IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 1, 2018 Session

STATE OF TENNESSEE v. TREVENO CAMPBELL

Appeal from the Criminal Court for Shelby County
No. 13-03166 James C. Beasley, Jr., Judge

No. W2017-01101-CCA-R3-CD

As a result of firing upon several law enforcement officers and actually killing one officer, the defendant, Treveno Campbell, was indicted for one count of first-degree murder (Count 1), five counts of attempted first-degree murder (Counts 2, 4, 6, 8, 10), six counts of employing a firearm during the commission of a dangerous felony (Counts 3, 5, 7, 9, 11, 12), possession of marijuana with intent to sell (Count 13), and possession of marijuana with intent to deliver (Count 14). After a trial, a jury convicted the defendant of second degree murder (Count 1), two counts of attempted second degree murder (Counts 2 and 10), two counts of employing a firearm during the commission of a dangerous felony (Counts 3 and 11), one count of possession of a firearm with intent to go armed (Count 12), possession of marijuana with intent to sell (Count 13), and possession of marijuana with intent to deliver (Count 14). Counts 5, 7, and 9 were dismissed. As a result of his convictions, the defendant received an effective sentence of forty years in confinement. On appeal, the defendant raises numerous issues, including the trial court erred in denying his motion in limine; the trial court erred in allowing Officer Goodwin to invoke his Fifth Amendment rights; the trial court erred in denying his motion for a mistrial based on the State and a two witnesses referencing gang activity; the trial court erred in instructing the jury on the defense of self-defense; the trial court erred in denying his request for an instruction on mistake of fact; the evidence was insufficient to support the jury's verdict; the trial court erred in sentencing him; and cumulative error. After a review of the record and the briefs, we find no reversible error and affirm the defendant's convictions and sentences.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ALAN E. GLENN and TIMOTHY L. EASTER, JJ., joined.

William D. Massey, Lorna S. McClusky, and Melody M. Dougherty, Memphis, Tennessee, for the appellant, Treveno Campbell.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Alanda Dwyer and Reginald Henderson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts

State's Proof

On December 14, 2012, members of the Memphis Police Department were tasked with executing a search warrant for drugs that were allegedly being sold out of the residence located on Mendenhall Cove in Memphis, Tennessee. The target of the warrant was an individual known by the nickname, Little Toot. Prior to executing the warrant, the officers were advised that the residence was known for gang activity and that weapons were likely present. The officers were also concerned that any drugs present in the house might be destroyed before they could be seized. Based on these facts, the officers obtained a "no knock" warrant and decided to enter the house in a tactical stack formation. Per procedure, a tactical stack formation consisted of the initial officer carrying a "Police" shield for protection and followed by five other armed officers.

On the day in question, Officer T. J. Goodwin[1] carried the shield and was followed by Officer Louis Mobley, who was armed with a shotgun and responsible for protecting Officer Goodwin. Officer Williams Vrooman and Officer Martoiya Lang, the homicide victim, followed Officer Mobley. Sergeant Darryl Dotson and Officer Eric Dobbins carried the "ram" and the "pick" and were responsible for opening the door, after which they fell in line behind Officer Vrooman and the victim. In addition to the officers who entered the house, four other officers were stationed around the perimeter of the residence.

As the officers reached the front door of the residence and prepared to breach, Officer Dobbins "banged" on the door and announced, "Police, search warrant." Once the wrought iron first door was opened and removed, Officer Dobbins again announced,

[1] At the time of trial, Officer Goodwin had retired from the Memphis Police Department. Despite his status as a civilian, we will refer to him as Officer Goodwin since the testimony in question relates to his time as an active police officer and in order to be consistent with the summary of the evidence presented at trial.

"Police, search warrant" prior to ramming and opening the wooden door. As the officers made entry into the residence, they again announced their presence and purpose.

The officers first "cleared" the living room and the kitchen. Officer Goodwin and Sergeant Mobley then noticed an individual, later to be identified as co-defendant Willie Braddock, in the bedroom at the end of the hall and immediately instructed Braddock to get on the ground. As Officer Goodwin and Sergeant Mobley secured Braddock, they heard several gunshots. Sergeant Mobley looked back in the direction of the shots, saw the victim on the floor, and heard her "wince" twice. When Officer Dobbins heard the shots, he "hugged the wall for concealment and cover." He then heard someone say "get [the victim] out of here," and noticed the victim lying on the ground "half in the door and half out" of the door of the first bedroom. When Officer Dobbins reached the victim, she was not breathing. He attempted to locate her wound but was unable to determine where she had been shot. When Officer Dobbins called for an ambulance, Officer Sarah Hardison, who had been positioned around the perimeter of the house, entered the house and helped Officer Dobbins move the victim outside. Once outside, Officer Dobbins removed the victim's helmet and vest but was still unable to locate the victim's wound. When asked to describe the victim's condition at that point, Officer Dobbins stated, "she wasn't there."

As Officer Dobbins was attending to the victim, the remaining officers converged on the room where the shots had originated. Sergeant Dotson was the first officer to enter the room followed by Officer Goodwin. According to Sergeant Dotson, the first shots were fired at the team after Officer Vrooman stepped in the hallway once he had "cleared" the kitchen. After the initial round of shots, Sergeant Dotson proceeded down the hallway where he "observed the victim lying on her back and not moving." Sergeant Dotson stepped over the victim and entered the room and found the defendant "crouched against the wall with a weapon pointed towards the door." Sergeant Dotson shot the defendant two or three times causing the defendant to fall to the floor. When the defendant fell, his weapon fell out of his hand. Sergeant Dotson then noticed that Officer Goodwin had also entered the room. When Detective Mobley finally entered the room, he found Sergeant Dotson holding the defendant at gunpoint. The defendant was lying down and appeared to be injured. Seeing that the defendant was safely detained, Detective Mobley and Officer Goodwin finished "clearing the house."

After the house was cleared and the defendant and Braddock had been detained, the officers involved in executing the warrant "convened at the raid van" but were separated once Internal Affairs ("IA") arrived on the scene. The officers' guns were collected, and all unused ammunition was counted. The officers were then transported to the station where each gave a statement concerning the incident.

According to the officers stationed around the perimeter of the house at the time the warrant was executed, the entry officers could be heard announcing "police, search warrant" several times. The officers continually announced their presence and purpose until the shooting started.

Officer Charlie Cathey was one of several officers charged with documenting and collecting evidence from the crime scene. After photographing the scene, the officers entered the defendant's bedroom to locate and secure the defendant's gun. They located a 9mm handgun on the floor under a dresser. When asked how far under the dresser the gun was located, Officer Cathey stated, "maybe wrist length." According to Officer Cathey, the gun had one live round in the chamber and six additional rounds in the clip.

After securing the defendant's weapon, the officers returned to Braddock's room. There, they discovered two jars each containing several small plastic bags of marijuana packaged to sell. Forensic testing of the items collected revealed the jars contained 25.02 grams of marijuana -- 13.57 grams in one jar and 11.45 grams in the other. Officers also discovered a set of digital scales in the bedroom.

Next, the officers searched the bedroom that was later determined to be Little Toot's room. The search of that room produced several live rounds of ammunition hidden in a jewelry box, .82 grams of marijuana, a 10,000 volt TASER, another glass jar containing 4.08 grams of marijuana, an extended gun magazine between the mattresses, two white plastic buckets containing 17.63 grams of marijuana, and several items with Little Toot's name on them -- an empty hydrocodone medicine bottle, birthday cards, court papers, a handgun carry permit, and the title to a Dodge Charger. A search of the vehicle, which was on the scene, produced 32.53 grams of marijuana. The search of a black Lincoln, also found on the scene, produced a bag containing 127.2 grams of marijuana that was "packaged ready to sell."

After searching Little Toot's room, the officers returned to the defendant's room. In the defendant's room, officers discovered $660 in the defendant's shoe, $376 in the defendant's wallet, and $3,108 in a dresser drawer. They also found over 500 grams of marijuana in multiple places -- plastic bags, jars, the defendant's backpack, and dresser drawers -- all of which was packaged and ready to sell. Additionally, the search produced two bags of live rounds of ammunition, two boxes of 9mm ammunition, and a set of digital scales.

