IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 19, 2024 Session

STATE OF TENNESSEE v. BRANDON CODY PHILLIPS

Appeal from the Criminal Court for Scott County
No. 11672-B Zachary R. Walden, Judge

No. E2024-00418-CCA-R3-CD

The Scott County Grand Jury indicted the Defendant, Brandon Cody Phillips, and his Codefendant, Amanda Jean Phillips, on one count of aggravated assault, two counts of especially aggravated kidnapping, two counts of aggravated child neglect, and one count of carjacking. Prior to trial, the Defendant filed a motion to sever his trial from his Codefendant's trial, which the trial court denied. At trial, the trial court dismissed the Defendant's carjacking count, and the jury convicted the Defendant on the remaining five counts. Following the sentencing hearing, the trial court imposed an effective twenty-five-year sentence for the Defendant's convictions. On appeal, the Defendant argues: (1) the evidence is insufficient to sustain his convictions; (2) the trial court denied his right to an impartial jury; (3) the trial court denied his right to a unanimous verdict; (4) the trial court improperly conducted a "closed-door" severance hearing without the Defendant's presence; (5) the trial court failed to comply with the rules of criminal procedure during this severance hearing; and (6) the trial court improperly denied his severance motion. After review, we affirm the judgments of the trial court.

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

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Amanda H. Sammons (on appeal), LaFollette, Tennessee, and Maxwell E. Huff (at trial), Oneida, Tennessee, for the appellant, Brandon Cody Phillips.

Jonathan Skrmetti, Attorney General and Reporter; Johnny Cerisano, Assistant Attorney General; Jared Effler, District Attorney General; and Apryl C. Bradshaw and Thomas E. Barclay, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Motions to Sever. On September 23, 2020, the Defendant filed a motion to sever his trial from Codefendant's trial. In this motion, the Defendant requested that the trial court grant him a severance pursuant to Rule 14(c)(2)(A) and 14(c)(1). The Defendant specifically argued in the motion: (1) if he was tried jointly with the Codefendant, then he would be deprived of his right to call the Codefendant as a witness in his behalf; (2) the Codefendant, if called as a witness in a severed trial, would establish that Defendant did not participate in the offenses charged in the indictment; (3) the Codefendant had given a statement to police that, if admitted, would be a violation of Bruton and would unfairly prejudice the jury; (4) the proof against the Defendant was far weaker than the proof against the Codefendant; (5) the Defendant had a strong defense compared to the Codefendant; (6) a severance was necessary to protect the Defendant's right to a speedy trial because the State wrongly detained him with a punitive bond; (7) the Defendant would be unable to receive a fair determination in his case where almost all the proof established the Codefendant's guilt and the State could not prove the Defendant was criminally responsible for the charged offenses; (8) the State knew there were no grounds to join the Defendant with the Codefendant pursuant to Rule 14(c)(3); and (9) the denial of the severance motion would result in unfair prejudice to the Defendant.

On November 12, 2020, the State filed a response to this motion to sever, contending that the Defendant had offered no proof that joinder of the cases would prevent the Defendant from receiving a fair trial; that even if the cases were severed, the Codefendant would not be compelled to testify for the Defendant because the Codefendant could assert her right against self-incrimination; that under Bruton, the State would be able to redact the confession or omit it altogether in lieu of severing the trials and that the trial court, prior granting a severance, would determine whether the State intended to offer the confession into evidence and then determine which option the State would intend to follow at trial; that a joint trial does not impact the Defendant's right to a speedy trial; that the State denies any assertions regarding the weight of the evidence against the Defendant; and that the State had a good faith belief it could prove the charged offenses beyond a reasonable doubt.

During the pretrial motion hearing on April 19, 2021, the State reminded the trial court that the Defendant's attorney had filed a motion to sever, that there was argument on that motion, and that the trial court had taken the severance issue under advisement. When the trial court asked for the basis of the severance motion, the State replied that Defendant's counsel argued that the Defendant's and Codefendant's statements "could not be used against" each other, and the trial court had said it would "review the statements in camera to determine what could be used" in a joint trial. The Defendant's attorney asserted that he was still arguing for a severance, and both defense counsel said the proof during the preliminary hearing indicated that the Defendant and Codefendant had made oral statements at the time of their arrest that inculpated each other. The State explained that

the Defendant and Codefendant each made statements that "we," namely the Defendant and the Codefendant, did certain things during the incident in this case.

The trial court ordered the State to provide the statements made by the Defendant and Codefendant to the defense. The court explained that it needed to schedule a hearing on the severance issue quickly because there was an "impending trial date[.]" The court asserted that it did "not want to [do a] Zoom [hearing][,]" but they could "talk about [the issue] in chambers" and the court could "make a ruling" and enter an order from there. The trial court set the hearing for May 4, 2021, at 2:00 p.m.; however, when the trial court learned that Judge Davis was using the courtroom on that date, the trial court stated:

> Well, we can come to my office if we need to—we can come to my office. Barbara[, the court reporter], you don't need to be there. We'll get a—we'll just do an Order that sets out what we're doing, unless you all want—I mean, there's not—no proof, it's just argument, right?

The Defendant's attorney confirmed that he would be making "just argument" on May 4, and the State promised to provide the statements made by the Defendant and Codefendant to their attorneys and to the trial court's assistant prior to May 4, 2021. When the State added that the officers had not made a written report concerning these statements, the trial court said, "[T]he sole purpose [of this hearing is] to discuss the necessity of severance based on potential inculpation of statements crossing over." The State confirmed that this was the case. The record contains no indication that defense counsel objected to the trial court's suggestion of an in-chambers meeting or objected to the absence of the Defendant and Codefendant from this May 4, 2021 meeting.

The record indicates that on May 4, 2021, both prosecutors in this case, counsel for the Defendant, and counsel for the Codefendant "met in the [j]udge[']s office." There, the "scarcity of the Oneida Police Department file was mentioned as well as the fact [that] discovery was complete."

Although the appellate record does not contain a transcript from the May 4, 2021 meeting, the transcript from the June 1, 2021 motions hearing shows that the trial court referenced a "sit[-]down in the office" regarding the severance motion, which prompted defense counsel to file a motion to suppress the statements made by the Defendant and Codefendant. The State acknowledged that during this May 4, 2021 meeting, the trial court asked the State to require the officers to reduce the statements made by the Defendant and Codefendant during their arrest to separate affidavits, given that the only reference to these statements had been made during the officers' testimony at the preliminary hearing. The State also asserted that both defense counsel were given these officer affidavits. The trial court explained that the officers' affidavits were necessary to get the Defendant's and

Codefendant's statements "as they would be presented at trial." Defendant's counsel also acknowledged that the May 4, 2021 in-chambers meeting took place. Later, the trial court asserted that the Defendant and Codefendant were "set for trial" the next day because it "did not sever" the trials and that the parties were "in chambers when I made these findings." It reiterated that the "severance was not granted," which prompted defense counsel to raise the suppression issue regarding the Defendant and Codefendant's statements.

Although the Defendant and Codefendant's joint trial was initially set for June 2, 2021, the record shows that a third pre-trial motion hearing was held in this case on October 25, 2021, based on the Codefendant's claim that her statements to police should be suppressed because she was not given the Miranda warning. The record then showed that the Defendant's and Codefendant's joint trial began on October 26, 2021, the day after this hearing.

Prior to the beginning of the first day of trial, the Defendant and Codefendant renewed their motions to sever. The Codefendant's attorney said he was concerned that they were "going to spend a lot of time trying to redact stuff" and that much of the State's proof implicated both defendants. He noted specifically, "We're going to have a lot of they's." The trial court noted that it had already made its ruling regarding severance. The court then stated, "I don't remember anything at pretrial that would suggest the State's proof would intertwine to the point that . . . the proof of one [defendant] would run over [to] the other."

