IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs at Knoxville November 17, 2015

STATE OF TENNESSEE v. DOUGLAS KINCAID

Appeal from the Circuit Court for Madison County
No. 14451 Roy B. Morgan, Jr., Judge

No. W2015-00689-CCA-R3-CD - Filed January 28, 2016

Appellant stands convicted of possession with the intent to sell not less than one-half ounce but not more than ten pounds of marijuana, a Class E felony; possession with intent to sell a schedule IV controlled substance,[1] a Class D felony; possession of a firearm with the intent to go armed during the commission of a dangerous felony,[2] a Class D felony; and possession of drug paraphernalia, a Class A misdemeanor. The trial court imposed partially consecutive sentences, for an effective sentence of five years. On appeal, appellant argues that: (1) the evidence was insufficient to support his possession of tramadol conviction and his firearm conviction; (2) the trial court erred in admitting into evidence the photographs and text messages from appellant's cellular telephone; and (3) the trial court erred in allowing witnesses to testify regarding appellant's oral statement to police. Following our review of the record and the applicable law, we affirm the judgments of the trial court.

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

ROGER A. PAGE, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and ROBERT H. MONTGOMERY, JR., JJ., joined.

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[1] The substance was tramadol.

[2] Tennessee Code Annotated section 39-17-1324(i)(1)(L) states that a dangerous felony includes a "felony involving the sale, manufacture, distribution or possession with intent to sell, manufacture or distribute a controlled substance or controlled substance analogue defined in part 4 of this chapter." The dangerous felony during which petitioner possessed a firearm was possession of not less than one-half ounce but not more than ten pounds of marijuana with the intent to sell or deliver. *See* Tenn. Code Ann. § 39-17-417(g)(1).

George Morton Googe, District Public Defender; and Jeremy B. Epperson, Assistant District Public Defender, for the Appellant, Douglas Kincaid.

Herbert H. Slatery III, Attorney General and Reporter; Lacy Wilber, Senior Counsel; James G. (Jerry) Woodall, District Attorney General; and Rolf G. S. Hazlehurst, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

This case concerns the discovery of marijuana, a loaded 9mm handgun, two hydrocodone tablets, and twenty-seven tramadol tablets at appellant's residence. Due to the discovery of these items, appellant was indicted for possession with the intent to sell not less than one-half ounce but not more than ten pounds of marijuana, possession with the intent to deliver not less than one-half ounce but not more than ten pounds of marijuana, unlawful possession of hydrocodone,[3] possession with intent to sell a schedule IV controlled substance, possession with intent to deliver a schedule IV controlled substance, unlawfully possessing a legend drug without a written prescription,[4] two counts of possession of a firearm with the intent to go armed during the commission of a dangerous felony, and possession of drug paraphernalia. Appellant's trial took place on February 2, 2015.

I. Facts

Metro Narcotics Investigator Tikal Greer testified that due to information received from a confidential informant, on February 11 and 14, 2014, officers conducted surveillance of appellant's residence. Numerous vehicles were observed stopping at appellant's home for short periods of time. Occupants of the vehicles had brief conversations with appellant, and the vehicles left within a "couple of minutes." Investigator Greer opined that this repeated sequence of events indicated drug transactions. Based on this information, the officers obtained a search warrant for appellant's residence. On February 18, 2014, Investigator Greer and other officers executed the search warrant. Investigator Greer explained that he and the other officers were looking for "controlled substances, marijuana, books, ledgers, texts, papers, [and] electronic media." When officers entered appellant's residence, appellant was located in

[3] Appellant was initially indicted for possession with the intent to sell hydrocodone and possession with intent to deliver hydrocodone; however, prior to trial, the State amended the indictment to the lesser offense of unlawful possession of hydrocodone.

