IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #01C01-9409-CC-00307
APPELLEE,	*	MONTGOMERY COUNTY
VS.	*	Hon. Robert W. Wedemeyer, Judge
LESTER A. PEAVYHOUSE,	*	(First Degree Murder; Attempted First and Second Degree Murder;
APPELLANT.	*	Aggravated Assault; Possessing Unlawful Weapon)
	*	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Lester A. Peavyhouse, was convicted of two counts of first degree murder, one count of attempted first degree murder, one count of attempted second degree murder, four counts of aggravated assault with a deadly weapon, and one count of possession of an unlawful weapon. The appellant received two life sentences for the first degree murder convictions (counts one and two), to be served consecutively. He was sentenced as a Range II, multiple offender on the remaining counts as follows:

> Count Three: Attempted First Degree Murder, a class A felony, thirty-five years to be served concurrently with count four and consecutively to the remaining sentences;
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> Count Four: Attempted Second Degree Murder, a class B felony, fourteen years to be served concurrently with count three and consecutively to the remaining sentences;
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> Count Five: Aggravated Assault, a class C felony, nine years to be served concurrently with count six and consecutively to the remaining sentences;
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> Count Six: Aggravated Assault, a class C felony, nine years to be served concurrently with count five and consecutively to the remaining sentences;
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> Count Seven: Aggravated Assault, a class C felony, nine years to be served concurrently with count eight and consecutively to the remaining sentences;
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> Count Eight: Aggravated Assault, a class C felony, nine years to be served concurrently with count seven and consecutively to the remaining sentences; and
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> Count Nine: Possession of an Unlawful Weapon, a class E felony, three years to be served consecutively to the remaining sentences.

Thus, the aggregate sentence is two consecutive life terms plus fifty-six years in the Department of Correction.

On appeal, the appellant raises the following issues for our review:

> (a) whether the evidence was sufficient to establish the appellant's sanity at the time of the offenses;

(b) whether the trial court erred in refusing to allow the appellant to request expert services in an ex parte proceeding;

(c) whether the trial court erred in denying the appellant's motion for appointment of a psychiatrist;

(d) whether the trial court erred in excluding a police report detailing a prior incident between one of the victims and the appellant;

(e) whether the trial court erred in allowing the State to call Chris Johnson as a rebuttal witness;

(f) whether the trial court erred in allowing the State to call Dr. Carl Selavka as a rebuttal witness;

(g) whether the trial court erred in overruling the appellant's motion for a mistrial based on the prosecution's conduct with regard to Dr. Selavka;

(h) whether the trial court erred in allowing Dr. Selavka to testify as an expert witness in the field of hair growth analysis; and

(i) whether the trial court imposed improper sentences.

We conclude that there is no reversible error in the record, and we affirm the judgment of the trial court.

On October 31, 1991, a Halloween party was held at the residence of Robert Huff in Clarksville, Tennessee. Those in attendance included the victims of the first degree murders, Misty Harding and Billy Hembree, the victims of the attempted first and second degree murders, David Ross and Huff, and the victims of the aggravated assaults, Charity Baggett, Deanna Shepherd, Walter Scott Palmer, and Jeffrey Underwood. Several in attendance were dressed in Halloween costumes; Huff and Billy Hembree were dressed in women's clothing, complete with make up and high heeled shoes.

Around midnight, the appellant, who lived in an adjacent apartment, called the police to complain about the loud music and noise from the party. Officer Robert

Osterholtz responded to the call, talked to several people, and told them not to play the music too loud. Osterholtz described the appellant as "upset and a little angry." The appellant told Osterholtz that he had been harassed by occupants of Huff's apartment on prior occasions. The appellant described the harassment as being of a homosexual nature.

Several witnesses testified that Robert Huff was upset that the appellant had called the police. According to Brian Jurisin, Huff stood up and said he was "going to go kick [the appellant's] ass." Huff had been drinking beer and appeared to be intoxicated. Jurisin and Chris Johnson tried to stop Huff from leaving the apartment, but he opened the front door and took one or two steps outside. Jurisin saw the door to the appellant's apartment open; he then heard a gunshot, and Huff said he had been shot. Jurisin pulled Huff back into the apartment and shut the door. Most everyone ran for the back door. Jurisin believed he heard six or seven shots as he fled from the house, and he was aware of "some short period of time," perhaps fifteen or twenty seconds, between each shot.

David Ross testified that he heard a gunshot and saw Robert Huff being "blown back into" the apartment. Huff yelled that he had been shot, and everyone ran toward the back of the apartment. Ross ran into the bathroom along with Misty Harding and Huff. Seconds later, the bathroom door was kicked open. The appellant fired one shot into Ross's stomach with a sawed-off shotgun. Ross fell backward and grabbed his stomach; he was bleeding badly. He then saw the appellant reload the shotgun and shoot Harding, who fell back into the bathtub. Ross believed that five or ten seconds separated the shot that hit him from the shot that hit Harding.

The appellant then left the bathroom "jumping and screaming," and acting

"like a wild person." Ross managed to walk out the back door of the house, and he saw several people getting into Deanna Shepherd's car. The appellant fired two shots at the car, which then sped away from the scene in reverse. Ross was taken to the Emergency Room at Clarksville Memorial Hospital and then flown to Vanderbilt Hospital where he had two operations and remained for sixteen days. While hospitalized, Ross told police that Huff had said, "This guy [appellant] is crazy....He's killed his sister before or tried to kill her."

Deanna Shepherd testified that she ran out of the house after hearing the first gunshot and seeing Robert Huff fall back into the room. She ran to her car with Scott Palmer, Charity Baggett, and Jeff Underwood. David Ross ran toward the car holding his stomach. Shepherd then saw the appellant come around the side of the house with "a long gun." Palmer was driving Shepherd's car; he backed away from the scene as the appellant fired shots at them. The first shot missed. A second shot hit the driver's side window. Shepherd believed that she heard four shots in all.

Robert Huff testified that he had consumed about a case of beer and was "really, really drunk." He remembered that the police complained about the music, but he did not recall seeing the appellant. After the police left, Huff opened his front door. He saw the appellant holding a shotgun and "grinning from ear to ear." The appellant shot him in the chest.[1] Huff ran to the bathroom to wash the blood from his wound; he then heard a "loud crash" in the bathroom and Misty Harding fell into the tub on top of him. He did not see who shot Harding, nor did he recall seeing David Ross in the bathroom.

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[1] Huff did not recall telling police that he heard a knock at the door and saw the appellant when he opened it.

Huff acknowledged that he is bisexual. He did not recall making homosexual threats toward the appellant or leaving notes under the appellant's door suggesting homosexual acts. He also did not recall a prior instance in which the appellant reported homosexual threats to the police. Huff testified that a friend, Kevin Howell, had shown him a letter the appellant had written to the editor of the Austin Peay University newspaper. The letter was in response to a "gay awareness" article, and it was published on October 23, 1991.[2] It contained derogatory remarks about homosexuals, referred to threats made by homosexual men against heterosexual men, and included a veiled reference to Huff's homosexual threats against the appellant.[3] The letter concluded that "homosexuals should not be surprised if they get bashed." Huff said he read part of the letter, threw it down, and did not think about it any longer.[4]

Kevin Howell was also at the Halloween party. He testified that Robert Huff got angry after the appellant called the police. As Huff walked out the door, Howell saw a flash and heard a gunshot. Everyone tried to run from the apartment; Howell left the building and ran down the street. As he did, he heard Billy Hembree "screaming at the top of his lungs." He then heard another gunshot. Howell believed that he heard four shots fired no more than one minute apart.

Howell ran to the Minit Market convenience store a few blocks from the scene and called 911. He went into the restroom to try to calm down. When he came out he saw the appellant talking on the telephone. The appellant was covered with

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[2] Copies of the letter, both as written by the appellant and as edited and published in the newspaper, were introduced into evidence. Experts testified that the letter was written in the appellant's handwriting.