A moment later, the Defendant's attorney also renewed his motion to sever on the basis that the Oneida police had referred to the Defendant and Codefendant as "they" when memorializing what the defendants said in their statements. The State asserted that it was "well aware that we cannot use phrases such as 'they' or any statement from one that would implicate the other, and the State does not intend on eliciting any information from law enforcement that would cross that line." The trial court held that it would not allow the Oneida police officers' testimony to include the word "they" when referencing statements made by the defendants. The court also said that it would not allow one of the defendants to testify to use the word "we" when referring to both defendants because it was "not going to let one [defendant] inculpate the other." The Codefendant's attorney argued that if the defendants' trials were severed, the Codefendant could provide exculpatory testimony in the Defendant's trial, and the Defendant could provide exculpatory testimony in the Codefendant's trial. When the trial court asked him what it was supposed to do with that, the Codefendant's attorney replied, "I think I would say you grant a severance and let the State decide who they wanted to try first." The trial court noted that if the Defendant and Codefendant did not testify, then the point was "moot." At the conclusion of this hearing, the trial court denied both severance motions.

Jury Selection. During jury selection in this case, the trial court and both defense attorneys questioned prospective jurors. One juror, in response to the trial court's questioning, stated that he felt "biased" after hearing a defense attorney state in his opening that the Codefendant and Defendant "wanted to take the car" and that "when they took the car two . . . children were in it." This juror then said, "As far as I'm concerned, [the Defendant] did it. There's no ifs, ands, or buts. I can't go any other way." The trial court responded by explaining that attorney arguments are not actual evidence, that no proof had been heard yet, and that the juror would have to consider the guilt of each of the defendants individually for each count. However, the trial court ultimately excused this potential juror, stating that it appeared that he was "tainted already."

A short time later, a second juror stated that if both defendants "got in a car and took it," that did not seem to be "the right thing to do" because you should not "go around taking stuff that [isn't] yours." In response, the State explained that it had to prove the defendant's committed these crimes and that the jury had not heard any proof yet. The trial court reminded this juror that no one had admitted anything and that the State still had its burden to prove each element of each count beyond a reasonable doubt. After the juror admitted that she was probably fixed in her opinion regarding the guilt of the Defendant and Codefendant, the trial court excused her.

Trial.[1] Terri Mills testified that she was the owner of Mi Rancho restaurant and that she witnessed the March 24, 2020 incident involving Jessica Hibbard and her two children. She noted that because of the Coronavirus (COVID-19), her restaurant could only take to-go orders. Because her restaurant did not have a drive-through window, customers had to come inside the restaurant to pick up their orders.

Mills stated that on March 24, 2020, Ms. Hibbard placed an order and then called to see if her order was ready. Mills met Ms. Hibbard at the front glass door to the restaurant because it was raining, and she could see Ms. Hibbard's car parked directly in front of the door. Mills handed Ms. Hibbard her food, and as Mills walked into the restaurant to answer the phone, she heard Ms. Hibbard screaming that someone was trying to take her car. When Mills looked out the window, she could see Ms. Hibbard holding onto the door handle of her car as she was being dragged down the street. Mills ran to the front door and saw that the door handle on Ms. Hibbard's car had broken, and an instant later Ms. Hibbard ran into the restaurant, screaming for Mills to call 9-1-1 because her children were inside her car that had been taken. Mills said that Ms. Hibbard's hands were bleeding, and she had scrapes down her side from being dragged by the car. Mills called 9-1-1 and attempted to

[1] This court has summarized only the portions of the trial testimony that are relevant to the issues raised on appeal.

bandage Ms. Hibbard's injuries. During this call, Ms. Hibbard was able to use another customer's iPhone to track her cellphone, which was inside her car, so she could tell the 9-1-1 dispatcher where her car was going.

On cross-examination, Mills said that when Ms. Hibbard entered the restaurant, she kept glancing back at her car. She stated that shortly thereafter, Ms. Hibbard began screaming, "Stop. Those are my kids," and Mills saw Ms. Hibbard grab the handle to the door of her vehicle as the vehicle was reversing. Mills acknowledged that she was unable to identify either the Codefendant or the Defendant based on what she observed that day.

Mills said approximately five minutes after they started tracking Ms. Hibbard's car with the Find My iPhone App, the car stopped not too far away. Mills then called Ms. Hibbard's fiancé, her husband at the time of trial, who was trying to find Ms. Hibbard's car along with the police. She said that by the time Ms. Hibbard's fiancé had gotten to the restaurant, the police had found Ms. Hibbard's vehicle. She said Ms. Hibbard then went with her fiancé to her vehicle. Later that night, she texted Ms. Hibbard to see if she and her children were okay, and Ms. Hibbard said her children were pretty shaken up from the incident.

Jessica Hibbard testified that around 5:30 to 5:45 p.m. on March 24, 2020, she picked up her five-year-old son, K.F., and her two-year-old son J.P.,[2] from the babysitter and then drove to Mi Rancho restaurant. When she arrived at the restaurant, she parked her Fiat compact SUV directly in front of the restaurant's front door. While sitting in the car, Ms. Hibbard gave K.F. her cellphone so he could video call his father. Because it was raining heavily and because Terri Mills was pregnant at the time, Ms. Hibbard decided to enter the restaurant to grab her food, rather than making Mills walk outside.

Upon entering the restaurant, Ms. Hibbard waved at Mills, who was bringing her food, and Ms. Hibbard "kept turning around and looking at [her] car." Ms. Hibbard saw a woman, the Codefendant, "come from the right side of the building" and look "into the back passenger's side door" of Ms. Hibbard's car where her children were sitting. Ms. Hibbard initially thought the Codefendant was concerned about her children, so she ran out of the restaurant and told the Codefendant, "Those are my kids. They're fine." The Codefendant then walked around to the back driver's side door where K.F. was sitting, and she opened the door. Ms. Hibbard again explained that the children belonged to her and that they were fine. Then the Codefendant closed the back door and opened the driver's door to Ms. Hibbard's vehicle, and Ms. Hibbard realized the Codefendant was stealing her car with her kids inside. At that point, Hibbard screamed, "My kids are in the car."

[2] It is the policy of this court to identify all minors by their initials only.

Upon hearing Ms. Hibbard's screams, the Codefendant laughed, sat down in the driver's seat of Ms. Hibbard's car, and, while the driver's door was still open, began backing the vehicle onto the road. Ms. Hibbard ran up to the car, grabbed one of the door handles, and yelled, "Stop. Stop. My kids are in there. Just stop. Let me get my kids." The Codefendant refused to stop and continued to back out into the street, and Ms. Hibbard ran beside the car, still yelling that her children were inside the vehicle. When the Codefendant was in the middle of the road, Ms. Hibbard ran in front of the vehicle, but the Codefendant drove around her, nearly hitting her as the Codefendant reentered the restaurant's parking lot.

Ms. Hibbard said she threw her food down and ran toward her vehicle a second time and grabbed the front passenger door handle, but it slipped from her grasp. She observed the car moving forward slightly, and then she saw a man, the Defendant, walk around the right side of the restaurant and come running up the sidewalk toward the car. Initially, Ms. Hibbard thought the Defendant was coming to help her. Ms. Hibbard screamed that her children were inside the car, and the Codefendant opened the passenger door and yelled at the Defendant, "Come on. Get in." Ms. Hibbard said the Defendant did not say anything to her, just got in the car, and never told the Codefendant to stop. Ms. Hibbard made a last attempt to catch the vehicle. When she approached the car, she opened the rear passenger door but was unable to get inside. She stated, "If I had two more seconds I would have been inside that car." Ms. Hibbard saw the Defendant get into the front passenger door of her car, and she still was holding the door handle to the back passenger side because she was trying to get inside. As the car accelerated, Ms. Hibbard continued to hold the door handle and saw her two-year old son crying. As she continued to hold onto the door handle, the Codefendant drove off, dragging Ms. Hibbard down the road. Ms. Hibbard said she remembered thinking, "If I die, I'm going with my kids. I'm going to hold on. They're mine. They're my babies."

As her car approached the Phillips Drive-In restaurant, the door handle broke, and Ms. Hibbard fell into a pothole. At the time, she said she was "feeling a lot of fear." She got up, saw her car go around a corner, and ran inside the restaurant, yelling for Mills to call 9-1-1.

Ms. Hibbard said Mills dialed 9-1-1 and handed the phone to her. Mills also called Ms. Hibbard's fiancé. Another customer, who was also picking up food, had an Apple iPhone, so Ms. Hibbard used that phone to track her own cellphone, which was still inside her Fiat. Ms. Hibbard also relayed her cellphone's movement inside her car to the 9-1-1 operator in real time. She stated that she tracked her cellphone's movements for approximately ten minutes, which was enough time for Ms. Hibbard's fiancé to arrive at the restaurant from his home. Once Ms. Hibbard's fiancé arrived, the customer got into his car with her cellphone, and they drove off to look for Ms. Hibbard's vehicle.

