IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 21, 2005 Session

STATE OF TENNESSEE v. BRYANT GUARTOS, a.k.a. BRYANT GUARTOS CHARRY, a.k.a. BRIAN GUARTOS, a.k.a. BRIAN CRUZ, a.k.a. HECTOR CRUZ DELEON

Appeal from the Criminal Court for Davidson County
No. 2001-A-280 Cheryl Blackburn, Judge

No. M2003-03073-CCA-R3-CD - Filed Janaury 24, 2006

A Davidson County Criminal Court jury convicted the defendant, Bryant Guartos, of first degree felony murder, especially aggravated robbery, a Class A felony, aggravated robbery, a Class B felony, and conspiracy to commit aggravated robbery, a Class C felony. The trial court sentenced the defendant as a Range I, standard offender to life imprisonment for the murder, twenty-five years for the especially aggravated robbery, and twelve years for the aggravated robbery, and as a Range II, multiple offender to ten years for the conspiracy, ordering the sentences to run consecutively for an effective total sentence of life imprisonment plus forty-seven years. The defendant appeals, claiming that the evidence is insufficient, that newly discovered evidence exists, that his right to due process was violated for various reasons, that the police obtained his confession in violation of the federal constitution, that the trial court erred in allowing inadmissible hearsay into evidence, and that the trial court improperly sentenced him under state law and the rule announced in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Concluding that no reversible error exists, we affirm the judgments of the trial court.

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

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and J. C. MCLIN, J., joined.

David L. Raybin, Nashville, Tennessee (on appeal), and Michael Colavecchio, Nashville, Tennessee (at trial), for the appellant, Bryant Guartos, a.k.a. Bryant Guartos Charry, a.k.a. Brian Guartos, a.k.a. Brian Cruz, a.k.a. Hector Cruz DeLeon.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to a robbery of Rolex watches, resulting in the death of Roy Rogers, a security guard, at the Green Hills Mall in Nashville. A Davidson County Grand Jury indicted the defendant along with Edwin Gomez, Jonathan Londono, and Luzdari Jimenez, a.k.a. Maria Charry, for first degree felony murder, especially aggravated robbery, aggravated robbery, and conspiracy to commit aggravated robbery. The Davidson County Criminal Court thereafter ordered the defendant's trial severed from his co-defendants' trial. The jury convicted the defendant as indicted, and he filed a motion for new trial and an amended motion for new trial, which the trial court denied.

On appeal, the defendant presents twenty-seven issues for our review. Some of the issues raise similar questions of law, and we will review the defendant's issues in the following order:

(I) whether the evidence was sufficient;

(II) whether an undiscovered photograph constitutes newly discovered evidence requiring a new trial;

(III) whether an undiscovered newspaper article constitutes newly discovered evidence requiring a new trial;

(IV) whether undiscovered "movement sheets" that contradict the testimony of the lead detectives concerning the length of time they interrogated the defendant constitute newly discovered evidence requiring a new trial;

(V) whether the undiscovered fact that the detectives destroyed their notes constitutes newly discovered evidence requiring a new trial;

(VI) whether an undisclosed statement the defendant gave to a detective in Nashville after his arrest constitutes newly discovered evidence requiring a new trial;

(VII) whether the state violated due process by using an outdated photograph of the defendant for identification;

(VIII) whether the state violated due process based upon its photograph lineup procedures;

(IX) whether an eyewitness' inconsistent testimony and the prosecution's pointing out the defendant to the eyewitness before her testimony violated due process;

(X) whether an eyewitness' identification of the defendant violated due process;

(XI) whether one eyewitness' pointing the defendant out to another eyewitness violated due process;

(XII) whether a second eyewitness' in-court identification of the defendant violated due process;

(XIII) whether a third eyewitness' in-court identification of the defendant violated due process;

(XIV) whether the state violated due process by failing to disclose that an eyewitness' car had tinted windows;

(XV) whether the state violated due process by failing to give the defendant the entire 9-1-1 tape of an eyewitness;

(XVI) whether the state violated due process by failing to give the defendant certain tape-recorded statements of eyewitnesses;

(XVII) whether the state violated due process by failing to give the defendant a statement by a confidential informant;

(XVIII) whether the state violated due process and Rule 26.2 of the Tennessee Rules of Criminal Procedure by failing to disclose all of one victim's statements;

(XIX) whether the state violated due process and Rule 26.2 by failing to give the defendant a detective's report which corroborated the defendant's trial testimony;

(XX) whether the state violated due process and Rule 26.2 based upon the lead detectives destroying their personal notes of the interrogation;

(XXI) whether the state violated due process and Rule 16 of the Tennessee Rules of Criminal Procedure by failing to give the defendant a statement he made to a detective after his arrest;

(XXII) whether the state's failure to ensure that the state's closing argument was transcribed or recorded violated due process;

(XXIII) whether the defendant's confession was given in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution;

(XXIV) whether the state violated due process by mischaracterizing key evidence;

(XXV) whether the trial court erred by allowing into evidence a police report from Miami, Florida, as a public record exception to the general rule against hearsay; and

(XXVI) and (XXVII) whether the defendant's sentences are excessive.

TRIAL EVIDENCE

At the trial, the murder victim's mother testified that her son was forty-seven years old at the time of his death. She said that before working as a security guard, he had retired from the United States Army, where he had been a Green Beret. She said her son survived twenty-one days after the shooting.

Kimberly Allison testified that on the day of the robbery, she was the store manager of Carlyle and Company, a jewelry store located in Green Hills Mall in Davidson County. She said that on March 16, 1999, her store had a special showing of seventy-five to one hundred Rolex watches. She said that Carlyle and Company had a special showing twice each year and that the special showing lasted only for one day. She said Carlyle and Company advertised the event in the newspaper.

Ms. Allison said that on the day of the special showing, the murder victim and Gene Nagele were the security officers who transported the watches to Carlyle and Company. She said that after the close of business, the watches were secured in the store's vault until the morning when the security officers would return and retake possession of the watches. She said that on the morning of March 17, she arrived as usual, drove into the Green Hills Mall parking garage, parked her car, and saw the victim lying on the ground. She said Gene Nagele was next to the victim, helping him. She said the victim had been shot in the chest. Ms. Allison said that the value of the Rolex watches was between $700,000.00 and $750,000.00 and that the watches were never recovered.

Gene Nagele testified that he worked for Corpus Securities International in March 1999. He said the company provided security for Carlyle and Company, escorting Rolex watches to and from shows. He said he was assigned to pick up the watches in Greensboro, North Carolina, take them to the location of the show, and then return the watches to Greensboro. He said the murder victim was his partner for the Carlyle and Company assignment. He said both he and the victim carried .45 caliber handguns.

Mr. Nagele testified that on March 16, 1999, he and the victim arrived at the Carlyle and Company store at Green Hills Mall in their company car, a Jeep Cherokee, with the Rolex watches. He said he had the morning shift and the victim had the evening shift. He said that at the close of business, both he and the victim were present as the watches were secured in the store's vault. He said that on the morning of March 17, he and the victim arrived in the Green Hills Mall parking garage and parked on the second floor. He said they were parked between fifty and one hundred feet from the closest entrance to the Carlyle and Company store, which was on the second floor of the parking garage. He said that when they retrieved the watches, the victim was transporting the watches on a cart and he was behind the victim, providing security. He said that as they approached the Jeep Cherokee, he heard someone running behind him. He said that he turned to see who it was but that as he turned, he was struck in the back, heard a shot fired, fell down, and lost consciousness. He said that before he lost consciousness, he heard his assailants speaking but not in English. He said that although he caught a brief glimpse of his assailants, he could not identify them except to

say that "they were not light skinned." He said that when he regained consciousness, he heard the victim calling his name, saying he had been shot. He said he went to the victim's aid and noticed that his own gun and the watches were missing. He said he also noticed a woman trying to get her children out of a car. He said that he had noticed the woman before the robbery as he and the victim were leaving the mall and that she had just arrived with her two small children in car seats. On cross-examination, Mr. Nagele acknowledged that he was unable to identify the defendant as one of his assailants.

Deborah Sloan testified that on the morning of March 17, 1999, she was in the Green Hills Mall parking garage with her two children. She said she parked about two parking spaces away from the mall entrance. She said she had been parked for about thirty seconds when she saw the security guards leaving the mall. She said she was getting her children ready when she heard a bang behind her car. She said that she turned to see what had happened and that she thought the security guards had dropped one of the big boxes they were transporting. She said she quickly realized that was not what happened as she saw both security guards on the ground and three men running around. She said two of the men were picking up the boxes and the other one was picking up a gun. She said that the men who picked up the boxes ran away but that the other man remained behind to pick up the gun before fleeing. She said she saw all three men get into a fairly new, red or maroon minivan with tinted windows. She said she was not sure if the men knew she was there because she had stayed down. She said the men were in their late twenties, wore baggy clothing, and had dark hair and dark skin. She said it was difficult to tell if they were African-American or Hispanic but said the men were dark skinned. She said the men were not particularly tall or heavy. Ms. Sloan identified the defendant as the man who picked up the gun.

Ms. Sloan testified that Metropolitan Police Department Detective Norris Tarkington showed her a set of photographs in July 1999. She said she thought she was supposed to identify all of the assailants from the photograph array. She said, however, that she was only able to identify positively one man, the defendant. She said Detective Tarkington returned in October 2000 and showed her another set of photographs. She said she was able to identify two other people from this set of photographs as the other two men who committed the robbery. She said the second person she identified was Jonathan Londono and the third was Edwin Gomez. She said that of the three men she identified from the photographs, she was most certain about the defendant.

On cross-examination, Ms. Sloan said that she was certain that the defendant was one of the men involved in the robbery from the moment she saw the photograph array containing his picture. She admitted, however, making a statement to the police that the robbers were black men. On redirect-examination, Ms. Sloan said that in her statement where she described the assailants as black men, she put quotation marks around the words "black men." She said she did so only to indicate that they had dark skin and were not Caucasians. She said she told the detectives why she had put the quotations around the words "black men."

Christina Hudson testified that she worked in the Green Hills Mall in March 1999. She said that on the morning of March 17, 1999, she arrived at the mall and parked in the parking garage. She

said she noticed a purple or dark maroon minivan parked behind her. She said a man approached and got into the van. She said she was able to see other men in the van. She said that the men were Hispanic but that she was unable to identify any of them to the police.