[3] Huff was not mentioned by name; rather, the letter mentioned the appellant's "strong homosexual neighbor."

[4] According to Howell, Huff "wasn't really upset" about the letter but may have been "a little bit angry."

blood but sounded "very calm and serene." Howell asked the store clerk for change, left the store, and used a pay phone to call 911 a second time. As he did, a Tennessee highway patrolman and a Clarksville police officer pulled into the parking lot. Howell told the officers that the appellant was inside the store.

Ernestine Keith was working at the Minit Market. The appellant was a regular customer. She saw him enter the store around midnight. The appellant asked to use the store phone and said that it was an emergency. Keith did not notice anything unusual about the appellant; she said that he was "very calm" and spoke in a normal tone of voice. The appellant then ended his phone conversation by saying "never mind, they are on their way."

The appellant had called 911 from the store. The State introduced the tape recording of the call:

> "This is 911, can I help you?"
>
> "911, this is Lester Peavyhouse and I am at the Minit Mart at Crossland and Greenwood, and there has been a disturbance at my house where I was living, could a police officer come and talk to me at the Minit Market?"
>
> "Okay, just a minute sir, don't hang up."
>
> "All right."
>
> "Sir?"
>
> "Yeah?"
>
> "Bear along with me, okay?"
>
> "Yeah."
>
> "What kind of disturbance was it?"
>
> "Well, I heard shots, there was-- there was loud shots, and screaming and yelling and all kinds of commotion."
>
> "You heard shots?"

"Yeah."

"Okay. Okay. Stay on the line until the officer gets there, okay?"

"Okay. I called earlier. I called the-- 911 earlier and I talked to a police officer at my house."

...

"Did you hear one shot, sir?"

"No, it sounded like there were several."

...

"The police officer is here, I think."

Clarksville Police Officer Joseph Papastathis and a Tennessee highway patrolman took the appellant into custody. The appellant had blood on his hands, but said he did not know where it had come from. The appellant denied having a weapon, and he said that he had walked to the store to call police. The appellant spoke in a "normal conversation tone," and he was very passive.

Officer Eric Gonzales arrived at the scene of the shooting at 12:13 a.m. David Ross and Robert Huff had been shot. Billy Hembree was found dead in the driveway. Misty Harding was found dead in the bathtub. Officers from the Crime Scene Unit later collected blood samples, shot fragments, lead pellets, and plastic wadding. The ammunition was for a .410 shotgun. A search warrant was later obtained for the appellant's apartment. A sawed-off .410 shotgun was recovered from a dresser drawer; an empty box of .410 ammunition was found in the kitchen.

Thomas Heflin, a firearms expert with the Tennessee Bureau of Investigation (TBI), testified that the barrel of the shotgun had been sawed off to 11 and 1/16 inches; the normal barrel length for the weapon was 26 inches and the minimum

legal standard was 18 inches. Heflin testified that the ammunition found in Huff's apartment was consistent with the box of shells found in the appellant's apartment. He also said that the ejecting mechanism on the shotgun was worn; as a result, spent shells did not eject from the gun when it was opened, but rather, had to be extracted by hand, making it more difficult to fire rapidly.

Dr. Mona Gretal Case Harlan, Medical Examiner for Davidson County, conducted autopsies on Misty Harding and Billy Hembree on November 1, 1991. Misty Harding, age 17, had been shot in the left chest and abdominal area. There was extensive damage to her heart, right lung, liver, and esophagus. The wound pattern indicated that she had been shot from a distance of approximately five feet. Billy Hembree, age 23, had likewise been shot in the chest, which caused extensive damage to his heart. The wound indicated that the shot had been fired from a distance of five to six feet. The State concluded its case in chief.

Lana Parker, the appellant's sister, testified on behalf of the defense. The appellant, who was forty-one at the time of the trial, had been hospitalized numerous times for mental illness. In 1985, while Parker and the appellant were visiting their mother, the appellant was nervous and seemed "ill at ease." He told Parker he wanted her to drive him home, but Parker refused because it was too late in the evening. The appellant left the room, returned with an ax, and struck Parker in the head. Parker sustained a skull fracture and was hospitalized. The appellant had a "dead, dull look" on his face prior to striking her with the ax. After the incident, he was committed to the Middle Tennessee Mental Health Institute (MTMHI) for several years.

Amelia Bozeman testified that she was the opinion editor for the Austin Peay University newspaper in October of 1991. She knew the appellant was a student

at Austin Peay and considered him to be a friend. They often had interesting conversations; in her opinion, the appellant was intelligent and fun to talk with. In late summer of 1991, the appellant told Bozeman he was concerned that his neighbor, a male, was trying to rape him. Bozeman said that the appellant appeared to be afraid. In October of 1991, the appellant wrote the letter to the editor regarding his views of homosexual men.

William Cannady owned the apartments that Huff and the appellant lived in. In the summer of 1991, the appellant complained to him about Robert Huff putting notes under his door that made reference to homosexual acts. The appellant was "not happy" about the situation. Debra Weeks, who lived in an apartment above Huff's, was also aware of the "aggravation" between the appellant and Huff. On the night of the offenses, she believed she heard close to ten gunshots.

Rebecca Smith, a licensed clinical social worker with the Forensic Services Division of MTMHI, testified that the appellant had been committed numerous times from 1972 to 1991. In December of 1972, the appellant was evaluated relative to criminal charges for desecration of a flag. The appellant acknowledged using LSD, mescaline, peyote, and marijuana. He was diagnosed with acute schizophrenia. In 1978, the appellant was evaluated following a charge of assault with intent to commit murder. He was not considered psychotic, but was diagnosed with a paranoid personality disorder. He was showing signs of delusions, and he expressed fear of homosexuals. He was found competent to stand trial, and a defense of insanity to the criminal charge was not supported by MTMHI officials.

In 1985, the appellant was evaluated and eventually committed in connection with his attack on his sister. He had auditory hallucinations involving rapes

and homosexuals. He was delusional, and he feared that members of minority groups, particularly homosexuals, were "out to get him." The appellant was diagnosed with paranoid schizophrenia and treated with several anti-psychotic medications. A defense of insanity for the attack upon his sister was supported by MTMHI.

In November of 1991, the appellant was evaluated for the offenses in question. The appellant's diagnosis remained paranoid schizophrenic; he expressed fear of homosexuals and homosexual assaults, and he considered himself to be weak and deformed. The appellant was found competent to stand trial but committable. The trial court signed an order to this effect. Although not expressing an opinion on the appellant's mental state at the time of the offenses, Smith considered it significant that Robert Huff was dressed as a woman and possibly acting in a hostile manner. She could not recall whether she was aware of this information when the evaluation team met in December of 1991.

William H. Tragle, a psychiatrist at MTMHI, became involved with the appellant's case in January of 1992. The appellant was being treated for chronic paranoid schizophrenia; the records showed that he had been receiving 50 milligrams of haloperidol every four weeks at the time of the offense. Dr. Tragle labeled this a "low to moderate" dosage, and eventually doubled the dosage to 100 milligrams in March of 1992 because he was dissatisfied with the appellant's progress. Tragle testified that haloperidol is commonly used to treat paranoid schizophrenics because it controls delusional thinking and hallucinations. Tragle noted that the appellant had false beliefs which centered on homosexuality and that he was easily threatened. Dr. Tragle did not express an opinion on the issue of insanity.

Jonathan Lipman, a Ph.D. in neuropharmacology, also testified for the

defense. Lipman was Chief of Pharmacology for Molecular Geriatrics in Illinois, a company that conducts drug discovery and research, and a former professor in the Department of Medicine at Vanderbilt University in Nashville. Lipman discussed the effects of haloperidol on paranoid schizophrenics, and he said that the treatment helps to control delusional fears and hallucinations. The side effects of haloperidol include drowsiness and depression.

Lipman testified that large doses of caffeine and ephedrine produce agitation and nervousness and exacerbate the paranoid psychosis of a paranoid schizophrenic. Caffeine may also cause excretion of haloperidol. Lipman testified that the amount of drugs or chemicals in a person's system may be determined by analyzing that person's hair. Moreover, by determining the growth rate of a person's hair, the amount of drugs can be measured for a given time period.

