IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

FILED

February 16, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9904-CC-00167**
	)	
Appellee,	)	
	)	**COCKE COUNTY**
VS.	)	
	)	
EMIT KEITH CODY,	)	**HON. BEN W. HOOPER, II,**
	)	**JUDGE**
Appellant.	)	
	)	**(First Degree Murder)**

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OPINION FILED _____

REVERSED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Emit Keith Cody, was indicted for both premeditated first degree murder and felony murder by a Cocke County Grand Jury and was later found guilty by jury on both counts. He was sentenced to life on both counts, with the sentences to be served concurrently.[1] **In this appeal as of right, the Defendant raises the following three issues: (1) whether the evidence was sufficient to support the verdict; (2) whether the trial court erred in disallowing the claim of marital privilege by Eugenia Buttry; and (3) whether the District Attorney General failed to provide pretrial discovery information of promises of immunity, preferential treatment, and leniency to a State witness. Because we find plain error when Eugenia Buttry's prior inconsistent statement was improperly admitted as substantive evidence, we must reverse the Defendant's convictions and remand for a new trial.**

FACTS

On the day of the trial, the State informed the trial court that its primary witness, Eugenia Buttry, had employed counsel and had indicated that she did not wish to testify, relying partly on marital privilege. After a lengthy pre-trial hearing, the trial court ruled that Eugenia Buttry and the Defendant were never married because there was never a wedding ceremony performed and thus the marital privilege did not apply. As a result, Eugenia Buttry was required to testify against her wishes.

At trial, Jackie Bennett testified that in November 1996, he was out hunting when his dog found a human skull. He immediately left the scene to call 911. Sergeant Derrick Woods of the Cocke County Sheriff's

[1] Because the Defendant cannot be convicted of both premeditated murder and felony murder of the same victim, these convictions merge into one conviction. If we were to affirm instead of reverse, we would remand this case to the trial court for correction of the judgment to reflect a single first degree murder conviction.

Department testified that he received a call from Mr. Bennett reporting that a skull had been found. He, along with other officers, went to the scene, saw the skull, and then discovered a body. The Sheriff's Department contacted the University of Tennessee Anthropology Department for assistance.

Dr. William Bass of the Forensic Anthropology Center at the University of Tennessee was certified as an expert in the field of forensic anthropology. He testified that on November 23, 1996, a group of advanced graduate students from the University of Tennessee went to site of the body in Cocke County and made a full report. They brought the skeletal remains back to the University, where Dr. Bass examined them. Dr. Bass presented eleven slides showing where the victim was found — on a steep slope, lying face down on his stomach. Due to decay, the skull had become detached from the victim's body and had rolled down the hill into a creek. Dr. Bass testified that the body had been there for about five weeks and that the cause of death was three gunshot wounds to the head. Due to the size of the entry wounds, Dr. Bass indicated that a .22 or .25 caliber weapon was used. Four missing teeth, a piece of the skull, and the three bullets were not located. Dr. Bass testified that the bullets "could be anywhere along that hillside." He also agreed with defense counsel that the victim could have been shot elsewhere.

The victim, who was wearing blue jeans, a tee shirt, tennis shoes, and a baseball cap, was identified through dental records as Elvis Lynn Gibson. Dr. Bass offered the opinion that based on the amount of decay, the victim "probably died the day he was reported missing or shortly after he disappeared."

Todd Cotner testified that he was the victim's employer and that on

October 11, 1996, he paid the victim $351.00 in cash. George Shults then testified that he is the victim's mother's live-in boyfriend and that on Friday, October 11, 1996, the victim gave him $30.00 and told him to give it to his mother for groceries or bills. The victim also told Mr. Shults he still had over $200.00 that he had been saving to buy a car. Mr. Shults saw the victim that same day with a roll of money in his hand. The last time Mr. Shults saw the victim was the next morning, Saturday, October 12, when the victim was asleep on the couch as Mr. Shults went to work.

Georgia Mayes testified that Elvis Lynn Gibson was her eighteen year old son and that she last saw him on Saturday, October 12, 1996. Her son introduced her to the Defendant, Keith Cody, and told her that he was going to buy the Defendant's car. He had on blue jeans, a pair of tennis shoes, a white tee shirt, and a "White Sox" cap. He left with the Defendant and another person, and she never saw him again.