The deposition testimony of Dorothy Drake was read into the trial record because she was unable to attend the trial due to surgery. In her deposition, Ms. Drake said that she was at the Green Hills Mall on March 17, 1999. She said she parked in the parking garage. She said that when she entered the mall, she saw some young men standing near the entrance. She said that although she could not determine the men's ethnicity or race, "they were not American, our race." She said the men were young. She said she was unable to identify the defendant as one of the men she saw at the mall entrance.

Metropolitan Police Department Officer Thales O. Finchum testified that he responded to a robbery call at Green Hills Mall on the morning of March 17, 1999. He said that when he arrived, he saw the victim lying on the ground, wearing a security guard's uniform. He said the victim told him that a "mulatto" had shot him and that three men had taken boxes from him containing Rolex watches. He said he took and secured the victim's weapon, a .45 caliber semi-automatic handgun. He said that semi-automatic handguns expel shell casings from the weapon when fired but that no shell casings were recovered at the scene.

Metropolitan Police Department Officer Charles Anglin testified that he was involved in the crime scene investigation at Green Hills Mall on March 17, 1999. He said that no shell casings were recovered during the investigation. He said the absence of shell casings was potentially significant because a semi-automatic ejects shell casings when it is fired but a revolver does not. On cross-examination, Officer Anglin admitted that he was unable to discover any fingerprints at the scene.

Michelle Nicholson testified that on March 17, 1999, she was traveling on Interstate 40, taking her son to school. She said she noticed a maroon van with Florida license plates driving erratically on Interstate 40, weaving in and out of traffic. She said she saw men in the van who were Hispanic. She said the van took the Hillsboro Road exit, which is the exit for Green Hills Mall. She said she learned later that a robbery occurred at the Green Hills Mall and that the suspects were Hispanic, traveling in a van. She said she called the police and told them what she had witnessed earlier in the day. She said, however, that she did not get a good enough look at the occupants of the van to identify anyone. On cross-examination, Ms. Nicholson admitted that the van she saw on the interstate had tinted windows in the middle.

Metropolitan Police Department Sergeant Freddie Stromatt testified that he worked in the Metropolitan Police Department's Robbery Division in March 1999. He said he was assigned to investigate the Green Hills Mall robbery. He said that based upon the information given by Ms. Nicholson, he sent detectives out to check motels along Interstate 40 to determine whether any Hispanic men had stayed at a motel on the night of March 16, 1999. Sergeant Stromatt said they were able to learn that four Hispanic men had stayed at a Howard Johnson located along Interstate 40 at Charlotte Pike, that the Hispanic men had filled out a registration card indicating they were

driving a van with Florida license plates, and that the Hispanic men had checked out the morning of the robbery. Sergeant Stromatt said that after they were able to identify suspects, photograph arrays were taken to the motel and that the motel clerks were able to identify the Hispanic men who had stayed in the motel on March 16, 1999.

Sue Madan testified that she was the manager of the Howard Johnson on Charlotte Pike in March 1999. She said she gave to the police telephone records for the date in question and surveillance videotapes from five cameras. She said she talked to one of the Hispanic men who stayed at the motel but could not identify him. On cross-examination, Ms. Madan said that Rafael Cruz was listed on the registration card as occupying room 207 on the night of March 16, 1999.

Tiffany Dozier testified that she worked as a front desk clerk at the Howard Johnson on Charlotte Pike in March 1999. She said the Hispanic men stayed at the motel for three or four days. She said that one of the men acted as a spokesman for the group and that he flirted with her. She said at least five Hispanic men were in the group staying at the motel. She said the men were driving two different vans, one white and one maroon. Ms. Dozier said that in July 1999, Detective Tarkington asked her to look at some photograph arrays. She said she was able to identify the defendant as the man who spoke English and flirted with her and Jonathan Londono as the man who often accompanied the defendant. On cross-examination, Ms. Dozier admitted that the person registered as Mr. Cruz occupied rooms 202, 204, 207, 210 and 212 between March 14 and March 17.

Robin Capps testified that she worked as a housekeeper at the Howard Johnson on Charlotte Pike in March 1999. She said that on March 17, 1999, she helped another housekeeper remove a seat that had been left in room 204. She said the seat looked like it was from a van.

Liliana Gonzalez testified that she worked in the pre-paid calling card business in Miami, Florida. She said that in March 1999, she was working for Gloria Telecommunications, which sold pre-paid calling cards in different parts of the United States but mainly in Miami. She said the Metropolitan Police Department asked her to determine if Gloria Telecommunications pre-paid calling cards had been used at certain Nashville area telephone numbers. She said that her research revealed that Gloria Telecommunications pre-paid calling cards had been used from the Nashville area telephone numbers the police had asked her to research. As a result of Ms. Gonzalez' testimony, the state introduced into evidence as an exhibit a listing of telephone records from Gloria Telecommunications.

Metropolitan Police Department Detective James Arendall testified that he was a robbery detective in March 1999. He said that while assisting in the investigation of the robbery at Green Hills Mall, he went to the Howard Johnson on Charlotte Pike. He said that in room 204, he found a pre-paid calling card that had been torn apart and a box of .357 caliber ammunition. He said that the box of ammunition held fifty rounds but that six or seven rounds were missing.

Detective Arendall said he returned to the Howard Johnson a few months later and showed some photograph arrays to Ms. Dozier, who identified the defendant as the man who spoke English and flirted with her. He said the Metropolitan Police Department's procedure for compiling a photograph array is to enter a suspect's physical characteristics into a computer. He said this produces about 7,000 results. He said the procedure then requires the officer to go through the pictures and find photographs that are similar to the photograph of the suspect. He said the photograph array shown to a witness will contain no information other than the pictures. He said that if a witness made a positive identification, they were presented with an identification form to sign. He said that the identification form had a "comments" section and that whatever the witness said, he would write it down. On cross-examination, Detective Arendall acknowledged that he only investigated room 204 and did not go to rooms 202, 207, 210, or 212.

Metropolitan Police Department Sergeant Johnny Hunter testified that in March 1999, he was assigned to the Technical Investigation Section of the Identification Division. He said he was called to the Howard Johnson on Charlotte Pike to process room 204. He said that he lifted fingerprints from a box of ammunition, a telephone book, and the room telephone. He said, however, that he did not do a comparison analysis on the fingerprints recovered from room 204. On cross-examination, Sergeant Hunter admitted that he was unable to lift fingerprints from any other surface area in room 204.

Tennessee Bureau of Investigation Agent Steve Scott testified that he worked in the bureau's crime laboratory in the Firearms Identification Unit. He said the Metropolitan Police Department sent him the bullet used to kill the victim for analysis. He said that the bullet was manufactured by Remington Peters Corporation and that it was either a .38 or .357 caliber bullet. He said it could have been either caliber because the bullets were interchangeable in a .357 magnum handgun. He said the bullet was fired from a revolver and not from an automatic.

Agent Scott testified that he also received the box of ammunition recovered from room 204. He said that the box held fifty rounds of ammunition but that six rounds were missing. He said that most revolvers hold six bullets. He said that in his opinion, the bullet recovered from the victim was consistent with the bullet cartridges recovered from room 204. On cross-examination, Agent Scott admitted that the bullet recovered from the victim could have been fired from either a .38 caliber or a .357 caliber handgun and that the manufacturer of the weapon could not be determined.

Todd Hagedorn testified that he worked for Integraham St. Louis Seating. He said his company manufactured seats for Daimler-Chrysler minivans. He said he was familiar with the different types of seats his company manufactures for Daimler-Chrysler. He said that he was asked to identify the seat found in room 204. He said the seat came from a 1996 or 1997 model year Chrysler Town and Country minivan.

Lorita Marsh testified that she worked for the Metropolitan Police Department as a fingerprint analyst. She said she compared the sets of fingerprints lifted from room 204 at the Howard Johnson motel with known sets of fingerprints from the defendant, Edwin Gomez, and

Jonathan Londono. She said the fingerprint lifted from the telephone book matched the right index fingerprint of the defendant. She said the fingerprint lifted from the room telephone matched the right middle fingerprint of Edwin Gomez. She said the fingerprint lifted from the box of Remington ammunition matched the right middle fingerprint of Jonathan Londono. On cross-examination, Ms. Marsh acknowledged that she found the defendant's fingerprints only on the telephone book.

Officer Steven Kaufman testified that he was with the Police Operations Bureau in Florida, which he characterized as a special details unit. He said that on March 1, 1999, he met with the defendant and his girlfriend at the defendant's apartment in Miami, Florida, as part of an official investigation. He said that the defendant's telephone number at the apartment was 305-228-8973 and that the girlfriend's work telephone number was 305-640-2460. The telephone records from Gloria Telecommunications reflect that on March 16, 1999, someone called 305-640-2460 using a telephone on the second floor of the Green Hills Mall just down the hall from the Carlyle and Company store.

Jim Spearman testified that he worked for BellSouth Telecommunications. He said that he was the Corporate Security Manager for Middle Tennessee and that he also performed duties as the custodian of records. He said that in his capacity as custodian of records, he occasionally testified in court about BellSouth telephone records. He said he received a subpoena for the telephone records from the Howard Johnson located on Charlotte Pike and for other telephone records from subscribers located in and around Green Hills Mall. He said the records reflected that calls were made from telephones at the Howard Johnson to two different toll free numbers: 800-464-3139 and 800-791-0964. On cross-examination, Mr. Spearman acknowledged that he was unable to determine from which room the calls were placed. As a result of Mr. Spearman's testimony, the state introduced various phone records as exhibits into evidence. The records reflect that someone from the Howard Johnson motel used a Gloria Telecommunication calling card to place a telephone call. They also reflect that someone called the defendant's telephone number in Miami from the Howard Johnson motel.

Barbara Franklin testified that she worked for Carlyle and Company in Green Hills Mall. She said she was working the day before the robbery when two Hispanic men came into the store around 3:00 p.m. She said one of the men asked her questions about the Rolex watches. She said that he asked her if the store always had the watches and that she told him the watches were only there for a special showing. Ms. Franklin identified the defendant as the Hispanic man who asked her questions about the Rolex watches on the day before the robbery. She said the defendant had long hair that was "pulled back" when he was in the store. On cross-examination, Ms. Franklin admitted that the police never showed her any photographs before the trial. She maintained, however, that she was certain the defendant was the man who asked her questions the day before the robbery.

Stacy Butts testified that she worked for Carlyle and Company in the Green Hills Mall. She said she was working the day before the shooting with Ms. Franklin. She said that on that day, she noticed two men talking to Ms. Franklin about the Rolex watches. Ms. Butts identified the defendant as one of the two men. She said the defendant's hair was shorter on the day before the

robbery than it was at the trial. On cross-examination, she said she did not know if the defendant had a mustache on the day before the robbery.

Metropolitan Police Department Detective Harold Haney testified that he had been assigned to the Armed Robbery Unit in March 1999. He said that his role in the investigation of the robbery was focused initially on watching videotapes from the Howard Johnson motel. He said the videotapes showed a maroon van and a white van in the parking lot on the morning of March 17, 1999. He said the vans left the parking lot at 8:07 a.m.

Detective Haney said that about one year later, he and Detective Tarkington went to Miami, Florida, and talked to the defendant about the Green Hills Mall robbery. He said he told the defendant that his fingerprints had appeared in connection with the robbery at Green Hills Mall. He said he then asked the defendant if he knew anything about the robbery. He said the defendant told him that the defendant had heard that four men and a woman went from Miami to Nashville in two rented cars, that one of the men was named Julio, that Julio had died two weeks before the detectives arrived, that another man named Javier was involved, and that the men sold the watches for $200,000.00. Detective Haney said that during this conversation, the defendant claimed he was not involved in the robbery.

Detective Haney testified that he and Detective Tarkington had further conversations with the defendant. He said that during these conversations, the defendant told them he was not in Nashville on the day of the robbery. He said the defendant said he had heard that the reason the guard was shot was because he was reaching for his gun. He said the defendant maintained that he had just heard about this crime but that he was not in Nashville.

Detective Haney testified that during another conversation, the defendant "broke down and started crying." He said the defendant acknowledged "that we knew who all was there, that we had their names." He said the defendant told him that he was in Nashville and had stayed at the Howard Johnson motel with "Maria Charry," Jonathan Londono, Edwin Gomez, Javier and someone he knew only as Mosquito. He said the defendant admitted they had rented two rooms and were driving a maroon van and a white van. Detective Haney said that he told the defendant his fingerprints were on the seat left behind in room 204 and that the defendant said his fingerprints should not be on the seat because he had "wiped it off." He said the defendant admitted planning for the robbery. He said the defendant told him that the defendant and his confederates received about $230,000.00 for the watches. Detective Haney said the defendant admitted that his share was $40,000.00. He said the defendant admitted that they took a gun but disposed of it. Detective Haney said the defendant told him that during the robbery, the defendant and Maria were about one to two blocks away, waiting in the maroon van.

On cross-examination, Detective Haney acknowledged that the interview with the defendant lasted three to four hours. He said the defendant did not confess until the last hour. He acknowledged that he did not have a tape recording of the defendant's confession and that the defendant did not sign a confession.

Detective Tarkington testified that he was an investigator in the Robbery Unit. He said he was assigned to work the Green Hills Mall robbery. He said that after a suspect was identified, he went to Ms. Sloan with a photograph array and asked her to identify anyone who looked familiar. He said the "standard procedure for me is to tell the person that the person whom [sic] is the subject of this investigation may or may not be in here. I need for them to look at each of the pictures and tell me if they recognize them and where they recognize them from." He said that Deborah Sloan looked at different photograph arrays and identified the defendant, Jonathan Londono, and Edwin Gomez as the robbers.

Detective Tarkington said he investigated two particular telephones in the Green Hills Mall area. He said the first telephone was located in front of the August Moon Restaurant and the second was located in the mall across from Carlyle and Company. Detective Tarkington also testified concerning the defendant's confession. His testimony in that respect was cumulative to that of Detective Haney.

The defendant testified that he lived in Miami, Florida. He said he made a trip with his girlfriend to Nashville in the middle of March 1999, driving a Nissan Sentra. He said that when he arrived in Nashville, he went to Hickory Hollow Mall where he saw some people he already knew. He said he could not remember their names but thought one was named Javier and another Julio. He said these people told him they did not have any form of identification and asked him for help in renting a room. He said he helped them rent a room at the Howard Johnson motel. He said he rented another room for himself and his girlfriend. He said he stayed in room 202 and the other people stayed in room 204. He said there were seven other people. He said that after he checked in, he went and knocked on room 204 and talked with the people inside. He said he used the telephone book in room 204 to look for a telephone number in the yellow pages to an escort service. He said he called the escort service for the people in room 204. He said he left Nashville a few days later and went to Louisville, Kentucky, and that from Louisville, he returned to Miami.

The defendant testified that Detectives Haney and Tarkington interviewed him about one year after he returned to Miami. He said he told the detectives about helping rent a room at the Howard Johnson for the people he knew. He said he told them that the other people wanted him to help them buy drugs but that he refused. The defendant denied confessing to the detectives but did admit checking into the Howard Johnson under an assumed name. The defendant testified that in March 1999, he had very short hair, that he did not have a ponytail, and that he did not have a mustache because his wife did not like facial hair.

On cross-examination, the defendant said that the name of the girl he was traveling with was Sandra but that he did not know her last name. The defendant admitted that when he was in Nashville, he called his wife in Miami at home and at her place of work with a phone card that he borrowed from the people in room 204. He said that his wife did not know he was with another woman and that he and his wife were in a fight at the time. He maintained that the detectives' testimony relating to his confession was false, that he did not go to Green Hills Mall, and that he did not go to Carlyle and Company and ask about Rolex watches. The defendant said he did not know

if he went to any other malls in the Nashville area. The defendant admitted that he had previous felony convictions for burglary and theft.

MOTION FOR NEW TRIAL HEARING

At the motion for new trial hearing, Lorita Marsh testified that she examined the defendant's fingerprints and latent prints. She said she identified the prints on October 4, 1999, and October 3, 2000. She said she faxed a copy of the identification report to the district attorney's office before the trial. On cross-examination, Ms. Marsh admitted that the first identification she performed did not use prints obtained from the Nashville Police Department but were from another police department. She acknowledged that the second identification used prints collected from the defendant once he arrived in Nashville. She said the results of her examination of the prints in 1999 were the same as the results in 2000.

Kimberly Allison testified that she was present during jury selection. She said she did not point out the defendant to Ms. Sloan. She said she knew who the defendant was because he was the person sitting with the attorneys. She said she did look back into the courtroom after she had been excluded but did not recall whether Ms. Sloan did.

Maria Charry, the defendant's mother, testified that she was from Miami and had lived there for fifteen years. She said she understood English but did not speak it. She said she was in the courtroom when the trial started. She identified Ms. Sloan and Ms. Allison. She said that at the trial, she was outside the courtroom and saw Ms. Sloan and Ms. Allison looking through the window to the courtroom. She said that Ms. Allison pointed into the courtroom. Ms. Charry said she then walked over to the door, looked in, and saw her son, the defendant. On cross-examination, she acknowledged that she heard the trial judge tell the witnesses and jury that Mr. Guartos was standing trial. She acknowledged that she never heard what Ms. Allison and Ms. Sloan said while looking through the window.

Wanda Hiett testified that she was the court reporter during the defendant's trial. She said she listened to the tapes a second time and the transcript of Mr. Nagele's testimony was accurate. She said there was nothing in the testimony of Mr. Nagele to the effect that he crawled "military style." She said the transcript did not include the state's closing argument because the recorder stopped. She said she did not stop the assistant district attorney or record his closing statement on her stenograph machine because she did not consider the closing argument to be testimony. She said there was no way to recreate the assistant district attorney's closing argument. She said her notes reflected that the defendant failed to object during the state's closing argument, which lasted for twelve minutes. She acknowledged that the trial court did not interrupt the assistant district attorney during his closing argument.

Roger Moore, the assistant district attorney, testified that he did not remember his closing argument. He said he only remembered referring to the cost of the Rolexes as "costing a good man

his life." He said he did not remember any objections or interruptions by the trial court during his closing argument.

Deborah Sloan testified that she did not look through the window with Ms. Allison during trial. She said she saw the defendant in the courtroom during voir dire. She testified to the following:

> Q. Before you testified, did anyone ask you if he looked familiar to you?
>
> A. Well, that morning, I had been introduced to, I suppose, Mr. Guartos when I got introduced to the Judge and all these people to make sure nobody was recognized or knew each other, I suppose, and then when I was on, after I left there, they wanted to know if I recognized him before, then I went back in to testify.
>
> Q. And who asked you if you recognized anyone?
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> A. I don't really recall. I think it was either [the assistant district attorney] or the victim's advocate lady - - I'm not sure what her title is, but she had kind of shown us where to go that day and told us what to do and all that stuff.
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> Q. So it was somebody from either the Police Department or the District Attorney's office?
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> A. Yes, yes.
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> Q. And when you were asked either by [the assistant district attorney] or the lady from the DA's office if anyone looked familiar, what did you say?
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> A. Yes.
>
> Q. Okay, and what did you tell them?
>
> A. That, yes, that was the man at the Green Hills Mall that day.

She said that she was told someone would testify about fingerprints and that she understood this to mean the state would introduce fingerprint evidence.

> Q. Do you recall what it is that they did tell you?

A. I was told that morning, the morning of court, that - - actually, what I was told, the best I recall, is that I had asked how long it was going to take, and the response was a couple of days or more, that there is a lot of witnesses and the fingerprint people have been called and I honestly, I guess I could even say that my assumption was that meant that there was evidence. I don't think anyone - - I was actually very frustrated that no one would tell me anything before the trial, so I guess I probably inferred, I suppose, that that meant obviously there was some kind of fingerprint evidence, but that there were no names or information or where or anything given to me at all for sure.

Q. Okay, and the only person being tried in that first trial was Mr. Guartos.

A. That's right.

Q. And so is it fair to say, Ms. Sloan, that you believed that or you could infer that there was fingerprint evidence against him?

A. Actually, I can tell you for sure that I was not sure who it was on because by then, I had already ID them, all of them, and I knew that all of them were involved, regardless of who was being tried that day, so I'm not, like I said, nobody gave me any name of which it was on, but I kind of assumed they were sort of all related.

Ms. Sloan said she identified the defendant in a photograph array sometime after the robbery. She identified a form that she admitted signing.

Q. Okay. Is there a place on the form where you said you identified him?

A. There is a place for me to sign where it says signature of person making the identification, and that is all I was asked to do is to sign my name on that line.

Q. Before or after it was filled out?

A. After it was filled out with the words, the detective wrote those words, and he asked me if those are the words that I

said, and I said, yes, it is, and he said can you please sign here where it says signature of person making identification, and that is where I signed it.

THE COURT: What were those words?

A. Number two looks familiar. Number three's face looks familiar but hair would be shorter. She continued to look at photo number two.

She testified that her voice was the voice on the 9-1-1 tape but that the tape did not include her giving directions to the 9-1-1 operator to her location. After defense counsel showed her a mug shot taken of the defendant two weeks before the crime, Ms. Sloan said the photograph looked familiar but she did not know for sure who it was. She said she was not sure that the photograph was a picture of the shooter but she believed that she saw the man in the photograph the day of the shooting. She said that she did not remember the length of the defendant's hair or whether he was wearing a hood over his head. In the defense's offer of proof, Ms. Sloan acknowledged that the forms for her identifications of the two co-defendants were marked as positive identifications, but the form on the defendant contained only comments and was not marked as a positive identification. Ms. Sloan admitted that her car had tinted windows.

Detective Tarkington testified that no physical lineups were conducted in this case. He said that he took notes on a notepad while the defendant was interviewed. He said that once he reduced his handwritten notes to typewritten form, he discarded the handwritten notes. He said he did not read the defendant his Miranda rights when he interviewed the defendant in Miami. He acknowledged that he testified at the trial that the interview with the defendant lasted about four hours. He also acknowledged, after being shown the movement sheets from the jail in Miami, that the interview may have lasted only two hours. He said three other officers participated in the defendant's interview. He said that he interviewed a woman while in Miami but that he was unable to ascertain her true identity. He acknowledged he sent a letter to Ms. Franklin when he could not get in contact with her through telephone calls. He admitted the statements the defendant made to him after the defendant arrived in Nashville may not have been included in the file given to the district attorney's office.

The defendant's trial attorney testified that he was not aware of the defendant's statement made to Detective Tarkington in Nashville or the 1999 mug shot. He said he became the attorney of record only six weeks before the trial. He said he did not obtain the Florida jail movement sheets because he did not know the length of the interview would be an issue until he got to trial. He said he did not know that Detective Tarkington destroyed his notes until after trial and that the state never told him about the destroyed notes. He said that he filed a discovery motion but that the state told him to get the discovery material from the file or from the public defender's office. He said that he obtained audio tapes of interviews of Ms. Franklin and Ms. Butts and a videotape of Mr. Nagele's interview but that he never played them for the defendant. He said he was aware that identification

was an issue in this case but was unaware that anyone could identify the defendant as being at the scene. He testified that if he had had the mug shot, he would have used it to cross-examine Ms. Sloan. He said that he did not have a copy of the police report stating someone called an escort service from the Howard Johnson motel. He said he did not have the newspaper article written near the time of the shooting. He acknowledged he did not file a motion to suppress the statement or a motion about the identification issues. He acknowledged the state provided Jencks material and the tapes before the trial.

The defendant testified that he was arrested in Miami on March 1, 1999, and that the police department took his mug shot. He said he knew about the mug shot but did not tell his attorney about it. He said his attorney told him that no one at the mall at the time of the shooting could identify him. He identified a photograph taken of him in Nashville in 2000. He said that his hair was long on top in the picture but even longer at the trial. He said in March 1999, his hair was short. He said that when the Nashville police officers interviewed him both in Miami and in Nashville, he asked for his lawyer and was not read his Miranda rights. He testified he did not make the statements to Detective Tarkington in Miami that were introduced at the trial. He said that in his Nashville interview, he told Detective Tarkington that he could not talk to him without his lawyer and that the detective returned him to his cell. He identified the picture of himself used in the photograph array as having been taken in 1995 or 1996. He said that he testified at the trial that his fingerprint was on the telephone book because he called an escort service. He said that there was no other evidence to support his statement about the fingerprints at the trial but that Detective Haney's report would have corroborated his trial testimony. He acknowledged the arresting officer from his March 1999 case in Miami testified at the trial. The defendant acknowledged that on cross-examination, he did not ask the officer from Miami about the length of his hair in March 1999.

Detective Haney testified that the interview of the defendant in Miami could have lasted only two hours though he testified at the trial that it was three and a half to four hours. He said that he was writing notes but that he only wrote one to two pages. He said he brought the notes back to Nashville, compared them to Detective Tarkington's notes, and destroyed them after the trial. He said there was nothing in his notes that could have added to or taken away from the supplement typed up by Detective Tarkington. He said he did not tell the prosecution about the destroyed notes. On cross-examination, Detective Haney acknowledged he did not have a watch or clock in the interview room. He acknowledged that during the trial, neither the state nor the defendant asked him about his notes.

Assistant District Attorney General Bret Gunn testified that he was primarily responsible for discovery. He said he disclosed all of the descriptions of the potential suspects in the various discovery responses. He said he had never seen the mug shot taken of the defendant in Miami. He said that Ms. Sloan's telephone call was prematurely disconnected in the 9-1-1 tape and that he never had any other 9-1-1 tape of her telephone call. He said he did not know anything about the detectives' handwritten notes. He said he was not aware that Detective Tarkington talked to the defendant once he was extradited to Nashville. He said that if he had known about the statement made by the defendant in Nashville, he would have used it at the trial. He said he never questioned

Ms. Sloan about her windows being tinted because it was not in any of the reports. He said there was no indication that Ms. Sloan could not see out of her car windows. He said that he disclosed all the tapes he was provided and that he did not know until the second trial that a microcassette of an interview with Mr. Nagele existed. He said that if he had known about the microcassette tape, he would have disclosed it but that the tape contained nothing exculpatory.

On cross-examination, General Gunn said that undeveloped photographs in the case existed, were made available to be copied from the property room, and included photographs of Ms. Sloan's car. He acknowledged someone from his office probably asked Ms. Sloan if she recognized anyone from the day of the incident. He acknowledged Ms. Sloan and other witnesses were in the courtroom when Mr. Guartos was identified as the defendant. He said that he reviewed the microcassette tape of Mr. Nagele's interview and that the tape did not contain additional information to what Mr. Nagele said in his videotaped or written statements. He acknowledged the transcript of the microcassette stated that the defendant was wearing a hood over his head but said he could not remember if Mr. Nagele testified to that at the trial.

The defendant introduced into evidence certain exhibits of relevance to this appeal: a police report prepared by Detective Tarkington containing the statements of a confidential informant and filed under seal, a police report prepared by Detective Haney concerning the escort service, a mug shot taken of the defendant on March 1, 1999, in Miami, the photograph array shown to the witnesses in Nashville, and a newspaper article. The police report prepared by Detective Tarkington filed under seal contains evidence gathered from a confidential informant, the report prepared by Detective Haney states that someone from room 204 called an escort service, the mug shot of the defendant shows that he had very short hair, but the photograph from the photograph array shows the defendant with longer hair on top and in the back but shorter on the sides. The newspaper article, published in the Tennesseean on March 18, 1999, stated that Ms. Sloan "crouched down in her seat, told her boys to be quiet and hoped the men would not see her."

After hearing the testimony of witnesses and the arguments of counsel, the trial court entered an order denying the defendant's motion for a new trial. The trial court found that the mug shot taken in Miami on March 1, 1999, was not newly discovered evidence because the defendant was present when the photograph was taken, the defendant knew of its existence, and the state did not have the mug shot in its possession. The trial court found that the newspaper article was readily available at the time of the defendant's trial and that the article contained no information inconsistent with the trial testimony. The trial court found the detectives' discarded notes were not newly discovered evidence because although they no longer existed, Detective Tarkington had reduced them to typewritten form. The trial court found no discovery violation existed because the typewritten form was given to the defense. The trial court also found no discovery violation existed because the district attorney's office was never in possession of the handwritten notes. The trial court found that the confinement records from Miami did not constitute newly discovered evidence because the information contained in the records was available before trial, the defendant failed to show he was reasonably diligent in obtaining this evidence, and the impeachment value of the evidence was minimal.

The trial court found that the defendant waived the issues challenging the identification procedure and lineup procedure by failing to file a motion to suppress. The trial court found that the 9-1-1 call had cut off, that no more of the call placed by Ms. Sloan existed, and that the state provided the complete tape it had in its possession. After reviewing the interview of the confidential informant in Miami, the trial court found that it contained no exculpatory information and that in any event, it was not discoverable because the state did not call the confidential informant as a witness at the trial. The trial court stated it was not convinced by the defendant's mother's testimony that Ms. Allison pointed out the defendant to Ms. Sloan. The trial court found that the supplemental discovery response noted that the taped statements of Mr. Nagele, Ms. Franklin, and Ms. Hudson were available upon request for copying. The trial court found that the state should have turned over to the defense the microcassette of a statement by Mr. Nagele discovered after the trial but concluded no prejudice existed after comparing Mr. Nagele's statement made available to the defense with the statement not made available.

The trial court found that the state also should have provided Detective Haney's police report to the defense which revealed that an escort service number was called from the Howard Johnson motel. It concluded, however, that because all the telephone records were provided to the defendant in discovery, he could have brought this telephone call to his attorney's attention. The trial court found that the state did not mischaracterize the evidence regarding the calls placed on March 16, 1999. The trial court found that the state should have provided the defendant's statement made in Nashville in June 2000 but that the failure to do so did not provide grounds for a new trial. The trial court found that the state did not use the statement at the trial and that the defendant had failed to show prejudice. The trial court also found that no discovery violation existed and that the defendant failed to show prejudice by the state's failure to disclose that the windows on Ms. Sloan's car were tinted.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence is insufficient to support his convictions. He claims the only evidence linking him to the crimes was the eyewitness testimony of Deborah Sloan and his confession. He claims this court should disregard Ms. Sloan's testimony because she originally stated the robbers were "black men" and because of procedural defects surrounding her in-court identification of the defendant. He argues that he confessed to being present at the scene not to participating in the crimes. He therefore argues that the state's evidence was entirely circumstantial and did not eliminate every reasonable hypothesis except the guilt of the defendant. The state contends the evidence was sufficient. We agree with the state.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal 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, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence; rather, we presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d

542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

At the trial, Deborah Sloan testified that she was certain the defendant was one of the robbers. She said he was the man who bent down and retrieved Mr. Nagele's gun. Barbara Franklin and Stacy Butts testified that the defendant was in the Carlyle and Company store on the day before the robbery, asking questions about the Rolex watches. Detectives Haney and Tarkington testified that the defendant confessed to his involvement in the robbery. They said he admitted to planning the robbery and being present at the scene. They said he admitted that he and the other robbers were driving a maroon van and a white van. They said he admitted accepting $40,000 as his share of the stolen Rolex watches. Tiffany Dozier testified that while staying at the Howard Johnson, the defendant, accompanied by Jonathan Londono, came to the front desk on different occasions. Other evidence produced by the state reflected that a maroon van and a white van were at the Howard Johnson motel and left on the morning of March 17, that the defendant's fingerprints were on a telephone book in room 204, that ammunition consistent with the bullet removed from the victim was found in room 204, and that someone placed calls to the defendant's wife in Miami from the Green Hills Mall on March 16, 1999, and from the Howard Johnson motel on various dates. The defendant testified that he was not involved in the robbery and that he did not go to Green Hills Mall while he was in Nashville. The jury obviously chose to accredit the state's evidence and to reject the testimony of the defendant. We conclude the evidence was sufficient. The defendant is not entitled to relief on this issue.

NEWLY DISCOVERED EVIDENCE

The defendant contends that the trial court erred in denying his motion for a new trial based on newly discovered evidence. He claims that newly discovered evidence exists consisting of (1) photographs and a mug shot taken near the time of the offenses, (2) a newspaper article about a witness' ability to see the defendant, (3) movement sheets from the Dade County Police Department showing the length of time the detectives interrogated the defendant, (4) admissions by the lead detectives at the motion for new trial hearing that they destroyed their handwritten notes taken during the defendant's interview, and (5) the defendant's post-arrest statement. The state contends that none of the items constitute newly discovered evidence.

The decision to grant or deny a new trial on the basis of newly discovered evidence is a matter that rests in the sound discretion of the trial court. State v. Goswick, 656 S.W.2d 355, 358 (Tenn. 1983). However, a new trial is a matter of right only when the defendant establishes (1) reasonable diligence in seeking newly discovered evidence, (2) the materiality of the evidence, and (3) that the new evidence is likely to change the result of the trial to one more favorable for the defendant. State v. Bowers, 77 S.W.3d 776, 784 (Tenn. Crim. App. 2001) (citing State v. Singleton, 853 S.W.2d 490, 496 (Tenn. 1993)). When newly discovered evidence merely tends to contradict or impeach the trial evidence, a new trial is not always warranted. Sheffield, 676 S.W.2d at 544. On appeal, our standard of review is abuse of discretion. State v. Meade, 942 S.W.2d 561, 565 (Tenn. Crim. App. 1996).

II. MUG SHOT

The defendant contends that his mug shot taken in March 1999 in Miami, Florida, was newly discovered evidence. He asserts that the mug shot was critical evidence because it shows that he had short hair around the time of the offense, contradicting some witnesses' testimony describing him as having "long hair on top and average on the sides" and as having his hair "pulled back." The defendant claims he did not inform his attorney about the mug shot because neither he nor his attorney was aware that anyone was able to identify him as one of the robbers. The state contends that the mug shot does not constitute newly discovered evidence. The state asserts the defendant failed to satisfy the reasonable diligence requirement because he had known about the mug shot since the time that it was taken.

"In order to show reasonable diligence, the defendant must demonstrate that neither he nor his counsel had knowledge of the alleged newly discovered evidence prior to trial." State v. Caldwell, 977 S.W.2d 110, 117 (Tenn. Crim. App. 1997). We conclude that the defendant has failed to establish the reasonable diligence requirement. In this regard, we note that the defendant was certainly aware of his arrest and mug shot. He is not entitled to relief.

III. NEWSPAPER ARTICLE

The defendant contends that a newspaper article stating that Ms. Sloan said she had "crouched down in her seat" constitutes newly discovered evidence requiring a new trial. The state contends that the newspaper article does not meet the newly discovered evidence test because the defendant did not exercise reasonable diligence to find the article, the statement in the article is not substantive evidence, and the statement was not inconsistent with the evidence produced at the trial.

We conclude that the newspaper article does not constitute newly discovered evidence. At the trial, Ms. Sloan testified that she did not believe the robbers had noticed her because she had kept down. We discern no effective difference between Ms. Sloan's testimony and the statement reported in the paper. The defendant is not entitled to relief on this issue.

IV. MOVEMENT SHEETS

The defendant contends that the inmate movement sheets from Dade County established that Nashville police detectives interviewed him for two hours and twenty minutes, contradicting Detective Tarkington's testimony at the trial that the interview lasted four to five hours. The defendant claims that the movement sheets would have "called into question the truthfulness" of the officers and that he did not know that these movement sheets would be relevant until the trial. The state contends the defendant failed to establish reasonable diligence in discovering this evidence because the defendant knew about the movement sheets and could have obtained them through counsel. The state also contends the movement sheets had minimal impeachment value.

At the motion for new trial, the trial court found the movement sheets were not newly discovered evidence because the "information was available prior to trial as it is known that all places of incarceration keep logs of the inmate's activities." The trial court stated the defendant failed to prove that he was reasonably diligent or that the evidence was material. We conclude that the defendant did not show he acted with reasonable diligence and that the impeaching evidence was not so important or convincing to have changed the result of the trial. The trial court did not abuse its discretion in denying a new trial on this issue, and the defendant is not entitled to relief.

V. INVESTIGATING DETECTIVES' NOTES

The defendant contends that he learned after the trial that the investigating detectives who interrogated him destroyed their personal notes taken during the interrogation. He claims this constitutes newly discovered evidence entitling him to a new trial. The state contends that the notes do not constitute newly discovered evidence because they no longer exist.

At the trial, the following exchange occurred during the cross-examination of Detective Haney:

> [Defendant's Attorney]: [A]s part of your duty as a police officer investigating a crime such as this, you got [the defendant's confession] on audiotape; right?
> [Detective Haney]: Oh, I wish I would have.
> [Defendant's Attorney]: Oh, well, you didn't?
> [Detective Haney]: No, sir.
> [Defendant's Attorney]: You got it on videotape?
> [Detective Haney]: No, sir.
> [Defendant's Attorney]: You got him to sign a confession?
> [Detective Haney]: No, sir.
> [Defendant's Attorney]: So he gave this great confession to you after three-and-a-half to four hours of discussion and you got no documentation whatsoever?
> [Detective Haney]: Yes, sir, I have my notes and other detectives that were there.

During the cross-examination of Detective Tarkington, a similar exchange occurred:

> [Defendant's Attorney]: But you didn't get [the defendant] to sign a confession after he confessed to all of these crimes that you claim he confessed to?
> [Detective Tarkington]: No, sir. We didn't have anybody there to do stenography or any of those things, and we wrote our notes as we went.

At the trial, Detectives Haney and Tarkington testified that they took notes of their interview with the defendant. We conclude the defendant did not exercise reasonable diligence in obtaining the detectives' notes. In this regard, we note he failed to request the notes during discovery and failed to cross-examine the detectives about their notes after each detective testified to the existence of the notes. The defendant is not entitled to relief on this issue.

VI. DEFENDANT'S POST-ARREST STATEMENT IN NASHVILLE

The defendant asserts that he gave a statement to the police once he was taken to Nashville but that the statement was not provided to the defense. He contends this undisclosed evidence constitutes newly discovered evidence entitling him to a new trial. The state contends the defendant failed to prove that he suffered prejudice from the state's failure to disclose a report of the defendant's second statement.

We note that the trial court found that the state had constructive knowledge of the statement and should have provided the report to the defense. However, the trial court found that the defendant had not shown any prejudice.

At the motion for new trial hearing, the defendant had the burden to show that the newly discovered evidence likely would have led to a more favorable result. The defendant contends that his statement was consistent with his position that he did not make a confession to the authorities in Miami. He claims that if he had confessed in Miami, the police would have had no reason to talk to him in Nashville. We question this contention. The defendant was one of at least five Hispanic men seen at the Howard Johnson motel but one of only four defendants charged in this case. It is reasonable to believe that the detectives re-interviewed the defendant when he arrived in Nashville as part of their continuing investigation. Additionally, the report reinforces the fact that the defendant confessed in Miami, stating:

> At the time he stated no one could know he had confessed to being involved in the robbery/homicide for fear of his life but more importantly fear his family would be killed. He stated he hoped we had taped him then because he had nothing else to say. Threats had been made to him because someone in Miami had informed old friends he had snitched on the others about the robbery and homicide that occurred in Nashville.

This statement would have been favorable to the state had it been introduced at the trial. We conclude that the defendant's post-arrest statement would not likely have changed the outcome of the trial and that he is not entitled to relief on this issue.

VII & VIII. PHOTOGRAPH IDENTIFICATION PROCEDURES

The defendant contends that the state's photograph identification procedures violated his right to due process of law. He claims that the state improperly used an outdated photograph of him when a more current photograph was available and that the state's identification procedures were impermissibly suggestive. The state contends the defendant has waived this issue by failing to file a pre-trial motion to suppress. We agree with the state.

The Tennessee Rules of Criminal Procedure mandate that certain motions be raised before trial, including motions to suppress evidence. See Tenn. R. Crim. P. 12(b)(3). Failure to raise such a motion constitutes waiver on appeal. See Tenn. R. Crim. P. 12(f). We conclude that the defendant has waived these issues.

IN-COURT IDENTIFICATION PROCEDURES

The defendant contends that in-court identification of him by Ms. Sloan, Ms. Franklin, and Ms. Butts violated his right to due process. The state contends that the defendant has waived these issues for failing to file a motion to suppress and for failing to object at the trial. In the alternative, the state contends the defendant has failed to establish that his due process rights were violated.

IX. PROSECUTORIAL MISCONDUCT

The defendant contends that newly discovered evidence exists showing that the prosecution "pointed out" the defendant to Ms. Sloan before her identification of him at the trial and told her that other witnesses would testify concerning fingerprint evidence. He claims this is prosecutorial misconduct which contaminated Ms. Sloan's in-court identification, rendering it unreliable and in violation of his right to due process. The state's only response to this contention is waiver based upon the defendant's failure to file a pretrial motion and failure to object at the trial.

Initially, we believe the state has misapprehended the waiver issue. The defendant's contention is that based upon newly discovered evidence, he learned that Ms. Sloan's identification of him at the trial was impermissibly suggested by the state. We will address this issue.

The defendant attempts to equate the state's pointing out the defendant to Ms. Sloan and telling Ms. Sloan that fingerprint evidence would be presented at the trial with a "show up" identification, which occurs when the police bring a lone suspect to a witness and ask the witness to identify the suspect. He cites United States v. Kaylor, 491 F.2d 1127 (2nd Cir. 1973), and Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 374 (1972), for the proposition that a "show up" identification can violate due process in certain circumstances. He claims that in his case, the witness' in-court identification of him that was impermissibly suggested by the state was tantamount to a "show up" identification. We conclude that the state's actions do not offend due process. We note that unlike the myriad cases cited by the defendant, Ms. Sloan had already identified the defendant when she picked his picture out of the photograph array shown to her by Officer Tarkington in July 1999,

confirming the defendant's identity as one of the robbers. Further, although the state's actions may have been suggestive, we believe they were not impermissibly so. In this regard, we note that when Ms. Sloan took the stand, the defendant was seated at the defense table, charged by the state as one of the robbers. The defendant is not entitled to relief on this issue.

X. INCONSISTENT TESTIMONY OF DEBORAH SLOAN

The defendant contends that Ms. Sloan's trial testimony was inconsistent and contradicted by other witnesses. He illustrates that Ms. Sloan said the robbers were "black men" when they were in fact Hispanic; that the form she signed when picking the defendant out of the photograph array states the defendant "looked familiar," when at the trial she said she was certain the defendant was the robber; and that her testimony concerning whether the defendant was wearing a hood during the robbery was inconsistent with the statement of the victim and Mr. Nagele. He claims this incredible testimony violated his right to due process. The state responds that the defendant has waived this issue for failing to file a pretrial motion to suppress and for failing to object at the trial and that he has failed to establish a due process violation.

Initially, we note the defendant failed to object at the trial to a due process violation based upon Ms. Sloan's testimony, which he contends was inconsistent with her pre-trial statements. Failure to object at the trial constitutes waiver. See T.R.A.P. 36(a). However, the defendant's contention is based, in part, upon his discovering an undisclosed statement of Mr. Nagele after the trial. In any event, the defendant is asking this court to make a credibility determination. The credibility of Ms. Sloan's testimony was in the exclusive province of the jury. See Bland, 958 S.W.2d at 659. The defendant is not entitled to relief on this issue.

XI. KIMBERLY ALLISON IMPROPERLY POINTING OUT THE DEFENDANT TO DEBORAH SLOAN AT THE TRIAL

The defendant contends that Ms. Allison improperly interacted with Ms. Sloan by pointing out the defendant to her at the trial. He claims this interaction tainted Ms. Sloan's in-court identification and violated his right to due process. The state contends that the defendant has waived this issue for failing to file a motion to suppress and for failing to object at the trial and that in the alternative, the defendant failed to prove his allegation at the motion for new trial. Because the defendant alleged at the motion for new trial that he did not learn of Ms. Allison's pointing him out to Ms. Sloan until after the trial, we conclude he has not waived this issue for failure to object at the trial to Ms. Sloan's testimony. We will address this issue.

At the motion for new trial hearing, the defendant's mother testified that she saw Ms. Allison pointing out the defendant to Ms. Sloan. Ms. Allison testified that she did not point out the defendant to Ms. Sloan. The trial court found Ms. Allison's testimony credible, and we conclude the record does not preponderate against the trial court's findings. The defendant is not entitled to relief on this issue.

XII. IMPROPER IDENTIFICATION BY BARBARA FRANKLIN

The defendant contends that Ms. Franklin's testimony was incredible and violated his right to due process. He claims that Ms. Franklin's in-court testimony that the defendant had long hair when he was in the Carlyle and Company store is directly refuted by the fact that the photograph taken of the defendant two weeks before the robbery showed him with short hair. He asserts that because Ms. Franklin neither viewed a photograph array nor identified him as one of the robbers before the trial, her identification of him in court was wholly unreliable, rendering the entire proceeding fundamentally flawed. The state responds that the defendant has waived this issue and that in the alternative, the defendant is improperly attacking the witness' credibility.

The trial court found that the state had not violated discovery for failing to disclose to the defense a copy of a taped statement of Ms. Franklin in which she stated that the man who entered the Carlyle and Company store and whom she identified at trial as the defendant had long hair tied in the back with a ponytail. The court found that the prosecution had made the statements available to the defense. We conclude the defendant has waived this issue with respect to the prior recorded statement of Ms. Franklin. See T.R.A.P. 36(a).

With regard to the defendant's contention that Ms. Franklin's in-court identification violated due process because she had failed to identify him previously, we note that Ms. Franklin admitted on cross-examination that she had never before viewed a photograph array of the defendant. She also admitted the police had not asked her to identify the defendant before the trial. The record reflects that the defendant failed to take any action available to him at the time to prevent this issue regarding Ms. Franklin's testimony. Accordingly, he has waived this issue. Id.

With regard to the defendant's contention that Ms. Franklin's testimony amounts to a due process violation because it was inconsistent with the testimony of other witnesses for the state, the defendant is again asking this court to make a credibility determination. See Bland, 958 S.W.2d at 659. The defendant is not entitled to relief on this issue.

XIII. IMPROPER IDENTIFICATION BY STACY BUTTS

The defendant contends that Ms. Butts' testimony was incredible, inconsistent, and violated his right to due process. He claims that Ms. Butts gave a statement shortly after the robbery in which she described the defendant as being 5'8" tall but that she testified at the trial that one of the men who came into the Carlyle and Company store was "very large in size" and the other one "was very small." He claims that Ms. Butts' statement that he was 5'8" tall is inconsistent with trial testimony describing him as "very small" and that her statement did not match Ms. Franklin's testimony that the defendant was 5'4" tall. He claims these gross inconsistencies violated his right to due process because the witness' identification of him was wholly unreliable. The defendant also claims that because Ms. Butts had not identified him from a photograph array before the trial, her identification of him in court was wholly unreliable, rendering the entire proceeding fundamentally flawed. The

state contends that the defendant has waived this issue and that in any event, he is not entitled to relief.

Initially, we note the defendant has not contended that the state failed to provide him Ms. Butts' statement given shortly after the robbery. We also note the defendant asked only one question of Ms. Butts on cross-examination: "Ms. Butts, at that time, did [the defendant] have a mustache?" The defendant complains that Ms. Butts' testimony was inconsistent with the testimony of Ms. Franklin and with her earlier statement. We conclude that regarding the earlier statement, the defendant failed to take any action available to him at the time to prevent or nullify the effect of Ms. Butts' testimony. He has waived this issue. See T.R.A.P. 36(a).

With regard to the defendant's contention that Ms. Butts' in-court identification violated due process because she had failed to previously identify him, we note that Ms. Butts testified directly after Ms. Franklin; yet, the defendant elected not to ask Ms. Butts whether she had previously picked the defendant out of a photograph array. We also note the defendant failed to move to strike Ms. Butts' testimony or to ask for a mistrial based upon a due process violation. The record reflects that the defendant failed to take any action available to him at the time to prevent or nullify the effect of Ms. Butts' testimony. Accordingly, he has waived this issue. Id.

DISCOVERY VIOLATIONS

The defendant contends that the state committed various discovery violations. He claims the state committed due process violations by failing to disclose that Ms. Sloan had tinted windows in her car, by failing to provide the tape-recorded statements of Ms. Hudson and Ms. Franklin, by failing to disclose the contents of an interview with a confidential informant in Miami, Florida, by failing to disclose statements he made during a second interview, and by failing to disclose a report prepared by Detective Haney corroborating his trial testimony. He claims the state violated discovery under Rule 26.2 of the Tennessee Rules of Criminal Procedure by failing to provide to the defense all of Mr. Nagele's statements, Detective Haney's report, and notes destroyed by Detectives Haney and Tarkington concerning their interrogation of the defendant. The defendant claims that the state failed to produce the entire 9-1-1 conversation of Ms. Sloan. The defendant also claims the state violated Rule 16 by failing to disclose the statement he made during the second interview.

The state contends the defendant failed to prove that the state knew that Ms. Sloan's windows were tinted, failed to prove it affected her ability to see, and did not question her about them at the trial. The state asserts the defendant failed to identify any discrepancy in the inadvertently suppressed statement of Mr. Nagele and failed to show prejudice because the statement was the same in all material respects. The state also asserts that it disclosed the 9-1-1 tape in its entirety and that the defendant failed to show prejudice. The state contends that the taped statements of Ms. Hudson and Ms. Franklin were made available to the defendant. It claims the defendant failed to prove that the detectives had an obligation to preserve their personal notes of the interrogation or that the state had an obligation to disclose the notes. The state admits that it violated Rule 16 by failing to disclose the defendant's statements made during the second interview but claims the defendant failed

to show prejudice. Finally, the state contends that no materially exculpatory evidence was contained in either the confidential informant's statement or Detective Haney's police report and that the defendant failed to show prejudice.

In Brady v. Maryland, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). In order to establish a due process violation under Brady, four prerequisites must be met:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not);
>
> 2. The State must have suppressed the information;
>
> 3. The information must have been favorable to the accused; and
>
> 4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). Brady does not require the prosecution "to disclose information that the accused already possesses or is able to obtain." State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). The burden of proving a Brady violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. Edgin, 902 S.W.2d at 389.

This court has stated that in order to establish a Brady violation, the information need not be admissible, only favorable to the defendant. See State v. Spurlock, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993). Favorable evidence includes

> evidence that . . . "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness."

Johnson v. State, 38 S.W.3d 52, 56-57 (Tenn. 2001) (quoting Commonwealth v. Ellison, 376 Mass. 1, 22, 379 N.E.2d 560, 571 (1978)). This court will deem evidence material if a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed. See United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. at 682, 105 S. Ct. at 3383 (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). In the context of Brady, "once a reviewing court applying Bagley has found

constitutional error there is no need for further harmless-error review." Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995).

Rule 26.2 of the Tennessee Rules of Criminal Procedure, provides, in part, as follows:

> (a) Motion for Production. – After a witness other than the defendant has testified on direct examination, the trial court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
>
> . . . .
>
> (g) Definition. – As used in this rule, a "statement" of a witness means:
> (1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness; or
> (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof.

"The determination of what constitutes a producible statement is a matter that rests purely within the discretion of the trial judge and can be set aside by the appellate courts only if his decision is clearly erroneous." State v. Daniel, 663 S.W.2d 809, 812 (Tenn. Crim. App. 1983) (considering Rule 16(a)(1)(F), the precursor to the current Rule 26.2).

Rule 16(a)(1) of the Tennessee Rules of Criminal Procedure governing discovery, in part, provides:

> (A) Statement of Defendant. – Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general; the substance of any oral statement which the state intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogations by any person then known to the defendant to be a law-enforcement officer[.]
>
> . . . .

> (C) Documents and Tangible Objects. – Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

If a party fails to comply with a discovery request, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2). Whether a defendant has been prejudiced by the state's failure to disclose information is a significant factor in determining an appropriate remedy. State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). When arguing that the state violated Rule 16, the defendant bears the burden of showing "the degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992).

XIV. WITNESS DEBORAH SLOAN'S TINTED WINDOWS

The defendant asserts that the state's failure to disclose that Ms. Sloan's car windows were tinted constitutes a Brady violation, thereby denying him due process of law. He contends that this knowledge was a "matter uniquely within the knowledge of the state" and highly material. The state asserts the defendant failed to prove that the state knew that Ms. Sloan's windows were tinted or that the tinting affected Ms. Sloan's ability to identify the defendant. It also asserts the defendant did not question Ms. Sloan on the issue when she testified at the hearing on the motion for a new trial.

In order to establish a due process violation under Brady, the defendant must demonstrate that the evidence is material. At the motion for a new trial hearing, the defendant asked Ms. Sloan if she had tinted windows in her car but did not ask any further questions about her ability to see through those windows. He also failed to introduce into evidence any expert testimony or empirical evidence for the proposition that tinted windows obscure a person's view from within a car sufficient to call into question the ability of that person to identify someone outside the car. We conclude no reasonable probability exists that the results of the defendant's trial would have changed had the state disclosed this evidence. The defendant has not established the element of materiality, and he is not entitled to relief on this issue.

XV. 9-1-1 TAPE

The defendant contends that he was denied due process by the failure of the state to provide the entire 9-1-1 tape of Ms. Sloan's call. The defendant asserts that Ms. Sloan testified that she told the 9-1-1 operator her location, which was not on the tape. Therefore, he asserts that more of the 9-1-1 tape exists than what the state provided to him. The state replies that the defendant failed to

prove that the state did not disclose the entire 9-1-1 tape and failed to prove prejudice from the failure of the recording device to capture the entire telephone call. The state also asserts that it disclosed the entire 9-1-1 tape as it existed. The trial court found that

> it appears that simply the call cut off and that there was no more to that call than what is reflected on the tapes provided to the Defendant and defense counsel. At most, Ms. Sloan indicated that she might have provided additional directions on how to get to the crime scene once the call cut off. The State provided the totality of the tape that it had in its possession and the fact that the tape cuts off is not a basis to grant a new trial.

We conclude the defendant has failed to establish that the state suppressed a 9-1-1 tape in its possession containing the remainder of Ms. Sloan's telephone call. The defendant has failed to establish a Brady violation, and he is not entitled to relief on this issue.

XVI. TAPE RECORDINGS OF CHRISTINA HUDSON AND BARBARA FRANKLIN

The defendant contends that the state violated Brady by failing to disclose the tape-recorded statements of Christina Hudson and Barbara Franklin. He claims that although his trial attorney had the recordings of Ms. Hudson's and Ms. Franklin's statements, he never played the tapes for the defendant and thus the defendant was severely prejudiced by the state's failure to disclose the interviews in order that "he" could hear them. The state asserts that the defendant failed to prove that the tape-recorded statements were not disclosed. It claims that it listed the tape-recorded statements in its discovery response, stating the tapes would be available for copying upon request. We agree with the state.

The defendant cites no authority for the proposition that due process requires the state to ensure that the defendant personally reviews all potentially exculpatory evidence that it discloses to the defense. Brady simply does not require the prosecution "to disclose information that the accused already possesses or is able to obtain." Marshall, 845 S.W.2d at 233 (emphasis added). The defendant has failed to show that the state had any hand in the defendant's failure to review the tapes. This issue is without merit.

XVII. INTERVIEW WITH CONFIDENTIAL INFORMANT

The defendant contends he was denied exculpatory information in violation of Brady by the state's failure to disclose the contents of Detective Tarkington's interview with a confidential informant. He asserts that if the information in Detective Tarkington's report connects the defendant to the crime, then the information is exculpatory and should have been turned over under Brady because he could have used that information to impeach the detective's testimony at the trial. He claims the impeachment value is based upon the detective's statement that he did not go to Miami to interview the defendant and that therefore, he did not bring any recording equipment with him to

Miami. The defendant argues that if the detectives had learned from a confidential informant that he was involved in the crime, they would have brought recording equipment with them to the interview. The state contends that the defendant failed to prove the confidential informant's statement was exculpatory in any respect.

Initially, we note that the defendant did not have an opportunity to review the information from Detective Tarkington's interview with the confidential informant because it was filed under seal. We have reviewed the interview and conclude that it does not contain "obviously exculpatory" material. The defendant claims, however, that if the report identified him as a perpetrator of the robbery, he could have used that information to cross-examine the detectives on why they failed to record their interrogation of him. We believe, though, that such questioning would not show that a reasonable probability exists that the results of his trial would have changed. The defendant is not entitled to relief on this issue.

XVIII. STATEMENT BY EUGENE NAGELE

The defendant asserts that he was denied due process and denied the right to discovery under Rule 26.2 of the Tennessee Rules of Criminal Procedure by the state's failure to provide all the statements of Mr. Nagele to him. He claims the state found an additional tape of Mr. Nagele's interview after the trial but did not provide a copy to the defendant before the trial. He claims that Mr. Nagele stated in the interview that his assailant wore a hood, which he argues is inconsistent with Ms. Sloan's identification of him. The defendant also contends that he was prejudiced because the distances reported by Mr. Nagele differed in the two reports and argues that this fact is critical because the location of the shooter was highly dependent on Mr. Nagele's testimony and made Ms. Sloan's testimony highly questionable. He asserts that if Mr. Nagele was near Ms. Sloan, the gunman would have had to be an extraordinary marksman, but if the shooter was close to the victim, then Ms. Sloan's ability to identify the perpetrators would have been more doubtful.

The state contends that the defendant failed to identify any discrepancy in the statement from Mr. Nagele that inured to his prejudice. It concedes that it failed to turn over the statement but asserts that the two statements are the same in all material respects.

The trial court found that the state's supplemental discovery response noted that the taped statement of Mr. Nagele by Officer Tarkington was available for copying upon request. The second statement by Mr. Nagele to Officer Finchum was not found until after the trial. The trial court found it was error for the defendant not to receive the second statement, but after comparing the Finchum interview with the Tarkington interview, it found no material inconsistencies between the two interviews and no prejudice.

The state's supplemental discovery response noted that a taped statement of Mr. Nagele was available for copying upon request. The record reflects that this statement was taken by Detective Tarkington. In that statement, Mr. Nagele stated that the man who attacked him was wearing "military wet weather gear" and had a hood on his head. The second statement from Mr. Nagele was

taken by Detective Finchum. In this statement, Mr. Nagele again stated the man who attacked him "had a green hood on with just his face showing," had "like a poncho but it had buttons up front and the hood was pulled up," and "had something around his forehead, [but did not] know if it was a ski cap or what of a bluish color."

Regarding the defendant's argument concerning whether he was wearing a hood, the defendant asserts a due process violation, claiming that Mr. Nagele's statements constituted Brady material. Initially, we note that Mr. Nagele's statement to Detective Tarkington was not suppressed by the state because it was made available to the defendant for copying. No Brady violation exists with regard to this statement. Concerning Mr. Nagele's statement to Detective Finchum, we conclude that the statement is not favorable to the defendant because it is not inconsistent with Mr. Nagele's statement to Detective Tarkington and that the state's failure to disclose it did not constitute a Brady violation.

The defendant also asserts that the state violated Rule 26.2 of the Tennessee Rules of Criminal Procedure by failing to provide Mr. Nagele's statements after Mr. Nagele testified at the trial. We disagree that the state failed to provide Mr. Nagele's statement taken by Detective Tarkington because that statement was made available to the defendant to copy. We agree that the state violated Rule 26.2 of the Tennessee Rules of Criminal Procedure by failing to disclose Mr. Nagele's statement to Detective Finchum. Although the prosecution was unaware the statement existed, it had constructive knowledge of the tape held in the Nashville Police Department's property room. However, we conclude that the defendant has failed to show any prejudice resulting from the state's failure to turn over the statement and that he is not entitled to relief on this issue.

Regarding the defendant's argument concerning distances, we note that only the statement disclosed by the state contained information relating to distances. Therefore, we conclude the defendant has waived this issue. See T.R.A.P. 36(a). The defendant is not entitled to relief.

XIX. DETECTIVE HANEY'S POLICE REPORT

The defendant contends he was denied due process by the failure of the state to disclose Detective Haney's police report containing information that someone placed a telephone call from the Howard Johnson motel to an escort service. He also asserts that the report should have been disclosed to him under Rule 26.2. He claims that his fingerprint on the phonebook placed him in room 204 and that Detective Haney's report would have supported the defendant's testimony that he had been in the room only to call an escort service for the occupants of the room. The defendant claims that if he had this report at the trial, it would have supported his credibility by corroborating his testimony and allowed him to cross-examine Detective Haney about the escort service. He asserts that Detective Haney's report was a statement under Rule 26.2 because it was prepared by Detective Haney.

The state contends that the defendant failed to prove that Detective Haney's report was exculpatory or that he was prejudiced by the state's failure to disclose it. It claims that the defendant

was provided with the telephone records and had personal knowledge of the telephone call. The trial court found that the state "should have erred on the side of caution and provided the report to the defense." However, the trial court found the state's failure did not provide grounds for a new trial because the defendant was provided with all of the telephone records and the defendant could have brought the telephone call to his attorney's attention.

We conclude that the report was not material and that the state's failure to disclose it to the defense did not constitute a Brady violation. In this regard, we note that the report corroborated the defendant's statement that he called an escort service from room 204. That fact, however, is not incongruous with the defendant's culpability in the robbery. Although someone from room 204 called an escort service, we conclude that the jury could well have accepted the defendant's statement that he called the escort service from room 204 and still determined that he along with his room 204 confederates committed the robbery. The defendant has failed to demonstrate that a reasonable probability exists that the result of his trial would have changed had he been provided Detective Haney's report. The defendant is not entitled to relief on this issue.

Concerning Rule 26.2, we are inclined to agree with the defendant that the state violated the rule by failing to provide a copy of Detective Haney's report after he testified at the trial. However, based on the foregoing analysis, we conclude that the defendant has failed to show prejudice and that he is not entitled to relief on this issue.

XX. DETECTIVES' DESTROYED NOTES

The defendant contends that he was denied due process and that the state violated Rules 16 and 26.2 of the Tennessee Rules of Criminal Procedure because the detectives' notes from their March 15, 2000 interview of the defendant were destroyed. The state contends that the defendant failed to prove that the detectives had an obligation to preserve their personal notes or that the state had an obligation to disclose the existence of the detectives' personal notes.

The trial court stated, "There is no rule that detectives must retain all handwritten notes, and since the notes were reduced to typed form, there was no reason to retain the notes." The trial court found no discovery violation.

At the trial, Detectives Haney and Tarkington testified that they had taken notes during their interview with the defendant in Miami, Florida. At the motion for new trial, Detective Haney testified that he had not destroyed his notes of the interview until after the defendant was convicted and Detective Tarkington testified that the typewritten report accurately reflected all of the pertinent information contained within the handwritten notes. The record reflects that the defendant failed to seek production of the notes at the trial or to otherwise cross-examine the detectives regarding their existence. Therefore, he has waived his Rule 26.2 argument. See T.R.A.P. 36(a). Regarding his due process argument, we conclude the defendant has failed to show that the handwritten notes contained any exculpatory information. The defendant is not entitled to relief on this issue.

XXI. DEFENDANT'S POST-ARREST STATEMENT

The defendant contends that he was denied due process by the failure of the state to comply with Tennessee Rule of Criminal Procedure 16 by disclosing his post-arrest statement to him. He claims he was prejudiced because he could have used the statement to impeach the testimony of Detectives Haney and Tarkington. He admits that the statement buttressed his confession in Miami, but he claims that if he had actually confessed in Miami, the detectives would have had no reason to interrogate him further after he was arrested and brought to Tennessee. The state asserts the defendant failed to prove that he suffered prejudice from the state's failure to disclose the report of the defendant's second statement.

"The prosecutor's duty to disclose extends not only to material in his or her immediate custody, but also to statements in the possession of the police which are normally obtainable by 'exercise of due diligence,' that is, a request to all officers participating in the investigation or preparation of the case." State v. Hicks, 618 S.W.2d 510, 514 (Tenn. Crim. App. 1981) (citing United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971)). We conclude that the state violated Rule 16 by failing to disclose to the defendant his post-arrest statement. However, the statement in question reinforces the fact that the defendant confessed to Detectives Haney and Tarkington in Miami. The defendant in his statement acknowledges his prior confession and states his concern for safety of himself and his family because of his implicating his confederates. We conclude that the defendant failed to show prejudice and the state's failure to disclose the statement did not affect the outcome of the proceedings.

XXII. FAILURE TO TRANSCRIBE CLOSING ARGUMENTS

The defendant contends that he was denied his right to due process based upon the court reporter's failure to transcribe the closing argument of the state. He claims that the law is "abundantly clear that the absence of a significant portion of the trial transcript dictates that a new trial be granted." The state responds that the defendant is not entitled to relief because he could have prepared a statement of the closing argument pursuant to the Rules of Criminal Procedure and that in any event, because the defendant failed to object to any portion of the state's closing argument, his due process rights were not violated by the court reporter's failure to transcribe the closing arguments.

The Tennessee Rules of Appellate Procedure provide that if a "stenographic report, substantially verbatim recital or transcript of the evidence or proceedings" is not available, a defendant "shall prepare a statement of the evidence . . . from the best available means, including the appellant's recollection" and include it in the appellate record. T.R.A.P. 24(c). The defendant has failed to prepare a statement of the evidence of the state's closing argument and include it in the appellate record and has not shown that such preparation could not have occurred. We conclude that he has waived this issue. See T.R.A.P. 36(a).

XXIII. DEFENDANT'S CONFESSION

The defendant contends that the inculpatory statements he made to Detectives Haney and Tarkington were taken in violation of his Fifth Amendment rights. He claims that when the detectives interrogated him, he was in jail in Miami, Florida; that the detectives did not give him the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966); and that although he asked for his lawyer before the conversation began, the detectives continued to interrogate him without his lawyer present. The state contends the defendant has waived this issue for failing to file a pretrial motion to suppress his confession. We agree with the state.

Pursuant to Rule 12(b)(3) of the Tennessee Rules of Criminal Procedure, motions to suppress evidence must be raised "prior to trial." See State v. Davidson, 606 S.W.2d 293, 295-96 (Tenn. Crim. App. 1980); Feagins v. State, 596 S.W.2d 108, 109-10 (Tenn. Crim. App. 1979). The failure to present a motion to suppress by the time set by the trial court constitutes waiver, but the trial court may grant relief from the waiver for "cause shown." Tenn. R. Crim. P. 12(f). The record reflects that the defendant did not file a motion to suppress the statements he made in Miami, Florida, to Detectives Haney and Tarkington. He has accordingly waived this issue.

XXIV. PROSECUTORIAL MISCHARACTERIZATION OF TELEPHONE RECORDS

The defendant contends that he was denied due process by the state's mischaracterization of telephone records. He claims that the state asserted certain calls were placed from the Green Hills Mall on March 17 when they were actually placed on March 16. The state responds that the defendant has misapprehended the telephone record evidence. It asserts that the telephone records in question do not list when the calls were placed but rather who the subscriber was to certain telephone numbers in Green Hills Mall on March 17, 1999. It claims the defendant's contention is "completely without foundation." We conclude the defendant has waived this issue.

Failure to object to the introduction of evidence at the trial constitutes waiver. See T.R.A.P. 36(a). The record reflects that the defendant failed to object to the state's introduction of the telephone records as exhibits. It also reflects that he failed to object to any purported mischaracterization of those records by the state. Id. He has waived this issue.

XXV. HEARSAY

The defendant contends that the trial court erred in allowing the state to introduce into evidence his telephone number in Miami. He claims that Officer Kaufman learned of his telephone number from the hearsay statement of his wife and that the officer's report does not constitute a hearsay exception as police reports are specifically excluded from the public records hearsay exception in Tennessee. The state claims the defendant has waived this issue for failing to object at the trial.

At the trial, Officer Kaufman testified that the defendant's wife told him her telephone numbers at home and at work. The defendant objected to this testimony as inadmissible hearsay

evidence. At a jury-out hearing, Officer Kaufman testified that he had responded to a domestic violence call at the defendant's home and that as a result, he had written a report which contained the telephone numbers in question. He said that he had transcribed those telephone numbers onto another document and brought that document with him to the defendant's trial. Based upon this testimony, the trial court found the telephone numbers were admissible as a public record hearsay exception. The defendant did not renew his hearsay objection, but we believe the defendant had preserved this issue for appellate review.

Hearsay evidence is generally inadmissible. See Tenn. R. Evid. 802. Rule 803(8) of the Tennessee Rules of Evidence provides for a public records exception to the general bar against hearsay:

> (8) Public Records and Reports. – Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

(Emphasis added). The Advisory Commission Comments to the rule explain, "Police reports are expressly excluded . . . ." We conclude that Officer Kaufman's notes, which he transcribed from his police report based upon the statements of the defendant's wife, constitute inadmissible hearsay. However, because we do not conclude that the error more probably than not affected the judgment, it was harmless. See Tenn. R. Crim. P. 52(a); T.R.A.P. 36(b).

At the trial, the state introduced the defendant's telephone numbers into evidence as circumstantial evidence of the fact that he was in Nashville and at the Green Hills Mall during the time of the robbery. However, the state's proof absent this evidence showed that Ms. Sloan positively identified the defendant as one of the robbers through a photograph array and at the trial. Ms. Franklin and Ms. Butts testified that the defendant was at the Carlyle and Company store the day before the robbery asking questions about Rolex watches. The evidence also showed that the defendant's fingerprint was found on the telephone book in room 204 of the Howard Johnson motel and that the defendant confessed to being in Nashville, participating in the robbery, and taking $40,000.00 as his share of the proceeds from the sale of the stolen watches. The defendant is not entitled to relief on this issue.

XXVI & XXVII. EXCESSIVE SENTENCE

The defendant contends his sentences are excessive. He claims that the trial court's application of enhancement factors to some of his sentences violated the rule announced in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). He also claims that the trial court erred in

ordering his sentences to be served consecutively under both state law and Blakely. The state claims the defendant has waived his Blakely issues by failing to object in the trial court. It does not, however, respond to the defendant's assertion that the trial court's imposition of consecutive sentencing was excessive under state law.

At the sentencing hearing, the trial court justified its imposition of consecutive sentencing by finding that the defendant was

> a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high.
>
> . . . This was a well-planned execution. Clearly, [the victim] was meant to be killed. I mean, it happened so quickly, you can say nothing except that he was shot quickly. He had–there was not time to defend himself. He was just killed for no good reason except for somebody wanting some Rolex watches. . . .
>
> Looking at not only the nature of the crime, I have to look at whether or not the aggregate term reasonably relates to the severity of the offenses, and whether incarceration of this defendant for a long period of time is necessary to protect the public from further criminal conduct by this defendant, and I think, again, the facts of this case, he has indicated no remorse at all, there is clear, the staking out, the long history, the fact that [the victim] was shot immediately, all of this leads me to believe that [the defendant] has absolutely no remorse, that he needs to be incarcerated for the maximum period of time; therefore, I am going to sentence him to consecutive sentences on all counts of this indictment, so that Counts 1, 3, and 4 not only run consecutively to the life sentence. They also run consecutive to each other, for a total sentence of 47 years plus life . . . .

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2003).[1] As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act,

[1] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal.

we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Unless enhancement factors are present, the presumptive sentence to be imposed is the midpoint in the range for a Class A felony and the minimum in the range for a Class B felony. T.C.A. § 40-35-210(c) (2003). Our sentencing act provides that, procedurally, the trial court is to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Id. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

In conducting our de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2003); see Ashby, 823 S.W.2d at 168; Moss, 727 S.W.2d at 236-37.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the court may order sentences to run consecutively if it finds by a preponderance of the evidence that the defendant is a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." For dangerous offenders, "consecutive sentences cannot be imposed unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995); see State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court "specifically recite the reasons"

behind its imposition of a consecutive sentence. See State v. Donnie Thompson, No. M2002-01499-CCA-R3-CD, Maury County (Tenn. Crim. App. Mar. 3, 2003).

Concerning the defendant's arguments relating to Blakely, our supreme court held in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), that failure to object on Sixth Amendment grounds during the sentencing hearing to the trial court's enhancement of a sentence constitutes waiver and that in any event, Tennessee's sentencing scheme does not violate a defendant's right to trial by jury as expressed in Blakely and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005). Accordingly, the defendant's failure to object at the trial constitutes waiver, and he is not entitled to relief on this issue.

Concerning the defendant's argument that the trial court improperly ordered all of his sentences to run consecutively under state law, the trial court found that the defendant was a dangerous offender who committed this crime with no hesitation about the risk to the life of the victim, that the total effective sentence reasonably relates to the severity of this offense, and that the defendant needs to be incarcerated to protect society from his future criminal conduct. We agree. The defendant is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing and the record as a whole, we conclude that the errors did not deny the defendant a fair trial either individually or collectively. We affirm the judgments of the trial court.

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JOSEPH M. TIPTON, JUDGE