must be shown to sustain a kidnapping conviction.*Id.* at 301.The supreme court refined the test for whether due process bars a separate conviction for kidnapping in *State v. Dixon,* 957 S.W.2d 532 (Tenn.1997). The supreme court stated that although it adheres to the due process principles articulated in *Anthony,* the two-part test announced in *Dixon* replaced *Anthony's* "essentially incidental" analysis. *State v. Richardson,* 251 S.W.3d 438, 442–43 & 443 n. 5 (Tenn.2008)."The *Dixon* test 'provides the structure necessary for applying the principles announced in *Anthony.*' " *Id.* at 443 (quoting *Fuller,* 172 S.W.3d at 537). The *Dixon* test first requires a court to inquire "whether the movement or confinement was beyond that necessary to consummate the act...." *Id.* at 535 (citing *Anthony,* 817 S.W.2d at 306). In *Fuller,* the supreme court clarified that *Dixon's* first prong is a threshold determination. *Fuller,* 172 S.W.3d at 537. If the first prong is satisfied, the court next must determine "whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm." *Dixon,* 957 S.W.2d at 535.

*4 The *Anthony* rule was designed to prevent a defendant from being convicted of kidnapping when the confinement was only that necessary to complete a rape or robbery. *Id.* at 534–35.Tennessee's broad statutory definition of kidnapping " 'could literally overrun' crimes such as robbery and rape because detention and confinement against the will of the victim necessarily accompany these crimes."*Richardson,* 251 S.W.3d at 442) (citing *Anthony,* 817 S.W.2d at 303; and quoting *People v. Levy,* 15 N.Y.2d 159, 256 N.Y.S.2d 793, 204 N.E.2d 842, 844 (N.Y.1965)); see Tenn.Code Ann. §§ 39–13–301 to –305. During the commission of a rape or robbery, a victim may often be held " 'briefly at gunpoint,' 'bound and detained,' or 'moved into and left in another room or place.' " *Richardson,* 251 S.W.3d at 442–43 (quoting *Levy,* 256 N.Y.S.2d 793, 204 N.E.2d at 844). In this regard, the purpose of the confinement or removal is at issue, not the distance or duration. *Dixon,* 957 S.W.2d at 535. However, when this brief confinement or removal goes beyond what is necessary to accomplish the associated rape or robbery, a separate conviction for kidnapping does not violate principles of due process.*Anthony,* 817 S.W.2d at 306.

Our supreme court has declined to extend the *Anthony* rule to separate convictions for automobile burglary and theft. *State v. Ralph,* 6 S.W.3d 251, 254–55 (Tenn.1999). This Court has likewise declined to extend the *Anthony* rule to separate convictions for attempted first degree murder, aggravated burglary, and especially aggravated robbery. *State v. Cowan,* 46 S.W.3d 227, 234 (Tenn.Crim.App.2000); *see State v. Landy M. Clemmons,* No. E2008–01326–CCA–R3–CD, 2009 WL 3255242, at *7–8 (Tenn.Crim.App., Knoxville, Oct. 12, 2009). While every robbery or rape involves some detention of the victim, not every burglary involves kidnapping. *See Cowan,* 46 S.W.3d att 235. Unlike the offense of kidnapping, the offense of aggravated burglary is narrowly defined by statute and its elements are clearly defined. *Id.* at 234;*see*Tenn.Code Ann. §§ 39–14–401 to –404; *see also Ralph,* 6 S.W.3d at 255. Aggravated burglary is a property offense, and the crime is complete upon entry into the habitation. *Cowan,* 46 S.W.3d at 234 (citing Tenn.Code Ann. §§ 39–14–402(a)(1), –403(a)). The Defendant in this case completed the offense of aggravated burglary the moment he entered the victim's home with the intent to commit a theft therein. *See Clemmons,* 2009 WL 3255242, at *8.

We conclude that the victim's subsequent confinement in her bedroom was a separate offense and that the evidence supports the Defendant's conviction for especially aggravated kidnapping. With a box knife in hand, the Defendant jumped on top of the victim, who had been sleeping, and placed an ether-soaked rag over her mouth. The victim fought with the Defendant for around ten minutes, during which time she received cuts to her thumb and chin. The statutory elements of especially aggravated kidnapping do not require a finding that Defendant moved the victim any specific distance or restrained her for any particular length of time in order for the Defendant's actions to substantially interfere with her liberty. *See State v. Turner,* 41 S.W.3d 663, 670 (Tenn.2000); *see also Dixon,* 957 S.W.2d at 535). The facts are sufficient to show beyond a reasonable doubt that the Defendant knowingly confined the victim by use of a deadly weapon.

Conclusion

*5 We conclude that the Defendant's convictions for aggravated burglary and especially aggravated kidnapping do not violate principles of due process under *Anthony* and that the evidence is sufficient to support the kidnapping offense. In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

Footnotes

1 Testimony established that it was ten point six miles from Mr. Baker's residence to the victim's residence, taking approximately seventeen minutes to drive there at the posted speed limit.

2 It was noted on cross-examination that, in her police statement, the victim stated the struggle lasted between ten to fifteen minutes.

3 Under Tennessee Code Annotated section 40–35–501(i), especially aggravated kidnapping is specified as an offense requiring 100% service of the crime.

4 He does not challenge his aggravated burglary convictions.

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Court of Criminal Appeals of Tennessee, at Jackson.

STATE of Tennessee
v.
Aaron TATE.

No. W2012–00462–CCA–R3–CD. | Assigned on Briefs at Knoxville May 21, 2013. | Dec. 18, 2013. | Application for Permission to Appeal Denied by Supreme Court June 20, 2014.

Appeal from the Criminal Court for Shelby County, No. 1007532; James M. Lammey, Judge.

Attorneys and Law Firms

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CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

OPINION

CAMILLE R. McMULLEN, J.

***1** The Defendant–Appellant, Aaron Tate, was convicted by a Shelby County jury of one count of attempted especially aggravated robbery; one count of especially aggravated burglary; one count of employment of a firearm during a felony offense; one count of especially aggravated kidnapping; one count of aggravated kidnapping; two counts of aggravated assault; and one count of facilitation to commit aggravated assault. The trial court sentenced Tate as a Range II, multiple offender and ordered each of his sentences to be served consecutively, for an effective sentence of one-hundred-thirty-eight years' imprisonment. In this appeal, Tate argues that the jury was not provided with an instruction consistent with *State v. White,* 362 S.W.3d 559 (Tenn.2012); therefore, his "convictions for especially aggravated kidnapping and aggravated kidnapping offend due process."He further argues that the trial court imposed an excessive sentence. Upon our review, we conclude that the absence of an instruction pursuant to *White* was harmless beyond a reasonable doubt as to Tate's convictions for attempted especially aggravated robbery, aggravated burglary, and facilitation of aggravated assault. However, the lack of the *White* instruction was reversible error as to his convictions for aggravated assault charged in counts six and seven. Accordingly, we reverse Tate's kidnapping convictions charged in counts four and five and remand the matter for a new trial as to those offenses. We modify count two and reduce the especially aggravated burglary conviction to aggravated burglary and remand for resentencing on this conviction. We reverse Tate's conviction for employing a firearm during the commission of a dangerous felony offense and remand for a new trial on count three. In all other respects, the judgments of the trial court are affirmed.

In the early morning hours of May 26, 2010, Aaron Tate and Curtis Keller broke into the home of Tamika Jones located at 454 South Main Extended in Collierville, Tennessee. [1] Ms. Jones, her two teenage sons, J.G. and M.B., [2] and her boyfriend, Andrew Morrow, were at home asleep. During the burglary, J.G. managed to call the police, and Tate and Keller were apprehended while leaving the home. Based on this event, Tate was indicted for the offenses listed in the below chart. [3]

***2** The following proof was presented in a joint trial.

Officer Christopher Davidson of the Collierville Police Department responded to a "burglary in progress call" at the victim's house at around 3:36 a.m. His emergency equipment was activated as he approached the area but he "turned it off and went dark before he entered the neighborhood."Upon arrival at the victim's house, he observed a "dark-colored sedan" parked on a street close to the house. He and his partner ran toward the house, and the sedan "stopped in front of the house ... for a moment then continued on."He "heard screaming and yelling coming from the front room—glass breaking and somebody yelling for help."He identified

photographs of the area in which the sedan was located as well as photographs of the interior and exterior of the house.

