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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 9, 2019

STATE OF TENNESSEE v. MELVIN WIGGINS

Appeal from the Criminal Court for Shelby County
No. 15-05135 Paula L. Skahan, Judge

No. W2018-01675-CCA-R3-CD

The defendant, Melvin Wiggins, appeals his Shelby County Criminal Court jury convictions of especially aggravated kidnapping and aggravated robbery, arguing that the trial court erred by denying his motion to suppress certain statements he gave to the police, that the trial court erred by admitting certain statements in violation of evidence rule 404(b), and that the evidence was insufficient to support his convictions. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, and J. ROSS DYER, JJ., joined.

Mark A. Mesler, Memphis, Tennessee, for the appellant, Melvin Wiggins.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Pam Stark and Leslie Byrd, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Shelby County Grand Jury charged the defendant, along with co-defendants Marterius O'Neal and Antwon Young, with one count each of especially aggravated kidnapping and aggravated robbery arising from an incident on October 11, 2014, in which Steven Smith, a pizza delivery driver, was robbed at gunpoint and forced into the trunk of his car. The defendant was tried separately from his co-defendants.

At the May 2017 trial, the victim testified that, in October of 2014, he worked as a Domino's Pizza delivery driver. On October 11, 2014, he was sent to deliver a pizza order to 935 Isabelle at approximately 5:15 or 5:20 p.m. When he arrived at the

address, the victim observed "two black males, one sitting on a porch and one standing next to the porch." The man sitting on the porch, later identified as Antwon Young, was wearing "[t]an pants and a white hoodie," and the second man, later identified as Marterius O'Neal, was wearing black and red pajama pants and "a dark hoodie." The victim parked his car in the driveway and approached the two men with the pizzas. When he handed the men the receipt, they had "questions about the price." The men told the victim that they did not want the pizzas, and he returned to his vehicle. As the victim backed his car out of the driveway and onto the street, Mr. Young "waved me back into the driveway."

At that point, the victim "pulled back into the driveway," and Mr. Young approached on the "passenger side, and I rolled down my window and he asked to see the pizzas." The victim showed him the pizzas, and Mr. Young said that he wanted them. The victim saw Mr. Young "fiddling with [his] wallet," "could tell he didn't have any money in the wallet," and "knew that he wasn't going to pay." The victim said that he began to get nervous. To his left, the victim saw Mr. O'Neal "clutching something in his pajamas." The victim then saw Mr. Young pointing a black, Glock, semi-automatic pistol at his chest from approximately three to three-and-a-half feet away. Mr. Young opened the passenger's side car door, and Mr. O'Neal approached the driver's side door, brandishing a "very ugly" black semi-automatic pistol. Mr. O'Neal opened the driver's door, and the victim "gave him the $20.00 that I got from Dominos" and his wallet. Mr. O'Neal took the keys out of the ignition and "popped open the trunk." The men told the victim to get into the trunk of the vehicle, and the victim complied.

After the men "slammed the trunk closed," the victim called his manager with his cellular telephone. When he heard his phone automatically connect to the Bluetooth in his vehicle, he "immediately hung up, turned off the Bluetooth" and placed the call again. While he was in the trunk, the victim "felt the engine cranking" and the vehicle moving. He estimated that the vehicle was driven for only six or seven seconds. After the car stopped moving, the victim "unlocked my backseat and kicked down the seats" and saw that no one else was in the vehicle and that a door was left open. He climbed out of the trunk, looked around to ensure that the perpetrators no longer posed a danger to him, and "started looking for witnesses." The victim found a witness who was able to provide him with the license plate number and description of the vehicle, a gold Monte Carlo, driven by the perpetrators, which information the victim provided to the police. The victim "check[ed] out" the house where the robbery occurred and noted that it appeared to be vacant. He then returned to Domino's, where he spoke with the police. His wallet was returned to him the next day by a woman who had found it. He did not recover the $2.00 taken from his wallet or the $20.00 from Domino's.

Five days after the robbery, the victim identified Mr. O'Neal from a

photographic lineup. Several months later, he identified Mr. Young from a photographic lineup.

During cross-examination, the victim stated that when he arrived at 935 Isabelle, it was still light outside, and he saw the two men who robbed him but did not see anyone else. He had never seen the suspects before. He estimated that he spoke with the men about the price of the pizzas for approximately 10-15 seconds before returning to his vehicle. Both men had the hoods of their sweatshirts up over their heads, but the victim stated that he could still see their faces. When he pulled back into the driveway, he talked with Mr. Young through the passenger's side window for approximately a minute before Mr. O'Neal approached his driver's side door. Mr. Young had already drawn his gun when Mr. O'Neal approached his vehicle. Mr. Young took the bags with the pizza and a coke.