[4] The trial court granted appellant's motion for judgment of acquittal regarding his unlawfully possessing a legend drug without a written prescription; therefore, this count was not submitted for the jury's consideration. As such, we have not included the facts relevant to this charge.

the hallway on the bottom floor, and his father was on a couch near the entryway. Officers found 683.4 grams of marijuana, some of which was packaged in small amounts, during the search. Most of the marijuana was located in an attached utility shed. Investigator Greer opined that the individually wrapped bags were significant because it indicated that the marijuana was packaged for resale. Officers also found numerous prescription tablets, digital scales, baggies, a bulletproof vest, marijuana stems and seeds, approximately $900, and a loaded Smith & Wesson 9mm handgun. Investigator Greer explained that two hydrocodone tablets were found on a shelf in the kitchen and twenty-seven tramadol tablets were found in the utility shed with the marijuana. The officers also found gallon-sized baggies in a closet with the washer and dryer and two Mason jars on the shelf in kitchen; both the baggies and Mason jars had marijuana residue inside. Investigator Greer explained that this was significant because sellers normally packaged marijuana in baggies for resale and that individuals often kept marijuana in Mason jars in an attempt to contain the marijuana's odor.

Investigator Greer testified that he examined appellant's cellular telephone and downloaded several text messages and photographs from the telephone. One of appellant's incoming text messages read, "'What's up? What you[sic] charge for a half a ounce?'" Appellant responded to the message, "'55.'" Investigator Greer explained that this conversation indicated that appellant sold half of an ounce of marijuana for $55 and opined that this information was consistent with the street value for marijuana at the time. Investigator Greer also testified regarding numerous other similar text messages in which individuals asked for various amounts of marijuana or "a blunt." Other text messages revealed that appellant bought half of a pound of marijuana from a supplier for $625. Investigator Greer also explained that in some incoming text messages, individuals asked for prescription tablets. Numerous photographs were also found on appellant's cellular telephone, some of which depicted "the gun and magazine loaded with ammo." Other pictures portrayed marijuana, the Mason jars, money, and a gun; these pictures were uploaded to Instagram, an online social networking service for sharing photographs. Investigator Greer explained that the Smith & Wesson 9mm handgun was found in an upstairs bedroom that was shared by appellant and his sister. The weapon was found loaded with a bullet in the chamber. Investigator Greer opined that this was the same weapon that appeared in appellant's photographs on his cellular telephone and Instagram page.

On February 19, 2014, Investigator Greer and Investigator Smith interviewed appellant. They informed appellant of his *Miranda* rights, and appellant signed a *Miranda* waiver. During the interview, appellant asserted that the 9mm handgun did not belong to him but that it might have his fingerprints on it because he had handled it in the past. Appellant alleged that the gun belonged to a friend who had left the weapon at appellant's home, but appellant refused to identify his friend.

During cross-examination, Investigator Greer stated that appellant, his sister, his father, and several children all lived in the residence in question. Investigator Greer initially asserted that the tramadol tablets were found in a "little cigarette plastic bag," but after locating a specific photograph, he stated that the tramadol tablets were found "in a glass container." Investigator Greer explained that the handgun was found in the upstairs, master bedroom in a closet. Investigator Greer agreed that during the search, approximately thirty baseball hats, twenty-one pairs of shoes, two pairs of socks, clothes, belts, a bulletproof vest, and a television were confiscated from a downstairs storage area. Investigator Greer agreed that no drugs were found in the toilet and that there was nothing on fire when officers entered appellant's residence, even though based on recovered text messages, appellant knew the officers were outside his home. Investigator Greer conceded that he did not record or document in any report his conversation with appellant about the handgun.

Investigator Andrew Smith, a deputy sheriff assigned to the Metro Narcotics Unit, testified that he participated in the search of appellant's home on February 18, 2014. Investigator Smith explained that he discovered the marijuana and tramadol tablets in the utility shed. Investigator Smith could not remember if the tramadol tablets had been in a container, but he recalled that the tablets had been wrapped in "cigarette cellophane." Investigator Smith was also present for appellant's interview. Investigator Smith's testimony regarding the interview was substantially similar to Investigator Greer's testimony. Investigator Smith agreed that he would have referenced the interview in his report had he been the lead investigator.

