IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 16, 2002 Session

STATE OF TENNESSEE v. CHRISTINE D. McCLAIN

Direct Appeal from the Circuit Court for Wayne County
No. 11932 Robert L. Jones, Judge

No. M2001-00020-CCA-R3-CD - Filed June 7, 2002

Defendant, Christine D. McClain, was convicted by a Wayne County jury of permitting or facilitating the escape of a person in custody for a felony conviction, Tenn. Code Ann. § 39-16-607, a Class C felony. Following a sentencing hearing, the trial court ordered Defendant to serve three years in confinement. In this appeal, Defendant challenges her conviction and sentence, raising the following issues: (1) whether the evidence was sufficient to support her conviction; (2) whether the trial court erred in its rulings on various evidentiary issues; (3) whether the trial court erred by denying Defendant's request for a continuance on the ground that the State failed to abide by the rules concerning timely discovery; (4) whether the trial court erred by failing to give the proper jury instruction concerning the identification of Defendant; (5) whether the trial court erred by failing to instruct the jury on appropriate lesser-included offenses; and (6) whether the trial court erred by denying Defendant probation and/or any form of alternative sentencing. After a thorough review of the record, we affirm the judgment of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Ricky L. Wood, Parsons, Tennessee, for the appellant, Christine D. McClain.

Paul G. Summers, Attorney General and Reporter; Peter M. Coughlan, Assistant Attorney General; T. Michael Bottoms, District Attorney General; and J. Douglas Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

In January 1999, David Britt was an inmate at the Corrections Corporation of America ("CCA") prison in Wayne County, Clifton, Tennessee. Britt had been previously convicted of first degree murder and sentenced to life imprisonment. The defendant, Christine D. McClain, was employed as a correctional officer at CCA and assigned to the area where Britt was incarcerated. At approximately 2:00 p.m. on January 30, 1999, Britt escaped by walking out of the prison with other corrections officers during a shift change. He was wearing a correction officer's uniform and successfully passed through numerous security controls. The Tennessee Bureau of Investigation ("TBI") was called in to assist CCA and local law enforcement with recapturing Britt. On January 31, 1999, after various inquiries and interviews with CCA staff and inmates, the TBI arrested Defendant and charged her with permitting or facilitating Britt's escape. A few days later, Britt was captured in Decatur County by officers from the Decatur County Sheriff's Department, but he refused to give a statement or reveal the names of anyone who had assisted him.

On January 30, 1999, shortly after the prison officials at CCA discovered that Britt may have escaped the facility, TBI Agent Jerry Tenry was assigned to investigate the incident. Arriving at approximately 5:30 p.m. that same afternoon, Tenry spoke with the prison warden, Kevin Meyers, and CCA's internal affairs officers. Tenry then requested additional TBI agents. The team of agents and officers began by inspecting the fences and checking to see whether any of CCA's vehicles were missing, in an effort to discover how Britt had exited the facility. When it became apparent that Britt did not escape through a hole in the fence or drive away in a prison vehicle, the investigation team began interviewing inmates and employees of CCA. The employees working the previous shift (6:00 a.m. to 2:00 p.m.) were requested to return for questioning.

Agent Tenry testified at trial that Defendant was one of the numerous employees asked to return to CCA for an interview and that he was present during her questioning. Defendant was asked whether anyone was in Defendant's vehicle when she left the prison facility after her shift, whether she supplied inmate Britt or any individual with a CCA uniform, and whether she assisted Britt in leaving the facility in any way. Defendant admitted knowing Britt, but denied supplying him with a CCA uniform or assisting in any way with his escape. According to Tenry, the questions directed to Defendant were the same as those asked the other employees.

Subsequent to Defendant's initial interview, Agent Tenry received information which required that Defendant return to CCA for further questioning. Tenry testified an officer was sent to Defendant's house; if she refused to return, he was instructed to bring her back involuntarily. Defendant returned of her own accord at approximately 10:00 a.m. on January 31, 1999, at which point she was taken to a meeting room to talk with Tenry and TBI Agent T. J. Jordan. Tenry testified that, prior to beginning the second interview, he informed Defendant of her "constitutional rights" and told her that additional information had come to light since they first questioned her. Initially, Defendant persisted in asserting that she had no knowledge of Britt's escape. However,

she changed her story when Tenry "interjected a hypothetical scenario" (the details of which were not given at trial) and then gave the agents a statement. Agent Jordan remained with Defendant and handwrote her statement because Tenry's presence was required elsewhere. Tenry returned once or twice while Jordan was writing. When he finished, Tenry read the statement and then gave it to Defendant. After Defendant read the statement, she told them she wanted to make some changes. Jordan composed an addendum, Defendant read it over, and then she signed both parts--the original statement and the addendum. Defendant also initialed the top and bottom of each page of the statement.

At trial, Agent Tenry read Defendant's statement which, in relevant part, declared the following:

> I have been employed at [CCA] since October 16, 1998. I started work in the pod that housed inmate David Britt about a week before Christmas, 1998. Very shortly after I started working around David, he began to befriend me. He started talking to me about how he felt he could have gotten a lighter sentence. He felt that--he felt he had been stuck with a life sentence because things became political. The more he talked to me, I just saw him as a kid who had been--who had had it stuck to him by the justice system. I also felt sorry for him as a mother. I have children myself David's age. I just felt like he was a child who had been wronged by the system. Nobody had been there for him to right it. David has also--David had also come up to me and preached the Bible to me. He indicated he had found religion and reform.
>
> As time went on, David made comments about having a perfect plan to escape. He kept making the comments. At some point he approached me and asked what I would do if he jumped in my truck with me. I asked him how he would do that? He said he was just going to walk out. I kind of blew it off and told him he was crazy. He told me all of this about three weeks ago. Up until that time--up until the time of the escape, he would hint around about escaping. He never said a definite time. He would comment that it was getting closer. He told--I told David several times I could get him in trouble for planning the escape. I didn't report him because I didn't think he would do it. I thought if he tries, he is going to get caught. Yesterday I came back from my weekend. I did not know he was going to escape when I came to work. There was nothing previously discussed. During my shift he told me today is the day. He said, George, an inmate, is going to help him. He said he was going to walk out. There was no plan discussed between us. I did not see David from about 1:10 p.m. until shift change. I was leaving my assignment, Apollo B pod, at about 2:00 p.m. I was relieved by Officer Kelly right at two o'clock p.m. Me, Sorenson and Lowery left at the same time. Me and Sorensen made our way to 11A gate. Lowery was stopped to talk to Ruddle. We went through 11A gate. We got to the break room and clocked out. I walked out of the break room and started towards operations. I stopped at the secured door. I was holding the door waiting

> for it to pop open, that is when David walked up. That is the first time I had seen him since 1:10 p.m. I didn't say anything to him and he never said a word. He was in a guard uniform. He had a cap on. He also had an ID badge on. His hair had been cut and he was clean shaven. The last time I saw him at 1:10 p.m., he still had all of his hair and beard. He walked through the door. He headed on to the next door that opens into central control. He was walking behind me. I got to the door and went through. He would come through behind me. He got into control. I walked up to the blacklight and showed my hand. I stepped back. David was asked to show his hand. He stuck his hand under the light and passed through. He left central and headed down the hill through two more secured gates. It would have been--it would have been me, David, and about 15 correctional officers when we got to the administration building. I went through the checkpoint metal detector and blacklight. He would have still been behind me. I processed out of the building to my truck. I ran into my sister right out front. Nobody was around me. I don't--I don't know where he was. I got in my truck--I got to my truck and got in. David slid in behind me. I have to get in on the passenger side because the driver's side door will not open from the outside. It will open from the inside. He told me just to drive. I drove out of the lot through the vehicle checkpoint. I slowed and waived [sic]. He told me to head toward Savannah. I got to the road that goes to Savannah. He kept saying, she was going to get him. I pulled off the road. He asked me about a coat behind the seat and I gave him--and I gave it to him. It was a brown men's coat. He put the coat on and run up through the woods. That is the last time I saw him. I did not supply David with a guard uniform. I don't have--I didn't have anything to do with the invisible ink on his hand. I did not supply him with any clothes other than a jacket. David and I have not had any type of intimate relationship.

Agent Tenry testified that although the entire second meeting with Defendant spanned several hours, the actual conversation which gave rise to Defendant's statement took only forty-five minutes. Handwriting the statement took more than an hour and, afterward, Tenry spent additional time trying to locate the assistant district attorney or a judge to issue an arrest warrant. Because it was Sunday morning, Tenry did not complete the task until approximately 3:00 p.m. Tenry further testified that although Defendant's attitude during the second interview was "standoffish," she answered the agents' questions and was not belligerent. When Tenry was asked whether Defendant appeared coherent and able to understand the questions put to her during the second interview session, he answered affirmatively. Tenry also stated that Defendant did not appear drugged or complain that she was too tired to talk to the agents.

During cross-examination, Agent Tenry conceded that the TBI's investigation had uncovered no evidence that Defendant furnished Britt with a uniform, identification badge, shoes, or anything of that nature. Tenry testified that Defendant had consented to a search of her house and vehicle prior to her statement, but the TBI agents had discovered no fingerprints or any other proof which would have linked Britt with Defendant or indicated that Britt had been staying at Defendant's house. (Britt was apprehended 2.5 miles from Defendant's residence.) Tenry admitted that the

primary evidence against Defendant consisted of Defendant's own statement and the statement of Danny Ruddle, a fellow CCA correctional officer who observed Britt and Defendant drive away together in her truck after her shift. The TBI was unable to recover the CCA identification badge or uniform worn by Britt during his escape or discover where they came from.

