IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1996 SESSION

FILED

**October 2, 1997**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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| STATE OF TENNESSEE, | ) | No. 02-C-01-9602-CC-00056 |
| | ) | |
| APPELLEE, | ) | Chester County |
| | ) | |
| v. | ) | J. Franklin Murchison, Judge |
| | ) | |
| HALLEY O'BRIEN THOMPSON, also known as TONY OZIER, | ) | (First Degree Murder, Attempt to Commit Voluntary Manslaughter, and Possession of a Deadly Weapon during Commission of a Felony Offense) |
| | ) | |
| | ) | |
| APPELLANT. | ) | |

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

# O P I N I O N

The appellant, Halley O'Brien Thompson, also known as Tony Ozier (defendant), was convicted of first degree premeditated murder, attempt to commit voluntary manslaughter, a Class D felony, and possession of a deadly weapon during the commission of a felony offense, a Class E felony, by a jury of his peers. The trial court imposed the following sentences: life imprisonment in the Department of Correction for first degree murder; four (4) years in the Department of Correction for attempted voluntary manslaughter; and two (2) years in the Department of Correction for possession of a deadly weapon. The sentences are to be served concurrently.

The defendant presents five issues for review. He contends the trial court committed error by (a) denying a request for mistrial after a juror indicated he had seen the defendant at the courthouse on prior occasions; (b) admitting into evidence a newspaper containing an article on the shooting; (c) failing to ensure the defendant was knowingly and intelligently waiving his right to testify; and (d) allowing testimony of a witness on rebuttal. The defendant also claims the state withheld exculpatory information that the shooting victims were members of a gang. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issues presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

Prior to May 29, 1994, the defendant and one of the victims, Eric Blount, had several angry confrontations. One involved Blount's girlfriend. Another incident involved the niece of Blount's girlfriend. There were angry words spoken and hard looks at a mutual friend's parties. Most of the witnesses testified the defendant had stated he was "going to get Eric." One witness testified both the defendant and Blount had threatened to harm to each other.

On Sunday evening, May 29, 1994, the defendant and Byron Kidd, a friend of the defendant, drove through Hillview Manor, an apartment complex in Henderson, on two separate occasions. When the automobile stopped on the second occasion, Blount and one of his friends, Michael Bowen, approached the vehicle. The defendant and Blount had an argument. When the argument had run its course, a person referred to as "Pack" told

Blount he should take care of his business like a man. One witness heard a shot fired from beside an apartment building.

Bowen was armed with a pistol. He removed the pistol from his pocket, and held the weapon next to his leg. The defendant told the police Bowen did not threaten him. The defendant first shot Bowen in the leg. Bowen fell to the ground. In the process, he dropped his weapon. When he stood, the defendant shot him a second time. The second projectile struck Bowen in the stomach. Bowen ran to an apartment. When the investigating officer examined Bowen's weapon, he found the weapon contained all live rounds. There were no spent bullets.

The defendant turned to Blount and shot him in the chest. Blount then ran away. The defendant chased him. He admitted firing four or five times at Blount as he was running through the complex. When Blount returned to the site where he was first shot, he collapsed. The defendant stood over Blount attempting to fire his pistol at him as he laid on the ground. The pistol clicked as there were no live rounds in his pistol. He then kicked Blount. The defendant stated: "I told you to leave me alone, but you wouldn't do that." The defendant fled on foot.

Bowen was required to have surgery later that night. The projectile striking him in the stomach damaged his colon. He had to wear a colostomy bag for six months. The projectile striking Blount's chest passed through both lungs, damaged the esophagus, and the aorta. A pathologist testified Blount died as a result of internal bleeding.

The defendant admitted to a police officer that he shot Blount and Bowen. He did not see Blount with a weapon. He admitted he chased Blount and shot at him four or five times with his .32 caliber pistol. The defendant stated Bowen was holding a pistol next to his leg. The defendant stated neither Bowen nor Blount had threatened him before he shot them.

**I.**

The defendant contends the court committed prejudicial error by denying his motion for mistrial after a potential juror made a prejudicial comment against the defendant during voir dire. He also contends the court should have given individual instructions to the

prospective jurors regarding the prospective juror's comment.