A short time later, the 9-1-1 operator informed Ms. Hibbard that they had found her children. Initially, the operator would not disclose if her children were safe, and Ms. Hibbard was afraid they were withholding bad news about her children. When the operator finally told her that her children were safe, Ms. Hibbard rode with her in-laws to where her children had been found. She said her sons were "scared" and K.F. was "wet and shaking" because he had gotten rained on when he exited her car after it stopped.

Ms. Hibbard explained that her injuries from the incident included "road rash" down her body, cuts on her hands, and a cut on her forehead. She recalled Mills telling her that she was "bleeding all over the place." She identified the Codefendant as the woman who drove away with her children and identified the Defendant as the man who got into her vehicle the day of the incident.

On cross-examination, Ms. Hibbard stated that when she was in front of her car in the street, the Codefendant almost hit her as she swerved to get around her, although she did not know if the Codefendant was trying to run her over. She said that although she did not see the Defendant in control of her vehicle, she did not know what happened after they left the area of the restaurant.

Ms. Hibbard said that after she recovered her vehicle, she found the Codefendant's cellphone on the passenger's side floorboard of her vehicle, which was given to police. That night, she received a video call from the police, wherein she identified the Codefendant and Defendant from photos the police showed her while on the call.

Ms. Hibbard said that since this incident occurred, her children were "scared," and they had only recently started sleeping in their room by themselves. Hibbard said her son K.F. still asked questions about what happened, and she had taken him to see a counselor because he had "a lot of issues" from the incident. She also said she was scared to let her children out of her sight. Ms. Hibbard insisted that the Codefendant looked in her car and saw her children before she stole her car. She also said that she repeatedly screamed at the Codefendant that her children were in the car during this incident.

Ms. Hibbard stated that she saw the Defendant along the sidewalk as the Codefendant opened the passenger door to her vehicle. Initially, she believed that the Defendant was running to help until the Codefendant yelled at the Defendant, "Get in. Get in." At the time, Ms. Hibbard had the back passenger side door open because she was trying to get inside the car. She acknowledged that the Defendant hesitated before getting in her car and that the Defendant heard her yell that her kids were inside the car. Ms. Hibbard did not recall the Defendant saying anything to her before he got in her car, and they drove off. She said that although she did not see the Defendant endangering her

children, she did not see what he did or was planning to do to her children when the Defendant and Codefendant rode away in her stolen car.

Kyle Hibbard, Ms. Hibbard's husband, testified that he received a call from his father, telling him that someone had stolen Ms. Hibbard's car with the children inside. He immediately drove to the restaurant and when he arrived, he saw Ms. Hibbard crying and another woman standing next to her outside the restaurant's front door. This woman ran toward Mr. Hibbard and jumped into his truck because she was using her cellphone to "track" Ms. Hibbard's phone, which still was inside her vehicle.

As they tracked Ms. Hibbard's phone, Mr. Hibbard said they were unable to catch up to the Fiat. However, once the Fiat stopped, they were able to catch up to it. They found Ms. Hibbard's Fiat behind the First National Bank, and they arrived at Ms. Hibbard's car around the same time as the police. Although both children were in the vehicle, K.F. was wet because he had gotten out of the vehicle after it stopped. Mr. Hibbard noted that he found Ms. Hibbard's broken key chain and an old cellphone that did not belong to Ms. Hibbard inside the Fiat. He later gave this cellphone to an officer.

Chad Jones, an officer with the Oneida Police Department, testified that he was on duty on March 24, 2020, and initially drove toward the Mexican restaurant but changed directions when he learned that Ms. Hibbard's phone, which was inside her Fiat, was being tracked. Upon arriving at Ms. Hibbard's Fiat, he observed that the two children were with the car. He noted that one of the children had gotten out of his seat, appeared "very scared" and ran into the officer's arms and began crying. This child told him that the two adults who had been in the car had gone behind a building that was north of there.

Once Ms. Hibbard's family arrived at the scene, Officer Jones began trying to locate the assailants. By the end of his shift at 11:00 p.m. that night, they had not found them, although he did receive some photographs of the Codefendant and Defendant. Officer Jones acknowledged that one of the assailant's cellphones had been found inside the Fiat and given to him; however, he stated that this cellphone was lost prior to trial.

On cross-examination, Officer Jones said that the recovered cellphone rang while at the police department, and Officer Dustin Burke answered it. Officer Jones acknowledged that it took him "less than five [minutes]" to find Ms. Hibbard's car. He stated that he was not involved in questioning the Defendant or Codefendant.

Aleisha Byrd testified that she was the 9-1-1 dispatcher who talked to Ms. Hibbard the day of the incident. Ms. Byrd recalled that Ms. Hibbard was "very distraught" and "frantic" because her two children were inside her car when it had been stolen. Ms. Byrd

reiterated that Ms. Hibbard had used the "Find My iPhone" application to track her cellphone, which was still inside her vehicle. The 9-1-1 phone call was played for the jury.

On cross-examination, Ms. Byrd said that based on the information she was receiving, Ms. Hibbard's car kept moving until it finally stopped and stayed stopped. She acknowledged that Ms. Hibbard's car was located approximately six to eight minutes after Ms. Byrd began reporting the 9-1-1 call.

Mark Byrd testified that he was working at his pharmacy when his security camera monitor showed someone running around the pharmacy building. When he went outside, he saw a woman and man run up a hill that was north of the pharmacy just before 6:00 p.m. Mr. Byrd learned about the incident involving Ms. Hubbard's children that night over Facebook, which inspired him to look at his security footage again. Thereafter, he took photos and a video of the suspects from this footage and sent them to Darryl Laxton, the Oneida Police Chief. Two of these photographs were admitted into evidence.

Oneida Police Chief Darryl Laxton testified that Mr. Byrd provided the photos and video of the suspects, which were given to the investigating officers and were also posted on the police department's Facebook page. Chief Laxton stated that the search for the assailants continued through the night and into the next morning, when he received a report from a citizen stating that he believed the assailants were in an area near a school and a church. When he arrived at this location, the Codefendant and Defendant had already been taken into custody.

Dustin Burke, an investigator with the Oneida Police Department, testified that he received the photographs of the suspects sent by Mark Byrd. He also observed the cellphone collected from Ms. Hibbard's vehicle sitting on a desk at the police department on March 24, 2020. Investigator Burke explained that he did not receive the cellphone initially and did not log the cellphone into evidence. When this cellphone rang, he answered it and was able to further develop one of the suspects in this case, which he was able to verify through other law enforcement agencies. Investigator Burke then contacted Sergeant Max Smith with the Clinton Police Department and showed him the photographs of the suspect, and Sergeant Smith was able to identify the male suspect and gave information as to who the female suspect might be. Once this information was forwarded to law enforcement who were searching for the suspects, Investigator Burke posted information on Facebook that the police were looking for these two suspects.

Toby Jeffers, an officer with the Oneida Police Department, testified that the day after the incident, he heard over dispatch that the Codefendant and Defendant were seen going north from a business on Main Street. Officer Jeffers headed in that direction, located the Codefendant and Defendant, and assisted other officers in arresting them. He

confirmed that neither the Codefendant nor the Defendant had any weapons at the time of their arrest.

Following the close of the State's proof, both defense counsel made a motion for judgment of acquittal on behalf of their clients. After hearing argument from the parties, the trial court dismissed the carjacking count against the Defendant, Brandon Cody Phillips.

Thereafter, the Codefendant and Defendant did not testify on their own behalf.

The Defendant recalled Chief Darryl Laxton. Chief Laxton said that when he arrived at the scene, both the Defendant and the Codefendant had been taken into custody. He noted that the Defendant had been questioned first and had been placed in the back of a patrol car while another officer questioned the Codefendant. He acknowledged that none of the statements made by the Defendant and Codefendant were reduced to writing or audio recorded.

On cross-examination, Chief Laxton said that although he was in the area when the Defendant was questioned regarding this incident, he did not overhear this questioning. He acknowledged that the questioning officers did not take written statements from the Codefendant or the Defendant.