Lipman became involved in this case in January of 1992. By interviewing the appellant and others, he learned that the appellant was receiving injections of haloperidol and also ingesting large amounts of caffeine and ephedrine (a stimulant). Lipman conducted a forty-two day study of the appellant's hair growth rate, and sent a sample of the hair to National Medical Services in Willow Grove, Pennsylvania. The lab measured the amount of haloperidol and other drugs in the appellant's hair for those segments corresponding to October of 1991, and furnished a report of its findings. Lipman concluded that on October 31, 1991, the appellant had not received a haloperidol treatment for twenty-five days. As the appellant was on twenty-eight day cycles, he was near the end of a cycle. The amount of haloperidol in the appellant's system was "massively low at the time of the offense."[5] The tests also revealed that the dosage of haloperidol was doubled in March of 1992.

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[5] The testing also revealed traces of caffeine but no ephedrine.

Christopher Johnson testified in the State's rebuttal case. He was at the party when the police investigated the complaint of loud music. The appellant made a remark about sexual preferences. Johnson said that they needed to "straighten out the problem" while the police officer was still there. When the police left, the appellant said that he would be "back in a minute." Johnson said to someone, "You'd better watch; that guy is liable to have a gun." Robert Huff became angry and said he had "had enough" and was going "to take care of" the situation. When Huff opened the door, there was a shotgun blast. This occurred about three minutes after the appellant said he would be "back in a minute."

Dr. Samuel Craddock, a clinical psychologist at MTMHI, testified that he evaluated the appellant in November of 1991. The appellant's IQ was above average. Personality testing revealed a paranoid schizophrenic personality. Screening tests for organic impairments were negative. In December, the evaluation team postponed making a determination on the appellant's sanity until Rebecca Smith could contact Debra Weeks and Ernestine Keith. Craddock believed that they did not have all the information to make a decision "with a high level of competence or assurance." The evaluation team met again in April of 1992, which was after Smith contacted the remaining witnesses.[6]

Craddock testified that the appellant had a mental illness of paranoid schizophrenia at the time of the offense and was being treated with haloperidol. There were several signs that the haloperidol was working well. The appellant had made no complaints to Harriet Cohn Mental Health Center where he received his medication. In September or October of 1991, he had requested a lower dosage of haloperidol.

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[6] Nonetheless, the report of the evaluation team was dated December 17, 1991. Craddock said that the report reflected the date of the initial conference even though subsequent staff conferences were held as more information was obtained.

The records from Harriet Cohn did not reflect any inappropriate conduct or emotions expressed by the appellant. The appellant lived alone, attended college, and had not been a disturbance to the community.

Craddock opined that the appellant was not legally insane at the time of the crimes: he had the substantial capacity to appreciate the wrongfulness of his actions and to conform his conduct to the requirements of the law. Craddock's conclusion with regard to the appellant's capacity to appreciate the wrongfulness of his actions was based on the appellant's comments about the offense, which indicated that he was not suffering from hallucinations, delusions, or gross misperceptions of reality. The appellant did not indicate that he was acting in self defense or under a "command delusion" to commit the crimes. To the contrary, the appellant indicated that he wanted to frighten the individuals at the party. With regard to the appellant's ability to conform his conduct, Craddock noted the elements of planning: the appellant said that he "would be back," secured a gun, pursued the victims, and acted as the aggressor. In sum, the appellant "was able to carry out a sequence of actions toward a purpose or goal." His actions "were not random actions that had no rational purpose."

Craddock said that the appellant's 1985 adjudication of insanity had no bearing on his determination; a person's mental state varies over time and with regard to particular incidents. In the appellant's case, delusions were a slow process occurring on and off for a period of years. Craddock conceded that he "could see a basis" for the defense of insanity in December of 1991; after obtaining additional witness statements and information, Craddock concluded otherwise in April of 1992. He also conceded that it was significant that Robert Huff opened the door and had "a fighting demeanor" because it lent credibility to the appellant's version of the offenses. Similarly, given the nature of the appellant's paranoia, the fact that Huff was dressed as a woman would

have caused "anguish" to the appellant. Neither of these factors, however, changed Craddock's opinion that the appellant was sane at the time he committed the offenses. Craddock saw a "common theme" in the appellant's history: whenever he "is challenged or confronted and demeaned in some way...he secures a weapon and assaults an individual."

Dr. A.K.M. Fakhruddin, a psychiatrist at MTMHI, also opined that the appellant was legally sane at the time of the offense. He agreed that the appellant was a chronic paranoid schizophrenic, yet said that haloperidol injections kept the appellant's delusions "under fairly good control." The appellant's last injection before the offenses was on October 9, 1991. Records from the Harriet Cohn Mental Health Center indicated that the appellant was feeling well and attending college. The appellant also had asked for a lower dose of medication.

Fakhruddin concluded that the appellant's mental illness did not prevent him from knowing the wrongfulness of his actions on October 31, 1991, nor did it render him incapable of controlling his conduct. The appellant's words and actions showed that he was aware the shootings and killings were wrong; he called the police immediately after the crimes. Many of the witnesses also commented on the appellant's "calm and rational" demeanor right after the offenses. In December of 1991, the decision about the appellant's mental state was deferred. After getting more information from other witnesses, Fakhruddin determined that the insanity defense could not be supported.

Karl Selavka, a Ph.D. in forensic analytic chemistry and Director of Forensic Operations for National Medical Services, also testified for the State. He described the methods for testing hair samples and discussed the factors that may

affect the rate of one's hair growth such as age, gender, weather, and diet. Selavka's lab tested the hair samples sent by Dr. Lipman. The samples, and the appellant's hair growth rate, were based on averages that necessarily had some variability. Selavka said that at a ninety-five per cent statistical level of confidence, there was a twenty-two per cent variance. This, in turn, was a variance of weeks or months as the sample related to specific periods of time. Selavka noted that the results were negative for ephedrine; the testing included standards to prevent false negative readings.

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The appellant claims that the State failed to prove that he was sane at the time of the offenses. When there is a challenge to the sufficiency of the evidence, the standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); State v. Smith, 868 S.W.2d 561, 568-69 (Tenn. 1993), cert. denied, 115 S.Ct. 417, 130 L.Ed.2d 333 (1994); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable inferences that may be drawn therefrom. State v. Smith, 868 S.W.2d at 568-69.

The central issue in this case was the appellant's mental state at the time he committed these crimes. Under the law controlling this case, insanity was an absolute defense to a crime "if at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law." Tenn. Code Ann. §39-11-501(a)(1991); see Graham v. State, 547 S.W.2d

531, 543-44 (Tenn. 1977).[7]

The law presumes the sanity of one accused of a crime. State v. Overbay, 874 S.W.2d 645, 650 (Tenn. Crim. App. 1993); Brooks v. State, 489 S.W.2d 70, 72 (Tenn. Crim. App. 1972). If the evidence raises a reasonable doubt as to the accused's sanity, the burden shifts to the State to establish the accused's sanity beyond a reasonable doubt. State v. Jackson, 890 S.W.2d 436 (Tenn. 1994); see State v. Sparks, 891 S.W.2d 607 (Tenn. 1995); State v. Graham, 547 S.W.2d at 544; State v. Overbay, 874 S.W.2d at 650. Sanity thus becomes an element of the offense. State v. Jackson, 890 S.W.2d at 440.

In order to prove sanity, the State must prove either: (a) the defendant was not suffering from a mental illness at the time of the offense or (b) the illness did not prevent the defendant from knowing the wrongfulness of his act and did not render the defendant substantially incapable of conforming his conduct to the requirements of the law. State v. Jackson, 890 S.W.2d at 440; Graham v. State, 547 S.W.2d at 544. The State may establish sanity "by the use of expert testimony, lay testimony, or by showing the defendant's behavior prior to, during, or after the commission of the crime was consistent with sanity and inconsistent with insanity." Edwards v. State, 540 S.W.2d 641, 646 (Tenn. 1976), cert. denied, 429 U.S. 1061 (1977).