The victim stated that he was armed at the time but that the men "already had a drop on me so I had no chance." He did not draw his weapon out of concern that "[a]ny sudden movement and I probably wouldn't be sitting here today."

The victim stated that, after being locked in the trunk of his car, he could hear noises from the car but could not see what was happening, and he did not know whether both men got in the car or only one of them. He "heard a door opening and then shut, and then I felt the car moving." After feeling the car come to a stop, he did not hear any car doors open. He waited approximately 30-45 seconds before unlatching the back seats and climbing out of the trunk. When he got out of the trunk, the victim observed that the driver's side door was open, and the car was turned off with the key in the ignition. The car was in the backyard of the house, and, as the victim walked back to the front of the house, he did not see the men who had robbed him, but he did see two other witnesses a "few houses down." The victim stated that he was "[p]ositive" in his identification of the suspects from the photographic lineups.

Michael Davis, General Manager at the Domino's Pizza on Summer Avenue at the time of the robbery, stated that the victim called the store shortly after leaving on a delivery and reported being robbed. At first, Mr. Davis "thought it was a joke" but, after "realiz[ing] it was my driver," he called the police. The police arrived at the store shortly after the victim had returned. Mr. Davis provided the police officers with "information from the order" including the telephone number, address, and name associated with the order.

Memphis Police Department (MPD) Officer Malcolm Smith investigated the October 11, 2014 robbery of the victim as well as a robbery that occurred on the following day at Macon Manor Apartments ("Macon Manor robbery") and determined

that the same gold Chevrolet Monte Carlo with license plate number J72054X had been used in both robberies. He located the Monte Carlo at the address listed on the registration and had it towed "to the tunnel" for processing.

On October 15, 2014, Officer Smith arrested the defendant and brought him in for questioning. After signing a written rights waiver, the defendant gave a statement to Officer Smith ("Statement I") regarding the robbery of the victim.[1] In that statement, the defendant denied having knowledge of the robbery of the victim but acknowledged owning a gold 2005 Chevrolet Monte Carlo with license plate number J70254X. The defendant explained that he had loaned his car to Mr. O'Neal on October 11, 2014, to drive to the store. The defendant identified Austin McGee as having been with Mr. O'Neal at the time. According to the defendant, Mr. O'Neal returned the car on October 12 at midnight accompanied by Mr. McGee and "'another male black with a tattoo on his neck.'" The defendant said that he had known Mr. O'Neal for four years and had known him to have a black .38 revolver. Officer Smith stated that the defendant identified Mr. O'Neal from a photographic array.

Upon being questioned about the Macon Manor robbery, the defendant gave a second statement ("Statement II") in which he again maintained that he had loaned Mr. O'Neal his vehicle on October 11 at approximately 5:30 p.m. for Mr. O'Neal to go to the store and that Mr. O'Neal had not returned the vehicle until October 12 at midnight. He described Mr. O'Neal as wearing a "'black and green hoody with black sweats'" on the day that he borrowed the Monte Carlo. Officer Smith stated that the defendant was not in distress at the time he gave the statements. The defendant was not charged in connection with the crimes at that time and was released.

On March 26, 2015, Officer Smith learned that Sergeant Eric Kelly had questioned the defendant and that the defendant had given a statement related to the robbery of the victim ("Statement III"). Following Sergeant Kelly's interview, Officer Smith questioned the defendant for a second time about the Macon Manor robbery. The

[1] Relevant to this case, the defendant gave four statements to police. For the sake of clarity, we have summarized the defendant's relevant statements provided in the record below:

Statement	Date and Time	Interviewing Officer	Subject Matter
Statement I	October 15, 2014, 2:46 p.m.	Officer Malcolm Smith	Robbery of the victim
Statement II	October 15, 2014, 5:30 p.m.	Officer Malcolm Smith	Macon Manor Robbery
Statement III	March 26, 2015, 6:00 p.m.	Sergeant Eric Kelly	Robbery of the victim
Statement IV	March 26, 2015, 10:30 p.m.	Officer Malcolm Smith	Macon Manor Robbery

defendant signed a written rights waiver and provided a statement ("Statement IV") regarding the Macon Manor robbery. In Statement IV, the defendant said that he "'just drove the car'" during the Macon Manor robbery. He implicated Nunie, whom he identified as Mr. O'Neal, and Nuke, whom he identified as Mr. Young, as the perpetrators of the Macon Manor robbery. The defendant denied having been armed during the Macon Manor robbery but said that Mr. O'Neal "'had a .38 revolver, it was silver with a black handle'" and that Mr. Young "'had a .45 calib[er], it was black hi-point.'" The defendant said that "'money, [a] wallet and a bank card'" were taken in the Macon Manor robbery and that the wallet and bank card were tossed out of the car window. The defendant acknowledged that he received $20.00 worth of gasoline in his car out of the proceeds of the robbery.