While Officer Davidson and his partner maintained a security position around the exterior of the house, they heard something on the north side of the building hit the ground. Officer Davidson said that he heard footsteps, a chain-link fence rattle, and the sound of someone running away. As Officer Davidson entered the home from a back entryway, Curtis Keller, the codefendant, met him at the door. Keller told Officer Davidson that he was a victim, that there were three people in the house who were trying to rob him, and that he was terrified. Officer Davidson secured Keller, entered the home, and observed Andrew Morrow with severe cuts and wearing a blood-soaked t-shirt. Officer Davidson then spoke with all of the victims. Morrow identified codefendant Keller as the perpetrator of the offense, and the other victims confirmed that there were three men who broke into their home and attempted to "extort jewelry and money and drugs from Mr. Morrow."

Officer Davidson said that Detective Riley recovered a pistol magazine clip inside a bedroom in the house. He described the interior of the house as follows:

> The back bedroom was strewn all about. There was blood all over tables. Tables were turned over. There was blood on comforters that were thrown about. There was—pretty much the whole room was in disarray. There was blood on the walls.

On cross-examination, Officer Davidson confirmed that no guns were recovered from the house or from codefendant Keller. Although he observed approximately five grams of marijuana "scattered about" the home, he did not believe anyone was charged with this offense. On redirect examination, Officer Davidson said that a mask and gloves were recovered from the sofa area inside the house. He said that Jones told him that codefendant Keller was wearing them during the burglary.

Officer Noel Tipler of the Collierville Police Department testified that he responded to the north side of the victim's house on the morning of the offense. He said other officers were on the scene prior to his arrival. As he approached the house, he heard a man and a woman scream for help. Using a photograph, he showed the jury the north side of the victim's house. He stated that as he was coming through the yard, he saw two officers attempting to take Tate into custody after he had apparently jumped out a window. He assisted the officers and placed Tate in his patrol car. Officer Tipler identified photographs of the area surrounding the house, including a photograph of the window Tate was exiting. After he processed Tate at the jail, Officer Tipler returned to the scene. He said he found "tracks leading to the side of the house ... over a fence here."He followed the trail to another fence and a back road, which led him to opine that another individual may have gotten into a car. On cross-examination, Officer Tipler affirmed that the screams from the house occurred simultaneously with Tate's exiting the window of the house. He further clarified that he did not observe Tate exit the home.

*3 Within forty-five seconds to a minute of a "burglary in progress call," Officer Christopher Rossie of the Collierville Police Department responded to the victim's house. He testified, in large part, consistently with the testimony of his partner, Officer Davidson. In addition, he said that as he approached the house he heard a man and a woman screaming for help. While Officer Davidson was positioned toward the back of the house, Officer Rossie went to the front of the house. As he rounded the corner to the north side, Officer Rossie heard a "loud noise of something hitting the side of the house" and then observed Tate jump out a window of the house. Officer Rossie told Tate to get on the ground, and Tate complied. Officer Rossie said that when Tate jumped out the window, he was wearing a "bluish-colored stocking cap type —like a nylon material on his head."

A .45 semi-automatic Llama was recovered from the bushes underneath the window from which Tate jumped. Officer Rossie opined that "the loud thud against the house" was consistent with a gun hitting the house immediately before Tate jumped out the window. A photograph of the gun in the area from which it was recovered was shown to the jury. Officer Rossie said that the magazine clip was missing from the gun and that blood and human hair appeared to be on the gun. Upon securing the house, Officer Rossie observed signs of forced entry into the house including a footprint on the door leading into the house from the carport and a broken doorframe.

On cross-examination, Officer Rossie confirmed that no weapons were found on codefendant Keller or inside the house. He believed that a magazine clip that was found in a bedroom inside the house matched the gun recovered from underneath the window outside of the house.

Detective Michael Riley of the Collierville Police Department testified that he was primarily responsible for collecting the evidence from the scene in this case. Detective Riley also photographed the interior and exterior of the house. He collected a black ski mask and a glove located on a couch inside the house, a blue "do-rag/mask, and a pair of gloves" recovered from Tate, a magazine clip for a .45 caliber gun recovered from inside a bedroom in the house, and a .45 caliber gun that was found outside the window from where Tate jumped. All of these items were admitted into evidence. Detective Riley recovered a cell phone from Tate after he was processed at the jail and determined that phone calls were made during the instant offense. The day after the offense, Detective Riley recovered another gun, a Caltech nine-millimeter, from the backyard of a residence near the victim's house.

On cross-examination, Detective Riley said that he did not perform any testing on the glove recovered from the couch. He also said that there was no blood on the magazine clip recovered from the bedroom inside the house.

Officer Jason Ehrat of the Collierville Police Department responded to the victim's house "about five or six minutes after the call went out."Upon arrival, he approached the north side of the house, met with other officers, and observed Tate jump out the window of the house. He took Tate into custody, and the other officers secured the house. He said that Tate was wearing "a mask or a hat ... some kind of skull cap" when he jumped. Officer Ehrat confirmed that as Tate was exiting the window he heard a loud noise that was later identified as a gun. Officer Ehrat assisted in securing the house and observed that the victims were very "distraught" and "shaken up." On cross-examination, Officer Ehrat agreed that there was nothing unusual about the hat or the single glove that was recovered from the house. Although Officer Ehrat heard a thud noise as Tate was exiting the window, he did not see Tate in physical possession of a gun.

*4 Officer William Hill of the Collierville Police Department said that he responded to a call from the homeowner of 439 Starlight Drive, which borders the victim's house. Sometime after noon on the day of the offense, the homeowner of 439 Starlight was outside cleaning his pool and found a gun in his backyard. Officer Hill identified the Caltech nine-millimeter gun as the gun that was recovered from the homeowner's backyard. On crossexamination, Officer Hill agreed that there was no indication that the gun had been tested or analyzed for fingerprints.

Lieutenant Kenneth Rowlett of the Collierville Police Department testified and responded to the victim's house on the morning of the offense. He eventually handcuffed and searched Keller, who Lieutenant Rowlett described as a large man, before taking him into custody. Lieutenant Rowlett coordinated the effort to apprehend a potential third suspect in the offense and contacted Detective Riley, the on-call detective for the area, to advise him of the situation. On cross-examination, Lieutenant Rowlett agreed that Keller did not have any blood on him when he was taken into custody.

J.G., age seventeen, testified that at the time of the offense he lived at 454 South Main with his younger brother, M.B., their mother, Tamika Jones, and her boyfriend, Andrew Morrow. At around 3:00 a.m. on the morning of the offense, he was watching television and talking on the phone. He was about to turn off the television and go to bed when he heard a "big boom" and "footsteps running through his house." After he heard his mother scream, he ran to his closet and shut the door. He knew there was more than one person inside his house based on the number of footsteps he heard. While inside the closet, he called 911. He confirmed that the voice on the 911 tape, played for the jury and admitted into evidence, was his.

J.G. said that one of the burglars came into his room and kicked his door down. The man came straight to his closet, had his hand on his gun, and told J.G. to slide across his bed. When J.G. complied, he slid his cell phone underneath the pillow so the man would not know that he had been on the phone. J.G. said that the man took him to his brother's room and kept him separated from his brother and mother. He said his mother's room was "completely destroyed" and that the "big guy" went through her dressers.

J.G. said that he could hear the burglars talking to someone on the phone while they were inside his house. He could also hear his mother crying. He overheard the burglars say, " 'They were going to kill us and leave.' " J.G. assumed that the person on the phone with the burglars told them the police had surrounded the house because the burglars became scared and began looking for a way to flee the house. After the burglars left, J.G. joined his mother, brother, and Morrow outside with the police. J.G. was unable to identify which man had a gun. He agreed, however, that the men appeared to know each other and worked "as a team" during the burglary.

*5 On cross-examination, J.G. agreed that he saw only two men during the burglary. He said that the man who came to his

room had a gun but the larger man going through his mother's dressers did not. He agreed that this observation was omitted from his initial statement to the police.