Special Agent Shalandus Garrett, a forensic scientist for the Tennessee Bureau of Investigation, testified that she tested plant material and multiple tablets. She found 83.02 grams of marijuana, two tablets of hydrocodone, and twenty-seven tablets of tramadol. She did not perform testing on additional plant material weighing 594.04 grams, even though she asserted that it was the same substance as the marijuana, because she recognized that it would not reach or exceed the amount necessary for prosecution under the next higher level offense.

Appellant's first witness was his sister, Bridgette Perry. She explained that on February 18, 2014, her brother was staying in her home. Ms. Perry asserted that appellant did not have a bedroom and that he slept in a recliner in the downstairs living room. Ms. Perry stated that she and her daughters slept in the upstairs bedrooms. Ms. Perry agreed that both her father and her brother stored items in her closet and in a downstairs closet but asserted that she was the only person to keep items in the outdoor utility shed. Ms. Perry agreed that Danny Neidig had been in her home around February 18. During cross-examination, Ms. Perry denied owning the gun found in her closet or the marijuana found in her utility shed. During re-direct examination, Ms. Perry asserted that the gun belonged to Mr. Neidig.

Clint Daniel "Danny" Neidig testified that he knew appellant through Ms. Perry. Mr. Neidig agreed that he owned a Smith & Wesson 9mm handgun and that he left the handgun in Ms. Perry's closet because he was going out drinking and did not want to carry it with him. During cross-examination, Mr. Neidig stated that he had purchased marijuana from appellant "once or twice before." Mr. Neidig asserted that he left the gun at Ms. Perry's home the weekend prior the search and that he left the gun in the corner of the closet floor in a Crown Royal bag with "[t]wo clips" of 9mm bullets. Mr. Neidig did not know how a picture of his gun got onto appellant's cellular telephone or Instagram page.

Whitney Griffin, appellant's wife, testified that on February 18, 2014, appellant was living with his sister and that she had stored some tramadol at the residence because she stayed there periodically. Ms. Griffin explained that she had the tramadol due to complications after giving birth to her son. She stated that it was her tramadol that was seized in the search of appellant's home and that the tramadol was in a prescription bottle. During cross-examination, Ms. Griffin testified that the marijuana belonged to appellant. During re-direct examination, Ms. Griffin asserted that the handgun belonged to Mr. Neidig.

Following this testimony, the State recalled Investigator Greer, who testified that his analysis of appellant's cellular telephone revealed that the photograph of the 9mm handgun was taken on January 3, 2014, even though Mr. Neidig claimed that the handgun was left at appellant's home around February 13 or 14, 2014, the weekend prior to the search. Investigator Greer also testified that the gun was not located in a purple Crown Royal bag in the floor of the closet but rather on the top shelf in the closet in a blue "little gun bag" inside of a box. Investigator Greer asserted that there was only one magazine, not two, and that the magazine was loaded in the gun.

The jury subsequently found appellant guilty of all counts except for the unlawful possession of hydrocodone. After the trial court merged all relevant convictions, appellant stands convicted of possession with the intent to sell not less than one-half ounce but not more than ten pounds of marijuana, possession with intent to sell a schedule IV controlled substance, possession of a firearm with the intent to go armed during the commission of a dangerous felony, and possession of drug paraphernalia. Appellant now appeals from his convictions.

II. Analysis

Appellant argues that the evidence was insufficient to support his possession of a schedule IV controlled substance with intent to sell conviction and his firearm conviction, that the trial court erred in admitting into evidence the photographs and text messages

from appellant's cellular telephone due to a violation of Tennessee Rule of Criminal Procedure 16, and that the trial court erred in allowing witnesses to testify regarding appellant's oral statement to police due to a violation of Tennessee Rule of Criminal Procedure 16.