Eugenia Buttry was then called to testify. When asked how she knew the Defendant, she replied, "I thought we were married but I guess we're not." She testified that she and the Defendant once obtained a marriage license and that they had a five-month old child. She then gave the following account of the events of October 12, 1996: She said that in October of 1996 she and the Defendant went to the victim's house to see if the victim wanted to buy the Defendant's car. The victim said he did want to buy the car but that he did not have all the money, so he asked the Defendant and Ms. Buttry if they could take him to Newport where he could get the money. They took the victim to Newport, and he saw someone he knew in a blue truck. They pulled over, and the victim talked to the person in the blue truck. The victim then told the Defendant and Ms. Buttry that he was "going to go with that guy and make the money to buy the car and then he knew where we lived, he would be at the apartment to buy the car when

he got the money." After that, Ms. Buttry said she and the Defendant never saw the victim again.

This version of events was consistent with the statement Ms. Buttry first gave to police when questioned about the death of Mr. Gibson, but was totally inconsistent with another statement that Ms. Buttry gave to police on January 29, 1997. The prosecutor questioned Ms. Buttry in depth about her second statement, and Ms. Buttry admitted telling police, after consulting with her attorney, Ms. Meador, and with Ms. Meador present, the following version of events: She said that she and the Defendant picked up the victim and that he did not have all of the money to purchase the car. They then drove out Lee Road in Cocke County toward Newport and up a gravel road to harvest some marijuana so that the victim could get the rest of the money for the car by selling the marijuana. The victim and the Defendant got out, leaving Ms. Buttry in the car. The Defendant took a pistol that he always kept wrapped in a pink pillowcase in the car. They walked down a steep bank and were gone into the woods for five to ten minutes when Ms. Buttry heard a gunshot. About a minute and a half later she heard two more gunshots. Soon thereafter the Defendant returned to the car alone, out of breath and asking for something to drink. He said to Ms. Buttry, "You didn't think I would do something like that, did you." The Defendant showed Ms. Buttry approximately $120.00 that he had in his possession, and Ms. Buttry said that she knew it came from the victim because the Defendant had only $10.00 or $15.00 when he left home that morning. The Defendant said, "I made Lynn lay down on the ground on his stomach and the second and third time I had to do it to make sure." They then went to a place in the woods where the Defendant buried the gun. Later, the Defendant told Ms. Buttry that he was going to go back and move the gun because he did not want the police to be able to find it if she ever did talk to them. On their way back to Newport, the Defendant told her what

to tell police if questioned. What he told her to say was consistent with Ms. Buttry's first statement.

Ms. Buttry also told the police in her second statement that sometime after the murder, she and the Defendant were "out riding" with Joe and Michael Lindsey and that the Defendant and Joe Lindsey were talking about killing somebody. The Defendant said, "I can kill somebody." He then looked at Ms. Buttry and said, "you know it." After giving her second statement, Ms. Buttry took the police to where the victim was killed, but they could not get all the way down the road because the car got stuck in the mud. She also took the police to where the Defendant first buried the gun, but the gun was not there.

After admitting at trial that she told the police the foregoing and that she took the police to where the body was found, Ms. Buttry stated that she lied in her statement and that she knew where the murder occurred because it was in the paper. She said she lied because "they kept telling me I wasn't married to him and I did not have that child at that time" and because "they were also telling me he was running around with everybody in the county trying to make me mad at him." However, she also said that the police just asked her to tell them what happened and that she told them while they wrote it down. She then said she lied because "if I hadn't told them the lie about him then they were going to put accessory on me." She said, "they told me to tell the truth but they didn't want the truth." Later in her testimony, she said she lied to police "because I knew I was pregnant and I did not want to have that baby in jail and then have somebody take it from me."

The entire substance of Ms. Buttry's second statement to police was presented to the jury during direct examination of Ms. Buttry. Even though

Ms. Buttry adamantly denied the truth of her second statement, the defense did not object to its introduction, and the trial court did not give a limiting instruction on the use of the statement. In closing argument, the prosecutor told the jury,

> The fact that she [Ms. Buttry] tells you what she said on January the 29th is not the truth is of no consequence if you find in fact it was. And if you find in fact that it was, there's no question that this man is guilty as charged, both of first degree murder and felony murder. . . . Ladies and gentlemen, when you finish your deliberations I submit to you that you'll find that in fact he's guilty as charged; that in fact that statement given on January the 29th was in fact the truth; that there's no way she could have led those officers up and told them where this crime was committed. All the things that I've gone over and I'm not going to belabor the point but all the facts that she knew and knew about that she couldn't have just simply made up. And it would be a travesty of justice to let this man walk simply because now his girlfriend wants to back up.

Defense counsel did not object to this argument. In fact, defense counsel commented during closing argument that "[t]he State's case rises and falls on whether you think that Gina Buttry gave an accurate statement to law enforcement officers or whether she lied on January the 29th because she was afraid."

