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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 4, 2023 Session

STATE OF TENNESSEE v. ANTONIO TYWAN JAMES

Appeal from the Circuit Court for Madison County
No. 19-868 Donald H. Allen, Judge

No. W2022-00023-CCA-R3-CD

The Appellant, Antonio Tywan James, appeals as of right from his convictions of first-degree premeditated murder and tampering with evidence, for which he received an effective sentence of life imprisonment.[1] The Appellant argues the trial court erred in denying funds to obtain expert services and in excluding the Appellant's conversation with his aunt, Annie Merriweather, as inadmissible hearsay. Based upon the combination of these two alleged trial errors, the Appellant contends reversal under the cumulative error doctrine is required. The Appellant additionally argues the trial court erred in not requiring the State to elect which item it was using in its prosecution of tampering with evidence. Upon our review, we affirm.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which J. ROSS DYER and JOHN W. CAMPBELL, SR., JJ., joined.

George Morton Googe, District Public Defender, Jessica F. Butler (on appeal), Jeremy B. Epperson and Greg Gookin (at trial) Assistant District Public Defenders, for the Appellant, Antonio Tywan James.

Jonathan Skrmetti, Attorney General and Reporter; James E. Gaylord, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Matthew Floyd, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

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[1] The Appellant was also charged with being a convicted felon in possession of a firearm in connection to this case, to which he entered a plea of guilty and received a concurrent term of twelve years' imprisonment. He does not challenge this conviction on appeal.

On March 5, 2019, the Appellant fatally shot his mother, Ermateen James, the victim in this case, in the head. The Appellant does not challenge the sufficiency of the evidence on appeal, and we will limit our recitation of the evidence to that which is relevant to the issues raised herein. Annie Merriweather, the victim's sister and the Appellant's aunt, was close to her sister, and they worked at the same hotel. On the night of the offense, Merriweather was at her sister's home and observed the Appellant "fussing" and "cussing" at the victim. Merriweather said the Appellant was "back and forth" living with his mother, but she was unsure how long he had done so. Merriweather identified a photograph of a pair of coveralls the Appellant was wearing on the night of the offense, which was admitted into evidence. Around 4:30 or 5 p.m. that afternoon, family members were in the victim's living room enjoying the evening, and Merriweather briefly left to go to the restroom. When she returned, the Appellant was "cussing" the victim and told her "'if you throw my stuff out, you will never throw nothing else out.'" Merriweather was unclear as to what sparked the argument. The victim asked the Appellant to leave but told him his children could stay until his girlfriend got off work. In response, the Appellant said "'if he left, [his] kids were going with him.'" The victim went to the back room to get the Appellant's child, and the Appellant stood up and "pulled a pistol out of his pocket." Merriweather "hollered" at him, and he put the pistol away. The victim initially ignored the Appellant, but later said, "you're not going to keep on disrespecting me. Get up and get out of my house."

The Appellant remained angry with the victim; however, he "went on out the door." Merriweather said the victim went to pick up the Appellant's child's diaper bag and "hollered" to the Appellant that he had left it. When the victim handed the Appellant the diaper bag, he shot her near her temple in the head. Merriweather was certain that the Appellant shot the victim because she saw his hand come through the door when the victim was shot. When the victim was shot, the door was open and the curtain had been pulled back. After the shooting, the victim fell to the ground, Merriweather was in shock, and another family member called an ambulance. The Appellant left and did not return to the house.

On cross-examination, defense counsel asked Merriweather had she received a phone call from the Appellant after the fatal shooting on the night of the offense, and the State objected based on hearsay. During a bench conference, defense counsel advised the trial court that he wanted to ask "what [the Appellant] said and what she included in her statement . . . that it was a question of did I hit mama. She says, yeah, then he said, I wasn't trying to." Defense counsel argued the first utterance was a question, not a statement under the hearsay rules, and the second utterance qualified as the Appellant's then-existing mental, emotional, or physical condition, an exception to the hearsay rule under Rule 803(3). The trial court sustained the State's objection and denied the Appellant his request to proffer the anticipated testimony. In excluding the statement under Rule 803(3), the trial court reasoned "this wasn't a statement made at the time of the alleged shooting. This was

a statement made apparently several hours later when she was riding in the car with the investigator and according to the statement, he called her on her cell phone and made some statements to her." In resuming her testimony, Merriweather agreed that the shooting occurred around 6 p.m., that she gave a statement to the police around 6:30 p.m., and that the Appellant called her sometime in between this timeframe.

Latoria Scott, Merriweather's daughter-in-law, testified that she met the victim and the Appellant for the first time on the day of the offense. She was at the victim's home that night along with other family members enjoying the evening until a derogatory comment was made about the Appellant's girlfriend. The Appellant did not like the comment, and "that's when everything seemed to go heated." The Appellant stood up and began to collect his belongings and his children. The victim had initially gone to a back room, but she returned and asked the Appellant to leave. Scott observed the Appellant with a gun behind his back while he was arguing with the victim. Scott told Merriweather about the gun, Merriweather told the Appellant to put it away, and the Appellant complied. Scott said the Appellant then "went out the door," came back, and asked for the diaper bag. Before the Appellant walked out the door, Scott heard him say, "'if you throw my bag, I'm going to do something.'" Scott said they found the diaper bag, and as the victim was handing it to the Appellant out the door, Scott heard "the pop" sound of the gunshot, observed the victim fall back, and watched the door close. While Scott did not observe the actual shooting, she saw the Appellant walk out the door. Scott gathered a young child, took her to a back room, and called 911.