A. Sufficiency of the Evidence

The standard for appellate review of a claim challenging the sufficiency of the State's evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)); *see* Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). To obtain relief on a claim of insufficient evidence, appellant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

On appellate review, "'we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" *Davis*, 354 S.W.3d at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). This court presumes that the jury has afforded the State all reasonable inferences from the evidence and resolved all conflicts in the testimony in favor of the State; as such, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *Dorantes*, 331 S.W.3d at 379; *Cabbage*, 571 S.W.2d at 835; *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Because a jury conviction removes the presumption of innocence that appellant enjoyed at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the State to the convicted appellant, who must demonstrate to this court that the evidence is insufficient to support the jury's findings. *Davis*, 354 S.W.3d at 729 (citing *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)).

It is a criminal offense to possess tramadol, a Schedule IV controlled substance, Tenn. Code Ann. § 39-17-412(c)(51), with the intent to sell or deliver. Tenn. Code Ann. § 39-17-417(a)(4). It is also illegal to possess a firearm during the commission of or attempt to commit the possession of not less than one-half ounce but not more than ten

pounds of marijuana with the intent to sell or deliver. Tenn. Code Ann. §§ 39-17-417(g)(1), -1324(i)(1)(L).

Appellant argues that the evidence was insufficient to support his conviction for possessing tramadol, a schedule IV controlled substance, with the intent to sell because Ms. Griffin claimed ownership of the tramadol. Appellant further argues that the evidence was insufficient to support his firearm conviction because Mr. Neidig claimed ownership of the handgun and because the handgun was not located near appellant or the other contraband found during the search. However, both of appellant's arguments rest almost solely on the credibility of Ms. Griffin's and Mr. Neidig's testimony at trial. In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. *Bland*, 958 S.W.2d at 659; *Pruett*, 788 S.W.2d at 561. In finding appellant guilty of the charged offenses, the jury discredited these two witnesses' testimony regarding ownership of the contraband. The jury heard testimony regarding Ms. Griffin's close relationship with appellant and heard the conflicting testimony between Investigator Greer and Ms. Griffin's testimony regarding how the tablets were packaged. Furthermore, the jury heard testimony that the tramadol and the marijuana, to which Ms. Griffin and Mr. Neidig attributed ownership to appellant, were both found in the utility shed. The jury also heard conflicting testimony regarding the gun's location and storage in the closet. Mr. Neidig asserted that he placed the gun in the corner of the closet floor in a Crown Royal bag with two "clips." However, Investigator Greer explained that the gun was found on the top shelf of the closet in a blue "little gun bag" inside of a box with only one magazine, which was loaded into the handgun. Furthermore, Mr. Neidig asserted that the handgun was left at appellant's residence on the weekend prior to the search on February 18, 2014; however, Investigator Greer explained that analysis of the photograph from appellant's cellular telephone revealed that appellant had photographed the handgun on January 3, 2014, and subsequently uploaded the photograph to his Instagram page. Given this testimony, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *Dorantes*, 331 S.W.3d at 379.

Regarding appellant's argument that the evidence was insufficient to support his firearm conviction because the firearm was not located in his vicinity or near the other contraband found during the search, appellant cannot prevail on his claim. There are two types of possession—actual and constructive. Our supreme court has defined constructive possession as when one "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons." *State v. Edmondson*, 231 S.W.3d 925, 928 (Tenn. 2007) (citation omitted). At trial, Investigator Greer testified that he recovered a photograph from appellant's cellular telephone in which there was cash next to the handgun. Investigator Greer explained that the Smith & Wesson 9mm handgun was found in an

upstairs bedroom that was shared by appellant and his sister. The weapon was found loaded with a bullet in the chamber. Considering this testimony in the light most favorable to the State, there was sufficient evidence to show that appellant was in constructive possession of the handgun.

Furthermore, there was sufficient evidence that appellant possessed the gun while he was selling marijuana.[5] Ms. Griffin stated that the marijuana recovered at the residence belonged to appellant, and Mr. Neidig testified that he had bought marijuana from appellant in the past. Furthermore, Investigator Greer produced numerous text messages that revealed others asking appellant for various amounts of marijuana and appellant's discussing a bulk purchase of marijuana for $625. These text messages were dated from February 12 through February 18, 2014, which was after the appellant's January 3, 2014 picture of the handgun. Therefore, considering the evidence in the light most favorable to the prosecution, there was sufficient evidence to support appellant's conviction for possession of a firearm during the commission of a dangerous felony.

B. Tennessee Rule of Criminal Procedure 16

Tennessee Rule of Criminal Procedure 16(a) provides the procedure for the State to disclose evidence to a defendant upon the defendant's request, stating:

> a) Disclosure of Evidence by the State.
>
> (1) *Information Subject to Disclosure.*
>
> (A) Defendant's Oral Statement. Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;
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> . . . .
>
> (F) Documents and Objects. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state's possession, custody, or control and:

[5] Possessing marijuana with the intent to sell qualifies as a dangerous felony pursuant to Tennessee Code Annotated section 39-17-1324(i)(1)(L).

> (i) the item is material to preparing the defense;
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> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

Rule 16(c) explains:

> A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney, or the court if:
>
> (1) the evidence is subject to discovery or inspection under this rule, and
>
> (2) the other party previously requested, or the court ordered, its production.

Rule 16(d) states that in the event a party fails to comply with Rule 16, a trial court may

> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;
>
> (B) grant a continuance;
>
> (C) prohibit the party from introducing the undisclosed evidence; or
>
> (D) enter such other order as it deems just under the circumstances.

"A trial court has wide discretion in fashioning a remedy for non-compliance with a discovery order, and the sanction should fit the circumstances of the case." *State v. Downey,* 259 S.W.3d 723, 737 (Tenn. 2008).

i. Photographs and Text Messages

At trial, appellant objected to the admission of photographs and text messages that were found on appellant's cellular telephone, alleging that they were not produced by the state during discovery in violation of Rule 16. The prosecutor explained that the photographs and text messages were in the investigating officer's file and that the prosecutor was unaware of the items until the morning of trial. The prosecutor explained that it was the office's policy to refer defense counsel to the law enforcement file because their file may be incomplete. Defense counsel stated that he did not attempt to retrieve the investigator's file because he had been denied access in the past. In overruling

appellant's objection, the trial court stated that appellant was aware that his cellular telephone had been seized and was subject to search and that defense counsel was aware of the local discovery policy.

We note that the items were "within the state's possession, custody, or control" when they were in the officer's file. *State v. Goodman*, 643 S.W.2d 375, 379 (Tenn. 1982) ("When the state utilizes the facilities of the F.B.I. Laboratory for various scientific tests, the F.B.I. is an agent for the State of Tennessee, and reports in its possession are in the state's possession for the purposes of Rule 16(a)(1)(D)."); *State v. Thomas Dee Huskey*, No. E1999-00438-CCA-R3-CD, 2002 WL 1400059, at *63 (Tenn. Crim. App. June 28, 2002) (stating that reports in the possession of the Federal Bureau of Investigation and Tennessee Bureau of Investigation were in the State's possession under Rule 16). Furthermore, the State has a continuing duty to provide defendants with discovery before and during trial. *See* Tenn. R. Crim. P. 16(c). However, this court has also stated that "[t]he state is not obliged to furnish the appellant with information, evidence, or material which is available or accessible to him or which he could obtain by exercising reasonable diligence." *State v. Dickerson*, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993). Therefore, it is not a violation of Rule 16 if the State tells a defendant where information can be found and the defendant fails to take steps to obtain the information. "Under such circumstances, some responsibility must be placed upon a defendant . . . to adequately investigate." *State v. Gilford E. Williams*, No. W1999-01556-CCA-R3-CD, 2001 WL 43176, at *5 (Tenn. Crim. App. Jan. 17, 2001); *see also State v. Steven Lee Whitehead*, No. W2000-01062-CCA-R3-CD, 2001 WL 1042164, at *15 (Tenn. Crim. App. Sept. 7, 2001), *appeal granted and cause remanded for consideration on other grounds*, No. W2002-00484-CCA-RM-CD, 2002 WL 1426542 (Tenn. Crim. App. June 27, 2002) ("[A]bsent evidence that the State's invitation to defense counsel to visit the TBI laboratory in Nashville was a tactic designed to hinder the appellant's discovery of material evidence or otherwise harass the appellant, it was indeed the responsibility of defense counsel to visit the laboratory and thereby obtain the requested information.").

We conclude that any error committed by the State in failing to provide appellant with the photographs and text messages was harmless. Tennessee Rule of Appellate Procedure 36(b) states, "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Therefore, appellant is only entitled to relief if the discovery violation affected the judgment or resulted in prejudice to the judicial process. *See State v. Caughron*, 855 S.W.2d 526, 539 (Tenn. 1993). Defense counsel conceded that the defense was aware appellant's cellular telephone had been seized and that he was not surprised that the telephone contained text messages and photographs. Furthermore, appellant has failed to show how he was prejudiced by the discovery delay. Defense counsel was able to thoroughly cross-examine Investigator Greer and even used some of

the text messages to show that although appellant was aware that officers were outside his home, he did not attempt to dispose of the illegal substances. Therefore, because appellant has failed to show that he was prejudiced by the delay in discovery, any error was harmless. Appellant is not entitled to relief on this issue.

ii. Testimony Regarding Appellant's Statement

Appellant also objected to the introduction of Investigator Greer's testimony regarding an oral statement made by appellant during an interrogation because the statement had not been provided during discovery pursuant to Rule 16(a)(1)(A). Again, the prosecutor asserted that he was unaware of the statement until the morning of trial and explained that the statement was never reduced to writing. The prosecutor stated that there was a *Miranda* waiver in Investigator Greer's file but that the waiver was not in the prosecutor's file that defense counsel copied. Defense counsel stated that he did not attempt to retrieve the investigator's file because he had been denied access in the past. In overruling appellant's objection, the trial court stated that he knew of no law requiring law enforcement to reduce each statement to writing and that appellant was aware that he had given an oral statement.

Rule 16(a)(1)(A) requires that "the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial." This provision is separate from Rule 16(a)(1)(B) that requires the State to produce a defendant's written or recorded statement. Therefore, while the trial court was correct that there is not a duty to reduce each oral statement to writing, it is clear that Rule 16 places a duty on the State to in some way inform appellant of the substance of an oral statement. This court stated in *State v. Hicks*, 618 S.W.2d 510 (Tenn. Crim. App. 1981), that there is no duty on a defense attorney to seek out an officer to obtain information about a client's statement. *Id.* at 514. Instead, "[o]nce the Rule 16(a)(1)(A) request [is] made, the burden was on the Assistant District Attorney to use reasonable diligence prior to and during the trial to discover the existence of a statement and to provide the defendant with an opportunity to inspect and copy it." *Id.* at 514. Of course, unlike in *Hicks*, the investigating officer in the instant case did not reduce appellant's oral statement to writing and did not transcribe any type of summary of the statement; however, the investigator's file contained a *Miranda* waiver, which would have informed the State and defense counsel that appellant had been interviewed by the police. The State failed to discover this waiver or the substance of appellant's oral statement until the day of trial and add it to the State's file; therefore, it was never provided to appellant as discovery.

However, considering the facts in this case, we conclude that any error committed by the State in failing to provide appellant with the substance of his oral statement was

harmless. As stated above, appellant is only entitled to relief if the discovery violation affected the judgment or resulted in prejudice to the judicial process. *See Caughron*, 855 S.W.2d at 539. As the trial court stated, appellant was aware that he had provided law enforcement with an oral statement; therefore, the substance of the statement could not have been a surprise to him. Furthermore, the substance of the oral statement that was introduced at trial was appellant's assertion that the handgun found at the residence did not belong to him. All three of the defense witnesses testified similarly, stating that the handgun belonged to Mr. Neidig. Therefore, it is clear that appellant's presentation of his defense was in no way affected by learning of the substance of the oral statement on the day of trial. Therefore, because appellant has failed to show that he was prejudiced by the delay in discovery, any error was harmless. Appellant is not entitled to relief.

CONCLUSION

Based on the parties' briefs, the record, and the applicable law, we affirm the judgments of the trial court.

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ROGER A. PAGE, JUDGE