Thomas Michael Lindsey testified at trial that he and the Defendant were friends and that they had "partied together." He was asked about the Defendant's leg injury (the Defendant has only one leg) and how the Defendant "gets around" on his crutches, and Mr. Lindsey said, "He gets around as good as me." Mr. Lindsey then gave the following account of what happened with the Defendant one night:

> Well, we was just riding around one night and it come up and he said that he had killed somebody, you know. I just thought, you know, it was a joke and he turned around and he looked at Gina and said am I kidding and she said no, he's not kidding.

This conversation occurred after the victim disappeared but before his body was found. Mr. Lindsey also testified that he had seen the Defendant with "a few different guns."

Melinda Meador, Ms. Buttry's former attorney, was called to the stand and questioned about the second statement Ms. Buttry gave to the police. Ms. Meador testified that Ms. Buttry told the police what happened after consulting with her and that Ms. Buttry gave a narrative statement to police. Ms. Meador said that the police "did ask her questions from time to time and she responded to those questions." After Ms. Buttry gave the statement, she and Ms. Meador reviewed it and made corrections, and Ms. Buttry signed it. Ms. Meador testified that she accompanied Ms. Buttry and the officers to the place where the body was found, but they could not get all the way down the road because it was too muddy.

Ms. Meador was also questioned about the "deal" Ms. Buttry made with police in return for her statement. Ms. Meador testified that Ms. Buttry was in custody at the time she gave the statement and that she had approximately two weeks left to serve on her sentence of thirty days.[2] Ms. Meador stated, "She was allowed to leave Jail approximately five to seven days early. That is the only consideration she was given." Ms. Meador testified that she asked the District Attorney if he would forgo prosecuting Ms. Buttry and if he would reduce the amount of restitution that Ms. Buttry owed because of some checks, but the District Attorney refused. She was told that the District Attorney "wouldn't make any promises" not to prosecute Ms. Buttry for anything in connection with the statement she was about to give and that Ms. Buttry "would have to make restitution on all the checks, that was not negotiable." Ms. Meador also asked to have Ms. Buttry released early, and the District Attorney's office made arrangements to have Ms. Buttry released after the statement was given.

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[2] While not entirely clear from the record, it appears that Ms. Buttry pleaded guilty in Sevier County to charges stemming from writing bad checks. She was serving a thirty-day sentence pursuant to her guilty plea to those charges when she gave the statement to police.

David Davenport of the Tennessee Bureau of Investigation and Harold David Hutchison, an investigator with the District Attorney's Office, both testified regarding their questioning of Ms. Buttry, but their testimony is either cumulative or irrelevant to the issues before us. The defense called only one witness, who was unavailable due to illness. By agreement, defense counsel read the witness's statement to the jury. The statement was from Virginia Spears, the victim's aunt by marriage. Ms. Spears told police that the last time she saw the victim, he left her house on Friday with the Defendant and a girl. She loaned the victim $5.00 to buy a pack of cigarettes and told him to keep the change. When he left the house it was getting "dusky dark." She said the victim and his mother had been fighting that day. The victim did not have on a shirt so her daughter Dolly gave him a green long-sleeved shirt to wear.

I. SUFFICIENCY OF THE EVIDENCE

The Defendant first challenges the sufficiency of the convicting evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing 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 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61

(Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

A crime may be established by circumstantial evidence alone. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). However, before an accused may be convicted of a criminal offense based only upon circumstantial evidence, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (1971). In other words, a "web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 613.

The Defendant was charged with both first degree premeditated murder and felony murder. Premeditated first degree murder is a "premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). Felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnaping, aggravated child abuse or aircraft piracy." Id. § 39-13-202(a)(2). If the second statement that Ms. Buttry gave

to police, which implicated the Defendant, is considered as substantive evidence of his guilt, then we have no hesitation in holding that the evidence was sufficient to support the convictions. Ms. Buttry told police that the Defendant and the victim walked into the woods down a steep slope and that she heard three shots. When the Defendant returned alone, he told her he made "Lynn lay down on the ground on his stomach and the second and third time I had to do it to make sure." According to Dr. Bass, the victim was found on a steep slope on his stomach on the ground, and he had three bullet holes in his skull. Michael Lindsay testified that the Defendant "gets around as good as me" on his crutches, indicating that the Defendant was physically able to maneuver in the woods and accomplish the murder even though he has only one leg. Ms. Buttry also told police that the Defendant showed her a roll of money which she knew had come from the victim because the Defendant had only $10.00 or $15.00 when they left home that morning. Other witnesses established that the victim had just gotten paid and that he had some money which he planned to use to buy the Defendant's car. These facts support a finding that the Defendant intentionally and with premeditation killed the victim and that the Defendant killed the victim during the perpetration of a robbery.

