IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 3, 2015

STATE OF TENNESSEE v. CHUNCY LESOLUE HOLLIS

Appeal from the Circuit Court for Gibson County
No. 8551A Clayburn L. Peeples, Judge

No. W2015-00718-CCA-R3-CD - Filed January 28, 2016

The defendant, Chuncy Lesolue Hollis, whose original first degree premeditated murder conviction was reversed by this court due to an error in jury instructions, was again convicted by a Gibson County jury in a second trial of first degree premeditated murder and sentenced to life imprisonment. On appeal, he argues that the evidence is insufficient to sustain his conviction; that the trial court erred by issuing a jury instruction on flight and by not instructing the jury on cause of death, by allowing prior statements of witnesses to be introduced as substantive evidence, by allowing photographic lineups into evidence and by summarily dismissing his motion for judgment of acquittal and/or a new trial without holding a hearing; that the State committed prosecutorial misconduct by the manner in which the prosecutor questioned witnesses and by the improper comments he made in opening statement and closing argument; and that the cumulative effect of various trial errors deprived the defendant of his constitutional right to a fair trial. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and TIMOTHY L. EASTER, JJ., joined.

Joseph E. Tubbs, Humboldt, Tennessee (on appeal); and Larry Copeland, Memphis, Tennessee (at trial), for the appellant, Chuncy Lesolue Hollis.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Garry G. Brown, District Attorney General; and Larry Hardister and Jason Scott, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

This case arises out of the May 13, 2007 shooting death of Prentice Turner, which occurred outside the W.J.O. Elks Lodge in Humboldt following an altercation between members of rival gangs from Jackson and Humboldt. Several eyewitnesses identified the defendant and Desmond Deshawn Ragland, also known as "TKO," as the gunmen, and both men were indicted by the Gibson County Grand Jury for the first degree premeditated murder of the victim. Their cases were severed, and the defendant was tried alone before a Gibson County jury in June 2009, convicted of the indicted offense, and sentenced to life imprisonment. This court, however, overturned his conviction and remanded for a new trial, concluding that, "although the evidence was sufficient to sustain the jury's finding that the defendant premeditated the killing, the trial court committed reversible error by improperly commenting on the evidence and giving an incomplete statement of the law in its expanded premeditation instruction." State v. Hollis, 342 S.W.3d 43, 45 (Tenn. Crim. App. 2011).

The defendant was retried before a Gibson County jury January 29-February 1, 2013. The State's first witness was retired Humboldt Assistant Chief of Police Bill Baker, who identified various items of evidence that were introduced as exhibits, including: a diagram of the crime scene, which showed, among other things, a large pool of blood outside the front door of the lodge; the ballistics evidence recovered from the scene, which consisted of three 9 millimeter Winchester cartridge casings, three 9 millimeter PMC cartridge casings, a 9 millimeter Remington unfired cartridge, a 9 millimeter Winchester unfired cartridge, and a 9 millimeter magazine with four PMC bullets inside; the defendant's May 15, 2007 tape-recorded interviews with Chief Baker; a photograph of the defendant at the time of his arrest showing that he wore his hair in "long dreads"; and a photograph of a blue Toyota Camry that belonged to the defendant's ex-girlfriend, Marquita Tucker.

Chief Baker testified that, in his first statement, the defendant admitted he was at the Elks Lodge at the time of the shooting but claimed that he was inside the building and that he did not know "TKO." In a follow-up statement a few minutes later, however, the defendant suggested that "TKO" might be a man named Lee Harris. Chief Baker estimated that he questioned more than thirty individuals during his investigation of the crime, including Desmond Ragland, who had since pled guilty to second degree murder in connection with the case.

On cross-examination, Chief Baker testified that the ballistics report revealed that the shell casings had been fired through two separate weapons. He acknowledged that

there was no one similar in height to the defendant, who was "between sixty-four" inches in a six-person photographic array prepared with the defendant's photograph. He pointed out, however, that there were "other numbers on the other side of the chart" and expressed his opinion that most people would not make the connection between the numbers visible in the photographs and the heights of the individuals pictured. He acknowledged that none of the other individuals had "dreads," but said that he thought several of them had similar hairstyles to the defendant.