Jackson Police Department (JPD) Officer Dan Long was involved with the investigation of the victim's death. He received information from a relative of the Appellant's that the Appellant went to the home of Roberta Stinson after the fatal shooting. Officer Long said the Stinson home was a short distance from the victim's home and, upon their arrival, Stinson was cooperative in the search of her home. Officers found a pair of coveralls, confirmed to be the same clothing worn by the Appellant on the day of the offense as previously identified by Merriweather, a pair of gloves, and a toboggan inside a white trash bag located inside of a can outside the home. The items were marked and admitted as evidence at trial. While a search for the firearm involved in the victim's death was conducted, no firearm was recovered in this case. Based on information officers obtained during the Appellant's subsequent interview, Officer Long believed the firearm had been thrown into a pond near Lane College. An extensive search around the college, including divers to search the nearby pond, was also unsuccessful in locating the firearm.

Aimee Oxley, the Director of Evidence and Forensic Services for the Jackson Police Department, testified regarding the chain of custody for the items recovered from the Stinson home. She specifically identified the coveralls recovered from the Stinson home, which had been sealed in a bag in the property room until they were opened at trial. The

coveralls were admitted into evidence. The coveralls were not submitted for further testing to the Tennessee Bureau of Investigation. Michael Byrd, an investigator with the JPD, testified that at the time of the offense, he was assisting the United States Marshals Task Force in locating the Appellant. In the late evening on the night of the offense, the Appellant was apprehended at 160 Tomlin Street. Investigator Byrd explained that upon their arrival at the home, officers called for the Appellant to come outside. The Appellant initially did not respond, and another adult male exited the home. When the Appellant ultimately exited the home, the Appellant had something in his hands, walked down the sidewalk, and sat down on the steps. After the Appellant failed to comply with repeated officer commands, Investigator Byrd utilized his Taser and a probe connected to the Appellant. The probe jolted the Appellant and the object in his hand "flung over to the right side[.]" The Appellant was then taken into custody. A search of the Appellant and the home did not reveal a firearm.

Dr. Thomas Deering, the Deputy Chief Medical Examiner for Metro Nashville, conducted the autopsy of the victim. He identified his report of the autopsy at trial, which was admitted as an exhibit. Based on his examination of the victim's fatal gunshot wound to the head, Dr. Deering opined it was a "distance" or "indeterminate" wound. This meant that if the weapon used was a handgun, then the weapon was within "at least two feet away" of the victim's wound. In other words, so long as there was no intervening target over the barrel of the gun, the end of the barrel of the gun was within 24 inches of the victim's head. He identified the bullet recovered from her head, which was admitted into evidence. Dr. Deering determined the cause of the victim's death to be a gunshot wound to the head and the manner of her death to be a homicide. The toxicology report revealed the victim also had a blood alcohol concentration of 0.181 and had recently ingested marijuana.

The State rested its case. The defense renewed its motion to make a proffer of evidence of the Appellant's phone conversation with his aunt, Annie Merriweather, which the trial court allowed him to do at the close of the defense proof. During the proffer, Merriweather testified that she rode with the police after the shooting and provided a statement around 6:30 p.m. On the way to the investigator's office, she received a phone call from the Appellant. The Appellant asked her, "Did my mama get hit?" To which, Merriweather replied, "you know she did." Merriweather said the Appellant did not respond to her. Upon being shown a copy of her March 5 statement, Merriweather agreed that she told police that the Appellant replied, "I'm going to turn myself in." She explained that she did not remember the Appellant saying, "I wasn't trying to."

In excluding the testimony, the trial court initially began its analysis by noting that the statement did not qualify as an excited utterance because it did not happen at the time of the shooting. In response, defense counsel clarified that the hearsay exception upon which he relied was under Rule 803(3), for the purpose of establishing the Appellant's then

existing state of mind. The trial court noted the testimony did not show anything about the Appellant's then existing state of mind; but instead, showed only that the Appellant asked the witness a question which was inadmissible hearsay.

The Appellant offered the following witnesses in his defense: Investigator Joseph Williams of the JPD and Kelsey Wood, the mother of his child and girlfriend at the time of the offense. Investigator Williams testified that he observed the Appellant on March 6, the day after the offense and after the Appellant had given an interview to the police. Investigator Williams said the Appellant was "on the parking lot smoking a cigarette" with another officer present. The Appellant appeared visibly upset, very emotional, and was crying. Investigator Williams noted his observations in a report and requested the Appellant to be placed on suicide watch in the jail.

Kelsey Wood testified and confirmed that she and the Appellant had been living with the victim at the time of the offense. She described the Appellant's relationship with his mother as "toxic." On the day of the offense, Wood drove the Appellant and the victim to Memphis to shop, and she drove them on their return trip home. The Appellant and the victim consumed alcohol on both trips, and the victim and Wood smoked marijuana. When Wood dropped them off at the victim's home, Wood did not go inside because she had to go to work. Wood testified that the Appellant was taking medication at the time of the offense. She explained that the Appellant was told by his doctor not to mix alcohol with his medication because it made him "delusional," but the Appellant did so anyway. Wood confirmed that the Appellant took the medication every three hours or so on the day of the offense.