Special Agent Cervinia Braswell with the Tennessee Bureau of Investigation (TBI) testified as an expert in the field of firearms identification and ballistics. Agent Braswell received three weapons to examine -- a Springfield Armory 9mm ("9mm") and two SIG Sauer .40 caliber Smith and Wesson handguns (".40 caliber"). According to

Agent Braswell, the 9mm was identified as belonging to the defendant and had the ability to hold a total of eighteen rounds -- seventeen in the magazine and one in the chamber. When Agent Braswell received the weapon, it contained 7 unfired rounds.

The first .40 caliber handgun examined by Agent Braswell belonged to Sergeant Dotson. Sergeant Dotson's gun was capable of holding thirteen rounds -- twelve in the magazine and one in the chamber. In addition to the weapon, Agent Braswell also received three magazines meaning, if the weapon had not been fired, he should have received a total of thirty-seven live rounds. Instead, Agent Braswell only received thirty-four live rounds which he concluded meant the weapon had been fired three times. The second .40 caliber examined by Agent Braswell belonged to the victim and was identical to the .40 caliber handgun carried by Sergeant Dotson. The victim's .40 caliber handgun had nine live rounds in it meaning the victim had fired a maximum of four shots the day of the incident.

After test firing each weapon and comparing the test-fired bullets to the bullets recovered from the scene and from the victim, Agent Braswell concluded that the bullet taken from the victim was a 9mm round that had been fired from the defendant's gun. Agent Braswell also studied the crime scene sketches and photos, and when paired with the bullets and their locations, was able to determine the trajectory of the shots that were fired. For example, based on the location of the bullets fired from the victim's gun, Agent Braswell was able to determine that the victim fired at least two shots as she was falling down. Furthermore, based on the trajectory of the bullets that were fired from the defendant's gun, Agent Braswell was also able to determine that the defendant would have been "crouched down" when firing his weapon.

After the close of the State's case-in-chief, retired Officer Timothy Goodwin was called to the stand. When questioned by his attorney about whether he would testify if called as a witness, Officer Goodwin stated that he would exercise his Fifth Amendment rights if called by either party to testify concerning the events of December 14, 2012. After informing the trial court of his decision to invoke his Fifth Amendment rights, Officer Goodwin was dismissed and declared unavailable by the trial court. The parties then discussed whether Officer Goodwin's prior statements to IA could be introduced at trial. At the conclusion of that hearing, the trial court held that Officer Goodwin's testimony concerned events that took place after both the victim and the defendant had been shot, and therefore, was not relevant to, and did not hinder the defendant from arguing and presenting the defense of self-defense.

Defense Proof

The defendant's first witness was Paul Kish, a forensic consultant and bloodstain analyst. Mr. Kish was allowed to provide expert testimony concerning his review of the bloodstain patterns at the crime scene. Based on his review of the bloodstains and the defendant's injuries, Mr. Kish determined the defendant was "ruffed up" by the officers as they removed him from the house, in addition to being shot.

William Braddock, the other individual found and detained in the house on December 14, 2012, and the defendant's co-defendant on the drug-related charges, was the defendant's second witness. Braddock testified that he lived at the residence and that the defendant would stay there occasionally. Braddock, however, had never seen the defendant sell drugs. On the morning in question, the defendant arrived at the house around 3:00 a.m. and went to his room and went to bed. Later that morning, Braddock woke to "something that sounded like a car crash" and hearing people saying "get down." Braddock stated he never heard anyone say "police." A few seconds after Braddock was detained and handcuffed, he heard five to six gunshots. On cross-examination, Braddock admitted he originally told police that the defendant was already home when Braddock got home and that the defendant "kept a gun in case he got robbed or anything from hustling marijuana." However, Braddock claimed he told the police these things originally because they threatened him with being charged with murder.

Next, the defendant took the stand in his own defense. The defendant stated that at the time of the murder he was working at FedEx and his shift had ended around 2:30 a.m. that morning. Upon arriving home, the defendant went straight to his room and went to bed. He woke later that morning because there was "lots of loud noise." The defendant testified he did not know what was going on and was scared to death. He feared someone was breaking into the house. According to the defendant, he never heard anyone say "police." The defendant then grabbed his gun and started shooting. The defendant admitted he could not see anyone and was just firing his gun in an attempt to scare the people in his house.

Once the defendant stopped shooting, an officer carrying a police shield entered his room and instructed the defendant to put his hands up. The defendant testified that he complied. The defendant stated that within seconds of the first officer entering his room and him complying with the officer's instructions, another officer entered the room and shot the defendant three times.

The defendant denied ever seeing the victim and claimed he did not intend to shoot the victim. The defendant stated that he had a gun to protect himself and his house because there had been several burglaries and robberies in the area. While the defendant admitted to smoking marijuana, he denied selling it. The defendant also claimed that some of the money found in his room was Braddock's money. He stated that he had

saved around $3,000 from working and gambling and that he was going to use the money to buy his mother a birthday and Christmas present.

In rebuttal, the State called Major Charles Newell with the Memphis Shelby County Crime Commission. Major Newell reviewed the crime statistics within a one mile radius of the defendant's residence and found no reports of burglaries, robberies, or thefts in that area around the time period of the incident.

Analysis

1. Denial of Motion in Limine

The defendant contends the trial court erred in denying his motion in limine which sought to preclude evidence of gang and drug activity and the presence of various weapons at the residence. He argues the jury only needed to hear that the police were executing a signed no-knock search warrant on a third party and that any other information concerning the warrant or the affidavit in support of the warrant was irrelevant as to the defendant. The State submits the information was necessary to show the officers possessed a valid warrant, to explain why they entered the residence in a highly organized and tactical manner, and to provide contextual background information for the jury. We agree with the State.

Tennessee Rule of Evidence 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence is typically admissible, while irrelevant evidence is inadmissible. Tenn. R. Evid. 402. "Generally, the admissibility of evidence rests within the trial court's sound discretion, and the appellate court does not interfere with the exercise of that discretion unless a clear abuse appears on the face of the record." *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2017)). This Court finds an abuse of that discretion when the trial court applies "an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *Lewis*, 235 S.W.3d at 141 (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

The victim's murder occurred while officers with the Memphis Police Department were executing a lawful search warrant. According to the warrant, a high-ranking member of the Gangster Disciples street gang, Little Toot, lived at the residence and was manufacturing, storing, and selling crack cocaine out of the residence. The affidavit also noted that guns had been seen at the residence. Because the defendant was not mentioned in or the subject of the warrant, the defendant filed a "Motion in Limine to Preclude

Evidence as to [the defendant] of Unsubstantiated Allegations Related to the Following: Gangs, Gang House, Gang Membership, Gang Ranking and Gang Related Activity; Automatic Weapons and/or AK47s; Willingness of Unknown Persons to Fire Upon Officers, Presence of a Security System at the [the residence]; Cocaine and/or Crack Cocaine; and Drugs for Which a Certified Test Result From TBI has not been Provided to Defense Counsel." In ruling on the defendant's motion, the trial court concluded:

> [t]he State has the right to prove that they are there with a valid search warrant that's been signed. That it is a no knock warrant that's been signed. That it is a no knock warrant and to explain what that means. And that that is the reason that they go into this residence; that it was legal and it is permitted by law. And the basis for it, the information is that drugs were being stored there; that there's a high[-]ranking member of the Gangster Disciple[s] gang there. Weapons, I think it said weapons had been seen there.

It is clear from the above referenced ruling that the trial court found the circumstances surrounding the warrant were material and necessary to set the stage for the jury and provide them with sufficient, but limited, information as to why the police were present and why they entered the home in the manner they did.