**A.**

During voir dire, a prospective juror, Richie Butler, was asked if he knew any of the parties. In front of the entire panel, Butler responded that he knew the prosecutor and he had seen the defendant before at the courthouse:

> I have seen him. Twice my house has been broken into, twice in the last couple of years, and you were the prosecutor both times, and every time I was down here, he was sitting down here. I just seen him.

Defense counsel moved for a mistrial based upon Butler's comment. The trial court called Butler to the bench to clarify what he meant by his comment. Butler said he did not mean the defendant had broken into his house; he merely meant he had seen the defendant at the courthouse when he (Butler) was there on matters related to the two burglaries.

The court told counsel he would instruct the jury that the defendant had been in court on preliminary matters related to the murder case. The court said he would also tell jurors the defendant had not been charged with anything in his court except this murder case. The defense objected to the instruction on the ground it would not be sufficient because Butler had said the "last couple of years." This would include an event that occurred before the murder. The trial court told counsel that Butler "was obviously mistaken about that," referring to the time frame. The judge instructed the jury:

> Ladies and gentlemen, we have to be very careful. It is kind of like having to do delicate surgery in these things -- to make sure that nothing happened that prejudices the cases -- for the State or for the defendant. And the reason I called Mr. Butler over, I wanted -- he had said that he had been here before -- he had some burglaries. He had seen, of course, Mr. Allen, who is the regular D.A. and then the defendant. I wanted to clarify that, and I asked Mr. Butler about it. The defendant hasn't been guilty of the burglaries he's talking about. It just happened that he came up on the burglaries. Mr. Thompson had nothing to do with any burglaries. I cleared that up with Mr. Butler.
>
> And Number 2: The defendant -- if he saw the defendant here, and I take it that he did -- Mr. Thompson was here on this very case on other preliminary matters. As you know -- we can always assume that you have some common

> sense, and when you get up this stage, you know there have been preliminary hearings and arraignments and things of that sort in every case. You are to assume that if Mr. Thompson was in this court, he was here on this case. He hasn't been in this court on anything, except this very case.
>
> We just wanted to clear that up with you. Mr. Butler saw him -- he did see him. I take his word for it, but he saw him, and the defendant was here on preliminary matters relative to this very case. Okay?

After the instruction was given, the jury selection proceeded and a jury was chosen.[1]

**B.**

A motion for the entry of a mistrial is a procedural device which requests the trial court to stop the trial, discharge the jury, and impanel another jury to determine the guilt of the accused. See Clark v. State, 170 Tenn. 494, 496-99, 502, 97 S.W.2d 644, 646 (1936); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). The entry of a mistrial is appropriate when the trial cannot continue, or, if the trial does continue, a miscarriage of justice will occur.

Whether an occurrence during the course of a trial warrants the entry of a mistrial is a matter which addresses itself to the sound discretion of the trial court; and this Court will not interfere with the exercise of this discretion absent clear abuse appearing on the face of the record. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991); State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977), cert. denied (Tenn. 1978).

The denial of the motion for mistrial was proper. The trial court cured any potential error by instructing the jury not to consider the unsolicited statement. State v. West, 767 S.W.2d 387, 397 (Tenn. 1989), cert denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990); State v. Taylor, 763 S.W.2d 756, 761 (Tenn. Crim. App. 1988); State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State

[1]Interestingly, Butler was not stricken from the panel and served on the jury.

v. Mayo, 735 S.W.2d 811, 816-17 (Tenn. Crim. App. 1987). A jury is presumed to follow a trial court's curative instruction. State v. Foster, 755 S.W.2d 846, 849 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); Newsome, 744 S.W.2d at 915; State v. Lawson, 695 S.W.2d 202, 204 (Tenn. Crim. App. 1985); State v. Barton, 626 S.W.2d 296, 298 (Tenn. Crim. App.), per. app. denied (Tenn. 1981).

This case is analogous to State v. Melvin Morris, where this Court held that the denial of a mistrial was proper after a witness made a nonresponsive comment about the defendant. State v. Melvin Morris, Madison County No. 02-C-01-9404-CC-00077 (Tenn. Crim. App., Jackson, September 28, 1994), per. app. denied (Tenn. January 30, 1995). The witness was asked if the defendant ever spent time at the witness's house to which the witness replied: "Yeah, when he's not in jail, he's over there." The trial court denied the defendant's motion for mistrial and gave a curative instruction. This Court found the trial court did not abuse its discretion. State v. Melvin Morris, Madison County No. 02-C-01-9404-CC-00077 (Tenn. Crim. App., Jackson, September 28, 1994), per. app. denied (Tenn. January 30, 1995); see also Lawson, 695 S.W.2d at 204 (jury presumed to follow instruction to disregard witness's answer to the question "How long have you known him?" -- "Ever since he got out of jail that first time.")