Based in large part on the above testimony, the Appellant was convicted as charged of first-degree premeditated murder and tampering with evidence. Following a bifurcated hearing, the jury imposed a sentence of life imprisonment for the first-degree premeditated murder conviction. The trial court subsequently imposed a concurrent sentence of ten years for the tampering with evidence conviction. The Appellant filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

I. Denial of expert funding. Prior to trial, the Appellant filed an ex parte motion seeking funding for the services of Dr. Keith Caruso demonstrating, according to the Appellant, a particularized need for Dr. Caruso's services to defend against the State's assertion that the Appellant killed his mother with premeditation and intent. In his brief, the Appellant asserts the trial court denied the motion to obtain expert services without holding a hearing and without providing any rationale for its decision. In response, the State contends the Appellant has waived this claim on two grounds. First, to the extent that

the Appellant argues he was not provided an ex parte hearing, the State argues this issue is waived because it was not raised or addressed in the motion for new trial. Second, the State argues the language in the order of the trial court denying relief established that an ex parte hearing was in fact conducted on April 29, 2021, and the Appellant has failed to include in the appellate record a transcript of the hearing, a statement of the evidence, or an explanation as to what transpired on that day. Alternatively, the State submits that a review on the merits of the issue shows the trial court properly denied expert services because the educational records assessed "the Appellant's IQ at 84 or 85, but specifically ruled out [intellectual disability]."[2]

In review of this issue, we are guided by the following law. "When a State brings its judicial power to bear against an indigent defendant in a criminal proceeding, it must take steps to insure that the accused has a fair opportunity to present his defense." State v. Barnett, 909 S.W.2d 423, 426 (Tenn. 1995) (citing Ake v. Oklahoma, 470 U.S. 68, 76 (1985)). This principle of law is grounded in the Fourteenth Amendment's due process guarantee of fundamental fairness and "derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." Id. While a State need not provide an indigent defendant with all the assistance his wealthier counterpart might buy, the Court stressed that fundamental fairness requires a State to provide an indigent defendant with the "'basic tools of an adequate defense or appeal.'" Id. (citing Ake, 470 U.S. at 77 and quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

As a threshold matter, in order to obtain an ex parte hearing, an indigent defendant must, in a written sealed motion to the trial court, allege particular facts and circumstances that raise the question of the defendant's sanity. Barnett, 909 S.W.2d at 429-30. As to form, the motion should conform to Tenn. Sup. Ct. Rule 13 § (2)(B)(10). A bare allegation that sanity will be a significant factor at trial is not sufficient. An ex parte hearing, in which the defendant is afforded an opportunity to establish particularized need, should be granted if these procedural criteria are satisfied. A state-funded psychiatric expert is required under the following circumstances:

> [B]efore an indigent defendant is entitled to the assistance of a state-funded psychiatric expert, the defendant must make a threshold showing of particularized need. To establish particularized need, the defendant must show that a psychiatric expert is necessary to protect his right to a fair trial. Unsupported assertions that a psychiatric expert is necessary to counter the

[2] Mental retardation and "intellectual disability" are interchangeable terms and intellectual disability is the preferred term. Coleman v. State, 341 S.W.3d 221, 227 n.5 (Tenn. 2011). Where the parties or documents have referred to mental retardation, we have used the term intellectual disability.

> State's proof are not sufficient. The defendant must demonstrate by reference to the facts and circumstances of his particular case that appointment of a psychiatric expert is necessary to insure a fair trial. Whether or not a defendant has made the threshold showing is to be determined on a case-by-case basis, and in determining whether a particularized need has been established, a trial court should consider all facts and circumstances known to it at the time the motion for expert assistance is made.

Id. at 431; Ruff v. State, 978 S.W.2d 95, 101 (Tenn. 1998).

In addition, Tennessee Supreme Court Rule 13, section 5(a)(1) provides the procedure for courts to apply when determining whether state funds for expert services should be permitted and states:

> In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel, in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, and in juvenile transfer proceedings, the court, in an ex parte hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

"Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services . . ." Tenn. Sup. Ct. R. 13 § 5(c)(1). In criminal cases, a particularized need "is established when a defendant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial." Id. § 5(c)(2) (citing Barnett, 909 S.W.2d at 423). Similarly, the Tennessee Supreme Court adopted a two-pronged test to determine whether a defendant has established a "particularized need" for expert services: "(1) the defendant must show that he or she 'will be deprived of a fair trial without the expert assistance'; and (2) the defendant must show that 'there is a reasonable likelihood that [the assistance] will materially assist [him or her] in the preparation of [the] case.'" State v. Scott, 33 S.W.3d at 753 (quoting Barnett, 909 S.W.2d at 430). Tennessee Supreme Court Rule 13 section 5(c)(4) also states that particularized need "cannot be established and funding requests should be denied" in the event that the motion contains only:

> (A) undeveloped or conclusory assertions that such services would be beneficial;

(B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;
(C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or
(D) information indicating that the requested services fall within the capability and expertise of appointed counsel.

Tenn. S. Ct. R. 13 § 5(c)(4).

A trial court's denial of expert services will not be reversed on appeal absent a showing that the trial court abused its discretion. State v. Scott, 33 S.W.3d 746, 752 (Tenn. 2000); State v. Barnett, 909 S.W.2d at 431. The trial court abuses its discretion by applying an incorrect legal standard or reaching a decision which is against logic or reasoning, and which causes an injustice to the complaining party. Id. When the trial court commits an abuse of discretion in denying expert assistance and this denial amounts to a violation of due process, the error is analyzed under the constitutional harmless error standard to determine whether the error complained of was harmless beyond a reasonable doubt. Id. at 755.