Notwithstanding, we may not consider Ms. Buttry's second statement to police as substantive evidence. Because the statement was contrary to Ms. Buttry's sworn testimony given at trial, the statement was properly admissible as a prior inconsistent statement only for the purpose of impeaching Ms. Buttry's credibility. See Tenn. R. Evid. 607, 613. It was not, however, admissible as substantive evidence. Tennessee Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible unless it falls into one of the hearsay exceptions. Tenn. R. Evid. 802. Ms. Buttry's

second statement was clearly a statement other than one made by Ms. Buttry at trial, and it was offered by the prosecutor to prove its truth. Indeed, the prosecutor told the jurors that it was up to them to decide in which statement Ms. Buttry was telling the truth. Accordingly, the statement was hearsay. Because we find no exception to the hearsay rule which would allow the introduction of Ms. Buttry's statement to prove its truth, we must hold that the statement was inadmissible as substantive evidence.

The Defendant did not, however, object to the use of the statement as substantive evidence or ask the trial judge for a limiting instruction. Generally, "[w]hen no objection to [hearsay] testimony is interposed, it may properly be considered and given its natural probative effect as if it were in law admissible." State v. Harrington, 627 S.W.2d 345, 348 (Tenn. 1981) (citing State v. Bennett, 549 S.W.2d 949, 950 (Tenn. 1977)). But, in State v. Reece, 637 S.W.2d 858 (Tenn. 1982), our supreme court stated,

> Our cases clearly establish that prior inconsistent statements offered to impeach a witness are to be considered only on the issue of credibility, and not as substantive evidence of the truth of the matter asserted in such statements. McFarlin v. State, 214 Tenn. 613, 381 S.W.2d 922 (1964); King v. State, 187 Tenn. 431, 215 S.W.2d 813 (1948). Accordingly, the trial judge should give a contemporaneous instruction to this effect when the impeaching statements are offered. Martin v. State, 584 S.W.2d 830, 833 (Tenn. Ct. App. 1979).

Id. at 861.

Like the Defendant in this case, the defendant in Reece did not properly object to the hearsay testimony or request a special limiting instruction. The supreme court reversed this Court's holding in that case that the failure to give a limiting instruction in the absence of a special request was harmless error, stating, "if the State's case is weak and the prior inconsistent statements are extremely damaging, the failure to give the limiting instruction may amount to fundamental error constituting grounds for reversal, even in the absence of a special request." Id. (citing

United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970)). Our supreme court then expressly limited its holding "to those exceptional cases in which the impeaching testimony is extremely damaging, the need for the limiting instruction is apparent, and the failure to give it results in substantial prejudice to the rights of the accused." Id.

While the defendant in Reece did not object to the prior inconsistent statement at the time it was given, he did raise the issue on appeal. Conversely, the Defendant in this case did not raise the issue on appeal. Generally, we do not consider issues that are not presented for our review. See Tenn. R. App. P. 13(b). However, Tennessee Rule of Criminal Procedure 52(b) recognizes "plain error" and provides that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Tenn. R. Crim. P. 52(b); see also Tenn. R. App. P. 13(b). In State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994), we set forth the following factors to consider in determining whether an error constitutes "plain error":

> (a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is "necessary to do substantial justice."

Id. at 641-42.

We recently had occasion to consider this precise issue as applied to prior inconsistent statements where no objection was made and where the issue was not raised on appeal. In State v. Donald Ray Smith, C.C.A. No. 02C01-9805-CC-00151, 1999 WL 250593 (Tenn. Crim. App., Jackson,

Apr. 29, 1999), perm. to app. granted (Tenn. Nov. 8, 1999), we examined a case in which the defendant was convicted of aggravated sexual battery even though the victim—the defendant's daughter—testified at trial that the defendant never touched her. The State questioned the victim at length, without objection, about her prior statements in which she accused her father of touching her private parts and of offering her candy and money for her silence. The victim admitted making the statements, but claimed that her sister offered her $20.00 to accuse their father because she was angry with him for disapproving of a boy whom she had been dating.

There, like here, the defendant argued on appeal that the evidence was insufficient to support the conviction, but did not argue that the prior inconsistent statement was improperly considered as substantive evidence. Recognizing the "plain error" rule as set fort in Adkisson and the Rules of both Appellate and Criminal Procedure, we found that the failure of the trial court to give a limiting instruction constituted "plain error" that "severely prejudiced the defendant's right to a fair trial" because the victim's prior inconsistent statement was the only testimony, other than inculpatory statements by the Defendant, establishing that a crime even occurred. Smith, 1999 WL 250593, at *6. Without accepting the victim's testimony as substantive evidence, the conviction could not stand. Id.