Andrew Morrow, along with his girlfriend and her two teenage sons, lived at 454 South Main Extended on the morning of the offense. He testified that he had just fallen asleep and heard a loud boom. He dismissed the noise, reasoning that the boys were playing or wrestling. When he turned over in his bed, a man was holding a gun in his face. His girlfriend repeatedly screamed, "What's going on ... we ain't got nothing—we ain't got no money—we work every day."The man then started beating Morrow with the gun. Morrow said that the man beating him was wearing all black and that all of the men in the house wore ski masks. His girlfriend screamed " 'You want some jewelry?" and the man replied, " 'Yeah.' " The man continued to beat Morrow about the head. Morrow eventually grabbed the gun and struggled with him over it.

Morrow said that he "busted the window trying to yell for help."However, he was unable to scream loudly because blood was running down his eyes, throat, and ears. His girlfriend was screaming because one of the burglars said, " 'Do you see what you're fixin' to make me do?' " while holding a gun on her younger son, M.B. At this point, Morrow began to pray. He testified that, "all of a sudden when I prayed ... I heard a knock—said, 'Collierville police.' I said, 'Thank God.' " Morrow followed the men and tried to hold one of the men as they attempted to flee from the police. He identified Keller at trial as the larger man who burglarized his home armed with a gun. He said there were three men working in concert during the burglary of his home and that each one of them had a gun. He said he saw Keller's face, but the other men wore ski masks, even after they were arrested by the police. He said the ski mask recovered from his couch did not belong to him. He said he heard Keller on the telephone during the burglary, but he could not hear what was said.

Morrow said he suffered at least ten blows to his head during the burglary. As a result, he was taken to the hospital and received forty-two stitches and sixteen staples. He said he still had scars from the beating he endured during the offense, which he displayed to the jury. He described his pain as "a hell of a pain I ever had in my life."He denied inviting the burglars into his home. Asked what the men attempted to take from him, Morrow said

> I didn't have nothin'—they were asking for money, but I ain't have no money. You know. I work everyday. You know, I pay—lottery scratch off and everything, but I don't have nothin —I'm just a poor man trying to make it like everybody else.

On cross-examination, Morrow conceded that he smoked marijuana or "weed" and had "one shot" of vodka before he went to bed that night. He affirmed that Keller had a gun and cell phone, but he could not remember in which hand Keller held the gun. He also clarified that Keller was not the man who beat him during the offense. He described the man who beat him as "the skinny tall guy." He said he did not know the men who broke into his house.

*6 M.B., age sixteen, testified that on the morning of the offense he lived at 454 South Main Extended with his brother, mother, and her boyfriend. He was watching television around 3:00 a.m., and his mother told him to go to bed. He went to his room, turned on the radio, and was almost asleep when he heard a "big boom." He stated that three people with guns came into his house. He referred to the man who came into his room as the "skinny one," who was wearing a blue mask. This man came into his room and told him to get up. He showed the man around his house and was then told to " '[l]ay down on the ground' " in his mother's room. His mother was screaming in a corner in the room, and the men were beating Morrow. The "big dude" said, " 'Get [Jones] quiet[,]' " and his mother managed to make her way to M.B. The men threw a sheet over M.B. and his mother, and the skinny man put his foot on M.B.'s back.

M.B. and his mother tried to escape from her bedroom but were stopped by the larger man, who forced them back into the bedroom at gunpoint. M.B. said his mother was screaming for his brother, and the men went to his brother's room. M.B. saw his brother's feet as the men led his brother to another room. At one point, the skinny man told M.B. to "get up [and] put the gun to [M.B.'s] head." Although it appeared to M.B. that the larger man was in control during the burglary, he testified that the skinny man said, " 'Look at this little boy. Do you see him? If you don't give me the stuff, we're going to kill him.' " Asked if he felt he was being used as bait or held as a hostage, M.B. replied, "Yes, sir." He also testified that all three men inside his house had guns. During the burglary, M.B. was afraid and feared for his life.

Tamika Jones testified that on the morning of the offense she lived at 454 South Main Extended in Collierville,

Tennessee. Her testimony was consistent, in large part, with the testimonies of her two sons, J.G. and M.B., and her boyfriend, Andrew Morrow. In addition, she said that when the men entered her house they repeatedly asked, "Where its [sic] at?" She identified Keller at trial as the larger man who burglarized their home on the night of the offense. She explained that she was able to see Keller's face during the burglary because he took off his mask and threw it on the couch before he walked out the door.

Codefendant Curtis Keller, a Memphis native, testified on his own behalf. After his family business closed, Keller moved to Dallas, Texas and engaged in drug trafficking. He said that he sold marijuana throughout Dallas, Nashville, Jackson, Grand Junction, and Memphis. He met Andrew Morrow through a friend "about seven or eight months" prior to the instant offense. He sold large quantities of marijuana to Morrow for the purpose of resale "numbers of times." Keller explained that he would sell Morrow a pound of marijuana for $700, and Morrow would resell it for $850 to $900. Keller said that on May 23, 2010, he met with Morrow because Morrow wanted to purchase fifteen pounds of marijuana. Keller agreed to sell Morrow the marijuana and allowed Morrow to pay him for the purchase a few days later, as he had done in the past.

*7 According to Keller, some time after the purchase, Morrow claimed that he could not repay Keller because someone had stolen the money and the drugs. Keller determined that this was not true and that Morrow had lost the money gambling at a crap house. When Keller attempted to talk to Morrow about it, Morrow slammed the door in his face. Keller knew that Morrow lived with his girlfriend but did not know that children lived with him. Keller said that he returned to Morrow's house with two friends. When no one came to the door, they "bust[ed] the door open and went in."Keller said he "just wanted to get [his] money so [he] could leave and go on back to Dallas, Texas, because, you know, [he] owed people."

Keller testified that he went into the room where Morrow and his girlfriend were in bed. He said that no children were in the room. Keller demanded his money, and Ms. Jones began to scream about her children. Keller insisted that he was only attempting to get the money and drugs owed to him and said,

> [I]f she weren't screaming and hollering to go get her kid—you know that's how the boy were able to call 911. It weren't no intention about no kid—Ms. Tamika Jones or nothing. Our basis was Andrew Morrow. Those kids didn't owe me nothin'. I didn't know they was in the house.... If Andrew Morrow wouldn't have tried to grab the gun, he wouldn't have been bust open or none of that.

Keller claimed that he only had his cell phone inside the house and not a gun. He did not see one of the teenage boys being brought into the bedroom by someone else and said that all four victims were ultimately in the corner in the same bedroom. He agreed that as he was on his cell phone during the offense, the police responded to the house. He also agreed that he let the other two men know that the house was surrounded by the police. He was wearing a black ski mask and one glove during the offense, which he took off and laid on the couch prior to leaving the house. Finally, he agreed that he met the police when he exited the house and told them that he had been robbed because he had not been given his drugs or money.

On cross-examination, Keller agreed that Tate and another individual named "Little Ronnie" were the two men with him during the offense.

Based on the above proof, the jury convicted Tate of attempted especially aggravated robbery, especially aggravated burglary, employing a firearm during the commission of a felony, especially aggravated kidnapping, aggravated kidnapping, two counts of aggravated assault, and facilitation of aggravated assault.

Sentencing Hearing. At the January 17, 2012 sentencing hearing, the trial court reviewed Tate's presentence report and determined that he was a Range II, multiple offender. The presentence report reflected that Tate had a prior conviction for kidnapping and for robbery, both Class C felonies. He also had three prior convictions for simple possession of a controlled substance. *See* T.C.A. § 39–17–418 (2006). Although simple possession is normally a Class A misdemeanor, the third offense under this section is a Class E felony. *See id.*

*8 The trial court found the following six enhancement factors applicable to all eight of Tate's convictions: that he had a previous criminal history, in addition to that necessary to establish the appropriate range, T.C.A. § 40–35–114(1); that he was a leader in the commission of the offense with two or more criminal actors, *id.* § 40–35–114(2); that the offense involved more than one victim, *id.* § 40–35–114(3);

that he treated, or allowed a victim to be treated, with exceptional cruelty, *id.* § 40–35–114(5); that he previously failed to comply with the conditions of a sentence involving release into the community, *id.* § 40–35–114(8); and that he had no hesitation about committing a crime when the risk to human life was high, *id.* § 40–35–114(10). The court placed "great weight" in enhancement factor (1). In addition, the trial court applied enhancement factor (9), that Tate possessed a deadly weapon during the commission of the offense, to his conviction for especially aggravated burglary under count two. *Id.* § 40–35–114(9). The trial court did not find any applicable mitigating factors under Tennessee Code Annotated section 40–35–113.