Tenry also testified that the TBI agents collectively interviewed and took statements from approximately twenty or more correctional officers during the investigation. He acknowledged that no other persons where charged with crimes relating to the escape, but also stated that no other officers admitted having knowledge that an inmate was exiting the facility with them. Defendant was the only CCA employee asked to return for a second interview. For a brief time, a correctional officer named Fred Atwood was the focus of further inquiry because Atwood's phone number was discovered in Britt's cell after the escape. At trial, Atwood testified that he had been employed at the CCA facility two separate times and that he initially met Britt in 1992 or 1993, during his first period of employment. Atwood admitted that he had a relationship with Britt during this time, such that he would do various "favors" for him or overlook some minor indiscretions with regard to the rules. However, Atwood quit in 1995. When he was rehired in 1997, he was assigned to work "visitation," which limited his contact with the inmates and he ceased doing "favors." Atwood claimed that he had no contact with Britt after he was rehired. With regard to the discovery of his telephone number in Britt's cell, Atwood testified that the number was six years old and he has had ten different phone numbers since then. Atwood testified that he was terminated shortly after Britt's escape, allegedly based upon the breach of regulations involving Britt during his first employment period.

Tenry also conceded during cross-examination that Britt had walked out of the prison facility with approximately three to fifteen correctional officers and that at least three of those officers actually spoke with Britt. One of those three officers was Danny Ruddle, the only person who reported observing Defendant and Britt drive away together. At trial, Ruddle testified that at approximately 2:00 p.m. on January 30, 1999, he was approaching the facility's final checkpoint after completing his shift. Just prior to the opening of the gate, he noticed a young male correctional officer walking "side-by-side" with Defendant. The man had a little piece of hair sticking out from under his hat and Ruddle mentioned this to him. The man tucked it back in, leaned over and said something to Defendant, and they all continued walking. Defendant and the young officer were ahead of Ruddle. Next, he observed them both enter Defendant's pickup truck (which he claimed to recognize) and drive away. Defendant was driving at the time, and the young officer sat on the passenger side. Although Ruddle recognized Defendant from previous encounters at CCA, he said that he did not know her personally. He surmised that Britt was a new recruit because he did not recognize him--new faces were not uncommon at CCA. Ruddle testified that during his interview with Agent Tenry the next morning, he asked to see a photograph of Britt. Ruddle claimed that the man in the photograph was the same man that he had observed walking out of the prison facility with Defendant the previous day.

Ruddle testified during cross-examination that Defendant's truck was a light blue color. When asked whether the truck had a two-tone paint job, he replied, "I don't think so." Defendant's

counsel pointed out that a statement given by Ruddle on the day after the incident claimed that Defendant's truck was painted white on the top and blue on the sides. This same prior statement also maintained that Defendant entered the truck on the driver's side and the young officer got in on the passenger side. Defendant's counsel informed Ruddle that the driver's side door to Defendant's truck could not be opened from the outside. Ruddle confessed that he was uncertain from which side of the truck Defendant and Britt entered the vehicle, but, even so, he was positive that they both entered the vehicle and that they drove away together. Ruddle also testified that the photograph from which he identified Britt was not an accurate likeness of the man he watched exit the prison with Defendant–the photograph showed Britt with long hair and unshaven. On the day Britt escaped, he was clean-shaven and appeared to have short hair. Notwithstanding, Ruddle testified that it was "pretty easy" to identify him from the photograph, which was presented to him independently (not with other photos in the form of a lineup). Ruddle claimed that he was "nose to nose" with Britt when the two men discussed the hair sticking out from under Britt's hat.

Agent Tenry testified that Correctional Officer Roger Dale Norman also gave the TBI agents a statement concerning Britt. Pursuant to an agreement between Defendant and the State, the trial court allowed Tenry to read Norman's statement in court because law enforcement officers had been unable to locate him or secure his appearance by subpoena. The trial court informed the jury that although Norman's statement was hearsay, the State was forgoing an objection in favor of an instruction that the statement should be considered in the same light as if Norman were testifying in court. In other words, the State "was not stipulating or admitting the truth of those matters" contained therein. Consequently, Norman's statement concerning the events of January 30, 1999, was read and declared the following:

> I have been working for [CCA] for about one and a half years. I am a C.O. and work all over the facility. Today I worked the 11B gate. That is the gate to the Columbia and Discovery mini yard. I got relieved from duty at about 1:55. When I started towards central, a couple of people, coworkers, got in front of me and some were behind me. When we got to central's door, I heard someone at central ask to see the C.O.'s hand. I don't know who he was. He showed his hand under the light and must–and must have–must have had a stamp because they let him pass. I knew David Britt because I had worked around him quite a bit. I didn't recognize this guy as Britt. He looked taller and walked differently. When I came through central, he was behind me. And when I got to checkpoint, I went to the rest room. I don't know where he went from there. I know he appeared to have a discolored hat on. It wasn't a new CCA blue cap like most of us wear.

Inmate Britt was captured in Decatur County three days after his escape by Officer Mike Harralston, of the Decatur County Sheriff's Department. Officer Harralston testified that Britt's hair was long and pulled back in a ponytail when he was apprehended. He also appeared "scrubby," as though he had not shaved in three or four days. Britt was wearing a brown Carhartt-type jacket; a blue sweat shirt; a blue long-sleeve, button-up shirt; a blue tee-shirt; black jeans and white tennis shoes. After Britt's arrest, his clothes were given to Agent Tenry, who bagged and boxed them at

the Decatur County jail upon receipt. Tenry testified that Britt's clothing had been kept in a separate and secure evidence storage facility at Tenry's home since that time. He further testified that no analysis of any kind was performed on the clothing, and the inventory list presented at trial was composed from memory sometime after the evidence was stored. After Agent Tenry's testimony, the clothing discussed was admitted into evidence without objection by the Defendant.

Kevin Bradley Meyers, the CCA prison warden at the time of the escape, testified at trial that the facility has the capacity to house 1506 inmates. The average number of prisoners ranges between 1475 and 1500, which was the approximate number of prisoners at the facility in January 1999. CCA employed a total staff of 400 persons. Defendant was hired as a correctional officer in October 1998. Each correctional officer undergoes 120 hours of classroom training and 40 hours of on-the-job supervised experience in the facility itself. In October 1998, CCA was particularly "security conscious." The training of correctional officers emphasized escape prevention because four inmates had escaped earlier that month. Once Warden Meyers was notified of Britt's escape, he followed standard procedure. This included notification of all law enforcement personnel in the area: Tennessee Highway Patrol, Tennessee Bureau of Investigation, all local police departments and the Sheriff's Department in Wayne County, as well as all of the counties contiguous to Wayne County. CCA also launched an internal investigation.

Warden Meyers testified that Defendant was assigned to work the 6:00 a.m. to 2:00 p.m. shift in "Apollo B pod," which handled 111 inmates, including Britt, in January 1999. To gain entrance to the prison facility, the security procedures in force at that time required an employee to first pass through a checkpoint at the rear of the administration building. At that point, the employee's hand was stamped with blacklight ink, and then he or she passed through a metal detector. Once through the administration building, the employee proceeded through a "cattle run," an area with two fences side by side. Inside this "run," two electronically controlled gates allowed access into another building called "central control," where additional employees monitor those entering and exiting the two electric gates and also oversee the electric fence alarm system. Once through the two gates, the employee enters a long hallway. At the end of the hallway is a third electronic door which allows access to the "operations" building and the prison itself. The prison area is divided into zones. One of the zones contains the Apollo building, which is further divided into two pods, "A" and "B." An additional officer stationed in a room at the entrance to the pods controls two more doors. During a typical shift change in January 1999 (the recounted procedures had since changed), the employees reporting to work would relieve the on-duty officers upon arrival at their assigned posts. A departing employee would then clock out and exit the facility either individually or with a group, by reversing the process described above. On any given day, the traffic number could swell due to the presence of trainees who accompanied their supervising officers. Warden Meyers testified that the turnover rate of employees at CCA was "rather high" and, therefore, training of new officers was a interminable process.

During cross-examination, Warden Meyers testified that the employees in central control regulate the doors based on visual inspection of the persons moving in and out through those doors. In other words, the employees operating the doors from central control manage the flow of personnel

simply by watching them through the clear doors separating them. During a shift change, employees entered and exited simultaneously and, in January 1999, it would not have been unusual to have ten to fifteen officers in the waiting room at one time. Under those circumstances, the central control person was to visually inspect the crowd for unfamiliar faces and ensure that everyone was wearing a uniform. If the person operating the doors observed someone they did not recognize, they were to locate someone who could confirm that person's identity. The mix of people could include inmates, who were being transferred from one place to another. Employees exiting the facility were required to wear identification name tags and place a hand under a blacklight at inspection checkpoints to reveal a stamp which was placed there when the employee entered. No written log was kept for uniformed staff–the coming and going of the officers was recorded solely by the time clock. Once through the administration building, the employee was in the parking lot, which is a flat, open, unfenced area, outside the prison compound.

With respect to employee attire, Warden Meyer testified that the standard uniform was navy blue pants, white shirt, and black shoes. The hat was navy blue with a patch on the front; the name tag was laminated and the size of a driver's license, with the employee's picture in the upper left-hand corner. Female employees were required to keep their hair off of their collar and male employees were required to be clean shaven and their hair above the ears. Uniforms were issued to the correctional officers during pre-service training and a log was kept. When asked whether the log was checked to discover whether anyone requested an additional uniform, Warden Meyers testified that the inventory record was not as accurate as it should have been. Regarding name tags, Warden Meyers explained that the officer is issued a name tag which he or she is responsible for and required to report if missing. Warden Meyers further testified that during the week Britt escaped, a name tag was reported missing but he did not recall the identity of the person who lost it. He did recall, however, that the missing name tag did not belong to Defendant.

According to Warden Meyers, Britt was discovered missing at 4:30 p.m. on January 30, 1999, during one of three counting procedures which occurred at 10:45 a.m., 4:30 p.m., and 9:00 p.m. This indicated that Britt left the facility sometime between 10:45 a.m. and 4:30 p.m. As a result of the investigation which followed, Defendant and another correctional officer named Freddie Atwood were fired. When Defendant's counsel asked Warden Meyers to state the reason for Atwood's termination, the prosecutor objected. The trial court sustained the State's objection.

Other correctional officers who worked on the day Britt escaped also testified. Brenda Harris Whitehead, the officer working the doors to Apollo B pod on January 30, 1999, testified that she recalled Defendant exiting that day and saw no one unfamiliar to her. Gloria Lang checked identification badges and hand stamps at the final checkpoint that particular day and testified that nothing out of the ordinary occurred. Lang said that she knew who Britt was and did not recall seeing him exit the facility.