We believe the rationale of Smith dictates the results of this case as well. Like the situation in Smith, all of the Adkisson factors are present here. The record is clear that the State was allowed to extensively question Ms. Buttry about her prior statement without a limiting instruction; in so doing, the trial court violated a clear and unequivocal rule of law. The prior statement of Eugenia Buttry was more than extremely damaging. Without Ms. Buttry's prior inconsistent statement, the Defendant's convictions cannot stand. Being the only direct evidence tying the Defendant to the

murder of Lynn Gibson, it was the crux of the State's entire case. Without this evidence, the only evidence tying the Defendant to the murder was the testimony that the victim left his home on the last day he was seen with the Defendant and Eugenia Buttry and the testimony that the Defendant stated to Michael Lindsey that he had killed someone. Such vague, circumstantial evidence is not sufficient to prove beyond a reasonable doubt that the Defendant was guilty of any degree of criminal homicide. Thus, the inadmissible evidence was critical to the State's case, and the failure to limit its consideration did result in substantial prejudice to the rights of the Defendant. "[A]n error sufficiently egregious to probably change the outcome of a trial constitutes plain error." Id. (citing Adkisson, 899 S.W.2d at 642).

Therefore, based on the plain error doctrine as set forth in Adkisson and our previous resolution of a similar evidentiary situation in Smith, we hold that the admission of Eugenia Buttry's prior inconsistent statement without a limiting instruction was plain error affecting the substantial rights of the accused. Consequently, we are required by law to reverse the Defendant's convictions.

Having determined that the Defendant's convictions must be reversed, there remains the issue of the proper disposition upon remand. After holding that the defendant's conviction must be reversed because of plain error, this Court in Smith reversed and then dismissed the case without explaining why the error mandated dismissal rather than a remand for a new trial. Smith, 1999 WL 250593, at *7. Thus, Smith suggests that dismissal is the proper remedy instead of a new trial when evidence is erroneously admitted and the remaining evidence

is insufficient to support the conviction. Such a resolution, however, appears to be contrary to established law.

Both the Fifth Amendment to the United States Constitution and Article I, § 10, of the Tennessee Constitution provide protections against being placed in jeopardy twice for the same offense. Double jeopardy under both constitutions protects against: (1) a second prosecution for the same offense after conviction; (2) a second prosecution for the same offense after an acquittal; and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Maupin, 859 S.W.2d 313, 316 (Tenn. 1993). This case calls into question the protection against a second prosecution for the same offense after conviction.

The general rule is that if a defendant appeals a conviction and obtains a reversal because of a trial error, he cannot assert double jeopardy in order to bar his retrial. United States v. Ball, 163 U.S. 662, 672 (1896); United States v. Tateo, 377 U.S. 463, 465 (1964). The Supreme Court in Tateo explained the rationale for this rule as follows:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach

> of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Tateo, 377 U.S. at 466.

In Burks v. United States, 437 U.S. 1 (1978), the Supreme Court recognized an exception to the general rule that double jeopardy does not bar the retrial of a defendant who has succeeded in getting his conviction set aside because of error in the proceedings below. Id. at 18. Burks held that double jeopardy precludes a second trial when the conviction is reversed solely on the ground that the evidence was insufficient to support the conviction. Id. Its holding was based on the premise that a reversal for insufficiency of the evidence is in reality a determination that "the government's case was so lacking that it should not have even been submitted to the jury" and the trial court should have granted a judgment of acquittal. Id. at 16 (emphasis in original). Because the Double Jeopardy Clause protects a defendant who obtains a judgment of acquittal at the trial level from further prosecution for the same offense, a defendant who obtains a reversal at the appellate level due to insufficient evidence should have the same protection. Id. at 10-11. "To hold otherwise would create a purely arbitrary distinction" between defendants based on whether the determination was made at the trial court or appellate level. Id. at 11.

In Greene v. Massey, 437 U.S. 19 (1978), decided the same day as Burks, the Supreme Court expressly reserved the issue of whether double jeopardy allows retrial when a defendant's conviction is reversed because evidence was erroneously admitted against him and the remaining evidence was insufficient to support the conviction. Id. at 26 n.9. Ten years later, the Supreme Court addressed this issue and held that "where the evidence offered by the State and admitted by the trial court – whether erroneously or not – would have been sufficient to sustain a guilty verdict,

the Double Jeopardy Clause does not preclude retrial." Lockhart v. Nelson, 488 U.S. 33, 34 (1988).

