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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 7, 2020 Session

STATE OF TENNESSEE v. DERRICK JEFFERSON

Appeal from the Criminal Court for Shelby County
No. 16-03541 Paula L. Skahan, Judge

No. W2018-02249-CCA-R3-CD

The Appellant, Derrick Jefferson, was convicted of first degree premeditated murder, and he received a sentence of life imprisonment. On appeal, the Appellant contends that (1) the trial court erred by allowing the State to enter the Appellant's prior mug shots into evidence; (2) the trial court erred by allowing the State to admit photographs of the victim's body and the bullets taken from the victim's body during the autopsy; (3) the trial court gave an erroneous oral jury instruction regarding the presumption of innocence; (4) the trial court gave an erroneous oral jury instruction that the stipulation regarding the Appellant's mug shot, which revealed the Appellant's prior arrests, was relevant only on the issue of the Appellant's appearance; (5) the trial court erred by denying the Appellant's request for a mistrial when, during voir dire, the jury pool entered the courtroom before the Appellant came out of "lockup"; (6) the cumulative errors require reversal of the Appellant's conviction and a new trial. Upon review, we conclude that the trial court committed no reversible error, and we affirm the judgment of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which and ALAN E. GLENN, J., joined. THOMAS T. WOODALL, J., not participating.

William D. Massey and Melody M. Dougherty (on appeal), and Marty McAfee and John Catmur (at trial), Memphis, Tennessee, for the Appellant, Derrick Jefferson.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd and Theresa McCusker, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Factual Background

The thirty-eight-year-old victim, Larry Boyd, was shot to death during a Keep the Peace rally held in Hastings Park in the Smoky City area of Memphis on June 6, 2015. Thereafter, the Appellant was charged with the first degree premeditated murder of the victim.

At trial, Officer James Aylor with the Memphis Police Department testified that in the late afternoon of June 6, 2015, he responded to a report of a shooting at Hastings Park, which was located near the intersection of East Hastings and LaGrange. The park was surrounded by a residential area, and children frequently played in the park. Upon his arrival at the scene, Officer Aylor learned that a "Keep the Peace" rally had been taking place in the park. The park was filled with a number of children and adults, and food and other items were available for purchase. Officer Aylor saw the victim lying on the concrete on the east side of the park. The victim had been shot multiple times.

Officer Aylor said that he made sure the scene was safe and that there were no other victims. Officer Aylor did not locate any weapons around the victim's body or at the scene. He was still at the scene when medical personnel arrived. He learned that the suspect was not at the scene and alerted other officers in the area to look for the suspect. Officer Aylor stayed until the victim's body was removed from the scene. Officer Aylor prepared a report and submitted it to the homicide investigators, after which his involvement in the investigation ended.

On cross-examination, Officer Aylor said that he did not search the victim's body at the scene. When Officer Aylor arrived at the scene, the victim was still alive.

Hope Smith testified that on June 6, 2015, she worked with the crime scene division of the Memphis Police Department. Upon her arrival at Hastings Park, she noticed that a block party had occurred and that children were playing. Smith took photographs and made a sketch of the scene. However, she found no evidence, such as a weapon or shell casings, to collect. Smith opined that the absence of shell casings indicated the shooter used a revolver, which would have left the casings inside the gun after the bullet was fired.

On cross-examination, Smith agreed that she found no blood at the scene. Smith stated that after she left the scene, she went to Regional One Hospital and collected the victim's personal belongings. She collected the victim's clothing, which consisted of two white t-shirts, a pair of black tennis shoes, a pair of black jeans, a black belt, a pair of gray socks, and a pair of "blue checkered" boxer shorts. The victim also possessed one "Med"

receipt. Additionally, the victim had 1.1 grams of heroin and .4 grams of crack cocaine. Smith opined that the amount of heroin was "significant."

William Lee McKinnie testified that he arrived at Hastings Park around 11:30 a.m. or 12:00 p.m. for the peace rally. Areas were set up in the park for cooking, for children to play, for a disc jockey (DJ) to play music, and for dancing. When McKinnie arrived, approximately seventy-five people were in the park, and approximately two hundred people were in the park later in the day.

McKinnie said that after he arrived, he helped his friend Marty Marcellus set up his grill and then helped Marcellus cook "hot dogs and chicken and stuff." Around 12:30 p.m., the victim, whom McKinnie had never seen prior to that day, walked up to the grill and asked for something to eat. Marcellus gave the victim a couple of hot dogs. The victim sat, ate, and then walked off.

McKinnie said that around 5:00 p.m. that evening, he and "a couple of older guys" were standing in a circle. The victim and a couple of other men walked up and started talking with them. McKinnie and the victim were standing "face to face." McKinnie saw a man, whom he later identified as the Appellant, walk "[f]rom all the way across the park" to join the men. He described the man as approximately five feet and seven or eight inches tall. He was wearing a purple Polo shirt, a necklace, and "shades." The Appellant had his hair "in braids . . . going to the back . . . ." McKinnie could not recall the kind of pants or shorts the Appellant was wearing.

McKinnie said that the Appellant stopped about an arm's length from him and was approximately two feet from the victim. The Appellant told McKinnie, "[T]he D.J. is playing all this hard music and these weak ass boys are out here." McKinnie said that the Appellant "upped the gun," which meant the Appellant pulled a revolver from his pants and pointed the gun at the victim's chest. The victim put his arms over his face as if he thought the Appellant was going to shoot him in the face. The Appellant fired four, five, or six times, striking the victim's chest, side, and under his arm. The victim turned and ran out of the park. After the Appellant stopped shooting, he put the gun in his pants, looked around, and walked out of the park, "heading left." The DJ, using the microphone, announced that everyone should calm down because the noise was fireworks. McKinnie told the DJ that the victim had been shot, that the shooter was fleeing, and that he should stop the music. McKinnie saw the shooter leave the park and get into the front passenger seat of a gray or black Cadillac, possibly a Seville, with tinted windows that was parked beside some apartments. The Cadillac proceeded north on Hasting Street. The victim ran out of the park and collapsed on a curb. McKinnie stayed near the victim until the police and the paramedics arrived.

Sometime after the shooting, McKinnie was shown a photograph lineup by the police. He said that photograph number two, which was a photograph of the Appellant, "looked like the guy that shot [the victim]."

On cross-examination, McKinnie said that he did not know Dennis Butler, who went by the nickname "Little D." McKinnie estimated that the shooting happened around 4:45 p.m. and that he gave the police a statement at 7:30 or 7:50 p.m. He told the police that the shooter was a black male, who was twenty-five to thirty years old, wearing a purple shirt, a silver chain, and "shades." He described the shooter's hair as "going, like, to the back, or braids. It was faded low to his shoulder."

McKinnie acknowledged that the suspect he identified in the photograph lineup had "textured, low hair." McKinnie said that during the shooting, the Appellant's hair "[l]ooked like braids, coming towards me, all I can say his hair was text right in half it was hanging in the back." McKinnie said that person number two in the photograph array had long hair. Specifically, he said, "If you look at it from a distance from where you and I are standing, if he's coming towards, until you get closer, it looks like braids."

McKinnie said that he told the detectives, "'I can't remember what his hair looked like.'" Defense counsel asked if McKinnie was "aware that when people are arrested they get a mug-shot," and McKinnie responded, "Yes." Defense counsel showed McKinnie a mug shot of the Appellant dated March 17, 2012. McKinnie identified the mug shot as the same photograph that was used for person number two in the photograph lineup. In the mug shot, the Appellant's hair was "[l]ong. . . . [I]t was short to the front and long in the back. It looked like braids coming at me." Defense counsel showed McKinnie a mug shot of the Appellant dated November 19, 2013, in which the Appellant had shorter hair. McKinnie acknowledged that the detectives did not tell him "that this picture [in the photograph lineup] is from 2012, the one with the long hair, but we've got one from 2013 where his hair is clean cut."