The defendant described the events of the Macon Manor robbery:

> "[W]hen we first met up we met at Nunie's grandma's house on Coleman. Nunie said let's go hit a lick. Nuke was already there. We drove to the apartments on Macon and they did the robbery. They told me to pull around front and wait for them so I did. They robbed the dude then came and jumped in my car. They told me to stop at a store for cigarettes and they put gas in my car. I took them to Nunie's mom's house on Powell and dropped Nunie off. Then I dropped Nuke off at their grandmother's house."

The defendant said that Mr. O'Neal planned the robbery. He denied participating in any other robbery. The defendant was given an opportunity to review and make corrections to Statement IV before signing it.

MPD Detective Jesus Perea, the case officer assigned to the robbery and kidnapping of the victim, testified that the victim identified Marterius O'Neal as one of the perpetrators of the robbery from a photographic array on October 16, 2014. On that same day, Detective Perea showed the victim a second photographic array that included a photograph of the defendant, but the victim did not make an identification from that array. On March 27, 2015, the victim identified Antwon Young from a third photographic array as the second man who robbed him.

On cross-examination, Detective Perea testified that he showed the victim a photographic array that contained the defendant's photograph because the defendant was the owner of the car used in the robbery. Detective Perea obtained a search warrant for the Monte Carlo after it was located by other officers, and he was present when Sergeant Adam Pickering processed the vehicle for evidence.

MPD homicide investigator Sergeant Eric Kelly testified that he interviewed the defendant on March 26, 2015, regarding the robbery and kidnapping of the victim. Sergeant Kelly contended that the defendant was not in custody at that time and was free to leave the interview at any time. Despite Sergeant Kelly's determination that the defendant was not in custody, Sergeant Kelly nonetheless provided the defendant with *Miranda* warnings, and the defendant signed a written rights waiver form before Sergeant Kelly began questioning him. The defendant gave Statement III, Sergeant Kelly typed it, and the defendant reviewed it for corrections before signing it. In Statement III, the defendant admitted that he was present during the robbery of the victim and implicated Mr. O'Neal, to whom he referred as Nunie, and Mr. Young, to whom he referred as Nuke, as the perpetrators of the robbery and kidnapping. The defendant said that Mr. O'Neal used "'a .45 calib[er] Hi-Point gun'" during the incident and described the events of the robbery and kidnapping of the victim:

> "Went over to my girlfriend grandmother's house on Coleman Road that day. Nunie and Nuke was there and they told me to take them over onto Isabelle Road so they can rob the pizza man cause Nunie favorite food is pizza and they wanted some.
>
> So I drove them over there and they told me to park my car on Guernsey. When I parked I could see them in my rearview mirror. The pizza man came in like thirty to sixty minutes. They was sitting on the front of some white house. The pizza man was a white guy, he was driving a black medium size car, four-door.
>
> The pizza man got out of the car and was talking to them. Then the pizza man walked back to his car and got in. He was about to close the door and Nunie ran up and put the gun to him while the pizza man was in the driveway of the house. I guess Nunie or Nuke told him to pop the trunk of his car.
>
> Nunie got him out of the car and walked him towards the back of the car. Nuke was standing near the car with the pizzas in his hands and they put the man in the trunk and closed it. Nunie got in the pizza man's car on the driver's side and he pulled it to the back of the house they was at.

> Then Nuke and Nunie ran down to the car and got in with the pizzas and we drove to the gas station at Macon and Maria. Nuke got out of the car and went inside and bought some stuff and came back out. Then we went home on Coleman.
>
> They went in and ate the pizza. I didn't eat none. I told them I didn't know they was going to do all that and Nunie told me I needed to stop acting like a buster. Then he offered me some gas money but I didn't take it. Me and Nunie got into a verbal fight and Nunie was yelling 'N[****], I got bodies.' I was like well, 'that's you.'"

The defendant said that Mr. Young tossed the victim's wallet out of the car window after taking the money out of it. The defendant denied driving Mr. O'Neal and Mr. Young for other robberies.

During cross-examination, Sergeant Kelly stated that prior to the March 26, 2015 interview, he went to the defendant's residence to bring him in for questioning. The defendant, who was inside when the police arrived, "came and spoke with us" when the officers knocked on the door. Sergeant Kelly denied threatening the defendant to get him to come out of the house. Sergeant Kelly testified that the defendant was placed in the back of a police car and transported to the station, but he could not recall whether the defendant was handcuffed. Although he acknowledged that the defendant would not have been able to open the back doors of the police car from the inside, Sergeant Kelly maintained that the defendant was free to leave, was not taken into custody, and was not under arrest. When asked about previous testimony in which he had stated that the defendant was not free to leave because they had cause to arrest him, Sergeant Kelly explained that it was "a very layered situation that [wa]s multi-faceted" and that it was his understanding at the time that he "was to maintain and keep [the defendant] as a witness because the information that had been developed in regards to the robbery was that . . . he was a potential witness in the particular matter."