Doretta May Hacker worked the control room doors on January 30, 1999 and recalled observing an unidentifiable man standing behind Defendant in the waiting room. The man was in uniform and had a name tag on, but he would not make eye contact with her. Hacker notified her

supervisor, Officer Daphane Casey, who instructed her to open the door. Defendant's counsel then asked Hacker whether he showed his hand stamp. Hacker replied that the job of checking hand stamps was Casey's responsibility that day. When she learned that an inmate had escaped later that day, she alerted the proper officials of the incident involving the unidentified man at the control room doors.

Officer Daphane Casey testified that she recalled working in the control room with Hacker on January 30, 1999 but claimed that she was not working in a supervisory capacity that day. Rather, she and Hacker were "partners." Casey testified that pedestrian traffic was busy that day, as usual, and that one of her duties was to check the correctional officers' identification tags as they exited the facility. Standard procedure required her to request assistance from her partner (Hacker, on this occasion) when she saw someone she did not recognize. Casey explained that an inability to recognize everyone who passed through the doors was not unusual and, if neither her or her partner could positively identify an officer, they were expected to alert the supervisor prior to opening the door. Casey claimed that on the day Britt escaped, she did not recall anyone getting through the doors without showing their identification badge and the proper hand stamp. Casey also testified that since she did not know Defendant or Britt by sight, and she could not positively state whether she saw either of them on the day Britt escaped. She claimed, however, that no unidentified persons exited via the control room doors during her shift unless someone was able to vouch for that person's identity. When asked why she had instructed Hacker to open the door, Casey denied doing so.

Pamela Kelley, Defendant's sister, also worked as a correctional officer at CCA. At trial, Kelley testified that she worked the same shift as Defendant on January 30, 1999 and that she also spoke with Defendant in the parking lot after they finished their shifts. Defendant was alone at that time. Kelley testified that she observed Defendant a second time that day in her rear view mirror as they drove out of the parking lot. She saw no one in the vehicle with her. They waved at each other and then drove off in different directions.

ANALYSIS

I. Sufficiency of the Evidence

Defendant contends that the evidence presented at trial is insufficient to support her conviction. Defendant argues that her actions did not appreciably differ from those of the other correctional officers present when Britt walked out of the prison and that, if she is guilty of anything, it is for the offense of accessory after the fact, Tenn. Code Ann. § 39-11-411. We disagree.

When evidentiary sufficiency is questioned on appeal, the standard of review is whether, after considering all the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Tenn. R. App. P. 13(e). In determining the sufficiency of the

evidence, we will not reweigh the evidence or substitute our own inferences for those drawn by the trier of fact. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Instead, on appeal the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. Hall, 8 S.W.3d at 599. A guilty verdict by a jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory, effectively removing the presumption of innocence and replacing it with a presumption of guilt. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions concerning the credibility of witnesses, the weight and value of evidence, and factual issues raised by the evidence are matters to be resolved by the trier of fact, not this Court. Id. The defendant bears the burden of demonstrating that the evidence is insufficient to support his or her conviction. State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Defendant was convicted of permitting or facilitating escape, Tenn. Code Ann. § 39-16-607, as charged in the indictment. In relevant part, this statute provides: "An official or employee of any penal institution which is responsible for maintaining persons in custody commits an offense who intentionally, knowingly or recklessly permits or facilitates the escape of a person in custody." Tenn. Code Ann. § 39-16-607(a) (1997). This offense is enhanced from a Class E felony to a Class C felony when one of three enumerated circumstances is proven. See id. § 39-16-607(c). Defendant's indictment charged that the person in custody had been "charged with or convicted of a felony," proof of which raises the offense to a Class C felony under section 39-16-607(c)(1).

The proof adduced at trial showed the following: (1) Defendant had foreknowledge that Britt was planning an escape; (2) she recognized Britt as he exited the prison facility disguised in a guard uniform; (3) she accompanied him as he walked out of the prison and said nothing to alert the other guards; (4) she believed that Britt had been treated unfairly by the justice system; (5) she drove him away from the prison in her truck; and (6) she provided him with a coat to wear. We find this evidence sufficient to support the jury's finding that Defendant permitted and facilitated the escape of Britt, a person in custody. The proof also revealed that Britt was convicted of a felony, namely, first degree murder.

Defendant's argument that her actions were no different from those of the other correctional officers is unsupported by the evidence. Defendant was the sole officer who admitted recognizing Britt as an inmate while he was making his way through the prison doors and the parking lot. Defendant's contention that, at most, the evidence supports only a charge of accessory *after the fact* is likewise without merit. See Tenn. Code Ann. § 39-11-411 (1997). Clearly, Defendant's involvement with Britt's escape commenced before the escape was completed.

In sum, when the evidence is viewed in the light most favorable to the State, we find it is sufficient to support Defendant's conviction. Defendant is not entitled to relief on this issue.

II. Suppression of Defendant's Statement

Defendant contends that the trial court erred by denying Defendant's motion to suppress her statement to the TBI agents investigating Britt's escape. Specifically, Defendant claims that she was not advised of her rights prior to the agents' interrogation as required under Miranda v. Arizona, 384 U.S. 486 (1966). Defendant further argues that, even if she had been given her constitutional rights, her statement was nevertheless inadmissible because fatigue and a failure to resist the agents' coercive interview tactics rendered her incapable of knowingly waiving those rights. We disagree.

The record reflects that, prior to trial, Defendant filed a motion to suppress the statement she gave to TBI Agents Tenry and Jordan during her second interview following Britt's escape. The suppression hearing occurred on February 14, 2000, and the following testimony was presented.

Defendant testified that she was unaware of Britt's escape until approximately 9:15 p.m. on January 30, 1999 (the day it occurred). Defendant claimed that she had gone to a ball game after work and, shortly after she returned home, her son informed her that CCA wanted to talk to her. When she telephoned CCA, they informed her of Britt's escape and requested that she return to the prison for an interview. Before she left her home, a policeman arrived. He requested permission to search her house, and she consented. Returning to CCA at approximately 10:00 p.m., she waited until 1:30 a.m. to be interviewed. She finished talking to the investigators at approximately 3:00 a.m and went back to her truck. It would not start. A man gave her a ride to her mother's house. She arrived at her mother's house at 3:45 a.m. At approximately 5:00 a.m., her mother drove her home.

When Defendant arrived at home, she called a friend and talked with her son for a while. Sometime between 8:00 and 8:30 a.m., her mother returned to drive her back to the prison because CCA wanted to talk with her again. As they emerged from Defendant's driveway, a police officer arrived "to make sure that [she] was going back to CCA." She arrived back at the prison at approximately 10:00 a.m. She had not slept at all the previous night.

Defendant testified that immediately upon her arrival at CCA, she was taken into an interrogation room and informed that she was "guilty" and "would be charged." Shortly thereafter, Defendant signed a consent form allowing the police to search her truck. She claimed that at this point, she asked Agent Tenry whether she was going to need an attorney. He responded, "Not at this time." Defendant was then questioned more or less continuously by two agents from 10:00 a.m. until 3:00 p.m., with occasional breaks during which she dozed off. Defendant testified that she was not given anything to eat or drink during this time and that she had missed several doses of her anti-depressant and hormone medications. She had been instructed to take these medications two times per day, but she had not received a dose since Saturday morning, January 30, 1999. Defendant stated that a deficiency of these drugs would typically result in anxiety, upset stomach, dizziness, and mood swings. Defendant claimed that she had also gone completely without sleep for thirty-six hours (from 3:30 a.m. Saturday to 3:30 p.m. Sunday) and that she had requested permission to telephone her mother, but never received the opportunity. Agent Tenry had seemed concerned about her condition. He asked her whether she had slept lately. By contrast, the other agent was "very

hateful" and "bossy," apparently utilizing the classic "good guy, bad guy approach" so popular with law enforcement.

Defendant further testified that she was familiar with the rights commonly referred to as "Miranda rights," although she was unaware of the proper name for them. She claimed that no one gave her these rights, orally or otherwise, prior to her second interview and that she did not sign any document other than the search consent form. She admitted receiving Miranda warnings after she was charged, searched, and handcuffed at the conclusion of the second interview. When Defendant was shown the seven-page document which the State presented as her statement, she stated that she had seen the document before. It was never read to her, however, and she never read it herself or signed it. She recalled signing the addendum. Defendant testified that she was very sleepy during the second interview and would have agreed to anything if she thought it meant she could go home afterward.

During cross-examination, Defendant conceded that she was accustomed to functioning on only a couple hours of sleep. She also admitted that she had an opportunity to sleep for a short while both at her mother's and at her own home after the first interview, but she was too "anxious" to do so. She also admitted that she had opportunities to eat during her wait at CCA, while at her mother's home or her own home, and during the drive back to CCA on Sunday. When asked whether she ever told Agents Tenry or Jordan that she was hungry, thirsty or required medication, Defendant replied negatively. She also admitted that she never informed Agents Tenry or Jordan that she felt disoriented during the interview or that she wanted to stop talking at any point. Regarding the initials which appeared numerous times on every page of her statement, she observed that "CM" were indeed her initials but claimed that she did not know whether the initials on the statement were "the way she would initial things." She explained that standard TBI procedure requires agents to place initials on all statements and, although she did not place her initials on the document, she could not say whether someone else did. Defendant further denied that the signature at the bottom of the addendum was hers (contradicting earlier testimony that she recalled signing it). Later, she again claimed that the signature on the addendum was hers.

Agent Tenry testified that TBI policy recommends that its agents give suspects the Miranda rights and get a written waiver from them whenever possible. Since Defendant was a suspect at the start of the second interview, Tenry gave her the Miranda rights before proceeding. He failed to get a signed waiver from her, however, because he did not have any forms with him. He also admitted that he did not question other agents in the building as to whether they had forms with them. Tenry said that the actual interrogation of Defendant lasted a little over an hour, at which point Tenry asked Agent Jordan to write out the statement while he left in search of someone to sign the arrest warrant. Tenry testified that Defendant did not request a phone call, complain of fatigue, or appear sleep-deprived during the interrogation. He recalled asking Defendant whether she wanted a cup of coffee or to visit the restroom. She declined.