On redirect examination, McKinnie said that less than a minute elapsed from the last shot and the Appellant's departure in the Cadillac.

Marcellous Pruitt testified that he was "spearheading" the Keep the Peace rally and picnic at Hastings Park. Pruitt arrived at the park around 8:30 or 9:00 a.m. and began setting up his table and grill. Other people "were setting up bouncers and waterslides and the DJ was setting up, also." People began to arrive for the rally around 10:00 a.m., but the rally "really start[ed] to take off around" noon or 1:00 p.m. Pruitt remained at the park until 6:30 or 7:00 p.m.

Pruitt first saw the victim at approximately 10:00 a.m. and again around noon and around 4:30 p.m. By 4:30 p.m., "the picnic and the celebration was in full bloom," and at least two hundred people were in the park. The victim was standing and talking with several people. Pruitt was cooking and handing out food.

Pruitt said that at approximately 4:40 or 4:45 p.m., he was handing out food when he heard shots coming from about thirty feet in front of him "on the pavement itself." Pruitt looked up and heard two more shots. The shooter, whom he later identified as the Appellant, pointed a gun at the victim "at point blank range" and fired two more shots after the victim "ducked down." Pruitt said that the bullets appeared to have hit the victim in his side. The victim turned and ran from the park toward Hastings Avenue. Pruitt thought that "before [the victim] could take off running good," a bullet hit the victim in his back.

Pruitt said the Appellant had a "small, black revolver. It looked maybe like a .22 handgun, I know it was a very small revolver." After the shooting, the Appellant, who still had the gun in his hand, "was chatting and raving saying, 'I told you I was going to get you boy, I told you I was going to get you.'" The Appellant was "bouncing around," and "he was hyped from the shooting." The Appellant stayed where he was for forty-five seconds to one minute after the victim ran away. The Appellant did not aim at anyone else. Pruitt said the Appellant "knew his target and whom he wanted," explaining that the Appellant "was at point blank range and he only fired it at [the victim], nobody else, never pointed it at anybody else."

After Pruitt heard the shots, he immediately called 911 and gave the dispatcher the location of the shooter, and that "he was right here in the park." The dispatcher asked what kind of vehicle the shooter had, and Pruitt responded that "he is standing right here, he is not in a vehicle." Pruitt gave the dispatcher a description of the shooter and the clothing he was wearing.

Pruitt described the Appellant as "[a] young male black, approximately 150, to 160 lbs. paper sack brown, in color, looked to be in his mid-twenties." The Appellant was wearing "like a golf shirt, almost like a Polo shirt, like, short sleeved shirt, had khaki pants on." The shirt "was like a lavender, a light colored purple like shirt." Pruitt thought the shooter was wearing "khaki pants, or blue, if I can remember, like khaki jeans, or something like that . . . ." He also "had like a band, or something around the top of his head and the hair seemed like to be in small twist, or miniature dreads like."

Pruitt said that after the shooting, the victim ran east from the park and collapsed on the corner. Pruitt ran to the victim's side. The victim was gasping for breath, and Pruitt saw the victim "take his last breath." The police and an ambulance arrived at the scene within three or four minutes, and the police barricaded the area.

Pruitt said that after the victim ran away, the Appellant ran to an apartment complex where he got into a parked four-door, black Cadillac Seville with tinted windows, and the Cadillac left the complex. Pruitt had never seen the Appellant before that day. Pruitt identified the Appellant in the courtroom as the shooter.

Pruitt said that on June 6, 2015, the police showed him a photograph lineup, and he identified the Appellant as the shooter.

On cross-examination, Pruitt said that he did not know Dennis Butler. Pruitt said that he gave his statement to the police around 7:00 p.m. In his statement to police, Pruitt said the shooter was wearing dark jeans. At trial, Pruitt clarified that he remembered the shooter wearing khakis or "khaki like jeans." Pruitt also said that the Appellant's hair was short, explaining that his hair was in "[s]mall dreads, or twist, yes and they were short."

Pruitt said that in the photograph from March 17, 2012, the Appellant's hair "[l]ooks like he has long braids, or something to that nature." Pruitt acknowledged that the police did not tell him that they had access to a more recent photograph of the Appellant. The police never showed Pruitt the November 19, 2013 photograph of the Appellant.

Dr. Paul Benson testified that he was a medical examiner and forensic pathologist with the Shelby County Medical Examiner's Office. On June 6, 2015, Dr. Benson performed the autopsy on the victim's body, prepared an autopsy report, drew diagrams of the wounds, and took photographs of the body during the autopsy. Dr. Benson said that reviewing the photographs, the diagrams, and the autopsy report would "refresh his recollection about his findings in this case and assist[him] in [his] testimony."

Dr. Benson said that the thirty-four-year-old victim had five "fresh" gunshot wounds on the body and "one old gunshot wound on his left thigh." Two of the gunshot wounds were fatal, and the combination of all five wounds "hastened the death of the victim." Dr. Benson determined that the cause of death was multiple gunshot wounds and that the manner of death was homicide. Dr. Benson recovered five bullets from the body. Dr. Benson said that the victim's blood tested positive for marijuana.

Sergeant Michael Chipman with the Memphis Police Department homicide squad testified that he arrived at the scene of the shooting after the victim had been taken to the hospital. The Appellant was identified as the suspect, and, the day after the shooting, the police went to 1651 Oriole Street to try to find the Appellant and the vehicle in which he had left the scene. Upon the officers' arrival, Sergeant Chipman saw a black Cadillac, which matched the description of the suspect's vehicle. The car had been backed into the driveway and parked.

Sergeant Chipman said that the Appellant's mother met them at the door of the residence. The officers asked if the Appellant was at the home, and the Appellant came to the door. Sergeant Quinn had other officers secure the Appellant inside a squad car, and they obtained the Appellant's consent to search his bedroom and his vehicle. The officers also obtained consent from the Appellant's mother to search the residence. The officers brought the Appellant back into the residence, had him sit in the living room on the couch next to his mother, and advised him that at any time during the search, he could tell the officers to stop. Sergeant Chipman said that just off the kitchen area was a washing machine and a dryer. Inside the dryer, the officers found a light purple Polo shirt that matched the description of the shirt the shooter was wearing.

Sergeant Chipman said that in the Appellant's bedroom, the officers found a gold chain and a silver herringbone necklace on a long table next to the bed. The silver necklace matched the description the officers had been given of a necklace worn by the shooter. Following the search of the residence, the officers transported the Appellant "back to the office" at Sergeant Mundy Quinn's request. Sergeant Chipman said that the vehicle was a Cadillac SLS with dark tinted windows and that it was registered to the Appellant. The police did not find a weapon at the scene, in the Appellant's mother's house, or in the Appellant's vehicle.

On cross-examination, Sergeant Chipman said that he was not the lead detective on the case but that he assisted the case coordinator. Sergeant Chipman acknowledged that the police had learned that the victim had been involved in an altercation "earlier in the week with a man named, Little D, or Dennis Butler." However, Sergeant Chipman never spoke with Dennis Butler, and he did not know whether Sergeant Quinn ever spoke with Dennis Butler. Sergeant Chipman was asked to describe a photograph handed to him by defense counsel. Sergeant Chipman said that the person in the photograph was a "[m]ale black, six-foot, six-one, medium complexion, white shorts, purple shirt, baseball cap," and a silver necklace. The photograph was dated May 19, 2015. Sergeant Chipman conceded that the photograph appeared similar to other Facebook posts that he had seen; however, he had not seen that particular post, and it was not investigated by the police.