Sergeant Kelly stated that the defendant was placed in an interview room without being handcuffed or shackled and that "the door was left cracked open." He stated that the defendant "potentially could have" walked out of the room if he had so desired. When pressed, Sergeant Kelly conceded that the door to the interview room could not be opened from the inside and that the defendant may have been shackled, but he contended that the defendant "wasn't treated as a straight up suspect."

Sergeant Kelly said that he provided the defendant with *Miranda* warnings

and described the defendant as "cooperative" and "truthful" during the interview. He said that the defendant "was basically acting ignorant to the situation but we had information to prove otherwise" and that "the gist of the conversation was me explaining to him that . . . I would like for him to be honest with us and explain to us what we had been told and to basically get himself out of a bad situation." Sergeant Kelly acknowledged that, at first, he did not believe the defendant was being truthful, but he denied threatening, coercing, or making promises to the defendant during the interview. Sergeant Kelly stated that he confronted the defendant "with the inconsistencies with what he was telling me" until the defendant gave a statement that Sergeant Kelly believed to be truthful. At that point, Sergeant Kelly typed up Statement III, and the defendant reviewed it before signing it.

On redirect examination, Sergeant Kelly testified that, although the defendant was not under arrest at the time that the interview began on March 26, after the defendant began admitting to his participation in the crimes, he was no longer free to leave. Because of that, the defendant may have been shackled or handcuffed and the interview room door closed when Sergeant Kelly left the room to develop photographic arrays.

MPD Sergeant Adam Pickering, a crime scene investigator at the time of the offenses, processed the gold Chevrolet Monte Carlo, taking photographs, collecting fingerprints, and inspecting the vehicle for evidence. Photographs of the Monte Carlo, including one which depicted a firearm case in the floorboard behind the passenger seat, were exhibited to his testimony and shown to the jury. Sergeant Pickering stated that the firearm case was a "factory shipping case" for a Glock.

Based upon this evidence, the jury convicted the defendant as charged of the aggravated robbery and kidnapping of the victim. Following a sentencing hearing, the trial court imposed an effective sentence of 13 years and 6 months' incarceration.

Following a timely but unsuccessful motion for a new trial, the defendant filed a timely notice of appeal.

In this appeal, the defendant asserts that the trial court erred by denying his motion to suppress Statements III and IV, arguing that the statements were the product of threats and coercion by the police. He also argues that the trial court erred by admitting Statement IV, which related to the Macon Manor robbery, because it violated Tennessee Rule of Evidence 404(b). Finally, he challenges the sufficiency of the convicting evidence.

I. Suppression

Prior to trial, the defendant moved the trial court to suppress "any and all statements purported to have been made by the [d]efendant" on the ground that his statements were elicited in violation of his rights under the threat of violence by police officers. In this appeal, the defendant challenges only the admission of the two statements that he gave on March 26, 2015, Statements III and IV. Accordingly, we have included only the facts relevant to those statements below.

At the hearing on the motion to suppress, Detective Perea testified that, during the summer of 2014, he developed Mr. O'Neal as a suspect in a series of robberies and homicides involving Hispanic victims. Detective Perea learned that the same gold Monte Carlo that was used in the October 12 Macon Manor robbery of a Hispanic victim had been used in the robbery and kidnapping of the victim on October 11. The defendant became a suspect in both robberies when Detective Perea learned that the defendant was the registered owner of the gold Monte Carlo used in both robberies.

Officer Smith testified as he did at trial that the defendant gave Statement IV, in which he admitted being present during the Macon Manor robbery after signing a written waiver of his constitutional rights. Officer Smith stated that the defendant waived his rights before giving the statement and that the defendant was permitted to make changes to the written statement before signing it. He said that he would not have interviewed the defendant if he had believed the defendant was injured or afraid.

During cross-examination, Officer Smith testified that he assisted in arresting and bringing the defendant in for questioning in handcuffs on March 26, 2015. Officer Smith conducted the interview that resulted in Statement IV, but he was not present during the interview that resulted in Statement III. Officer Smith maintained that, at the time of his interview, the defendant did not appear to need medical treatment or to be in distress.

Sergeant Kelly testified as he did at trial that the defendant was not in custody when he gave Statement III, insisting that the defendant could have gotten up and left at any point in time during this particular segment." Sergeant Kelly stated that he advised the defendant of his constitutional rights and that the defendant agreed to waive his rights before giving Statement III. He said that the defendant did not seek to terminate the interview or ask for an attorney at any time.