This case is distinguishable from the cases cited by the defendant, State v. Scruggs, 589 S.W.2d 899 (Tenn. 1979) and Blankenship v. State, 410 S.W.2d 159 (Tenn. 1966). In Scruggs a potential juror stated he had supervised the defendant while on probation. This clearly indicated the defendant had a prior conviction. While evidence of guilt was overwhelming, the Supreme Court noted the jury imposed a severe sentence. Real doubt was raised as to whether the cautionary instruction was effective. In Blankenship, a witness testified he was told the defendants were pleading guilty to their crimes. Again, the Supreme Court said despite a curative instruction, the court could not say the comment did not contribute to the verdict returned by the jury.

Here, Butler's comment was not a definitive statement about prior crimes or a plea of guilty. He merely stated he had seen the defendant before at the courthouse. The judge explained to the prospective jurors the defendant's previous appearances were for preliminary matters in the case sub judice.

The defendant also argues "there is no way to know beyond a reasonable doubt that the minds of the jurors who decided this case were not so influenced." The defendant cites State v. Furlough, 797 S.W.2d 631, 645 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). The issue in Furlough was whether a jury should have been sequestered. This Court's discussion centered around the problem of determining the influence of comments and extraneous influences made upon jurors who were not sequestered. The defendant also cites State v. Perry, 740 S.W.2d 723 (Tenn. Crim. App.), per. app. denied (Tenn. 1987) for support. In Perry this Court upheld the grant of a new trial because of communications about the defendant between a juror and the juror's spouse. The juror's spouse also discussed the case with a witness in the case. This case is distinguishable from both Furlough and Perry because the remarks made occurred in the presence of the trial judge who was able to determine the exact nature of the comment and its effect, if any, on the prospective jurors. The comment was quickly addressed by the court with a curative instruction.

The issue is without merit.

**II.**

The defendant contends the trial court committed error of prejudicial dimension by admitting a newspaper article which contained a story about the shooting death of the victim into evidence. The defendant argues it was error to admit an exhibit that was not properly authenticated. He predicates his argument on the premise that it was not certain the newspaper found in a cell occupied by the defendant was the same paper he had in his possession when he was booked into the jail. The defendant also argues the newspaper was not relevant.

**A.**

Patrolman David Russell of the Jackson Police Department arrested the defendant about 9:40 p.m. on June 1 at an apartment building in Jackson. When he took the defendant into custody, Russell found several items on the defendant's person. One of

the items was a folded page from the June 1st edition of The Jackson Sun in a back pocket. The defendant was allowed to keep the newspaper for reading material after being booked at the jail. This was a routine practice.

Russell said he noticed the newspaper contained an article about the shooting. He testified a newspaper article shown to him by the assistant district attorney general "appeared" to be the same newspaper article. He remembered the headline about the shooting was on the right side of the paper, and, although he did not read the article, he remembered it dealt with grief over the victim's death.

Russell said the next morning he thought the newspaper might be relevant so he decided to make an effort to locate it. Detention Specialist Tracy Chapman located the paper in the defendant's cell. It was located under a mattress. Russell said he forwarded the paper to an investigator. The paper introduced in court appeared to be the paper found in the defendant's possession the night he was taken into custody, the one found in his cell, and the article he forwarded to an investigator.

Chapman told jurors the defendant was the only one in the cell when he was placed there but he was later moved. She could not say for certain that no one else had been placed in the cell.

The trial court admitted the newspaper into evidence but said the article about the shooting would not be read to the jury.

**B.**

The defendant argues the most the witnesses could say was that the paper "appears" to be the one in the defendant's possession. No one knew for sure it was the same paper. Thus, the defendant claims the "chain of custody" was not established.

The state is not required to establish the identity of a newspaper beyond all possibility of doubt. State v. Ferguson, 741 S.W.2d 125, 127 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). See Ritter v. State, 3 Tenn. Crim. App. 372, 378, 462 S.W.2d 247, 250 (1970), cert. denied (Tenn. 1971). Nor is the state required to establish facts that exclude every possibility of tampering. Ferguson, 741 S.W.2d at 127. See Ritter, 3 Tenn.