Sergeant Chipman said that both McKinnie and Pruitt identified the Appellant from a photograph lineup. Sergeant Chipman described the man in the photograph McKinnie and Pruitt selected as a "[m]ale black, mustache, longer type hair, pulled back." The photograph was a mug shot and was dated March 17, 2012. Defense counsel showed Sergeant Chipman another mug shot of the Appellant, which was dated November 19, 2013. In that photograph, the Appellant had short hair and a beard. Sergeant Chipman did not know that Paul Mitchell was shown the same photograph lineup as McKinnie and Pruitt

and was unable to identify anyone. Sergeant Chipman was aware that Patricia Adams was unable to make an identification from the photograph lineup.

On redirect examination, Sergeant Chipman said that the case officer was Sergeant Quinn, who was no longer employed with the Memphis Police Department and did not reside in Tennessee. None of the witnesses identified Butler as the shooter.

Sergeant Chipman said that he did not know how many mug shots had been taken of the Appellant. The State showed Sergeant Chipman the Appellant's mug shot from December 2, 2012, which had been previously admitted as an exhibit. The trial court instructed the jury, "Again, ladies and gentlemen any evidence, booking photos of [the Appellant], any other arrests have no relevance to the case on trial today. . . . As far as his guilt or innocence, is what I mean to say. No relevance to his guilt or innocence, as far as prior arrests."

The State showed Sergeant Chipman another mug shot of the Appellant from 2013; in the photograph, the Appellant's hair was "long and pulled straight back." Sergeant Chipman agreed that when selecting a photograph to include in a lineup, the police search for a photograph that is closest to the descriptions they have received.

On recross-examination, Sergeant Chipman said that he did not know "there was a beef" between Butler and the victim. Sergeant Chipman said that the Appellant's mug shot in the instant case was taken on June 7, 2015. In that photograph, the Appellant's hair was "[n]atural, I guess a little longer, maybe – I really don't know how to describe it – an inch high, maybe." Sergeant Chipman stated that "people can easily alter their hair appearance."

Defense counsel showed Sergeant Chipman a Facebook photograph with a posting date of May 31, 2015. Sergeant Chipman acknowledged that the person in the photograph "favor[ed]" the Appellant. When asked if he thought it was the Appellant in the photograph, Sergeant Chipman responded, "I don't believe so, but his hair appears to be somewhat the same as, in length and style as the hair of [the Appellant's] the day we arrested him." Sergeant Chipman said that gunshot residue could not be found on clothes after they were washed "[b]ecause detergent can throw it off."

On further redirect examination, Sergeant Chipman agreed he was aware "that if you post a photograph it is not necessarily [taken] the same date as the post." Sergeant Chipman said that when he went to the Appellant's mother's residence and arrested the Appellant, he noticed two things about the Appellant's hair: "For one, the color was off, but two there was little remnants, of little small remnants of rubber bands still left in his hair." Sergeant Chipman said that photographs were taken that showed "the remnants of

the little small white rubber bands that we found in his hair, like knotted up." Sergeant Chipman said he saw remnants of two rubber bands.

On further recross-examination, Sergeant Chipman said that the Appellant's hair in the photograph which was used in the lineup was different than his hair in the Facebook photograph. Sergeant Chipman said that he did not look on Facebook for any photographs of the Appellant and that he had not seen the Facebook photograph of the Appellant before defense counsel showed it to him.

Jason Parrish testified that in June 7, 2015, he worked with the crime scene investigation unit of the Memphis Police Department, and he was dispatched to the Appellant's mother's residence. Sergeant Parrish recalled that the Appellant's vehicle, a black Cadillac with tinted windows, was backed into the driveway beside the house. Sergeant Parrish took photographs of the vehicle at the scene. Later, the vehicle was moved to another location so it could be searched and more photographs taken. Sergeant Parrish did not recall collecting anything from inside the vehicle.

Sergeant Parrish said that while he was inside the residence, he found a purple Polo knit pullover inside the clothes dryer. He photographed the shirt before he removed it from the dryer. Sergeant Parrish collected two gold necklaces, a herringbone necklace and a chain necklace, from a nightstand in a bedroom. Sergeant Parrish said that it was highly unlikely the police would be able to find gunshot residue after a shooter had washed his hands or after a significant amount of time had passed.

On cross-examination, Sergeant Parrish acknowledged that the police did not find a gun inside the residence or inside the Appellant's vehicle. Sergeant Parrish also acknowledged that gunshot residue could have gotten on a shooter's herringbone necklace. However, Sergeant Parrish did not perform a gunshot residue test on any items. Sergeant Parrish recalled that several other items of clothing were in the dryer with the purple Polo shirt. Sergeant Parrish did not look for fingerprints in the vehicle.

Renita Allen, the first defense witness, testified that she and the Appellant had been friends since the eighth grade. Sometime between 3:00 p.m. and 5:00 p.m. on Saturday, June 6, 2015, Allen attended a cookout at the home of the Appellant's mother. More than fifteen people were at the cookout. Allen initially stated that when she arrived, the Appellant greeted her and told her he had to "do the sound system." Allen later stated that the Appellant was cooking on the grill. The Appellant's mother was making the "sides" for the dinner, but she stopped to move her car so that Dennis Butler could use the Appellant's car for some errands. Allen thought Butler was at the cookout for only "a quick second" before he left in the Appellant's Cadillac. Allen said that the Appellant did not leave the cookout while she was there. Allen left the cookout around 11:00 p.m.

Allen said that Butler returned to the cookout before she left. He drove the Appellant's car "quickly" around the corner, followed by his wife in a separate car. After Butler got out of the Appellant's car, he and his wife argued because Butler was in the Appellant's car. Butler gave the keys to the Appellant, got into his wife's car, and left.

Allen said that the Appellant and Butler were friends. Allen knew Butler as "Playboy" and had also heard him called "Little D." Defense counsel showed Allen a photograph, and she identified the person in the photograph as Dennis Butler. Allen said that Butler was wearing a lavender Polo shirt, a silver necklace, and khakis. Allen said that she had seen the photograph on Facebook and that it appeared to be a "screen shot" of a Facebook post. Allen stated that she "kn[e]w of" Butler. She saw Butler at the June 6, 2015 cookout at the Appellant's mother's house, and "[h]e was wearing the same thing he was wearing in the photo," namely a lavender purple Polo shirt and khaki pants.

Allen recalled that during the cookout, the Appellant's mother was wearing the purple Polo shirt the police found inside the dryer. She said that Butler's shirt was lavender but that the Appellant's mother's shirt was light purple. She recalled that the Appellant was wearing a white t-shirt and black pants at the cookout.

Allen said that she "kn[e]w of" the victim but was not friends with him. A couple of weeks before the shooting, Allen went to Butler's residence and picked up the Appellant. They stopped by a convenience store near Butler's house, and Allen saw the victim and Butler "having words with each other, like they wasn't pleasant words, they was actually having words, like they was getting into [an] argument." Allen said that they were calling each other names and threatening each other. Allen thought a fight could break out. A young man approached and told them to calm down and not argue in front of the store because children were there. The victim told Butler, "[Y]ou're going to have to see me." Allen explained that "[i]n the neighborhood like that, if you say, 'You have to see me,' then you're either going to fight later on down the line, or something is going to happen, it's a threat."