The evidence was sufficient for the jury to conclude that the appellant was legally sane at the time of the crimes. The clinical psychologist and psychiatrist at MTMHI determined that the appellant's paranoid schizophrenia did not prevent him

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[7] Effective July 1, 1995, however, insanity is shown where "as a result of a severe mental disease or defect, [the defendant] was unable to appreciate the nature or wrongfulness of [his] acts." Moreover, the burden is on the defendant to prove insanity by "clear and convincing evidence." See Tenn. Code Ann. §39-11-501(a)-(c)(1995 Supp.).

from appreciating the wrongfulness of his conduct or from conforming his conduct to the requirements of the law. Both experts noted that while treated with haloperidol, the appellant had been living independently and attending college. He had not been a disturbance to the community, did not appear to be exhibiting inappropriate emotions or behavior, and did not appear socially withdrawn.

Both experts testified that the appellant's conduct before and after the crimes supported their opinions. The appellant did not complain of "command" delusions or feelings of self defense when he committed the crimes. Rather, he expressed a desire to "go after" or "scare" the victims. His actions also revealed elements of planning: he said he would "be back" when initially leaving the scene; he went to his apartment to get his shotgun and ammunition; and his actions were not sudden or random. Finally, the appellant called the police on his own, which suggested that he appreciated the wrongfulness of the shootings.

Nonetheless, the appellant stressed his history of mental illness and argued that his actions, while possibly consistent with sanity, were not inconsistent with insanity. The jury heard that the appellant had been diagnosed with paranoid schizophrenia as early as 1972, and that he had been committed on several occasions. The jury also heard detailed testimony that there was a low level of haloperidol in the appellant's system at the time of the crimes, which made him more susceptible to his paranoid ideations and delusions. The jury also heard about the appellant's delusions regarding homosexuals and the prior incidents involving Robert Huff.

The State's rebuttal proof addressed these points. There was expert testimony of sanity, lay testimony that the appellant appeared "calm and rational," and descriptions of his conduct before, during, and after the crimes. As noted, the State

may prove sanity with any of these forms of proof. Thus, the jury could have rationally found from the State's evidence that the appellant was legally sane at the time he committed the crimes.

The appellant also claims that the jury verdicts were inconsistent because the appellant was convicted of attempted second degree murder of Robert Huff but attempted first degree murder and first degree murder of David Ross, Misty Harding, and Billy Hembree. In Wiggins v. State, 498 S.W.2d 92, 93 (Tenn.1973), our supreme court said that seemingly inconsistent jury verdicts stemming from a multi-count indictment do not warrant speculation about the jury's reasoning provided the evidence was sufficient to sustain the verdicts. Thus, we will evaluate the sufficiency of the convicting evidence under the prevailing standards of appellate review.

At the time of these offenses, first degree murder was defined as "an intentional, premeditated, and deliberate killing of another...." Tenn. Code Ann. §39-13-202(a)(1)(1991).[8] A deliberate act was "one performed with a cool purpose," and a premeditated act was "one done after the exercise of reflection and judgment." Tenn. Code Ann. §39-13-201(b)(1)& (2)(1991). Second degree murder was "a knowing killing of another." Tenn. Code Ann. §39-13-210 (a)(1)(1991). The jury was also instructed as to how an attempted crime is committed. Tenn. Code Ann. §39-12-101(a)(1)-(3)(1991).

The evidence showed that the appellant had prior altercations with Robert Huff and was upset about the loud music from Huff's party on the night of the crimes. After the police left the scene, the appellant said, "I'll be back." He went to his

[8] Effective July 1, 1995, the element of deliberation was deleted from first degree murder. See Tenn. Code Ann. §39-13-202(a)(1)(1995 Supp.).

apartment and retrieved a single shot, sawed off shotgun and ammunition. He shot Robert Huff in the chest, and made his way through the home firing more shots. He shot David Ross in the abdomen, reloaded the weapon, and shot Misty Harding in the chest from approximately five feet away. He left the house, and again reloaded the weapon. He shot Billy Hembree in the chest from a distance of five to six feet. The appellant then reloaded the shotgun and fired several shots at four occupants of Deanna Shepherd's car.

The jury rationally found from the evidence that the appellant attempted a knowing killing of Huff, attempted an intentional, premeditated and deliberate killing of Ross, committed the intentional, premeditated and deliberate killings of Misty Harding and Billy Hembree, and committed aggravated assault with a deadly weapon against the four occupants of the car. The evidence was sufficient to support the offenses; thus, we will not speculate as to why the jury convicted the appellant of attempting to commit second degree murder of Huff.

Finally, the appellant argues that the jury rejected the insanity defense only because it feared the legal consequences of acquitting him on that basis. The appellant argues that "it is a commonly held view" that the mental health system is incapable of protecting the public from the dangerously mentally ill. He cites State v. Overbay, supra, in which the court mentioned a newspaper article and a study that addressed the public's misconceptions of an insanity defense and its consequences. Id. at 651, n. 2.

There is no evidence to support the appellant's claim in this case. The jury heard from two mental health experts who opined that the appellant was legally sane. Several other witnesses described the appellant's calm demeanor immediately

before, during, and after the offense. Although David Ross described the appellant acting like a "wild person," no other lay or expert witness testified that the appellant appeared to be insane at the time of the offenses. By contrast, the jury in Overbay rejected the insanity defense even though both experts had testified that the defendant was insane, and the remaining proof also failed to prove sanity. It was in that context that the court cited the study and noted that this "type of issue is proving to be increasingly difficult for our juries." Id. at 651. This case is far different. The appellant is not entitled to relief on this ground.

II & III

The appellant argues that the trial court erred in (a) denying his request to pursue his motions for support services in an ex parte proceeding and (b) denying his motion for a psychiatrist. A written motion, filed under seal on February 7, 1992, requested funds for a mitigation specialist, a psychiatrist, and a neuropharmacologist. The motion relied upon Ake v. Oklahoma, 470 U.S. 68, 70, 105 S.Ct. 1087, 1090 (1985), a capital case in which the United States Supreme Court held that due process requires the appointment of a state funded psychiatrist "when [a defendant's] sanity at the time of the offense is seriously in question."

On March 31, 1992, argument was heard on the request for an ex parte proceeding. The State argued that there was no such authority in a non-capital case. See Tenn. Code Ann. §40-14-207(b). However, since the State had not yet elected whether it would seek the death penalty, the trial judge took the motion under advisement. On April 28, 1992, the trial court filed a written order stating that it would hear the motions ex parte if the State filed notice to seek the death penalty, and hear the motions in open court if the death penalty was not sought. On May 6, 1992, the State filed notice that it would not seek the death penalty for the crimes. The appellant

thereafter refiled his motions for support services in open court, and a hearing was held on the motions on August 26, 1992.

At the hearing, Dr. Jonathan Lipman testified about the field of neuropharmacology, which is the study of "the effect of drugs on behavior and on mental disorders and defects." He related his education and professional experience, which included a Ph.D. and board certification in the field. He said that he has testified as an expert in civil and criminal cases in approximately 150 cases. He discussed the effects of haloperidol on a person with paranoid schizophrenia, and the studies that could be performed to analyze the amount of haloperidol or other drugs in the appellant's system at the time of the offense.

There was no testimony with regard to the need for a psychiatrist; instead, counsel said that he was "standing on [the] showing of need as made in the Ake motion by way of affidavit." Counsel also said that the mitigation specialist and psychiatrist were "not as critical" as the neuropharmacologist. In sum, counsel said he could not "try this case without Dr. Lipman."