During cross-examination, Tenry explained that Defendant's first interview was routine--she was not a suspect at that time. Things had changed by the start of the second interview, at which

point Tenry orally informed Defendant of her Miranda rights and asked whether she understood them. She had responded affirmatively and appeared "quite willing" to speak with them. Initially, she denied any involvement in the escape, but then changed her story dramatically when Tenry told her that Britt had been imprisoned for killing a man in a dispute over a woman and may do it again.

Tenry did not recall Defendant asking him whether she needed an attorney and he was certain she did not affirmatively request one. In Tenry's opinion, Defendant was "clear-headed" at the time she gave her statement; her speech was not slurred and she did not appear drowsy. Tenry was present when Defendant read the statement written out by Jordan. He also watched her sign and initial it afterward. When she had finished reading the statement, she told the agents that she wanted to clarify something. This request gave rise to the addendum, which Tenry observed Defendant review and sign also. Tenry testified that Defendant never complained that she felt sick or irritable. She also never asked to make a phone call.

Agent T. J. Jordan confirmed that he was present at the start of Defendant's second interview when Tenry orally related Defendant's Miranda rights to her. Jordan testified that Defendant appeared "okay" at that time and that the interview lasted between one and two hours. Afterward, Jordan transcribed Defendant's statement. This took a little longer than the interview. Defendant then read what Jordan wrote, initialed it, and changed some of the wording. Ultimately, Defendant wished to clarify a point, and this required an addendum. Jordan testified that at no time during the interrogation did Defendant complain about not having her medication or being denied access to a telephone. She also did not seem disoriented, sick, or agitated.

Dr. Dennis Wilson, a clinical psychologist, testified that he was acquainted with sleep deprivation in clinical practice, but he had not engaged in any experiments wherein persons are deprived of sleep to determine the effects. Dr. Wilson testified that, in general, a person deprived of sleep would suffer a lack of alertness and cognitive function, depending on the extent of deprivation. A person's moods may also worsen and he or she may become depressed. Continued deprivation of sleep could result in a hypnagogic state, which may include hallucinations.

Dr. Wilson testified that he saw Defendant on two occasions, for one hour each visit, and that she informed him of the circumstances surrounding her statement. According to the information received from Defendant, Dr. Wilson opined that she "lost coherence" during the second interview. Specifically, her memory, attention and concentration significantly deteriorated and she may have experienced some mild hyphagogic hallucinations. In effect, "she was drifting in and out of reality contact due to her extreme exhaustion and lack of sleep." Dr. Wilson concluded that Defendant was incapable of making rational decisions during this time. In other words, an individual who had been deprived of sleep for a period of thirty-six hours, prior to undergoing five and one-half hours of interrogation and the stress that entails, would be incapable of making a willful and voluntary statement.

During cross-examination, Dr. Wilson acknowledged that his opinion was based exclusively on the information related to him by Defendant. Dr. Wilson also conceded that the various effects

and problems associated with sleep deprivation change from person to person and, although extreme fatigue may cause a person to lose touch with reality, he was not aware of any research which indicated that people "mak[e] up stories because they are sleep deprived." Dr. Wilson further testified that, based on the testimony of the two agents concerning Defendant's demeanor during the second interview (Defendant was attentive, comprehended the questions, et cetera), he would have come to the opposite conclusion, i.e., that Defendant was not suffering from sleep deprivation at the time she gave her statement.

In an order filed April 3, 2000, the trial court overruled Defendant's motion to suppress and made the following findings: The statements of the agents were believable and, thus, the evidence demonstrated that Defendant was given the appropriate Miranda warnings and acknowledged them prior to her statement. Further, in Tennessee there is no requirement that a defendant sign a written waiver prior to giving a statement which is otherwise admissible at trial. The trial court also concluded that the evidence was inadequate to prove that Defendant suffered from lack of sleep.

On August 14, 2000, Defendant's trial was scheduled to begin. Prior to its commencement, a number of pre-trial motions were heard during which Defendant argued that he had received late discovery information, the lack of which had prejudiced his motion to suppress. Specifically, Defendant claimed he had just received information that other TBI agents, who were present in the building during Defendant's statement, were also in possession of written waiver forms at that time. Because this information could have been used to impeach the agents' testimony that no forms were available, Defendant requested that the motion to suppress be reopened or the record supplemented.

After a brief recess, the trial court agreed to continue the hearing on Defendant's motion to suppress. The sole additional evidence presented at the second hearing was the testimony of TBI Agent Wayne Wesson. Agent Wesson testified that he was one of many agents assisting in the investigation of Britt's escape and that he had Miranda forms in his possession while at CCA on January 31, 1999. However, he was not present at Defendant's interview. Wesson stated that in cases where an agent cannot find a form, "standard procedure" is to transcribe the Miranda rights by hand and have the person sign the handwritten document. Wesson explained that the rights may also be read. Signatures were a policy matter only–the law did not require a written, signed waiver.

At the conclusion of Agent Wesson's testimony, the trial court denied Defendant's motion to suppress her statement. (Judge Robert L. Jones presided at the trial and the second hearing on Defendant's motion to suppress; Judge Jim T. Hamilton presided at the initial hearing on the motion to suppress.) The trial court stated that, after considering the parties' briefs, the arguments of counsel, the evidence presented, and Judge Hamilton's findings, it found an affirmative waiver of Defendant's Miranda rights had occurred. Further, Judge Jones stated that, although Judge Hamilton did not expressly find that an "affirmative waiver" had taken place, this finding may be implied because he did find that Defendant's Miranda warnings were given her and that she understood them.

Initially, we observe that "[i]t is the duty of the trial judge to determine the voluntariness and the admissibility of the defendant's pretrial statement." State v. Chalmers, 28 S.W.3d 913, 928

(Tenn. 2000). Moreover, when the admissibility of a defendant's statement is raised in the context of a suppression hearing, this Court shall uphold the trial court's findings of fact unless the evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Id. Moreover, "the party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Id.

In the case sub judice, Defendant argues that her statement was inadmissible because she was not read her constitutional rights prior to questioning as required by Miranda v. Arizona, 384 U.S. 436 (1966). Defendant further asserts that, even if she had been given her constitutional rights, sleep deprivation and a failure to resist the agents' coercive interview tactics rendered her incapable of affirmatively waiving those rights. The State responds that, according to the testimony of two experienced TBI agents, Defendant was orally informed of her Miranda rights prior to her second interrogation and, further, the law does not require that she sign an affirmative waiver form before her statement is admissible as evidence at trial.

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that before custodial interrogation can take place, the police must inform the individual that (a) he has the right to remain silent; (b) any statement made may be used as evidence against him; (c) he has the right to the presence of an attorney; and, (d) if he cannot afford an attorney, one will be appointed for him prior to questioning, if he so desires. If these warnings are not given, the subsequent statement elicited from a defendant is not admissible in trial. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). (It should be noted that a statement given without prior Miranda warnings would not be admissible as evidence in the state's case-in-chief. It would be admissible for impeachment purposes unless the statement was found to be involuntary, in which case it would be inadmissible under any circumstances.)

In order for an accused to effect a valid waiver of these rights, she must be adequately apprised of her right to remain silent and the consequence of deciding to abandon it. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The burden of proof is on the State, which need prove a voluntary and knowing waiver by a preponderance of the evidence only. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997). Under certain circumstances, waiver may be inferred. See House v. State, 592 S.W.2d 902, 904 (Tenn. Crim. App. 1979) ("although the courts must presume a defendant did not waive his or her rights, and the prosecution's burden is great to prove otherwise, at least in some cases waiver can be clearly inferred from the actions and words of the person interrogated"). In determining whether the State has satisfied its burden of proof, the court must consider the totality of the circumstances. Bush, 942 S.W.2d at 500.

In our view, Defendant's motion was properly denied. Judge Jim Hamilton, the trial judge who presided at the initial hearing on the motion to suppress, concluded that the testimony of the two TBI agents was more credible than that of Defendant. Judge Hamilton also found that the evidence

presented was "inadequate" to prove that Defendant was sleep-deprived at the time she gave the statement in issue. At the second hearing on this same motion, Judge Robert Jones stated that, after a review of the briefs submitted by the parties at the initial hearing, Judge Hamilton's order, and considering the additional evidence, he found "both the lack of sleep issue and the lack of a knowing and voluntary waiver of Miranda rights issue [were] without merit." Judge Jones further concluded that an affirmative waiver of Defendant's Miranda rights had occurred. The evidence does not preponderate against the trial courts' findings. Regarding the absence of a separate waiver form, we observe that the law does not require a written waiver, as long as the record demonstrates the defendant was advised of her rights and did, in fact, waive them. See State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim. App. 1986) (absence of written waiver does not per se require suppression if waiver can be found from the surrounding circumstances); State v. Robinson, 622 S.W.2d 62, 67 (Tenn. Crim. App. 1980). Defendant is not entitled to relief on this issue.

III. Admissibility of Evidence

Defendant argues that the trial court also erred in its rulings on various other evidentiary issues. Specifically, Defendant contends that (1) the letter written by inmate Britt was admissible under the rules of evidence pertaining to hearsay exceptions; (2) Correction Officer Ruddle's testimony concerning his identification of inmate Britt was unfairly prejudicial and improperly admitted; (3) the clothing worn by inmate Britt was admitted as evidence without first establishing a proper chain of custody; and (4) Defendant's constitutional right of confrontation was violated by the trial court's refusal to allow cross-examination of Warden Meyers for purposes of impeachment.

As a preliminary matter, we note that whether evidence is admissible is a question generally within the trial court's discretion. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). "When arriving at a determination to admit or exclude even that evidence which is considered relevant trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion." Id. After a thorough review of the record, we are unpersuaded that the trial court abused its discretion in its rulings on the above issues.