Jury Verdict. At the conclusion of trial, the jury foreperson read the jury verdict for each count, stating that the jury convicted the Defendant of one count of aggravated assault (Count 1), two counts of especially aggravated kidnapping (Counts 2 and 3), and two counts of aggravated child neglect (Counts 4 and 5). After the jury foreperson read the verdict for each count, the trial court asked, "Is that the collective judgment of the jury?" The trial court then asked the jurors to confirm the judgment for each count by having each juror raise his or her right hand. The trial court then noted that "all jurors agree[d]" to the verdicts on each count. The trial court then reviewed and approved the verdict forms in this case.

Following a sentencing hearing, the trial court imposed a five-year sentence for the Defendant in Count 1 and twenty-year sentences for the Defendant in Counts 2 through 5, with Counts 2 through 5 served concurrently to one another but consecutive to Count 1, for an effective sentence of twenty-five years in the Tennessee Department of Correction. These judgments were entered on June 2, 2022, but the Defendant did not file a motion for new trial until August 5, 2022. The State filed a response to this motion, asserting that the Defendant's motion for new trial was filed beyond the mandatory thirty-day deadline and, therefore, was a nullity. Following a hearing, the trial court denied the motion for new trial

on the basis that the Defendant failed to file his motion for new trial within the thirty-day deadline, which meant that the trial court no longer had jurisdiction in the case.

Thereafter, the Defendant filed a notice of appeal and a motion to waive the timely filing of the notice of appeal. State v. Phillips, E2023-00616-CCA-MR3-CD (Tenn. Crim. App. May 1, 2023) (order). The Court of Criminal Appeals denied this motion and dismissed the appeal, noting that the Defendant had also filed a pro se petition for post-conviction relief alleging ineffective assistance of counsel and that the Defendant could receive post-conviction relief in the form of a delayed appeal, which would allow the Defendant to file a timely motion for new trial.

On August 11, 2023, the post-conviction court entered an order granting the Defendant post-conviction relief in the form of a delayed appeal. The post-conviction court held that the Defendant had been denied his right to appeal his original convictions and allowed the Defendant to file a new motion for new trial within thirty days of entry of the post-conviction court's order.

On August 23, 2023, the Defendant filed a timely motion for judgment of acquittal or, in the alternative, a motion for new trial, arguing in part that the evidence was insufficient to sustain his convictions; that the trial court committed structural constitutional error by holding a severance hearing behind closed doors without the Defendant's presence; that the trial court failed to comply with Tennessee Rules of Criminal Procedure 12 and 14 in denying the Defendant's request for a severed trial, which equated to an abuse of discretion; that the trial court denied his constitutional right to a unanimous verdict; that he was prejudiced by Codefendant counsel's opening statement during voir dire and the improper conducting of voir dire thereafter; and that the trial court's failure to sever the Defendant's trial resulted in reversible constitutional error. The State filed a written response, and on March 8, 2024, the trial court denied this motion. On March 21, 2024, the Defendant timely filed a notice of appeal.

ANALYSIS

I. Sufficiency of the Evidence. The Defendant contends the evidence is insufficient to sustain his convictions. The State responds that the evidence is sufficient to support these convictions because the Defendant knowingly abandoned the victim's children after helping the Codefendant take the children. We conclude the evidence is sufficient to sustain all the Defendant's convictions.

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." State v. Hanson, 279

S.W.3d 265, 275 (Tenn. 2009) (citing State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)). "Appellate courts evaluating the sufficiency of the convicting evidence must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Wagner, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. State v. Davis, 354 S.W.3d 718, 729 (Tenn. 2011) (citing State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Sutton, 166 S.W.3d 686, 691 (Tenn. 2005); State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). The standard of review for sufficiency of the evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. State v. Campbell, 245 S.W.3d 331, 335 (Tenn. 2008) (citing Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury. Dorantes, 331 S.W.3d at 379 (citing State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court "neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury." Wagner, 382 S.W.3d at 297 (citing State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997)).

A. Aggravated Child Neglect. The Defendant argues that the evidence at trial was insufficient to sustain his two convictions for aggravated child neglect. First, referencing State v. Sherman, 266 S.W.3d 395, 405-07 (Tenn. 2008), the Defendant claims that a person who does not stand in loco parentis to a child cannot be convicted of child neglect as a matter of law. Second, the Defendant asserts that a conviction for child neglect cannot stand where the necessary element of harm, that a child's health and welfare has been adversely affected, has not been proven beyond a reasonable doubt. See State v. Mateyko, 53 S.W.3d 666, 670-72 (Tenn. 2001). Lastly, the Defendant argues that even if this court determines that he stood in loco parentis to the child and caused harm to the children, the State failed to prove beyond a reasonable doubt that he knowingly used or intended to use a dangerous instrumentality on the children that could cause serious bodily injury to them. See Tenn. Code Ann. § 39-15-402(d).

"A person commits the offense of . . . aggravated child neglect . . . who commits . . . child neglect, as defined in § 39-15-401(b)[,] . . . and: (2) A . . . dangerous instrumentality . . . is used to accomplish the act of . . . neglect[.]" Tenn. Code Ann. § 39-15-402(a)(2). "A 'dangerous instrumentality' is any item that, in the manner of its use or intended use as applied to a child, is capable of producing serious bodily injury to a child, as serious bodily injury to a child is defined in this section. Id. § 39-15-402(d). "'Serious bodily injury to the child' includes, but is not limited to . . . a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, [and] injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement . . . ." Id. § 39-15-402(c). A person commits child neglect who "knowingly . . . neglects a child . . . so as to adversely affect the child's health and welfare[.]" Id. § 39-15-401(b) (Supp. 2019). "[I]f the abused or neglected child is eight (8) years of age or less, the penalty is a Class E felony." Id. § 39-15-401(b) (Supp. 2019). "[B]efore a conviction for child neglect may be sustained, the State must show that the defendant's neglect produced an actual, deleterious effect or harm upon the child's health and welfare." Mateyko, 53 S.W.3d at 671-72. "[T]he mere risk of harm is insufficient to support a conviction." Id. at 667.

First, we will consider the Defendant's claim that he cannot be convicted of child neglect as a matter of law because he did not stand in loco parentis to the children in this case. The trial court, in its order denying the motion for new trial, held that no legal duty is required when the harm to the children is "directly caused by the Defendant's and Co-Defendant's affirmative actions" and that even if such a legal duty is required under these facts, "the Defendant owed a duty to the children arising from the creation of peril" and the Defendant "also owed a duty arising from voluntary assumption of care when he jumped into the stolen vehicle with [the Codefendant] knowing, based on the mother's screams, that children were in the vehicle."

"In order to establish neglect, the State must first prove that a defendant owes a legal duty to the child." Sherman, 266 S.W.3d at 404 (citing Mateyko, 53 S.W.3d at 671). Traditional sources of a legal duty fall into six categories: "(1) duty based on relationship; (2) duty based on statute; (3) duty arising from contract; (3) duty arising from a voluntary assumption of care; (4) duty to control others; (5) duty arising from creation of peril; and (6) duty of landowner." Id. at 404-05 (footnote omitted) (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 6.2(a) (2d ed. 2003); Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962)). While the legal duty envisioned by Code section 39-15-401(a), along with the knowledge of such a duty, generally arises from a relationship with a child victim, this is not the only source of a legal duty under the statute. Id. at 405.

We conclude that the Defendant owed a duty to the children in this case that arose from his "creation of peril" and from his "voluntary assumption of care" when he jumped

into the stolen vehicle with the Codefendant after hearing the mother scream that her children were inside. The Defendant clearly helped create the peril in this case by not stopping the vehicle initially and by getting into the car with the Codefendant as she drove away. In addition, because the Defendant assisted the Codefendant in kidnapping the children, he owed a duty to the children by voluntarily assuming their care, and then the Defendant neglected the children when he later abandoned them in the vehicle. Accordingly, the Defendant is not entitled to relief on this claim.