The motion requesting a psychiatrist that had been filed under seal on February 7, 1992, included documentation of the appellant's prior mental health evaluations and diagnoses from 1972 through 1985. In 1972, the appellant was evaluated in connection for a criminal charge of flag desecration. He was noted to be a drug user and diagnosed with acute schizophrenia. In 1978, the appellant was evaluated after being charged with assault with attempt to commit murder. He was diagnosed with a paranoid personality disorder but found legally sane at the time of that offense. In 1985, the appellant was evaluated relative to his attack upon his sister. He was again diagnosed as a paranoid schizophrenic, and officials at MTMHI determined

that he met the legal standard for insanity.

Accordingly, counsel's affidavit asserted that sanity was the central issue in the case, that mental health experts had historically reached different opinions with regard to the appellant's mental state, and that the defense could not afford to wait for the MTMHI professionals to render an opinion. Finally, counsel said:

> For the above listed reasons and given the fact that the opinions of the State experts are not protected by attorney-client privilege, or the psychiatrist-patient privilege,...it is absolutely essential to obtain the services of its own psychiatric or psychological expert. Given the present climate of State funding, it is felt to be appropriate that I be able to approach potential experts with the assurance that I at least have court approval to have a psychiatric expert....I will submit to the court the name and curriculum vitae of my recommended expert to the Court along with a detail[ing] of charges and reimbursable expenses....

No submission to the court detailing a specific expert and costs was ever filed. When the motion was refiled on June 12, 1992, it alleged:

> As to the services of a defense psychologist, these services are absolutely essential for the formulation and presentation of an insanity defense in this case. As of the filing of this motion, counsel...is still evaluating possible psychiatrists to consult with concerning this matter. Counsel's first choice will be made known to the court and the District Attorney prior to the hearing on this cause and said expert will be made available for the court's inquiry either by telephone deposition or presence at a hearing....

As noted, no psychiatrists testified at the hearing. Following the hearing, the court denied the requests for a mitigation specialist and psychiatrist as such experts "were not required for [the appellant] to be afforded due process." The court granted the appointment of Dr. Lipman. The court found that the neuropharmacologist's testimony had shown that his "area of expertise [was] uniquely appropriate in this case."

A

The appellant argues that the proceedings on his Ake motions should have been ex parte, particularly since the State delayed its election on whether it would seek the death penalty. The State maintains that the trial court did not have the authority to conduct such a hearing. The relevant statute provided:

> In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an ex parte hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court.

Tenn. Code Ann. §40-14-207(b)(1995 Supp.). The statute, and its ex parte provision, was expressly limited to capital cases. See State v. Aucoin, 756 S.W.2d 705, 713 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084 (1989); State v. Phillips, 728 S.W.2d 21, 25 (Tenn. Crim. App. 1986). Here the trial court's denial of an ex parte hearing was on this basis.

However, the supreme court has recently addressed ex parte requests for psychiatric assistance in non-capital cases in State v. Joseph Barnett, 909 S.W.2d 423 (Tenn. 1995). After discussing Ake v. Oklahoma, supra, the Barnett court said that the "due process principle of fundamental fairness applies to all criminal prosecutions, and does not rest upon the severity of the sanction sought or imposed." Id.at 428; see also State v. Edwards, 868 S.W.2d 682, 697 (Tenn. Crim. App. 1993)("constitutional due process...applies whether the death penalty is sought or not."). The court then concluded that the principles of Ake are not limited to capital cases, at least with respect to the assistance of psychiatric experts. Barnett, 909 S.W.2d at 431.

The court then addressed "whether an ex parte hearing is authorized or

required by the federal constitution in the context of requests by indigents for state-funded psychiatric expert assistance." Barnett, 909 S.W.2d at 428. Again, the court's holding was based on Ake; once a defendant makes "an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." 470 U.S. at 83, 105 S.Ct. at 1097. The court explained:

> The logic of requiring an ex parte hearing under such circumstances is apparent. Indigent defendants who must seek state-funding to hire a psychiatric expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense, or the identity of experts who are consulted, but who may not, or do not, testify at trial.

Barnett, 909 S.W.2d at 429. The court concluded that "at least in the context of a request for a psychiatric expert, an ex parte hearing is required" under the federal constitution. Id. at 430.

The court discussed the procedural aspects to its holding. To obtain an ex parte hearing, the burden is on the defendant to file a written, sealed motion that "alleges particular facts and circumstances that raise the question of the defendant's sanity." Id. at 429-30. A "bare allegation that sanity will be a significant factor at trial is not sufficient." Id. at 430. Rather, the motion should conform to Tennessee Supreme Court Rule 13 §(2)(B)(10).

The same procedural requirements were discussed in Owens v. State, 908 S.W.2d 923 (Tenn. 1995), in which the supreme court applied the ex parte requirement to post-conviction capital cases.[9] The court held that, in addition to alleging why state-funded services are necessary to ensure due process is afforded

[9] We note that Owens was based solely on the court's interpretation of the relevant statutes. As discussed, Barnett was based on a constitutional ground.

under the particular facts of a case, a motion for an ex parte hearing must also include the following: "(a) the name of the proposed expert or service; (b) how, when and where the examination is to be conducted or the services are to be performed; (c) the cost of the evaluation and report thereof; and (d) the cost of any other necessary services, such as court appearances." Id. at 928. This procedure is adopted from Tennessee Supreme Court Rule 13 §(2)(B)(10)-- the same rule cited in Barnett.

Obviously, neither Owens nor Barnett had been decided when the trial court ruled upon the appellant's request for an ex parte hearing. Under Barnett, it is now clear that due process requires an ex parte hearing for psychiatric assistance upon a sufficient threshold showing. The court did not, however, discuss the ramifications of the denial of such a hearing in Barnett. Since the conviction was affirmed, the denial was apparently harmless error.

Tennessee Supreme Court Rule 13 clearly was in effect at the time of this case. Whether the appellant made a sufficient showing under the rule is a close question. The appellant's history of mental illness and the nature of the crimes indicated that his mental state would be a potential issue. The motion did not, however, include many of the threshold factors set forth in Barnett, Owens, and Rule 13. It did not allege with particularity the facts and circumstances making a hearing necessary with respect to the charged crimes. It did not disclose the name or identity of proposed experts the appellant intended to consult or whether such experts would be called to testify. It also did not disclose the estimated costs associated with such services. The motion revealed a possible defense of insanity but it did not discuss strategic decisions, defense tactics, or any other matters that the court stressed in Barnett. Id. at 429. As a result, we conclude that the appellant is not entitled to relief based on the denial of an ex parte hearing.

B

We now address the question of whether, apart from the request for an ex parte hearing, the appellant made a sufficient showing for the appointment of a psychiatric expert. The courts have held that a "particularized need" must be shown by a defendant before a state-funded expert is provided under Tennessee Code Annotated section 40-14-207(b). State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992), cert. denied, 114 S.Ct. 740, 126 L.Ed.2d 702 (1994). The defendant must show that a substantial need exists requiring the assistance of state paid services and that his defense cannot be fully developed without such professional assistance. Id. Such a showing required "more than undeveloped assertions that the services were needed to attempt to counter the State's proof." State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994), cert. denied, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995).

In Barnett, the court adopted the "particularized need" test for requesting state-funded psychiatric experts. It summarized the following principles:

> [T]he defendant must demonstrate by reference to the facts and circumstances of his particular case that appointment of a psychiatric expert is necessary to ensure a fair trial. Whether or not a defendant has made the threshold showing is to be determined on a case by case basis, and in determining whether a particularized need has been established, a trial court should consider all facts and circumstances known to it at the time the motion for expert assistance is made....

Barnett, 909 S.W.2d at 431 (emphasis added).

The appellant failed to meet the particularized need test. The appellant has a history of mental illness-- the Ake motion was documented to that extent. The appellant did not, however, show specific evidence that would be developed through the appointment of an additional state-funded expert. Moreover, there was no indication as to who would conduct an examination, what an independent examination

would reveal, or why another examination was necessary given that the appellant had already been evaluated by officials at the Middle Tennessee Mental Health Institution. See, e.g., State v. Hood, 422 S.E.2d 679 (N.C. 1992), cert. denied, 113 S.Ct. 1955, 123 L.Ed.2d 659 (1993) (insufficient showing).