For his prior convictions for kidnapping and robbery, Tate had received a three-year sentence of probation. The trial court found that Tate previously violated the conditions of this probation and made the following observation:

> He was given an opportunity, at that point, to straighten his life out. It's rather troubling to note that he got probation on that, and he squandered that probation by going above and beyond those facts and having a home-invasion robbery. So, that shows me he's a danger to society-definitely. But he's learned nothing from that situation.

In regard to the case sub judice, the trial court stated:

> I remember, very well, the testimony of the young man who was in the closet. If there ever was a time in a person's life when they were frightened, almost to death, it was at that point. And to think that if he hadn't had the thought—the forethought or the where-with-all to jump in the closet with his cell phone and call the police, they may not be here. That's how dangerous I think Mr. Tate is because, see, he got caught the last time he committed a robbery and a [kidnapping]. And, so, in this case, I doubt very seriously that these people in this house would have survived based upon what I saw from this proof.

After considering the applicable sentence range for each of Tate's eight convictions, the trial court imposed the maximum sentence within each range.[4] The court found Tate to be a "dangerous offender" under Tennessee Code Annotated section 40–35–115(b)(4) and ordered his sentences to be served consecutively for a total effective sentence of one-hundred-thirty-eight years' imprisonment. After the denial of his motion for new trial, Tate filed a timely notice of appeal.

ANALYSIS

I. *White Instruction.* Based on *State v. White,* 362 S.W.3d 559 (2012), Tate contends that his "convictions for especially aggravated kidnapping and aggravated kidnapping offend due process because the conduct forming the bases of these convictions was 'essentially incidental' to the conduct forming the bases for his especially aggravated burglary conviction, attempted especially aggravated robbery and aggravated assault convictions."In response, the State contends that "the trial court's failure to define 'substantial interference with the victim's liberty' in the jury instructions for especially aggravated kidnapping and aggravated kidnapping" was harmless beyond a reasonable doubt. Upon our review, we agree with the State that the omission of the requisite *White* instruction was harmless error as the convictions for aggravated burglary, attempted especially aggravated robbery, and facilitation to commit aggravated assault (against Morrow). However, we disagree that the error was harmless beyond a reasonable doubt as to the aggravated assaults charged in counts six and seven (against M.B. and Jones).

***9** Prior to *State v. White,* this court conducted an appellate due process review when a defendant challenged dual convictions involving a form of kidnapping and a separate felony offense. This due process analysis developed over time in cases such as *State v. Anthony,* 817 S.W.2d 299 (Tenn.1991), *State v. Dixon,* 957 S.W.2d 532 (Tenn.1997), and its progeny. *See, e.g., State v. Cozart,* 54 S.W.3d 242 (Tenn.2001), *State v. Fuller,* 172 S.W.3d 533 (Tenn.2005), and *State v. Richardson,* 251 S.W.3d 438 (Tenn.2008). In *White,* the supreme court expressly overruled this separate due process analysis conducted by the appellate courts. *See White,* 362 S.W.3d at 578. The court concluded that the Tennessee kidnapping statutes were not meant to apply to a removal or confinement of a victim that was "essentially incidental" to the accompanying felony and that this inquiry was a factual question for a properly instructed jury to resolve.

Id. at 576–78. This is because the "essentially incidental" language in *Anthony,* which previously informed appellate due process review, was now deemed a part of a material element of kidnapping. *Id.* at 578 ("[W]e are merely providing definition for the element of the offense requiring that the removal or confinement constitute a substantial interference with the victim's liberty."). Accordingly, to protect the defendant's due process rights, trial courts must instruct juries to determine "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.* at 578.

Based on the court's holding in *White,* the Tennessee Pattern Jury Instruction Committee adopted the following jury instruction to guide the trial courts:

> To find the defendant guilty of [the charged kidnapping 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(s) of _____ as charged [*or included*] in count(s)_____. 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 alleged 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 alleged victim's liberty was inherent in the nature of the separate offense;
>
> (d) whether the removal or confinement prevented the alleged victim from summoning assistance, although the defendant need not have succeeded in preventing the alleged 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 alleged victim's risk of harm independent of that posed by the separate offense.
>
> ***10** Unless you find beyond a reasonable doubt that the alleged victim's removal or confinement exceeded that which was necessary to accomplish the alleged _____ and was not essentially incidental to it, you must find the defendant not guilty of [the charged kidnapping offense].

7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 8.01–.03, 8.05 (footnotes omitted) (citing *White,* 362 S.W.3d at 576–81).

A year and a half after its ruling in *White,* the supreme court provided further guidance regarding appellate review of dual convictions of kidnapping and other felony offenses in *State v. Cecil,* —— S.W.3d ——, No. M2011–01210–SC–R11–CD, 409 S.W.3d 599, 2013 WL 4046608 (Tenn. Aug.12, 2013). The court made it clear that the principles in *White* applied to all pending appellate actions as of the date of the *White* decision and to all actions arising thereafter. Cecil, —— S.W.3d ——, at *8. Having clarified the scope of application of the *White* ruling, the court concluded that the absence of a specific jury instruction as required under *White* constitutes error. *Id.* at *9. Moreover, " '[t]he failure to instruct the jury on a material element of an offense is a constitutional error subject to harmless error analysis.'" *Id.* at *10 (quoting *State v. Faulkner,* 154 S.W.3d 48, 60 (Tenn.2005))."The existence of a non-structural constitutional error requires reversal unless the State demonstrates beyond a reasonable doubt that the error is harmless."*State v. Rodriguez,* 254 S.W.3d 361, 371 (Tenn.2008). To determine if an error is harmless, the reviewing court must consider " 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"*Id.* (quoting *State v. Allen,* 69 S.W.3d 181, 190 (Tenn.2002)). The court in *Cecil* emphasized that "the touchstone of this inquiry is whether a rational trier of fact could interpret the proof at trial in different ways."*Cecil,* —— S.W.3d ——, at *10 (citing *White,* 362 S.W.3d at 579).

In the absence of the required *White* instruction, the resulting kidnapping conviction must be reversed and remanded for a new trial where the evidence was subject to differing interpretations and the proper jury instructions could have changed the outcome of the trial. *See, e.g., State v. Reginald W. Davis,* No. M2011–02075–CCA–R3–CD, 2012 WL 5947439, at *6 (Tenn.Crim.App. Nov.16, 2012) and *State v. Bobby A. Raymer,* No. M2011–00995–CCA–R3–CD, 2012 WL 4841544, at *7 (Tenn.Crim.App. Oct.10, 2012). However, the omission of the *White* instruction does not require reversal where the record supports a finding that the error was harmless beyond a reasonable doubt. *Cecil,* ——S.W.3d ——, at * 10 (citing as examples *State v. Curtis Keller,* No. W2012–00825–CCA–R3–CD, 2013 WL 3329032 (Tenn.Crim.App. June 27, 2013) and *State v. Jonathan Kyle Hulse,* No. E2011–01292–CCA–R3–

CD, 2013 WL 1136528 (Tenn.Crim.App. Mar.19, 2013)). Therefore, a reviewing court should determine from the record whether the proof is unequivocal that the victim's removal or confinement was not essentially incidental to the accompanying offense and that the jury's verdict would have been the same if it had been properly instructed.*Cecil,* —— S.W.3d ——, at *12.

***11** Here, Tate's trial occurred in October 2011, prior to the supreme court's decision in *White.*Consequently, the trial court did not require the jury to determine whether the victims' removal or confinement was incidental to the accompanying felonies or, in the alternative, were significant enough to stand alone. *White,* at 577. Because Tate's appeal was in the appellate pipeline at the time of the *White* decision, we must now determine whether, beyond a reasonable doubt, the jury's verdict would have been the same had it been provided with the instruction pursuant to *White.*

Tate maintains that the confinement of Ms. Jones and her son, M.B., was not beyond that necessary to commit the underlying felony offenses of especially aggravated burglary, attempted especially aggravated robbery, and the aggravated assaults. For the reasons that follow, we conclude that due process concerns are not implicated in dual convictions for aggravated burglary and kidnapping; thus, no jury instruction pursuant to *White* was required. We also conclude that the proof is unequivocal that the victims' removal or confinement had criminal significance above and beyond that necessary to consummate the attempted especially aggravated robbery. With respect to the aggravated assaults against M.B. and Jones as charged in counts six and seven, we are unable to conclude beyond a reasonable doubt that the jury's verdict would have been the same if it had been properly instructed regarding the charges for kidnapping and for aggravated assault against M.B. and Jones. We will address each of the accompanying felony offenses in turn.

