

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

KRISTINA COLIS (APPELLANT) v. STATE OF TENNESSEE (APPELLEE)

Shelby County Criminal Court

No. 17-01568

No. W2020-01607-CCA-R3-PC

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Did trial counsel provide ineffective assistance by failing to prepare a strategy based on her own review of the evidence?
  
- II. Did trial counsel provide ineffective assistance by failing to object to comments on Petitioner's exercise of her Fifth Amendment rights?
  
- III. Did trial counsel provide ineffective assistance by failing to object to improper closing argument by the state?

## STATEMENT OF THE CASE

Kristina Cole was indicted by the Shelby County Grand Jury on March 30, 2017 on four charges relating to possession of methamphetamine. Archived Record in *State v. Kristina Cole and Montez Mullins*, No. W2017-01980-SC-R3-CD, Vol. 1, pp. 1-5 (hereinafter "A.R.").<sup>1</sup> On July 14, 2017, a Shelby County jury found Ms. Cole guilty of four Class A Felonies: two counts of Conspiracy to Commit Unlawful Possession of Methamphetamine in a Drug Free Zone and two counts of Possession of Methamphetamine with Intent to Sell in a Drug Free Zone. A.R. Vol. 1, p. 12. On August 25, 2017 Judge Robert Carter sentenced Ms. Cole to 13.5 years in the Tennessee Department of Corrections. A.R. Vol. 1, p. 17. Ms. Cole's convictions were affirmed on appeal and on March 28, 2019, the Tennessee Supreme Court denied Ms. Cole's application for permission to appeal. *State v. Kristina Cole and Montez Mullins*, No. W2017-01980-SC-R3-CD (Tenn. Crim. App. Nov. 5, 2018), 2018 WL 5810011, *perm. app. denied* (Tenn. Mar. 28, 2019).

On July 9, 2019, Ms. Cole filed a timely *pro se* petition for post-conviction relief. **1; 24-32**.<sup>2</sup> On August 26, 2019, attorney Ben Israel (hereinafter "post-conviction counsel") was appointed to represent Ms. Cole.

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<sup>1</sup> Petitioner respectfully requests that this Court take judicial notice of this particular archived record.

<sup>2</sup> The number preceding the semi-colon represents the volume number of the post-conviction record, and the number following the semi-colon represents the page number within that particular volume.

**1; 33.** On January 7, 2020, post-conviction counsel filed an amended petition for post-conviction relief. **1; 35-50.** A post-conviction hearing was conducted on February 21, 2020 and August 27, 2020. **Vols. 2-3.**

On November 6, 2020, the post-conviction court entered a written order denying Ms. Cole's petition for post-conviction relief. **1; 62-65.** On November 6, 2020, post-conviction counsel was appointed to represent Ms. Cole on appeal. **1; 66.** On November 13, 2020, notice of appeal was timely filed. **1; 71-72.**

## **STATEMENT OF THE FACTS**

### **I. PROOF AT TRIAL**

The facts of Ms. Cole's trial are set forth in State v. Kristina Cole and Montez Mullins, No. W2017-01980-SC-R3-CD (Tenn. Crim. App. Nov. 5, 2018), 2018 WL 5810011, *perm. app. denied* (Tenn. Mar. 28, 2019), which has been attached to this brief as Exhibit "A."

In its opinion denying Ms. Cole's direct appeal, the Court of Criminal Appeals stated a critical fact in a footnote. The opinion states "[o]n February 3, 2016, Defendant Cole sent the following text messages to [Jason White]: 'Package arrived'; 'They put the wrong street name. Lucky they knew what it was suppose[d] to be'; and 'What do you want me to do with it?'" State v. Kristina Cole and Montez Mullins at \*3. These messages *were* sent from Ms. Cole's phone. However, at least one of the messages was sent by Detective Gaia. Id. at \*3, FN7.

In addition to the facts contained in the Criminal Court of Appeals' opinion, the following events occurred in trial.

Detective Gaia testified that police entered Ms. Cole's home at *approximately* 3:40 PM. V, 138. The texts from Ms. Cole's phone confirming that the package had arrived were sent at 3:38:45, 3:39:28, and 4:27:18. A.R. Vol. 3, Exhibit 31, p. 33, texts 813-815.

Also, the State introduced photos of a web-browser history showing visits to FedEx's website to track the package that contained

methamphetamine, but omitting the portion of the screen that showed what time the website was accessed. A.R. Vol. 2, Exhibit 13.

The full SMS histories, call logs, and contact lists of several phones found in Ms. Cole's home were admitted as exhibits. A.R. Vol. 2, Exhibits 21-32. In addition, Detective Gaia read numerous selected texts aloud to the jury. App. Vol. 5, pp. 107, 112-115, 117-119, 121-125.

Many of the text messages that Detective Gaia read to the jury related to prepaid credit cards. A.R. 5, pp. 115, 117, 118, 122, 123. The full SMS histories included numerous text conversations in which Ms. Cole gave information and direct assistance to several correspondents about how to purchase and put money on prepaid cards. See A.R. Vol.5, pp. 90-91, 115, 117-118. The State contended that these conversations showed that Ms. Cole was acting as a bookkeeper for a gang called the "Junk Yard Dogs." **4; 55**. Yet, Detective Gaia conceded that nothing in his investigation connected the texts about the prepaid cards to the delivery of methamphetamine. A.R. Vol. 5, p. 137.

## **II. POST-CONVICTION HEARING**

**Kortney Simmons** (hereinafter "trial counsel") testified that she had been practicing law for nine years at the time of the post-conviction hearing. **2; 14**. Trial counsel was retained to represent Ms. Cole. See **2; 15**.

Trial counsel designed her defense strategy based on Ms. Cole's preferences about how the case should be presented to the jury. **2; 15-16**.

Trial counsel further testified that she never considered arguing that Ms. Cole did not know that the package was being sent to her. **2; 24.**

Prior to trial, Ms. Cole's co-defendant made a statement to a detective providing an explanation of the evidence that – if believed – would have exculpated Ms. Cole. The co-defendant, Montez Mullins claimed that he had convinced Ms. Cole to accept delivery of the package and that he had lied to her about the contents. A.R. 3, Exhibit 36. Trial counsel "thought that [Mr. Mullins' statement] was a little farfetched." **2; 15.** However, Ms. Cole felt that Mr. Mullins' statement would exonerate her, so trial counsel agreed to adopt the statement as part of her trial strategy. **2; 16.**

Trial counsel did not recall whether she had spoken with Ms. Cole about the possibility of moving to suppress Mr. Mullins' statement. **2; 18.** However, trial counsel also testified that she was "almost certain that she would have told" Ms. Cole that there was a good basis for excluding Mr. Mullins' statement from evidence. **2; 21.**

Trial counsel testified that Ms. Cole had told trial counsel in privileged conversations that she had sent two of the text messages confirming that the package had arrived. **2; 12.** In addition, trial counsel said that Ms. Cole had admitted that she knew that the package was coming and that she had tracked it on the FedEx website. **2; 22, 27.**

Trial counsel suggested that Ms. Cole's statements to trial counsel tied trial counsel's hands – that she had to admit that Ms. Cole knew that the package was coming. **2;24, 27.** Moreover, trial counsel testified that she did

not seriously consider trying to suppress the internet search history tracking the package. **2; 28**. Trial counsel said that suppressing that evidence would not have served her trial strategy because her defense was that Ms. Cole was expecting the package but did not know what it contained. *Id.*

Trial counsel said that she did review all of the text messages that were admitted into evidence from phones that were seized during the search of Ms. Cole's home. **2; 29**. However, trial counsel did not make any objection to introduction of the full text message history into evidence at the trial. **2; 29**. Trial counsel failed to object even though the text messages included a misleading conversation about a totally separate package. See A.R. Vol. 3, Exhibit 31, p. 27, text number 653-655.<sup>3</sup>

This conversation had nothing to do with the FedEx package that contained methamphetamine. See Argument § I(A)(i) of this Brief. However, trial counsel did not think that it would be useful to move to exclude those messages. **2; 31**. Rather, she chose to allow the messages into evidence and argue that the messages were irrelevant. See **2; 30-31**.

Trial counsel further testified that it was her "strategy to just let [introduction of the full text history] go" and that she felt that the jury would

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<sup>3</sup> Exhibit 31 is a printout of text messages from a CD that was also introduced into evidence as Exhibit 31. The CD contains an Examination Report from a phone (LG GSMP 870 Escape 013237001386997). The printed report includes 33 pages of SMS messages. The page number in this and following citations to Exhibit 31 refer to the page number within those 33 pages of SMS messages.

“be able to decipher what was relevant and what was not relevant.” **2; 29, 30.**

Trial counsel also made no objection during closing argument when the prosecutor commented on Ms. Cole’s failure to testify. **4, 53.** In the post-conviction hearing, trial counsel explained this failure to object. She explained that she has a blanket policy that she does not object during closing arguments because closing arguments are not testimony. **2; 37.** Trial counsel further testified that she did not object because the statement was “not egregious” (**2; 38**) and because the prosecutor did not single out Ms. Cole, rather, the prosecutor said that none of the defendant’s testified (**2; 39-40**). Trial counsel said that she would have objected if the prosecutor’s statement had singled Ms. Cole out. **2; 40.**

**Detective Gaia** testified that he led the police search of Ms. Cole’s home during which Ms. Cole was interrogated and arrested. **3; 8.** Detective Gaia said that police did not use any audio or visual equipment to record the search. **3; 11.** Detective Gaia testified that he did not know exactly what time he and his team entered Ms. Cole’s home. **2; 12-13.** Rather, he prepared the report the day after the search and approximated the times that critical events occurred. **2; 12-13, 15.** The time that the package was delivered and the time that the team entered Ms. Cole’s home were both imprecise estimates based on Detective Gaia’s recollection one day after the search. **2; 12-13.**

Detective Gaia further testified that he confiscated Ms. Cole's phone after placing her under arrest. He said that he entered Ms. Cole's home at approximately 3:40 PM and arrested her at least 15 minutes later – maybe as much as 45 minutes later. **2; 16.**

Detective Gaia admitted that his search warrant did not extend to electronic devices that were found in the home. **2; 16-17.** However, he asserted that Ms. Cole gave him verbal consent to search her computer. **2; 17.** Detective Gaia admitted that he did not obtain written consent to search the computer, that the search of the home was not audio or video recorded, and that he did not advise Ms. Cole that she had a right to refuse the search. **2; 17.**

### **ARGUMENT**

Under the Post-Conviction Procedure Act (PCPA) a petitioner is entitled to relief whenever her "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. Ms. Cole is entitled to relief under the PCPA because her counsel provided ineffective assistance in violation of Ms. Cole's Sixth Amendment right to counsel. Trial counsel's errors are enumerated below.