After the defendant gave a statement regarding certain homicides, Sergeant Kelly again advised the defendant of his rights, and the defendant gave Statement III related to the robbery of the victim, in which the defendant described his role in the robbery as minor. Sergeant Kelly typed up the defendant's statement, and the defendant

had an opportunity to review and make corrections to Statement III before signing it. Sergeant Kelly stated that the defendant was offered food, drink, and bathroom breaks during the interview.

During cross-examination, Sergeant Kelly testified that on March 26, he went with other officers to the defendant's apartment, where the defendant was with his girlfriend and children. The officers knocked on the door, and the defendant's girlfriend asked them several questions. The officers did not have an arrest warrant or a search warrant, but they told the defendant's girlfriend that they needed to speak with the defendant. Sergeant Kelly stated that the officers entered the apartment without the use of force or threats. Sergeant Kelly specifically denied threatening to rape the defendant but said, "I have a very colorful vocabulary and I will tell you that at that point in time that I would have said something to get his attention." Although Sergeant Kelly could not recall specifically what he said to the defendant at the time, he testified, "I know that I did at that time make it clear that we were investigating a murder and that he was a witness as far as we knew and that we needed to speak with him."

Sergeant Kelly conceded that the defendant was transported to the police station in a patrol car, but he could not recall whether the defendant was handcuffed. Sergeant Kelly acknowledged that he may have been shackled when placed in the interview room. Sergeant Kelly conceded that the door to the interview room was closed during his interview with the defendant and could not be opened from the inside. Contrary to his trial testimony, Sergeant Kelly acknowledged that when he interviewed the defendant on March 26, the defendant was in custody and was not free to leave, stating that "there was enough information at the time where he had been charged with a crime." On March 26, the defendant signed a written rights waiver at 1:10 p.m., and Sergeant Kelly interviewed him from that time until 5:15 p.m., when Statement III was typed up. Sergeant Kelly stated that he did not recall using any "colorful language" during the defendant's four-hour interview. He acknowledged telling the defendant that he was trying to help the defendant, explaining that "[i]f he's a murderer then I am helping him out by putting him where he belongs in jail."

Sergeant Kelly adamantly maintained that he did not threaten the defendant. Sergeant Kelly speculated that the defendant admitted participating in the robbery of the victim because he "decided that it was time to come clean about all of the stuff that he knew and had information about." Sergeant Kelly clarified that the defendant gave information regarding the robbery of the victim during the same four-hour interview in which he was questioned about certain homicides.

On redirect examination, Sergeant Kelly acknowledged that his use of colorful language included the use of profanity but denied that it included threats,

reiterating that he did not threaten the defendant. Sergeant Kelly stated that he interviewed the defendant on March 26 because on March 23, Mr. O'Neal had implicated the defendant in the robbery of the victim and in certain homicides.

The defendant testified that, on March 26, 2015, he was at his townhouse on Whitehaven with his brother, his children, and his girlfriend, Shalonda Scott. At approximately 8:00 or 9:00 a.m., police officers approached the defendant's brother outside of the house and said that they were looking for the defendant. Through the closed screen door, the defendant asked if the officers had a warrant, and they told him that they did not. The defendant said that he saw Ms. Scott outside of the home in handcuffs and heard Sergeant Kelly tell Ms. Scott that "he was going to take [her] child." Ms. Scott then pleaded with the defendant to speak to the officers. After having her handcuffs removed, Ms. Scott unlocked the door but did not otherwise give the officers permission to enter the house; rather, the officers "just stormed in." The defendant testified that the officers placed him in handcuffs, and Sergeant Kelly "said he was going to grease my butt and rape me his self if I don't cooperate." According to the defendant, Sergeant Kelly made the threat in front of Ms. Scott and their three-year-old child. The defendant said that he felt intimidated, afraid, and disrespected as a result of Sergeant Kelly's threat.

The defendant said that he arrived at the MPD homicide office at approximately 9:30 a.m. He said that he was never told that he was under arrest but that he also was never told that he was free to leave. He was placed "in the interview room with the shackle on" for approximately two or two-and-a-half hours before Sergeant Kelly and another officer came in to interview him. The officers gave the defendant the rights waiver form at approximately 12:00 p.m. Although he acknowledged signing the form, the defendant asserted that he "didn't actually read the Waiver of Rights" because the officers pressured him into signing.