Next, the Defendant argues his conviction for aggravated child neglect cannot stand because the State failed to prove beyond a reasonable doubt that both children's health and welfare were adversely affected. The trial court, in its order denying the motion for new trial, held:

> [T]he proof was sufficient to show that . . . the Defendant and Co-Defendant neglected each child so as to adversely affect the child's health and welfare. One child was abandoned and stuck in a restraint, too young to escape. The other child was able to escape and ran outside in the rain. Any number of harms could have befallen the children based on the Defendant's abandonment had it not been for the quick thinking of the store [customer] to use an iPhone tracker and the sheer luck that the victims' mother left her iPhone in the car. Fortunately, the intervening acts of the store [customer], mother, and law enforcement allowed the children to be found relatively quickly. When found, the children were in sheer terror, and this terror continued to follow them as the mother testified that they still cannot be left alone in their rooms."

We agree that the State established that the Defendant neglected the children so as to adversely affect their health and welfare. The Defendant abandoned the children in the car, where they were exposed to a variety of dangers, and the Defendant inflicted psychological damage to the children, which was reflected in the trial proof regarding how the children were traumatized by this incident. Because the record fully supports the detailed findings and conclusions made by the trial court, we conclude that the Defendant is also not entitled to relief on this claim.

Lastly, the Defendant contends that the State failed to prove beyond a reasonable doubt that he knowingly used or intended to use a dangerous instrumentality that was capable of causing serious bodily injury to the children. The trial court, in denying the motion for new trial, held that although the Defendant claimed that he did not use a dangerous instrumentality, "the evidence show[ed] that the process of stealing a car and abandoning very young children in the car meets the definition of [a] dangerous instrumentality because it is capable of producing serious bodily injury to a child, and the

jury found as such." Here, because the car was driven recklessly and was used to separate the children from their mother, we agree with the trial court that the car met the definition of a dangerous instrumentality for the aggravated child neglect offense. Because the evidence is sufficient to sustain the Defendant's two convictions for aggravated child neglect, he is not entitled to relief.

B. Especially Aggravated Kidnapping. The Defendant also contends that the proof is insufficient to sustain his two convictions for especially aggravated kidnapping. First, citing United States v. Ferguson, 65 F.4th 806 (6th Cir. 2023), the Defendant claims the State failed to prove he was criminally responsible for the especially aggravated kidnapping offenses because the State never established that he "intended" for the children to be kidnapped. See State v. Watkins, 648 S.W.3d 235, 257 (Tenn. Crim. App. 2021); State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994). He maintains there was no clear evidence that he "was personally aware that [the] children were in the vehicle before he entered it or that he intended that these children be kidnapped." He also asserts that because the trial court erred in conducting his severance motion off the record and outside of his presence and erred in denying his severance motion, the Codefendant's guilt was "unfairly attributed to him by association" when they had "starkly differing degrees of involvement and awareness and intent" at the time of these offenses.

Especially aggravated kidnapping, as charged in this case, is defined as "false imprisonment . . . [w]here the victim was under the age of thirteen (13) at the time of the removal or confinement[.]" Tenn. Code Ann. § 39-13-305(a)(2) (Supp. 2019). "A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Id. § 39-13-302(a).

Criminal responsibility is "not a separate, distinct crime" but "a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999). As charged in this case, an individual is criminally responsible for the conduct of another person if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, [the individual] solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2). Therefore, criminal responsibility for the actions of another person "requires that a defendant act with a culpable mental state, specifically, the 'intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense.'" State v. Carson, 950 S.W.2d 951, 954 (Tenn. 1997) (quoting Tenn. Code Ann. § 39-11-402(2)). "A person acts with intent as to the nature or result of conduct when it is that person's conscious objective or desire to engage in the conduct or cause the result." Id. (citing Tenn. Code Ann. § 39-11-302(a); Maxey, 898 S.W.2d at 757).

In the theory of criminal responsibility, "an individual's presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime may be inferred." State v. Watson, 227 S.W.3d 622, 639 (Tenn. Crim. App. 2006) (citing State v. Ball, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998)). In this situation, "[n]o particular act need be shown, and the defendant need not have taken a physical part in the crime to be held criminally responsible." Id. (citing Ball, 973 S.W.2d at 293)). There is no requirement that the State "elect between prosecution as a principal actor and prosecution for criminal responsibility[.]" State v. Hodges, 7 S.W.3d 609, 625 (Tenn. Crim. App. 1998) (citing State v. Williams, 920 S.W.2d 247, 257-58 (Tenn. Crim. App. 1995)).

In its order denying the motion for new trial, the trial court held that the evidence supported the Defendant's two convictions for especially aggravated kidnapping, stating:

> As the [C]odefendant sped off with children in the backseat of the stolen vehicle, the Defendant was keenly aware that children were present before he entered the car, and the jury made a reasonable inference that his intent was to promote or assist the [C]odefendant in the commission of the offense and that the aided or attempted to aid the [C]odefendant in her [especially] aggravated kidnapping of the victim's children.

The proof at trial shows that the Defendant intended to help Codefendant kidnap the children. Ms. Hibbard testified that the Defendant got into her stolen vehicle after she screamed several times that her children were inside it. She said the Defendant slightly hesitated, as if he understood the seriousness of the situation, before entering the car after the Codefendant repeatedly encouraged him to "get in." Ms. Hibbard also stated that at least one of her children cried as these events were taking place, which also alerted the Defendant that her children were inside the car. Although the Defendant could have refused to get in the car or could have attempted to stop the vehicle, he ultimately got into the car with the Codefendant as she was driving away. Based on these facts, a reasonable jury could have found that the Defendant aided and encouraged the Codefendant in committing the especially aggravated kidnapping offenses. The State's proof also showed that the Defendant appeared an instant after the Codefendant stole her car and that the Defendant and Codefendant fled from the scene together in the car, abandoned the car with the children inside and fled together, and were arrested together. We agree that the Defendant's presence and companionship with Codefendant before and after the commission of this offense are circumstances from which the Defendant's participation in the crime can be inferred. See Watson, 227 S.W.3d at 639. Accordingly, we conclude that the proof in this case was sufficient to sustain the Defendant's two convictions for especially aggravated kidnapping.

C. Aggravated Assault. In what appears to be an afterthought buried in the depths of her brief, appellate counsel suggests that the Defendant is not criminally responsible for the aggravated assault offense because the State failed to prove that he "intended" to commit this offense or to achieve the criminal objective for this offense. Although appellate counsel cites to a handful of authorities for this issue, she fails to provide any argument or analysis as to why the evidence presented at trial is insufficient to support the aggravated assault offense, and she fails to include any references to the record. As a result, appellate counsel has waived this issue. See Tenn. R. App. P. 27(a)(7) (An appellant's brief must contain "[a]n argument . . . setting forth: (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on."); Tenn. R. Ct. Crim. App. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). In any case, we conclude that the evidence is sufficient to sustain the Defendant's aggravated assault conviction.

As charged here, a person commits aggravated assault when he intentionally or knowingly causes another to reasonably fear imminent bodily injury while using or displaying a deadly weapon. Tenn. Code Ann. §§ 39-13-102(a)(1)(A)(iii), -101(a)(2) (Supp. 2019). A deadly weapon is defined as "(A) a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury[.]" Id. § 39-11-106(a)(6)(A), (B) (Supp. 2019). An object that is not necessarily deadly per se, may nevertheless be deadly "if the defendant in a particular case actually used or intended to use the item to cause death or serious bodily injury." State v. McGouey, 229 S.W.3d 668, 673 (Tenn. 2007). This court has held that a motor vehicle can constitute a "deadly weapon" for the purpose of Code section 39-11-106(a)(6)(B). State v. Tate, 912 S.W.2d 785, 787-88 (Tenn. Crim. App. 1995).

In its order denying the motion for new trial, the trial court initially noted that "the jury found the Defendant . . . criminally responsible for [the] aggravated assault" perpetrated by the Codefendant before stating:

> The evidence supports the jury's finding. The [C]odefendant in this case, after stealing the victim's vehicle, sped away with the victim clinging to the car's door handle being dragged down the road, which not only caused injury, but clearly caused reasonable fear and did so with a deadly weapon—an automobile. The Defendant is criminally responsible because, after the victim shouted at him to tell him that her kids were in the car, he got into the passenger side of the vehicle and joined the [C]odefendant in the commission of her offense, and a reasonable jury could infer beyond a reasonable doubt

that he solicited, directed, aided, or attempted to aid the [C]odefendant in the commission of this offense.