Here, Tate was indicted, and convicted as charged, for especially aggravated burglary with intent to commit theft against Andrew Morrow. *See id.* § 39–14–404 (2010). We have reduced Tate's conviction from especially aggravated burglary to aggravated burglary, which we discuss in further detail later in this opinion. Although Tate argues that dual convictions for aggravated burglary and kidnapping violate due process, this Court has previously declined to extend the due process analysis adopted in *Anthony* to property related offenses such as burglary. *See State v. Larry Jereiler Alston, et. al.,* No. E2012–00431–CCA–R3–CD, 2013 WL 2382589, at * 11 (Tenn.Crim.App. Feb.27, 2013) (collecting cases) (noting that "[u]nlike the 'modern, broadly-drawn kidnapping statutes' at issue in *Anthony,* there is no danger that the offenses of aggravated burglary or aggravated robbery "could literally overrun several other crimes"). In *Anthony,* the Supreme Court was concerned that proving one felony, the armed robbery, inherently and necessarily proved the elements of the second felony, kidnapping. *Anthony,* 817 S.W.2d at 303. However, where the offenses of conviction are narrowly defined by statute and require proof of different elements, as in this case, there is no due process violation. *See State v. Ralph,* 6 S.W.3d 251, 256 (Tenn.1999); *State v. Cowan,* 46 S.W.3d 227, 235 (Tenn.Crim.App. Oct.27, 2000). Accordingly, because the proof supporting the aggravated burglary in this case did not inherently involve unlawful confinement of the victim, we conclude that the kidnapping offense was not essentially incidental to the burglary offense. *See State v. Zonge,* 973 S.W.2d 250, 253 (Tenn.Crim.App. Oct.9, 1997) (citing *State v. Oller,* 851 S.W.2d 841, 842–43 (Tenn.Crim.App.1992)). As the rationale in *Anthony* is inapplicable, no instruction pursuant to *White* was required. Tate is not entitled to relief on this issue.

***12** Next, in the absence of the *White* instruction, we are required to determine whether the proof is unequivocal that the removal or confinement of Jones and M.B. was significant enough to support separate kidnapping convictions along with the conviction for the attempted robbery of Morrow. Robbery "is the intentional or knowing theft of property from the person or another by violence or putting the person in fear."T.C.A. § 39–13–401(a) (2010). Especially aggravated robbery is a robbery that is "[a]ccomplished with a deadly weapon; and ... [w]here the victim suffers serious bodily injury."T.C.A. § 39–13–403(a) (2010). Criminal attempt requires that the defendant intentionally take a "substantial step" toward committing the underlying offense. *See, e.g., State v. Dickson,* —S.W.3d ——, No. E2010–01781–SC–R11–CD, 2013 WL 5530670 (Tenn. Oct.8, 2013) (holding that an accomplice took substantial step toward committing first degree murder to constitute criminal attempt); *see also*T.C.A. § 39–12–101(a) (2010). This court has previously held that a defendant's conduct in approaching a victim and pointing a gun at his head constituted a substantial step toward the commission of especially aggravated robbery. *See State v. Webster,* 81 S.W.3d 244 (Tenn.Crim.App.2002), *perm. app. denied* (Tenn. July 1, 2002).

The record shows that the confinement of Jones and M.B. was greater than necessary to accomplish the attempted

robbery of Morrow, especially in light of the fact that when they attempted to escape the bedroom, they were forced at gunpoint to return and remain there. Previously, this court has considered the lack of a *White* instruction to be harmless error and has affirmed kidnapping convictions in instances where the victim was prevented from escaping. *See, e.g., Jonathan Kyle Hulse,* 2013 WL 1136528 (affirming a conviction for especially aggravated kidnapping under harmless error review where the defendant raped the victim indoors, then chased the victim with a boxcutter after she fled outside, grabbed her by the ankles, dragged her along the sidewalk, and prevented her from summoning help); *State v. Rochelle Bush,* No. W2011–02721–CCA–R3–CD, 2013 WL 1197859, at *4 (Tenn.Crim.App. Mar.25, 2013) (affirming the defendant's conviction for especially aggravated kidnapping committed during an aggravated robbery where the pregnant victim was prevented from leaving and the defendant held a knife to the victim's stomach and threatened to kill her even after all the money was stolen), *perm. app. denied* (Tenn. Sept. 18, 2013). In addition to preventing M.B. and Jones from escaping, the perpetrators placed a gun to the teenage victim's head as they demanded money and drugs from Morrow. The threat to kill M.B. increased the potential harm to him beyond that necessary to commit the attempted especially aggravated robbery of Morrow. [5] When the perpetrators entered the home, one of the men went to M.B.'s room and forced M.B. to show him around the house. After complying, M.B. was forced to lie on the floor in his mother's room, and one of the men put his foot on M.B.'s back and threw a sheet over M.B. and his mother. The perpetrators ransacked the victims' bedroom and repeatedly stated, "Where its [sic] at?" While one of the perpetrators was engaged in a struggle over the gun with Morrow, Jones and M.B. tried to flee from the bedroom. However, another perpetrator thwarted their attempt and forced them back into the room at gunpoint. When the perpetrators' demands were not met, one of the men held a gun to M.B.'s head and said, " 'Look at this little boy. Do you see him? If you don't give me the stuff, we're going to kill him.' " Codefendant Keller testified at trial that Morrow was the target and that "[i]t weren't no intention about no kid—Ms. Tamika Jones or nothing."The confinement of M.B. and Jones was extended in duration and they were prevented from escaping and summoning assistance. Such interference with their liberty was not inherent in the nature of the separate offense of attempted robbery. Consequently, no rational trier of fact could conclude from the proof that the removal or confinement of M.B. and Jones was essentially incidental to the attempted robbery. M.B. and his mother were clearly held as hostages until the perpetrators' efforts to get money were thwarted by the police. As such, the victims' confinement far exceeded that necessary to accomplish the attempted robbery.

***13** The circumstances supporting the dual convictions for kidnapping and for aggravated assault against both M.B. and Jones are less clear. As charged in the indictment in counts six and seven against M.B. and Tamika Jones, a person commits aggravated assault when he or she "[u]ses or displays a deadly weapon" and "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury."T.C.A. §§ 39–13–101, –102 (2010). As charged in counts four and five against M.B. and Tamika Jones, a person commits especially aggravated kidnapping when he or she "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty" and accomplishes such act "with a deadly weapon[.]" *See*T.C.A. §§ 39–13–302, –305(a)(1) (2010). The jury convicted Tate of the aggravated assaults as charged. Tate was also convicted of the especially aggravated kidnapping of M.B. and of the lesser-included offense of aggravated kidnapping of Tamika Jones. Because the convictions in counts four through seven arise from the same set of circumstances, that Tate threatened the safety of M.B. and Jones with a gun, the jury may have reached a different conclusion if it had been adequately instructed. Based on the record, a reasonable jury could find that Tate only intended to assault M.B. and Jones, and that any removal or confinement of the victims was incidental to the assaults. However, the record also supports a finding that the removal or confinement of the teenage victim and his mother had criminal significance beyond that necessary to accomplish the assaults against them. We conclude that the omission of the *White* instruction was reversible error because the jury's verdict could have been different if it had been properly instructed regarding the charges for kidnapping and for aggravated assaults against M.B. and Tamika Jones. *See State v. Rodriguez,* 254 S.W.3d at 371. Accordingly, to protect Tate's due process rights, we reverse the kidnapping convictions charged under counts four and five and remand the matter for a new trial on those counts.

As to Tate's conviction under count eight for facilitation of aggravated assault against Andrew Morrow, we conclude that the proof is unequivocal that any movement or confinement of M.B. and Tamika Jones was not essentially incidental to the accompanying assault against Morrow. No rational trier of fact could interpret any removal or confinement of M.B. and Jones to be accomplished in furtherance of the assault against Morrow. Therefore, the omission of the *White* instruction

was harmless beyond a reasonable doubt as to the conviction under count eight.