Here, the record shows that the Appellant filed a motion entitled, "Ex Parte Motion for Expert Services" with a stamp file date of May 4, 2021. We note at the outset that the trial court order denying expert services, as detailed more fully below, provides a different file date of April 29, 2021, for the Appellant's motion. Additionally, in response to the State's waiver argument and after submission of briefs in this case, appellate counsel sought and was granted permission to supplement the record with the trial court's "rule docket" containing the minutes entry for each filing in this case. Appellate counsel submitted an affidavit averring that given the lack of any minute entry designating a hearing on expert services, trial counsel's accompanying statement that no ex parte hearing ever occurred in this case, and the court clerk's accompanying statement that the trial court "never" conducts such hearings, waiver does not apply because the Appellant cannot provide a transcript for a hearing that did not occur.

The record additionally shows that the Appellant's motion for expert services specifically requested entry of an ex parte order authorizing the services of Dr. Caruso and alleged a particularized need based on the Appellant's "learning disabilities" and "enroll[ment] in resource classes" in school. The motion further alleged that the Appellant had been a patient at a local mental health clinic due to his various mental health issues, including alcohol dependence, personality disorder, and intellectual disability. The motion did not request an ex parte hearing. Instead, attached to the motion were the following: an affidavit and curriculum vitae of Dr. Caruso; a memorandum from Lauren Hanks detailing her review of the Appellant's Jackson-Madison County School System Records as well as

several pages of actual school records; a page with a handwritten notation of "left blank intentionally"; a memorandum from Lauren Hanks detailing a review of records for the Appellant from Pathways of Tennessee as well as actual progress report pages of the Appellant's treatment at Pathways.

On the same day as the stamp file date on the motion for expert services, May 4, 2021, an order entitled "Order Denying Ex Parte Motion for Expert Services of Dr. Keith Caruso" was filed by the trial court and stated as follows:

> This cause came on to be heard on [April 29, 2021], via motion of the defendant for a psychiatric evaluation to be performed by Dr. Keith Caruso. At the conclusion of this ex parte hearing, this Court found that a particularized need for these services of Dr. Keith Caruso does not exist based upon the evidence relied upon by [the Appellant] which includes his past records from the Jackson-Madison County School System and mental health records from Pathways of Tennessee. (Emphasis in original). [Appellant's] motion and exhibits are hereby incorporated by reference as part of this order.

Our review of the rule docket report for the proceedings in the trial court did not contain a minute entry for April 29, 2021. In fact, there is no entry at all for this date. In his motion for new trial, the Appellant argued in a single sentence that the trial court erred in denying the Appellant's request for expert services, and he did not elaborate further at the hearing on the motion for new trial. In denying this issue at the motion for new trial, the trial court stated that the Appellant "never showed [the court] anything that indicated that [the Appellant] had any type of mental health issues or anything that would even justify a mental health evaluation." When defense counsel responded that he submitted the materials attached to his ex parte motion, the trial court stated, "I've reviewed everything you submitted. There wasn't anything to me that indicated there was any issues concerning his mental health at the time [of the] alleged[] act." The trial court concluded that "there wasn't any reason to grant his services because there wasn't anything to substantiate that he had . . . or suffered from any type of mental health disability."

At the crux of this issue is whether an ex parte hearing was conducted. We are certainly perplexed by the inconsistent file dates for the Appellant's motion, the lack of a minute entry reflecting an ex parte hearing, and the language in the order of the trial court denying relief stating that a such a hearing occurred. With respect to these concerns, we note that the ex parte nature of the proceeding is for the purpose of allowing a defendant to disclose aspects of his defense fully and freely without the presence of the State as the adversary. It does not mean that the hearing is "off the record" or otherwise not transcribed. This is to facilitate meaningful appellate review and avoid situations like the case before

us. Nevertheless, the record clearly shows the Appellant did not request an ex parte hearing in his motion for expert services. The Appellant also did not preserve as an issue in his motion for new trial the trial court's denial of or refusal to hold an ex parte hearing. This means that even if there was error in the failure of the trial court to conduct an ex parte hearing, the Appellant deprived the trial court of an opportunity to correct it. Accordingly, we are inclined to agree with the State and conclude that this issue is waived. Tenn. R. App. P. 3(e) (noting that no issue presented for review shall be predicated upon error . . . [or] other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived"); State v. Keel, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) (footnote omitted).

Waiver notwithstanding, the threshold issue of the denial of an ex parte hearing is of no consequence when the defendant fails to show a particularized need for the expert service. Ruff v. State, 978 S.W.2d at 101 n.9 (finding that the preliminary issue of denial of an ex parte hearing was of no consequence where the defendant failed to show a particularized need for a psychiatric expert). Here, we acknowledge that the Appellant has the duty to "have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal[,]" which he failed to do. Tenn. R. App. P. 24(b). In the absence of an adequate record, we presume that the trial court's judgments are correct. State v. Richardson, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993). However, if the record provides an adequate basis for review, this court may reach the merits of an issue with the presumption that the missing part of the record would support the trial court's decision. See State v. Jones, 568 S.W.3d 101, 137 (Tenn. 2019), cert. denied, 140 S. Ct. 262 (2019) (noting that the defendant had failed to include a transcript of the ex parte hearing on expert funding but holding that, on the basis of the record provided, the defendant had not established particularized need); State v. Caudle, 388 S.W.3d 273, 279 (Tenn. 2012); State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (concluding that, in the absence of an order denying expert assistance and in the absence of any indication regarding whether an ex parte hearing took place, "[t]he record does not support the defendant's claim of error"). In this case, the Appellant's motion, the attachments to the motion, and the reasoning articulated by the trial court at the motion for new trial hearing provide this court with an adequate record to reach the issue on the merits.