The defendant in Nelson pleaded guilty to burglary and was sentenced under Arkansas' habitual criminal statute. Id. at 34-35. To sentence a defendant under the statute, the State was required to prove beyond a reasonable doubt at a sentencing hearing that the defendant had the requisite number of prior felony convictions. At Nelson's hearing, the State introduced, without objection from the defense, certified copies of four prior felony convictions. The case was then submitted to a jury, which found that the State had met its burden of proving four prior felony convictions and imposed the enhanced sentence. Id. at 36. The state courts upheld the enhanced sentence on direct and collateral review, but several years later a writ of habeas corpus was granted by the United States District Court. Id. at 36-37. The United States District Court declared the enhanced sentence to be invalid because one of the convictions used to support the sentence had been pardoned. Without the pardoned conviction, the remaining evidence was insufficient to support the enhanced sentence. Id. at 37. When the State announced its intention to resentence the defendant as a habitual offender using another prior conviction that was not offered or admitted at the initial sentencing hearing, the defendant asserted a claim of double jeopardy. Id.

In distinguishing this situation from that in Burks, the Supreme Court declared,

> **It appears to be beyond dispute that this is a situation described in Burks as reversal for "trial error" – the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly with that evidence, there was enough to support the [verdict] . . . . It is quite clear from our opinion in Burks that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause . . . . The**

> basis for the Burks exception to the general rule is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.
>
> Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to "obtai[n] a fair readjudication of his guilt free from error." Had the defendant offered evidence at the sentencing hearing to prove that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon.

Id. at 41-42 (citations omitted).

Seven years prior to the Supreme Court's decision in Nelson, the Tennessee Supreme Court reached the same conclusion using similar rationale. In State v. Longstreet, 619 S.W.2d 97 (Tenn. 1981), the defendant was convicted of second degree murder. On appeal, the conviction was reversed because the trial court improperly admitted into evidence a rifle which was the fruit of an unlawful search of the defendant's car. Longstreet, 619 S.W.2d at 97, 100. Without the inadmissible evidence, the evidence was insufficient to sustain the conviction. Id. at 100. In holding that retrial would not violate double jeopardy, the supreme court relied upon prior decisions from federal courts of appeal. From the decision in the Ninth Circuit case of United States v. Harmon, 632 F.2d 812 (9th Cir. 1980), our supreme court determined that retrial after reversal because of inadmissible evidence is based on at least two considerations:

> First, it is impossible to know what additional evidence the government might have produced had the faulty evidence been excluded at trial or what theory the government might have pursued had the evidentiary ruling of the trial court been different. A rule which would require the government to introduce all available evidence and assert every possible legal theory in anticipation of appellate reversal of trial court rulings

> would unduly prolong and clutter the original trial. Second, there is a risk that appellate courts would be less zealous in protecting the pretrial and trial rights of the accused if they knew reversal of a trial court's ruling would bar further prosecution.

Longstreet, 619 S.W.2d at 101. The supreme court further relied on United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), and United States v. Block, 590 F.2d 535 (4th Cir. 1978), for the proposition that it is undesirable for the appellate court to supplant the role of the jury as trier of fact. Longstreet, 619 S.W.2d at 101. Finally, the Tennessee Supreme Court pointed to language in Burks which distinguished evidentiary insufficiency from trial error as follows:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Id. (quoting Burks, 437 U.S. at 15) (emphasis added in Longstreet).

We conclude that the United States Supreme Court's decision in Nelson and the Tennessee Supreme Court's decision in Longstreet establish the proper remedy for this case. Although Ms. Buttry's prior inconsistent statement was erroneously admitted as substantive evidence, when that inadmissible statement is considered, the evidence introduced at trial was sufficient to support the Defendant's convictions. Accordingly, we reverse because of trial error and remand this case for a new trial.

II. MARITAL PRIVILEGE

The Defendant also argues that the trial court erred in disallowing the claim of marital privilege by Eugenia Buttry. Pursuant to Tennessee Rule

of Evidence 501, no person has the privilege to refuse to testify or to refuse to disclose any matter, except as otherwise provided by law. Tennessee law does recognize a marital privilege, which is set forth in Tennessee Code Annotated § 24-1-201 as follows:

> (a) In either a civil or criminal proceeding, no married person has a privilege to refuse to take the witness stand solely because that person's spouse is a party to the proceeding.
>
> (b) In either a civil or criminal proceeding, confidential communications between married persons are privileged and inadmissible if either spouse objects . . . .

Thus, if a witness is married to the defendant in a criminal proceeding, the witness may not refuse to testify but may be able to assert a privilege as to communications between the spouses.