A. Inmate Britt's Letter

Defendant contends that the trial court erred by ruling that a letter written by inmate Britt was inadmissible. Rather, Defendant asserts that the letter was admissible under Tennessee Rules of Evidence 803 and 804, which provide for admissibility of otherwise inadmissible hearsay statements when certain conditions are met. We disagree.

The record reflects that Defendant requested that the trial court allow a letter written by inmate Britt into evidence at trial during a pre-trial motion hearing on August 14, 2000. The letter was allegedly written by Britt while in prison after his escape. The composition was dated "Tuesday noon" and chiefly concerned Britt's reflections about living outdoors and amongst various woodland creatures. Toward the end of his letter, Britt also wrote that Defendant was "not a part of this."

Defendant argued that the letter was material in that it revealed Britt's state of mind and, more specifically, it indicated that he was living *in the woods* subsequent to his escape and *not* in Defendant's house. Defendant agreed to redact the portion of the letter which was arguably "self-serving," i.e., the implication that Defendant had "no part" in Britt's escape, if the trial court allowed the letter into evidence. Notwithstanding this concession, the trial court ultimately ruled that the letter was inadmissible because (1) the mental state hearsay exception did not apply, (2) Britt's mental state was not relevant to any material issue, and (3) the letter was not an appropriate statement against interest. For the following reasons, we agree with the trial court's determination.

Rule 803 of Tennessee's Rule of Evidence provides that certain statements are not excluded by the rule against hearsay. Included among these exceptions are statements which reveal

> the declarant's *then existing state of mind*, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Tenn. R. Evid. 803(3) (emphasis added). The Tennessee Advisory Commission contemplates that only the declarant's conduct, not that of a third party, is provable by this hearsay exception. See id., Advisory Commission Comments. Moreover, the exception applies only to statements of the declarant concerning his mental state *at the time of the statement*. See Neil P. Cohen et al., Tennessee Law of Evidence § 8.08[2] (4th ed. 2000) (emphasis added).

The letter written by Britt was dated "Tuesday noon." At best, this "date" is equivocal and unreliable proof of the time of the statement. Moreover, the letter's content primarily concerned Britt's mental condition during his sojourn in the woods. The actual "time of the statement" occurred after his return to prison. Thus, the rule would allow only evidence of his mental state at that time. Either way, we agree with the trial court that Britt's mental state was not relevant to any material issue in Defendant's case. See Tenn. R. Evid. 401, 402.

The letter was also not admissible under Rule 804(b)(3) of Tennessee's Rules of Evidence, which provides for the admissibility of

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Tenn. R. Evid. 804(b)(3). This rule further requires that the declarant be "unavailable," as set forth in Tenn. R. Evid. 804(a).

Defendant argued during the pre-trial hearing that the declarant, Britt, was "unavailable" under section 804(a)(1) because the rule provides an exemption from testifying on the ground of privilege, i.e., Britt's fifth amendment right not to be a witness against himself. Whether Britt would be classified properly as "unavailable" is immaterial. The trial court found the letter inadmissible under Rule 804(b)(3) based upon the "inherent risk of unreliability, even fraud," and because the statement did not properly conform to the legal requirements for a statement against interest. We agree that the letter is not a statement against interest within the purview of Rule 804(b)(3). As a practical matter, Britt would not be even remotely prejudiced by the statement unless he planned to assert that, in fact, he did not escape. The statements made by Britt which are arguably against his interest are not relevant to any material issue in Defendant's case.

B. Officer Ruddle's Identification of Britt

Defendant also contends that the trial court erred by allowing correction officer Ruddle to testify concerning his identification of inmate Britt from a photograph. Specifically, Defendant argues that the testimony should have been excluded because (1) it was inadmissible hearsay; (2) the photograph upon which the identification was based was presented to Ruddle in a "highly suggestive" manner; (3) the authenticity of the photograph was not established; and (4) Defendant never received the original photograph, which was necessary to impeach Ruddle's testimony at trial.

During pre-trial motions on August 14, 2000, Defendant argued that Ruddle's identification of Britt should be excluded because (1) Agent Tenry's testimony as to Ruddle's identification of Britt would be inadmissible hearsay, and (2) Britt's photograph was presented to Ruddle independently, and not as part of a photographic lineup, which caused the manner of identification to impermissibly "suggestive." The trial court ruled that Agent Tenry could testify that he showed a photograph of Britt to Ruddle, but that he could not testify as to Ruddle's response. Further, Ruddle could testify that a TBI agent showed him a single photograph and that the photograph was of the same man he observed driving away with Defendant on January 30, 1999. The trial court also stated that Defendant would be permitted to cross-examine both Ruddle and the TBI agent about the "suggestive" nature of the identification procedure, which would then be considered by the jury when they determined what weight to give this evidence.

With regard to the identification of Britt, the record reveals that Agent Tenry gave the following testimony at trial:

> [PROSECUTOR]: When you were interviewing Danny Ruddle, the guard, the correctional officer that [Defendant's counsel] was asking you about that made the identification of Britt leaving with [Defendant], did you show Mr. Ruddle a photograph of David Britt?
>
> [TENRY]: Actually he asked to see Britt, a photograph of Britt. And then I produced one to let him see.

Correctional officer Danny Ruddle subsequently testified as follows:

[PROSECUTOR]:	How many individuals got into [Defendant's] truck?
[RUDDLE]:	There were two people that got into the truck.
[PROSECUTOR]:	Okay. Was she one of them?
[RUDDLE]:	Yes, she was.
[PROSECUTOR]:	Okay. And the other was the gentleman that you described walking with her?
[RUDDLE]:	Yes, sir.
[PROSECUTOR]:	That you did not know at that time?
[RUDDLE]:	Right.
[PROSECUTOR]:	And did you see her--who was driving?
[RUDDLE]:	[Defendant] was.
[PROSECUTOR]:	And was it an extended cab truck or just a regular --
[RUDDLE]:	It has been--I am not sure.
[PROSECUTOR]:	Okay. Where was this other individual seated, do you recall?
[RUDDLE]:	In the passenger's side.
[PROSECUTOR]:	And did you see them drive off?
[RUDDLE]:	Yes, sir.
	* * *
[PROSECUTOR]:	Did you at some point have a conversation about this with Agent Jerry Tenry seated here?
[RUDDLE]:	The following morning.
[PROSECUTOR]:	And did you at that time see a photograph?
[RUDDLE]:	Yes, sir.
[PROSECUTOR]:	Did you ask to see this photograph?
[RUDDLE]:	Yes, I did.
[PROSECUTOR]:	And after looking at the photograph, was it the same person that you saw walk out with [Defendant]?
[RUDDLE]:	The same person that I saw walk out with her, yes.
[PROSECUTOR]:	And the same person that she drove off with?
[RUDDLE]:	Yes, sir.

Defendant did not object when Ruddle gave the above testimony. During cross-examination, Ruddle testified that he had not had any contact with Britt prior to his escape and that the man he observed leaving the prison with Defendant was clean-shaven, presumably short-haired, and wearing a CCA uniform. Defendant's counsel pointed out that the hair and clothing of the man in the photograph were different than those of the man he observed with Defendant. Ruddle explained that the faces were the same and , further, that he found it "pretty easy" to identify Britt because he was standing "nose to nose" with him when they spoke. The actual photograph was not introduced into evidence at trial.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). A "statement," within this definition, includes oral, written, and nonverbal assertions. Tenn. R. Evid. 801(b). According to this definition, neither the testimony given by Agent Tenry nor Ruddle was inadmissible hearsay.

Moreover, the record reflects that Defendant did not object to Ruddle's above testimony on the ground that it was hearsay at the time he testified. Ordinarily, the defendant's failure to make a contemporaneous objection to the admissibility of evidence at the time it is entered results in waiver of the issue concerning whether admissibility was proper. See Tenn. R. App. P. 36(a); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). However, in cases where the precise issue has previously been considered and a ruling made, it is not necessary for counsel to further object to that ruling at trial to preserve the issue for appeal. State v. McGhee, 746 S.W.2d 460, 463-64 (Tenn. 1988) (our supreme court stated that it was "not inclined to require counsel to make technical, argumentative or repetitious objections to issues which have already been ruled upon"). In this case, Defendant raised the issue of admissibility of Britt's identification during a pre-trial hearing on her motion in limine. However, Defendant argued at that time that *Agent Tenry's testimony* was inadmissible hearsay, rather than Ruddle's. Thus, even if Ruddle's testimony was hearsay, a conclusion which we did not make here, the issue would have been waived for purposes of this appeal.

We also disagree that the photograph upon which the identification was based was presented to Ruddle in a "highly suggestive" manner. In State v. Hall, 976 S.W.2d 121 (Tenn. 1998), our supreme court considered whether a photographic array created a substantial likelihood of misidentification due to the suggestiveness of the array. The supreme court stated that the law simply requires that the police refrain from "suggestive identification procedures." Id. (quoting Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). Further, "a photographic identification is admissible unless, based upon the totality of the circumstances, 'the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law.'" Id. (quoting Stovall v. Denno, 388 U.S. 293, 301-302, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199, 1206 (1967)).

Finding it not improper to apply the above caveats regarding suggestive photographic arrays to Ruddle's identification from a single photo, we find that the TBI did not engage in a suggestive identification procedure. We also find that, based upon the totality of the circumstances, the identification of Britt from the photograph was not conducive to irreparable mistaken identification. If Ruddle has been shown a photograph of Britt as he appeared at the time of his escape, i.e., in uniform with short hair and a clean-shaven face, undue suggestiveness might be an issue. This was not the case, however. The photograph of Britt shown to Ruddle was apparently taken on a different day and Britt's appearance in the photograph was not similar to his appearance at the time of his escape. Ruddle viewed the photo to determine whether he could identify Britt as the same man he observed in the company of Defendant. In our view, this procedure was not unduly suggestive.

As for Defendant's argument that the Ruddle's testimony was improper because the photograph's authenticity was not established, we note that it was not necessary to do so. The photograph was not admitted into evidence at trial. See Tenn. R. Evid. 901(a). Defendant also complains that the State failed to give him the original photograph, which he argues was necessary to impeach Ruddle's testimony at trial. Defendant admitted receiving a faxed copy of the photograph. If this was insufficient for her purposes, she should have objected prior to trial. See Tenn. R. App. P 36(a).