The evidence, when viewed in the light most favorable to the State, was sufficient to support the Defendant's aggravated assault conviction. A reasonable jury could have determined that the Defendant was criminally responsible for the Codefendant's actions in dragging the victim down the road because the Defendant, after hearing the victim repeatedly scream that her children were inside the car, got into the stolen vehicle with the Codefendant and joined the Codefendant in the commission of the aggravated assault offense. Based on these facts, the jury could have found that the Defendant, "[a]cting with intent to promote or assist" the Codefendant in the commission of the offense, "solicit[ed], direct[ed], aid[ed], or attempt[ed] to aid" the Codefendant in committing the aggravated assault offense. See Tenn. Code Ann. § 39-11-402(2). Because the evidence is sufficient for the jury to find the Defendant guilty of the aggravated assault offense, he is not entitled to relief.

II. Right to an Impartial Jury. The Defendant contends that his constitutional right to an impartial jury was violated in this case. He claims "the jurors were bent [on] finding [him] guilty by association" based on the trial court's denial of his severance motion. He also asserts that "[m]ultiple potential jurors had to be excused from the jury at voir dire for bias" based on their comments, and "this bias was apparently a result of the fact that these two defendants were being tried together." The Defendant asserts that the potential jurors' comments during voir dire should have suggested to the trial court that the Defendant and Codefendant needed to be tried separately because "unfair prejudice was already obstructing [the Defendant's] constitutional right to a fair trial." In response, the State argues that the Defendant waived this issue and that, in any case, the Defendant admitted none of the jurors who expressed bias served on the petit jury at his trial.

We agree that the Defendant waived this issue by failing to include it in his motion for new trial, which resulted in the absence of findings of fact or conclusions of law by the trial court regarding this issue in its order denying the motion for new trial. See Tenn. R. App. P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."). The Defendant also waived this issue by failing to cite to the authority upon which he relied in support of this claim. See Tenn. R. App. P. 27(a)(7) (A brief shall contain "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the

record . . . relied on."); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Although this court has the discretion to address waived errors under the plain error doctrine, we decline to exercise such discretion in this case. See Tenn. R. App. P. 36(b) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal."). Appellate counsel did not request plain error review in the Defendant's initial brief and did not respond to the State's waiver argument in the Defendant's reply brief. See State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) ("It is the accused's burden to persuade an appellate court that the trial court committed plain error."); State v. Thompson, No. W2022-01535-CCA-R3-CD, 2023 WL 4552193, at *5 (Tenn. Crim. App. July 14, 2023) ("Where a defendant fails to respond to a waiver argument, only particularly compelling or egregious circumstances could typically justify our sua sponte consideration of plain error relief."). Therefore, we conclude that the Defendant is not entitled to plain error relief on this issue.

III. Right to a Unanimous Verdict. Next, the Defendant argues his constitutional right to a unanimous verdict on each of the charged counts was violated in this case. He claims the trial court failed to poll the jury to ensure that each juror independently reached a verdict for each count of the indictment beyond a reasonable doubt with respect to the Defendant, as opposed to his Codefendant. In response, the State argues that the Defendant waived this issue because the Defendant failed to request jury polling and that the trial court did not have a duty to poll the jury. We conclude that the Defendant waived this issue not only by failing to request a polling of the jury at trial but also by failing to present any proof regarding this issue at the motion for new trial. We also conclude the Defendant is not entitled to plain error relief on this issue.

Initially, we note that the trial court is not required to poll the jury. See Tenn. Code Ann. § 20-9-508 ("The trial judges in all courts of record in which suits are tried by juries . . . shall be required to poll the jury on application of either the state or the defendant in criminal cases[.]"); Tenn. R. Crim. P. 31(e) ("After a verdict is returned but before the verdict is recorded, the court shall—on a party's request or on the court's own initiative—poll the jurors individually."). Because the Defendant never asked the trial court to poll the jury and never asked for a specific method of polling the jury, he has waived this issue. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); see also State v. Banks, 271 S.W.3d 90, 123-24 (Tenn. 2008) (reiterating that although "[d]efendants in criminal cases have a statutory right to have the jury polled upon request[,] . . . they waive this right if they fail to make a timely request that the jury be polled"); State v. Stephens, 264 S.W.3d 719, 736-

37 (Tenn. Crim. App. 2007) (concluding that the defendant waived his argument that the trial court erred in its method of polling the jury when the Defendant failed to request that the jury be polled and failed to object to the method of polling), abrogation on other grounds recognized by State v. Beaty, No. M2014-00130-CCA-R3-CD, 2015 WL 7307993, at *15 (Tenn. Crim. App. Nov. 20, 2015).

The Defendant also waived this issue by failing to present any proof in support of this issue at the motion for new trial hearing. See Tenn. R. App. P. 36(a); State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996) ("Ordinarily, issues raised for the first time on appeal are waived."). In its order denying the motion for new trial, the trial court noted that although the Defendant raised the unanimous verdict issue in his motion for a new trial, "no argument or proof was offered" by the Defendant in support of this issue, and "this issue was 'merely raised to preserve'" it. As a result, the trial court "decline[d] to make further findings of fact since no specific issue was raised" and summarily denied the motion on this ground.

The record shows that after the jury foreperson read the verdict for each count, the trial court asked, "Is that the collective judgment of the jury?" The trial court asked the jurors to confirm the judgment for each count by having each of the jurors raise their right hand, and the trial court noted that "all jurors agree[d]" to the verdicts on each count. Appellate counsel did not request plain error review in the Defendant's initial brief and did not respond to the State's waiver argument in the Defendant's reply brief. We conclude that the Defendant has failed to show the existence of error, much less plain error. See Tenn. R. App. P. 36(b); Bledsoe, 226 S.W.3d at 355.

IV. "Closed Door" Severance Hearing. The Defendant contends that his right to a public trial was violated when the trial court conducted a "closed door" severance hearing without a record of the hearing and without the Defendant's presence. He claims this error constitutes a structural constitutional error requiring automatic reversal. In response, the State asserts that the Defendant waived this issue by failing to object to the trial court's attempt to conduct an off-the-record severance hearing and that this error does not amount of plain error. We conclude that because the Defendant failed to include an accurate record on this issue, we must presume that the trial court properly denied the Defendant's severance motion. We also conclude that the Defendant is not entitled to plain error relief.

At the motion for new trial hearing, the trial court asked the prosecutor if the May 4, 2021, meeting took place, and the prosecutor replied:

> All we did is we got there to the meeting, [and the trial court] said, is there anything we need to talk about, is there anything to go over. [The State] said, your Honor, it's just [the Defendant's statement to Officer Andy Davis

> that he was not involved in the crimes] and the Codefendant[']s [statements], "[W]e were trying to get back to Anderson County" and "[W]e decided to steal the car].

The prosecutor said she made it clear during this in-chambers meeting that the State was intending to offer these statements by the Defendant and the Codefendant. She noted that although the Defendant had repeatedly claimed that "there was a whole severance hearing" during this in-chambers meeting, "that's not what happened." The prosecutor insisted that "[t]here were no witnesses" and "no testimony" at this in-chambers meeting, and the trial court told the State at the end of the hearing to reduce the aforementioned statements "to writing" so the Defendant and Codefendant could make further argument, if necessary. The prosecutor said that after this meeting, she had Officer Davis and Chief Laxton write out what the Defendant and Codefendant said to them and that at the June 1, 2021 hearing, the trial court asked the State for "the officers to write down a memorandum of some type, a report as to what happened that day." The prosecutor confirmed that these statements and reports were completed and given to the defense during discovery.

The prosecutor asserted that her summary of the pertinent events from the May 4, 2021 "closed door" meeting was "supported by the transcripts" and "by what happened at trial." She added that it was clear at the time of the in-chambers meeting that if the State decided not to use these statements, "there was no Bruton issue." She added that the State ultimately decided not to use the Defendant's and Codefendant's statements at trial. The prosecutor then explained:

> And as far as it being prejudicial to [the Defendant]—again, we don't have to put that on, but the only thing that was there for [the Defendant] was a self-serving statement made by him[,] which would have been hearsay for him to introduce. And so, even if it was severed, even if we're looking at, well, [the trials] could have been severed, the only issue we're looking at is the statement, and [the Defendant] would not have been able to enter the statement that he made. He would not have been able to elicit it from [Officer] Andy Davis because it would have been eliciting a self-serving testimony, and it would have been . . . hearsay[,] and it wouldn't have come in. So it wouldn't have mattered whether it was severed or kept together[.]