Allen said that at the cookout, the Appellant "had a low cut," which meant that his hair "was cut a little higher than what it is now, but it wasn't like braided or nothing . . . ." Allen said that during the time she had known the Appellant, he had had long hair, braids, and pony tails but that he had never worn his hair in a "twist."

Allen identified a Facebook photograph of the Appellant dated May 31, 2015, and a Facebook photograph of the Appellant dated June 5, 2015. Allen was not with the Appellant when the photographs were taken, but she knew how the Appellant looked

around that time, and she said that he looked like he did in the photographs taken on the day of the cookout.

On cross-examination, Allen said that she was thirty-two years old and that she and the Appellant talked almost every day. On the day of the cookout, the Appellant's mother moved her vehicle so that Butler could borrow the Appellant's car. Allen said that she and the Appellant were standing in front of the door, and "when [Butler] pulled up [the Appellant] gave him the keys, because [the Appellant] told [Allen] that he was going to let his friend use his car." After Butler left, Allen and the Appellant walked into the house, and he showed her some studio equipment he kept in the back room, then they went to the cookout to mingle with other party attendants. Allen said that she knew the Appellant never left the cookout because she was with him until she left at 11:00 p.m.

Allen could not recall how long Butler was gone before he returned to the cookout, but she knew that "it was more than a minute" and that "it was nighttime when he came back." He was speeding in the Appellant's car when he returned, and his wife was following him. Allen said that when Butler got out of the Appellant's car, Butler's wife got out of her car and asked why he was in the Appellant's car. Butler responded that he "had to make a couple of runs." Allen said that Butler and his wife "got into it." Butler then gave the Appellant his keys, said that he had to go, and left with his wife. Butler and his wife were yelling at each other as he got into her car. Butler did not return to the cookout. Allen asked the Appellant why Butler was mad, but the Appellant did not know the reason. Allen said that some of the party attendants were drinking alcohol and that she had two vodka drinks.

Allen recalled that the day after the cookout, she learned from Facebook and a telephone call from the Appellant's mother that the Appellant had been arrested. Allen said that on the night of the cookout, Butler was wearing "a purple shirt and like a Polo horse on it and a collared shirt with some khaki's pants and a black hat and black shoes." Allen said that the khaki pants were "short pants." Butler was also wearing a silver necklace. Allen said that Butler was dressed like he was in his Facebook photograph. She had seen the photograph before coming to court. She explained that she had "seen it on Facebook, a little bit after everything was going on." She was not Facebook friends with Butler, but she looked up his Facebook page "[b]ecause [she] knew they was friends and everybody, like on the news they was talking about the black Cadillac and [she] knew that [Butler] came and go[t] this car." She explained that Butler had been "tagged in a post" by a mutual friend.

Allen said that on the night of the cookout, the Appellant was wearing a white t-shirt and short black pants. Allen said that she did not tell the police that she was with the

Appellant on the day of the shooting, explaining, "They didn't come to me, so I didn't go to them."

Allen said that she knew the victim through mutual friends but that she had not known him "that long." At 3:30 or 4:00 p.m. a couple of weeks before the shooting, Allen saw the victim and Butler arguing at a convenience store "right in front of [Butler's] house." Allen had stopped at the store on her way to pick up the Appellant at Butler's house. A young man came out of the store and told the victim and Butler to calm down. Allen got in her car and sent a text message to the Appellant to say she was almost there. Allen's car windows were down, and, as the victim and Butler were walking away from each other, she heard the victim tell Butler "that he was going to have to see him." At that point, Allen drove away from the store. When she picked up the Appellant, she told him about the incident at the store, "and he said he wasn't going to get off into it because that is not his fight."

Allen estimated that Butler was five feet and six or seven inches tall and that the victim was five feet and eleven inches tall. Allen said that she had never been to the peace rally at Hastings Park.

Allen stated that the Facebook photographs of Butler were uploaded on May 31, 2015, and June 5, 2015. She acknowledged, however, that she did not know what day the photographs were taken. Nevertheless, she maintained that Butler's appearance in the June 5 photograph was how he looked during the cookout.

On redirect examination, Allen said that when she saw the victim and Butler arguing, she thought the argument could become violent. The young man who intervened had to tell them several times to stop and had to raise his voice to get them to pay attention. Allen left the store and picked up the Appellant at Butler's house, which was a half of a mile or a mile from the store. Allen estimated that Butler left the cookout around 4:00 p.m.

Kirk Tipton testified that he was friends with the Appellant's parents. At approximately 3:00 or 3:15 p.m. on June 6, 2015, Tipton went to a cookout at the Appellant's mother's house. When Tipton arrived, a few people were standing in front of the house, and the Appellant was getting the grill from behind the house to cook the meat. Tipton saw the Appellant's black Cadillac parked in the driveway behind his mother's black Escalade. Tipton saw the Appellant's mother move her vehicle so the Cadillac could leave. Tipton did not see who was driving the Cadillac.

Tipton was shown a photograph of Butler, and he said that he saw Butler arrive at the Appellant's mother's house on the day of the cookout. The Appellant was at the cookout the majority of the time Tipton was there. Tipton remembered seeing Marona

Jefferson, the Appellant's mother, at the cookout. Ms. Jefferson was wearing "those jeans that had the little tears in them and a lavender, purple shirt, Polo shirt." Tipton thought that Ms. Jefferson's jeans were "almost purple, or almost lavender, too." Tipton was shown the photograph of the shirt discovered in Ms. Jefferson's dryer, and he said "[i]t was similar, very similar" to the shirt Ms. Jefferson was wearing on the night of the cookout. Tipton said that the Appellant's hair at the time of the cookout was "clean cut, it was like a little fade and a little hair on the top."

On cross-examination, Tipton said that he had known Ms. Jefferson for approximately three years. On the night of the cookout, the Appellant was wearing a white t-shirt and black shorts. Tipton said that he assumed the black car belonged to the Appellant because only the Appellant and Ms. Jefferson lived at the residence and the Escalade belonged to Ms. Jefferson. Tipton saw the black car leave, but he did not see who was in it. Tipton acknowledged that he never told the police what he saw on the night of the cookout.

On redirect examination, Tipton said that the police did not talk to him until approximately one week prior to trial. Tipton thought that the Cadillac left about forty-five minutes after he arrived at the residence.

Tipton said that he and the Appellant talked about cooking on the grill. Tipton left around 7:45 p.m., before it got dark. Tipton remembered the cookout because a couple of days later, the Appellant's mother told Tipton that the Appellant had been arrested.

In rebuttal, the State called Nigel Houston. Houston testified that around 2:00 or 3:00 p.m. on June 6, 2015, he went to a Stop the Violence cookout in Hastings Park. When he arrived, the barbeque grills were being set up, the music was starting, and people were mingling. Houston estimated that from five hundred to seven hundred people were in the park.

Houston said that his friends, Paul Mitchell, William Moore, and the victim, were waiting for him on the south side of the park. The victim gave Houston a Smoky City Stop the Violence cookout shirt, and the men began talking. A woman walked up to the men, told them they looked good together, and asked to take their photograph. Afterward, Butler approached them and asked Houston, "[H]ow you been doing?" Butler was wearing an Army fatigue vest with a black hat and pants; Houston could not recall the color of Houston's pants. Butler shook Houston's hand then shook Mitchell's hand. When Butler tried to shake the victim's hand, the victim refused to shake Butler's hand. Butler looked the victim "up and down" and said, "'Are you still on that?'" and "'I know what that means.'" Butler shook Moore's hand and walked to the east side of the park to talk with the Appellant, and Butler shook the Appellant's hand. Houston said that he had seen the

Appellant three or four times in the neighborhood but that he did not know the Appellant personally.