C. Inmate Britt's Clothing

Defendant contends that the trial court erred by allowing the clothing worn by inmate Britt admitted as evidence without first establishing a proper chain of custody. Defendant argues that the clothing evidence, specifically the brown jacket, was highly prejudicial to Defendant's case because it was the only piece of physical evidence linking Defendant with inmate Britt.

It is "well-established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody." State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998). The purpose of the chain of custody requirement is "to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence." See State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993). The identity of tangible evidence, however, need not be proven beyond all possibility of doubt. State v. Holloman, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992). Neither is the State required to establish facts which exclude every possibility of tampering. See State v. Baldwin, 867 S.W.2d 358, 361 (Tenn. Crim. App. 1993); State v. Ferguson, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987). Instead, the evidence may be admitted when the circumstances surrounding the evidence reasonably establish the identity of the evidence and its integrity. See Baldwin, 867 S.W.2d at 361; Holloman, 835 S.W.2d at 46. This issue addresses itself to the sound discretion of the trial court, and the trial court's determination will not be disturbed in the absence of a clearly mistaken exercise of that discretion. Holbrooks, 983 S.W.2d at 701; State v. Beech, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987).

Officer Mike Harralston testified at trial that Britt was arrested wearing a brown Carhartt-type jacket; a blue sweat shirt; a blue long-sleeve, button-up shirt; a blue tee-shirt; black jeans and white tennis shoes. After Harralston's testimony, Agent Tenry was recalled to testify concerning the "chain of custody" procedures followed with regard to Britt's clothing. Specifically, Tenry testified that Britt's clothes was given to him when he arrived at the Decatur County Jail on the same day Britt was recaptured. Upon receipt of the clothing, Tenry promptly bagged and boxed them. Tenry claimed that since that time, the clothing had been kept in a separate and secure evidence storage facility in Tenry's home. Tenry admitted that no analysis of any kind had been performed on the clothing and that the inventory list he made and presented at trial was composed from memory after the evidence had been stored. He did not reopen the evidence bag or box to create the list. After Agent Tenry's testimony, the clothing was admitted into evidence *without objection by the Defendant.*

Tenry's testimony demonstrated, within an acceptable degree of certainty, that there had been no tampering, loss, substitution, or mistake with respect to the evidence. Since the identity of the evidence and its integrity was reasonably established by the circumstances, we find no abuse of discretion by the trial court in admitting this evidence.

D. Cross-examination of Warden Meyers

Defendant also argues that the trial court violated his right of confrontation, and therefore erred, when it refused to allow his cross-examination of Warden Meyers. The record reveals that in an effort to impeach Meyers, Defendant attempted to question him regarding his reasons for terminating Officer Fred Atwood's employment. The prosecutor objected on the ground that the testimony would be inadmissible hearsay, unless Meyers had first-hand knowledge regarding the facts obtained from the investigation leading to Atwood's dismissal. The trial court briefly questioned Meyers, who responded that he terminated Atwood based on information received from other people. The trial court sustained the State's objection.

Defendant argues that this information was crucial to his defense. Defendant relies on Rules 607 and 608 of Tennessee's Rules of Evidence (which allow, in certain circumstances, proof concerning bias and/or attacks on a witness' credibility), to argue that the trial court's refusal to allow him to cross-examine Meyers on this issue violates his right of confrontation. The rules clearly allow a defendant to raise questions regarding the credibility of an opposing witness. However, nothing in the law provides that a defendant may use clearly inadmissible testimony to accomplish this.

Moreover, Defendant effectively waived this issue by not requesting a jury-out hearing to make an offer of proof as to what facts Meyers would have testified to. State v. Hall, 958 S.W.2d 679, 691 n.10 (Tenn. 1997) ("Not only does [an offer of proof] ensure effective and meaningful appellate review, it provides the trial court with the necessary information before an evidentiary ruling is made. Indeed, generally, if an offer of proof is not made, the issue is deemed waived and appellate review is precluded." (citations omitted)).

In summation, based on our review of the record and in light of the wide latitude given the trial court's determinations regarding evidence admissibility, we find that Defendant has failed to show an abuse of discretion by the trial court in the above evidentiary matters. Accordingly, we find no reversible error by the trial court. Defendant is not entitled to relief on these issues.

IV. Denial of Continuance

Defendant contends that the trial court committed reversible error by denying Defendant's request for a continuance based on the State's failure to abide by the rules concerning timely discovery. Specifically, Defendant complains that the State failed to provide her with (1) proof that other TBI agents present during Defendant's interrogation (namely, Agent Wesson) possessed Miranda forms; (2) the original photograph used by Officer Ruddle to identify Britt, and (3) a

complete list of all possible witnesses, until ten days prior to trial. She claims that the untimely receipt of this information left her with insufficient time to adequately prepare and that her defense was prejudiced as a result.

We observe that "the decision to grant or deny a motion for continuance rests within the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of that discretion and prejudice inuring to the accused as a direct result of the court's ruling." State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994). With this in mind, we find that a reversal of Defendant's conviction is not justified for the following reasons.

Defendant first claims that her untimely discovery that Agent Wesson possessed Miranda forms prejudiced her case. This argument fails for two reasons. First, we note that the hearing on the specific issue whether this evidence warranted a suppression of Defendant's statement was reopened on August 14, 2000. The evidence at issue was presented by Defendant at that time, and the trial court denied Defendant's motion. The evidence does not preponderate against the trial court's ruling. Second, as previously discussed, the law does not require a written waiver of Miranda rights in order for a statement to be admissible. See State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim. App. 1986); State v. Robinson, 622 S.W.2d 62, 67 (Tenn. Crim. App. 1980).

Defendant's next argument, that her defense was prejudiced by the fact that she did not receive the original photograph used by Officer Ruddle to identify Britt, is likewise without merit. Defendant was supplied with a faxed copy of the photograph. We have already noted that if this copy was not sufficient for her purposes, Defendant should have objected during the trial proceedings. Tenn. R. App. P. 36(a). In any event, Defendant has not revealed to this Court how the lack of the original photograph prejudiced her case. "An appellate court may reverse a conviction only if the denial of the continuance was an abuse of discretion, and a different result might reasonably have been reached had the continuance been granted." See Cazes, 875 S.W.2d at 261 (appellant must demonstrate prejudice to the accused as a direct result of the court's ruling).

Finally, Defendant contends that the State's failure to provide her with a complete list of witnesses until ten days prior to trial prejudiced her defense. Specifically, Defendant argues that the untimely disclosure denied her a reasonable opportunity to interview all of the witnesses and prepare a proper rebuttal, especially as to the testimony of Danny Ruddle. We disagree. The record reflects that the hearing on Defendant's motion for new trial occurred on December 14, 2000, approximately four months after Defendant's trial was concluded. This period of time was more than sufficient for Defendant to develop all possible leads which were arguably discovered "too late" for proper investigation prior to trial and present this evidence. However, the record of that hearing is devoid of proof as to what testimony or evidence the late-discovered witnesses would have been able to offer at trial. Since we cannot find that the "new evidence" would have been helpful in Defendant's defense, we also cannot find that she was prejudiced by the lack thereof.

In sum, Defendant has failed to clearly show that the trial court abused its discretion or that she inured prejudice as a direct result of the trial court's denial of a continuance. Consequently, she is not entitled to relief on this issue.

V. Jury Instruction on Identification

Defendant contends that the trial court erred by improperly instructing the jury on the issue concerning Officer Ruddle's identification of Defendant. Specifically, Defendant argues that the jury instruction pertaining to eyewitness identification, as promulgated by our supreme court in State v. Dyle, 899 S.W.2d 607 (Tenn. 1995), was necessary in her case because the identity of Defendant was a material issue.

In Dyle, our supreme court determined that the pattern identity instruction traditionally given in Tennessee was not adequate in cases where identity is a material issue. Dyle, 899 S.W.2d at 612. As a result, the court promulgated a new instruction which must be given when identity is a material issue *and* the instruction is requested by the defendant's counsel. Id. (emphasis added). Failure to give the instruction under these circumstances will be plain error. Id. By contrast, where identification is a material issue and the defendant does not request the instruction, failure to give it is reviewable under a Rule 52 harmless error standard. Id. In a footnote, the court stated that "identity is a material issue when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence." Id. n.4.

Defendant concedes that she failed to specifically request this instruction, as mandated by Dyle. Consequently, she requests that this Court review the issue under the harmless error standard enunciated in Tenn. R. Crim. P. 52. Thus, the first question before this Court is whether identification was a material issue at trial. If so, our inquiry shifts to whether it appears that the trial court's failure to give the instruction affirmatively affected the result of the trial on the merits. See Tenn. R. Crim. P. 52(a). If identity was not a material issue, failure to give the Dyle instruction is not error at all.

In her brief, Defendant appears to argue two separate identification issues. First, she contends that Ruddle's identification of Defendant as the person who assisted Britt in his escape was a material issue because Ruddle's testimony was contradicted by Defendant's sister, Pamela Kelley, who testified that she drove away alone. This is less an issue of identity than it is one of credibility as between Ruddle and Kelley. We observe that Ruddle worked with Defendant. He recognized her on January 30, 1999, and positively identified her as leaving the prison facility and parking lot with another person, who he subsequently identified as Britt. Defendant's statement corroborated Ruddle's testimony, and Kelley's testimony contradicted it.

"[I]dentity is a material issue when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence." Dyle, 899 S.W.2d at 612 n.4. Defendant never raised the question as to whether she was actually the person observed driving her truck away from the prison after work on January 30, 1999. Thus, her own identity was never an issue.

Defendant's brief also appears to allege that Ruddle's identification of Britt was a material issue. Defendant points out that Ruddle was the only witness able to place Britt with the Defendant as she exited the prison facility and drove away. Given the fact that permitting or facilitating the escape of a person in custody (in this case, Britt) is an element of the offense for which Defendant was convicted, the identity of the person in Defendant's truck could be considered a material issue in this case.