Crim. App. at 378, 462 S.W.2d at 250. However, the circumstances established by the state must reasonably assure the identity of the item and its integrity. Ferguson, 741 S.W.2d at 127. See Ritter, 3 Tenn. Crim. App. at 378, 462 S.W.2d at 250.

The question of whether the State established the requisite chain of custody to justify the admission of the newspaper into evidence was a question which addressed itself to the sound discretion of the trial court. State v. Beech, 744 S.W.2d 585, 587 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Johnson, 705 S.W.2d 681, 684 (Tenn. Crim. App.), per. app. denied (Tenn. 1985); Wade v. State, 529 S.W.2d 739, 742 (Tenn. Crim. App.), cert. denied (Tenn. 1975); State v. Robert Glen Grissom III, Henderson County No. 02-C-01-9204-CC-00076 (Tenn. Crim. App., Jackson, March 10, 1993)(admission of blood sample); State v. Greg Lee, Anderson County No. 225 (Tenn. Crim. App., Knoxville, January 22, 1991)(admission of drug evidence). This Court will not interfere with the exercise of this discretion unless it clearly appears on the face of the record that the trial court abused it. Beech, 744 S.W.2d at 587; Johnson, 705 S.W.2d at 684; Wade, 529 S.W.2d at 742; Robert Glen Grissom III, Henderson County No. 02-C-01-9204-CC-00076 (Tenn. Crim. App., Jackson, March 10, 1993)(admission of blood sample); Greg Lee, Anderson County No. 225 (Tenn. Crim. App., Knoxville, January 22, 1991)(admission of drug evidence). In the case sub judice, the trial court did not abuse its discretion in admitting the newspaper into evidence.

**C.**

The defendant argues the newspaper was given an "aura of mystery" since the jurors were not allowed to see it. The paper invited speculation and had no relevance.

The defendant had the paper in his pants pocket when he was taken into custody. It was folded to a story about the shooting. As the trial court noted, it showed the defendant had an interest in the case. The fact that he had the paper on his person was relevant.

**D.**

The defendant also argues a procedural rule requiring that all exhibits be taken to the jury room was violated and resulted in "prejudice to the judicial process." As a result, reversal is warranted.

Tennessee Rule of Criminal Procedure 30.1 requires that exhibits be taken to the jury room. The rule provides an exception for good cause. In this case, the trial court admitted the paper, but the court decided its contents would not be related to the jury because "it would be replete with all kinds of hearsay and possibly unreliable information." This certainly satisfies the "good cause" exception to Rule 30.1.

**E.**

The defendant tries to raise for the first time on appeal a related issue, namely, no exhibits were given to the jury for their deliberations and thus Tenn. R. Crim. P. 30.1 was violated. This issue was not raised in the motion for new trial and, therefore, is waived. Tenn. R. App. P. 3(e). Furthermore, the record is silent as to whether exhibits were given to the jury or not.

This issue is without merit.

**III.**

The defendant contends he was deprived of his constitutional right to testify in support of his defense. The defendant argues he would have testified, but he was dissuaded because the trial court said the jury was ready to go home. Additionally, he claims a sheriff's deputy attending the jury made a similar comment. The defendant said he "chose not to testify based on his perception that such a choice by him would somehow irritate the jury."

**A.**

The trial court did say before closing arguments began that counsel might want to keep closing arguments short because the court sensed the jury was becoming restless as a result of repetitious testimony. But, as the state points out in its brief, the comment occurred after the proof was closed; and the comment would not have impacted the defendant's decision to testify. There is nothing in the record regarding any other comments made by the trial court or the deputy assigned to the jury.

When the defense began its case on the second day of trial, defense counsel stated they would present four witnesses including the defendant. The defense called one witness. At the conclusion of that testimony, the record indicates defense counsel and the defendant conferred. Counsel then met with the court to discuss jury instructions. The court indicated it would not decide on whether to give a self defense instruction requested by the defendant until the proof was closed. The defense counsel said they would not close the proof until they raised the issue of self-defense. A brief recess followed. The defense then rested. The defendant was not advised of his right to testify in a jury-out hearing nor was he questioned regarding his decision not to testify at trial.