Accordingly, we conclude that there was unequivocal proof that the victims' removal or confinement was not essentially incidental to the facilitation of aggravated assault, attempted especially aggravated robbery, or the aggravated burglary. Because the jury's verdict would have been the same if it had been properly instructed on those counts, the omission of the *White* instruction was harmless beyond a reasonable doubt. However, Tate is entitled to relief on the issue of the dual convictions for kidnapping and for aggravated assault against M.B. and Jones because the proof supporting those convictions was subject to different interpretations and the instructional error was not harmless.

***14** We are compelled to address two issues which were observed as plain error by this court in *State v. Curtis Keller,* No. W2012–00825–CCA–R3–CD, 2013 WL 3329032 (Tenn.Crim.App. June 27, 2013) (wherein State conceded plain error regarding trial court's failure to properly instruct jury on the charge of employing a firearm during the commission of a felony and finding dual convictions of especially aggravated burglary and attempted especially aggravated robbery violated Tennessee Code Annotated section 39–14–404(d)). In *Curtis Keller,* a case in which Tate's codefendant appealed his convictions stemming from the same trial, this court addressed whether the trial court properly instructed the jury on the charge of employing a firearm during the commission of a dangerous felony and whether Keller's dual convictions for especially aggravated burglary and attempted especially aggravated robbery violated Tennessee Code Annotated section 39–14–404(d). Upon our review, we likewise perceive plain error on this record. For the reasons outlined below, we reverse Tate's conviction for employing a firearm during the commission of a dangerous felony in count three and reduce his conviction of especially aggravated burglary to aggravated burglary in count two.

Neither of the above claims was included in Tate's motion for new trial or his brief to this court. These issues are therefore waived. *See*Tenn. R.App. P. 3(e) ("[N]o issue presented for review shall be predicated upon error ... unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."). This court may review an issue that has been waived and conclude that "plain error" exists if: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *See State v. Smith,* 24 S.W.3d 274, 282 (Tenn.2000). All five factors must be established by the record before a court will find plain error. *Id.* at 283.

As in *Curtis Keller,* the record reflects that count three of the indictment charging employing a firearm during the commission of a dangerous offense did not specify which of the several possible felonies allegedly committed by Tate had given rise to the offense. While the trial court narrowed the potential felonies that qualified as a "dangerous felony" to especially aggravated kidnapping, aggravated kidnapping, especially aggravated burglary, and aggravated burglary, it failed to specify which of those four felonies was intended as the predicate crime. This is problematic because a person may not be charged with employing a firearm during the commission of a dangerous offense "if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged[,]"T.C.A. § 39–17–1324(c) (2010), and the indictment charging Tate with especially aggravated kidnapping includes the use of a deadly weapon as an essential element of the offense. Accordingly, the State's failure to elect and the trial court's failure to specify to the jury which felony served as the predicate to Tate's conviction in count three may have resulted in his conviction based on an invalid predicate felony.

***15** Under the above limited circumstances, this court has deemed consideration of a defendant's otherwise waived instructional error necessary to do substantial justice. *State v. Trutonio Yancey and Bernard McThune,* No. W2011–01543–CCA–R3–CD, 2012 WL 4057369, at *9 (Tenn.Crim.App.Sept.17, 2012) (holding that trial court committed plain error in not requiring the State to elect which felony it relied on to support charge of employing a firearm during a dangerous felony and observing that "in cases in which 'there is technically one offense, but evidence of multiple acts which would constitute the offense, a defendant is still entitled to the protection of unanimity[.]' ") (quoting *State v. Forbes,* 918 S.W.2d 431, 446 (Tenn.Crim.App.1995)); *State v. Jeremiah Dawson,* No. W2010–02621–CCA–R3–CD, 2012 WL 1572214, at *8 (Tenn.Crim.App. May 2, 2012) (holding that the State is required to elect when multiple dangerous felonies are alleged in indictment for violation of Code section 39–17–1324), *perm. app. denied* (Tenn. Sept. 20, 2012); *State v. Michael L. Powell and Randall S. Horne,* No. E2011–00155–CCA–

R3–CD, 2012 WL 1655279, at *14 (Tenn.Crim.App. May 10, 2012) (same). Accordingly, Tate's conviction for employing a firearm during the commission of a dangerous felony is reversed and count three is remanded for new trial. Upon retrial, the only dangerous felony that may be considered by the jury is the aggravated burglary, which we address below.

Tate was convicted of especially aggravated burglary and attempted especially aggravated robbery. Tennessee Code Annotated section 39–14–404(d) states that "[a]cts which constitute an offense under [the especially aggravated burglary statute] may be prosecuted under this section or any other applicable section, but not both."T.C.A. § 39–14–404(d) (2010)."Subsection (d) prohibits using the same act to prosecute for especially aggravated burglary and another offense."*State v. Holland,* 860 S.W.2d 53, 60 (Tenn.Crim.App.1993) (holding that T.C.A. § 39–14–404(d) precluded convictions for both especially aggravated burglary and aggravated rape when serious bodily injury was an element of both offenses); *see also State v. Michael Dean Marlin,* No. M2011–00125–CCA–R3–CD, 2011 WL 5825778, at * 14 (Tenn.Crim.App. Nov.17, 2011) (holding that the "effect of subsection (d) is that the Defendant cannot be convicted of especially aggravated burglary and aggravated robbery when the serious bodily injury of [the victim] was an element of both offenses"). The appropriate remedy for improper dual convictions under Tennessee Code Annotated section 39–14–404(d) and other applicable sections is to modify the especially aggravated burglary conviction to aggravated burglary. *See Holland,* 860 S.W.2d at 60.

The record shows that serious bodily injury of Morrow was an element of especially aggravated burglary and attempted especially aggravated robbery. Thus, Tate's dual convictions for these offenses are precluded under section 39–14–404(d).*See State v. Shanda Alene Wright,* No. M2006–02343–CCA–R3–CD, 2008 WL 371258, at *7 (Tenn.Crim.App. Feb.11, 2008) (holding that Tennessee Code Annotated section 39–14–404(d) precluded convictions for both especially aggravated burglary and especially aggravated robbery when serious bodily injury was an element of both offenses), *perm. app. denied* (Tenn. Oct. 27, 2008). Accordingly, we modify Tate's convictions for especially aggravated burglary to aggravated burglary, and we remand for resentencing on the aggravated burglary conviction. *See id.;* T.C.A. § 39–14–403.

16 II. *Sentencing. Tate contends that the trial court erred in imposing excessive sentences for each of his convictions and erred in ordering that his sentences be served consecutively. In response, the State argues that the record supports the sentence in this case. We agree with the State.

We review the length and manner of service of a sentence imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise,* 380 S.W.3d 682, 708 (Tenn.2012). Furthermore, the misapplication of enhancement or mitigating factors does not invalidate the imposed sentence "unless the trial court wholly departed from the 1989 Act, as amended in 2005."*Id.* at 706. "So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld."*Id.* This standard of review also applies to "questions related to probation or any other alternative sentence."*State v. Caudle,* 388 S.W.3d 273, 278–79 (Tenn.2012).

In *Bise,* the record reflected that the defendant participated in a burglary where no weapons were involved and the victim was not at home. Both tiers of our appellate courts agreed that the trial court erroneously applied the enhancement factor that the defendant had no hesitation about committing a crime when the risk to human life was high. *See Bise,* 380 S.W.3d at 708 (observing "that the Court of Criminal Appeals properly ruled that the evidence does not support the single enhancement factor applied by the trial court"). However, the supreme court reversed this court's downward adjustment of the defendant's sentence, holding that the record otherwise supported the trial court's imposed sentence. Morever, the supreme court in *State v. Carter* previously held that the appellate courts are bound to a trial court's imposition of a within-range sentence that is otherwise consistent with the purposes and principles of the Sentencing Act, even if we would have preferred a different result. *See State v. Carter,* 254 S.W.3d 335, 346 (Tenn.2008) (reinstating the trial court's imposition of a minimum sentence despite expressing discomfort with the decision).

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; –21–

(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; and

***17** (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40–35–210(b) (2010); *Carter*, 254 S.W.3d at 343. The burden is on the appellant to demonstrate the impropriety of his sentence. *See*T.C.A. § 40–35–401, Sentencing Comm'n Cmts.