In support of this argument, Defendant asserts that Ruddle's testimony was "impeached" by his own misstatements and contradictions. For example, Ruddle testified that Britt had short hair and that he and Defendant got into a blue truck. In fact, Defendant's truck was two colors, blue and white, and Britt had long hair when he escaped (albeit tucked under his cap). Defendant asserts that some witnesses recalled observing her on that date and some did not. She also revisits the alleged "suggestibility" of the photograph identification, arguing that this undermined the credibility of Ruddle's testimony.

Defendant's argument focuses again on credibility, rather than identity issues. The jury heard the conflicting statements of the various witnesses, including the direct testimony of Ruddle and the cross-examination, during which the problems with the photograph identification were adequately explored. Thereafter, the jury resolved the resulting evidentiary questions in favor of the State.

Even if the identification of Britt was an issue, we find that the trial court's failure to give the Dyle instruction did not affirmatively affect the result of Defendant's trial on the merits. The instruction promulgated in Dyle was intended to assist the jury in evaluating eyewitness testimony. The supreme court acknowledged that this type of testimony, by nature, "is affectable by the usual universal fallibilities of human sense perception and memory," a phenomenon which is "potentialized by the fact that this testimony is prone to many outside influences . . . and often decisive." Dyle, 899 S.W.2d at 612. Accordingly, the court set out various factors for a jury to consider when appraising eyewitness testimony, e.g., the witness' capacity and opportunity to observe the suspect, the degree of certainty expressed regarding the identification, and any inconsistencies which erupted between the identification and other circumstances. Id. We believe that these factors were not crucial given the circumstances in Defendant's case. Ruddle testified that he was "nose to nose" with Britt and that identifying him was "pretty easy." Defendant's statement corroborated Ruddle's testimony in all material aspects and with regard to both identification issues. Hence, the failure to give the jury the Dyle instruction, if indeed it was error, was certainly harmless error. Defendant is not entitled to relief on this issue.

VI. Instruction on Lesser-Included Offenses

Defendant argues that the trial court erred by not charging the jury with the lesser-included offenses of: (1) criminal responsibility for the conduct of another, i.e., criminal responsibility for the escape of inmate Britt; (2) criminal responsibility for facilitation of a felony, i.e., facilitation of the escape of inmate Britt; and (3) accessory after the fact to the escape of inmate Britt. After a thorough analysis of the facts and applicable law, we disagree with Defendant's assertions.

The indictment charging Defendant with the offense of "permitting or facilitating escape," in violation of Tennessee Code Annotated section 39-16-607, alleges:

> That [Defendant] . . . did unlawfully and intentionally, knowingly, or recklessly, and being an official or employee of any penal institution which is responsible for maintaining persons in custody did permit or facilitate the escape of a person in custody, said person being charged with or convicted of a felony, in violation of T.C.A. 39-16-607.

The elements of the offense of permitting or facilitating escape, as pertaining to Defendant's charge, are as follows:

(1) an employee of a penal institution responsible for maintaining persons in custody,
(2) intentionally, knowingly, or recklessly,
(3) permits or facilitates the escape of a person in custody, and
(4) the person in custody has been convicted of a felony.

A trial court is required by statute to charge juries as to the law of each offense "included" in an indictment. See Tenn. Code Ann. § 40-18-110 (1997). Our supreme court has interpreted this provision to mean that "a trial court must instruct the jury on all lesser-included offenses if the evidence introduced at trial is legally sufficient to support a conviction for the lesser offense." State v. Burns, 6 S.W.3d 453, 464 (Tenn. 1999) (quoting State v. Langford, 994 S.W.2d 126, 128 (Tenn.1999) (add'l citations omitted)). Further, "[t]his mandate to charge lesser-included offenses applies whether or not a defendant requests such an instruction." Id.

In Burns, the supreme court also set forth the factors to consider in determining whether an offense is a lesser-included offense of another crime. Specifically, an offense is a lesser-included offense of another if

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing (1) a different mental state indicating a lesser kind of culpability; and/or (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included of lesser-included offense in part (a) or (b) . . . .

Id. at 466-467.

Defendant argues that under part (c) of the Burns test, facilitation of the escape of inmate Britt should have been charged as a lesser-included offense. Part (c) of Burns requires the trial court to charge facilitation as a lesser-included offense only if the lesser-included offense consists of facilitation of *the offense charged*, or facilitation of an offense that *otherwise meets the definition of a lesser-included offense in part (a) or (b)*. See id. Defendant does not argue that the jury should have been charged with the lesser-included offense of facilitation of the offense charged (i.e., facilitation of facilitating escape). Rather, she argues that under the second prong of the Burns test, part (c), the jury should have been given the option to convict her of facilitation of a lesser-included offense of facilitating or permitting escape (i.e., escape).

"Escape," in violation of Tennessee Code Annotated section 39-16-605, is a Class E felony if the person who has escaped is being held for a felony, as in the case here. The essential elements of that crime are as follows:

(1) the person has been convicted of a felony,
(2) the person is confined to a penal institution, and
(3) the person escaped from the penal institution.

In a literal sense, all of the statutory elements of "escape" are included within the statutory elements of the offense of "permitting or facilitating escape," the crime for which Defendant was charged and convicted, as set forth in Tennessee Code Annotated section 39-16-607(a). In other words, to prove that Defendant committed the offense of "permitting or facilitating escape," in violation of Tennessee Code Annotated section 39-16-607, the State must also prove beyond a reasonable doubt that a person convicted of a felony, and confined to a penal institution, had then escaped from that penal institution. However, this circumstance is not sufficient to make "escape" a lesser-included offense of "permitting or facilitating escape" because the offense of "permitting or facilitating escape" requires the involvement of a person other than the "escapee" before a conviction may be obtained. If, at trial, the State was able to prove only that inmate Britt had escaped from the CCA facility, no conviction could be sustained against Defendant. Thus, "escape" cannot be a lesser-included offense of "permitting or facilitating escape" under parts (a) or (b) of Burns; and "facilitation of escape" does not meet part (c) of the Burns test.

Next, Defendant argues that "criminal responsibility for the offense of escape of inmate Britt" should have been charged as a lesser-included offense of "permitting or facilitating escape." We disagree. "Criminal responsibility for the conduct of another" is defined at Tennessee Code Annotated section 39-11-402 and states, in its entirety, the following:

> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or

(3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

Here, Defendant argues that subsection (3), supra, applies to her case and, for this reason, "criminal responsibility for the offense of escape of inmate Britt" should have been charged as a lesser-included offense. As previously stated, "escape" is a Class E felony. Thus, if Defendant was convicted of criminal responsibility for the offense of escape, she would be guilty of only a Class E felony, rather than the Class C felony for which she stands convicted.

We find that a Burns analysis is unnecessary under the circumstances here. If the offense of "permitting or facilitating escape," as defined in Tennessee Code Annotated section 39-16-607, did not exist, Defendant's conduct, as proven at trial, would clearly be sufficient to sustain a conviction for the offense of "criminal responsibility" for Britt's escape. Such is not the case, however. Tennessee Code Annotated section 39-11-109 provides, in full, as follows:

Prosecution under more than one (1) statute.

(a) When the same conduct may be defined under both a specific statute and a general statute, the person may be prosecuted under either statute unless the specific statute precludes prosecution under the general statute.

(b) When the same conduct may be defined under two (2) or more specific statutes, the person may be prosecuted under either statute unless one (1) specific statute precludes prosecution under another.

Clearly, the offenses described in Tennessee Code Annotated section 39-16-607, and the offense of "criminal responsibility" for the escape of an inmate, fall within the provisions of Tennessee Code Annotated section 39-11-109. In our view, if criminal conduct can be prosecuted under either a general statute or a specific statute, or the conduct can be defined under two or more specific statutes, and the defendant can be charged under either one, then one may not logically conclude that one offense would be a "lesser-included" of the other under any definition of Burns. To do so would act in direct contravention of the legislative intent underlying the statute's enactment: that a person can be prosecuted under either one of two or more statutes, unless the Code has set forth that prosecution under one statute specifically excludes prosecution under the other statute. In other words, we believe that by enacting Tennessee Code Annotated section 39-11-109, the legislature intended that the State be able to choose which statute applies (unless precluded from doing so by other statutory provisions), but not prosecute under both statutes. The general principle underlying the requirement to charge lesser-included offenses is that all lesser-included offenses are part of the indictment embodying the offense charged. If the State must choose between two or more different statutes in order to prosecute the conduct of the defendant, then obviously the other offenses are not part of the body of the charge returned in an indictment. Therefore, criminal responsibility for the escape of inmate Britt cannot be a lesser-included offense of "permitting or facilitating escape." Defendant is not entitled to relief on this issue.

Finally, Defendant argues that the offense of "accessory after the fact" is a lesser-included offense of "permitting or facilitating escape." In pertinent part, "accessory after the fact" is defined in Tennessee Code Annotated section 39-11-411 as follows:

> (a) A person is an accessory after the fact who, after the commission of a felony, with knowledge or reasonable ground to believe that the offender has committed the felony, and with the intent to hinder the arrest, trial, conviction or punishment of the offender:
>
> (1) Harbors or conceals the offender;
>
> (2) Provides or aids in providing the offender with any means of avoiding arrest, trial, conviction or punishment; or
>
> (3) Warns the offender of impending apprehension or discovery.
>
> * * *
>
> (c) This section shall have no application to an attorney providing legal services as required or authorized by law.
>
> (d) Accessory after the fact is a Class E felony.

Clearly, "accessory after the fact" cannot be a lesser-included offense of the offense for which Defendant was charged. First, "accessory after the fact" does not occur until after the commission of another felony is completed. In addition, "accessory after the fact" does not meet either test (a), (b), or (c) as set forth in Burns. Consequently, Defendant is not entitled to relief on this issue.

VII. Sentencing

Defendant also contends that the trial court erred by denying Defendant probation and/or any form of alternative sentencing. After a review of the record and applicable law, we disagree.