Defense counsel argued in the ex parte motion that the expert would assist him in conducting a clinical interview or forensic evaluation of the Appellant and that other testing may be required. The motion further alleged "a particularized need for expert services" because the Appellant "suffered from learning disabilities and was enrolled in 'resource' classes" while in school and the Appellant was "a patient at Pathways, which is a local mental health clinic due to his various me[n]tal health issues including alcohol dependence,

personality disorders, and [intellectual disability]." The affidavit of Dr. Caruso, attached to the motion and relied heavily upon by the Appellant on appeal, states, in relevant part, that Dr. Caruso had been in contact with defense counsel regarding the need for forensic psychiatric evaluation of the Appellant. Based on his discussions with defense counsel, Dr. Caruso stated (1) educational and mental health records indicate that the Appellant has a history of intellectual disability that may have rendered the Appellant unable to appreciate the wrongfulness of his actions in accordance with the criteria listed in Tenn. Code Ann. section 39-11-501; (2) even if the Appellant was not insane at the time of the alleged offense, his severe mental defect may have prevented him from forming the requisite mens rea for the alleged offense in accordance with the criteria listed in State v. Hall, 958 S.W.2d 679, 690 (Tenn. 1997); and (3) there is also a significant concern that the Appellant's intellectual disability may prevent him from understanding the charges against him and the possible consequence of those charges and to cooperate intelligently with his attorney in accordance with State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000).

The school records attached to the motion show the school system's attempt to develop an individualized education plan for the Appellant. In August 1999, the Appellant had been enrolled in two resource classes and six regular education classes. He was performing below grade level in language arts, math, and prevocational classes. In September 1999, the school system determined that the Appellant would not go through a formal re-evaluation process and that he "still qualified for SE Services and his needs could not be met in the regular classroom." In October 1999, the Appellant was certified as learning disabled and enrolled in special education classes. The report included prior IQ test scores from 1993 and 1995, which showed the Appellant's full IQ score as 85 and 84 respectively. The "areas of discrepancy" were mathematic reasoning, basic reading, and reading comprehension. The assessment "ruled out" "physical/sensory handicaps, [intellectual disability], emotional disturbance, [and] inappropriate/insufficient teaching" as the primary cause of the Appellant's impairment. In another October 1999 assessment to consider "a manifestation determination based upon [the Appellant's] disability prior to a disciplinary action/hearing," school officials determined that the Appellant's alleged behavior was not a manifestation of the Appellant's learning disability.

The Pathways records attached to the motion appear to show that the Appellant received intensive outpatient treatment from January 2015 to May 2015, due to his alcohol or chemical dependence. The Appellant was required to report to the program three times a week for two-hour group therapy or treatment sessions. The records included "group progress reports" of the Appellant's participation in the treatment program. The records show the Appellant successfully completed the treatment. However, on February 20, 2019, records show the Appellant self-reported to the Pathways community mental health center and presented at "triage due to his alcohol abuse." The report reflected that the Appellant had been drinking since the age of 13, that the Appellant had been drinking daily a half

pint of vodka in the morning, two 40 ounces of beer during the day, and another half pint of vodka at night. The Appellant denied any depression but reported having tremors for the last two months. Intake officials noted that the Appellant did not appear to be responding to internal stimuli, and he did not appear with any psychotic features. The report also noted that the Appellant did not have any homicidal ideation and was negative for the threatening behavior assessment. There was also no evidence of intellectual or developmental disability or medication adherence issues. The Appellant was not admitted as an in-patient. He was assessed and a safety plan established because he wanted to see how his new medication would work. In a follow-up call on February 22, the Appellant reported that his medication was helping and that he was not drinking alcohol at the time.

Upon our review, we conclude that the trial court did not abuse its discretion in denying the Appellant funding for expert services. The affidavit of Dr. Caruso was based on his conversation with trial counsel and not a review of the records submitted to the trial court. The school records specifically ruled out the possibility of intellectual disability as a cause for the Appellant's learning disability and further included IQ scores of 84 and 85. The Pathways report showed only that the Appellant had a chemical dependency on alcohol that was not physiological, and that the Appellant successfully completed an intensive outpatient treatment program with one relapse almost four years later. Given this proof, we conclude that the Appellant provided only unsupported assertions that a mental health expert might have been of assistance in his case. He also failed to show that testimony from his requested expert was necessary in order to receive a fair trial. See State v. Wade P. Tucker, No. M2004-02792-CCA-R3-PC, 2005 WL 3132387, at *9 (Tenn. Crim. App. Nov. 22, 2005), perm. app. denied (Tenn. May 30, 2006) (concluding that because the defendant "provided only unsupported assertions that independent scientific experts may have been helpful to his case[,]" he "failed to demonstrate that independent expert testimony was 'necessary' to insure he received a fair trial."); State v. David Edward Niles, No. M2011-01412-CCA-R3-CD, 2012 WL 1965438, at *15-17 (Tenn. Crim. App. June 1, 2012), perm. app. denied (Tenn. Oct. 17, 2012). Accordingly, the Appellant is not entitled to relief on this issue.