**B.**

Criminal defense attorneys often ask for a jury-out hearing in order to place on the record the fact the defendant was advised of his right to testify and the defendant's

decision not to take the stand. This was not done in this case. Moreover, this procedure is not required by the law. State v. Danny L. Evans, Shelby County No. 02C01-9205-CR-00109 (Tenn. Crim. App., Jackson, November 10, 1993), per. app. denied (Tenn. March 28, 1994).

The trial court has no obligation or duty to advise the defendant of his right to testify nor establish for the record that he waived his right knowingly, voluntarily or intelligently. State v. Danny L. Evans, Shelby County No. 02C01-9205-CR-00109 (Tenn. Crim. App., Jackson, November 10, 1993), per. app. denied (Tenn. March 28, 1994). No Tennessee authority suggests that is the law. The waiver of his right is presumed from the defendant's failure to indicate his intention to do so. Evans, Shelby County No. 02C01-9205-CR-00109 (Tenn. Crim. App., Jackson, November 10, 1993); State v. Perry Riley, Wilson County No. 01-C-01-9201-CR-00040 (Tenn. Crim. App., Nashville, October 22, 1992), per. app. denied (Tenn. February 1, 1993); State v. Aubreyel B. Akbar, Shelby County No. 46 (Tenn. Crim. App. April 6, 1988), per. app. denied (Tenn. July 25, 1988).

**C.**

The defendant states "it is indisputable that the record plainly demonstrates that the defendant chose not to testify" based upon his perception. The record of the trial indicates no such thing. There is no mention in the trial record of the defendant's decision regarding his testimony. The first mention of this issue is made in the defendant's statement portion of the presentence report. The issue was discussed when the defendant was sentenced and also at the motion for new trial.

The defendant also complains about the record and lack of inquiry into this issue. It is the defendant's responsibility to prepare a record for appellate review. When an accused seeks appellate review of an issue in this Court, it is the duty of the accused to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); State v. Matthews, 805 S.W.2d 776, 783-84 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Allegations contained in pleadings are not evidence. Also, the arguments of counsel and

the recitation of facts contained in a brief, or similar pleading, are not evidence. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988).

The record simply does not support the defendant's claim. Assuming the trial court did make such a comment regarding a restless jury, the defendant has still failed to show how such a comment impacted his decision not to testify and how that made the decision involuntary.

The issue is without merit.

**IV.**

The defendant next contends the trial court abused its discretion by permitting a case-in-chief witness to testify as a rebuttal witness.

The defense called Sherry Trice as a witness. Trice said she was drinking "quite a bit" of alcohol with two friends on an apartment porch. Trice said she sensed a fight between the men and left to get her children. She did not see the defendant shoot the victims but she heard gunshots on her way to a nearby apartment. She said she ran into Blount who was being chased around the complex. Trice said Blount had a gun, and, when they encountered one another, Blount turned and began chasing the defendant.

The state called Vicki Carpenter as a rebuttal witness. She had been drinking with Trice. Before she testified, the defense objected. Counsel argued Carpenter was a case-in-chief witness and was not a proper rebuttal witness. After the judge stressed to the prosecutor that she could only rebut what Trice had said, the questioning of Carpenter began.

Carpenter told jurors that she saw the first shot fired and it was fired by the defendant. She also said Blount did not have a gun. When these observations were made, Trice had already left the porch to get her children. The defense objected again. The judge reiterated that Carpenter could only testify as to what she saw when she was with Trice. He then instructed the jury to disregard a portion of her testimony because it was improper rebuttal evidence.

The prosecutor made another attempt to use her testimony but the examination of

Carpenter quickly ended after she said that Trice was not with her when any of the shots were fired.

**A.**

The defendant claims a reversal is required pursuant to State v. West, 825 S.W.2d 695 (Tenn. Crim. App. 1992). The defendant's reliance on West is misplaced. In West, the state offered testimony from a witness in rebuttal who was an eyewitness to the shooting. This Court noted the "rebuttal" witness was actually the strongest witness the state had for its case implying that the witness should have been called during the state's case-in-chief. The state had also failed to notify the defense this eyewitness existed.

In this case, the defendant does not complain he was not notified of Carpenter's existence. In fact, Carpenter was drinking with Trice. The meat of the defense's complaint is that Carpenter did not have proper rebuttal evidence. Unlike the testimony of the "rebuttal" witness in West, Carpenter's testimony was not strikingly different from other state witnesses who saw the defendant fire first and who also observed that Blount did not have a gun.