The defendant testified that when the officers confronted him with statements from Mr. O'Neal and Mr. Young, he "just stopped talking." Sergeant Kelly then told the defendant that he could not leave until he gave a statement. After getting reassurance that he would be permitted to go home, the defendant "just told him what he wanted to hear," repeating "basically what Marterius said. I just mixed it." The defendant said that the officers continued to threaten him, telling him that if he did not talk with them, he would be charged with the crime. The defendant asserted that he said to the officers, "'I'll just go upon what Marterius -- what you told me Marterius said.'" The defendant insisted that the officers continued to pressure him during the interview and that, at some point, a "lady officer" said, "'[J]ust talk. Just talk. Just talk. You need to just talk. . . . [I]f I was your parent I would hit you in the mouth. Just talk. You need to just talk. Stop stuttering. Stop doing this.'" The defendant said that, before he began

talking with the officers, Sergeant Kelly told him "'I meant what I said,'" which caused him to be afraid.

The defendant also said that, during his later interview with Officer Smith, Officer Smith promised that the defendant could go home if he agreed to talk with them, claiming that Officer Smith "actually called my girl to notify her that I was coming home."

During cross-examination, the defendant testified that he did not want to let the officers into his house because they told him they wanted to talk to him about a homicide, and he "didn't know anything about" that. He maintained that he read only the top portion of the rights waiver form and did not read the Waiver of Rights portion because the officers "didn't even give me a chance to read" the form and, instead, "was pressur[ing] me to just sign it." The defendant acknowledged that he made hand-written changes to an unrelated statement he gave on March 26 about certain homicides, but he stated that he made the corrections at the behest of the officers because he was afraid and was doing "what they pressured me to do."

At the close of the hearing, the court took the matter under advisement. In its written order denying the defendant's motion to suppress, the trial court found that, on March 26, 2015, Officer Smith and Sergeant Kelly each interviewed the defendant and that the defendant gave a total of three statements that day,[2] signing a written rights waiver for each statement. The court accredited the testimony of Officer Smith and Sergeant Kelly and found that the officers had properly advised the defendant of his constitutional rights during each interview. The court further found that the defendant "did not express a desire to terminate any interview, in which a statement was given," never invoked his right to counsel, and was given an opportunity to amend each of his statements before signing. The court also found that, although Sergeant Kelly admitted "to using 'colorful language' during his encounter with [the d]efendant, . . . no physical threats were ever made." The court found that the defendant was not under arrest during the interview with Sergeant Kelly that resulted in Statement III and, consequently, found no merit in the defendant's claim that he gave Statement III in order to leave the interview.

The trial court concluded that the defendant made a knowing waiver of his rights before giving Statements III and IV. The court, finding that the defendant made a hand-written amendment to at least one statement, also concluded that Statements III and IV were given voluntarily and not as a result of threat or coercion, discrediting the defendant's claim that Sergeant Kelly threatened him.

[2] Only two of those statements, Statements III and IV, are at issue here.

The defendant challenges the ruling of the trial court, reiterating that he did not make a knowing and voluntary waiver of his constitutional rights and that his statement were the products of threats and coercion. The State contends that the trial court did not err.

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The application of the law to the facts, however, is reviewed de novo on appeal. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998).

Miranda

The defendant argues that he did not voluntarily waive his constitutional rights, insisting that the officers pressured him into signing a waiver of his rights and told him that he could not leave until he agreed to talk with them.

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding "the Fifth Amendment's exception from compulsory self-incrimination" applicable to the states through the Fourteenth Amendment). In *Miranda*, the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* To safeguard the privilege against self-incrimination, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent,

> the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Id. at 473-74.

A statement made "during a custodial interrogation is inadmissible at trial unless" the State can establish a knowing and voluntary waiver of the *Miranda* rights. *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010). "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475. "The State bears the burden of establishing 'waiver by a preponderance of the evidence.'" *State v. Climer*, 400 S.W.3d 537, 564 (Tenn. 2013) (quoting *Berghuis*, 560 U.S. at 384). Although the State need not "show that a waiver of *Miranda* rights was express," the giving of an uncoerced statement following the provision of *Miranda* warnings, "standing alone, is insufficient to demonstrate 'a valid waiver.'" *Berghuis* 560 U.S. at 384 (quoting *Miranda*, 384 U.S. at 475).

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Berghuis, 560 U.S. at 382-83 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)); *see also Climer*, 400 S.W.3d at 564-65.

Here, the evidence established that, on March 26, 2015, Officer Kelly went

to the defendant's residence and transported the defendant to the homicide office for questioning. The defendant signed a written rights waiver form at 1:10 p.m., and Sergeant Kelly interviewed him for at least four hours. Sergeant Kelly typed up Statement III, and the defendant signed it. Statement III explicitly stated that the defendant was "not under arrest" but advised him that he would be arrested and charged in connection to the robbery of the victim "if the fact[s] so warrant." After the defendant signed Statement III, he was transported to Tillman Station to be questioned by Officer Smith about the Macon Manor robbery. During the interview with Officer Smith, the defendant signed Statement IV, initialing next to statements of his rights and a statement indicating that he wished to proceed with questioning without a lawyer present. Statement IV indicated that the defendant was under arrest at that time.