II. Admissibility of Phone Call Conversation. The Appellant next argues the trial court erred in excluding the Appellant's phone conversation with his aunt, Annie Merriweather. Specifically, the Appellant submits the utterance, "Did I hit my mama?" was a question posed to his aunt and, therefore, not barred by the hearsay rule. When his aunt replied, "you know you did[,]" the Appellant further claims that his responses, "I wasn't trying to" and "I'm going to turn myself in," were admissible hearsay as these statements spoke to the Appellant's then-existing mental, emotional, or physical condition pursuant to Rule 803(3), and also qualified as an excited utterance pursuant to Rule 803(2). The State submits the trial court properly excluded each of the above out-of-court statements made by the Appellant as inadmissible hearsay.

Generally, hearsay is not admissible during a trial, unless the statement falls under one of the exceptions to the rule against hearsay. Tenn. R. Evid. 802. Whether a statement fits under one of the exceptions to the hearsay rule is a question of law subject to de novo review by this court. Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Accordingly, as a threshold matter, the Appellant must show that the evidence he sought to admit regarding his first utterance was not a "statement." A statement is defined as "an oral or written assertion[.]" Tenn. R. Evid. 801(a). Although an assertion made in words is undoubtedly intended by the declarant to be an assertion, not all verbal utterances are readily ascertainable as assertions, such as the case now before this court. See State v. Land, 34 S.W.3d 516, 525-26 (Tenn. Crim. App. 2000). "An out of court utterance must have two characteristics before it is rendered inadmissible as hearsay: It must be a 'statement'—that is a verbal assertion or conduct intended as an assertion, and it must be offered to probe the truth of the matter it asserts." Id. at 526 n.4 (internal citations omitted). In other words, an utterance must, in order to be an assertion, be offered with the intent to state that some factual proposition is true. State v. Brown, 373 S.W.3d 565, 572 (Tenn. Crim. App. 2011) (quoting Land, 34 S.W.3d at 526)) (noting that the defendant's question was actually an assertion offered for the truth of the matter asserted but ultimately concluding that the question was admissible because it was an admission by a party opponent); State v. Flood, 219 S.W.3d 307, 314-15 n.5 (Tenn. 2007) (recognizing that questions are not hearsay if they are "not offered to prove the truth of their content").

A question is typically not hearsay because it does not assert the truth or falsity of a fact. United States v. Wright, 343 F.3d 849, 865-66 (6th Cir. 2003) (noting that a question merely seeks answers and usually has no factual content and that it is an inquiry, not an assertion). However, in Tennessee, when an utterance is offered on the theory that it is not a statement, and hence, not hearsay, a preliminary determination is required to determine whether an assertion is intended. State v. Land, 34 S.W.3d at 526 (quoting Advisory Committee's Note, Fed. R. Evid. 801(a)); United States v. Summers, 414 F.3d 1287, 1300 (10th Cir. 2005) (holding that co-defendant's intent to make an assertion was apparent from the record and that his question directed to police officers on the scene constituted hearsay for purposes of Rule 802). The extent to which an utterance may or may not contain an implied assertion for hearsay purposes depends on the nature of the utterance and the circumstances surrounding it. Land, 34 S.W.3d at 526. The reason for requiring that an utterance be intended as an assertion is that when a speaker does not intend to communicate anything, his or her sincerity is not in question and the need for cross-examination to test perception, memory, and narration is much diminished. United States v. Long, 905 F.2d 1572, 1580 (D.C. Cir.1990).

The first out of court utterance at issue in this case is, "Did I hit my mama?" During trial, the Appellant argued that this utterance was a question, not an assertion, and therefore admissible. As to this issue, the trial court sustained the State's objection without elaboration. There was no preliminary determination as to whether the question contained an assertion and was thus a statement under Rule 801(c). In his brief, the Appellant argues that the phrasing of the question did not indicate that he intended to make an assertion. However, upon our de novo review of the utterance and the circumstances surrounding it, we disagree. Merriweather's response, "you know you did," is certainly proof that she believed the question was disingenuous and that the Appellant intended to make an implied assertion. Based on her response, the Appellant knew that he had shot his mother, and he was not intending to illicit an answer to his question. Rather, the Appellant intended to impliedly assert that he shot *at* his mother on the night of the offense and that he was unaware his gunfire had struck his mother. Additionally, under the hearsay rule, the evidentiary purpose of the proffered testimony cannot be for the truth of the matter asserted. Here, there can be no doubt that the Appellant was soliciting this testimony for the truth of the matter asserted—that he did not know he shot the victim thereby attempting to negate his intent. The Appellant did not offer any other purpose for this testimony at trial or on appeal. To allow such testimony would run afoul of the principal goal of the hearsay rule to exclude declarations when their veracity cannot be tested through cross-examination. United States v. Long, 905 F.2d at 1580. Accordingly, we conclude that the testimony was properly excluded as inadmissible hearsay, and the trial court did not err in sustaining the State's objection on this ground.

Next, the Appellant contends that the second statement, "I wasn't trying to," was admissible under both Rule 803(3) as evidence of his then-existing state of mind and Rule 803(2) as an excited utterance. The Appellant further asserts that the latter part of the second statement, "I will turn myself in," was also admissible under Rule 803(3) to establish his present intent and plan. Rule 803(2) of the Tennessee Rules of Evidence is an exception to the hearsay rule and applies to statements, "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." For a statement to fall within this exception, three criteria must be met: (1) there must be a startling event or condition that causes the stress of excitement; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant was under the stress of excitement. State v. Ramos, 331 S.W.3d 408, 415 (Tenn. Crim. App. 2010) (internal citations omitted). Rule 803(3) of the Tennessee Rules of Evidence 803(3) provides for the admission of "[a] statement of the declarant's then existing state of mind, emotion . . . (such as intent, plan, motive, design, mental feeling, pain, and bodily health) but not . . . a statement of memory or belief to prove the fact remembered or believed[.]" We are not convinced that the Appellant's statements were admissible under either exception. We agree that neither statement can be considered as an excited utterance because they were given at least a half an hour after the fatal

shooting occurred. We also conclude that neither statement is admissible as evidence of the Appellant's then-existing state of mind because they were clearly self-serving. State v. Wilson, 164 S.W.3d 355, 365 (Tenn. Crim. App. 2003). There is a general policy excluding such self-serving statements:

> "A declaration made by a defendant in his own favor [with certain exceptions], is not admissible for the defense. A self-serving declaration is excluded because there is nothing to guarantee its testimonial trustworthiness. If such evidence were admissible, the door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence."

Hall v. State, 552 S.W.2d 417, 418 (Tenn. Crim. App. 1977) (quoting Wharton, Criminal Evidence, § 303 (13th ed.)); see also State v. Wiseman, 643 S.W.2d 354, 366 (Tenn. Crim. App. 1982). Accordingly, the Appellant is not entitled to relief as to this issue.

III. Cumulative Error. The Appellant next argues the trial court's decisions to deny expert funding and exclude the Appellant's statements require reversal under the cumulative error doctrine. "To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings." State v. Hester, 324 S.W.3d 1, 77 (Tenn. 2010). We have concluded that there was no error in the trial court's determinations; accordingly, the cumulative error doctrine does not apply.

IV. Election. Finally, the Appellant argues the trial court erred in not requiring the State to elect which item—the coveralls worn by the Appellant, or the gun used to commit the offense—upon which it was relying in its prosecution of tampering with evidence. The Appellant contends the State was required to elect which theory it intended to rely upon at trial. In response, the State contends this issue is waived because the Appellant failed to object to the lack of a formal election at the motion for judgment of acquittal or closing, and the Appellant did not lodge an objection when the trial court discussed the jury instructions or charged the jury. The State nevertheless asserts the Appellant is not entitled to plain error relief because tampering with evidence is a continuing offense which does not implicate the election doctrine.

Tennessee Code Annotated section 39-16-503(a)(1) defines the offense of tampering with evidence as follows:

> (a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to:

> (1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding . . .

The indictment tracked the language of the statute and alleged that the Appellant "knowing that an investigation or official proceeding was pending and in progress, did alter, destroy, or conceal any record, document, or thing with the intent to impair its verity, legibility, or availability as evidence in an investigation." The State argued in closing that the Appellant tampered with the coveralls by concealing them in a bag in a can outside the Stinson home as well as by disposing of the gun at an unknown location near or in a lake. The trial court provided the jury with the pattern jury instruction for tampering with evidence and a general unanimity charge. The record shows that the Appellant did not move for a bill of particulars to determine what evidence would be the subject of the tampering with evidence charge, he did not include this issue as grounds in his motion for judgment of acquittal, and he did not request the jury to be instructed as to this issue. See Tenn. R. App. P. 36 (a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Accordingly, we are inclined to agree with the State and conclude that this issue is waived absent plain error.

The plain error doctrine "has long been recognized as a necessary exception . . . which affords appellate courts discretion to review unpreserved errors and grant relief when fairness and justice demand." State v. Reynolds, 635 S.W.3d 893, 931 (Tenn. 2021) (quoting State v. Minor, 546 S.W.3d 59, 65 (Tenn. 2018)). The doctrine permits appellate courts to consider issues that were not raised properly in the trial court. See Tenn. R. App. P. 36(b) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal."). In order for this court to find plain error,

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

State v. Michael Smith, 492 S.W.3d 224, 232-33 (Tenn. 2016); State v. Donald Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "It is the accused's burden to persuade an appellate court that the trial court committed plain error." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing

U.S. v. Olano, 507 U.S. 725, 734 (1993)). "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283. Whether the elements of the plain error doctrine have been satisfied is a question of law. State v. Knowles, 470 S.W.3d 416, 423 (Tenn. 2015). "Because the election requirement safeguards a criminal defendant's fundamental, constitutional right to a unanimous jury verdict, errors pertaining to the sufficiency of the prosecution's election are subject to plain error review." State v. Knowles, 470 S.W.3d 416, 424 (Tenn. 2015) (citing Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1975)). "When applying plain error review," in the context of a challenge to the State's election of offenses, the reviewing court "must bear in mind that the election requirement is merely a means by which to protect the right to a unanimous verdict." Knowles, 470 S.W.3d at 424. Importantly, "the election requirement applies to offenses, not to the facts supporting each element of the offense." Id. We evaluate the Appellant's claims of error with these principles in mind.

On appeal, the Appellant did not respond to the State's waiver argument and did not subject this issue to plain error analysis. At the motion for new trial hearing, the trial court rejected this issue reasoning, consistent with the State's theory, that tampering with evidence is a continuing offense because the hat, coveralls, gloves, and the gun were all items or things the Appellant either concealed or disposed of in this case. The Appellant insists that the concealment of the coveralls and the gun constitute two discrete acts, and therefore, the trial court should have compelled the State to elect upon which theory it chose to proceed. The Appellant further argues that the tampering statute "precludes the possibility that tampering with multiple items can support a single conviction" because the word "thing" is defined as an object, which necessarily refers to a singular item. The Appellant asserts there is a possibility that some jurors convicted the Appellant based on the belief that he concealed the coveralls while others on the belief that he concealed the gun, resulting in a patchwork verdict the election doctrine was designed to prevent.

The right to a jury trial, which is protected by both the Tennessee and United States Constitutions, also requires that a jury's verdict be unanimous. Tenn. Const. art. I, § 6; U.S. Const. amend. VI, XIV; see State v. Kendrick, 38 S.W.3d 566, 568 (Tenn. 2001); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020). In other words, all twelve jurors must unanimously agree that the defendant committed the particular criminal act charged before returning a verdict of conviction. Kendrick, 38 S.W.3d at 568. A defendant's right to a unanimous verdict has been described as "fundamental, immediately touching the constitutional rights of an accused . . ." Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973). The duty to ensure unanimity exists on the part of the trial court even in the absence of a specific request by the defendant. Burlison, 501 S.W.2d at 804. "When the [S]tate presents proof [of] many offenses within an alleged time period, but neglects election, the

jury is essentially permitted to 'reach into the brimming bag of offenses and pull out one for each count." Tidwell v. State, 922 S.W.2d 497, 501 (Tenn. 1996). Conversely, when the evidence shows multiple acts of the defendant that constitute a single, continuing offense, however, election is not required. State v. Adams, 24 S.W.3d 289, 294 (Tenn. 2000). "An offense may be considered a continuing offense only when 'the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the legislature] must assuredly have intended that it be treated as a continuing one.'" State v. Legg, 9 S.W.3d 111, 116 (Tenn.1999) (quoting Toussie v. United States, 397 U.S. 112, 115 (1970)). The right of jury unanimity has never required more than a general verdict in cases where only one offense is at issue based upon a single criminal occurrence. State v. Lemacks, 996 S.W.2d 166, 171 (Tenn. 1999).

The election doctrine "assists the defendant in preparing for and defending against the specific charge, protects the defendant from double-jeopardy concerns, 'enables the trial judge to review the weight of evidence in its role as thirteenth juror[, and] enables an appellate court to review the legal sufficiency of the evidence.'" Qualls, 482 S.W.3d at 10 (quoting State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999)). However, the most significant purpose served by the election doctrine is to "ensure that the jurors deliberate over and render a verdict based on the same offense[.]" Brown, 992 S.W.2d at 391; see Shelton, 851 S.W.2d at 138 ("[T]he purpose of election is to ensure that each juror is considering the same occurrence."). "[E]lection errors are subject to a constitutional harmless error analysis." State v. Smith, 492 S.W.3d 224, 236 (Tenn. 2016). "[N]on-structural constitutional error requires reversal unless the State demonstrates beyond a reasonable doubt that the error is harmless." State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008) (emphasis added). "The test used to determine whether a non-structural constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (citations and internal quotation marks omitted).

In State v. Majors, 318 S.W.3d 850 (Tenn. 2010), the Tennessee Supreme Court applied a "broad, generic construction" to the word "thing" as it is used in Code section 39-16-503(a)(1). Majors, 318 S.W.3d at 859; State v. Hawkins, 406 S.W.3d 121, 132 (Tenn. 2013). The court held that "thing," as used in this statute, refers to "an object or entity not precisely designated and perhaps not even capable of being designated." Majors, 318 S.W.3d at 860. In addition, there is no requirement that the State "identify exactly what 'thing' was tampered with." Id. at 859. As a result, "the State must show only that the defendant, aware of an imminent police investigation, chose to '[a]lter, destroy, or conceal' something with the intent to deprive the police of its use as evidence in that investigation." State v. Harvell, 415 S.W.3d 853, 861-62 (Tenn. Crim. App. 2010) (quoting Tenn. Code Ann. § 39-16-503(a)(1)). "It does not matter for purposes of the statute whether the substance at issue was an illegal narcotic, a legal chemical precursor to

such a narcotic, the ashes of burned currency or counterfeit currency, or, for that matter, mere flour or baking soda." Id. at 862. Tennessee courts have yet to address the question of whether tampering with evidence constitutes a continuing offense, and we decline the State's invitation for us to do so here given the limited nature of our review and the parties' limited briefing on the issue. Based on our review of the record, we are satisfied that the Appellant's right to a unanimous jury verdict is not implicated in this case because the State charged only one offense and offered proof of only one offense—tampering with evidence. State v. Adams, 24 S.W.3d at 297 (citing Lemacks, 996 S.W.2d at 170; State v. Cribbs, 967 S.W.2d 773, 787 (Tenn.1998)) (noting that "[o]ur cases have not required that a jury unanimously agree as to facts supporting a particular element of a crime so long as the jury agrees that the appellant is guilty of the crime charged"); State v. Frank Green, No. M2021-01438-CCA-R3-CD, 2023 WL 2663102, at *12 (Tenn. Crim. App. Mar. 28, 2023) (discussing election doctrine and difference between cases involving single incident with one criminal offense at issue and cases involving multiple incidents and alternative modes of commission). Because the Appellant has not shown that a substantial right was adversely affected, he is not entitled to plain error relief.

CONCLUSION

Based on the above reasoning and authority, we affirm the judgments of the trial court.

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CAMILLE R. MCMULLEN, JUDGE