The existence of a privilege is a preliminary question to be determined by the trial court. Tenn. R. Evid. 104(a). The findings of fact made by the trial court after an evidentiary hearing are afforded the weight of a jury verdict; thus this Court will not set aside the judgment of the trial court unless the evidence preponderates against the findings. State v. Bush, 942 S.W.2d 489, 510 (Tenn. 1997); State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App. 1993). After a lengthy pretrial hearing in this case, the trial court determined that the Defendant and Ms. Buttry were never married; therefore the marital privilege did not apply. We find that the evidence does not preponderate against this finding and uphold the trial court's determination that the marital privilege was not applicable.

At the hearing, the State presented records showing that a marriage license was issued to the Defendant and Ms. Buttry from the County Clerk of Jefferson County, but that the marriage documents, showing that a marriage ceremony was actually performed, were never returned. Both Ms. Buttry and the Defendant testified that they went to Jefferson County on June 6, 1996 and got a marriage license. Then, they went to Cocke County

on the same day where Judge Marcus Mooneyham, the Cocke County General Sessions Judge, performed a marriage ceremony. Ms. Buttry testified that she had two papers from Jefferson County, that Judge Mooneyham signed one of the papers, and that he gave her back the license while keeping the marriage certificate. She said Judge Mooneyham did not tell her that she needed to do anything after the ceremony. She said she "kept waiting" at the Defendant's mother's house for the marriage certificate to arrive, but it never did. She did not call the Clerk's office to check on it. She also did not change her name. She said she did not change her name or start using the last name "Cody" because the Social Security office told her that it had to have a copy of her marriage "papers" before it would let her change her name on her Social Security card. She did not contact the Social Security office regarding her name until the summer of 1997, which was about a year after she and the Defendant were married. Ms. Buttry testified that she gave her copy of the marriage license to one of the investigators, an allegation

which the investigator adamantly denied. Ms. Buttry and the Defendant conceived a son after the date of their purported marriage.

Both Judge Mooneyham and Michael McCarter, an employee of the Cocke County Sessions Court Clerk's Office, testified that when a couple comes to get married with a marriage license from another county, the marriage documents are completed and then given back to the couple for the couple to file in the county that issued the marriage license.[3] Neither witness remembered the marriage ceremony of the Defendant and Ms.

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[3] Tennessee Code Annotated § 36-3-303(a) requires all persons who perform marriages to endorse on the marriage license the fact and time of the marriage and to sign the license and return it to the county clerk within three days of marriage. Failure to do so is a Class C misdemeanor. Though required by law to return the marriage license to the county clerk, Judge Mooneyham does not follow this procedure when he receives a marriage license from another county.

Buttry, though Judge Mooneyham remembered arraigning the Defendant on criminal charges. Judge Mooneyham said that he performs many marriage ceremonies and that he does not recall all of the persons he marries. Judge Mooneyham testified that when he marries individuals with a license from another county, he always tells them that they need to return the license to that county. He must sign both the marriage license and certificate. He cannot sign just one document. Judge Mooneyham does not keep records of the marriages he performs.

David Hutchison, an investigator with the District Attorney General's Office, testified that he interviewed Ms. Buttry in connection with the investigation of the victim's murder. Ms. Buttry had indicated that she and the Defendant were married, and Mr. Hutchison asked her when and where she got married. Mr. Hutchinson gave the following account of Ms. Buttry's response:

> She kind of hesitated, and first said that she didn't know if they was married. I said, "Well, surely you'd know if you'd had a ceremony. Where did you get your paperwork?" She said, "In Dandridge." Well, I said, "Who married you down there?" And she said, "Well, we got our license in Dandridge, but we come to Cocke County, Newport."
>
> And Marcus Mooneyham's name come up, but she never did say he married them, and they was [sic] some preacher, a minister, that was mentioned. . . . So she just - - she couldn't remember. And finally she says - - the last thing that I heard her say about that on that particular day was that she didn't know if they was married or not.

David Davenport of the Tennessee Bureau of Investigation testified that both Ms. Buttry and the Defendant represented to him that they were married when he interviewed them. Ms. Buttry's attorney provided the court with copies of records from the Sevier County Jail in which Ms. Buttry had indicated that she was married. Ms. Buttry had filled out this paperwork before she was questioned by Agent Davenport about Lynn Gibson's murder.