Sergeant Tony Williams of the Humboldt Police Department identified a number of items of evidence, including photographs of the victim's body showing multiple gunshot wounds, a bullet recovered from the victim's clothing in the emergency room, and another bullet removed from the victim's body by the medical examiner. He testified that the victim tested negative for gunshot residue, indicating that he had not fired a weapon. On cross-examination, he acknowledged it was possible that gunshot residue transferred from the victim's hands, which were not bagged, during his transport to the hospital. He further acknowledged that two of the men in photographs he used for the defendant's photographic spreadsheet had "twist" hairstyles, which looked similar to dreadlocks but were not exactly the same.

Marquita Tucker, the defendant's former girlfriend, testified that the defendant borrowed her Toyota Camry on the night of May 12, 2007, telling her that he was going to a party in Jackson. After the police began investigating her vehicle's connection with the crime, the defendant confessed to her that he had gone to the Humboldt nightclub but denied that he had anything to do with the shooting. On cross-examination, Ms. Tucker testified that she had not kept a gun in her vehicle and never saw the defendant with a gun.

Humboldt resident John Epperson testified it was a "possibility" he was at the Elks Lodge at the time the shooting occurred. He then acknowledged he had been interviewed by police and had identified from photographic spreadsheets both the defendant and Desmond Ragland as individuals involved in the shooting. He indicated, however, that he was no longer sure of his identifications or of his memory of the events of that night. He conceded that, in an earlier court proceeding, he provided the following testimony: that he was with some friends in a Chevrolet Suburban parked in the Elks Lodge parking lot when two men, whom he identified as the defendant and Mr. Ragland, came out to a Toyota Camry parked near the Suburban; that the defendant got into the driver's seat, reached below the dashboard, retrieved a gun, and put it into his pants; that both men headed back toward the club; that he heard several gunshots approximately five or ten seconds later; that the defendant and Mr. Ragland came running back toward the Toyota; that his friend's Suburban was blocking the Toyota and that the defendant brandished a

gun as he yelled for them to move the "damn truck"; that his friend backed up the Suburban and the defendant and Mr. Ragland then drove away.

Mr. Epperson testified in the current trial that he saw both men retrieve weapons from the Toyota before heading back to the club. He then clarified that he assumed from the men's gestures and the way they "stuck something in their pants" that they were retrieving weapons. He said that when the men returned, he saw the "butt of [the defendant's] gun hanging out . . . through his shirt." On cross-examination, he acknowledged that the events occurred at night, that the passenger of the Toyota was closer to his position in the Suburban than the driver was, and that "[p]retty much" everyone was fleeing the scene after the shooting.

Humboldt resident Lakosha Manley testified that she saw the defendant and Desmond Ragland, with whom she had attended high school in Jackson and whom she knew as "TKO," together inside the Elks Lodge on the night of the shooting. She recalled that she stepped outside the building at one point and saw the defendant and Mr. Ragland go to a green or blue Toyota Camry, retrieve something, and return to the building. After that, "everything just went berserk," with multiple gunshots fired. She ran back into the lodge and when she later came out, the defendant and Mr. Ragland were gone. Ms. Manley identified the photographic array from which she had identified the defendant to the police. She also made a positive courtroom identification of the defendant as the man who accompanied Mr. Ragland to the Toyota Camry. On cross-examination, she testified that a fight had broken out between Mr. Ragland and the victim before the gunshots sounded.

Humboldt resident LaRae Simpson, a relative of the victim, testified that she was standing outside by the door to the club when a fight between the victim and another man spilled outside in front of the doorway. A large crowd of people began exiting the club, and the defendant bumped into her as he passed her walking rapidly toward a blue Toyota Camry in the parking lot. One and a half to two minutes later, the defendant returned carrying a gun. At that point, she heard gunshots and someone pulled her around the corner of the building. Ms. Simpson testified that she heard at least seven "back to back" gunshots. Although she saw the defendant with a gun, she did not see him fire a weapon. She later identified the defendant from photographic arrays she was shown by the police.

On cross-examination, she testified that the man she saw the victim fighting was a medium-sized man with dreadlocks. She identified her voice on a tape-recorded interview with an investigator in which she apparently said she did not remember seeing the defendant go to the car. She insisted, nonetheless, that she saw the defendant go to his car and return with a gun and that she told the investigator the same thing.

Humboldt resident Cameo Pankey, who said the victim was his best friend, testified that on the night of the shooting he and the victim were together at the Elks Lodge when a man he knew as "TKO" and another man "got into it like fixing to get to fighting," which led to the management kicking "TKO" out. Afterwards, he and the victim went outside. As soon as they exited the front door, the victim, who was in front of him, was surrounded by a group of men from Jackson. Words were exchanged, and "TKO" and the victim began fighting. Less than a minute later, Mr. Pankey heard a gunshot and everyone began running. Mr. Pankey testified that he ran back into the club, heard several more gunshots, looked back from his position on the floor approximately ten feet from the open doorway, and saw the defendant firing a final shot at the victim, who was lying just outside the doorway.