The prosecutor asserted that what actually happened during that in-chambers meeting was "no . . . more than a preconference hearing" and that "the courts have repeatedly held that a preconference hearing does not violate the rules" because it is "just done for judicial economy." The prosecutor also maintained that the in-chambers meeting was not "a public trial" because "there was no testimony[,]" "there w[ere] no witnesses[,]" and there was nothing "for the general public to weigh in on." In addition, citing State v.

Smith, 334 P.3d 1049 (Wash. 2014), the State argued that "nothing is added to the functioning of the trial by insisting that the defendant or public be present during [a] side bar or in chamber conferences" particularly when "an issue like severance is completely within the province of the Judge" and is "not something that the general public gets to weigh in on." As a result, the prosecutor argued that there was nothing wrong with "simply looking at the statements to see if they're Bruton . . . in a pretrial conference" because it did not "trigger the need for a public trial." The prosecutor also asserted that the in-chambers meeting was "agreed to by [defense] counsel[,]" and "there was no objection" and "no argument" about it. She reiterated that "even if a severance had been granted, those statements wouldn't have done anything for the [D]efendant."

In the order denying the motion for new trial, the trial court addressed the Defendant's claims that the May 4, 2021 "hearing" violated his right to a public trial and his due process right to be present:

> The Defendant requests a new trial claiming structural error due to an in-chambers conference regarding severance that was held off the record and outside . . . the presence of the Defendant. As a preliminary matter, the Defendant received a public trial. He only contends that counsel for both parties met simultaneously with the trial judge in chambers to enable the judge to review statements subject to a Bruton objection. No witness testified at that pretrial conference. The court announced on the record and in advance that the meeting should occur, and no one objected. The right to a public trial was not violated by what amounts to an in camera review of a statement. While it is unclear what exactly occurred in the conference, it is the burden of the Defendant to prepare a fair, accurate, and complete account of what transpired. See State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); see also State v. Miller, 737 S.W.2d 556, 556 (Tenn. Crim. App. 1987).
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> To the extent that the Defendant has also claimed structural error as to his absence from the meeting, a due process violation did not occur because he is only guaranteed a right to be present at stages of the criminal proceeding that are "critical to its outcome if his presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 747 (1987). An in camera proceeding for the purpose of reviewing a statement pursuant to Bruton does not qualify as a critical proceeding, and further, this right is waivable through counsel. Again, at no point did anyone object to this proceeding or object to the absence of the Defendant. The issues surrounding the circumstances of the in camera review do not violate the right to a public trial or due process rights.

First, the Defendant argues that the trial court violated his right to a fair, open, and public proceeding in this case by conducting the May 4, 2021 hearing in chambers. See U.S. Const. amend. VI.; Tenn. Const. art. I, §§ 9, 17. He claims that "[b]ecause no record, no findings of fact, and no conclusions of law exist to establish what occurred in chambers" concerning his severance motion, "it is unknown whether the trial court considered the arguments of counsel, the prior recorded preliminary hearing testimony of Officer Andy Davis (as had been contemplated by the parties in their discussions on the record leading up to the in camera hearing . . .), or even determined, on any grounds whatsoever, as required by [Tennessee Rules of Criminal Procedure] 14 and 12(e), whether a severance was necessary to promote a fair determination of [his] guilt or innocence.[D's brief, 32]" The Defendant also claims that although defense counsel argued that Rule 14(c)(2) should be examined by the trial court, "any mention of whether severance was required in the present case in order to promote a fair determination of the defendant's guilt or innocence was conspicuously absent from the scant discussion of the parties on the record leading up to the in camera, closed door, off-the-record hearing."

Second, the Defendant contends that the trial court violated his right to a verbatim record of his severance hearing, as required by Tennessee Rule of Criminal Procedure 12. Specifically, Rule 12(g) requires that all trial courts make "[a] verbatim record . . . of all proceedings at the motion hearing, including findings of fact and conclusions of law that are made orally." Tenn. R. Crim. P. 12(g). The Defendant asserts that regardless of whether testimony of witnesses was considered during this hearing, he had a procedural right to a verbatim record of all proceeding occurring at the severance hearing.

Third, the Defendant argues that the "closed door" severance hearing held outside his presence amounted to a structural constitutional error requiring automatic reversal. He claims that his failure to be present at this severance hearing violated his due process rights and his right to confrontation, thereby undermining confidence in the entire judicial process and requiring automatic reversal.

We conclude that the Defendant waived all these claims when defense counsel failed to object to the in-chambers meeting suggested by the trial court, failed to object to the meeting taking place without a court reporter, and failed to object to the Defendant's absence from this meeting. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); State v. Gilley, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008) ("The failure to make a contemporaneous objection constitutes a waiver of the issue on appeal.").

The Defendant also waived these claims by failing to prepare an accurate record of what occurred at the May 4, 2021, in-chambers meeting. The appellant has a duty to prepare a record that conveys "a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). "Where . . . the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which a party relies, this Court is precluded from considering the issue." State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1998) (citing State v. Groseclose, 615 S.W.2d 142, 147 (Tenn. 1981); State v. Jones, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981)). "In the absence of an adequate record on appeal, we must presume that the trial court's ruling was supported by the evidence." State v. Bibbs, 806 S.W.2d 786, 790 (Tenn. Crim. App. 1991) (citing Smith v. State, 584 S.W.2d 811, 812 (Tenn. Crim. App. 1979); Vermilye v. State, 584 S.W.2d 226, 230 (Tenn. Crim. App. 1979)). Lastly, the Defendant does not ask for plain error review of this issue, and we conclude that no plain error exists. See Tenn. R. App. P. 36(b); Bledsoe, 226 S.W.3d at 355.

V. Deviations with the Procedural Rules. The Defendant also argues that because the trial court substantially deviated from the mandatory provisions of Tennessee Rules of Criminal Procedure 12(e), (g) and 14(c)(2), his convictions are subject to automatic reversal, even in the absence of prejudice. See State v. Frausto, 463 S.W.3d at 483-86 (Tenn. 2015) (holding that the trial court's substantial deviations from the procedures prescribed by Tennessee Rule of Criminal Procedure 24(d) for jury selection resulted in prejudice to the judicial process); State v. Lynn, 924 S.W.2d 892, 894-98 (Tenn. 1996) (concluding that the failure to comply with Code sections 22-2-306 and -308 outlining jury selection procedures was prejudicial to the administration of justice); State v. Bondurant, 4 S.W.3d at 669-77 (Tenn. 1999) (reversing the defendant's convictions for first degree murder and arson and remanding the case for a new trial because the trial court flagrantly and unnecessarily deviated from the statutory procedures governing selection of a special jury venire and because the trial court allowed the sequestered jury to separate twice daily). Alternatively, the Defendant asserts that the State cannot prove beyond a reasonable doubt that the trial court's deviations from the procedural rules did not contribute to the verdict in his case. In response, the State claims the Defendant waived this issue for failing to object to the closed hearing and, in any case, the Defendant is not entitled to plain error relief. We agree with the State.

Here, the Defendant claims that the trial court substantially deviated from Tennessee Rules of Criminal Procedure 12(e), (g) and 14(c)(2). Rule 12(e) provides:

> The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. The court shall not defer ruling on a pretrial motion if the deferral will adversely affect a party's right

> to appeal. When factual issues are involved in deciding a motion, the court shall state its essential findings on the record.

Tenn. R. Crim. P. 12(e). In addition, Rule 12(g) states that "[a] verbatim record shall be made of all proceedings at the motion hearing, including any findings of fact and conclusions of law that are made orally." Tenn. R. Crim. P. 12(g). Lastly, Rule 14(c)(2) states that a trial court shall grant a severance of defendants if before trial "the court finds a severance . . . appropriate to promote a fair determination of the guilt or innocence of one or more defendants" or during trial "with consent of the defendants to be severed, the court finds a severance necessary to achieve a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2)(A), (B). The Defendant claims the trial court's flagrant violation of these rules "so undermined the integrity of the judicial process and public confidence in the administration of justice" that automatic reversal of his judgments is required.