After hearing the testimony, the trial court commented on discrepancies between Ms. Buttry's account of her marriage ceremony and Judge Mooneyham's testimony regarding his standard procedures when presented with an out-of-county marriage license and resolved the differences in favor of Judge Mooneyham. He also considered Mr. Hutchison's testimony that Ms. Buttry was not certain whether Judge Mooneyham married her or a minister married her and commented that "the event should be terribly clear in her mind." The trial court found it relevant that Ms. Buttry had never used the last name "Cody," regardless of whether she could get her name changed on her Social Security card. In addition, the trial court found it significant that the Defendant has only one leg and that Judge Mooneyham remembered arraigning the Defendant but not marrying him. The court then held that "these parties have never been married, that there was never a ceremony performed by Judge Mooneyham."

We recognize that there is a strong presumption in favor of courts finding a valid marriage, but the presumption can be overcome by convincing evidence. See Duggan v. Ogle, 159 S.W.2d 834, 837 (Tenn. Ct. App. 1941). A marriage is valid if consummated by a ceremony, even if the procedures for filing the documents are not followed. See id; Tenn. Code Ann. § 36-3-306. Although Ms. Buttry and the Defendant testified that a marriage ceremony was performed, we believe the State presented sufficient convincing evidence to rebut the presumption of a valid marriage, and the evidence does not preponderate against the trial court's finding that a marriage ceremony was never performed. Consequently, we conclude that the trial court did not err in finding that the marital privilege, which would have protected confidential communications between the spouses, was not applicable.

III. FAILURE TO DISCLOSE

Lastly, the Defendant argues that the State failed to provide information about promises of leniency, immunity, or preferential treatment of Eugenia Buttry in exchange for her statement of January 29, 1997. "When the credibility of a witness is material or the state has falsely denied that a deal was made, the prosecution is required to disclose that a witness has been offered concessions." State v. Benson, 645 S.W.2d 423, 426 (Tenn. Crim. App. 1983) (citing DeMarco v. United States, 415 U.S. 449 (1974)).

Though the Defendant argues that Ms. Buttry was promised immunity and early release from custody in exchange for her statement, the record reveals only that Ms. Buttry was released from custody five to seven days early after she gave her statement. Ms. Meador, Ms. Buttry's former attorney, testified that the District Attorney informed her that he would not make any promises not to prosecute Ms. Buttry in exchange for her statement. The State does not deny that Ms. Buttry was released early or that it did not inform the Defendant that Ms. Buttry was released early. It instead points to a statement made by the District Attorney during the hearing on the motion for a new trial; the District Attorney told the court that Ms. Meador asked for Ms. Buttry's early release after Ms. Buttry had already given the statement and that Ms. Buttry was not promised early release in exchange for the statement. The State then argues that regardless of when the State agreed to release Ms. Buttry, the Defendant has failed to show any prejudice.

We agree with the Defendant that the State should have revealed that it released Ms. Buttry five to seven days early after she gave her statement; it certainly appears that was a concession on the part of the State given because Ms. Buttry gave her statement. See Benson, 645 S.W.2d at 426.

Notwithstanding, we agree with the State that the Defendant has failed to show prejudice. The burden is on the Defendant to show how he was prejudiced in trial preparation and defense at trial by the failure of the State to comply with discovery. See State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992). The Defendant simply states that the failure to reveal the transaction with Ms. Buttry "denied defendant the opportunity to impeach her credibility, or to develop a meaningful trial strategy."

However, Ms. Buttry's credibility was impeached both through her own testimony and that of other witnesses. The "deal" reached between the State and Ms. Buttry was fully explored at trial through the testimony of Melinda Meador, Ms. Buttry's former attorney, giving the jury the opportunity to determine whether Ms. Buttry's statement was motivated by her early release. Moreover, Ms. Buttry testified at trial that her statement was a lie and that the Defendant did not murder Lynn Gibson. This gave the Defendant the opportunity to argue that Ms. Buttry's statement to police was motivated by her early release. The Defendant was aware before trial that Ms. Buttry had been released early after giving her statement and that she would likely testify at trial that her statement was false, so the Defendant should not have been denied the opportunity to develop an effective trial strategy. In addition, Ms. Buttry's statement was not admissible to prove the truth of the statement, which made her testimony favorable to the Defendant. Because the Defendant has not shown prejudice from the State's failure to reveal its concessions to Ms. Buttry in exchange for her statement, that failure is not reversible error.

CONCLUSION

We must conclude that the trial court committed plain error when it admitted hearsay testimony without a contemporaneous limiting

instruction regarding Ms. Buttry's second statement to police in which she implicated the Defendant in the murder of Lynn Gibson. Accordingly, the Defendant's convictions are reversed and the case is remanded for a new trial.

_____
DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, PRESIDING JUDGE

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DAVID G. HAYES, JUDGE