Without question, the defendant was in custody when he provided both Statements III and IV.[3] That being said, the record indicates that the defendant was provided with *Miranda* warnings before giving both statements. Indeed, the defendant was given *Miranda* warnings before he gave each of the four statements in this case, and he provided statements of denial when first interviewed, which undercuts a claim that he incriminated himself because he feared the police. The defendant signed no less than four written rights waiver forms that indicated a voluntary waiver of his constitutional rights. Additionally, the trial court specifically accredited Sergeant Kelly's testimony that he did not threaten the defendant prior to or during the interview. Similarly, the trial court found the defendant's claim that he made the statements only so he would be permitted to leave not credible. Under these circumstances, the record establishes that the defendant's waiver of his rights was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and that the waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis*, 560 U.S. at 382-83 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)); *see also Climer*, 400 S.W.3d at 564-65.

Voluntariness

The defendant further contends that his statements were not voluntarily given and were instead the product of coercion.

Both the federal and state constitutions protect the criminally accused from

[3] The trial court found that the defendant "was not under arrest" when he provided Statement III to Sergeant Kelly. The relative inquiry, however, is not whether the defendant was "under arrest" but whether he was in "custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

compulsory self-incrimination. *See* U.S. Const. amend. V; Tenn. Const. art. I, § 9. To pass constitutional muster and be admissible at trial, a confession must be free and voluntary and not "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, . . . nor by the exertion of any improper influence" or police overreaching. *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (citation omitted). The rule is equally applicable to confessions given during custodial interrogations following appropriate provision of *Miranda* warnings, *see State v. Kelly*, 603 S.W.2d 726, 728 (Tenn. 1980), and those provided before the defendant has been placed in custody, *see Arizona v. Fulminante*, 499 U.S. 279, 286-88 (1991). To determine voluntariness, the reviewing court must examine the totality of the circumstances surrounding the confession to determine "whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not [the defendant] in fact spoke the truth." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961); *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996) ("The critical question is 'whether the behavior of the state's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined.'" (quoting *Kelly*, 603 S.W.2d at 728 (internal citation and quotation marks omitted))).

The defendant asserts that his statements were not voluntary because Sergeant Kelly threatened to rape him. The trial court, however, accredited Sergeant Kelly's testimony and found that Sergeant Kelly made no such threat. Furthermore, the officers' confronting the defendant with statements of his co-defendants and encouraging him to talk to them was not so great a pressure as to overbear his will. Although the defendant did not make any hand-written amendments to Statement IV, he amended Statement III by marking through the time "5:15 pm," hand-writing in the time "6:00 pm," and initialing next to the change. Additionally, each statement included a paragraph above the signature line that instructed the defendant to sign the statement only if he found "it to be true and correct." In our view, the totality of the circumstances supports the ruling of the trial court that the defendant's statements were voluntarily given.

II. Evidence Rule 404(b)

The defendant asserts that the trial court erred by admitting Statement IV into evidence, alleging that the prejudicial nature of the statement warranted its exclusion under Tennessee Rule of Evidence 404(b). The State contends that the statement was properly admitted to establish the defendant's intent and knowledge.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

with the character trait. It may, however, be admissible for other purposes." Tenn. R. Evid. 404(b). Before such evidence may be admitted, however, the following procedure must be followed:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Id. When, as here, the trial court substantially complies with the procedural requirements of Rule 404(b), this court will overturn the trial court's ruling only when there has been an abuse of discretion. *See State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005).

After the jury was empaneled and the parties had given opening statements, the trial court held a hearing outside of the presence of the jury to determine the admissibility of Statement IV regarding the Macon Manor robbery. During the hearing, Detective Perea testified as he did at trial that the same gold Monte Carlo that was used during the Macon Manor robbery on October 12 was used in the robbery of the victim on October 11. He traced the ownership of that vehicle to the defendant, and he had the defendant brought to the police station for questioning on both robberies in October 2014. At that time, the defendant gave two statements: Statement I, which related to the robbery of the victim, and Statement II, which related to the Macon Manor robbery. In both statements the defendant said that he had loaned his car to Mr. O'Neal and Mr. McGee. He also implicated a third person, "another male black with a tattoo on his neck."

Regarding Statements III and IV, Detective Perea stated that Sergeant Kelly brought the defendant in for questioning on March 26, 2015, and the defendant gave Statement III regarding the robbery of the victim. After Sergeant Kelly concluded his interview, the defendant was questioned again regarding the Macon Manor robbery. During that interview, the defendant gave Statement IV, in which he admitted to driving Mr. O'Neal and Mr. Young during the robbery and to receiving $20.00 worth of gasoline in his car out of the proceeds of the robbery.