**B.**

The phrase "rebuttal evidence" may be defined as evidence "which tends to explain or controvert evidence produced by an adverse party." Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979). This phrase encompasses "[a]ny competent evidence which explains or is a direct reply to, or a contradiction of, material evidence introduced" by an adverse party. Nease v. State, 592 S.W.2d 327, 331 (Tenn. Crim. App.), per. app. denied (Tenn. 1979). Rebuttal evidence is properly admitted for the purpose of impeaching a witness through the use of a prior inconsistent statement. Monts v. State, 218 Tenn. 31, 57-58, 400 S.W.2d 722, 733-34 (1966); Gray v. State, 194 Tenn. 234, 247-48, 250 S.W.2d 86, 92 (Tenn. 1952); Beasley v. State, 539 S.W.2d 820, 824 (Tenn. Crim. App.), cert. denied (Tenn. 1976). See Tenn. R. Evid. 613(b).

Questions concerning the admission or rejection of rebuttal evidence rest within the sound discretion of the trial court; and an appellate court will not interfere with the exercise

of this discretion unless it is clear on the face of the record that the trial court has abused its discretion. State v. Scott, 735 S.W.2d 825, 828 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). This Court agrees with the defendant that most of Carpenter's testimony was not proper rebuttal evidence. The trial court, recognizing this after the witness testified, gave a curative instruction to the jury to disregard the testimony.

The trial court cured any potential error by instructing the jury not to consider the improper testimony. State v. West, 767 S.W.2d 387, 397 (Tenn. 1989), cert denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990); State v. Taylor, 763 S.W.2d 756, 761 (Tenn. Crim. App. 1988); State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App.), per. app. denied (Tenn.1987); State v. Mayo, 735 S.W.2d 811, 816-17 (Tenn. Crim. App. 1987). A jury is presumed to follow a trial judge's curative instruction. State v. Foster, 755 S.W.2d 846, 849 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); Newsome, 744 S.W.2d at 915; State v. Lawson, 695 S.W.2d 202, 204 (Tenn. Crim. App. 1985); State v. Barton, 626 S.W.2d 296, 298 (Tenn. Crim. App.), per. app. denied (Tenn. 1981).

The defendant was not prejudiced. Carpenter's testimony was repetitious of earlier state witnesses who saw the shooting and said that Blount was unarmed. The defendant admitted to Investigator Heam that he shot the victims; he also said Bowen had a gun; he did not indicate Blount had a gun. Carpenter's testimony could not have affected the jury verdict.

This issue is without merit.

**V.**

The defendant next contends the prosecution withheld exculpatory evidence, namely, the victims belonged to a gang. The defendant argues that had he been provided this information and the opportunity to investigate it, it may have led to competent evidence which would have corroborated his claims of self-defense.

At the August 8, 1995 sentencing, Hal Armstrong a friend of both the defendant and victim Blount, testified he told the district attorney general, a police officer, and the sheriff that the shooting was a "gang-related incident." The following colloquy occurred during

direct examination:

> A. [T]he people that was involved -- the young man that was killed -- he was a gang member. And Mr. Michael [Bowen] -- he was a gang member.
>
> Q. How do you know that?
>
> A. I have been told that. I have saw them in action and everything.
>
> Q. Do you remember who told you that?
>
> A. I didn't have to see it. There was a member of the (inaudible), and it was well known in Henderson that they were members of this gang.

At the motion for new trial on November 6, 1995, the defense again complained about the withholding of exculpatory information:

> Defense: At sentencing Mr. Hal Armstrong brought up the fact that he had told Investigators that the two alleged victims were in gangs. He believed the gang to be called the Vice Lords.
>
> The Court: Now, wait a minute. Go back over that now.
>
> Defense: Sure. Mr. Armstrong - - at sentencing --
>
> The Court: At sentencing?
>
> Defense: Yes, Sir. Stated that he had told the Prosecutors -- or had told these investigators that these victims -- both the deceased and the one who lived, were in a gang. Of course, that would be real helpful in defending such a case, but we had no knowledge of that. Apparently , Mr. Armstrong said that he told somebody, and we believe that if we had a new trial that we could develop that and find out more on this --
>
> * * * *
>
> The Court: The two victims allegedly were in a gang?
>
> Defense: Yes sir, and that they had been active in gang activity. But not knowing that before hand -- you know -- I had no opportunity to --
>
> The Court: Just that they were in a gang.
>
> Defense: Yes, sir.
>
> The Court: Active in a gang?
>
> Defense: Yes, sir.

The Court: Now how would that help you? That wouldn't be a defense?

Defense: No sir, but it could have lead to more witnesses. I don't know where it could have lead. I didn't have that information.

The Court: I mean -- you know -- even if they were in gang, you can't shoot them? Okay.

The defendant argues the state had knowledge about the murder being gang-related, but the prosecution never communicated the information to the defendant. Thus, the defendant seeks a reversal of his conviction or, in the alternative, an evidentiary hearing to determine whether the witness communicated this to authorities and whether there is any recording of it.

In the landmark case of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that the prosecution has a constitutional duty to voluntarily furnish the accused with any exculpatory evidence that pertains to (a) the guilt or innocence of the accused and/or (b) the punishment which may be imposed if the accused is convicted of a criminal offense. The Court said in Brady that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 219. Thus, for evidence to fall within the constitutional duty of disclosure, it must be established that the evidence is material to the defense or the sentence that may be imposed if the accused is found guilty.

In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) the United States Supreme Court set forth the criteria for determining whether evidence is exculpatory in the constitutional sense. The Court said that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494. The Supreme Court reaffirmed the Bagley standard for determining materiality in Kyles v. Whitley, 514 U.S. 419, ___, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490, 505-08 (1995). The Tennessee Supreme Court followed Bagley and Kyles in State v. Edgin, 902 S.W.2d 387, 390-91 (Tenn. 1995).

In the recent case of Kyles v. Whitley, the United States Supreme Court explained

more fully its use of the term "reasonable probability" in the Bagley standard:

> Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

514 U.S. at ___, 115 S.Ct. at 1566, 131 L.Ed.2d at 506 (quoting Bagley v. United States, 473 U.S. at 678, 105 S.Ct. 3381, 87 L.Ed. at 491).

Initially the defendant complains in his brief that "no significant inquiry of the details of this matter appears in the record." As the state points out in its brief, the defendant had three months from the time of the sentencing hearing when this issue first came up until the motion for a new trial on November 6, 1995 to develop this issue and demonstrate what information the victims' gang connection would have brought forth. The defense made no attempt to offer any evidence about this issue at the hearing on the motion for a new trial.

The defendant's claim of a Brady violation must fail for two reasons. First, the state did not suppress this evidence. The trial record indicates defense counsel was aware of the gang connection. Witness Candice Jones was a friend of the victim. Her aunt dated the victim Blount. During the cross-examination of Jones the following line of questioning occurred:

> Defense: Mr. Blount and you were a member of the same group weren't you?
>
> Jones: I beg your pardon.
>
> Defense: Weren't y'all in a group together?
>
> Jones: Yes.
>
> Defense: Yes?
>
> Jones: No -- we hung out together.
>
> Defense: You and, I believe, your sister were part of that group? Was Michael Bowen a part of that group?
>
> Jones: We hung out together.

Defense: Did this group identify with each other by wearing bandanas?

Jones: Everybody wore bandanas.

Defense: Everyone?

Jones: Pretty much.

Defense: And who is everyone?

Jones: People around town. People that went to school together.

It is evident from defense counsel's questioning she knew or suspected the victims and others were members of a gang. It is common knowledge gang members wear bandanas of a particular color. Defense counsel could have examined the personal effects of the victims seized by the police to determine if a bandana was present. Moreover, Hal Armstrong was a close, personal friend of the defendant. He was available to defense counsel.

The prosecution is not required to furnish information which is known to the accused. State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App.), per. app. denied (Tenn. 1992); State v. Caldwell, 656 S.W.2d 894, 896-97 (Tenn. Crim. App. 1983); Banks v. State, 556 S.W.2d 88, 90 (Tenn. Crim. App.), cert. denied (Tenn. 1977). Furthermore, the prosecution is not required to provide information which is equally available to both the prosecution and the defense. Marshall, 845 S.W.2d at 233.

Second, the evidence was not material in the context of this case. The defendant has failed to prove that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." As the trial court noted, just because an individual is a gang member does not mean shooting him is a legal homicide. Furthermore, the defendant admitted to shooting the two men. Witnesses said the defendant was the first aggressor and Blount did not have a gun.

The issue is without merit.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

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JERRY L. SMITH, JUDGE