Here, Tate was convicted of attempted especially aggravated robbery, a Class B felony. *See*T.C.A. §§ 39–13–403, –12–107(a). As a Range II, multiple offender, he was subject to a sentence ranging between twelve and twenty years. *See id.* § 40–35–112(b)(2). As previously noted, we have reduced the especially aggravated burglary conviction in count two to aggravated burglary, a Class C felony, and we remand that particular conviction for resentencing. On remand, Tate is subject to a sentence between six and ten years as a Range II, multiple offender for the aggravated burglary conviction. *See id.*§§ 39–14–403, 40–35–112(b)(3). For his conviction of especially aggravated kidnapping, a Class A felony, Tate was subject to a sentence ranging between twenty-five and forty years. *See id.*§§ 39–13–305(b)(1), 40–35–112(b)(1). His conviction for aggravated kidnapping, a Class B felony, was subject to a sentence between twelve and twenty years. *See id.*§§ 39–13–304(b)(1), 40–35–112(b)(2). For the two counts of aggravated assault, Class C felonies, Tate was subject to sentences between six and ten years. *See id.*§§ 39–13–102(e)(1), 40–35–112(b)(3). For the facilitation to commit aggravated assault, a Class D felony, Tate was subject to a sentence ranging between four and eight years. *See id.*§§ 39–11–403, 40–35–112(b)(4). For these convictions, the trial court imposed the maximum sentence within each range.

On appeal, Tate argues that the trial court erred in applying three enhancement factors: (1) that the defendant has a previous criminal history in addition to that necessary to establish the range; enhancement factor (5), that the defendant acted with exceptional cruelty; and enhancement factor (10), that the defendant had no hesitation about committing a crime when the risk to human life was high. *See id.*§§ 40–35–114(1), (5), (10) (2010). Tate does not challenge the trial court's application of enhancement factors (2), (3), (8), and (9) (that he was the leader in the commission of the offense with two or more criminal actors; that the offense involved more than one victim; that he previously failed to comply with the conditions of a sentence involving release into the community; and that he possessed a deadly weapon during the commission of aggravated burglary).*See id.*§ 40–35–114(2), (3), (8), (9).

Tate challenges the trial court's application of enhancement factor (1). While conceding that he has two prior Class C felony convictions for kidnapping and robbery, Tate contends that his three misdemeanor convictions for possession of a controlled substance "are insufficient to justify enhancement pursuant to Tennessee Code Annotated section 40–35–114(1)." Tate further argues that, "[a]t the very least, the trial court should not have placed great weight in factor (1)." Initially, we note that, as a matter of law, while simple possession of a controlled substance is generally classified as a Class A misdemeanor, *see*T.C.A. § 39–17–418(c), a third offense under this section constitutes a Class E felony. *See id.* § 39–17–418(e) (2010). Moreover, this court has previously held that even a single misdemeanor conviction may support the enhancement of a sentence. *See, e.g., State v. Willie Givens,* No. M2000–02883–CCA–R3–CD, 2002 WL 1400049, at *18 (Tenn.Crim.App. June 28, 2002); *State v. Leon James Anderson,* No. M2004–00965–CCA–R3–CD, 2005 WL 1000235, at *5 (Tenn.Crim.App. April 29, 2005). As to Tate's argument that the trial court should not have placed "great weight" on enhancement factor (1), we note that "the 2005 amendments [to the Sentencing Act] deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors."*Carter,* 254 S.W.3d at 344. Accordingly, the trial court did not err in applying this enhancement factor.

***18** Tate argues that the trial court misapplied enhancement factor (5) as to his aggravated offenses because a proper application of this factor requires "evidence of exceptional cruelty separate and apart from the actions which constituted the offense[.]"*State v. Poole,* 945 S.W.2d 93, 99 (Tenn.1997). The application of an enhancement factor is generally appropriate "if not already an essential element of the offense,"T.C.A. § 40–35–114, and this court has held

that exceptional cruelty is not necessarily an element of aggravated kidnapping, aggravated robbery, or especially aggravated kidnapping. *See, e.g., State v. Kern,* 909 S.W.2d 5, 7 (Tenn.Crim.App.1993); *State v. Robert Morrow,* No. E2000–02796–CCA–R3–CD, 2001 WL 1105371, at *4 (Tenn.Crim.App. Sept.18, 2001). While this court has stated that " '[a] threat of the victim being shot is inherent in the offense of an especially aggravated kidnapping that is committed by the use of a firearm[,]' "*State v. Turner,* 41 S.W.3d 663, 673 (Tenn.Crim.App.2000) (quoting *State v. Quinton Cage,* No. 01C01–9605–CC–00179, 1999 WL 30595, at *10 (Tenn.Crim.App. Jan.26, 1999), *perm. app. denied* (Tenn. July 12, 1999)), we find that there is ample evidence in the record to support the trial court's application of this enhancement factor to the offenses in the instant case. Morrow sustained at least ten blows to the head and received forty-two stitches and sixteen staples. In an effort to extort money and drugs, the perpetrators held a gun to M.B. and threatened to kill him in front of his family. The victims were held at gun point in the corner of a bedroom until the perpetrators were thwarted by the arrival of the police. Other witnesses at trial testified as to the harsh treatment of the victims during the course of the attempted robbery. For instance, Officer Davidson observed Morrow with severe cuts and wearing a blood-soaked t-shirt. He also described the bedroom as covered in blood and in disarray. Blood and human hair were found on the magazine clip of the gun used to beat Morrow. Accordingly, the record establishes that Tate's actions were "separate and apart" from that necessary to constitute the aggravated offenses. *See Poole,* 945 S.W.2d at 99. Furthermore, even if the trial court erroneously applied this enhancement factor to some of Tate's convictions, the trial court did not otherwise abuse its discretion or depart from the purposes and principles of the Sentencing Act. *See Bise,* 380 S.W.3d at 702.

Finally, Tate challenges the trial court's application of enhancement factor (10) arguing that "[w]hen an offense is committed with a deadly weapon, it is inherent within the offense that there is a risk to human life and the potential for injury is great."In applying this factor, the trial court stated:

> I find No. 10 applies; that he had no hesitation about committing a crime when the risk to human life was high —other than, of course, the victims named in the indictment. There were other victims here that were present that were not named in the indictment. As I stated, it's my—after looking at this individual—and the way—the actions of the night in question, and also his previous record, you know, if it weren't for this young fellow in the closet calling the police this would have been a much, much, much worse situation, if you can imagine it and that other people were present whose lives were risked-were at risk. So, I find that does apply.

***19** Previously, this court has held that when enhancement factor (10) is inherent in the charged offense, it may still be applied to enhance a sentence where the defendant's actions created a risk of harm to an individual other than the named victim. *See, e.g., State v. Joe Carpenter Tyree,* No. M2006–02173–CCA–R3–CD, 2007 WL 2295611, at *8 (Tenn.Crim.App. Aug.10, 2007), *perm. app. denied* (Tenn. Jan. 28, 2008); *see also State v. Imfeld,* 70 S.W.3d 698, 707 (Tenn.2002). Here, J.G. was not specifically named as a victim in the indicted offenses, and his life was actually at risk. *Cf. State v. Jimmy Lee Whitmire,* No. M2007–01389–CCA–R3–CD, 2009 WL 2486178 (Tenn.Crim.App. Aug.13, 2009) (finding factor (10) to be inapplicable where the victim's children were asleep in their bedrooms, the defendant was unaware of their presence, and they were not in the immediate area of danger during the commission of the especially aggravated kidnapping, aggravated assault, and aggravated burglary against their mother). Accordingly, we conclude that this enhancement factor was properly applied.

Although Tate has not challenged the application of enhancement factor (3) to his sentences, we find that this application was erroneous as a matter of law. Generally, this factor should not be applied where, as here, the defendant is separately convicted of the offenses committed against each victim. *See Imfeld,* 70 S.W.3d at 705–06 ("[T]here cannot be multiple victims for any one offense ... committed against a specific, named victim."). Here, the trial court applied enhancement factor (3) because "the indictment didn't contain the names of the other individuals who were placed in fear and were in essence, [kidnapped]." However, this court has previously held that a "victim," for purposes of sentence enhancement factor (3), " 'is a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime.' "*Cowan,* 46 S.W.3d at 235 (quoting *State v. Raines,* 882 S.W.2d 376, 384 (Tenn.Crim.App.1994)). Furthermore, "[t]he psychological injuries suffered by relatives witnessing an attack on the actual victim are not covered by this interpretation of

the word 'victim.' "*State v. Alexander,* 957 S.W.2d 1, 6 (Tenn.Crim.App.1997). Accordingly, the fact that J.G. was present and not named in the indictment, standing alone, is not sufficient to trigger the application of the "multiple victims" enhancement factor.