Both the defendant and the State acknowledge contextual background evidence is allowable under certain circumstances. More specifically, our supreme court has held,

> A general policy that bars background evidence merely because it does not directly bear upon a material issue ignores the fact that such evidence is often crucial to understanding the other material evidence at trial, and the absence of background evidence could have detrimental effects on the jury's comprehension of the offense in question. Events do not occur in a vacuum, and in many cases, knowledge of the events surrounding the commission of the crime may be necessary for the jury to "realistically evaluate the evidence." *See Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972).
>
> This is not to say, however, that background evidence is always admissible or even appropriate, especially when the evidence would not serve to substantially assist the jury in its understanding of the issues or place the material evidence in its proper context. Further, background evidence may be particularly inappropriate when it consists of other crimes, wrongs, or acts that are not part of the same criminal transaction. A careful balance must be maintained so as not to allow background evidence to

> rupture the general prohibition against evidence offered only to show criminal propensity.

State v. Gilliland, 22 S.W.3d 266, 271-72 (Tenn. 2000).

Here, while the defendant was not the subject of the search warrant and no proof was offered to establish the defendant was a gang member, the facts surrounding the subject of the warrant, Little Toot, including the potential dangers law enforcement faced as they executed the warrant, were material to the jury's understanding of the case. In order to fully understand the circumstances surrounding the victim's murder, the jury needed to know the reasons why the officers entered the home in the manner and fashion they did that day. The jury needed to understand the officers' need for a tactical approach to executing the warrant in order to understand how the events unfolded. Additionally, it is clear there was a great deal of noise and commotion inside the residence during the execution of the warrant based on the way the officers entered. Therefore, in order to provide the jury with the necessary contextual background, the reason why the officers were present, the concerns the officers had executing the warrant, and the reason the officers entered the home in the manner in which they did was material. Accordingly, the trial court did not abuse its discretion in denying the defendant's motion in limine.

Additionally, the trial court specifically instructed the jury both during trial and as part of the written instructions prior to deliberation, as follows:

> Members of the jury, "Lil Toot" has been described as the subject of the search warrant in this case. [The defendant] is not the subject of the warrant. Lil Toot is described in the warrant as a "high ranking member of the Gangster Disciples" not [the defendant]. There is no proof that [the defendant] is a Gangster Disciple or that this residence is a Gangster Disciple House or that they shoot at the police. You are not allowed to consider any of those things as facts when you are deciding whether [the defendant] is guilty of the offenses allege[d] in this indictment.

Based on the trial court's instruction, the jury was fully advised they could not consider the information contained in the warrant and the officers' concerns about executing the warrant against the defendant. We presume the jury follows all instructions given by the trial court, "with commonsense understanding of the instructions in the light of all that has taken place at the trial [that is] likely to prevail over technical hairsplitting." *State v. Knowles*, 470 S.W.3d 416, 426 (Tenn. 2015) (quoting *Boyde v. California*, 494 U.S. 370, 381 (1990)). To overcome this presumption, the defendant must show by clear and convincing evidence that the jury failed to follow the trial court's instructions. *State v. Harbison*, 539 S.W.3d 149, 163 (Tenn. 2018) (citing *State v.*

Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App. 1987)). The defendant has presented no evidence to overcome this presumption. Accordingly, the defendant is not entitled to relief.

Next, the defendant contends the State used the trial court's ruling to allow improper hearsay testimony as substantive evidence. The State, however, contends its questioning of the officers simply allowed the jury to understand the officers' thinking and strategy and the reasons supporting their actions. Upon our review, we agree with the State.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). In general, hearsay statements are inadmissible. Tenn. R. Evid. 802. However, this Court has held that statements used to prove the effect on a listener are not hearsay:

> [A]ny time the statement is used to prove the hearer or reader's mental state upon hearing the declaration, words repeated from the witness chair do not fall within the hearsay exclusion. The statement fails the test of hearsay because it is not used to prove the truth of the matter asserted in the statement.

State v. Carlos Jones, No. W2008-02584-CCA-R3-CD, 2010 WL 3823028, at *14-15 (Tenn. Crim. App. Sept. 30, 2010) (quoting Neil P. Cohen, et al., *Tennessee Law of Evidence,* § 8.01[7], at 8-23 (5th ed. 2005)); see generally *State v. Venable*, 606 S.W.2d 298, 301 (Tenn. Crim. App. 1980) (noting that the victim's statement was not hearsay because it was offered for its effect on the hearer, the defendant, and established evidence of his motive in returning to the scene of the crime later in the day and threatening the victim).

Based on the trial court's pre-trial ruling, the State questioned the officers involved about the basis for the warrant. Officer Dobbins testified they obtained a no-knock warrant and were "going after narcotics. The target's nickname was Little Toot." He further stated the purpose of the no-knock warrant was the perceived dangers of gang activity, guns located in the house, and to prevent the destruction of evidence. Officer Dobbins's testimony was offered without objection by the defendant. However, when Officer Vrooman testified that he had been informed "there were firearms inside the house," "it was a known Gangster Disciple house," and "a high-ranking member [of the gang] lived there," the defendant objected.

Similar to the need to provide the jury with contextual background, allowing the officers involved in executing the warrant to testify as to their understanding of the situation and the circumstances they were facing was relevant as to why they entered in a tactical manner and why they continually announced their presence once inside the house. Thus, the trial court did not err in allowing the officers to testify concerning the information included in the warrant, its effect on them, and how they prepared for and actually executed the warrant. Additionally, we would again note that the trial court took great measures to limit the impact of this testimony and to ensure the jury understood the limited purpose of the testimony. Accordingly, we conclude that the statements about the affidavit admitted through the officers' testimonies were properly admitted as non-hearsay and were probative as to the effect the information had on the officers and their actions; therefore, the trial court did not abuse its discretion in denying the defendant's motion in limine.

2. Officer Goodwin's Invocation of the Fifth Amendment

The defendant contends the trial court erred in allowing retired Memphis Police Officer Timothy Goodwin to invoke a "blanket Fifth Amendment privilege." While the State agrees the trial court "failed to follow the proper procedure for determining whether [Officer] Goodwin was entitled to the privilege, the error was harmless beyond a reasonable doubt because [Officer] Goodwin's testimony related to what occurred after the defendant had already shot [the victim], and thus it would not have affected the jury's determination regarding whether the defendant was acting in self-defense." Upon our review of the record and the applicable law, we agree with the State.

After the State closed its case-in-chief, the defendant informed the trial court of his desire to call Officer Goodwin as a witness. Officer Goodwin's attorney then advised the trial court that Officer Goodwin would be "exercise[ing] his Fifth Amendment right" if questioned about the events surrounding the execution of the search warrant. Based on this, the trial court had Officer Goodwin take the stand, and the following exchange occurred:

Counsel:[2] You're Timothy Goodwin?

Officer Goodwin: Timothy J. Goodwin, Jr.

[2] In order to distinguish between all the parties and due to the fact that Officer Goodwin was represented by private counsel, we will refer to his attorney as "counsel." No disrespect is intended.

Counsel: All right. And [Officer] Goodwin, you've been subpoenaed to appear in these proceedings; is that correct?

Officer Goodwin: Yes, sir.

Counsel: You and I have discussed this matter for a number of months; is that correct?

Officer Goodwin: Yes, sir.

Counsel: All right. And if any party were to ask you questions about events and circumstances concerning the execution of a search warrant on December 14th, 2012 at 1062 North Mendenhall Cove, are you desirous of answering those questions? Or are you desirous of exercising your Fifth Amendment right to remain silent?

Officer Goodwin: I'll be exercising my Fifth Amendment right.

Counsel: Those are all the questions I have, your Honor.

Defense Counsel: [Counsel], your client -- could I ask -- if I ask him any questions right now in voir dire regarding that --

State: No.

Defense Counsel: -- exercise, is he going to also take the Fifth Amendment?

Counsel: Yes. He will not answer any questions about this incident.

Trial Court: My understanding is any questions dealing with the execution of this search warrant on that day in question, he's going to take the Fifth on.

Counsel: And the investigation thereof.

Trial Court: Okay. Thank you.

At that point, Officer Goodwin was excused without further questioning and without objection by the defendant.

A. Fifth Amendment

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Similarly, article I, section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Under the Sixth Amendment to the United States Constitution, which is applicable to the states via the Fourteenth Amendment, an accused has the right to compulsory process in order to obtain witnesses favorable for the defense. *State v. Hester*, 324 S.W.3d 1, 93-94 (Tenn. 2010) (appendix) (citing *Faretta v. California*, 422 U.S. 806, 816 (1975)). Similarly, the Tennessee Constitution affords a defendant facing criminal prosecution the right "to have compulsory process for obtaining witnesses in his favor." Tenn. Const. art. I, § 9. Regardless, a criminal defendant's right to compulsory process is not without limits; instead, " the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible.'" *State v. Smith*, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982) (quoting *Bacon v. State*, 385 S.W.2d 107, 109 (Tenn. 1964)).

Our supreme court has cautioned, however, that "[t]he calling of a witness who will refuse to testify does not fill the purpose of compulsory process, which is to produce testimony for the defendant." *State v. Dicks*, 615 S.W.2d 126, 129 (Tenn. 1981). Moreover, "where there is a conflict between the basic right of a defendant to compulsory process and the witness's right against self-incrimination, . . . the right against self-incrimination is the stronger and paramount right." *Id.* The court has further stated that

> [i]f it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has a right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.

Id. (quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)). The trial court has the discretionary authority to determine "whether a witness has properly invoked his fifth amendment right against self-incrimination." *State v. Zirkle*, 910 S.W.2d 874, 890 (Tenn. Crim. App. 1995). This Court will reverse the trial court's decision only upon a plain abuse of that authority. *Id.* This Court has previously stated that in order for the invocation of the Fifth Amendment right to be proper, "'it need only

be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question . . . *might* be dangerous because injurious disclosure *could* result.'" *State v. Burns*, 777 S.W.2d 355, 359 (Tenn. Crim. App. 1989) (emphasis in original) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951)).

Turning to the instant matter, Officer Goodwin, along with each officer involved, gave a statement to IA immediately after the shooting. According to his initial statement, Officer Goodwin was down the hall when he heard gun shots. As he turned in the direction of the shots, he saw the victim fall to the floor. Officer Goodwin was the first officer to enter the room from where the shots had originated and found the defendant in the room armed with a handgun. Almost immediately after Officer Goodwin entered the room, Officer Dotson entered the room and shot the armed defendant. Officer Goodwin's statement was consistent with the statements of the other officers. At a later date during the internal investigation, Officer Goodwin amended his statement claiming that Officer Dotson actually entered the room first and that the defendant was no longer holding his weapon when Officer Dotson shot him. Finally, prior to trial and after giving both statements, Officer Goodwin petitioned the City of Memphis for, and was granted, "a line of duty psychological retirement for a mental health disorder."

The defendant, citing *State v. Dooley*, contends that the trial court should have determined on a "'question by question'" basis whether the information he was attempting to elicit from Officer Goodwin was incriminating. *See Dooley*, 29 S.W.3d 542, 551 (Tenn. Crim. App. 2000). Additionally, the defendant contends that the trial court's ruling denied the defendant his right to present a favorable witness. While the State concedes the trial court failed to follow the proper procedure, the State argues that any error committed by the trial court was harmless in that the defendant has failed to show that Officer Goodwin's testimony would have been material or favorable to his defense. We agree.

While the trial court erred in not following the proper procedure, such error does not necessarily result in relief for the defendant. Thus, we apply constitutional harmless error analysis to assess the effect of the error in this case. When conducting constitutional harmless error analysis, our supreme court has identified two categories of error -- structural constitutional error and non-structural constitutional error. *State v. Climer*, 400 S.W.3d 537, 569 (Tenn. 2013). Structural constitutional errors amount to "defects in the trial mechanism" that "compromise the integrity of the judicial process itself," defy harmless error analysis and always require reversal. *Id.* (quoting *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008)) (internal quotation marks omitted). Non-structural constitutional error "requires reversal *unless* the State demonstrates beyond a reasonable doubt that the error is harmless." *Id.* (emphasis added) (quoting *Rodriguez*, 254 S.W.3d at 371) (internal quotation marks omitted). An appellate court evaluating

non-structural constitutional error determines, based upon an examination of the record, "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quoting *Rodriguez*, 254 S.W.3d at 371) (internal quotation marks omitted); *see also Neder v. United States*, 527 U.S. 1, 15 (1999); *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Cecil*, 409 S.W.3d 599, 610 (Tenn. 2013). "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . [the appellate court] should not find the error harmless." *Neder*, 527 U.S. at 19.

As argued by the State and found by the trial court, Officer Goodwin's testimony related to events that occurred after the defendant fatally shot the victim. While Officer Goodwin gave conflicting statements concerning the events that occurred after the victim was shot -- whether the defendant's hands were raised or whether he was pointing a gun at officers as they entered his room -- those questions and the answers to the same are not material or favorable to the defendant's claim of self-defense. As noted by the trial court, whether the defendant surrendered when several officers entered his room or whether he did not surrender until after he was shot by officers, did not preclude the defendant from putting on a defense of self-defense. Per the defendant's admission and the proof at trial, the defendant shot the victim prior to seeing the victim or the other officers. The fact that the defendant may have then later been shot by officers either prior to surrendering or after surrendering had no effect on the defendant's self-defense claim. Therefore, contrary to the defendant's claim, the trial court's handling of Officer Goodwin's invocation of his Fifth Amendment right, not only did not contribute to the verdict reached but also was not relevant to the instant matter, specifically the defendant's claim of self-defense. Thus, any error on the part of the trial court was harmless, and the defendant is not entitled to relief.

B. Compulsory Process

In conjunction with his claim regarding Officer Goodwin's invocation of his Fifth Amendment right, the defendant argues Officer Goodwin's testimony was both material and favorable to his defense, and by allowing Officer Goodwin to invoke his Fifth Amendment right, the trial court denied the defendant his right to compulsory process. The State contends the defendant failed to show the testimony was material or favorable to his defense, and therefore, failed to establish a violation of the Compulsory Process Clause of the Sixth Amendment. We agree with the State.

Under the Sixth Amendment to the United States Constitution, which is applicable to the states via the Fourteenth Amendment, an accused has the right to compulsory process in order to obtain witnesses favorable for the defense. *Hester*, 324 S.W.3d at 93-94 (appendix) (citing *Faretta v. California*, 422 U.S. 806, 816 (1975)). Similarly, the

Tennessee Constitution affords a defendant facing criminal prosecution the right "to have compulsory process for obtaining witnesses in his favor." Tenn. Const. art. I, § 9. Regardless, a criminal defendant's right to compulsory process is not without limits; instead, "'the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible.'" *State v. Smith*, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982) (quoting *Bacon v. State*, 385 S.W.2d 107, 109 (Tenn. 1964)).

Our supreme court has cautioned, however, that "[t]he calling of a witness who will refuse to testify does not fill the purpose of compulsory process, which is to produce testimony for the defendant." *State v. Dicks*, 615 S.W.2d 126, 129 (Tenn. 1981). Moreover, "where there is a conflict between the basic right of a defendant to compulsory process and the witness's right against self-incrimination, . . . the right against self-incrimination is the stronger and paramount right." *Id.* The court has further stated that

> "[i]f it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has a right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.

Id. (*quoting United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)). The trial court has the discretionary authority to determine "whether a witness has properly invoked his fifth amendment right against self-incrimination." *State v. Zirkle*, 910 S.W.2d 874, 890 (Tenn. Crim. App. 1995). This Court will reverse the trial court's decision only upon a plain abuse of that authority. *Id.*

Here, the defendant claims that by allowing Officer Goodwin to invoke his Fifth Amendment right, the trial court denied the defendant his right to compulsory process. More specifically, the defendant contends Officer Goodwin would have testified that he was the first officer to enter the room after the victim was shot and that the defendant immediately dropped his weapon and surrendered; thus, supporting the defendant's claim that "he reasonably believed that he was acting in self-defense." However, as found by the trial court and discussed supra, Officer Goodwin's testimony concerning entering the defendant's room related to events that occurred after the defendant shot the victim. Additionally, based on the overwhelming proof that the officers loudly and regularly announced their presence prior to the defendant shooting the victim, that the defendant admitted he could not see anyone, and the fact that no shots were fired by police until after the defendant shot the victim, Officer Goodwin's testimony would have, at best, suggested that the defendant only decided to surrender once he was confronted face-to-

face with several officers. Thus, the trial court's ruling did not deny the defendant his right to compulsory process. The defendant is not entitled to relief.

C. Officer Goodwin's Statements

Next, the defendant contends the trial court erred in finding that Officer Goodwin's statements to IA were inadmissible. He argues Officer Goodwin's statement qualified as a statement against interest under Tennessee Rule of Evidence 804(b)(3). The State contends the trial court properly found the statement to be self-serving rather than against Officer Goodwin's penal interest. Our review of the record reveals the statements in question were not relevant to the defendant's claim of self-defense, and therefore, the defendant is not entitled to relief.

Based on the testimony and arguments of counsel, Officer Goodwin initially gave a statement to IA on the day of the shooting in which he stated that he entered the defendant's room after Sergeant Dotson had entered the room. In a later statement to IA, Officer Goodwin allegedly stated that he entered the room first and that the defendant's hands were in the air when Sergeant Dotson then entered the room and shot the defendant.

As noted by the defendant and the State, Officer Goodwin's statements to IA were hearsay, defined as "a statement other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay is not admissible unless an exception applies. Tenn. R. Evid. 802. In order for hearsay to qualify for any exception under Rule 804, the declarant must be "unavailable." Tenn. R. Evid. 804(a). When Officer Goodwin asserted his Fifth Amendment privilege against self-incrimination, he became "unavailable" for the purpose of Rule 804 of the Tennessee Rules of Evidence. After a declarant has been found to be "unavailable," one of the exceptions in subsection (b) must apply for the statement to be admitted as testimony. The defendant, who intended to use the statement as proof that the defendant was acting in self-defense when he shot the victim, argues that Rule 804(b)(3) of the Tennessee Rules of Evidence governs:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The State counters, arguing Officer Goodwin's statement was not a statement against interest but was self-serving. The trial court agreed with the State's argument. However,

even assuming the defendant's argument is correct, the testimony concerning the order in which officers entered the defendant's room and when the defendant was shot is not relevant to the defendant's claim of self-defense.

Tennessee Rule of Evidence 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence is typically admissible, while irrelevant evidence is inadmissible. Tenn. R. Evid. 402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. The admissibility of evidence is within the sound discretion of the trial court, and this Court will not interfere with that discretion absent a clear showing of abuse of discretion. *See State v. Clayton*, 535 S.W.3d 829, 859 (Tenn. 2017). This Court finds an abuse of that discretion when the trial court applies "an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

Again, the defendant argues that these statements were material to his defense of self-defense, and thus, the trial court erred in not allowing them. However, as with Officer Goodwin's live testimony, his statements concerning how things may or may not have unfolded after the victim was shot are not relevant to the defendant's state of mind at the time he shot the victim -- whether or not at that moment he had a reasonable belief of imminent death or serious bodily injury. Which officer entered the defendant's room first and whether the defendant was shot before or after surrendering is not material to the defendant's claim of self-defense. Unlike in a case of first-degree murder in which the defendant's actions after the murder can be relevant to establishing premeditation, *see State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997), the defendant in the instant matter was charged with second-degree murder -- a knowing killing. Tenn. Code Ann. § 39-13-210(a)(1). Thus, the trier of fact is tasked with focusing solely on the defendant's mindset at the time of the shooting and not taking into account his actions immediately before or after the fact. *See State v. Page*, 81 S.W.3d 781 (Tenn. 2002) (second degree murder is strictly a result-of-conduct offense meaning the individual acts with awareness that his conduct is reasonably certain to cause the death of the alleged victim).

As noted by the State, numerous witnesses testified that the officers executing the warrant routinely and loudly announced "police, search warrant" prior to and once they were inside the house. Their announcements could be heard by people located outside the home. Additionally, the defendant admitted that he could not see anyone and just

started firing his gun. Thus, regardless of how officers entered the room after the victim was shot, such testimony does not support the defendant's claim that he was in fear of imminent death or serious bodily injury prior to firing his weapon. Once the defendant shot the victim, he had committed a knowing killing. His actions and those of the officers after that point were not relevant to the defendant's claim of self-defense. Therefore, the trial court did not abuse its discretion in excluding Officer Goodwin's statements, and the defendant is not entitled to relief.

3. Denial of Motions for Mistrial

Next, the defendant contends the trial court erred in denying his motions for mistrial after the State elicited testimony about gang activity and testimony that one of the officers involved had a brother shot in the line of duty. The State submits that it "did not elicit any testimony that would have precluded an impartial verdict" and that the trial court provided curative instructions in each instance. Our review of the record reveals the trial did not abuse its discretion in denying the defendant's motions.

The decision of whether to grant a mistrial is within the sound discretion of the trial court. *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). Normally, a mistrial should be declared only in the event that a manifest necessity requires such action. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "In other words, a mistrial is an appropriate remedy when a trial cannot continue, or a miscarriage of justice would result if it did." *State v. Land*, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000). The burden to show the necessity for a mistrial falls upon the party seeking the mistrial. *Id.* This Court will not disturb the trial court's decision unless there is an abuse of discretion. *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990). In evaluating whether the trial court abused its discretion, we may consider: "(1) whether the State elicited the testimony, (2) whether the trial court gave a curative instruction, and (3) the relative strength or weakness of the State's proof." *State v. Welcome*, 280 S.W.3d 215, 222 (Tenn. Crim. App. 2007).

A. References to Gang Activity

The defendant contends the trial court erred in denying his motion for a mistrial after Officer Vrooman and Sergeant Dotson testified concerning gang activity and the basis of the warrant. The State submits that the defendant failed to establish that any of the disputed testimony precluded an impartial verdict. Based on the overwhelming proof supporting the defendant's guilt, we agree with the State.

Initially, the defendant contends the trial court abused its discretion in denying the defendant's motion for a mistrial after the following exchange between Officer Vrooman and the State during Officer Vrooman's direct testimony:

> Q. And what was the information that you had regarding that house in order to obtain the search warrant?
>
> A. Through the course of the investigation my source told me that there were firearms inside the house. There were -- it was a known Gangster Disciple house. There was a high[-]ranking member of -- excuse me of the Gangster Disciples that lived --

Relying on his pre-trial ruling that the State had a right to prove they had a valid warrant, that basis of the warrant was that drugs were present in the house, and that a high-ranking member of the Gangster Disciples lived there, the trial court denied the defendant's motion. The trial court then instructed the jury to "disregard the statement that this was a Gangster Disciple house. There [is] no proof of that that's been presented. The officer testified as to a high[-]ranking member, he can testify to that . . . ."

While there is a difference between referring to a residence as one inhabited by a high-ranking gang member or as a gang house, that difference is slight. Additionally, no proof was introduced stating the defendant was a high-ranking member of the Gangster Disciples, or even a gang member for that matter. Also, any prejudice towards the defendant was greatly outweighed by the overwhelming proof presented at trial.

The defendant next contends that trial court should have granted a mistrial after the following exchange took place during the State's direct examination of Sergeant Dotson:

> Q. Sergeant Dotson, going back just a bit when you were in your briefing and y'all were discussing, did you all discuss anymore information that you had about that residence, what was present?
>
> A. Yes, sir. We stated that we were looking for crack cocaine. That they would have surveillance videos before inside and outside of the residence and that guns were inside of the residence. Also, they were Gangster Disciples and they will shoot at the police --

Immediately upon the defendant's objection and request for a bench conference, the trial court instructed the jury, "Ladies and gentlemen, disregard the last statement. That's not an issue for you to determine. At this particular point that's not a relevant

issue for you to consider. So, disregard that." Then, upon the completion of the bench conference, the trial court again addressed the jury:

> All right. Ladies and gentlemen, let me read this to you, please. Members of the jury, Little Toot has been described as a subject of the search warrant in this case. [The defendant] is not the [subject] of the warrant. Little Toot is described in the warrant as a high[-]ranking member of the Gangster Disciples, not [the defendant]. There is no proof that [the defendant] is a member of the Gangster Disciples or that this residence is a Gangster Disciple house or that they shoot at the police. You are not allowed to consider any of those things as facts when you are deciding whether [the defendant] is guilty of offenses alleged in this indictment. Does everybody understand that?

The jury unanimously answered in the affirmative. The trial court then asked if anyone had any questions. When no questions were presented by the jury, the trial court instructed the parties to continue.

Again, as with Officer Vrooman's testimony, Sergeant Dotson simply testified as to what the officers had learned about the subject of the search warrant, which was not the defendant. He testified to what the officers believed they were facing and explained why they approached the search and entry of the house in a tactical manner. And, while the portion of Sergeant Dotson's testimony complained of might be seen as prejudicial, the overwhelming proof presented at trial and the trial court's instructions to the jury cured and out-weighed said prejudice.

According to the proof presented, the officers were legally present in the home. They routinely announced their presence and purpose loud enough to be heard outside the house. The defendant admitted that he began haphazardly firing his weapon without seeing anyone and knowing whether he was in danger of death or serious bodily injury. Additionally, the search of just the defendant's room produced $4,144 in cash, over 500 grams of marijuana, all of which was packaged and ready to sell, two bags of live rounds of ammunition, two boxes of 9mm ammunition, and a set of digital scales. In addition to the overwhelming proof establishing the defendant's guilt, the trial court instructed the jury they were not to consider the information concerning the Gangster Disciples and Little Toot in reaching its verdict. We presume the jury follows the instruction of the trial court. *State v. Joshua R. Starner*, No. M2014-01690-CCA-R3-CD, 2016 WL 1620778, at *21 (Tenn. Crim. App. Apr. 20, 2016) (citing *State v. Young*, 196 S.W.3d at 111; *Shaw*, 37 S.W.3d at 904). When the testimony concerning gang activity is viewed in light of the trial court's instructions and the overwhelming proof presented at trial, the

trial court did not abuse its discretion in denying the defendant's motion for a mistrial. Accordingly, the defendant is not entitled to relief.

B. Testimony of Officer Harris

Next, the defendant argues the trial court abused its discretion in denying his motion for a mistrial after the State attempted to elicit "irrelevant" testimony from Officer Harris regarding his brother, who was shot in the line of duty. The State contends the jury could not have been prejudiced because the jury only heard that Officer Campbell's brother was in a similar situation. We agree with the State.

During the defendant's questioning of Officer Campbell, the defendant asked Officer Campbell what the officers were doing immediately after the incident. Officer Campbell explained all of the officers gathered around the raid van and tried to figure out what happened. Following Officer Campbell's response, the following exchange took place:

> Q. And so you're kind of talking to each other about what just happened?
>
> A. We're more concerned. We're not -- we're not talking about what happened. We're just concerned. You know, I told some people to call their family. Just let them know what's going on.
>
> Q. So when you say you're trying to figure out what happened you're saying you didn't talk about what just happened?
>
> A. No, sir. Not at all.
>
> Q. Okay. How were you trying to figure out what just happened?
>
> A. I'm talking about just internally. Just trying to internally make it make sense.
>
> Q. Okay. So you're all just over there just internally working through it?
>
> A. Yeah. No -- well, when I said I was trying to figure out what happened, I was talking about myself internally.

Then, on redirect examination, the State followed up with Officer Harris concerning the defendant's line of questioning. Specifically, the State asked,

> Now, you also talked about -- you were questioned about when you said something about after y'all got together trying to make it make sense and you said you were really speaking about yourself. You were telling people to call their family maybe. Would you -- did you have a brother or something in a situation like this before?

The defendant objected, concerned the State was going to discuss another officer involved shooting. After some discussion, the trial court determined Officer Harris could discuss telling the other officers to call their families but could not testify concerning the specifics of his family's history. When the State followed-up by asking, "You were asked about, you know, you said you were really talking about yourself internalizing what your feelings were trying to make it make sense but you have a brother that was in a similar situation," the defendant again objected. After another bench conference, the State ended it's questioning of Officer Harris.

While a review of the transcripts of the jury-out hearing makes clear that Officer Harris's brother, a sheriff's deputy, was shot while on duty, that fact was never presented to the jury. Rather, as noted by the State, the only testimony presented to the jury was that Officer Harris's brother was involved in a "similar situation" and that is why Officer Harris suggested his teammates contact their families. The defendant has failed to explain how this information prejudiced the jury against him or was so inflammatory as to deny him a fair trial. Additionally, when this testimony is viewed in light of the proof presented at trial, the defendant has failed to show how any potential prejudice was not outweighed by the overwhelming proof of his guilt. Thus, the defendant is not entitled to relief.

4. Jury Instruction

A. Self-Defense

The defendant contends the trial court failed to properly instruct the jury concerning the defense of self-defense. Specifically, the defendant argues the trial court's "failure to follow the procedure as outlined by the Tennessee Supreme Court in *State v. Perrier* resulted in an incomplete and erroneous instruction." The State, however, notes the defendant failed to object or raise the issue in his motion for new trial, and therefore, has waived his claim. Additionally, the State argues that any error on the part of the trial court was harmless as no reasonable jury would have acquitted the defendant based on the overwhelming proof presented at trial. We agree with the State.

Relying on *State v. Perrier*, 536 S.W.3d 388 (Tenn. 2017), which was decided after the defendant's trial, the defendant contends the trial court erred in instructing the

jury concerning self-defense. In *Perrier*, our supreme court clarified that "the phrase 'not engaged in unlawful activity' is a condition on a person's statutory privilege not to retreat" rather than a complete bar to self-defense. *Id*. at 401. "[A] duty to retreat does not mean that a person cannot defend herself or himself." *Id.* at 404. Consistent with the common law duty to retreat, a defendant engaged in unlawful activity "'must have employed all means in his power, consistent with his own safety, to avoid danger and avert the necessity of'" using force. *Id.* at 404 (quoting *State v. McCray*, 512 S.W.2d 263, 265 (Tenn. 1974)). Furthermore, when the defendant's unlawful activity is what provokes the other individual's use of force, the defendant must "abandon[ ] the encounter or clearly communicate[ ] to the other the intent to do so." Tenn. Code Ann. § 39-11-611(e)(2)(A); see also *Perrier*, 536 S.W.3d at 399 (noting that the portion of the "no-duty-to-retreat rule" that required the defendant be "without fault in provoking the confrontation" is presently codified in Tenn. Code Ann. § 39-11-611(e)(2)). We hold that a person is entitled to a jury instruction that he or she did not have to retreat from an alleged attack only when the person was not engaged in unlawful activity and was in a place the person had a right to be. *Perrier*, 536 S.W.3d at 401.

Here, the trial court instructed the jury concerning self-defense pursuant to the pattern jury instruction[3] but did not, as required by *Perrier*, make the initial determination of whether or not the defendant was engaged in unlawful activity; rather, leaving that determination for the jury. It is also undisputed that the defendant failed to challenge the self-defense instruction at trial and raised the issue for the first time on appeal based on *Perrier*. The defendant nevertheless argues that *Perrier* applies retroactively to all cases pending on direct review when it was decided, including his, and that appellate courts must evaluate his entitlement to relief under *Perrier* unconstrained by the plain error doctrine because *Perrier* constitutes a new rule.

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[3] As applicable to the defendant's claim on appeal, the trial court charged the jury, in pertinent part, with self-defense as,

> If a defendant was not engaged in unlawful activity and in a place where he had a right to be, he would have a right to use force against the alleged victim when and to the degree the defendant reasonably believed the force was immediately necessary to protect against the alleged victim's use or attempted use of unlawful force. The defendant would also have no duty to retreat before threatening or using force.
>
> If a defendant was not engaged in unlawful activity and was in a place where he had a right to be, he would also have a right to use force intended or likely to cause death or serious bodily injury if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury, the danger creating the belief of imminent death or serious bodily injury was real, or honestly believed to be real at the time, and the belief of danger was founded upon reasonable grounds. The defendant would also have no duty to retreat before threatening or using force likely to cause death or serious bodily injury.

The defendant is partially correct. In *State v. Minor*, 546 S.W.3d 59, 68 (Tenn. 2018), our supreme court concluded "that new rules apply retroactively to cases pending on direct review *subject to* appellate review preservation requirements and the plain error doctrine." Thus, because the defendant in the instant matter failed to comply with appellate review preservation requirements, this Court must utilize the plain error doctrine rather than plenary appellate review when applying a new rule.

Under the plain error doctrine, a defendant may obtain relief only if all of the following criteria are satisfied: (1) the record clearly establishes what occurred in the trial court, (2) a clear and unequivocal rule of law was breached, (3) a substantial right of the accused was adversely affected, (4) the issue was not waived for tactical reasons, and (5) consideration of the error is necessary to do substantial justice. *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016); *State v. Hester*, 324 S.W.3d 1, 56 (Tenn. 2010).

Based on our supreme court's holding in *Perrier* that a defendant's engagement in unlawful activity for the purpose of the self-defense statute is a threshold determination to be made by the trial court, the trial court's jury instruction in this case was erroneous, and as noted above, must be reviewed under plain error. The defendant argues he was prejudiced by the trial court's failure to make a threshold determination that he was engaged in unlawful activity. However, the State contends that the instruction was harmless beyond a reasonable doubt because the "defendant possessed a large quantity of marijuana, packed in various sizes for resale, along with more than $3000 in cash, a digital scale, and numerous small plastics baggies." Thus, the evidence overwhelmingly established the defendant was engaged in unlawful activity such that the "no duty to retreat" instruction would not apply, and any error on the part of the trial court was harmless beyond a reasonable doubt. We agree with the State.

Based on the overwhelming proof presented at trial, no reasonable juror would have found the defendant had a reasonable basis to believe death or serious bodily injury was imminent. The defendant admitted he could not see anyone and just haphazardly fired his weapon. The proof also overwhelming established that no shots were fired by police until after the defendant had shot the victim. Additionally, the proof established that the officers announced "police, search warrant" numerous times before and after entering the house. Thus, the defendant had no reason to believe his life was in danger and had no justification for firing upon the officers. While the trial court erred in instructing the jury concerning self-defense, the defendant was clearly engaged in unlawful activity and no reasonable juror would have concluded the defendant had a reasonable basis to believe death or serious bodily injury was imminent. Thus, any error on the part of the trial court is harmless beyond a reasonable doubt, and the defendant is not entitled to relief.

B. Mistake of Fact

The defendant contends the trial court erred in denying the defendant's request for an instruction on mistake of fact. He claims the instruction was warranted because he thought he was firing his weapon to scare intruders and did not realize he was shooting at police officers. The State contends the defendant's claim does not negate the mens rea, and therefore, the trial court properly denied the defendant's request. Upon our review of the record and the applicable law, we agree with the State.

Mistake of fact is available as a defense if it negates the necessary culpable mental state of the accused. Tenn. Code Ann. § 39-11-502. Here, the defendant has not raised the defense because he admitted he could not see who was in the house and "just fired" his gun not knowing it was police officers lawfully executing a warrant. In other words, if the jury believed the defendant, there would be no culpable mental state to negate. Furthermore, even if the jury believed the defendant fired at police because he mistakenly thought the police were intruders, he would still not have been entitled to a mistake of fact defense instruction, because his beliefs, even if reasonable, would not have justified his actions. Again, the police were executing a warrant and had announced their purpose and presence on several occasions; thus, their presence in the home and any force used in exercising the warrant was lawful. *See generally* Tenn. Code Ann. § 39-11-620(a). Accordingly, the defendant was not entitled to an instruction on mistake of fact and is not entitled to relief.

5. Sufficiency of the Evidence[4]

The defendant contends the evidence "is insufficient to establish beyond reasonable doubt that [the defendant] was not acting in self-defense." The State submits that it presented ample evidence upon which the jury could reasonably determine the defendant was not acting in self-defense and that by its verdict, the jury accredited the proof in favor of the State. Upon our review of the record, we agree with the State.

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also*

[4] On appeal, the defendant only challenges his conviction for second degree murder, arguing that he acted in self-defense. He does not challenge the sufficiency of the evidence as it relates to his other convictions. Therefore, we will only address the sufficiency of the evidence relating to his second-degree murder conviction. However, our review of the record reveals the evidence is sufficient to sustain the defendant's remaining convictions.

Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court has stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (1963)). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977); *Farmer v. State*, 343 S.W.2d 895, 897 (Tenn. 1961)). The standard of review for sufficiency of the evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury. *Dorantes*, 331 S.W.3d at 379 (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). This Court, when considering the sufficiency of the evidence,

shall not reweigh the evidence or substitute its inferences for those drawn by the trier of fact. *Id*.

Second degree murder is the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). Second degree murder is a result-of-conduct offense. *State v. Page*, 81 S.W.3d 781, 787 (Tenn. Crim. App. 2002). Therefore, a person acts knowingly "when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b) (2014). "[T]he 'nature of the conduct' that causes death is inconsequential." *Page*, 81 S.W.3d at 787. A knowing intent is shown if the defendant acts with an awareness that his conduct is reasonably certain to cause the victim's death. *See id*. at 790-93. Whether a defendant acted "knowingly" is a question of fact for the jury. *State v. Inlow*, 52 S.W.3d 101, 104-105 (Tenn. Crim. App. 2000). In assessing the defendant's intent, the jury may rely on "the character of the assault, the nature of the act and [on] all the circumstances of the case in evidence." *Id*. at 105 (citing S*tate v. Holland*, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993)).

The defendant argues that the evidence shows that he acted in self-defense when he fatally shot the victim. Self-defense is defined as follows:

> [A] person who is not engaged in illegal activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:
>
> (A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;
>
> (B) The danger creating the belief of imminent death or serious bodily injury is real or honestly believed to be real at the time; and
>
> (C) The belief of danger is founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611(b)(2). The jury, as the trier of fact, determines whether the defendant acted in self-defense. *State v. Dooley*, 29 S.W.3d 542, 547 (Tenn. Crim. App. 2000) (citing *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997)). "[I]n the context of judicial review of the jury verdict, in order to prevail, the defendant must show that the evidence relative to justification, such as self-defense, raises, as a matter of law, a reasonable doubt as to his conduct being criminal." *State v. Clifton*, 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994). The State has the burden of negating the defendant's claim of self-defense in the event that "admissible evidence is introduced supporting the defense." Tenn. Code Ann. § 39-11-201(a)(3).

Here, the State presented several witnesses, some who were inside the house and some who were stationed outside the house, that testified the officers announced on several occasions -- "police, search warrant." And despite the defendant's claim that he

never heard the numerous police announcements and only heard "lots of loud noise" outside his room, he also admitted that he could not see what was going on and just "grabbed his gun and just shot." Therefore, based on the proof presented at trial, the jury could reasonably conclude that the defendant did not have a reasonable belief of imminent danger of death or serious bodily injury and that any belief the defendant did have was not founded upon reasonable grounds. *See* Tenn. Code Ann. § 39-11-611(b)(2). Whether the defendant acted in self-defense was a question of fact for the jury, and it was within the jury's prerogative to reject the defendant's self-defense claim. *Goode*, 956 S.W.2d at 527. The jury had sufficient evidence upon which to reject the defendant's claim of self-defense, and we will not disturb its verdict on appeal. *State v. Winters*, 137 S.W.3d 641, 655 (Tenn. Crim. App. 2003).

6. Sentencing

The defendant contends that the trial court erred in both enhancing his sentence and in imposing consecutive terms in Counts 1, 2, 3, and 13. While the defendant does not challenge the application of a specific enhancement factor considered by the trial court, he contends the trial court erred in concluding the defendant was "the one that started the ball rolling." Concerning consecutive terms, the defendant argues the trial court erred in "categorizing [the defendant] as a dangerous offender." The State contends the trial court did not abuse its discretion in sentencing the defendant. We agree with the State.

When an accused challenges the length, manner, or range of a sentence, this Court will review the trial court's decision under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 706 (Tenn. 2012); *State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013). This Court also reviews consecutive sentences imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *Bise*, 380 S.W. 3d at 707; *Pollard*, 432 S.W.3d at 859-60. The party appealing a sentence bears the burden of establishing that the sentence was improper. Tenn. Code Ann. § 40-35-401, Sent'g Comm'n Cmts. This Court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10.

In imposing a sentence, the trial court must also consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing

practices for similar offenses in Tennessee; and (7) any statement by the defendant in his own behalf. Tenn. Code Ann. § 40-35-210(b). In addition, the principles of sentencing provide that the sentence should be no greater that that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. *See* Tenn. Code Ann. § 40-35-103(2), (4). To provide meaningful appellate review, the trial court must state on the record its reasons for the sentence chosen. Tenn. Code Ann. § 40-35-210(e).

After doing so, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" *State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008) (quoting Tenn. Code Ann. § 40-35-210(d)). The trial court shall consider, but is not bound by, the provision that "[t]he minimum sentence within the range of punishment is the sentence that should be imposed . . . [and] should be adjusted, as appropriate by the presence or absence of mitigating and enhancement factors." Tenn. Code Ann. § 40-35-210(c); *Carter*, 254 S.W.3d at 346. A non-exclusive list of mitigating and enhancement factors are provided in Tennessee Code Annotated sections 40-35-113 and -114. The weighing of both mitigating and enhancement factors is left to the trial court's sound discretion, but a trial court's misapplication of a mitigating or enhancement factor will not remove the presumption of reasonableness from its sentencing determination. *Bise*, 380 S.W.3d at 709.

For clarity purposes both as to the defendant's claims regarding enhancement and consecutive sentencing, the following chart explains the terms for each conviction, what enhancement factors were applied to each count, and which counts are aligned consecutively or concurrently to each other:

Conviction	Applicable Enhancement Factor(s)	Sentence	Concurrent Or Consecutive
Second Degree Murder. (Count 1)	Employing a firearm during the commission of the offense.	25 years	Consecutive to Counts 2, 3, and 13. Concurrent to remainder
Attempted Second Degree Murder. (Counts 2 and 10)	None	8 years (each count)	Concurrent to each other. Count 2 to be served

			consecutive to 1, 3, and 13. Count 10 concurrent to remaining counts
Employing a Firearm During Commission of a Felony. (Counts 3 and 11)	No hesitation about committing a crime when the risk to human life was high.	6 years (each count)	Concurrent to each other and remaining counts. Count 3 consecutive to Counts 1, 2, and 13.
Employing a Firearm with the intent to go armed. (Count 12).		3 years	
Reckless Endangerment (3 Counts)	Employing a firearm during the commission of the offense.	11 months and 29 days (each count)	Concurrent to each other and remaining counts.
Possession of Marijuana with intent to sell. (Count 13)	Leader in the commission of an offense involving two or more criminal actors. No hesitation about committing a crime when the risk to human life was high.	1 year	Consecutive to Counts 1, 2, and 3. Concurrent to remaining Counts.
Possession of Marijuana with intent to deliver. (Count 14)	Leader in the commission of an offense involving two or more criminal actors. No hesitation about committing a crime when the risk to human life was high.	1 year	Merged with Count 13.

A. Enhancement

In sentencing the defendant, the trial court relied on three enhancement factors -- the defendant was the leader in the commission of an offense involving two (2) or more criminal actors; the defendant possessed or employed a firearm during the commission of the offense; and the defendant had no hesitation about committing a crime when the risk to human life was high. *See* Tenn. Code Ann. § 40-35-114(2), (9), and (10).

In addition to the enhancement factors listed, the trial court found no statutory mitigating factors applicable but did consider, as mitigation proof, the testimony of the defendant's character witnesses.

Rather than challenging the specific enhancement factors applied by the trial court, the defendant mischaracterizes and pieces together portions of the trial court's comments to support his contention that the trial court erred in enhancing his sentence. More specifically, the defendant takes a portion of the trial court's comments concerning the circumstances surrounding the murder and combines them with the trial court's finding concerning enhancement and mitigating factors.

During the sentencing hearing, the trial court concluded a rather lengthy summary of the evidence produced at trial and the nature and characteristics of the defendant's conduct, stating:

> No, whether he was reacting in a way under whatever circumstance, I don't have any idea. But I know he chose to put that ball rolling when he chose to sell drugs, when he chose to do it in a residential neighborhood, when he chose to get a gun, he chose to use that gun and keep it loaded and to keep all those items inside that residence. He's the one that started that ball rolling. And it rolled and it's still rolling. And at some point it's going to stop and [the defendant] has got consequences for his decisions.

Immediately upon concluding those comments, the trial court moved into discussing the enhancement factors applicable to each conviction. First, the trial court addressed the defendant's conviction for second degree murder:

> So I am of the opinion that he possessed and employed a firearm during the commission of the murder of a knowing killing of [the victim]. And I'm going to put a great deal of emphasis on that fact. I do not find that there are any statutory mitigating factors. I've addressed those other

> than character proof. But I think the circumstance under which [the defendant] chose to arm himself with a gun during the commission of this particular type of offense outweighs any mitigating factors and the [c]ourt is going to impose a sentence of 25 years for murder in the second degree in Count 1.

A complete and thorough reading of the record reveals the trial court properly considered the sentencing principles and guidelines, including the evidence received at trial and the nature and characteristics of the criminal conduct involved. *See* Tenn. Code Ann. § 40-35-210. While the trial court considered the defendant's actions leading up to and during the events of December 14, 2012, the trial court also took time to meticulously review each conviction and the statutory enhancement and mitigating factors applicable to each conviction. The defendant has failed to show how the trial court abused its discretion in sentencing him. Thus, the defendant is not entitled to relief.

B. Consecutive Sentences

Tennessee Code Annotated section 40-35-115 "creates several limited classifications for the imposition of consecutive sentences." *State v. Moore*, 942 S.W.2d 570, 571 (Tenn. Crim. App. 1996). A trial court "may order sentences to run consecutively if it finds by a preponderance of the evidence that one or more of the statutory criteria exists." *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Pursuant to statute, consecutive sentencing is warranted if "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(2), (b)(4). In imposing consecutive sentences based upon a dangerous offender status, it is necessary that "the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995); *see also State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999) (stating that the *Wilkerson* findings that the sentences are necessary to protect the public and reasonably relate to the severity of the offenses apply only to consecutive sentences involving dangerous offenders).

The defendant contends the trial court erred in ordering consecutive terms because the trial court "never stated that the imposition of consecutive sentences was reasonably related to the *severity* of the offenses." At the conclusion of a lengthy discussion concerning his determination that the defendant is a dangerous offender, the trial court stated,

> So it's [a] fact that these police officers were there legally doing what they were supposed to do and one of them lost [her] life. The other one could have lost his life. Several of them could have lost their life. This [c]ourt feels that the aggregate length of the sentence is reasonable -- does relate to the offense for which [the defendant] stands guilty.

While the trial court did not include the word 'severity' in its analysis, it is clear the trial court properly considered the *Wilkerson* factors and did not abuse its discretion in ordering consecutive terms. The defendant, therefore, is not entitled to relief.

7. Cumulative Error

The cumulative error doctrine applies when multiple errors were committed during trial, each of which alone would have constituted harmless error, but in the aggregate have a cumulative effect on the proceedings so great the defendant's right to a fair trial can only be preserved through reversal. *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). Circumstances warranting reversal of a conviction under the cumulative error doctrine "remain rare." *Id*. The defendant raised a plethora of issues on appeal. Of those issues, we have discerned two harmless errors: the trial court's procedural handling of Officer Goodwin's invocation of his Fifth Amendment right and the trial court's instruction on the defense of self-defense. Despite these harmless errors, the State presented more than ample evidence of the defendant's guilt, so the cumulative effect of the errors found on appeal was not such that it changed the outcome of the defendant's trial. Thus, the cumulative error doctrine does not entitle the defendant to relief.

Conclusion

Based on the foregoing, we affirm the judgments of the trial court.

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J. ROSS DYER, JUDGE