The court-ordered evaluation by MTMHI was not necessarily a substitute for the appointment of an independent expert to assist the defense. Compare, Lanier v. State, 533 So.2d 473, 481 (Miss. 1988) with DeFreece v. State, 848 S.W.2d 150, 150 (Tex. Crim. App.), cert. denied, 114 S.Ct. 284, 126 L.Ed.2d 234 (1993). Barnett states that upon a showing of particularized need, a defendant may obtain a "competent, independent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Barnett, slip op. at 18 (emphasis added). The appellant, however, did not show that the evaluation that was conducted was inadequate or that the opinions reached were incorrect.[10] In short, the appellant presented no evidence in support of the need for a psychiatrist and instead concentrated solely on his request for Dr. Lipman, the neuropharmacologist. The trial court found that the neuropharmacologist was "uniquely suited" to the case and necessary to assure the appellant would receive a fair trial. Under such circumstances, we cannot conclude that the trial court committed reversible error by denying the request for psychiatric assistance.

IV

The appellant argues that the trial court erred in excluding a police report that described a prior incident in which he had been sexually harassed by Robert Huff.

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[10] It is unclear from the record when the appellant received the MTMHI report dated December 17, 1991. There is a letter from MTMHI dated May 5, 1992, which states its conclusion that there was no basis for an insanity defense. However, there is an order dated August 21, 1993, which directed MTMHI officials to provide full disclosure of the appellant's medical records, including the December 17 report, to the appellant.

Sgt. Gary Hurst of the Clarksville Police Department testified that Officer Keith LaPrade had completed an offense report for June 19, 1991; the report was signed by Hurst as LaPrade's supervisor. LaPrade was no longer with the Clarksville Police. The State objected to the admission of the offense report.

The defense made a proffer of the evidence in a jury-out proceeding. The offense report contained the appellant's allegations that he had been harassed by Huff. According to the appellant, Huff had knocked on his door and said he "wanted to have sex" with the appellant and would do so "forcefully." The appellant also said that Huff had left notes under his door that suggested a number of homosexual acts. The report indicates that Huff denied making any threats or leaving the notes.

At trial, defense counsel first argued that the report as a whole was admissible as a record of regularly conducted activity pursuant to Tennessee Rule of Evidence 803(6).[11] He also made a general argument that the report was not offered to prove the truth of the matter asserted, but rather "for the relevance of [the appellant] taking it so serious [that] he called the police...[and] made a written complaint." Counsel asserted that it also showed the appellant's mental state. The trial court, however, excluded the evidence under Tennessee Rule of Evidence 803(8), which specifically excludes police reports.

On appeal, the appellant asserts that the evidence was admissible on several grounds. First, he contends that the report itself was admissible under Chambers v. Mississippi, 410 U.S. 284 (1973).[12] Second, he contends that his

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[11] This ground for admissibility was apparently abandoned, and it has not been argued on appeal.

[12] This ground was not argued in the trial court and is likely waived. Tenn. R. Evid. 103(a)(2). In any event, we have concluded that it is without merit.

statements to the officer were admissible to show his state of mind, that is, his fear of Robert Huff, under Tennessee Rule of Evidence 803(3). Finally, he contends that Robert Huff's statements were not offered to prove their truth, but rather, to show the effect on the appellant.

In Chambers, supra, the United States Supreme Court said that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 470 U.S. at 296. The defendant had been charged with murdering a police officer; he asserted that the killing had been committed by a witness named McDonald. At trial, McDonald's sworn confession to the crime was admitted into evidence; however, McDonald testified that he was innocent and he asserted an alibi. The trial court refused to allow the defendant to present three witnesses who had heard McDonald confess, ruling that such testimony was hearsay. The Supreme Court reversed the conviction, noting that "[t]o the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers." Id. at 297. The Court held that the evidence was "critical" to Chambers' defense and that its exclusion denied him a fair trial in accordance with due process. Id. at 302.

The same conclusion cannot be drawn here. The key point of the proffered evidence was that the appellant had made a prior complaint to the police about alleged harassment by Robert Huff. This evidence was heard by the jury even without the police report of the incident. The State's first witness, Robert Osterholtz, testified that when he responded to the loud music complaint on October 31, 1991, the appellant told him about prior harassment by his neighbors. According to Osterholtz, the appellant said that the resident of apartment two, (Huff's apartment), had been "putting notes on his door, generally harassing him, [and] offering some sort of sexual

favors." He made specific reference to homosexual suggestions.

Other witnesses for the appellant also related facts about the prior episode. Amelia Bozeman testified that in the late summer of 1991, the appellant told her that his neighbor had threatened to rape him. She described the appellant as "afraid" and "concerned" about the incident. William Cannady testified that in the summer of 1991, the appellant told him that Robert Huff was "putting notes under his door making propositions." Cannady testified that the appellant was "unhappy" about the situation. Finally, Debra Weeks testified that she was aware of "aggravation" that existed between Huff and the appellant.

Accordingly, we conclude that the evidence was not of such a critical nature that its exclusion deprived the appellant of a fair trial as in Chambers. Similarly, even if the evidence was probative of the appellant's state of mind, or not offered as true, its exclusion did not affect the outcome of the proceedings. The proof before the jury adequately described the prior incident as well as the appellant's state of mind with regard to Huff. Tenn. R. App. P. 36(a).

V

During the State's rebuttal, Chris Johnson testified about his encounter with the appellant at the Criminal Justice Complex following the offenses. According to Johnson, the appellant "flexed" his muscles and said "ha, ha, I got ya'll." The appellant argues that this testimony was improper because it did not rebut evidence raised by the defense, it was not within Johnson's personal knowledge, and it was cumulative to the testimony of Kevin Howell and Brian Jurisin. The State maintains that the issue was waived for the appellant's failure to object at trial and that the evidence was properly admitted. We opt to review the merits of the issue.

Rebuttal testimony is that which tends to explain or controvert evidence produced by an opposing party. Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979). Any relevant evidence offered in direct response to or in contradiction of material evidence offered by the accused or elicited on cross examination is admissible in rebuttal. State v. Smith, 735 S.W.2d 831, 835 (Tenn. Crim. App. 1987). The determination is left to the discretion of the trial judge. Id.

The trial judge did not abuse his discretion in this case. The appellant raised the issue of his mental state at the time of the offense. He argued that the crimes were triggered by circumstances that adversely affected his paranoid schizophrenia. The jury could find that the testimony describing the appellant's demeanor immediately following the offenses was probative of his mental state during the offenses. Johnson's testimony, therefore, was proper to rebut the defense proof. It was not cumulative, because the burden had shifted to the State to prove sanity beyond a reasonable doubt. Moreover, it was not speculative. Johnson initially prefaced his testimony by saying "I believe," but he clarified that he was certain of what the appellant had said. There was no error in this regard.

VI & VII

The appellant argues that the trial court erred in allowing Dr. Carl Selavka, Director of National Medical Services, to testify in the State's rebuttal case. His claim is twofold: (a) Selavka should have been precluded from testifying because he was a member of the defense team whose analysis was protected work product; and (b) the trial court should have declared a mistrial because the State engaged in misconduct by contacting Selavka and misrepresenting Selavka's relationship to the parties. The State maintains that the trial court allowed Selavka to testify as to limited matters, and that no error was committed.

The following procedural history may be gleaned from the extensive litigation of this issue below. The trial court appointed Dr. Lipman, a neuropharmacologist, to assist with the defense. Lipman conducted a 42 day study of the appellant's hair growth rate and preserved a sample of the hair. He described the precise methods by which the hair growth rate was measured and how the sample was collected and preserved. It was sent to National Medical Services for analysis in January of 1993. The lab was to analyze the hair for haloperidol, caffeine, and ephedrine, and to relate the amounts of the drugs to specific periods of time.