We conclude that the Defendant waived these claims when defense counsel failed to object to the in-chambers meeting suggested by the trial court and when defense counsel failed to object to this meeting taking place without a court reporter. See Tenn. R. App. P. 36(a); Gilley, 297 S.W.3d at 762. We also conclude that the Defendant waived these claims by failing to prepare "a fair, accurate and complete account" of what occurred at the May 4, 2021 meeting. See Tenn. R. App. P. 24(b); see also Roberts, 755 S.W.2d at 836. "In the absence of an adequate record on appeal, we must presume that the trial court's ruling was supported by the evidence." Bibbs, 806 S.W.2d at 790 (citing Smith, 584 S.W.2d at 812; Vermilye, 584 S.W.2d at 230). Because we do not have an adequate record regarding this issue, we must presume that the trial court's ruling was correct. Finally, the Defendant does not ask for plain error review of this issue, and we conclude that no plain error exists. See Tenn. R. App. P. 36(b); Bledsoe, 226 S.W.3d at 355.

VI. Denial of Severance Motion. Lastly, the Defendant argues the trial court erred in failing to sever his trial from his Codefendant's trial. He claims he is entitled to relief because the record does not show the trial court applied the correct legal standard pursuant to Rule 14(c)(2) and because the trial court's denial of his severance motion resulted in prejudice to him. See Spicer v. State, 12 S.W.3d 438, 442-43 (Tenn. 2000). He also asserts, based on the comments made by prospective jurors prior to trial, that the verdict in his case more probably than not resulted from unfair prejudice stemming from the trial court's denial of his severance motion. Finally, the Defendant maintains that the trial court's dismissal of the Defendant's carjacking charge at the close of the State's proof highlights the fact that a severance would have promoted a fair determination in this case. In response, the State contends that the Defendant has failed to show he was entitled to a severance or that he was prejudiced by the lack of a separate trial. Moreover, the State argues that because the Defendant did not challenge the trial court's later on-the-record severance

hearing immediately prior to trial, the Defendant waived this issue. We conclude that because of the Defendant's failure to provide an adequate record of the May 4, 2021 meeting, we must presume that the trial court's denial of the Defendant's severance motion was supported by the evidence. We also conclude that the Defendant is not entitled to plain error relief.

This court reviews a trial court's denial for severance under an abuse of discretion standard. State v. Dotson, 254 S.W.3d 378, 390 (Tenn. 2008); State v. Carruthers, 35 S.W.3d 516, 552 (Tenn. 2000). A trial court abuses its discretion if it "applie[s] an incorrect legal standard or reache[s] a decision against logic or reasoning that cause[s] an injustice to the party complaining." Dotson, 254 S.W.3d at 387-88. "Under this standard, an appellate court will uphold a trial court's ruling if reasonable minds can disagree with the propriety of the decision . . . and will not substitute its judgment for that of the trial court." State v. Harbison, 539 S.W.3d 149, 159 (Tenn. 2018). This court does not interfere with the trial court's exercise of its discretion unless the denial of the severance motion results in clear prejudice to the defendant. Id. (citing Carruthers, 35 S.W.3d at 552). "Reversal is required only when the defendant establishes that he was 'clearly prejudiced to the point that the trial court's discretion ended and the granting of [a] severance became a judicial duty.'" Id. (quoting Carruthers, 35 S.W.3d at 553).

In Harbison, the Tennessee Supreme Court provided a list of non-exclusive factors when deciding whether to grant a severance under Rule 14(c)(2):

> A defendant may seek a severance under Tennessee Rule of Criminal Procedure 14(c)(2), which requires a trial court to grant the request if severance is found to be "appropriate to promote a fair determination of guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2). There is no bright-line rule as to when a trial court should grant a defendant's request for severance. Courts consider the following factors, none of which are dispositive, when deciding whether to grant a severance: the number of defendants named in the indictment, the number of counts charged in the indictment, the complexity of the indictment, the estimated length of the trial, the disparities in the evidence offered against the defendants, the disparities in the degrees of involvement by the defendants in the charged offenses, possible conflicts between the defendants and their strategies, and prejudice from evidence admitted against a co-defendant(s) which is inadmissible or excluded as to another defendant. See United States v. Gallo, 668 F. Supp. 736, 749 (E.D.N.Y. 1987).

Harbison, 539 S.W.3d at 159 (footnote omitted). "When two or more defendants are charged in the same indictment, evidence that is not necessarily applicable to another defendant may be admissible against one or more defendants." Id. (citing State v. Meeks, 867 S.W.2d 361, 369 (Tenn. Crim. App. 1993)). A defendant is not entitled to a separate trial simply because damaging evidence is introduced against another defendant. Id. (citing Meeks, 867 S.W.2d at 369).

The trial court, in its order denying the motion for new trial, made the following findings of fact and conclusions of law regarding the trial court's denial of Defendant's severance motion:

> The Defendant, before and during trial, moved for severance from his [C]o-defendant. As an initial matter, the court properly required the State to elect a joint trial either without the statement or with a redacted statement, or to sever the moving defendant. See Tenn. R. Crim. P. 14(c)(1). The State elected to proceed to trial with both Defendants, and the Defendant has not pointed to an out-of-court statement that was improperly admitted which ran afoul of Rule 14(c)(1).
>
> Instead, the Defendant has focused his arguments on Tenn. R. Crim. P. 14(c)(2), arguing that . . . a severance was "appropriate to promote a fair determination of the guilt or innocence of" the Defendant.

The trial court then applied the Harbison factors:

> Here, only two defendants are named in the indictment, which weighs against severance. The indictment included six in total, which included four different offenses, which weighs against severance. The indictment was not overly complex, which weighs against severance. The length of trial was three days in total, which included one full day of jury selection, one full day of proof, and one day for jury instructions, closing arguments and deliberations. This also weighs against severance. The disparities of degrees of involvement by the co-defendants are not as severe as the Defendant argues. Both were equally involved in all of the events, even though one appeared more culpable than the other. This weighs against severance. Possible conflicts between the defendants and their strategies weigh in favor of severance[] but are not dispositive. Even mutually antagonistic defenses are not prejudicial per se. See State v. Ensley, 956 S.W.2d 502, 509 (Tenn. Crim. App. 1996). Further, the proof admissible against one defendant that was inadmissible against the other was negligible.

> The Defendant has not demonstrated, and the record does not show, that the joint trial "clearly prejudiced" his defense as a result of the joint trial. See State v. Price, [46] S.W.3d 785, 803 (Tenn. Crim. App. 2000). Therefore, the motion for new trial on the grounds of failure to sever is denied.

We conclude that the Defendant has waived this issue by failing to provide an adequate record on review. The appellant has a duty to prepare a record that conveys "a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). "Where . . . the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which a party relies, this Court is precluded from considering the issue." Roberts, 755 S.W.2d at 836 (citing Groseclose, 615 S.W.2d at 147; Jones, 623 S.W.2d at 131). "In the absence of an adequate record on appeal, we must presume that the trial court's ruling was supported by the evidence." Bibbs, 806 S.W.2d at 790 (citing Smith, 584 S.W.2d at 812; Vermilye, 584 S.W.2d at 230). Here, the Defendant has not provided a transcript of the May 4, 2021 meeting and has failed to provide any documentation concerning what occurred during this meeting. Given the state of the record regarding this issue, we must presume that the trial court's ruling at the May 4, 2021 meeting was correct. See Bibbs, 806 S.W.2d at 790.

The Defendant also waived this issue by failing to object to the trial court's later on-the-record denial of the severance motion at trial. See Tenn. R. App. P. 36(a); Alvarado, 961 S.W.2d at 153.

Finally, the Defendant does not ask for plain error review of this issue, and we conclude that no plain error exists. See Tenn. R. App. P. 36(b); Bledsoe, 226 S.W.3d at 355. Therefore, we conclude the Defendant is not entitled to relief.

CONCLUSION

Based on the foregoing analysis, the judgments of the trial court are affirmed.

s/ Camille R. McMullen
CAMILLE R. MCMULLEN, PRESIDING JUDGE