Houston said that the music started playing, and Moore started "dancing with the little kids." The victim stepped away from Houston, Mitchell, and Moore and "zoned out." Houston told the victim to come back, and the men "started back tripping and laughing and talking." A song called "Trigger Man" started to play, and the Appellant "ran up with his gun." Houston said that the Appellant

> bumped [the victim] that is when [the victim] turned this way and [the Appellant] shot him, "boom, boom, boom" and when he got shot three times he spent [sic] around and got shot again and he struck out running towards the east side and [Houston] was running right behind him.

Houston said that the Appellant was wearing a purple Polo shirt, shorts, and "his hair was blonde at the time, like gold." Houston recalled that the Appellant shot five or six times then "he stuttered off, walked off real fast and then when he got passed the playground, he ran" toward the north side of the park. Afterward, Houston ran after the victim, who had run to the east side of the park. The victim said, "'Oh, I'm hit, I'm hit, I'm hit." The victim fell, and Houston caught him before he hit the curb. Houston tried to soothe the victim, and the victim died in Houston's arms. Houston said that he did not see Butler after Butler shook the Appellant's hand. Houston estimated that fifteen minutes passed between the time Butler shook the Appellant's hand and the Appellant shot the victim.

Houston said that Butler was a little taller than he and that Butler was also taller than the Appellant. Houston explained that when Butler tried to shake the victim's hand, the victim "[f]olded his arms and looked him up and down with a frown. . . . He wasn't angry, he was like, he really was like what are you up to and we just got through arguing." Houston said that two weeks prior to the cookout, he and the victim were on the street in front of Houston's mother's house, and Butler and his girlfriend drove up in a Crown Victoria. Butler told the victim that he was selling a car for seven or eight hundred dollars. The victim said that he needed a car because he was trying to find a job. Butler told the victim that he would sell the victim the car if the victim could get the money. Butler left, and the victim called a few people to borrow enough money to purchase the car. After about an hour, the victim asked Houston to call Butler and tell him that the victim had enough money to buy the car. Butler drove by and told the victim that he had already sold the car, and the victim got angry.

Houston said that he identified the Appellant as the shooter from a photograph in a photograph array he was shown by the police.

On cross-examination, Houston agreed that he told the police that the shooter was wearing "'funny looking shorts that had a lot of designs on them . . . [u]gly looking shorts.'" Houston said the Appellant had "dreads" in the lineup he was shown.

Houston recalled that after Butler told the victim he had already sold the car, the victim said, "'Awe you going to do it like that?'" The victim told Butler, "'Don't come back on Dunlap no more," then walked away. Houston said that when the victim refused to shake Butler's hand at the cookout, the victim intended it to be offensive. Butler responded, "Oh man, he's still on that, all right, and he just walked off."

Houston said that he was five feet and six inches tall and that Butler was only a little taller than Houston.

On redirect examination, Houston said that the Appellant's hair was gold or blond on "just the top part." Houston stated that an abandoned store was next door to Houston's house on Dunlap and that another store was approximately one block down the street.

At that point, the trial court told the jury:

> [T]he parties have entered into a stipulation that the evidence includes several mug shot photos of [the Appellant] for several separate arrests. The parties stipulate that these various arrests were all related to one case for which [the Appellant] was arrested for a drug offense and submitted to a drug Court treatment program.
>
> . . . .
>
> The fact that [the Appellant] has prior arrests relating to a drug offense is relevant for your consideration in this case, only as it relates to his appearance.

The jury found the Appellant guilty of the first degree premeditated murder of the victim. The trial court sentenced the Appellant to life imprisonment. On appeal, the Appellant contends that (1) the trial court erred by allowing the State to enter the Appellant's prior mug shots; (2) the trial court erred by allowing the State to admit photographs of the victim's body and the bullets taken from the victim's body during the autopsy into evidence; (3) the trial court gave an erroneous oral jury instruction regarding

the presumption of innocence; (4) the trial court gave an erroneous oral jury instruction regarding how the jury was to consider the stipulation that the Appellant's mug shot, which revealed the Appellant's prior arrests, was relevant only on the issue of the Appellant's appearance; (5) the trial court erred by denying the Appellant's request for a mistrial when, during voir dire, the jury pool entered the courtroom before the Appellant came out of "lockup"; (6) the cumulative errors require reversal of the Appellant's conviction and a new trial.

II. Analysis

A. Admission of Photographs

1. Mug Shots

The Appellant contends that the trial court erred by allowing the State to introduce the Appellant's mug shots from his prior arrests. The record before us reveals that the Appellant had five mug shots: March 17, 2012; December 2, 2012; January 22, 2013; November 19, 2013; June 7, 2015. The mug shot used in the photograph lineup was from March 17, 2012, and it showed the Appellant with long hair.

During cross-examination of McKinnie, defense counsel attempted to introduce the Appellant's mug shot from November 19, 2013, which showed the Appellant had short hair, and another made immediately after his arrest on June 7, 2015, to show that the Appellant had short hair at the time of his arrest. After an objection by the State, defense counsel argued that the police had compiled the photograph lineup using an older mug shot of the Appellant which matched the description of the suspect; however, the Appellant's appearance at the time of the crime did not match the description of the suspect. Defense counsel repeatedly acknowledged that the Appellant had "been arrested five times[,] and I am going to have to deal with that and I am doing that at my own peril and that is just the way it is."

The trial court asked why defense counsel had not filed a pretrial motion to suppress the identification. Defense counsel responded that he did not want to exclude the photograph lineup; he wanted to show that it was misleading. He explained, "They have identified somebody that looks like, but [is] not him, I want that to be there." The trial court agreed to allow defense counsel to introduce the photographs and stated that it needed to give an instruction so the jury would not "consider any prior bad acts against" the Appellant. During cross-examination of McKinnie, defense counsel introduced the Appellant's March 17, 2012 mug shot, which was the photograph used in the lineup, and the March 19, 2013 mug shot. The trial court instructed the jury:

> Ladies and gentlemen, arrest information of [the Appellant] on these two different occasions has nothing to do with this case. You are not to infer anything about them, as far as his guilt in this particular case, okay.

Before the State conducted its redirect examination of Sergeant Chipman, the State announced its intention to introduce the three remaining mug shots. The December 2, 2012 mug shot shows that the Appellant's hair was long and was worn in "twist[s]." The January 22, 2013 mug shot shows that the Appellant's hair was short in the front and long in the back. The June 7, 2015 mug shot, which was taken immediately after the Appellant's arrest for the instant offense, shows the Appellant with short hair. As the trial court noted, this mug shot was not available at the time the police compiled the photograph lineup.

The State contended that the remaining mug shots showed the Appellant's "various hair lengths and hair styles" and that introducing all of the mug shots would give "a more complete picture" of the photographs from which the officers chose and would refute the Appellant's contention that the lineup was suggestive or misleading. The State maintained that it had not intended to introduce the other mug shots until defense counsel "open[ed] this door."