Mr. Pankey testified that he identified the defendant as the shooter from a photographic array he was shown by the police on June 13, 2007. He identified the photographic array, which was admitted as an exhibit and published to the jury. On cross-examination, he acknowledged that he had testified at a previous hearing that he witnessed the first shot being fired by a bald-headed man. He testified at the current trial that he did not actually see the first shot but, instead, based his earlier testimony on accounts he had heard from other witnesses. He was adamant, however, that he saw the defendant standing over the victim firing the final shot.

Dr. Thomas Deering, the medical examiner who performed the autopsy of the victim's body, testified that the cause of death was multiple gunshot wounds. The victim had four entrance wounds and three exit wounds, caused by either three or four separate bullets: a gunshot wound in the neck in which the bullet struck the carotid artery and ended behind an upper rib; a second gunshot wound that entered the front of the right shoulder, broke the victim's arm, and exited the back; a third gunshot wound in which the bullet entered the left lower back, hit the spinal cord, passed through a portion of the colon and exited the lower abdomen area; and a fourth gunshot wound in which the bullet entered the back of the right wrist and exited the front of the hand.

Tennessee Bureau of Investigation Special Agent Forensic Scientist Steve Scott, an expert in firearms identification, testified that he determined that the two 9 millimeter bullets were both fired through the barrel of the same weapon, the three PMC cartridge casings were fired from one firearm, and the three Winchester cartridge casings were fired from a second firearm. He said that gunshot residue on the left mid-back section of the victim's t-shirt was consistent with a close range gunshot, in which the muzzle of the gun was within twelve inches of the victim's body.

Humboldt resident Ranette Pettigrew testified that she was standing outside the Elks Lodge when the defendant walked past her saying that he was going to his car "to

get his s**t," which caused her to call out a warning that the defendant was going to his car for a gun. She next saw the defendant walk back toward the club and fire a gun twice into the air. After running and hiding behind a car, she heard, but did not see, at least five additional gunshots. Ms. Pettigrew identified the photographic array she was shown by the police after the shooting, from which she positively identified the defendant as the man who passed her as he went to his car to retrieve a gun. She, additionally, made a positive courtroom identification of the defendant. On cross-examination, she expressed her certainty in her identification of the defendant and testified that she did not see or hear anyone fighting.

Humboldt resident Ranatta Sphinx testified that she and her brother, Robert Sphinx, were at the Elks Lodge on the night of May 12-13, 2007, when her brother got into an altercation with another man. She followed the other man outside when the altercation ended and overheard him telling his friends about what had just happened. The victim then came outside, and when the man saw him, he and the victim began to fight. Approximately five to ten minutes later, a man shot a gun up in the air and said it was going to be a one-on-one fight. She and the other spectators initially "scattered" but then returned to continue watching the fight. Eventually, the other man jumped off the victim and the defendant stood over the victim and shot him from a distance of approximately five feet. Ms. Sphinx identified the photographic spread from which she had identified the defendant as the man she saw standing over the victim and shooting him. She also made a positive courtroom identification of the defendant as the shooter. On cross-examination, she testified that the man who was fighting the victim was "[s]tocky built with dreads."

Humboldt resident Brenda King testified that she arrived at the Elks Lodge at approximately 2:00 a.m. on May 13, 2007, to find the victim fighting a man with long dreads in the doorway of the club. She said the victim was winning the fist fight when a "bald headed" man began firing a gun up in the air and yelling, "[T]his is one on one[.]" She ran behind some cars and, from that position, saw the victim throw his hand up as if shot in the hand and then fall to the ground. She said she heard four or five different gunshots in total, coming from more than one gun.

Jesse Scott testified that he was housed in the same cell as the defendant in the Gibson County Jail from approximately January to June or July 2012. During that time, the defendant gave him two different accounts of the shooting, telling him in one version that he could not even get out of the club and had no involvement in the altercation or the shooting, and in another version that he had gone to Humboldt for the purpose of killing a "Crab" or "Crip," that the altercation had been a "gang fight" and that he had gone to his car, retrieved his gun, returned to the fight, and shot the victim. The defendant additionally disclosed that he had returned to Jackson after the shooting. Mr. Scott

testified that he was a "Crip," as was the victim. He said it was common knowledge throughout the jail that the defendant was a "Gangster Disciple." He stated that he had sent a letter to the district attorney disclosing the information he had learned from the defendant. He had also proposed to give information he had learned about another inmate who was charged with murder. He testified the district attorney agreed to allow him to plead guilty to his pending charges in exchange for a nine-year sentence, with credit for twenty-two months served and the remainder on community corrections. On cross-examination, he acknowledged it was possible that a jail inmate might fabricate a story about his involvement in a crime to try to make his fellow inmates fear and respect him. He further acknowledged that some of his pending charges had been dismissed and others reduced as part of his plea bargain.

The defendant's former co-defendant in the case, Desmond Ragland, aka "TKO," testified that in August 2009 he entered a best interest plea to second degree murder for the killing of the victim. He said he and the victim had a fist fight, someone fired gunshots in the air, the victim reached for a gun, and he then shot the victim in self-defense. According to Mr. Ragland, the defendant was outside but had "no role" in the killing of the victim. Mr. Ragland acknowledged he gave a statement to Assistant Chief Baker on August 6, 2007, in which he said that the defendant shot the victim, but he said he made it up after hearing rumors that the defendant was blaming the crime on him.

On cross-examination, Mr. Ragland testified that the defendant was outside when he was fighting the victim. He did not see him, but he heard him say, "One on one. One on one," which, he said, meant that it should remain a one-on-one fight and no one else should jump in. After he heard, "One on one," he heard the first gunshot.

Assistant Police Chief Baker, recalled by the State, identified a tape recording of his August 6, 2007 interview with Desmond Ragland, as well as Ragland's signed written statement, both of which were admitted as exhibits and published to the jury. In the statement, Mr. Ragland related that throughout the night at the club, the "Crips" and the "Gs" were throwing gang signals. He said that he and the defendant went outside the club and the defendant began bragging about how he was going to "put prices on Crips heads[.]" He stated that the victim hit the defendant in the mouth, knocking the defendant down, and the defendant got up and "struck out running[,]" with Mr. Ragland "pick[ing] up the fight with [the victim]." Mr. Ragland said he next saw the defendant walking across the parking lot with a chrome pistol and shooting several shots in the air. At that point, Mr. Ragland ran toward a friend's vehicle, got in, and left. The next day, the defendant told Mr. Ragland that he had shot the victim, "g[i]v[ing] him everything that was in the clip." The defendant also told Mr. Ragland that he was trying to get rid of the 9 millimeter weapon he had used in the shooting and asked him if he wanted it. Mr. Ragland said he told the defendant "hell no," and the defendant told him he was going to

go to Humboldt to get another weapon. The defendant later returned in a car with two other men and showed Mr. Ragland a black gun of a different caliber, which he said he had taken in trade for the 9 millimeter gun he used in the shooting.

Humboldt resident Courtney Thomas testified that he witnessed two altercations at the Elks Lodge on the night of May 12-13, 2007. The first altercation occurred inside the club between Robert Sphinx and another man. After that altercation was broken up, an altercation between "TKO" and the victim began inside the club and then moved outside. Mr. Thomas said he was standing outside the door of the club with his cousin, Sherita Powell, watching the fight when he saw the defendant stand over the victim and shoot him two or three times. He saw both the defendant and "TKO" with weapons, but never saw "TKO" shoot the victim. Mr. Thomas identified the photographic array he was shown by police in which he identified the defendant as the shooter. He also made a positive courtroom identification of the defendant as the man he saw stand over the victim and shoot him. On cross-examination, Mr. Thomas acknowledged that he did not mention the defendant in his first interview with the police.

The defendant's first witness, University of Alabama Psychology Professor Dr. Jeffrey Neuschatz, an expert in eyewitness identification, described different factors in the case that could have reduced the accuracy of the eyewitness identifications, including: the fact that the viewings occurred in a high stress situation; the fact that a weapon was involved, which could lead an eyewitness to focus on the weapon rather than the individual; the fact that the event occurred in a brief period of time; the existence of a "post event suggestion," or information, such as the photograph of the defendant that had been published in the newspaper, that could affect an eyewitness's memory of the event; and the amount of time that had lapsed between the event and several of the identifications.

Dr. Neuschatz testified there were four standards recommended by the Department of Justice and the American Psychology Law Society for unbiased lineup identifications: (1) the person conducting the lineup should not know the identity of the suspect; (2) "unbiased lineup instructions," which include the phrase that the suspect "may or may not be in the lineup," should be used; (3) the suspect should not "stick[] out based on the description given"; and (4) a "confidence statement" from the identifier should be taken immediately after the lineup. He further testified that once an eyewitness chooses someone from a lineup, it becomes more likely that he or she will again identify the same individual in a subsequent setting due to the "commitment factor" caused by his or her initial identification.

Dr. Neuschatz testified that the photographic lineups used for the identifications made by Courtney Thomas, LaRae Simpson, and Cameo Pankey all violated three of the

four factors for an unbiased identification because, although the suspect did not unduly "stick out," the person conducting the lineup knew the suspect, unbiased instructions were not given, and confidence statements were not taken after the identification. He said that the identification made by John Epperson violated all four of the factors because the suspect was described as a short man and the defendant's height was visible in the height chart behind his photograph. On cross-examination, he testified that he was unable to say whether the identifications made in the case were or were not correct.

Gary Patrick testified that he was housed in the county jail in a cell with the defendant, Jesse Scott, and two other inmates and that he never saw the defendant and Jesse Scott alone together. On cross-examination, he acknowledged that there were times when he was not with the defendant and Mr. Scott. He further acknowledged that he had been convicted of misdemeanor theft and the felony sale and delivery of cocaine in Tennessee and had additional felony convictions from Illinois.

Chauncey Ross testified that he witnessed the fight outside the club that occurred between the victim and a "heavy set," "[d]ark skinned" man with "long dreads." He said the men were initially fighting at the dark-skinned man's vehicle and the fight lasted only "some seconds" before a taller, lighter-skinned man got out of the passenger seat of the vehicle, pushed the larger man aside, drew a .45 revolver, and began shooting at the victim, who was running backwards. He testified that the police later showed him photographs of individuals they said were involved in the shooting, but none of the photographs matched the light-skinned man he saw shooting the victim. He said he knew the heavyset man who was fighting the victim as "TKO." He did not know the defendant and never saw him that night.

On cross-examination, Mr. Ross acknowledged he had a number of felony drug convictions and was currently incarcerated in a federal prison. He denied that he told the prosecutors that he was a Gangster Disciple, but he acknowledged that he did not like the prosecution and had refused to assist the police in identifying the man he claimed he saw shoot the victim.

Desmond Ragland, recalled as a witness for the defense, reiterated that he fabricated the story he gave police about the defendant's involvement in the crime because he believed, at the time, that the defendant was "putting everything on [him]."

The defendant elected not to testify and rested his case without presenting any additional witnesses.

Chief Bill Baker, recalled as a rebuttal witness by the State, testified that Chauncey Ross told him during a June 28, 2007 interview that he was a Gangster Disciple.

ANALYSIS

I. Sufficiency of the Evidence

As his first issue, the defendant contends that the evidence is insufficient to sustain his conviction, arguing that there were so many inconsistencies in the accounts of the shooting that a rational jury could not have found beyond a reasonable doubt either the essential elements of the crime or his identity as the perpetrator. The State responds that the evidence was more than sufficient to sustain the jury's verdict. 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 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 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, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 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).

The defendant was convicted of first degree murder, defined as "[a] premeditated and intentional killing of another[.]" Tenn. Code Ann. § 39-13-202(a)(1) (2006 & 2014). "Premeditation" is defined in our criminal code as

> an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d).

Whether premeditation exists in any particular case is a question of fact for the jury to determine based upon a consideration of all the evidence, including the circumstantial evidence surrounding the crime. See State v. Suttles, 30 S.W.3d 252, 261 (Tenn. 2000); State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997); State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998). Our supreme court has listed a number of factors which, if present, may support the jury's inference of premeditation. Among these are the defendant's declaration of an intent to kill the victim; the use of a deadly weapon upon an unarmed victim; the establishment of a motive for the killing; the particular cruelty of the killing; the infliction of multiple wounds; the defendant's procurement of a weapon, preparations to conceal the crime, and destruction or secretion of evidence of the killing; and the defendant's calmness immediately after the killing. State v. Jackson, 173 S.W.3d 401, 409 (Tenn. 2005); State v. Thacker, 164 S.W.3d 208, 222 (Tenn. 2005); State v. Leach, 148 S.W.3d 42, 54 (Tenn. 2004); State v. Nichols, 24 S.W.3d 297, 302 (Tenn. 2000); Bland, 958 S.W.2d at 660.

We conclude that the evidence is sufficient to establish both the identity of the defendant as the shooter and that the killing was premeditated. The defendant was identified by multiple witnesses, with some testifying that they saw him retrieve a gun from his vehicle, others testifying that they saw him with a weapon or shooting into the air, and three separate witnesses each testifying that he or she saw the defendant firing directly at the helpless victim as he lay on the ground. The evidence, moreover, when viewed in the light most favorable to the State, established that while the victim was fist fighting with Mr. Ragland, the defendant announced his intention to get his "s**t," which at least one witness interpreted as his weapon, that he went to his car and retrieved his

gun, and that he then returned to the scene of the fight and fired multiple gunshots at the victim, including at least one at point blank range as the victim was lying on the ground. Afterwards, the defendant fled the scene, later telling Mr. Ragland that he had "emptied [his] clip" into the victim and traded the gun he used in the shooting for another weapon. Other than the testimony of Mr. Ragland, there was no evidence that the victim was armed, and one of the gunshot wounds he sustained was a close range shot to his back. This evidence is more than sufficient to support a finding that the shooting was premeditated. We conclude, therefore, that the evidence is sufficient to sustain the defendant's conviction for first degree premeditated murder.

II. Jury Instructions

The defendant next contends that the trial court erred by instructing the jury on flight and by not instructing the jury on cause of death. He argues that there was no evidence to support the flight instruction and that the jury could not have convicted him without a cause of death instruction because causation was an element of the offense. The State responds by arguing that there was evidence to support the flight instruction and that the trial court was not required to provide a separate instruction on causation when the cause of death was not disputed. We agree with the State.

"It is well-settled in Tennessee that a defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001) (citing State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000); State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). An instruction will be considered prejudicially erroneous only if it fails to submit the legal issues fairly or misleads the jury as to the applicable law. State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)). "The failure to instruct the jury on a material element of an offense is a constitutional error subject to harmless error analysis." Id. at 60.

"In order for a trial court to charge the jury on flight as an inference of guilt, there must be sufficient evidence to support such instruction." State v. Berry, 141 S.W.3d 549, 588 (Tenn. 2004). Sufficient evidence supporting such instruction requires "both a leaving the scene of the difficulty and a subsequent hiding out, evasion or concealment in the community." State v. Payton, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989) (internal quotations omitted). Moreover, "[a] flight instruction is not prohibited when there are multiple motives for flight" as "[a] defendant's specific intent for fleeing a scene is a jury question." Berry, 141 S.W.3d at 589.

There was proof at trial that the defendant rapidly left the scene after the shooting, returned to Jackson, and immediately got rid of the weapon used in the shooting by trading it for one of a different caliber. This evidence is sufficient to support the trial court's instruction on flight. We conclude, therefore, that the trial court did not err in issuing the flight instruction to the jury.

We further conclude that the trial court did not err by not issuing a specific instruction on cause of death. In support for his argument that the trial court should have instructed on cause of death, the defendant merely cites Farner, 66 S.W.3d at 205-06, for the proposition that "[c]ausation is an element of every homicide offense, and the jury should be so instructed." We agree with the State, however, that, when viewed in context, it is clear that the above statement was *dicta*. The defendant in the Farner case, who was convicted of criminally negligent homicide, had been a participant in a drag race in which his competitors were killed. One of the main issues argued at trial was whether the defendant's conduct was the proximate cause of the victims' deaths. Id. at 204. Our supreme court reversed the conviction and remanded for a new trial "because the trial court in this case failed to provide the jury with an instruction on proximate causation, an essential element of the offense, and because the jury was erroneously provided an instruction as to criminal responsibility[.]" Id. at 191-92. The Farner court recognized that the case was a rare one in which the issue of causation, unlike in most homicide cases, was in serious dispute:

> We recognize that, while causation is an essential element of every homicide offense, including criminally negligent homicide, it is not seriously disputed in most cases. See Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law, § 3.12(a) (1986) ("In the usual case there is no difficulty in showing the necessary causal connection between conduct and result."). However, this is one of those rare cases in which causation was seriously and forcefully disputed at trial and on appeal by the defendant's reliance upon the co-perpetrator rule. ("It is the unusual case -- numerically in the minority, yet arising often enough to warrant considerable attention by the courts -- which gives difficulty in the area of causation." Id.).

Id. at 204 (footnote omitted).

In this case, the victim's cause of death was never disputed and the defendant did not request a specific instruction on causation. The defendant is not, therefore, entitled to relief on the basis of this claim.

III. Prior Statements as Substantive Evidence

The defendant contends that the trial court erred when "not following the strict requirements of Rule 803(26) of the Tennessee Rules of Evidence and allowing prior statements in as substantive evidence." He argues that the trial court failed to comply with the rule in admitting the statements of John Epperson and Desmond Ragland because the court did not hold a jury-out hearing to determine by a preponderance of the evidence that the statements were made under circumstances indicating their trustworthiness. The defendant also complains that the trial court committed prejudicial error by discussing Mr. Ragland's testimony in the presence of the jury and by the way it questioned Cameo Pankey, which, the defendant asserts, "prepped and indicated what his testimony should be."

Tennessee Rule of Evidence 803(26), "Prior Inconsistent Statements of a Testifying Witness," provides that a witness's prior statement is admissible as substantive evidence if it is otherwise admissible under Rule 613(b) and if all the following conditions are satisfied:

> (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
>
> (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement under oath.
>
> (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

Tenn. R. Evid. 803(26) (2015). Tennessee Rule of Evidence 613(b) provides in pertinent part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." "[F]or the purposes of Tennessee Rule of Evidence 803(26), a prior statement about events that a witness claims at trial to be unable to remember is 'inconsistent' with the witness' trial testimony." Davis, 466 S.W.3d at 64.

As the State points out, the trial court did, in fact, conduct jury-out hearings before admitting the statements of both John Epperson and Desmond Ragland. The record reveals that after Mr. Epperson indicated his lack of memory of the events, the trial court, at the State's request, held a jury-out hearing to discuss the admissibility of his prior

testimony under Tennessee Rule of Evidence 803(26). The court, early in the hearing, found that the prior statement was clearly made under conditions indicating its trustworthiness. Most of the discussion, instead, consisted of argument about whether the witness's earlier trial testimony was inconsistent with his current testimony. The court found that it was and ruled that the State could question the witness about the portions of his previous testimony that were contradictory to his current testimony by reading his previous responses aloud and asking him if he recalled making the statements in a previous court proceeding.

The court also held a jury-out hearing at which it considered the prior statement of Desmond Ragland. At the beginning of Mr. Ragland's testimony, defense counsel interrupted to request a short continuance for his assistant to make copies of a document he intended to use in his cross-examination. During the bench conference about that topic, the prosecutor mentioned that he expected the witness would testify differently from his prior statement and that he believed the prior statement would be admissible as substantive evidence under the same hearsay exception as Mr. Epperson's prior statement. The court then held a jury-out hearing in which Mr. Ragland acknowledged the prior statement and explained his reason for making it. The court concluded that the statement was trustworthy, noting there was nothing to indicate that it had been "extorted from him in any way" and that the witness's current position that he did not mean what he said did not make his prior statement unreliable.

We, thus, agree with the State that the trial court properly admitted the statements after following appropriate procedures. We further agree that there was no error in the trial court's initial discussion of Mr. Ragland's testimony during the bench conference, during which the jury was apparently preoccupied viewing a trial exhibit, or in the manner in which the court questioned Mr. Pankey. The defendant is not, therefore, entitled to relief on the basis of this issue.

IV. Admission of Photographic Lineups

The defendant contends that the trial court erred in admitting the photographic lineups into evidence, arguing that they were unduly suggestive and should have been excluded. In support, he cites his expert witness's testimony about the manner in which several of the identifications violated the Department of Justice's guidelines for unbiased identifications. The defendant acknowledges that defense counsel did not object to the admission of the photographs in the current trial. He points out, however, that counsel raised the issue in the first trial in a motion to suppress, which was denied, and requests that this court consider such action from the first trial sufficient to preserve the issue for consideration in the present appeal.

We respectfully decline to impute defense counsel's actions from the first trial to the second trial. The defendant has, therefore, waived the issue for his failure to raise it at trial. See Tenn. R. App. P. 36(a). Moreover, even if not waived, there is nothing so "unduly suggestive" about the lineups to make them inadmissible. State v. Reid, 213 S.W.3d 792, 825 (Tenn. 2006). We think it likely that defense counsel made a strategic decision not to raise the issue again in the second trial, having been unsuccessful with his motion to suppress in the first trial, and to instead concentrate his efforts on challenging the accuracy of the identifications through his expert witness's testimony, which pointed out to the jury the problems in the identifications and the various factors that could have influenced an eyewitness's attention and memory of an event. We conclude, therefore, that the defendant is not entitled to relief on the basis of this issue.

V. Denial of Motion for Judgment of Acquittal/New Trial

In a very brief argument, the defendant contends that the trial court erred by dismissing his motion for judgment of acquittal and/or new trial without holding a hearing. He asserts that he never waived his right to a hearing, either implicitly or explicitly, and cites Summerall v. State, 560 S.W.2d 413 (Tenn. Crim. App. 1977), to argue that he should have been granted an opportunity to argue his motion.

We agree with the State that the defendant's reliance on Summerall is misplaced. In Summerall, the defendant's counsel failed to appear in court to argue the defendant's motion for new trial, the State moved to dismiss for failure to prosecute, and the trial court granted the motion to dismiss without addressing the merits of the defendant's motion. Id. at 413. On appeal, this court reversed and remanded to the trial court with instructions to consider the motion on the merits and to determine whether defense counsel waived argument on the motion. Id. In the case at bar, by contrast, the court obviously considered the motion on its merits, merely finding that argument was unnecessary due to the "outstanding" and "scholarly and professional" motion filed by defense counsel. The defendant is not, therefore, entitled to relief on the basis of this issue. See, e.g., State v. Nelson, 275 S.W.3d 851, 863 (Tenn. Crim. App. 2008) (rejecting defendant's Summerall argument that he was prejudiced because trial court denied motion for new trial without a hearing when the record demonstrated that "trial court properly considered the motion on the merits before denying the motion").

VI. Alleged Prosecutorial Misconduct

The defendant contends that the State committed prosecutorial misconduct, violating his right to a fair trial, by the manner in which the prosecutor cross-examined Dr. Neuschatz and by improper comments he made during opening statements and closing argument. Specifically, the defendant complains that the prosecutor told the jury

what the evidence was, gave improper definitions of knowingly and intentionally, told the jurors to "keep in mind" that there was "bad blood" between the defendant and the victim, gave improper examples of premeditation, expressed personal opinion about the falsity of the testimony of Brenda King and Chauncey Ross, commented on things that were not in evidence, made improper argument designed to inflame the passions of the jury, and implied, through cross-examination, that the State's expert witness had an improper relationship with defense counsel. The State argues, *inter alia*, that the comments were not improper, that the defendant waived complaints about several of the comments by his failure to object at trial, and that the trial court cured any impropriety with its instructions to the jury to rely solely on the court for the law to be applied in the case. We agree with the State.

The five generally recognized areas of prosecutorial misconduct occur when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence or the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside the record, other than those which are matters of common public knowledge. State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Tennessee courts "have traditionally provided counsel with a wide latitude of discretion in the content of their final argument" and trial judges with "wide discretion in control of the argument." State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). A party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999).

We have carefully reviewed the record and agree with the State that the complained-of portions were either not improper or that the defendant was not so prejudiced by the comments as to have been deprived of his right to a fair trial. We conclude, therefore, that the defendant is not entitled to relief on the basis of this claim.

VII. Denial of Right to Fair Trial

Lastly, the defendant contends that the cumulative effect of the various trial errors, combined with the fact that defense counsel "disappeared" at the conclusion of the trial and both defense counsel and a juror slept during a portion of the trial, violated his right to due process and a fair trial. In support of his assertion that defense counsel and a juror were both asleep during part of the trial, the defendant attached to his motion for new trial affidavits from defense counsel's private investigator, Violetta Zelikov, and the

Clerk of the Circuit Court of Gibson County, Amanda Brown. In her affidavit, Ms. Zelikov stated she was "uncertain if any of the jurors were not paying attention or were sleeping," but defense counsel "did doze off on a few instances during trial but was never fully sleeping" to her knowledge. She also stated that the times that defense counsel "doze[d] off" were "brief and would last seconds." In her affidavit, Ms. Brown stated that she recalled a male juror's "falling asleep during the trial and a deputy . . . waking the juror." She said she did not recall the name of the juror or which day of trial the episode occurred.

From our review of the transcript, defense counsel appears to have been engaged, active, and zealous in his representation throughout the trial. The fact that he appeared to his investigator to have "doze[d] off" for a few seconds during some portion of the trial process is not enough for us to conclude that the defendant was denied his right to a fair trial. Likewise, one of the juror's having briefly fallen asleep during some unremembered portion of the trial process does not make for a deprivation of the right to a fair trial. Any errors in the trial process, when considered either individually or cumulatively, did not prejudice the defendant's right to a fair trial. We conclude, therefore, that the defendant is not entitled to relief on the basis of this issue.

CONCLUSION

Having reviewed the record and found no reversible error, we affirm the judgment of the trial court.

_____

ALAN E. GLENN, JUDGE