#### **Standard of Review**

A petitioner must establish two facts to prevail on a claim of ineffective assistance of counsel: first, that her lawyer's performance was deficient; and

second, that the deficient performance prejudiced her defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

To establish the first prong, deficient performance, a petitioner must show that her attorney's conduct fell "below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996). When considering whether trial counsel's performance was objectively reasonable, trial counsel's reasonable tactical decisions are entitled to deference. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). However, this deference is not absolute. Trial counsel is ineffective when her strategic decisions are the result of inadequate preparation. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

To establish the second prong, prejudice, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Goad v. State, at 370 (quoting Strickland, 466 U.S. at 694).

In determining whether to grant relief, this Court affords deference to the lower court's factual findings, but considers legal questions *de novo*.

"A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is *de novo* with no presumption of correctness."

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006).

## **I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.**

A. Trial counsel adopted a weak trial strategy based on inadequate preparation.

*i. Trial counsel's failure to object to irrelevant and prejudicial text messages was objectively unreasonable*

Trial Counsel allowed Detective Gaia to introduce full cell phone records from several phones allegedly belonging to Ms. Cole. See A.R. Vol. 5, pp. 55-56, 74, 107, 112-115, 117-119, 121-125. The records were not redacted in any way. Rather, the exhibits introduced into the record included the full text of all SMS messages to and from the phones recovered in Ms. Cole's home. A.R. Vol. 2-3, Exhibits 23, 26, 31. Many of the included messages were far more prejudicial than probative.

Particularly egregious, was the admission of a series of very misleading text messages about delivery of a package that was totally unrelated to the package of methamphetamine at issue in this case. During his direct examination of Detective Gaia, the Assistant District Attorney had the detective read several texts to the jury. These texts were from a cell phone that allegedly belonged to Ms. Cole. One of the texts Detective Gaia read to

the jury said “[i]t’s coming by UPS instead of regular mail. It’s on the truck for delivery now.” A.R. Vol. 5, 118.

Examining the SMS report, it is clear that this text had nothing to do with delivery of methamphetamine, occurred two weeks before the delivery that was the subject of the case, and was not sent to either of Ms. Cole’s co-defendants. Rather, it was about delivery of a package that likely contained a prepaid credit card. See A.R. Vol. 3, Exhibit 31, p. 27, text 653-655.

The text about a UPS delivery was part of a conversation between Ms. Cole’s phone and someone using phone number (901) 421-0249. The conversation began on January 17, 2016. A.R. Vol. 3, Exhibit 31, p. 24, text 580. The correspondents discussed the process for putting money on a prepaid card. A.R. Vol. 3, Exhibit 31, p. 24-26, texts 580-645. Later the same day, Ms. Cole agreed to have a prepaid card sent to Ms. Cole’s house and then forward the card to the unidentified correspondent. A.R. Vol. 3, Exhibit 31, p. 26, texts 632-638. The text that Detective Gaia read to the jury about the UPS package came three days later and the context strongly suggests that it referred to the prior conversation. A.R. Vol. 3, Exhibit 31, pp. 26-27, texts 652-653.

Trial counsel allowed the State to turn this innocuous exchange into something nefarious. The inference suggested at trial was that Ms. Cole was talking about the delivery of methamphetamine – either the package that was the subject of this case or some similar prior delivery. Indeed, in closing,

the State's Attorney made this implication explicit. He told the jury "look through those text messages, I invite you, that's not the only package. It's the only one I can prove it for them. She's getting others." **4; 56**. This text message was irrelevant and highly prejudicial. As such, it was inadmissible pursuant to Tennessee Rules of Evidence 402 and 403. Ms. Cole's trial attorney allowed the text to be admitted without any context.

There were also an extremely large number of texts discussing the process for putting money on prepaid cards and on prepaid phones. *See e.g. A.R. Vol. 3, Exhibit 31, pp. 20-21, 25-27, texts 493, 516, 623, 628, 630, 635-36, 658, 660*. Trial counsel similarly failed to object to these texts. This allowed the State to argue that Ms. Cole was working as a bookkeeper for a prison gang. **4; 55**. By Detective Gaia's own admission, however, the investigation had not linked the discussion of prepaid cards to the drug activity alleged in this case. *A.R. Vol. 5, p. 137*. Therefore, the texts likely would not have even qualified as relevant evidence.

Even Ms. Cole were a bookkeeper for the gang, and even if that fact were relevant to the charges in the indictment, the admitted texts were more prejudicial than probative of any fact in issue. They were therefore inadmissible pursuant to Tennessee Rules of Evidence 402 and 403. Defense counsel should have objected to the admission of these texts. Failure to do so was objectively unreasonable.

There were also numerous texts that reflected badly on Ms. Cole but had nothing to do with the case. Some texts suggested that she was carrying

on an affair with another man. Others documented an ongoing dispute with her landlord over unpaid rent. A.R. Vol. 3, p. 3-4, 11, 28-29, texts 55-57, 60, 64, 79, 85, 254, 684, 704. These messages painted Ms. Cole in a negative light but had no relevance to the case. The jury should not have been given this prejudicial and utterly irrelevant evidence.

*ii. Trial counsel's failure to file a Bruton motion was objectively unreasonable.*

Ms. Cole's trial counsel failed to effectively advocate for Ms. Cole prior to trial. Trial Counsel did not file critical motions and her failure to do so was objectively unreasonable.

Mr. Mullins was one of Ms. Cole's co-defendants. Prior to trial, he had spoken with Detective Christian of the Bartlett Police Department about the case. A.R. Vol. 6, pp. 222, 224. His statement to the detective – on its face – exculpated Ms. Cole. A.R. Vol. 3, Exhibit 36. However, the statement was actually extremely damaging to Ms. Cole's defense and clearly inadmissible. Failure to object to the portions of the statement that implicated Ms. Cole was objectively unreasonable.

A co-defendant's extrajudicial admission is inadmissible at trial to the extent that it implicates other defendants, unless the co-defendant testifies. Bruton v. U.S., 391 U.S. 123 (1968). Had Ms. Cole's trial counsel objected, Mr. Mullins's damaging statements about Ms. Cole would have been excluded from the trial.

Mr. Mullins's statement was ludicrous. The gist of his statement was that Mr. Mullins was an inmate with Jason White at the time that the package was delivered. A.R. Vol. 3, Exhibit 36, p. 4.<sup>4</sup> Not long before that, a Mexican inmate named Angel asked Mr. Mullins for an address to which he could send methamphetamine. A.R. Vol. 3, Exhibit 36, pg. 2. Mr. Mullins called Ms. Cole and asked if he could use her address. Id. Mr. Mullins told Ms. Cole that he was going to send jewelry to her house that would later be sent to Mr. Mullins's mother. Id. He didn't want to send it directly to his mother because it was a surprise. Id. Mr. Mullins claimed that Ms. Cole texted him when the package arrived and then he called her repeatedly but got no answer. Id. He also said that he had repeatedly tried to "take his charge" for what had happened and didn't understand why Ms. Cole and her 'husband' were being prosecuted for what he had done. A.R. Vol. 3, Exhibit 36, pp. 2-3, 6-7. He was insistent that Ms. Cole had no idea what was in the package. A.R. Vol. 3, Exhibit 36, p. 5.

Mr. Mullins said that he had a friendly relationship with Ms. Cole, but only knew her through her husband (Jason White) and never had any romantic relationship with her. A.R. Vol. 3, Exhibit 36, p. 3, 9. However, he also claimed that Ms. Cole called him Boo Bear. A.R. Vol. 3, Exhibit 36, p. 6.

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<sup>4</sup> An audio recording of Mr. Mullins's statement was introduced as Exhibit 34. A nine-page transcript of Mr. Mullins's statement was also introduced as Exhibit 36. (Thirteen copies – one for each juror – are included in the record). The page number in this citation and subsequent citations to Exhibit 36 refers to the page number within that nine-page transcript.

This was a blatant attempt to claim responsibility for the phone that texted with Ms. Cole's phone after the package arrived. However, it was transparently false. The State introduced ample evidence at trial to show that the phone in question belonged to Jason White, not Montez Mullins. A.R. Vol. 5, pp. 105-108.

There was very little question that the phone that called Ms. Cole after the package arrived belonged to Jason White, not Montez Mullins. The phone that sent the text messages about the package to Ms. Cole's phone also sent numerous pictures of Jason White and clearly belonged to Ms. Cole's boyfriend, Jason White. See State v. Kristina Cole and Montez Mullins, at \*3.

Mr. Mullins' statement was inconsistent with the phone records introduced at trial and obviously motivated by intent to exculpate Ms. Cole and Mr. White. Moreover, the statement actually implicated Ms. Cole. It confirmed the State's assertion that Ms. Cole was aware that the package was coming. Trial counsel should have objected to the admission of Mr. Mullins's statement because it contained transparent lies calculated to exculpate Ms. Cole and because it established that Ms. Cole knew that the package was coming to her home.

*iii. Trial counsel's concession that Ms. Cole had tracked the package was objectively unreasonable.*

Trial counsel also failed to object to admission of photographs showing that a computer had tracked the FedEx package that contained methamphetamine. A.R. Vol. 5, p. 45. Detective Gaia testified that he took the pictures in question during the search of Ms. Cole's home. Id. Detective Gaia said that the addresses in the computer history had been visited prior to his team's entry in Ms. Cole's home. However, the photographs show only the website address – they do not show the time that the site was accessed. A.R. Vol. 2, Exhibit 13. Nor do they show the computer itself. Id. Rather, they show a portion of a search history that could have come from any computer at any time. Id.

Trial counsel should have objected to the photograph of an unidentified internet history. The photograph was more prejudicial than probative. It was, therefore, inadmissible pursuant to Tennessee Rule of Evidence 403. Taken at face value, the photograph was proof that Ms. Cole had prior knowledge of the package. However, due to the method of preservation, the evidence preserved was wholly untrustworthy. The only evidence that it came from Ms. Cole's computer came in the form of testimony from Detective Gaia. A.R. Vol. 5, p. 45. Detective Gaia's credibility came into serious question later in the trial. See subsection C(i) of this Section, below.

Moreover, Detective Gaia's testimony about how he retrieved the search history was inconsistent with the photograph introduced. Detective Gaia testified that he opened the search bar and hit the letter 'F' and took a

picture of the result. A.R. Vol. 5, p. 45. This is inconsistent with the photo that was introduced as an exhibit. A.R. Vol. 2, Exhibit 13. That photo shows numerous search results beginning with the letter 'R.' Id. Had trial counsel objected to the photograph, the shaky foundation would have led to its exclusion.

Even if the photograph had been admitted over counsel's objection, trial counsel should not have simply conceded that Ms. Cole was expecting the package. The State would not have been able to prove that Ms. Cole was expecting the package if trial counsel had contested the assertion. The partial photograph of the search history of an unidentified computer would have been given little weight by the jury. Trial counsel should have simply argued that there was no proof that Ms. Cole made the searches that were partially depicted in the photograph. This argument would have demonstrated to the jury that there was reasonable doubt about whether Ms. Cole was expecting the package given the issues with Detective Gaia's credibility discussed below.

*iv. Trial counsel's defeatist approach to the case was the result of poor preparation, not a considered strategy.*

While counsel's reasonable tactical decisions are entitled to deference, Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994) decisions that are the result of inadequate preparation are not entitled to such deference. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). In this case,

trial counsel was ineffective because her strategy was not the result of preparation and deliberation.

Trial counsel's preparations for trial and actions during trial evinced resignation rather than zealous advocacy. Trial counsel testified in the Post-conviction Hearing that her approach was strategic. However, trial counsel also explicitly admitted that she simply let certain things go, rather than fight them.

The most galling and blatant evidence of trial counsel's resignation was her response to the voluminous text messages that the State introduced without objection. The State introduced several exhibits that included the full text and media message histories of phones found at Ms. Cole's home. While trial counsel recognized that some of this evidence was damaging and inadmissible, it was her "strategy to just let it go" and let the jury decide what was relevant and how it should be weighed. **2; 29, 30.**

Trial counsel's decision to "just let it go" is the antithesis of the defense attorney's obligation to zealously represent her client. This admission does not simply demonstrate that trial counsel failed in this specific decision. Rather, it sheds light on trial counsel's overall approach to the case.

While trial counsel explained all of her decisions as strategic, her actions could be explained equally well as the result of a defeatist approach. This approach included allowing her client to elect the defense strategy, rather than choosing the approach dictated by the evidence and trial counsel's experience.

This was, for example, how trial counsel explained her decision not to file a motion to suppress Montez Mullins's statement. Even though it was trial counsel's professional opinion that the statement was not credible, she chose not to request suppression. **2; 15**. Trial counsel admitted that she allowed Ms. Cole's opinion to trump trial counsel's own assessment. **2; 16**.

This decision seems to have been part of a feedback loop that explains trial counsel's actions in the case: Ms. Cole wanted to concede that she knew that the package was coming; so, trial counsel never seriously considered any other approach; so, trial counsel never presented other options to Ms. Cole; so, Ms. Cole continued to want to concede that she knew that the package was coming. Notably absent from this circuit was any independent assessment by trial counsel of the most effective defense to pursue at trial.

Trial counsel testified that she never even considered arguing that Ms. Cole did not know that the package was being sent to her. **2; 24**. This failure was a natural consequence of trial counsel's decision to simply adopt her client's preferred trial strategy. We know that trial counsel's assessment of evidentiary issues flowed from her decision to let Ms. Cole pick the strategy because trial counsel never even really considered whether there was another viable defense. Trial counsel testified that she did not seriously consider trying to suppress the internet search history tracking the package. **2; 28**. Trial counsel said that suppressing that evidence would not have served her trial strategy because her defense was that Ms. Cole was expecting the package but did not know what it contained. *Id.* Trial counsel abdicated her

responsibility to elect the best legal strategy. She instead chose to make the best arguments she could within a strategic framework built by the client.

Trial counsel's testimony at the Post-conviction Hearing also strongly implied a fundamental misunderstanding of the defense attorney's role which affected her strategic approach to the case: she apparently felt that she could not select a strategy that was inconsistent with apparent admissions that her client had made in confidence.

Trial counsel testified that Ms. Cole told trial counsel that she had sent text messages confirming that the package had arrived. **2; 12**. In addition, trial counsel said that Ms. Cole had admitted that she knew that the package was coming and that she had tracked it on the FedEx website. **2; 22, 27**. Trial counsel suggested that Ms. Cole's admissions to trial counsel tied trial counsel's hands – that she had to admit that Ms. Cole knew that the package was coming. **2;24, 27**.

B. Trial counsel failed to object when the State argued that Ms. Cole's failure to testify implied guilt.

"No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment privilege against self-incrimination is fundamental to our conception of ordered liberty. See Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964). So fundamental, indeed, that it was adopted at obvious and substantial cost: protecting defendants from self-incrimination impairs the truth-seeking

function of the courts and lets criminals go free. The “privilege is not an adjunct to the ascertainment of truth, but is aimed at serving the complex of values on which it has historically rested.” Mackey v. U.S., 401 U.S. 667 (1971) (internal quotation marks omitted). The privilege against self-incrimination “separates our system from an inquisitorial system of criminal justice.” Griffin v. California, 380 U.S. 609, 614 (1965).

The privilege is so important that The Supreme Court of the United States (SCOTUS) has protected the right jealously from erosion. The Court protects criminal defendants not only from speaking to police and testifying in trial, but also from any implication that their silence at either stage implies guilt. The privilege against self-incrimination is “as broad as the mischief against which it seeks to guard, and the privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.” Estelle v. Smith, 451 U.S. 454, 467-468 (1981).

The State violated Ms. Cole’s Fifth Amendment right several times during the trial. Trial counsel’s failure to object to this violation was unreasonable.

First, Detective Gaia testified – without objection – that Ms. Cole remained silent in response to certain questions that police asked during the search of Ms. Cole’s home. Detective Gaia stated that police asked Ms. Cole why she had lied to them about a photograph that they found in her house. A.R. Vol. 5, pp. 39-43. The photograph depicted Jason White, one of Ms.

Cole's co-defendants. A.R. Vol. 5, pp. 39-40. Ms. Cole initially told investigators that the man in the photo was Timothy Smith and remained silent when police asked why she had lied. A.R. Vol. 5, pp. 41-43.

Minutes later, Detective Gaia testified again that Ms. Cole had refused to answer some police questions during the search. Detective Gaia told the jury that Ms. Cole remained silent when he asked her who was calling her repeatedly. A.R. Vol. 5, p. 58. Then, Detective Gaia added that he "hit accept phone call, put it up to Ms. Cole's ear, she said 'I want my lawyer.'" Id. All of this testimony was admitted without objection.

Finally, the State violated Ms. Cole's Fifth Amendment right to remain silent at a critical moment in the trial. In closing argument the prosecutor stated:

"[Which] witness came up here and stood before the judge, swore to tell the truth, submitted himself to direct examination either by them or by me, the questions by anybody, that said Ms. Cole is ignorant, said that Ms. Cole don't know what's in that box[?]"

**4; 53.** Ms. Cole's trial counsel did not object to this statement.

There is a fine line between comments on defendant's failure to testify and arguing that the State's case was uncontroverted. While prosecutors are allowed to comment in closing that the evidence was uncontroverted, this court has cautioned against arguments that skirt the line.

Remarks which skirt the edges of impermissible comment are neither desirable nor worth the risk of reversal of what

may well be a thoroughly deserved conviction. Caution is desirable until the constitutional boundaries of permissible comment on the state of the evidence when the accused does not testify are thoroughly established. In the meantime the sensible course is to assume that jurors can see as well as hear, and do not have to be told when evidence is uncontradicted.

State v. Copeland, 983 S.W.2d 703 (Tenn. Crim. App. 1998). Despite this court's warnings, prosecutorial comment on defendants' silence is rampant in Shelby County. This type of argument would not be so popular were it not effective. Nor would prosecutors resort to it so freely if this court held them accountable for doing so.

### C. Trial counsel failed to object to improper closing argument

In Goltz, 111 S.W.3d at 6, this court outlined "five general areas of prosecutorial misconduct" that can occur during closing argument:

- (1) intentionally misleading or misstating the evidence;
- (2) expressing a personal belief or opinion as to the truth or falsity of the evidence or defendant's guilt;
- (3) making statements calculated to inflame the passions or prejudices of the jury;
- (4) injecting broader issues than the guilt or innocence of the accused; and
- (5) intentionally referring to or arguing facts outside the record that are not matters of common public knowledge.

In this case, the State violated two of the five prohibitions from Goltz without objection. Trial counsel failed to object when the State intentionally misled the jury and intentionally referred to facts outside of the record during closing argument. This failure was objectively unreasonable and constitutes ineffective assistance.

*i. Trial counsel failed to object when the prosecutor testified during closing argument in order to bolster his own credibility.*

First, trial counsel failed to object to testimony from the prosecutor during closing argument. During closing, the prosecutor told the jury that Detective Gaia's misleading testimony about the text messages acknowledging receipt of the package was accidental rather than nefarious. The prosecutor's testimony in closing violated the prohibition of intentionally referring to facts outside the record. This violation allowed the State to repair the most damaging testimony elicited by trial counsel during the trial.

Trial counsel elicited one of the strongest points for Ms. Cole's defense during cross-examination of Detective Gaia. On cross, Ms. Cole's trial attorney got Detective Gaia to admit that he had sent a text message from Ms. Cole's phone during the search of Ms. Cole's home. A.R. Vol. 5, pp. 141-142. Detective Gaia had omitted this information when he read the text to the jury under direct examination by the State. A.R. Vol. 5, pp. 124-125. Indeed, he strongly implied that he had not sent any messages from Ms. Cole's phone: when the State's attorney asked if Ms. Cole's phone stopped

sending text messages because Detective Gaia had the phone, Detective Gaia's answer was "[c]orrect." A.R. Vol. 5, p. 125. In other words, Detective Gaia was first forced to admit that he had created some of the evidence that Ms. Cole knew that the package was coming. He was then forced to admit that he had misled the jury about that evidence. The dialogue between the prosecutor and Detective Gaia should have tarnished the credibility of both men in the eyes of the jury.

Unfortunately, Ms. Cole's trial counsel allowed the State to repair some of this damage with a highly inappropriate statement during closing argument. The Assistant District Attorney testified during closing argument that "I didn't ask [Detective Gaia] about [the text he sent from Ms. Cole's phone] because I didn't know about that." **4; 22**. The prosecutor's statement was not only impermissible testimony, it was improper bolstering. The comment was designed to repair the credibility of both the prosecutor and his star witness, Detective Gaia.

*ii. Trial counsel failed to object when the prosecutor intentionally misrepresented evidence in closing.*

Second, in closing, the State's attorney intentionally tried to confuse the jury. He told the jury to "look through those text messages, I invite you, that's not the only package. It's the only one I can prove it for them. She's getting others." **4; 56**. This was a blatant misstatement of the evidence as

discussed above in subsection (A)(i) of this Section. Again, this statement went without objection from the defense.

## **II. PREJUDICE**

There is a reasonable probability that the outcome of this case would have been different if trial counsel had performed her duties to a reasonable professional standard. Therefore, Ms. Cole's convictions should be reversed.

A. Had trial counsel elected a trial strategy based on the evidence, rather than her client's preferences, the outcome would have been different.

The evidence that Ms. Cole had prior knowledge of the package and agreed to receive it was relatively weak on paper. Despite this, trial counsel elected to concede that Ms. Cole knew that the package was coming and argue that Ms. Cole did not know what the package contained. Had trial counsel argued that Ms. Cole did not know that the package was coming, there is a reasonable probability that Ms. Cole would not have been convicted.

There were three pieces of evidence that suggested that Ms. Cole was aware that the package was coming. However, all three of these pieces of evidence were problematic.

The first piece of evidence that Ms. Cole knew that the package was coming was Mr. Mullins statement. Had trial counsel moved to exclude portions of this statement under Bruton, all portions that implicated Ms. Cole would have been redacted. Mr. Mullins's statement was only admitted against Ms. Cole because trial counsel wanted the jury to hear it. Had trial counsel moved to suppress the statement, only two pieces of evidence even suggested that Ms. Cole was aware that the package was coming.

The second piece of evidence that suggested Ms. Cole knew about the package was a group of three text messages confirming receipt of the package. However, Detective Gaia admitted that he sent at least one of these messages. No witness provided the exact time that law enforcement entered Ms. Cole's home. Rather, Detective Gaia estimated that they had entered at approximately 3:40 PM. **2; 16**. He made this estimate when he prepared his report *the day after* conducting the search. **2; 12-13, 15**.

It was entirely possible that Detective Gaia also sent the other messages attributed to Ms. Cole. The first message confirming receipt of the package was sent at 3:38:45 PM on February 3, 2016. A.R. Vol. 3, Exhibit 31, p. 33. Detective Gaia said that police entered at *approximately* 3:40 PM. A.R. Vol. 5, p. 138. He testified that Ms. Cole's phone was confiscated when they entered and that she was not allowed to use it after police entered the home.

The only other evidence that suggested that Ms. Cole knew that the package was coming was a photograph of a computer search history. This

photo showed that a computer had accessed the FedEx website and searched for the tracking number associated with the package. A.R. Vol. 5, p. 45. However, it suffered from the same deficiency as the SMS records. The photo omitted the portion of the search history screen that showed the time that the website was accessed. A.R. Vol. 2, Exhibit 13 The search could have happened after police entered and began searching the home or it could have been conducted on a completely different computer. The weight of this evidence would have turned on the credibility of Detective Gaia. Detective Gaia's equivocal testimony about the three text messages confirming receipt of the package undercut his credibility and thus, the jury would have given little weight to his authentication of the photograph.

Had trial counsel adopted a reasonable trial strategy based on adequate preparation, Mr. Mullins's statement would have been excluded to the extent that it implicated Ms. Cole. In addition, trial counsel could have argued that there was not clear proof that Ms. Cole sent the text messages confirming receipt of the package. Finally, trial counsel could have shown the jury that there were serious questions about the probative value of the photograph of a partial search history. It is reasonably probable that this strategy would have yielded a different result.

B. Had trial counsel objected when the State shifted the burden of proof, the outcome would have been different

The right to remain silent is one of the most fundamental principles of our justice system and is intimately linked to the presumption of innocence. Whenever the State argues that a defendant's silence indicates that she is guilty it not only violates the defendant's Fifth Amendment right, it shifts the burden of proof to the defendant. This burden-shifting is prohibited by the constitution for good reason: because it can have a profound and unjust impact on the result of a trial. Had defense counsel objected to the State's impermissible comments, there is a reasonable likelihood that the result would have been different.

C. Had trial counsel objected to prosecutorial misconduct during closing argument, the outcome would have been different.

Trial counsel allowed the State to paint Ms. Cole as a gang member and repeat offender in closing argument. The State portrayed Ms. Cole as a bookkeeper for a prison gang. Moreover, the State explicitly told the jury that Ms. Cole had committed additional crimes that the state could not prove.

This kind of commentary during closing argument is extremely damaging. Both of these violations occurred during the State's second closing. They were among the last statements that the jury heard in the courtroom. These impermissible arguments would have been ringing in the juror's ears when they began deliberating. The effect of these prejudicial and impermissible arguments likely influenced the verdict. Had defense counsel

objected, there is a reasonable likelihood that the result would have been different.

D. Trial counsel's cumulative errors caused prejudice.

Even if any or all of the errors described above were harmless on their own, the cumulative effect of the errors undermines confidence in the fairness of the proceedings. Had trial counsel not committed the several errors described above, it is reasonably probable that the outcome would have been different. "[T]here may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010).

Here, the cumulative effect of trial counsel's errors ensured that Ms. Cole would be convicted. First, trial counsel failed to independently review the evidence and choose a trial strategy appropriate for the case. As a result, trial counsel adopted a defeatist strategy and failed to challenge extremely damaging evidence presented by the State. Then, trial counsel allowed these errors to be compounded during closing argument. During closing, trial counsel allowed the State to shift the burden of proof to Ms. Cole. Finally, trial counsel allowed the State to improperly bolster its case by testifying during closing argument and intentionally mischaracterizing the evidence.

The cumulative effect of these errors undermines confidence in the verdict. Had trial counsel elected a sensible trial strategy and objected to the State's misconduct it is reasonably likely that Ms. Cole would have been acquitted.

### **CONCLUSION**

Ms. Cole's trial counsel failed to provide Ms. Cole with objectively reasonable assistance. Trial counsel's errors were numerous. The individual and cumulative impact of these errors caused Ms. Cole's conviction. Trial counsel's failures constitute a violation of Ms. Cole's Constitutional right to effective assistance of counsel. Ms. Cole's conviction is therefore void and she is entitled to relief under the Post-Conviction Procedure Act.

Wherefore premises considered, Ms. Cole humbly requests that this court vacate her conviction in this matter and remand her case to the trial court.

Respectfully submitted this the 30<sup>th</sup> day of August, 2021.

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I have electronically filed a true and exact copy of the foregoing with the Court of Criminal Appeals of Tennessee at Jackson, provided a true and exact copy to each of the persons listed below by the means specified on November 30, 2021.

**ELECTRONIC SERVICE**

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CRIMINAL APPEALS DIVISION

s/ Benjamin Israel

Benjamin Israel  
Attorney for Appellant

### **CERTIFICATE OF COMPLIANCE**

In accordance with Tenn. Sup. Ct. R. 46 § 3.02, the total number of words in this application, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance, is 7,385. This word count is based upon the word processing system used to prepare this brief.

s/ Benjamin Israel  
Benjamin Israel  
Attorney for Petitioner

2018 WL 5810011

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE  
COURT OF CRIMINAL APPEALS RELATING  
TO PUBLICATION OF OPINIONS AND  
CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,  
AT JACKSON.

STATE of Tennessee

v.

**Kristina COLE and Montez Mullins**

No. W2017-01980-CCA-R3-CD

|  
Assigned on Briefs September 26, 2018 at Knoxville

|  
Filed 11/05/2018

|  
Application for Permission to Appeal  
Denied by Supreme Court March 28, 2019

Appeal from the Criminal Court for Shelby County, No.  
17-01568, J. Robert Carter, Jr., Judge

**Attorneys and Law Firms**

Kortney D. Simmons, Jackson, Tennessee, for the appellant,  
**Kristina Cole**.

Charles W. Gilchrist, Jr., Memphis, Tennessee, for the  
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Herbert H. Slatery III, Attorney General and Reporter; Sophia  
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General; and Chris Scruggs, Assistant District Attorney  
General, for the appellee, State of Tennessee.

Robert L. Holloway, Jr., J., delivered the opinion of the court,  
in which James Curwood Witt, Jr., and Robert W. Wedemeyer,  
JJ., joined.

**OPINION**

Robert L. Holloway, Jr., J.

After a jury trial, **Kristina Cole** was convicted of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one, conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two, facilitation of possession of methamphetamine with the intent to sell in a drug-free zone in count three, and possession of methamphetamine with the intent to deliver in a drug-free zone in count four. The jury found **Montez Mullins** guilty of facilitation of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one and facilitation of conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two. Defendant **Cole** received a total effective sentence of thirteen and one-half years in the Tennessee Department of Correction. Defendant **Montez** received a total effective sentence of thirty years as a career offender. On appeal, both Defendant **Cole** and Defendant **Montez** argue that the evidence at trial was insufficient for a rational juror to have found them guilty beyond a reasonable doubt. Additionally, Defendant **Cole** argues that the trial court erred by allowing Detective Gaia and Investigator Brown to speculate about the meaning of text messages between Defendant **Cole** and Defendant Jason White. After a thorough review of the facts and applicable case law, we affirm the judgments of the trial court.

**I. Factual and Procedural Background**

\*1 On March 30, 2017, the Shelby County Grand Jury indicted Defendant **Cole** on the following charges:

Count	Offense	Offense Classification
One	Conspiracy to possess 300 grams or more of methamphetamine with intent to sell in a drug-free zone	Class B
Two	Conspiracy to possess 300 grams or more of methamphetamine with intent to deliver in a drug-free zone	Class B

Three	Possession of 300 grams or more of methamphetamine with intent to sell in a drug-free zone	Class A
Four	Possession of 300 grams or more of methamphetamine with intent to deliver in a drug-free zone	Class A

On the same day, the Shelby County Grand Jury indicted Defendant **Montez** on the following charges:

Count	Offense	Offense Classification
One	Conspiracy to possess 300 grams or more of methamphetamine with intent to sell in a drug-free zone	Class B
Two	Conspiracy to possess 300 grams or more of methamphetamine with intent to deliver in a drug-free zone	Class B

At trial, Detective Mark Gaia testified that he worked for the Bartlett Police Department (“BPD”). Around February 2, 2016, Detective Gaia received a phone call from a detective in Visalia, California, regarding a package that had been shipped from California to an address in Bartlett that contained methamphetamine. The package was addressed to “Bailey Green” and listed 2552 Linwood as the address.<sup>1</sup> After the BPD received the package from the California detective, officers weighed the package and tested the contents for illegal drugs. Detective Gaia testified that the package contained a bag of children’s clothing and one pound of methamphetamine. He explained that a pound of methamphetamine would be worth \$12,000 to \$15,000.

Detective Gaia obtained a warrant to search for narcotics, and Detective Jeffrey Swindol conducted a controlled delivery of the package to Defendant **Cole**’s residence at 2552 Jenwood. After Defendant **Cole** accepted the package, Detective Gaia knocked on the door of her residence, and Defendant **Cole** let him inside. Once inside, Detective Gaia observed the package inside the house. Defendant **Cole** gave him permission to search the residence. During the search, Detective Robert Christian found a photograph on the nightstand in Defendant **Cole**’s bedroom that depicted a man wearing a prison uniform. When Detective Gaia asked Defendant **Cole** about the photograph, she stated that it was her ex-boyfriend, “Timothy Smith,” whose birthday was March 11. Detective Gaia confirmed that the individual in the photograph was Jason White based on “numerous handwritten letters that

were addressed to **Kristina Cole** from [Jason White] at the Riverbend Maximum Institution near Nashville.”

Detective Gaia collected three cell phones from Defendant **Cole**: a Verizon HTC phone, a Samsung phone, and an LG phone. He also found a laptop computer. He observed that Defendant **Cole** had recently tracked a package on the FedEx website from the search history of the computer. The tracking number of the package that Defendant **Cole** tracked electronically matched the number of the package that the BPD delivered to Defendant **Cole**’s residence. Defendant **Cole** denied knowing anyone named Bailey or knowing the contents of the package. Detective Gaia identified evidence of several forms of communication between Defendant **Cole** and Defendant White, including a handwritten letter from White to **Cole**. Detective Gaia also found a receipt for a money order to “Jason White,” which listed his inmate booking number, and a receipt for a purchase by Defendant **Cole** to Defendant White through Union Supply Direct, Inmate Direct Sales. Detective Gaia observed several PayPal and MoneyPak cards in Defendant **Cole**’s residence.

\*2 While Detective Gaia was discussing the contents of the computer with Defendant **Cole**, the LG cell phone continuously rang. The caller was listed in Defendant **Cole**’s phone as “Line Boo Other[.]” When Detective Gaia picked up the phone and hit the answer button, Defendant **Cole** stated that she wanted an attorney. After Detective Gaia placed Defendant **Cole** under arrest, Dustin White<sup>2</sup> pulled into the driveway of Defendant **Cole**’s residence. As he

spoke with Mr. White, Detective Gaia noticed that the same phone number that called Defendant Cole's phone was also continuously calling Mr. White's phone. Detective Gaia noted that Mr. White was the brother of Defendant White and that the phone number that called Mr. White's phone was listed as "J." Detective Gaia stated that Defendant Cole's residence was located "in very close proximity to a school." Detective Gaia identified a Google Earth picture that showed that Defendant Cole's residence was approximately 200.62 feet away from Raleigh-Bartlett Meadows Elementary School.<sup>3</sup>

Detective Gaia testified that he listened to the recordings of Defendant Cole's outgoing calls while she was incarcerated.<sup>4</sup> During one call, Detective Gaia identified the voice of Defendant Cole's daughter, Desiree Cole, who connected Defendant Cole with a third party, Kimberly White, Defendant White's mother. Ms. White then connected the call to Defendant White's phone via speaker phone. Detective Gaia identified nineteen phone calls where Defendant White was a part of the conversation with Defendant Cole.

On Defendant Cole's HTC cell phone, Detective Gaia observed that Defendant Cole sent a photograph of herself to (731) 693-6346. Defendant Cole also received a photograph of Defendant White from (901) 573-4218. The photograph message was signed "Da Junk Yard." Detective Gaia noted that the photograph of Defendant White appeared to have been taken in a jail cell. Detective Gaia also examined the contact list and text messages on Defendant Cole's HTC cell phone. He observed that the contact number for "Jason White" and "Boo" were the same—(731) 217-2745. He also noted that the contact number for "New Boobear" was (731) 694-7388.

When Detective Gaia examined Defendant Cole's Samsung cell phone, he observed text message exchanges with (731) 694-9127. This phone number used a signature of "COUNTRY CRAZY[.]"<sup>5</sup> Defendant Cole texted the following message to this number: "Hey baby. This is my other number. Lock me in. Love I [sic] baby ... [ ]" Throughout Defendant Cole's numerous text message exchanges with this phone number, she frequently referred to the recipient as "BooBear." Defendant Cole also referred to the recipient of messages to (731) 499-3517 as "BooBear." This phone number used "L.L.K.N. J.Y.D." as its signature, and Defendant Cole had saved this number in her contact list as "New BooBear." On January 28, 2016, Defendant Cole sent the following message to "New BooBear": "\$125 - 890 884 6154[.]" Detective Gaia stated that Defendant

Cole was informing Defendant White that she loaded \$125 into account number 890-884-6154. Detective Gaia also discovered contacts in Defendant Cole's Samsung cell phone named "BooBear Other Line[.]" connected to (731) 394-1929 and "BooBear Second[.]" connected to (615) 917-3749.

\*3 Detective Gaia also examined Defendant Cole's LG cell phone and found a photograph of Defendant White that was sent from (731) 693-2611. The sender of the photograph used the following signature: "Da Junk Yard." Defendant Cole sent messages to this phone number and referred to the recipient as "BooBear." Defendant Cole also exchanged text messages with (731) 443-6670, and again, she referred to the recipient of her messages as "BooBear." In May 2015, Defendant Cole texted (615) 564-0303 on her LG cell phone and referred to the recipient as "BooBear." The recipient used the following signatures: "\$SAME N\*\*\*A SINCE DAY1\$" or "\$Loyalty Bring Royalty\$[.]" In July 2015, Defendant Cole began exchanging text messages with (731) 694-9127, and she referred to the recipient as "BooBear." The recipient used the signature of "COUNTRY CRAZY[.]" Starting in September 2015, Defendant Cole began exchanging text messages with an unidentified contact at (901) 661-9076.<sup>6</sup> Defendant Cole and the recipient discussed loading various amounts of money on prepaid credit/debit cards. For example, Defendant Cole received the following message from "Eastwood": "\$40.# 7287013535. \$500.# 723-035-8681[.]" Defendant Cole also exchanged text messages with contacts identified as "New BooBear" connected with (731) 499-3517 and "Line Boo Other" connected with (615) 917-3749. Defendant Cole sent the following text messages to "Line Boo Other" on January 27, 2016: "Sender: Kristina Cole, Memphis TN Control # 864-588-3690, \$100" and "\$75 - 756 663 9348 \$30 - 748 829 1871[.]" On February 3, 2016, Defendant Cole sent the following text messages to "Line Boo Other": "Package arrived"; "They put the wrong street name. Lucky they knew what it was suppose[d] to be"; and "What do you want me to do with it?"<sup>7</sup>

On cross-examination, Detective Gaia clarified that the managers at the California FedEx facility opened the package because they suspected that it contained contraband. A detective in California then contacted the SCSO regarding the package. Detective Gaia agreed that the text message exchanges between Defendant Cole and Co-defendant White were not illegal on their face. He also agreed that transferring money into a PayPal account or using a prepaid credit/debit card was not illegal. Detective Gaia agreed that Defendant Cole had no criminal record prior to the current offenses. He

stated that Defendant White used at least ten different phone numbers to communicate with Defendant Cole. Detective Gaia could not confirm that Defendant White had exclusive control of the phone numbers.

Special Agent Peter Hall testified that he worked for the TBI as a forensic chemist. After the trial court declared Special Agent Hall to be an expert, he stated that the package delivered to Defendant Cole's residence contained 441.17 grams of methamphetamine, a Schedule II controlled substance.

Detective Christian testified that he worked in the Investigative Services Narcotics Unit of the BPD. On February 3, 2016, Detective Christian assisted Detective Gaia with executing the search warrant on Defendant Cole's residence at 2552 Jenwood. Detective Christian found a photograph of Defendant White on Defendant Cole's nightstand. On February 22, 2017, Detective Christian interviewed Defendant Mullins. Detective Christian stated that he did not believe Defendant Mullins was completely truthful during the interview because Defendant Mullins said "honestly" and "I swear to God" frequently.

During his interview with Detective Christian, Defendant Mullins stated that, at the end of January 2016, he was incarcerated at the "Northeast penitentiary" when another inmate, "Angel," approached him and offered to pay him \$600 if Defendant Mullins provided him with a mailing address in Memphis. Angel informed Defendant Mullins that the package would contain "ice," or crystal methamphetamine. Defendant Mullins contacted Defendant Cole and asked if he could send a package with a gift of jewelry for his mother to her address. Defendant Cole agreed, and Defendant Mullins gave her address to Angel. Angel then gave Defendant Mullins \$300 through PayPal and promised to give him an additional \$300 after the package was delivered. Angel later provided Defendant Mullins with a tracking number for the package, which Defendant Mullins gave to Defendant Cole. A few days later, Defendant Mullins received a text message informing him that the package arrived, despite the fact that the package listed the wrong address. Defendant Mullins informed Angel that the package arrived and attempted to call Defendant Cole. After he was unable to reach Defendant Cole, Defendant Mullins called Defendant Cole's "husband," Defendant White. Defendant Mullins later learned that Defendant Cole had been arrested and charged for her role in the current offenses.

\*4 Defendant Mullins asserted that Defendant Cole was unaware that the package contained methamphetamine. Defendant Mullins explained that he met Defendant Cole through Defendant White. Defendant Mullins met Defendant White while they were incarcerated in Morgan County in 2012. He also stated that Defendant Cole called Defendant Mullins "Boo Bear." He said that he did not have a romantic relationship with Defendant Cole.

Investigator Andrew Brown testified that he worked for the Tennessee Department of Correction as an investigator in the Office of Investigation and Complaints. Investigator

Brown met Defendant White while Defendant White was incarcerated at the Riverbend Maximum Security Institution. On February 3, 2016, Investigator Brown received a phone call from Detective Gaia about Defendant White. Based on his conversation with Detective Gaia, Investigator Brown and some other employees went to Defendant White's cell and observed Defendant White flushing a cell phone down his toilet. Investigator Brown confiscated a cell phone charger but was unable to retrieve the cell phone. Investigator Brown stated that one of the signatures that Defendant White used to communicate with Defendant Cole, LLKN JYD, meant "Long Live King Neal Junk Yard Dog[.]" "Long Live King Neal" referred to Neal Wallace, the founder of the Traveling Vice Lords gang. "Junk Yard Dog" referred to a faction of the Traveling Vice Lords that was organized by Charles Thompson, also known as "Country." Investigator Brown testified that there was no legitimate reason for an inmate to need a PayPal or Green Dot account. He explained that inmates could receive financial help from friends and family members through JPay, but inmates did not need a non-authorized cell phone to receive funds through JPay and non-inmates could send money to an inmate through JPay with a computer or smart phone. In Investigator Brown's experience, inmates used PayPal or Green Dot accounts to purchase contraband items such as tobacco products, narcotics, cell phones, or homemade weapons. He acknowledged that he did not know what the specific transactions noted on Defendant Cole's phone were for.

Defendant Cole, Defendant White, and Defendant Mullins decided to not testify. The jury found Defendant Cole guilty of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one, conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two, facilitation of possession of methamphetamine with the intent to sell in a drug-free zone in count three, and possession of methamphetamine with the

intent to deliver in a drug-free zone in count four. The jury found Defendant **Mullins** guilty of facilitation of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one and facilitation of conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two.<sup>8</sup>

The trial court sentenced Defendant **Mullins** to thirty years as a career offender for his convictions in count one and two. The trial court ordered these sentences to be served consecutively to his sentence in a previous case and merged Defendant **Mullins'** convictions in counts one and two.

\*5 The trial court sentenced Defendant **Cole** to thirteen and one-half years with release eligibility after service of 100% of the sentence in counts one and two. Additionally, the trial court merged the convictions in counts one and two. The trial court also merged counts three and four and sentenced Defendant **Cole** to thirteen and one-half years with release eligibility after service of 100% of the sentence in those counts. The trial court ordered Defendant **Cole's** sentences in counts one and two to be served concurrently to her sentences in counts three and four, for a total effective sentence of thirteen and one-half years in the Tennessee Department of Correction.

Defendant **Cole** and Defendant **Mullins** now timely appeal their convictions.

## II. Analysis

On appeal, Defendant **Mullins** argues that the evidence introduced at trial was insufficient for a rational juror to have found him guilty of facilitation of conspiracy to possess methamphetamine with the intent to sell or deliver beyond a reasonable doubt. Defendant **Cole** argues that the evidence introduced at trial was insufficient for a rational juror to have found her guilty of conspiracy to possess methamphetamine with the intent to sell or deliver and possession of methamphetamine with the intent to sell or deliver beyond a reasonable doubt. Defendant **Cole** also argues that the trial court erred by allowing Detective Gaia and Investigator Brown to testify about speculative, irrelevant testimony.

### *Sufficiency of the evidence*

Our standard of review for a sufficiency of the evidence challenge is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id.* Our standard of review “is the same whether the conviction is based upon direct or circumstantial evidence.” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009) ) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the “State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom.” *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007).

### *Defendant Cole*

Defendant **Cole** argues that the State failed to establish her guilt beyond a reasonable doubt because the State did not present any direct evidence that Defendant **Cole** knew what was in the package or the plan for the package upon arrival. The State notes that it can rely on circumstantial evidence alone for conviction and that “[t]he jury heard Defendant **Mullins's** statement and Defendant **Cole's** statement about her knowledge of the contents of the package and chose to reject them as the jury is entitled to do.”

Conspiracy is committed when “two (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense.” Tenn. Code Ann. § 39-12-103(a) (2016). “No person may be convicted of conspiracy to commit an offense, unless an overt act in pursuance of the conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.” Tenn. Code Ann. § 39-12-103(d) (2016). “Conspiracy is a continuing course of

conduct that terminates when the objectives of the conspiracy are completed or the agreement that they be completed is abandoned by the person and by those with whom the person conspired.” Tenn. Code Ann. § 39-12-103(e)(1) (2016). “The objectives of the conspiracy include, but are not limited to, escape from the crime, distribution of the proceeds of the crime, and measures, other than silence, for concealing the crime or obstructing justice in relation to it.” *Id.* “While the essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act, ... the agreement need not be formal or expressed, and it may be proven by circumstantial evidence.” *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998) (internal citation omitted).

\*6 Methamphetamine is a Schedule II controlled substance. Tenn. Code Ann. § 39-17-408(d)(2) (2016). It is a criminal offense for a person to knowingly “[p]ossess a controlled substance with intent to manufacture, deliver or sell the controlled substance.” Tenn. Code Ann. § 39-17-417(a)(4) (2016).

“Knowing” refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.”

Tenn. Code Ann. § 39-11-302(b) (2016). “Proof that a possession is knowing will usually depend on inference and circumstantial evidence.” *State v. Brown*, 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995). “The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs.” *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987).

With regard to a determination of intent to sell or deliver, proof of intent usually consists of circumstantial evidence and the inferences that can be reasonably drawn from that evidence. *See Hall v. State*, 490 S.W.2d 495, 496 (Tenn. 1973); *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983) (observing that a jury may derive a defendant's intent from both direct and circumstantial evidence). The jury may infer “from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing.” Tenn. Code Ann. § 39-17-419 (2016). “A person is criminally responsible for the facilitation of a felony, if, knowing that another intends

to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony.” Tenn. Code Ann. § 39-11-403(a) (2016).

When the evidence is viewed in the light most favorable to the State, we conclude that the evidence was sufficient for a rational juror to have convicted Defendant **Cole** of conspiracy to possess methamphetamine with the intent to sell or deliver and possession of methamphetamine with the intent to sell or deliver in a drug-free zone. Detective Gaia testified that he learned that a package that contained a controlled substance was scheduled to be delivered to “Bailey Green” at Defendant **Cole's** address. Detective Gaia opened the package and observed that it contained a pound of methamphetamine. Defendant **Cole** accepted the package containing methamphetamine during the controlled delivery. In Defendant **Cole's** residence, Detective Gaia and other officers found a photograph of Defendant White, letters from Defendant White to Defendant **Cole**, and prepaid credit/debit cards. Detective Gaia also found a computer, and Defendant **Cole** had recently tracked the package that contained methamphetamine on the FedEx website. Detective Gaia testified that Defendant **Cole's** residence was located in a drug-free zone.

\*7 Additionally, Detective Gaia recovered three cell phones. A phone number labeled as “Line Boo Other” called Defendant **Cole's** LG phone continuously during Detective Gaia's search of Defendant **Cole's** residence. After Mr. White arrived at the residence, Detective Gaia observed that the same phone number was calling Mr. White's phone but was labeled at “J” in Mr. White's phone. On Defendant **Cole's** three phones, Detective Gaia found several photographs of Defendant White in a prison cell that had been sent to Defendant **Cole** from various phone numbers. These phone numbers were sometimes labeled as “New BooBear” or “Line Boo Other” in Defendant **Cole's** contact list. In text message exchanges, Defendant **Cole** continually referred to the recipient of her messages at the phone numbers as “BooBear.” These phone numbers used signatures such as “Da Junk Yard[,]” “COUNTRY CRAZY[,]” or “L.L.K.N. J.Y.D.” The jury could have inferred that Defendant White was communicating with Defendant **Cole** through these text message exchanges. Additionally, several text messages between Defendant **Cole** and Defendant White's phone numbers referenced transferring money into accounts or purchasing prepaid credit/debit cards.

Investigator Brown testified that he observed Defendant White flushing a cell phone and charger down the toilet in his cell at Riverbend Maximum Security Prison on the same day that Detective Gaia observed “Line Boo Other” calling Defendant Cole’s cell phone. Investigator Brown also testified that inmates frequently transferred money into prepaid credit/debit card accounts through PayPal, Kroger, or Green Dot cards in order to purchase contraband such as “[t]obacco products, narcotics, cell phones, [and] weapons.”

The jury could have inferred that two or more people—including Defendant Cole, Defendant Mullins, Defendant White, and Angel—acted for the purpose of facilitating the possession of methamphetamine with the intent to sell or deliver and agreed that Defendant Cole would engage in conduct that constituted possession of methamphetamine with the intent to sell or deliver. Defendant Mullins admitted to Detective Christian that he asked Defendant Cole if he could send a package to her house that he knew contained methamphetamine. Defendant Cole tracked the package on her computer through the FedEx website and accepted the package during the controlled delivery. Shortly after delivery, she texted Defendant White to inform him that the package had been delivered. Agreeing to accept the package and accepting the package were overt acts in pursuance of the conspiracy. *See* Tenn. Code Ann. § 39-12-103(d) (2016).

Although Defendant Cole argues that the State failed to establish that she knowingly possessed the methamphetamine, it was jury’s prerogative to reject Defendant Mullins’ statement that he told Defendant Cole that the package contained jewelry and that she was unaware of the package’s actual contents. Based on Defendant Cole’s numerous text message exchanges with Defendant Cole and “Eastwood” about transferring money into accounts, which Investigator Brown testified was frequently used to purchase contraband such as illegal drugs, the jury could have inferred that Defendant Cole was aware that the package that Defendant Mullins arranged to send to her residence contained an illegal substance. *See* Tenn. Code Ann. § 39-11-302(b) (2016) (a person acts knowingly with respect to the circumstances surrounding the conduct “when the person is aware ... that the circumstances exist”). Additionally, the jury could have inferred that Defendant Cole knowingly texted Defendant White that the package that contained methamphetamine arrived when she texted “Package arrived” and “They put the wrong street name. Lucky they knew what it was suppose[d] to be[.]” Based on the fact that the package contained one pound of methamphetamine worth

between \$12,000 and \$15,000, the jury could have inferred that Defendant Cole and her conspirators intended to sell or deliver the methamphetamine to another party. *See* Tenn. Code Ann. § 39-17-419 (2016). Defendant Cole is not entitled to relief on this ground.

#### *Defendant Mullins*

Defendant Mullins argues that the evidence was insufficient to support his conviction of facilitation of conspiracy to possess methamphetamine with the intent to sell or deliver in a drug-free zone because he testified that neither Defendant Cole nor Defendant White knew that the package delivered to Defendant Cole’s residence contained methamphetamine. The State contends that “Defendant Mullins furnished substantial assistance to the conspiracy by providing Angel with Defendant Cole’s address, accepting money for the address, providing Defendant Cole with the tracking information, and informing Angel when Defendant Cole accepted the package.”

\*8 We have previously set out the law on conspiracy, facilitation, and possession in this opinion. When the evidence is viewed in the light most favorable to the State, we conclude that the evidence was sufficient for a rational juror to have found Defendant Mullins guilty of facilitation of conspiracy to possess methamphetamine with the intent to sell or deliver in a drug-free zone. Detective Christian testified that he interviewed Defendant Mullins about his involvement in the offenses at issue. During the interview, Defendant Mullins stated that a fellow inmate named Angel had offered to pay him \$600 if Defendant Mullins gave him an address in Memphis to which Angel could send a package of methamphetamine. Defendant Mullins asserted that he asked Defendant Cole if he could send a package of jewelry for his mother to her address and claimed that Defendant Cole did not know that the package actually contained methamphetamine. He also claimed that Defendant Cole referred to him as “Boo Bear.” However, it was within the purview of the jury to discredit Defendant Mullins’ statement to Detective Christian. It was also the jury’s prerogative to infer that Defendant Cole was communicating with Defendant White, not Defendant Mullins, in the numerous text message exchanges between Defendant Cole and “BooBear,” “New BooBear,” and “Line Boo Other[.]” Based on Defendant Mullins’ admission to Detective Christian that he provided a mailing address in Memphis to Angel in exchange for \$600, we conclude

that Defendant **Mullins** “knowingly furnishe[d] substantial assistance in the commission” of the conspiracy to possess methamphetamine with the intent to sell or deliver in a drug-free zone. *See id.* Defendant **Mullins** is not entitled to relief on this ground.

*Admission of testimony on text messages*

Defendant **Cole** argues that the trial court should not have allowed Detective Gaia and Investigator Brown to testify regarding the meaning of some text message exchanges between Defendant **Cole** and Defendant White, which referenced dollar amounts and account numbers. Defendant **Cole** asserts that Detective Gaia and Investigator Brown did not have sufficient personal knowledge to support their testimony and that the testimony was irrelevant. The State contends that the trial court properly admitted Detective Gaia and Investigator Brown's testimony.

In order for evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.” Tenn. R. Evid. 401. However, even if evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ....” Tenn. R. Evid. 403. “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.” Tenn. R. Evid. 602. A witness has personal knowledge of facts when the witness “perceived the facts through one or more of the five senses.” *State v. Boling*, 840 S.W.2d 944, 949 (Tenn. Crim. App. 1992). A lay witness may give testimony in the form of opinions or inferences if the testimony is “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.” Tenn. R. Evid. 701(a). We review a trial court's ruling regarding the admissibility of evidence for an abuse of discretion. *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008).

*Detective Gaia's testimony*

The following exchange occurred during Detective Gaia's direct testimony:

[THE STATE:] Now if you could look at 460, 465. Well, let me jump back a little bit. Look in the 270 range and tell the Court or tell the jury what you see happening here. These conversations with the unidentified person.

[DETECTIVE GAIA:] All right.

[THE STATE:] You don't have to go through, just describe what you see in the text messages and what your interpretation and their meaning is.

[DETECTIVE GAIA:] They're texts concerning account numbers and the amounts of money being put on them. Text message 277 has forty dollars and an account number.

[DEFENSE COUNSEL:] I'm going to object, your Honor.

THE [TRIAL] COURT: Based on?

[DEFENSE COUNSEL:] Your Honor, it's speculation as far as what's going on. It simply says a dollar amount and then there's a number that follows over it. He ... can't say definitely that it is talking about account being loaded or anything like that. He can just simply ... read the text message and what it is but he can't interpret that because he doesn't have the prior knowledge.

\*9 THE [TRIAL] COURT: Well, I think he can say what it means to him. But again, ladies and gentlemen, it's like slang or anything else, I can have someone tell you what they think it means, but ultimately it will be for you, the jury, to determine, if you need to make a determination what that means.

So I do understand where you're coming from but I think the officer in his limited experience is able to tell what he thinks that's referring to based on his experience. But again, it will be for you, members of the jury, to decide if that's what it means or not.

[THE STATE:] I'm not going to go very deep into this, Judge.

THE [TRIAL] COURT: I thought the question was more going to be relevance and I was more leaning in that direction. I'm not sure but I'm, we'll give you a little room to try to tie all this up.

[THE STATE:] If you would, Detective, look the number 278 and we'll pass this. Read the text. Just read the text?

[DETECTIVE GAIA:] Text 278 says: I've got the forty loaded but for some reason I can't load the five hundred. It's good because I called and checked -- and checked but I keep getting an error code every time I try and load it.

[DEFENSE COUNSEL]: Your Honor, I'm going to object to the relevance of that because, I mean.

THE [TRIAL] COURT: It will be for the, again, the jury. I don't see what it is right now but in terms of this, we've been talking about it since day one, these are conspiracy charges and so the conversation, if the jury accredits that to being between two of the defendants, you know, I will let them place what emphasis on it they will.

On cross-examination, Detective Gaia agreed that transferring money into a PayPal account or using a gift card was not illegal.

The State argues that, after Defendant **Cole** objected, "Detective Gaia provided no further commentary or 'interpretation' regarding [Defendant **Cole's**] text messages, and the trial court properly instructed the jury of its duty to determine the weight of Detective Gaia's testimony." The State also notes that "Detective Gaia acknowledged on cross-examination that, even if the text messages referenced account numbers, there was nothing inherently illegal about sending an account number with a dollar amount" and that "there was no direct evidence connecting this information to the methamphetamine in the package delivered to Defendant **Cole's** home."

We conclude that the trial court properly admitted Detective Gaia's testimony. Here, defense counsel objected to Detective Gaia's testimony on the basis of lack of personal knowledge and relevance. Detective Gaia had personal knowledge of the text messages because he seized Defendant **Cole's** phones and examined the text messages on the phones. *See* Tenn. R. Evid. 602. Additionally, we conclude that Detective Gaia's testimony relating to the text messages was relevant because the evidence had a tendency to make the existence of a financial relationship between Defendant **Cole** and Defendant **White** more probable. *See* Tenn. R. Evid. 401. Finally, we note that the trial court instructed the jury that it was the jury's task to determine whether the jury agreed with Detective Gaia's reading of the text messages. We hold that the trial court did not err in admitting Detective Gaia's testimony that discussed the text message exchange between Defendant **Cole** and Defendant **White**.

*Investigator Brown's testimony*

\*10 The following exchange occurred during Investigator Brown's direct testimony:

[THE STATE:] Have you ever had a chance to review transactions through these alternative meetings, these, you know, electronic phones that never really touch the ground, they're just kind of out there in a cloud?

[INVESTIGATOR BROWN:] Yes. On occasion I have been able to follow PayPal transactions, Green Dot transactions.

[THE STATE:] What do inmates use PayPal accounts, Kroger accounts, Walgreens accounts, what do they use those for?

[DEFENSE COUNSEL]: Judge, I object. That's outside the scope of this trial. It's not relevant to this trial.

THE COURT: Well I think it's, with all due respect, I think it is.

[DEFENSE COUNSEL]: And also calls for an opinion and speculation.

THE COURT: And I think he's given a basis for his knowledge on that subject. And again, it will be up to the jury what they accredit or don't. So I'm going to allow it. I think this is -- he'll be allowed to answer it if he knows.

[THE STATE:] In those text messages that involve monetary transactions -- let me back up. What legitimate transactions, what legitimate sources of income can inmates have access to while they're in custody?

[INVESTIGATOR BROWN:] Family members of inmates have access to what they call JPay. And what that does is you put money on an inmate[']s account, it goes onto their, their inmate books. They can buy commissary, time on the phone, toiletries or hygiene, things like that.

[THE STATE:] Time on a monitored ... prison phone?

[INVESTIGATOR BROWN:] Yes. Yes.

[THE STATE:] And just so we're clear, I'm sure everybody knows, but are personal cell phones permitted to be possessed by inmates?

[INVESTIGATOR BROWN:] No.

[THE STATE:] And to access th[ese] JPay accounts by outside free world person, [doe]s it require the inmate to have a cell phone?

[INVESTIGATOR BROWN:] No.

[THE STATE:] Does it require even a person on the outside to have a cell phone?

[INVESTIGATOR BROWN:] No.

[THE STATE:] You use a computer?

[INVESTIGATOR BROWN:] Yes.

[THE STATE:] Does it require direct contact between the inmate and the free world person?

[INVESTIGATOR BROWN:] Not on an unmonitored device, no.

[THE STATE:] Well on any device?

[INVESTIGATOR BROWN:] No.

....

[THE STATE:] And then going through those transactions, and for the record, I believe item -- what was the exhibit number on the back of that?

[INVESTIGATOR BROWN:] 31.

[THE STATE:] 31, that being the LG phone, you didn't go through all three phones, did you?

[INVESTIGATOR BROWN:] No, sir.

[THE STATE:] Just that one?

[INVESTIGATOR BROWN:] Just this one.

[THE STATE:] And you looked, you saw -- did you see transactions that appear to be involving monetary transfers?

[INVESTIGATOR BROWN:] I saw several transactions ranging from twenty-five dollars, I believe, all the way up to maybe five hundred. There was a mention of a five hundred dollar transaction in there as well.

[THE STATE:] All right. In your experience and investigation pre-prior, what are those transactions for? Or what could they be for?

[DEFENSE COUNSEL:] Again, judge, speculation.

THE COURT: I'm going to let him answer, if he knows, they could be for in your experience and give the reason. But as to what they were for, unless you have personal knowledge, I am going to sustain the objection to that question unless you have some way of knowing exactly what this is for. But what your experience tells you the type of things, let me hear the answer and I'm say it may or may not have anything to do with it.

\*11 So because I'm sitting here going -- somethings it could be very relevant to this trial and other things it, while it may be interesting, it may not have any bearing on this. What --

[INVESTIGATOR BROWN:] In my experience, your Honor, different amounts or different denominations transactions have meant different things.

PayPal, Kroger cards, Green Dots, those numbers are used for, and again in my experience, they've been used for the purchase of contraband[ ]. Tobacco products, narcotics, cell phones, even weapons, and by weapons I mean homemade knives. These specific transactions I don't exactly what they were for.

....

[INVESTIGATOR BROWN:] But in my experience the twenty-five, the fifty, the hundred, those are usually tobacco, marijuana and narcotics.

[THE STATE:] Okay. If the Court's finished.

THE COURT: I am. And, ladies and gentlemen, I think what I allowed the witness to tell you what his experience has been in the past as I think he very clearly said he doesn't have personal knowledge of these particular transactions and, you know, I think we'll go from there.

[THE STATE:] Suffice it to say, is there an underground market for the transactions of contraband in the prison?

[INVESTIGATOR BROWN:] Most definitely.

[THE STATE:] And in your review of these transactions that involve monetary amounts and what appear to be some

sort of transaction number or account numbers for any of them involving a JPay account?

[INVESTIGATOR BROWN:] There was one mention of putting money on JPay. When the individual came back with I can only put so much on an account per day, the individual on the other line said just get me a PayPal. So there was one mention of a potential, potentially legitimate transaction but then it went to who was the end of a transaction when it went to the PayPal. So I have to say no, there w[ere] no legitimate monetary transactions from what I've read in this cell phone report.

We agree with the State that the trial court did not err in admitting Investigator Brown's limited testimony. Here, defense counsel objected to Investigator Brown's testimony on the basis of lack of personal knowledge and relevance. Investigator Brown had personal knowledge of the content of the text messages on Defendant **Cole's** LG phone because he examined the report prepared by Detective Gaia that listed the text messages, the sender, and the recipient. *See* Tenn. R. Evid. 602. Further, Investigator Brown had personal knowledge of the fact that inmates frequently use prepaid debit/credit cards for illegal transactions while incarcerated based on his experience working as a corrections officer. Investigator Brown stated that, in his experience, PayPal, Kroger, and Green Dot cards are "used for the purchase of contraband" such as "[t]obacco products, narcotics, cell phones, even weapons[.]" Investigator Brown specifically acknowledged that he did not know what the transactions listed on Defendant **Cole's** phone were for, thereby limiting his testimony to the extent of his personal knowledge.

Additionally, we conclude that Investigator Brown's testimony relating to the text messages was relevant because the evidence had a tendency to make the existence of a financial relationship between Defendant **Cole** and Defendant White more probable. *See* Tenn. R. Evid. 401. We also conclude that Investigator Brown properly offered

an opinion on the evidence as a lay witness. Investigator Brown's testimony that inmates frequently use prepaid debit/credit cards for illegal transactions was an opinion that was "rationally based" on his perception as a corrections officer and was "helpful to a clear understanding" of his testimony as well as the jury's determination of whether Defendant **Cole** and Defendant White had conspired to possess methamphetamine. *See* Tenn. R. Evid. 701(a). The trial court properly admitted Investigator Brown's testimony, and Defendant **Cole** is not entitled to relief on this ground.

### III. Conclusion

\*12 We conclude that the evidence was sufficient for a rational juror to have found Defendant **Cole** guilty of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one, conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two, facilitation of possession of methamphetamine with the intent to sell in a drug-free zone in count three, and possession of methamphetamine with the intent to deliver in a drug-free zone in count four. Additionally, we conclude that the evidence was sufficient for a rational juror to have found Defendant **Mullins** guilty of facilitation of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one and facilitation of conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two beyond a reasonable doubt. Lastly, we conclude that the trial court did not err in admitting Detective Gaia's and Investigator Brown's testimony about Defendant **Cole's** text message exchange with Defendant White. Therefore, we affirm the judgments of the trial court.

### All Citations

Slip Copy, 2018 WL 5810011

### Footnotes

- 1 Detective Gaia determined that there was not a valid address of 2552 Linwood in Shelby County. He learned that the correct address was 2552 Jenwood.
- 2 Detective Gaia refers to this individual as "Dustin Van White." However, this individual is referred to as "Dustin White" in the remainder of the transcripts. For purposes of clarity, we will refer to him as Mr. White.
- 3 Sergeant Terrence Riley also testified that Defendant **Cole's** residence at 2552 Jenwood was located within 1,000 feet of Raleigh Bartlett Meadows Elementary School.
- 4 Detective Michael Harber of the Shelby County Sheriff's Office explained that inmates used personal identification numbers when placing a call at the jail. Detective Harber identified a recording of phone calls that Defendant **Cole** made

while she was incarcerated, and a CD containing the phone calls was admitted as an exhibit at trial. However, the CD of Defendant **Cole's** jail phone calls included in the appellate record was not functional.

- 5 Many phones have the ability to automatically add a signature of the user's choosing to the end of every text message.  
6 This phone number was later identified as "Eastwood" in Defendant **Cole's** contact list in her LG phone.  
7 On cross-examination, Detective Gaia stated that he sent this final text message to "Line Boo Other." He explained that he sent the text message because he was attempting to arrange for the owner of the package to pick it up.  
8 The jury found Defendant White guilty of conspiracy to possess methamphetamine with the intent to sell in a drug-free zone in count one and conspiracy to possess methamphetamine with the intent to deliver in a drug-free zone in count two. Defendant White filed a notice of appeal, and his appeal is currently pending with this court.

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