Defense counsel maintained that introducing additional mug shots showing the Appellant with long hair would do nothing more than show the jury that the Appellant had other arrests. The State responded that the defense had raised the issue of the other mug shots by contending that the police had "cherry picked" the photograph used in the lineup. The State explained that it wanted to introduce the other mug shots to show "that is the consistent version of the [Appellant] in those booking photos that they had access to, is the long hair." Defense counsel agreed that at the time the police compiled the lineup, the officers had two 2012 mug shots in which the Appellant had long hair and two 2013 mug shots, one in which the Appellant had long hair and one in which the Appellant had short hair. The Appellant argued that the State chose the oldest mug shot because it most closely matched the description of the suspect even though the more recent photographs did not. The trial court examined the photographs the State wanted to introduce and found that the mug shots were relevant and to counter the Appellant's argument and to show that the Appellant frequently changed his hair style. The trial court further found that the State's purpose in admitting the photographs was to counter the defense's argument that the State had "cherry picked" the photograph in the lineup.

The State introduced the photographs to the jury. Afterward, the trial court instructed the jury:

> Again, ladies and gentlemen any evidence, booking photos of [the Appellant], any other arrests have no relevance to the case on trial today.
>
> . . . .
>
> As far as his guilt or innocence, is what I mean to say. No relevance to his guilt or innocence, as far as prior arrests.

On appeal, the Appellant contends that the photographs had no evidentiary value, and that, pursuant to Rule 404(b) of the Tennessee Rules of Evidence, the photographs were evidence of the Appellant's prior bad acts and were not relevant to any issue at trial.[1] The Appellant argues that "[t]he fact that officers used a booking photograph from 2012 instead of a more recent photograph showing how [the Appellant's] hair was styled on June 6, 2015, is not changed by showing the officers could have used different booking photographs from between the two dates."

The decision regarding the admissibility of photographs lies within the sound discretion of the trial court and that ruling will not be overturned on appeal absent a clear showing of an abuse of that discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978); State v. Lacy, 983 S.W.2d 686, 694 (Tenn. Crim. App. 1997). In order to be admitted as evidence, a photograph must be relevant to an issue at trial. Tenn. R. Evid. 402; State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993). Relevant evidence is "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. However, even relevant photographs may be excluded if their probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Tenn. R. Evid. 403; Banks, 564 S.W.2d at 951.

The State contends the Appellant waived any argument under Rule 404(b) because he did not raise that objection at trial. Generally, a party is bound by the evidentiary theory argued to the trial court and may not change or add theories on appeal. See State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993). Therefore, "a defendant may not object to the introduction of evidence on one ground, abandon this ground, and assert a new basis or ground for the objection in this [c]ourt." State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988). Further, in his motion for new trial and his amended motion for new trial, the Appellant contends only that the mug shots violated Rules of Evidence 401 and

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[1] "Generally, [Tennessee Rule of Evidence] 404(b) directs the court to exclude evidence of 'other crimes, wrong, or acts . . . to prove the character of a person in order to show action in conformity with the character trait.'" State v. Jarman, 604 S.W.3d 24, 48 (Tenn. 2020).

403. As this court has repeatedly stated, the failure to raise an issue of error, other than sufficiency of the evidence or sentencing, in a motion for a new trial waives that issue for purposes of appellate review. See Tenn. R. App. P. 3(e).

We note that the Appellant also contends that the trial court violated Tennessee Rules of Evidence 401, 402, and 403 by allowing the State to introduce the additional mug shots. The Appellant asserts that the photographs were not relevant and were overly prejudicial. However, the record reveals that the State introduced the two mug shots only after the Appellant "opened the door" by introducing two mug shots of the Appellant to show that the police conducted a poor investigation and "cherry picked" an older mug shot of the Appellant that more closely matched the description of the suspect. Tennessee Rule of Appellate Procedure 36(a) provides that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." This rule expresses "the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error." Tenn. R. App. P. 36, Advisory Comm'n Cmt. At trial, defense counsel acknowledged the problem with introducing the Appellant's mug shots, noting that the Appellant had been arrested five times and "I'm going to have to get into that and I am doing that at my own peril and that is just the way it is." As the trial court noted, the State was admitting the photographs in response to defense counsel's argument that the police had chosen the photograph used in the lineup to mislead the jury. See State v. Leon J. Robins, No. M2001-01862-CCA-R3-CD, 2003 WL 1386835, at *10-11 (Tenn. Crim. App. at Nashville, Mar. 20, 2003). The Appellant is not entitled to relief on this issue.

2. Autopsy Photographs

The Appellant contends that the trial court abused its discretion in allowing the State to offer into evidence thirty-nine autopsy photographs, "nineteen of a bullet riddled corpse and twenty of bullets." At trial, defense counsel objected to "the medical pictures [the State] intend[ed] to offer from the medical examiner." He stated that the defense would stipulate to the cause of death. The State responded that it was required to prove the cause and manner of death and that the photographs of victim's injuries were relevant. Defense counsel specifically stated that although he was objecting to all of the photographs, the photograph showing the rod "through and through" was particularly gruesome. The State explained that the photograph "demonstrate[d] that there was an entrance and exit and a re-entrance of that wound." Defense counsel responded even if the photographs were relevant, they were unfairly prejudicial under Rule 403. The trial court looked at the autopsy photographs and held that the photographs were not "gruesome in any way, having seen many things much, much worse, I don't see a problem with [the photographs], at all.

I think [they are] relevant and I don't see any danger of unfair prejudice at all, so I'll show that overruled."

On appeal, the Appellant maintains that the inflammatory and prejudicial nature of the autopsy photographs substantially outweighed any probative value the photographs offered as evidence. The Appellant also maintains that the photographs of the bullets had no evidentiary value. The State maintains that the autopsy photographs were not gruesome and were introduced to prove the elements of the crime.

Initially, we note that on appeal the State contends that "it is not clear that [the Appellant] ever objected to the photographs of the bullets." The record reflects that during trial, the Appellant challenged "the medical pictures [the State] intend[ed] to offer from the medical examiner," which arguably could have included the photographs of the bullets recovered from the victim's body during autopsy. However, in his written motion for new trial, the Appellant complained that "any image depicting the victim during the autopsy violates the Tennessee Rules of Evidence 401 and 403." At the motion for new trial hearing, the Appellant argued that "we objected to the somewhat gruesome pictures of the victim in this case during the autopsy . . . ." No mention was made in either the written motion or at the hearing about the photographs of the bullets. Accordingly, the Appellant has waived any issue regarding the photographs of the bullets. See Tenn. R. App. P. 3(e) (providing that the failure to raise an issue, other than sufficiency of the evidence or sentencing, in a motion for a new trial waives that issue for purposes of appellate review); Tenn. R. App. P. 36(a) (providing that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"). Accordingly, we will address only whether the trial counsel abused its discretion in admitting the autopsy photographs.

As we stated earlier, the admissibility of photographs lies within the discretion of the trial court whose ruling will not be overturned on appeal except upon a clear showing of an abuse of discretion. Banks, 564 S.W.2d at 949. "Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases." State v. Robinson, 146 S.W.3d 469, 492 (Tenn. 2004). Notably, "[p]hotographs of a corpse are generally admissible in murder prosecutions if they are relevant to the issues at trial." Id.; see Tenn. R. Evid. 401. Next, the court must determine whether its probative value is substantially outweighed by the danger of unfair prejudice. Banks, 564 S.W.2d at 951 (citing Tenn. R. Evid. 403). When deciding whether photographs pose a risk of unfair prejudice, trial courts must consider whether the photographs have "[a]n undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." Id. (citation and internal quotations omitted); see also State v. Price, 46 S.W.3d 785, 815 (Tenn. Crim. App. 2000). Regardless,

> Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. Excluding relevant evidence under this rule is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion.

State v. James, 81 S.W.3d 751, 757-58 (Tenn. 2002) (internal quotations and citations omitted).

Our supreme court has stated that "[i]n the presence of an offer to stipulate the facts shown in the photograph, the State's burden of justification is often difficult to sustain . . . [and in] some cases, photographic evidence has been excluded because it does not add anything to the testimonial descriptions of the injuries." Banks, 564 S.W.2d at 951. Nevertheless, "the prosecution's right to prove its case may not be foreclosed by . . . a defendant's offer to stipulate or concede certain factual issues. Thus, . . . a defendant's offer to enter into a stipulation does not preclude the prosecution from introducing relevant, admissible evidence to prove its case." State v. Cole, 155 S.W.3d 885, 898 (Tenn. 2005).

Autopsy photographs must never be used "solely to inflame the jury and prejudice them against the defendant" and must be relevant to prove some material aspect of the case. Banks, 564 S.W.2d at 951. However, "'[p]hotographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character, and photographs are not necessarily rendered inadmissible because they are cumulative of other evidence or because descriptive words could be used.'" State v. Willis, 496 S.W.3d 653, 728 (Tenn. 2016) (quoting State v. Derek Williamson, No. M2010-01067-CCA-R3-CD, 2011 WL 3557827, at *9 (Tenn. Crim. App. at Jackson, Aug. 12, 2011)). "Thus, the fact that the State could have made its case using only descriptive words is a consideration in balancing the probative value against the prejudicial effect, but does not mandate exclusion of the photographs." Banks, 564 S.W.2d at 951.

In the instant case, the Appellant raised an objection to all of the autopsy photographs, with an emphasis on the photograph using a rod to show where a bullet entered the victim's right upper arm, exited under his arm, and reentered the side of the body near the upper ribs. Our review reveals that this photograph was not particularly gruesome or bloody and merely demonstrated the path of the bullet. During the medical examiner's testimony, Dr. Benson used the autopsy photographs to demonstrate the nature and trajectory of the wounds inflicted on the victim. Dr. Benson also introduced photographs of the bullets he retrieved from the victim's body. While we question the need to admit nineteen photographs of the victim's body, especially given the repetitive nature

of some of the photographs, we note that the autopsy photographs were not gruesome and merely showed where the bullets struck the victim. The Appellant was charged with the first degree premeditated murder of the victim; accordingly, the State was required to prove that the Appellant committed the "premeditated and intentional killing of [the victim]." Tenn. Code Ann. § 39-13-202(a)(1). As proof in support of the elements of the charged offense, the State argued that the Appellant shot the unarmed victim multiple times and continued to chase the victim as he ran from the scene. One of the bullets struck the victim in the back, as was shown by the photographs. See State v. Johnny Jenkins, No. W2017-02222-CCA-R3-CD, 2019 WL 911151, at *9-10 (Tenn. Crim. App. at Jackson, Feb. 15, 2019), perm. app. denied, (Tenn. June 20, 2019).

B. Jury Instructions

The Appellant raises several issues regarding the oral instructions the trial court gave to the jury. The Appellant concedes that he did not make a contemporaneous objection to the trial court's instructions but contends that he is entitled to plain error relief. The State maintains that the Appellant waived his objections to the jury instructions by failing to raise contemporaneous objections and that the Appellant is not entitled to plain error relief.

Tennessee Rule of Appellate Procedure 36(b) provides that "[w]hen necessary to do substantial justice, [this] court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." See also Tenn. R. Evid. 103(d); State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000); State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994). We may only consider an issue as plain error when all five of the following factors are met:

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

Adkisson, 899 S.W.2d at 641-42 (footnotes omitted); see also Smith, 24 S.W.3d at 283 (adopting the Adkisson test for determining plain error). Furthermore, the "plain error must be of such a great magnitude that it probably changed the outcome of the trial." Adkisson, 899 S.W.2d at 642 (internal quotation marks omitted) (quoting United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988)).

1. Presumption of Innocence Instruction

First, the Appellant contends that the trial court erred when instructing the jury regarding the presumption of innocence. "It is well settled that a defendant has a constitutional right to a complete and correct 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. Dorantes, 331 S.W.3d 370, 390 (Tenn. 2011). "In order to determine whether a conviction should be reversed on the basis of an erroneous instruction to the jury, this [c]ourt must consider whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." State v. James, 315 S.W.3d 440, 446 (Tenn. 2010) (internal quotation marks and citations omitted). "An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law." State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005).

During its preliminary oral instructions to the jury, the trial court stated:

> A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the [Appellant] is innocent. This presumption continues throughout the trial and entitles the [Appellant] to a verdict of not guilty, unless you are satisfied beyond a reasonable doubt that he is guilty.
>
> The [Appellant] is not required to prove his innocence, or to do anything.

During the final oral jury instructions, the trial court stated, "You may enter upon this investigation with the presumption that the [Appellant] is not guilty of any crime and this presumption stands as a witness for him unless it is rebutted and overturned by competent and credible proof." (emphasis added). The written jury instructions correctly provided:

> You enter upon this investigation with the presumption that the [Appellant] is not guilty of any crime and this presumption stands as a witness for him unless it is rebutted and overturned by competent and credible proof. . . .
>
> . . . .
>
> The State has the burden of proving the guilt of the [Appellant] beyond a reasonable doubt, and this burden never

> shifts but remains on the state throughout the trial of the case. The [Appellant] is not required to prove his innocence.

The Appellant maintains that "[t]he trial court's insertion of the word 'may' [in its final oral jury instructions] made the presumption of innocence discretionary." The State responds that there is no evidence the jury interpreted the trial court's oral instruction as permissively as the Appellant contends. The State notes that the trial court repeatedly instructed the jury that the presumption of innocence was mandatory. The State contends that the jury instructions, taken as a whole, were sufficient to instruct the jury. We agree with the State.

We cannot say that consideration of the trial court's error is necessary to do substantial justice. Smith, 24 S.W.3d at 283. While the trial court inserted "may presume" in its preliminary oral instruction on the presumption of innocence, the numerous other instructions regarding the presumption of innocence were correct statements of the law. Therefore, we conclude that the instruction did not infect the trial or render the conviction violative of due process. See State v. Devin Banks, No. W2005-02213-CCA-R3-DD, 2007 WL 1966039, at *33-34 (Tenn. Crim. App. at Jackson, July 6, 2007), aff'd as corrected, 271 S.W.3d 90 (Tenn. 2008). Accordingly, consideration of the issue is not necessary to do substantial justice, and the Appellant is not entitled to plain error relief on this issue.

2. Stipulation

The Appellant contends that during the final oral jury instructions, the trial court failed to instruct the jury that although the mug shots of the Appellant indicated he had been arrested on multiple occasions, it was to use the evidence of prior arrests only as it related to the Appellant's appearance. As we stated earlier, the record reveals that after the Appellant introduced his mug shots from March 17, 2012, and November 19, 2013, the trial court instructed the jury that "arrest information of [the Appellant] on these two different occasions has nothing to do with this case. You are not to infer anything about them, as far as his guilt in this particular case, okay." Following the State's introduction of the Appellant's mug shots, the trial court instructed the jury:

> Again, ladies and gentlemen any evidence, booking photos of [the Appellant], any other arrests have no relevance to the case on trial today.
>
> . . . .
>
> As far as his guilt or innocence, is what I mean to say. No relevance to his guilt or innocence, as far as prior arrests.

Before the parties rested, the trial court told the jury:

> [T]he parties have entered into a stipulation that the evidence includes several mug shot photos of [the Appellant] for several separate arrests. The parties stipulate that these various arrests were all related to one case for which [the Appellant] was arrested for a drug offense and submitted to a drug Court treatment program.
>
> . . . .
>
> The fact that [the Appellant] has prior arrests relating to a drug offense is relevant for your consideration in this case, only as it relates to his appearance.

During its final oral jury instruction, the trial court stated:

> A stipulation is an agreement the parties have stipulated about certain matters of fact are true. They are bound by this agreement and in your consideration of the evidence you are to treat these facts as proved. The evidence includes several mug shot photos of [the Appellant], for several separate arrests. The parties stipulate that these various arrests were all related to one case, for which [the Appellant] was arrested for a drug offense and submitted to a drug Court treatment program. The fact that [the Appellant] has prior arrests relating to a drug offense is relevant for your consideration.

The written jury instructions provide:

> A stipulation is an agreement. The parties have stipulated that certain matters of fact are true. They are bound by this agreement, and in your consideration of the evidence, you are to treat these facts as proved. The evidence includes several mug shot photos of [the Appellant] for several separate arrests. The parties stipulate that these various arrests were all related to one case for which [the Appellant] was arrested for a drug offense and submitted to a drug court treatment program. The fact that [the Appellant] has prior arrests relating to a drug

offense is relevant for your consideration in this case only as it relates to his appearance.

The Appellant maintains that "[d]uring the oral jury instruction, the trial court omitted the qualifying limitation with which the jury was to use [the Appellant's] prior arrests, thus allowing the jury to use unrelated arrests against [the Appellant]." However, the Appellant concedes that the written instructions provided that "[t]he fact that [the Appellant] has prior arrests relating to a drug offense is relevant for your consideration in this case only as it relates to his appearance." The Appellant argues that without a correct oral instruction, "there is no way to ensure the jurors received the limitation contained in the written instructions" and that, therefore, there should be no presumption the jurors followed the trial court's instructions. As the State notes, the trial court repeatedly instructed the jury that the Appellant's mug shots and the evidence of his prior arrests were relevant only on the issue of his appearance.

Upon reviewing the jury instructions as a whole, we conclude that the instructions were sufficient to correctly charge the jury and that, therefore, consideration of the trial court's error is not necessary to do substantial justice. Smith, 24 S.W.3d at 283. The single incomplete oral instruction did not infect the trial or render the conviction violative of due process. Accordingly, the Appellant is not entitled to plain error relief on this issue.

C. Mistrial

The Appellant contends that the trial court erred by failing to grant a mistrial during voir dire when potential jurors entered the courtroom before the Appellant. The State responds that the Appellant was not entitled to a mistrial. We agree with the State.

The record reveals that the trial court took a recess in the middle of voir dire. The potential jurors returned from the recess before the Appellant was brought into the courtroom. Upon noticing the error, defense counsel brought the matter to the trial court's attention, and the trial court excused the potential jurors from the courtroom. Defense counsel moved for a mistrial, arguing that the Appellant's right to a fair trial had been violated because the potential jurors were brought into the courtroom before the Appellant returned to the courtroom. Defense counsel stated that he was not aware that potential jurors were in the courtroom when he asked for the Appellant to be brought in from the jail. Defense counsel contended that the potential jurors in the courtroom must have heard him. Defense counsel explained, "[W]e've called the jury, in the people who have not been stricken, thus far, are not aware that [the Appellant] was not in the courtroom, but all the people in the back gallery are." The State maintained that it did not hear defense counsel and was unsure whether the potential jurors heard him. The trial court noted that it was

not "that big a shock to think somebody charged with first degree murder would be in custody" and refused to grant a mistrial.

In the motion for new trial, defense counsel acknowledged that the Appellant was wearing "street clothes" during trial. Defense counsel explained:

> When the jury was brought back in, [the Appellant] had not been brought back in from the lockup. For the record this courtroom is almost circular. The Court is at the front of the courtroom. The jury box is to the Court's right hand. Counsel table for the State is closer to the jury box and counsel table for the defense and the two clerks in the courtroom and the court reporter are closest to a door that is to the Court's left hand. That's the jail lockup and that's where [the Appellant] like all defendants walk through that door if they are in custody when they go to trial. Walk through that door and he is -- if you open that door, you are perhaps ten feet from where counsels sit at the table and where [the Appellant] would sit in the row of seats behind counsel table for the defense.
>
> When the jury was brought back in, there's no [Appellant]. It's during jury selection so there are potential jurors behind us and there are potential jurors in the jury box is how we refer to it. And then we alerted the Court to this. The Court then sends the potential jurors both front and back of the courtroom, this is how I recall it, sent all of them back out and [Appellant] is brought back in.
>
> I don't see how any potential jurors that are bright enough to sit in judgment over someone could not know that that's what happened, that he wasn't here, they come back and immediately he is here sitting there waiting when he comes in just like he had been the other times. And I respectfully submit that that prejudiced him.

The trial court reiterated that the Appellant was not prejudiced and that a mistrial was not required.

A mistrial should be declared in criminal cases 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. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial lies within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion absent clear abuse appearing on the face of the record. See State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998) (citing State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990)). Moreover, the burden of establishing the necessity for mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

Initially, we note that the Appellant made no allegations that the potential jurors saw him handcuffed or shackled, and he did not show that the jurors who actually served heard any comments indicating that the Appellant was brought into the courtroom from custody. See State v. Melvin Crump, No. M2006-02244-CCA-R3-CD, 2009 WL 723524, at *21 (Tenn. Crim. App. at Nashville, Mar. 18, 2009). "Without some indication that the jurors who served received extraneous information, we decline to hold the trial court in error for denying a mistrial." Id.

Moreover, "It is unclear from the limited record concerning the [Appellant's] entrance into the courtroom what effect, if any, this event may have had on the jury. There is nothing in the record, however, to indicate that the [Appellant] was prejudiced by the manner in which he was brought into the courtroom." State v. Marlon D. Beauregard, No. W1999-01496-CCA-R3-CD, 2000 WL 705978, at *9 (Tenn. Crim. App. at Jackson, May 26, 2000). As this court has previously observed:

> "Generally, the trial court, which has presided over the proceedings, is in the best position to make determinations regarding how to achieve [the] primary purpose [of ensuring a fair trial], and absent some abuse of the trial court's discretion in marshalling the trial, an appellate court should not redetermine in retrospect and on a cold record how the case should have been better tried."

Id. (quoting State v. Franklin, 714 S.W.2d 252, 258 (Tenn. 1986)). Further, we note that

> Common sense must prevail in such instances where a jury or jurors inadvertently see a defendant dressed in prison clothing [or coming from custody]. Reason dictates that they must know a person on trial is either on bail or in confinement during the course of a trial. The evidence of the guilt of [the Appellant] in this case was strong. There is no indication that [he was] prejudiced by the occurrence complained of.

State v. Baker, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); see State v. Robert Andrew Hawkins, No. E2015-01542-CCA-R3-CD, 2016 WL 5210770, at *3 (Tenn. Crim. App. at Knoxville, Sept. 19, 2016). "[J]urors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance." Holbrook v. Flynn, 475 U.S. 560, 567 (1986); see State v. Robert A. Guerrero, No. M2008-02839-CCA-R3-CD, 2011 WL 2306078, at *8 (Tenn. Crim. App. at Nashville, June 8, 2011). The trial court did not abuse its discretion in refusing to grant a mistrial.

D. Cumulative error

The Appellant contends that he is entitled to a new trial due to the cumulative effect of the errors. However, from our review of the record, we conclude that none of the errors in the record, singularly or cumulatively, are sufficient to grant the Appellant relief.

III. Conclusion

In sum, there is no reversible error, and the judgment of the trial court is affirmed.

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NORMA MCGEE OGLE, JUDGE