The trial court found by clear and convincing evidence that the Macon Manor robbery had occurred and found Statement IV to be admissible to show the defendant's "intent as well as guilty knowledge," noting that the defendant raised the question of his mental state to the jury during voir dire and his opening statement.[4] The court concluded that the probative value of the statement was not outweighed by the danger of unfair prejudice and admitted the statement.

Later, before the cross-examination of Officer Smith, the court instructed the jury that they could not consider evidence of other crimes "to prove [the defendant's] disposition to commit such a crime as that on trial" and that "[t]his evidence may only be considered by you for the limited purpose of determining whether it provides the defendant's intent."

The trial court did not abuse its discretion by admitting the defendant's statement. Evidence that the defendant drove Mr. O'Neal and Mr. Young in perpetration of another robbery was relevant to establish the defendant's intent for driving Mr. O'Neal and Mr. Young to rob the victim as well as his guilty knowledge of the criminal activity. The fact that the Macon Manor robbery occurred the day after the robbery of the victim did not preclude the use the defendant's statement regarding the Macon Manor robbery to show his intent and guilty knowledge relevant to the robbery of the victim. *See* NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 4.04[11] (4th ed. 2000) ("It should be noted that the other crimes could be subsequent to the act in issue as long as they permit an inference that the accused had the requisite knowledge or did not act accidentally.").

Moreover, even if Statement IV was admitted erroneously, any error was harmless. In light of the defendant's statement of confession regarding his participation in the robbery and kidnapping of the victim and the trial court's limiting instruction regarding the use of the challenged evidence, the admission of Statement IV likely did not affect the trial outcome. *See State v. Rodriguez*, 254 S.W.3d 361, 371-72 (Tenn. 2008) ("Where an error is not of a constitutional variety, Tennessee law places the burden on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error 'more probably than not affected the judgment or would result in prejudice to the judicial process.'" (quoting Tenn. R. App. 36(b))).

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[4] In his brief, the defendant asserts that he did "nothing in voir dire or opening statement other than remind jurors that the burden of proof is on the State to prove [the d]efendant['s] participation"; however, the jury voir dire and opening statements are omitted from the record on appeal. The defendant, as the appellant, bore the burden to prepare an adequate record for appellate review, *see State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993), and, in the absence of an adequate record, this court must presume the trial court's ruling was correct, *see State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993).

III. Sufficiency of the Evidence

The defendant contends that the State failed to present sufficient evidence to establish that he was present during the commission of the offenses against the victim or that he was criminally responsible for the actions of his co-defendants. We disagree.

We review the defendant's claim of insufficient evidence mindful that our standard of review is whether, after considering 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. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (superseded on other grounds); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

When examining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* Questions concerning the credibility of the 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. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id*.

As relevant to this case, aggravated robbery is "robbery as defined in § 39-13-401 . . . 'accomplished 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." T.C.A. § 39-13-402(a)(1). "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." *Id.* § 39-13-401. "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." *Id.* § 39-14-103(a). A deadly weapon is defined as "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or . . . [a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 39-11-106(a)(5).

Especially aggravated kidnapping is "false imprisonment, as defined in § 39-13-302 . . . [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." *Id.* § 39-13-305(a)(1). "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).

Moreover, "[a] person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." *Id.* § 39-11-401(a). Criminal responsibility for the actions of another arises when the defendant, "[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 person solicits, directs, aids, or attempts to aid another person to commit the offense." *Id.* § 39-11-402(2); *see State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999) ("As reflected in this case, criminal responsibility is not a separate, distinct crime. It is solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person.").

The State's evidence established that the defendant drove Mr. O'Neal and Mr. Young to 935 Isabelle Street to rob a pizza delivery man. In Statement III, given on March 26, 2015, the defendant admitted that Mr. O'Neal and Mr. Young asked the defendant to drive them to Isabelle Street in order for them to "rob the pizza man cause [Mr. O'Neal's] favorite food is pizza and they wanted some." Mr. O'Neal and Mr. Young robbed the victim of pizza and cash at gunpoint and forced him into the trunk of his car. Mr. O'Neal drove the victim's car, with the victim in the trunk, to the rear of the house. The defendant then drove Mr. O'Neal and Mr. Young away from the scene. By the defendant's own admission, he was present during the commission of the offenses, and he agreed to serve as the driver with full knowledge that Mr. O'Neal and Mr. Young intended to commit robbery. On these facts, a rational trier of fact could have found beyond a reasonable doubt that the defendant aided Mr. O'Neal and Mr. Young with the intent to assist them in committing the charged offenses. Accordingly, the evidence is sufficient to support a jury determination that the defendant was criminally responsible for the acts of Mr. O'Neal and Mr. Young and thus guilty of especially aggravated kidnapping and aggravated robbery.

Conclusion

Accordingly, the judgments of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE