IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 27, 2001 Session

STATE OF TENNESSEE v. STEVEN JAMES MCCAIN

Direct Appeal from the Criminal Court for Davidson County
No. 98-D-2520 J. Randall Wyatt, Jr., Judge

No. M2000-02989-CCA-R3-CD - Filed May 22, 2002

The appellant, Steven James McCain, was convicted by a jury in the Criminal Court of Davidson County of two counts of first degree premeditated murder. He received two consecutive sentences of life imprisonment with the possibility of parole. On appeal, the appellant raises the following issues for our review: (1) whether the trial court erred in denying the appellant's "Motion to Suppress Identifications Made During an Unconstitutional Photographic Line-Up Procedure"; (2) whether the trial court erred in denying the appellant's "Motion to Suppress Defendant's Statements"; (3) whether the trial court erred in admitting the audio-tape-recorded statement of Chad Collins; (4) whether the trial court erred in overruling the defense request for a mistrial when the prosecution improperly argued that the jury should consider Chad Collins' statement as substantive evidence at trial; and (5) whether the evidence was sufficient to support his convictions. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Dwight E. Scott, Karl F. Dean, Wendy S. Tucker, and Jodie A. Bell, for the appellant, Steven James McCain.

Paul G. Summers, Attorney General and Reporter; Patricia C. Kussmann, Assistant Attorney General; Victor S. (Torry) Johnson, District Attorney General; and Katrin Novak Miller and Bret T. Gunn, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At trial, the State presented proof that, on April 25, 1998, the appellant met Phillip Leslie at the home of a mutual acquaintance, Sally Ann Smith. Leslie only knew the appellant as "Steve." Leslie drank beer and played poker for a little while and then decided to leave Smith's

residence. The appellant asked Leslie to give him a ride home and Leslie agreed. On the way, Leslie stopped and purchased beer and cigarettes at an Exxon station. Also during the ride, the appellant mentioned that he needed to use the telephone, so they went to the nearby home of Leslie's mother.[1] While there, the appellant spent considerable time on the telephone. Some time later, Leslie fell asleep. The appellant revealed at trial that, during the course of his telephone calls, he discovered that a man named Reginald M. Conwell had taken some cocaine from Tina Bryant, a woman who was selling the cocaine for the appellant.

The next morning, Leslie awoke and found the appellant asleep on the couch. He informed the appellant that it was time to leave. The appellant asked Leslie to take him to "see Fonzie," directing Leslie to 2312 Shadow Lane in Madison. Once they arrived at the residence, the appellant retrieved his jacket from the rear portion of the extended cab of Leslie's truck. Leslie noticed that the appellant was hiding a sawed-off .22 caliber rifle underneath the jacket. The appellant walked toward the residence and instructed Leslie to follow him and to "watch his back." Leslie complied because "I've learnt that you don't argue with a man with a gun."

Conwell answered the door of the residence in response to the appellant's knock. The appellant entered the residence and asked Conwell, "How come you got my sh**?"[2] The two men started arguing. Leslie maintained at trial that another man, Malbourne Angiers,[3] also known as "Twango," was laying on the couch asleep during the altercation. Conwell told the appellant, "Go ahead and pop a–pop a cap at me. I'm ready to die." After the statement, the appellant shot Conwell four times with the rifle.

Leslie left the residence after the first shots were fired. He walked back to his truck,[4] and, on the way, he heard several more shots fired. The appellant exited the house and got in Leslie's truck. Leslie asked the appellant if he had killed anyone. The appellant told Leslie that, "I had to kill–I killed them both. I had to." The appellant further ordered Leslie not to "snitch him out" or the appellant would kill Leslie and burn his mother's house.

The appellant instructed Leslie to drop him off in front of a "large, white brick house" at 151 Oak Valley Drive. The appellant exited the truck with the gun under his coat and walked toward the rear of the house. Leslie left and returned to his mother's house. Over the course of the next one or two hours, he drank approximately twelve beers. However, Leslie asserted that he did not become intoxicated by the alcohol. Leslie then called the police and informed them that he may have witnessed a murder.

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[1] Leslie's mother was out of town at a church camp at this time.

[2] The appellant was apparently referring to the stolen cocaine.

[3] In the record, Angiers' first name is also spelled "Melbourne."

[4] Leslie explained that, due to health problems, he was unable to run.

Melinda Daugherty testified at trial that, on the morning of the murders, she went with three companions to 2312 Shadow Lane to "see who all was there and to use the phone." Although no one answered her knock, Daugherty went inside the house by herself. She saw Angiers laying on the couch and thought he was asleep because he sounded like he was snoring. While she was using the telephone, Daugherty noticed that Angiers had been shot. Daugherty yelled for her companions to come into the house, and they discovered Conwell's body lying face down in the kitchen. She then called 911 and notified the authorities that Conwell was dead and Angiers needed medical attention. Angiers died approximately twenty-one hours after the shooting.

Detective Brad Putnam with the Metropolitan Nashville Police Department ("Metro") went to Leslie's mother's house to interview Leslie. He then took Leslie to the Criminal Justice Center ("CJC") in order to tape record Leslie's statement. While at the CJC, Detective Putnam showed Leslie a photographic lineup, but Leslie was unable to identify anyone in that lineup as the perpetrator.

During the interview, Leslie revealed that the perpetrator, whom he knew as "Steve," had been in his truck that morning. Accordingly, Detective Putnam requested that the Metro Identification Unit retrieve fingerprints from the passenger side of Leslie's truck. The fingerprints obtained revealed that the appellant had been a passenger in Leslie's truck. Additionally, the police questioned Wanda Key, a resident at 151 Oak Valley Drive, and she revealed that her sons, KaRon Key and Jamal Cooper, had a friend named Steven McCain. Based upon this information, Detective Putnam included the appellant's picture in another photographic lineup, which he brought to Leslie's mother's house. Upon seeing this lineup, Leslie "almost immediately" identified the appellant as the perpetrator. Subsequently, the gun used in the murders was discovered in a crawl space behind Key's house at 151 Oak Valley Drive.

The appellant testified that at the time of the offense he was on parole for aggravated robbery. He admitted that, upon his release from incarceration, selling cocaine was his primary source of income. The appellant claimed that, on April 25, 1998, he and Leslie were at Smith's house. He asked Leslie to drive him around to make drug sales, and in return the appellant promised to give Leslie cocaine. The appellant maintained that Leslie agreed and took the appellant to several addresses, including the house at 151 Oak Valley Drive. The appellant alleged that Leslie used cocaine on several occasions that night. According to the appellant, he and Leslie went to Leslie's mother's house so the appellant could use the telephone. The appellant related that Bryant called and "told me that Reggie Conwell has took the drugs that I had gave to her. . . . I asked her why did he take it and where was he at?" Later that night, Conwell talked to the appellant and acknowledged that the cocaine he had taken from Bryant belonged to the appellant, stating that he would pay for the cocaine and buy additional cocaine from the appellant the next morning.

According to the appellant, he and Leslie slept until daybreak and then went to 2312 Shadow Lane. The appellant alleged that Conwell paid for the cocaine obtained the night before and bought more cocaine from the appellant. For no apparent reason, Conwell then became enraged. The appellant noticed a sawed-off .22 caliber rifle on the loveseat in the living room of Conwell's

house. The appellant said that, when Conwell moved toward the gun, the appellant also moved for the gun and grabbed it first. At this point, Leslie exited the house, and the appellant turned to see what was happening. While his head was turned, Conwell lunged toward the appellant, and, in reaction, the appellant fired at Conwell. The appellant then dropped the gun and fled. The appellant admitted that he told Leslie that he had killed Conwell but asserted at trial that he was not sure that Conwell was dead when he left the residence. The appellant denied that there was anyone else in the house at the time of the shooting.

The appellant maintained that he instructed Leslie to leave him near a bowling alley on Oak Valley Drive because he did not want Leslie to know where he was going. The appellant walked to 151 Oak Valley Drive, woke Jamal Cooper, and Cooper drove the appellant to "Auntie's." From there, the appellant attended the funeral of a family member. A few hours later, the appellant learned that the police were looking for him. He fled to Alabama where he was later discovered by officers with the Athens, Alabama Police Department. The appellant gave a brief statement to the Alabama police before being picked up by Metro officers.

In further support of his defense, the appellant called Chad Collins as a witness at trial. Collins maintained that, on a night in May after the shooting, he was with Leslie in Leslie's truck. Collins alleged that Leslie became "teary-eyed" and confessed to dropping off the appellant, returning to 2312 Shadow Lane for the cocaine, and therein killing the two men. In rebuttal, the State presented a previously taped statement of Collins in order to impeach parts of his testimony. The detective who took Collins' statement agreed that, at the time Collins made the statement, Collins "was either really tired or on something."

Upon hearing this proof, a jury in the Davidson County Criminal Court found the appellant guilty of the first degree premeditated murders of Conwell and Angiers. The jury sentenced the appellant to life imprisonment with the possibility of parole for both offenses. The trial court ordered the life sentences to be served consecutively. The appellant now appeals, raising issues regarding the admission of the photographic lineup identification, the admission of statements the appellant made to police in Athens, Alabama, the admission of the audio-taped statement of Collins, and the sufficiency of the evidence.

II. Analysis

A. Motion to Suppress Photographic Lineup

While the appellant cites authority concerning whether a lineup is suggestive, he essentially argues that the trial court erred in admitting testimony concerning Leslie's identification of the appellant in a photographic lineup because Leslie consumed approximately twelve beers some hours before viewing the lineup. The appellant contends that Leslie's identification of the appellant was unreliable and therefore inadmissible.

We begin by noting that our supreme court has stated that "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Nevertheless, this court will review the trial court's

application of law to the facts purely de novo. State v. Walton, 41 S.W.3d 75, 81 (Tenn.), cert. denied, __ U.S. __, 122 S. Ct. 341 (2001). Moreover, "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

"The rule is that constitutional due process is violated if a pretrial identification is influenced by suggestiveness by police officers to such degree as to render the identification unreliable." State v. Shanklin, 608 S.W.2d 596, 598 (Tenn. Crim. App. 1980). Tennessee courts have adopted the five factors suggested in Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382 (1972), in determining whether an identification is sufficiently reliable to withstand a due process attack despite a suggestive lineup:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty of the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Shanklin, 608 S.W.2d at 598; see also Bennett v. State, 530 S.W.2d 511, 514 (Tenn. 1975). Moreover, if a court using the Biggers standard determines that a pretrial confrontation was so impermissibly suggestive that it violated an accused's right to due process, both the out-of-court and in-court identifications are excluded. Shanklin, 608 S.W.2d at 598.

We note that the appellant does not specifically argue that any of the photographic lineups shown to Leslie were unduly suggestive, nor does he argue that the police in any way indicated that Leslie should pick the appellant's photograph from the lineup. See State v. Howell, 672 S.W.2d 442, 445 (Tenn. Crim. App. 1984). Based upon our review of the record, we conclude that the lineups were not suggestive. In making this determination, we first observe that Leslie asserted that he spent approximately eight hours with the appellant. The two were often alone, enabling Leslie to observe the appellant without distraction. Furthermore, Leslie contended that he was not intoxicated during the hours he spent with the appellant. Upon initial questioning by the police, Leslie described the appellant as "a black man . . . [a]pproximately five-ten, six foot" whose name is "Steve."[5] The proof reveals that Leslie viewed the photographs on the same day as the murders. See Shanklin, 608 S.W.2d at 599. At the suppression hearing, Leslie also maintained that the police never suggested that he select a certain photograph. Additionally, even though Leslie was shown at least one other photographic lineup, he identified no one until he saw the appellant's picture. See State v. Blanks, 668 S.W.2d 673, 675 (Tenn. Crim. App. 1984). Both Detective Putnam and Leslie testified that Leslie "immediately almost" identified the appellant as the perpetrator. See State v. Philpott, 882 S.W.2d 394, 400 (Tenn. Crim. App. 1994). Leslie asserted that he was one hundred percent certain of his identification of the appellant. Id. Moreover, even though Leslie admitted drinking approximately a twelve-pack of beer prior to looking at the photographs, both he and Detective Putnam asserted that he was not intoxicated at the time he

[5] We observe that the presentence report reflects that the appellant is a black male who stands 5' 10" tall.

identified the appellant. Accordingly, we find that Leslie's identification of the appellant was sufficiently reliable to be admitted at trial.

B. Appellant's Statement

The appellant also complains that he did not execute a valid waiver of his Miranda rights because he did not sign a written waiver of rights after being advised of those rights by the Athens, Alabama officers. The State contends that the appellant orally waived his Miranda rights and voluntarily talked with the Alabama police. Upon examination of this issue, we agree with the State.

The Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution generally provide a privilege against self-incrimination to individuals accused of criminal activity, thus necessitating our examination of the voluntariness of a statement taken during custodial interrogation. State v. Callahan, 979 S.W.2d 577, 581 (Tenn. 1998). Specifically,

> [i]n order for a confession to be admissible, it must be "freely and voluntarily [made]; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." In determining the admissibility of a confession, the particular circumstances of each case must be examined as a whole.

State v. James Robert Ledford, No. E1999-00917-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 656, at **33-34 (Knoxville, August 28, 2000) (quoting State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996)) (alterations in original). We note that if, prior to making a statement, the police inform the accused of his Miranda rights and the accused proceeds to knowingly and voluntarily waive those rights, the statement is then admissible against the accused due to the valid waiver of the privilege against self-incrimination. Callahan, 979 S.W.2d at 581 (citing Miranda v. Arizona, 384 U.S. 436, 444-445, 479-478, 86 S. Ct. 1602, 1612, 1630 (1966)). Again, in reviewing a trial court's ruling on a motion to suppress, we will uphold the trial court's findings of fact unless the evidence preponderates otherwise. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001).

In determining the validity of a waiver of Miranda rights, "the State need only prove waiver by a preponderance of the evidence. In determining whether the State has satisfied that burden of proof, courts must look to the totality of the circumstances." State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997) (citation omitted). In the course of our examination, we consider the following factors in determining the voluntariness of a confession: the appellant's age; education or intelligence level; previous experience with the police; the repeated and prolonged nature of the interrogation; the length of detention prior to the confession; the lack of any advice as to constitutional rights; the unnecessary delay in bringing the appellant before the magistrate prior to the confession; the appellant's intoxication or ill health at the time the confession was given; deprivation of food, sleep, or medical attention; any physical abuse; and threats of abuse. State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996).

The appellant states that, "[t]hough no case law could be found indicating a hard and fast rule of law that a Miranda waiver must be in writing and signed by the accused, the [a]ppellant invites this [c]ourt to make such a ruling." However, we must decline such an invitation. It is well-established that

> [l]ack of an explicit written waiver of the right to remain silent or the right to counsel after Miranda warnings does not per se require exclusion of a confession if waiver can be found from facts and surrounding circumstances.

State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim. App. 1986); see also North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757 (1979); State v. Robinson, 622 S.W.2d 62, 67 (Tenn. Crim. App. 1980). Even more specifically, this court has observed that "an express written or oral waiver of a defendant's Miranda rights is not necessary to establish a valid waiver." State v. Reginald L. Edmonds, No. 02C01-9708-CC-00334, 1998 Tenn. Crim. App. LEXIS 895, at *15 (Jackson, August 25, 1998); see also State v. Calvin Lee Sneed, No. 03C01-9611-CR-00444, 1998 Tenn. Crim. App. LEXIS 637, at *41 (Knoxville, June 12, 1998) (stating that, "[a]lthough an express written or oral statement of waiver of the right to remain silent is strong proof of the validity of the waiver, it is not necessary").

Officer Brett Constable with the Athens, Alabama Police Department testified that, prior to any questioning, he read the appellant his Miranda rights. On direct examination at the suppression hearing, Officer Constable testified that, "[a]s soon as I asked him if he understood his rights he responded, 'Yeah.' And I said, 'Do you want to talk to me?' And he said, 'Yeah.'" See Ledford, No. E1999-00917-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 656, at **34-35. Additionally, Officer Constable and Detective Christopher Slayton[6] both testified that the appellant appeared to understand his rights. Detective Slayton also asserted that the appellant did not appear to be under the influence of drugs or alcohol when he waived his Miranda rights.

After advising the appellant of his Miranda rights, the officers asked him if he would be willing to talk with Detective Slayton. The appellant stated that he would talk with the detective. Detective Slayton and the appellant went into a room, and Detective Slayton reminded the appellant that he did not have to talk to the police and that he could request an attorney. Prior to any questioning by Detective Slayton, the appellant blurted, "It was self-defense." Detective Slayton then asked the appellant to explain what happened. After describing the scene as he later did at trial, the appellant then informed the detective that he did not want to talk anymore. At that point, Detective Slayton ceased questioning and advised Metro police of the appellant's desire to remain silent when they came to pick up the appellant.

The trial court concluded that the appellant was sufficiently apprised of his rights and that, although a written waiver would be preferable, the evidence nonetheless suggests that the appellant knowingly and voluntarily waived his Miranda rights. In examining the circumstances

[6] In portions of the record, this detective's name is also spelled "Slaton."

surrounding the appellant's statement, we note that the appellant's prior conviction indicates that he has some previous exposure to the criminal justice system. We also observe that, at the time of trial, the appellant was twenty-four years old. Additionally, the conversation between the appellant and Detective Slayton lasted only ten or fifteen minutes and occurred shortly after the appellant's arrival at the Athens, Alabama police station. The appellant was not intoxicated, nor was he ill-treated by the police. Moreover, as we earlier stated, Officer Constable read the appellant his rights and asked the appellant if he understood his rights. Furthermore, prior to the appellant initiating conversation, Detective Slayton reiterated the appellant's right to remain silent and right to an attorney. Accordingly, we conclude that there is nothing in the record before us to preponderate against the trial court's decision. This issue is also without merit.

C. Collins' Statement

The appellant raises several related issues concerning the admission of Collins' audio-taped statement during the State's rebuttal. First, the appellant contends that the State did not lay a proper foundation for the admission of the statement. Second, the appellant argues that he should have been provided a copy of the statement prior to trial. Third, the appellant alleges that the statement was inadmissible because it is inherently unreliable. Finally, the appellant complains that the trial court should have declared a mistrial when the State "improperly argued that the jury should consider . . . Collins[']s statement as substantive evidence at trial."

Collins testified on direct examination that, although he did not know Leslie very well, he was riding in Leslie's truck around May 1, 1998. Leslie and Collins were both smoking crack during the drive. Collins said that Leslie looked at him "kind of teary-eyed" and confessed that "they got the wrong man" for the murders of Conwell and Angiers. Collins asserted that Leslie confessed to returning to 2312 Shadow Lane after dropping off the appellant and further admitted that, during the second visit, he killed Conwell and Angiers while stealing their cocaine.

Collins also testified on direct examination that, on the day of the murders, he went to Conwell's house with "T.J." and Tina Bryant. He stated that, when they got to 2312 Shadow Lane, "[Bryant] got mad and went to walking up the street." He maintained that, to his knowledge, there were no words exchanged between Conwell and Bryant before Bryant left the house. Collins stated that after Bryant walked away he did not see her again that day. He also averred that Angiers was not at the residence when he left Shadow Lane that morning.

On cross-examination, after Collins reiterated that Angiers was not present on the morning of the murders and he did not see Bryant again that day, the following exchange occurred:

> State: Do you remember giving a taped statement to the Detectives later that same day.
> Collins: Yeah, they took me downtown. Yes, they did.
> . . . .
> State: Do you want to change any of your testimony now?
> Collins: (No response.)
> State: You know they taped that statement.

Collins: Right.
State: Do you want to change any of your testimony now?
Collins: What, that she–oh, she banged on the doors?
State: Do you want to change any of your testimony about what happened that morning?
Collins: I'm trying to think of, you know–I don't remember seeing her no more that day.
State: Does your brain injury cause you problems with remembering what happened?
Collins: No. A lot of the dope does, and that's what we was on.

In rebuttal, the State requested and was granted permission to play the audio-taped statement in which Collins gave police his version of events. The audio tape revealed that Collins told police he observed Conwell take Bryant's purse in order to obtain the cocaine that was contained in the purse. After a brief confrontation between Bryant and Conwell, Bryant walked up the street, and Collins saw her banging on doors in the neighborhood trying to get inside. The audio-taped statement also reflects that Collins maintained that Angiers was asleep on the couch when Collins was at 2312 Shadow Lane on the morning of the murders.

1. Admission of Statement

We begin by addressing the admissibility of Collins' statement under Tenn. R. Evid. 613, which rule provides:

> (a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

The appellant argued at trial, and contends on appeal, that Collins was not "afforded an opportunity to explain or deny" the contents of his prior statement. At oral argument, the State conceded that the statement was impermissibly admitted but argued that the error was harmless.

From our review of the record, it is clear that the State did not comply with the mandates of Tenn. R. Evid. 613 and State v. Martin, 964 S.W.2d 564 (Tenn. 1998). NEIL P. COHEN, ET AL., TENNESSEE LAW OF EVIDENCE, § 6.13[5][a] and [b], at 6-138 & 6-139 (Lexis publishing, 4th ed. 2000), explains that

> Rule 613 permits counsel to introduce extrinsic proof of a prior inconsistent statement in certain situations. Ordinarily, counsel must first ask the witness about the witness's prior statement. . . . [Only after] the witness denies or equivocates about the prior statement or does not remember making the prior inconsistent statement, [may] extrinsic proof of the prior statement [be] admissible.
> . . . .
> [Additionally,] [i]f extrinsic evidence of a prior inconsistent statement is to be admitted into evidence, Rule 613 states that the witness must be afforded an opportunity to explain or deny the statement unless the interests of justice otherwise require.

The State only asked Collins if he had made a prior statement and then asked if he would like to change his trial testimony. Collins responded that he had given a statement. However, in answering the broad question of whether he wanted to change his trial testimony, Collins' response was ambiguous. Moreover, he was never specifically questioned about the earlier statement he gave the police. The State, and apparently the trial court, concluded that Collins had "denied" making the statement. However, it is clear that Collins was not afforded an opportunity to admit, deny, or acknowledge that he did not remember the contents of the statement. State v. Wyrick, 62 S.W.3d 751, 788 (Tenn. Crim. App. 2001); State v. Reginald Garner Brown, No. M1999-00002-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 498, at *10 (Nashville, June 23, 2000), perm. to appeal denied, (Tenn. 2000). Accordingly, we conclude that the trial court erred by admitting the contents of Collins' audio-taped statement.

The appellant also alleges that the trial court erred in admitting Collins' statement because the State did not supply the statement during discovery. However, the appellant does not explain how the statement was discoverable. We cannot discern from the record that the State would have been compelled to provide the appellant with a copy of the statement prior to trial. Specifically, Tenn. R. Crim. P. 16(a)(2) explicitly states:

> Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal State documents made by the district attorney general or other State agents or law enforcement officers in connection with the investigation or prosecution of the case, or of statements made by State Witnesses or prospective State Witnesses.[7]

Nor was the statement exculpatory, thus requiring the State to provide it to the appellant under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). See State v Harrison Pearson, No. 03C01-9802-CR-00076, 1999 Tenn. Crim. App. LEXIS 891, at **10-11 (Knoxville, August 31, 1999).

[7] The record indicates that Collins was a prospective State witness; however, the State did not call Collins during its case-in-chief.

Moreover, Collins was not a co-defendant; therefore, his statement was not discoverable under Tenn. R. Crim. P. 26.2. We note that the Committee Comment to Tenn. R. Crim. P. 16 encourages "the voluntary disclosure of evidence not within the ambit of this rule." However, we further observe that, prior to the trial court's introduction of the statement, the appellant was given an opportunity to examine the statement and did not request a continuance. The appellant was not prejudiced by the State's failure to reveal Collins' statement in discovery. Additionally, we note that the appellant did not object on this basis at the trial court level, arguably waiving this issue. See Tenn. R. App. P. 36(a); State v. Thomas J. Faulkner, Jr., No. E2000-00309-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 293, at **21-22 (Knoxville, April 17, 2001), perm. to appeal denied, (Tenn. 2001). Regardless, this issue is without merit.

The appellant further contends that the trial court should have given a curative instruction, limiting the jury's consideration of the prior inconsistent statement for the purpose of evaluating Collins' credibility. However, we observe that the appellant never requested such an instruction. See Tenn. R. Evid. 105; State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000) (stating that a trial court should give a limiting instruction *upon request*). Moreover, regardless of the appellant's failure, the trial court instructed the jury on the proper application of prior inconsistent statements during the final jury instructions. State v. West, 767 S.W.2d 387, 396 (Tenn. 1989); State v. Benjamin Blackwell, Jr., No. 02C01-9712-CC-00469, 1998 Tenn. Crim. App. LEXIS 1313, at **22-23 (Jackson, December 29, 1998); cf. State v. Reece, 637 S.W.2d 858, 861 (Tenn. 1982).

The appellant also argues that it was error for the trial court to admit Collins' statement because it "was inherently unreliable." As proof of the statement's unreliability, the appellant cites the testimony of Detective James Sledge. Detective Sledge, the officer who conducted Collins' interview, indicated that, during the interview, "[Collins] fell asleep more than once. I don't know how many, but more than once," and "[h]e was either really tired or on something." However, as the State correctly argues, Collins' condition during the interview goes to the weight the jury will afford the statement, not to the admissibility of the statement. As the exclusive judges of the weight of the evidence, the jury was entitled to take into account Collins' demeanor on the stand and at the time of the audio recording. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). We will not reevaluate the jury's findings on this issue.

The State contends that, even if the admission of the taped statement was error, that the error was harmless. We agree. The contents of the audio-taped statement, as played for the jury, reflect that Collins mentioned that Conwell stole drugs from Bryant. The appellant himself testified that he knew that Conwell had taken some cocaine from Bryant and that he went to Conwell's house the morning of the murders in order to get payment for that cocaine. See Pyburn v. State, 539 S.W.2d 835, 842 (Tenn. Crim. App. 1976) ("Thus the evidence in the statement in question, if the jury wrongfully considered it, was no more than cumulative."). Moreover, Collins' statement indicated that Angiers was on the couch asleep when Collins was at Shadow Lane. Leslie had also indicated that Angiers was sleeping on the couch when he and the appellant arrived at 2312 Shadow Lane. Id. Additionally, as the State argues, even if Angiers had not been sleeping on the couch

when Collins left, he could have been sleeping on the couch at the time the appellant arrived. The appellant contends that

> [t]he prejudicial effect of allowing into evidence the tape recorded statement of Mr. Collins in rebuttal of his earlier testimony was to deprive the defense of the full force and effect of Mr. Collins' testimony, which could have, and should have, exonerated the Appellant [of the murder of Angiers as alleged in count two of the indictment]. The result, however, was to lessen the effect of Mr. Collins' testimony, allowing a conviction in Count Two.

However, we note that Collins' credibility was already called into question by his testimony that he and Leslie were high on cocaine when Leslie revealed that he, rather than the appellant, had murdered the two men. Additionally, Detective Sledge indicated that Collins was "either really tired or on something" when he gave his earlier statement. Collins himself admitted that taking drugs affects his memory. Thus, the jury could have used all of the above testimony in assessing the credibility of Collins at the time of trial and at the time he made his statement. We conclude that the erroneous admittance of the statement was harmless error. Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

2. Mistrial

The appellant also argues that the trial court erred in denying a mistrial when the State "improperly argued [during closing arguments] that the jury should consider Chad Collins' statement as substantive evidence at trial." In a convoluted argument, the appellant apparently complains that the State argued to the jury that the omissions from Collins' in-court testimony were essentially proof of the appellant's guilt.

A mistrial is a procedural device that is only appropriate when the trial cannot continue without causing a miscarriage of justice. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). In other words, a mistrial should be declared in criminal cases only in the event that a manifest necessity requires such action. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). The decision to grant a mistrial lies within the sound discretion of the trial court, and this court will not overturn that decision absent a clear abuse of that discretion. See State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998). Moreover, we also note that the party seeking the mistrial bears the burden of demonstrating its necessity. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

BLACK'S LAW DICTIONARY 580 (7th ed. 1999) defines substantive evidence as "[e]vidence offered to support a fact in issue, as opposed to impeachment or corroborating evidence." Our supreme court recently explained:

> Our cases have consistently held that a prior inconsistent statement is admissible under the Rules of Evidence when the prior statement is used to impeach the credibility of a witness. On the other hand, the restriction on hearsay evidence limits the admissibility of prior inconsistent statements when a party offers the prior statements as

> evidence to prove the matter asserted in the statement, or as substantive evidence. Upon timely objection, the trial court should exclude a prior inconsistent statement when offered as substantive evidence of guilt or innocence, and *upon request*, the court should instruct the jury that the prior statement may only be considered as reflecting upon the credibility of the witness.

Smith, 24 S.W.3d at 279 (footnote and citations omitted) (emphasis added).

At trial, the appellant originally objected to the admission of the statement on the basis that the State had not established an adequate foundation; however, as we earlier noted, the appellant did not request a limiting instruction at the time the tape was played for the jury. Nonetheless, in its jury instructions at the conclusion of trial, the trial court admonished the jury:

> A witness may be impeached by proving that he or she has made material statements out of court which are at variance with his or her evidence on the witness stand. However, proof of such prior inconsistent statements may be considered by you only for the purpose of testing the witness' credibility and not as substantive evidence of the truth of the matter asserted in such statements.

Additionally, the trial court advised the jury that the "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence."

The appellant did not object to the State arguing Collins' statement as substantive evidence until the conclusion of closing arguments and the completion of the jury instructions; at that time, the appellant moved for mistrial. The trial court overruled the motion, finding that the State only offered Collins's statement for the purpose of rebuttal. Additionally, the court reminded the appellant that it instructed the jury to consider the statement only for the purpose of judging Collins' credibility. As our supreme court noted in State v. Cribbs, 967 S.W.2d 773, 784 (Tenn. 1998),

> [t]he jury in this case was correctly instructed prior to beginning deliberations that argument of counsel is not evidence and that the judge provides the relevant instructions as to the law. It is well-established that jurors are presumed to follow the instructions given by the trial judge.

Based upon the record, we agree with the trial court that the State's closing argument merely noted the inconsistencies in Collins' testimony. Moreover, we conclude that the trial court did not abuse its discretion in finding that there was no manifest necessity for a mistrial. This issue is without merit.

D. Sufficiency of the Evidence

"In a jury trial, a guilty verdict, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in testimony in favor of the theory of the state." State v. Oody, 823 S.W.2d 554, 558 (Tenn. Crim. App. 1991). Accordingly, the appellant no longer

enjoys a presumption of innocence, but, instead, is presumed guilty on appeal. State v. Suttles, 30 S.W.3d 252, 260 (Tenn.), cert. denied, 531 U.S. 967, 121 S. Ct. 401 (2000). Therefore, the appellant bears the burden of demonstrating to this court why the evidence will not support the jury's findings. Id. In order to satisfy this burden, the appellant must establish that no reasonable trier of fact could have found the essential elements of the offense in question beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); State v. Millsaps, 30 S.W.3d 364, 368 (Tenn. Crim. App. 2000); Tenn. R. App. P. 13(e).

Moreover, on appeal, the State, as the prevailing party in the trial court, is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000), cert. denied, 531 U.S. 1082, 121 S. Ct. 786 (2001). Additionally, the jury, as the trier of fact, resolves all questions concerning the credibility of witnesses, the weight to be given the evidence, and the factual issues raised by the evidence. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994).

In order to obtain the appellant's conviction for first degree murder on count one, the State was required to prove, beyond a reasonable doubt, that the appellant committed the "premeditated and intentional killing of [Conwell]." Tenn. Code Ann. § 39-13-202(a)(1) (1997). On count two, the State needed to establish that the appellant intentionally and with premeditation killed Angiers. Id. Premeditation "is an act done after the exercise of reflection and judgment" and "means that the intent to kill must have been formed prior to the act itself. [However,] [i]t is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time." Id. at (d). We also note that, "[a] homicide, once proven, is presumed to be second degree murder, and the state has the burden of proving premeditation to raise the offense to first degree murder." Millsaps, 30 S.W.3d at 368.

Whether the appellant premeditated the homicide is a factual question for the jury, and the jury may examine the circumstances surrounding the killing to determine if premeditation exists. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997). Our supreme court has listed several factors which support the existence of premeditation:

> the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing.

Id. Additionally, this court has suggested that facts concerning the prior relationship between the appellant and the victim from which motive could be inferred is indicative of premeditation. See State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993); State v. George Glenn Faulkner, No. M1998-00066-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 440, at *24 (Nashville, June 2, 2000), perm. to appeal denied, (Tenn. 2001).

In the instant case, there is ample evidence supporting the jury's conclusion that the appellant premeditated the killing of Conwell. At trial, the appellant acknowledged that, on the night

before the murders, he learned that Conwell had taken cocaine from Bryant, who was selling the cocaine for the appellant. Thus, the appellant had motive for killing Conwell. The appellant went to Conwell's residence the next morning armed with a loaded sawed-off rifle, demonstrating that he was prepared to commit the crime. See State v. Keough, 18 S.W.3d 175, 181 (Tenn.), cert. denied, 531 U.S. 886, 121 S. Ct. 205 (2000). The appellant took the rifle into the residence and told Leslie to "watch my back." During an argument, Conwell told the appellant that he was ready to die so the appellant should go ahead and shoot him. Upon hearing this statement, the appellant fired at the unarmed Conwell, striking him eight or nine times, with three of those shots being potentially fatal. See Millsaps, 30 S.W.3d at 369 (stating that "[a] killing committed during a state of passion may rise to the level of first degree murder if the State can prove that premeditation preceded the struggle").

Additionally, the record supports the first degree murder of Angiers. The appellant, after killing Conwell, fired one or two shots at Angiers' head while Angiers was sleeping on his back on the couch in the living room of the residence. See Morris, 24 S.W.3d at 796; see also State v. Donavan Edward Daniel, No. W2000-00981-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 967, at **38-40 (Jackson, December 28, 2001). Dr. John E. Gerber, who testified for the Davidson County Medical Examiner's Office concerning the autopsies, explained that all of the shots occurred within minutes. Once he was in Leslie's truck, the appellant confessed that, "I had to kill–I killed them both. I had to." The appellant warned Leslie that if Leslie told anyone about the murders he would kill Leslie and burn Leslie's mother's house to the ground. Then, the appellant instructed Leslie to drive him to 151 Oak Valley Drive, where the appellant hid the gun. The appellant then attended the funeral of a family member but fled to Alabama when he learned that the police were looking for him in connection with the murders. The appellant confessed that he fled to Alabama upon discovering he was wanted by the police because he did not want to go back to jail.[8]

While concealment of the weapon and fleeing the scene do not serve to establish premeditation, they do tend to prove that the appellant committed a crime. State v. West, 844 S.W.2d 144, 148 (Tenn. 1992). Additionally, such facts disprove the appellant's claim of self-defense. Id. The State's theory of the case was that the appellant killed Conwell because he had disrespected the appellant by stealing cocaine from Bryant and, further, that the appellant killed Angiers because he was a witness to the crime. See State v. Steve Mason, No. 01C01-9603-CC-00103, 1997 Tenn. Crim. App. LEXIS 526, at *20 (Nashville, June 6, 1997). We conclude that the evidence is sufficient to support the State's theory and sustain appellant's convictions on both counts of first degree murder.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

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[8] As we earlier noted, the appellant was on parole at the time of the murders.

NORMA McGEE OGLE, JUDGE