In this case, there was a separate offense for each specific, named victim. Thus, the trial court erred in applying this enhancement factor. Nevertheless, the misapplication of this enhancement factor does not remove the presumption of reasonableness of the imposed sentences. *See Bise,* 380 S.W.3d at 706 (holding that "a trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005.").

***20** Because the statutory enhancement and mitigating factors are advisory only, and because "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion[,]" we conclude that the trial court did not err in its sentencing determinations where the record otherwise supports the within-range sentences imposed. *See*T.C.A. § 40–35–114(c)(2) (2010); *Carter,* 254 S.W.3d at 345.

Tate also challenges the trial court's imposition of consecutive sentencing. He maintains that the trial court failed to make the requisite *Wilkerson* findings to support his status as a "dangerous offender" under Tennessee Code Annotated section 40–35–115(b)(4) (2010). Specifically, Tate asserts that "the trial court did not explicitly state that consecutive sentences were necessary to further protect the public from [the Defendant–Appellant]."

Where a defendant is convicted of one or more offenses, the trial court generally has discretion to decide whether the sentences shall be served concurrently or consecutively. T.C.A. § 40–35–115(a), (b) (2010). This court will not disturb the trial court's determination of concurrent or consecutive sentences absent an abuse of discretion. *State v. Blouvet,* 965 S.W.2d 489, 495 (Tenn.Crim.App.1997). A trial court may order multiple offenses to be served consecutively if it finds by a preponderance of the evidence that a defendant fits into at least one of seven categories enumerated in code section 40–35–115(b). Those categories include:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40–35–115(b) (2010). The finding of a single category is sufficient to authorize a court to impose consecutive sentences. *Id.,* Sentencing Comm'n Cmts. Furthermore, an order of consecutive sentencing must be "justly deserved in relation to the seriousness of the offense."*Id.* § 40–35–102(1) (2010). Additionally, the length of a consecutive sentence must be "no greater than that deserved for the offense committed."*Id.* § 40–35–103(2) (2010).

***21** Here, the court determined that Tate was a dangerous offender. *See id.* § 40–35–115(b)(4). Although Tate argues that the trial court improperly determined that he was a dangerous offender, we conclude that the trial court did not err in imposing consecutive sentencing. Regarding this subsection, the Tennessee Supreme Court has stated:

> "Proof that an offender's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk

> to human life was high, is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences. Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences; consequently, the provisions of [s]ection 40–35–115 cannot be read in isolation from the other provisions of the Act. *The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender.*"

Imfeld, 70 S.W.3d at 708 (quoting *State v. Wilkerson,* 905 S.W.2d 933, 938 (Tenn.1995)) (emphasis added). Unlike the other six subsections, the trial court must make additional factual findings for the "dangerous offender" factor because it is " 'the most subjective and hardest to apply.'"*Id.* (quoting *State v. Lane,* 3 S.W.3d 456, 461 (Tenn.1999)).

In concluding that Tate was a dangerous offender, the trial court stated:

> I find that he is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high; and I find that because—really, just—really, the facts of this case—coupled that with the fact that he was convicted of robbery and [kidnapping] before—like I said, he obviously didn't learn much from that. He had a violation of probation on that. But I think the circumstances surrounding this offense are particularly aggravated. The horror that must have gone through this family's brain. They testified, and it was very moving. You would have to be here to see it. The poor young man that was in the closet, I think was fifteen or sixteen years of age; and it almost brought people to tears when he testified; so, you would have to be here to see the emotion on his face; but this young man was terrified as well as the remaining people in the house. And as I already pointed out, it was just because of luck and the presence of mind to react quickly that this wasn't worse than what it is. I think that consecutive sentencing—the aggregate length of the sentences reasonably relates to the offense for which [Tate] stands convicted.... To me, the fact is, is that he is a dangerous, dangerous offender.... So, because of this, I'm going to order each of these to be run consecutive to one another. He is a dangerous offender; and as such, he should never have the opportunity to see the streets of Memphis, Tennessee, again. I can only hope that that happens.

***22** The record shows that the trial court made the additional factual findings required to determine that Tate was a dangerous offender. The court determined that Tate should be kept away from "the streets of Memphis." Furthermore, when given the opportunity to reconsider its sentencing decision at the motion for new trial hearing, the trial court stated:

> [A]s to the one-hundred-thirty-eight-year sentence, I still believe in light of the fact of his previous record and the particular facts of this case—the fact that this family was terrorized in this event and that Mr. Tate had previously been convicted of similar type charges—[kidnapping]—robbery, I believe. In light of all that, that was an appropriate sentence to protect society.

Accordingly, we conclude that the trial court properly exercised its discretion in ordering Tate to serve his sentences consecutively.

Here, the record reflects that the trial court carefully considered the evidence, the nature of the criminal conduct involved, the presentence report, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing consecutive, within-range

sentences of confinement. Therefore, Tate has failed to establish that the trial court abused its discretion in imposing his sentences and he is not entitled to relief.

CONCLUSION

After a thorough review of the record, the judgments of the Shelby County Criminal Court are affirmed in part, reversed in part, and remanded. Tate's convictions for one count of attempted especially aggravated robbery, one count of facilitation to commit aggravated assault, and two counts of aggravated assault are affirmed. We reverse the kidnapping convictions, as charged in counts four and five, and remand the matter for a new trial on those counts. We reduce Tate's conviction for especially aggravated burglary conviction to a conviction for aggravated burglary, and remand the matter for resentencing. Finally, we reverse the conviction for employing a firearm during the commission of a dangerous felony offense and remand for a new trial on count three. In all other respects, the judgments of the trial court are affirmed.

Footnotes

1 Curtis Keller, a codefendant in this case, similarly appealed his convictions stemming from these charges. This court affirmed his convictions in part and reversed in part in *State v. Curtis Keller,* No. W2012–00825–CCA–R3–CD, 2013 WL 3329032 (Tenn.Crim.App. June 27, 2013).

2 In an effort to protect the anonymity of minor victims, this court will refer to them by their initials only.

3 Tate was also charged with being a convicted felon in possession of a handgun; however, this count was dismissed after the trial.

COUNT	OFFENSE	VICTIM
ONE	attempted especially aggravated robbery by the use of a deadly weapon and causing serious bodily injury	Andrew Morrow
TWO	especially aggravated burglary of a habitation causing serious bodily injury	Andrew Morrow
THREE	employment of a firearm during a felony offense	N/A
FOUR	especially aggravated kidnapping by use of a deadly weapon	M.B.
FIVE	especially aggravated kidnapping by use of a deadly weapon	Tamika Jones
SIX	aggravated assault by use of a deadly weapon and causing fear of bodily injury	M.B.
SEVEN	aggravated assault by use of a deadly weapon and causing fear of bodily injury	Tamika Jones
EIGHT	aggravated assault by use of a deadly weapon and causing fear of bodily injury	Andrew Morrow

4 For count one, Tate was convicted of attempted especially aggravated robbery (against Andrew Morrow) and received a twenty-year sentence. For count two, he was convicted of especially aggravated burglary (against Andrew Morrow) and received a twenty-year sentence. For count three, he was convicted of employment of a firearm during a felony offense and received a ten-year sentence. For count four, he was convicted of especially aggravated kidnapping (against M.B.) and received a forty-year sentence. For count five, he was convicted of aggravated kidnapping (against Tamika Jones) and received a twenty-year sentence. For counts six and seven, he was convicted of aggravated assault (against M.B. and Tamika Jones) and received a ten-year sentence on each count. For count eight, he was convicted of facilitation to commit aggravated assault (against Andrew Morrow) and received an eight-year sentence.

5 The fact that Morrow was the victim named in the attempted especially aggravated robbery indictment and Jones and M.B. were named as victims in the kidnapping-related indictments is of no consequence to our analysis because they were all subject to the same criminal episode. *See, e.g., State v. Anthony,* (dismissing six counts of aggravated kidnapping in multi-victim case in which a different victim was named in the count of aggravated robbery), *overruled on other grounds* by *State v. White,* 362 S.W.3d 559 (Tenn.2012).

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