In January of 1993, assistant district attorney DeWerff contacted Dr. Selavka at National Medical Services. On January 27, 1993, Selavka sent a letter to DeWerff documenting the "proposed protocol" to be followed in the forensic testing of the appellant's hair. In sum, it described the tests used in the normal scope of hair analysis and the tests used when looking for haloperidol. The letter noted that an accurate measurement of the appellant's hair growth rate was an important factor to "accurately determine the time period represented by any portion of the hair." Selavka concluded the letter by requesting a "document which states the relationship with regard to confidentiality of testing results of our laboratory with the parties involved in the case." The letter noted:

> As we discussed, if we are informed in writing to provide equal access to the results to all identified parties, we will do so. We will, of course, keep all conversations and consultations with any one side confidential, and will not discuss the details of these conversations and consultations with the other parties in the case unless ordered to do so, in writing, by the presiding judge.

In response, DeWerff prepared a letter addressed to Selavka that purported to clarify the latter's role in the case:

> We agree that you are not retained exclusively by the State or the Defendant. You are working in conjunction with Dr. Jonathan Lipman, who is retained by the Defendant. However, pursuant to Rule 16 of the Tennessee Rules of

> Criminal Procedure, your report and results will be made available to both sides. Therefore, you are free to talk with all counsel involved.

The letter was dated February 17, 1993, and it was signed by the prosecutors. There was an unsigned space on the letter for defense counsel. Defense counsel asserted that he did not sign the letter because he believed Selavka was a member of the defense team. Apparently no further action was taken on the matter for several months.

On August 2, 1993, Dr. Lipman faxed a memorandum to Selavka that contained additional information regarding the appellant's neuroleptic medical records. The memorandum noted that while "the chronology herein is abstracted from institutional records available to both defense and prosecution, the assembly and collation of the chronology...is the proprietary work product of the defense and can only be released to the prosecution by the public defender's office...." On August 10, 1993, National Medical Services completed its report with regard to the appellant's hair. The report was furnished to the defense and the prosecution.

The trial began on August 16, 1993. Just prior thereto, a conference was apparently conducted in chambers. The trial court ruled that the State could not contact or interview Dr. Lipman without the presence of defense counsel. As the conference was ending, DeWerff asked whether the court's order only pertained to Dr. Lipman. The court said that it did. Defense counsel had apparently left the conference when this point of clarification was made.

After the meeting, DeWerff contacted Selavka and asked him to testify. DeWerff asserted that he never asked Selavka to reveal any communications he had with either defense counsel or the appellant. In a jury out hearing, Selavka testified that

did not reveal any communications he had with defense counsel to the State and that he did not disclose any of the raw data that went into the study. He did not discuss hair growth analysis with DeWerff until after the report had been completed and furnished to both sides.

In litigating this issue at trial, the appellant claimed that the State improperly contacted Selavka, that Selavka had information that was privileged, and that Selavka had information that was protected work product. He moved to exclude Selavka from testifying and requested a mistrial. The trial court denied both motions. The court limited Selavka's testimony, however, to a description of factors that may affect the rate of hair growth, a discussion of the degree of error such factors may cause, and a discussion of his lab's protocol.

A

The appellant maintains that Selavka should not have been allowed to testify because his information was work product and not discoverable.[13] The report generated by National Medical Services was discoverable. The applicable rule provides in part:

> [T]he defendant, on request of the state, shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

Tenn. R. Crim. P. 16(b)(1)(B). The rule does not authorize the discovery of work product:

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[13] The appellant does not contend on appeal that a specific privilege was applicable; thus, we deem these contentions made at trial as waived.

> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, his agents or attorneys.

Tenn. R. Crim. P. 16(b)(2).

The appellant failed to show that any "work product" was disclosed to the prosecution through Dr. Selavka or National Medical Services. It was clear that Dr. Lipman communicated work product and raw data to Selavka; however, there was no evidence at trial that the information was conveyed to the prosecution. The testimony of Selavka in the jury out hearing supported the trial court's finding that no violation had occurred. Moreover, Selavka's testimony to the jury was limited to matters not covered by work product.

This case differs from the authority cited by the appellant. In State v. Irick, 762 S.W.2d 121 (Tenn. 1988), cert. denied, 489 U.S. 1072 (1989), the defense requested "rough results" of an F.B.I. expert's tests on hair found on the victim's body and clothes. The trial court denied the motion. The defendant had been provided with the expert's results and report as mandated by Rule 16. The defendant was also extended an opportunity to interview the expert. He was entitled to no more. The supreme court affirmed the ruling. Id. at 126; see also Latham v. State, 560 S.W.2d 410, 411 (Tenn. Crim. App. 1977). Similarly, in State v. Chico Lopez Chigano, No. 1333 (Tenn. Crim. App., Knoxville, Sept. 26, 1991), the defense requested the "rough results" of an expert's ballistics examination. The defense was provided with the tests results and given the opportunity to interview the expert about the results. The request was denied by the trial court. On appeal, our court held that the State had complied with its discovery obligation under Rule 16.

Here the State received the reports and results of the analysis on the appellant's hair. It was entitled to that much under the rules of discovery. There was simply no showing that the State received protected work product or any other material to which it was not entitled.

B

The appellant argues that the prosecutor engaged in misconduct by contacting Dr. Selavka and by misrepresenting Selavka's relationship to the parties. He asserts that the misconduct warranted a mistrial. Although we question the nature and necessity of the prosecutor's conduct, we disagree that a mistrial was warranted.

Whether to grant a mistrial lies in the discretion of the trial judge. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990). A mistrial should be declared in a criminal case only in the event of a "manifest necessity" that requires such action. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1993). The trial court's determination will not be overturned on appeal unless it is shown that the trial court abused its discretion. State v. Adkins, 786 S.W.2d 744; see State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993).

In general, a witness or prospective witness does not belong to either party and may talk to either side as the witness sees fit. State v. Singleton, 853 S.W.2d 491, 493 (Tenn. 1993). Obviously, restrictions come into play in the event of a privilege or non-discoverable material. See Tenn. R. Evid. 501. The confusion that resulted from the prosecution's contacting Selavka could easily have been prevented. First, the prosecution could have sought information about hair testing and hair growth analysis by finding an entirely different expert. Moreover, the prosecution did not follow through when Selavka expressed his desire to be informed of his standing by court order.

Although the prosecution initially attempted to respond via an agreed letter, it was rebuked by defense counsel. Rather than seek a court order or clarification, the matter was dropped. After the report and results had been disclosed, the prosecution again contacted Selavka without ever having officially clarified Selavka's role. To compound the problem, the prosecutor tried to "clarify" the matter by making a vague, ex parte inquiry with the trial judge as the pre-trial meeting in chambers was concluding. The prosecutor had no explanation for why the issue was not discussed fully and openly. Moreover, the entire matter should have been resolved well before trial.

Nonetheless, there simply was no prejudice to the appellant. The trial court allowed the appellant to litigate this issue fully before making a ruling. The trial court heard the jury out testimony from Selavka and the arguments of counsel. The court found that no information of a protected nature was transmitted from Selavka to the prosecution. The court limited Selavka's testimony to matters of laboratory protocol and hair growth variables. Accordingly, we cannot conclude that the trial court abused its discretion in denying the motion for a mistrial.

VIII

The appellant contends that the trial court erred in allowing Selavka to testify as an expert in hair growth analysis. He claims that Selavka was not qualified in the field, and that the testimony was reversible error. The State maintains that there was a proper foundation for the testimony and that the trial court did not abuse its discretion.

Rule 702 of the Tennessee Rules of Evidence provides as follows:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education may testify in the form of an opinion or otherwise.

The qualification, admissibility, relevancy, and competency of expert testimony are matters largely left to the discretion of the trial court. The trial court's determination may be overturned on appeal if arbitrarily exercised. State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993); State v. Davis, 872 S.W.2d 950, 954 (Tenn. Crim. App. 1993).

Selavka testified that he had a bachelor's degree in chemistry, a master's degree in forensic chemistry, and a doctorate in forensic applied chemistry. The doctorate was earned in 1987. Since 1991, Selavka had worked as the director of forensic services at National Medical Services. In that capacity, he supervised the testing and analysis of hair samples. He described the methods of hair analysis, which are both biologically and chemically based.

Selavka testified that National Medical Services conducted hair growth studies on a regular basis. Selavka had conducted three of the studies personally. He testified that he had also read material by other authors in the field of hair growth analysis as it related to analysis for nutritional elements and drugs. He said he had attended two seminars, one for half a day and the other for two hours, in which hair growth studies were discussed. Selavka described hair growth analysis as an area within the field of hair testing and analysis. He described both hair growth analysis and hair analysis as areas within the broader field of forensic analytical chemistry. Selavka conceded, however, that he had not previously testified in court about hair growth studies.

We conclude that the appellant has not shown that the trial court erred in allowing Selavka to testify as an expert witness. The trial court deemed him qualified by virtue of his education, experience, and knowledge in the field. The testimony itself

was fairly limited, and it involved largely a recitation of factors that may affect the rate of hair growth. Accordingly, the appellant is not entitled to relief on this ground.

IX

Finally, the appellant argues that the trial court committed several errors in sentencing: finding that he was a multiple offender on counts three and four, enhancing the sentences for aggravated assault based on the use of a firearm, failing to consider the appellant's mental illness as a mitigating factor, and imposing consecutive sentences. In reviewing the sentences, we must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. §40-35-401(d). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The record of sentencing reveals that the trial court "considered all of the evidence, both at the trial of the case and at the sentencing hearing, including the presentence report and the exhibits, the testimony of all the witnesses both at trial and [sentencing], and ... considered what the State Legislature has ordered [it] to consider through the sentencing [act]." Thus, the court's determinations warrant the presumption of correctness.

A

A multiple offender is a defendant who has "a minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes," or "one (1) class A prior felony conviction if the defendant's conviction offense is a class A or B felony." Tenn. Code Ann. §40-35-106(a)(1) & (2). Although the appellant now argues that he was not a multiple offender for counts three and four (attempted first and second degree murder),

the record clearly indicates that counsel stipulated the appellant's multiple offender status for counts four through nine. In any event, the record supported multiple offender sentencing.

Count three, attempted first degree murder, was a class A felony, and count four, attempted second degree murder, was a class B felony. The State introduced two prior convictions to prove the appellant's multiple offender status: a 1978 conviction in Tennessee for assault with intent to commit murder under then Tennessee Code Annotated section 39-604; and a 1984 conviction in Minnesota for second degree assault. The appellant does not specifically contest the classification of the 1978 Tennessee conviction as a class A felony.[14] He argues that the Minnesota conviction was not shown to be "within the conviction class, a higher class, or within the next two (2) lower classes." Tenn. Code Ann. §40-35-106(a)(1).

As the State notes, a conviction from another state may be used to determine the proper sentencing classification. Tenn. Code Ann. §40-35-106(b)(5). If "a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given." Id. Here, the State introduced a certified copy of the Minnesota statute; it defined the offense of assault in the second degree as an assault with a dangerous weapon without causing great bodily injury. The State argued, and the trial court found, that the elements of the Minnesota offense matched the elements of aggravated assault in Tennessee both under Tennessee Code

[14] Tennessee Code Annotated section 39-604 was replaced by Tennessee Code Annotated section 39-2-103. The replacement contained the identical elements for the crime of assault with intent to commit murder. The classification table in Tennessee Code Annotated section 40-35-118 indicates that section 39-2-103 is to be treated as a class A felony. Thus, the trial court found that section 39-604 was also a class A felony.

Annotated section 39-2-101 and current Tennessee Code Annotated section 39-13-102. Since both the former and present aggravated assault offense is designated a class C felony, the court treated the Minnesota offense as a class C felony.

The appellant has not shown that the trial court's determination was incorrect. Accordingly, the State proved that the appellant had prior convictions for a class A and C felony, and the court properly sentenced him as a multiple offender on counts three through nine.

B

The appellant asserts that the trial court improperly enhanced the sentences for aggravated assault (counts five to eight) because he used a firearm. See Tenn. Code Ann. §40-35-114(9). The State concedes the error, as the indicted offenses were predicated on the use of a deadly weapon. The State maintains that the sentences were nonetheless proper based on the remaining enhancement factors. We agree.

As a multiple offender, the applicable range of punishment for the class C felonies was six to ten years. The trial court imposed nine year sentences. The court found that the appellant had a previous history of criminal convictions or behavior in addition to that used to establish the range, that he had no hesitation about committing a crime when the risk to human life was high, and that the crimes resulted in death and bodily injury to other persons and the appellant had a prior conviction for a felony resulting in death or bodily injury. Tenn. Code Ann. §40-35-114 (1), (10) & (11). The appellant has not shown that these factors were applied incorrectly.

The weight to be afforded each factor is left to the discretion of the trial

court so long as it complies with the purposes and principles of the 1989 Sentencing Act, and the findings are adequately supported by the record. Tenn. Code Ann. §40-35-210 (sentencing commission comments). Three of the four enhancing factors were fully applicable. The trial court also noted the appellant's mental illness was a mitigating factor. Tenn. Code Ann. §40-35-113(8). The trial court did not impose the maximum sentence in the range for any of the offenses. Accordingly, notwithstanding the elimination of one enhancing factor, the sentences for aggravated assault were entirely appropriate.

C

Finally the appellant claims that the trial court erred in imposing consecutive sentences. He argues that his mental illness weighs against the imposition of consecutive sentences and that the aggravated assault sentences (counts five to eight) should not be consecutive because the victims were all in the same car and the "targets" of the same criminal conduct.[15] The State maintains that the record supports the trial court's findings that the appellant's record of criminal activity is extensive and that he is a dangerous offender. Tenn. Code Ann. §40-35-115(b)(2) & (4).

The record and the presentence report support the finding that the appellant's record of criminal activity is extensive. It includes the 1978 conviction for assault with intent to commit murder, a 1980 conviction for assault, the 1984 conviction for assault with a deadly weapon, the 1985 attack upon his sister, and several misdemeanors. The mental health records introduced at trial also made reference to several criminal acts committed by the appellant while hospitalized. In sum, the appellant has not shown that application of this factor was incorrect. See State v.

[15] Not all of the sentences for aggravated assault were to run consecutively. Counts five and six are concurrent, and counts seven and eight are concurrent.

Marshall, 888 S.W.2d 786 (Tenn. Crim. App. 1994).

The record also supports the finding the appellant is a dangerous offender. In State v. Wilkerson, 908 S.W.2d 933 (Tenn. 1995), our supreme court said that evidence which shows a defendant had little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high establishes that the defendant is a dangerous offender but is not alone sufficient for consecutive sentencing. Instead,

> [t]he proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. In addition the Sentencing Reform Act requires application to all cases. The Act requires a principled justification for every sentence, including, of course, consecutive sentences. See Tenn. Code Ann. §40-35-102(1); 40-35-103(1)(2); 40-35-113; 40-35-114 (1990 & Supp. 1994).

Id. at 938. Here, the trial court ordered some of the sentences to be served consecutively, but also grouped other sentences to run concurrently. The court made the following findings:

> In this case, the fact [is] that beyond any shadow of a doubt, confinement of [the appellant] is necessary to protect society, to avoid deprecating the seriousness of the offense .... [This] case is a tragic grotesque failure of the mental health system and the criminal justice system.
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> [The appellant] is a dangerous offender whose behavior indicates little or no regard for human life and absolutely no hesitation about committing a crime in which the risk to human life is high.

Again, the appellant has failed to show that this factor was improperly applied. The record fully supports the trial court's findings, as well as findings that the sentences were related to the severity of the offenses and necessary to protect the public from further criminal acts by the appellant.

The judgment is affirmed.

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William M. Barker, Judge

_____
Joe B. Jones, Judge

_____
William Acree, Jr., Special Judge