During the sentencing hearing, the warden of the prison facility, Kevin Meyers, testified that immediately upon the discovery of Britt's escape, he notified the Tennessee Department of Correction, the Tennessee Bureau of Investigation, the Wayne County Sheriff's Department, and the Clifton Police Department. A short time later, the Sheriff's Department in Decatur County, Perry County, and Hardin County also became involved. Road blocks were set up and the local citizenry was alerted. Law enforcement teams began canvassing the area and the staff at CCA started processing interviews. Staff not designated to work was called in to assist with the facility's daily operations and prepare food for search teams in the field. Warden Meyers testified that CCA paid 816 hours of overtime to its employees and that a very conservative estimate of the cost incurred by CCA for Britt's escape would be approximately $12,000.

Warden Meyers further testified that a CCA correctional officer's training program typically included four weeks of classes (forty hours per week), during which the officer learned how to prevent escape and "de-escalate" prison situations. Defendant completed the standard training

program in October 1998, prior to her employment as a correctional officer. At that time, CCA had recently undergone an escape incident. Thus, the officers' training program had emphasized escape prevention and the deleterious effects of an escape on everyone concerned. Warden Meyers stated that the escape of a prisoner incarcerated for committing a violent crime negatively impacts the employees, the community, and even the other inmates in a significant way. With employees outnumbered by inmates at an overall ratio of nearly four to one, the ability of the employees to trust one another was of critical importance to the efficient functioning of the prison facility. He claimed that the inmates and staff of 400 employees at CCA were "very concerned" about the outcome of Defendant's trial, deterrence being the primary issue. During cross-examination, Warden Meyers stated his belief that persons other than Defendant were probably also culpable. No one else was charged, however. According to Warden Meyers, Defendant was not necessarily a "bad person," she simply made a very poor decision.

Raleigh F. Brewer, employed by CCA as an internal affairs officer, testified that he assisted the TBI agents in their investigation of Britt's escape. Brewer also testified concerning the importance of trust among the correctional officers at CCA. Specifically, he stated that fellow officers may be the only "weapon" available in some situations. Brewer claimed that Defendant's actions likewise had a "very detrimental effect on the morale" of the officers there. According to Brewer, Defendant's case was being followed by the inmates, the fellow officers, and the community itself. Regarding Defendant's sentence, Brewer claimed that convictions for this type of crime should entail "a real consequence and loss of freedom." In Brewer's opinion, the deterrent effect would be significant.

At the conclusion of proof, the trial court made the following findings of fact: Defendant had foreknowledge of Britt's plans to escape but said nothing to anyone about them. Prior to trial, Defendant filed a motion to suppress her statement, claiming that they had failed to warn her of her Miranda rights and that she was too fatigued to give a voluntary statement. In her statement to Laurie Wade, the preparer of her presentence report, Defendant declared that she was innocent, that Agents Tenry and Jordan were lying, that Britt did not enter her vehicle and that she did not assist him in any way with his escape. Simply stated, her then-current belief was that she did nothing wrong. The trial court interpreted her position to be that "every correction officer in the State of Tennessee ought to be able to get at least one chance to turn one murderer loose before they have to serve any time in custody." The trial court found that it could not assume a similar position on this issue. The trial court stated that, in its opinion, Defendant "lied" during her suppression hearing, in her statement to Laurie Wade for the presentence report and, if given the opportunity, would probably lie again to the court that very day.

At the conclusion of the hearing, the trial court found that Defendant's lack of candor and failure to accept responsibility for the offense, considered with the circumstances and nature of the offense and the best interest of the public, weighed against a suspended sentence. The trial court noted her lack of prior criminal record and social history, but stated that crime, and the expense and housing of inmates, was a major political issue in Tennessee. The trial court expressed its disappointment that a person hired and trained to restrain inmates would actually turn one loose into

society, thereby causing the State to spend valuable resources to not only reapprehend the escapee, but also to prosecute Defendant and search for anyone else who had assisted in the crime. Finding no enhancement or mitigating factors applicable, the trial court sentenced Defendant as a Range I standard offender to the minimum sentence in the range: three years.

With regard to probation, the trial court stated that although Defendant was legally eligible for probation, she had not successfully met the burden of proof which would entitle her to receive probation in this case. Specifically, the trial court found the need for deterrence and the fact that she remained untruthful concerning her involvement in the crime warranted incarceration. Concerning deterrence, the trial court stated that the inmates at CCA and those people responsible for restraining them must know that any actions taken to unlawfully release them or facilitate an escape will not go unpunished. Consequently, the court felt that a lesser sentence in this case "would depreciate the seriousness of this offense."

When a defendant challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review of the record with a presumption that the determinations made by the sentencing court are correct. See Tenn. Code Ann. §§ 40-35-401(d), 40-35-402(d) (1997). If our review "reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result." State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). On the other hand, if the trial court failed to comply with the statutory guidelines, our review is de novo without a presumption of correctness. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997). Having concluded that the trial court considered the sentencing principles and all relevant facts and circumstances in fashioning an appropriate sentencing alternative, our review of Defendant's sentencing determination in this case is de novo with a presumption of correctness.

The defendant has the burden of establishing that the sentence is improper. See Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In determining whether the defendant has carried this burden, this Court must consider: (a) the evidence adduced at trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel; (e) the nature and characteristics of the offense; and (f) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997).

Because Defendant is a standard Range I offender convicted of a Class C felony, she is entitled to the statutory presumption in favor of alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (1997). However, "the determination of whether the [Defendant] is entitled to an alternative sentence and whether the [Defendant] is entitled to full probation are different inquiries." State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Where a defendant is entitled to the statutory presumption favoring alternative sentencing, the State has the burden of overcoming the presumption with evidence to the contrary. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995) overruled on other grounds; see Tenn.

Code Ann. § 40-35-102(6), -103 (1997). "Conversely, the defendant has the burden of establishing suitability for total probation, even if the [defendant] is entitled to the statutory presumption of alternative sentencing." Bingham, 910 S.W.2d at 455; see Tenn. Code Ann. § 40-35-303(b) (1997). Therefore, we shall address the issues concerning probation and alternative sentencing separately.

A. Probation

To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." Bingham, 910 S.W.2d at 456 (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)). The following criteria, while not controlling the discretion of the sentencing court, shall be accorded weight when deciding the defendant's suitability for probation: (1) the nature and circumstances of the criminal conduct involved, Tenn. Code Ann. § 40-35-210(b)(4); (2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime, see Tenn. Code Ann. § 40-35-103(5); (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B); and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, Tenn. Code Ann. § 40-35-103(1)(B). Id.

A defendant is eligible for full probation where the sentence received by the defendant is eight years or less, subject to some statutory exclusions not relevant here. See Tenn. Code Ann. § 40-35-303(a). Although full probation must be automatically considered by the trial court as a sentencing alternative whenever the defendant is eligible, "the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b), Sentencing Commission Comments; State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). Rather, a defendant seeking full probation bears the burden of showing that the sentence imposed is improper and that probation will be in the best interest of the defendant and the public. State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). Generally, this court will not set aside findings of fact made by the trial court after an evidentiary hearing unless the evidence contained in the record preponderates against the trial court's findings. State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App. 1993); State v. Young, 866 S.W.2d 194, 197 (Tenn. Crim. App. 1992). This deference applies to a trial court's findings of fact in the context of sentencing hearings. See State v. Raines, 882 S.W.2d 376, 383 (Tenn. Crim. App. 1994).

Here, the trial court correctly observed that it was Defendant's responsibility to establish her suitability for full probation. After reviewing the statutory factors and the evidence presented at the sentencing hearing, the trial court found that Defendant should serve her sentence in confinement based on a need for deterrence and because she displayed a disturbing lack of candor with regard to the crime. See State v. Bryant, 775 S.W.2d 1, 6 (Tenn. Crim. App. 1988) ("any lack of candor on the part of the defendant is an important factor in the overall consideration of the issue of probation").

In our view, the trial court did not err in denying Defendant probation based on the need for deterrence. In State v. Hooper, 29 S.W.3d 1 (Tenn. 2000), our supreme court held that

> [A] trial court's decision to incarcerate a defendant based on a need for deterrence is correct so long as any reasonable person looking at the entire record could conclude that (1) a need to deter similar crimes is present in the particular community, jurisdiction, or in the state as a whole, and (2) incarceration of the defendant may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.

Id. at 10. Further, "[b]ecause the 'science' of deterrence is imprecise at best, the trial courts should be given considerable latitude in determining whether a need for deterrence exists and whether incarceration appropriately addresses that need." Id. Here, the testimony of Warden Meyers and Raleigh Brewer (the CCA internal affairs officer) was sufficient for the trial court to find that incarceration was necessary to address the need for deterrence.

We also agree that Defendant's lack of candor provided an additional basis for denying probation. A defendant's lack of candor, credibility, and willingness to accept responsibility for his crime are relevant considerations in determining a defendant's potential for rehabilitation, and its lack thereof is a proper consideration in determining whether confinement is appropriate. Tenn. Code Ann. § 40-35-103(5) (1997); State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); State v. Anderson, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992). Defendant's actions and testimony demonstrate a clear inability to accept responsibility for her criminal conduct. Accordingly, we find that Defendant has failed to show that the trial court's denial of probation was improper or that probation will be in the best interest of the defendant and the public.

B. Alternative Sentencing Other Than Full Probation

Defendant also argues that the trial court erred by not granting her any form of alternative sentencing.

As a Range I standard offender convicted of a Class C felony, Defendant may be presumed a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6) (1997). Such evidence includes proof that (1) "confinement is necessary to protect society by restraining the defendant who has a long history of criminal conduct," (2) "confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or (3) "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Id. § 40-35-103(1)(A)-(C); see Ashby, 823 S.W.2d at 169. In addition, a defendant's potential for rehabilitation or lack thereof may also be considered. Tenn. Code Ann. § 40-35-103(5).

Upon de novo review, we first note that neither (1) nor (3) apply in this case. Defendant has no criminal history or prior convictions. Consequently, measures less restrictive than confinement also have not frequently or recently been applied unsuccessfully to her. Instead, we agree with the trial court that confinement is necessary to avoid depreciating the seriousness of the offense and provide an effective deterrence to others likely to commit similar offenses. This conclusion is further supported by Defendant's lack of potential for rehabilitation, also previously discussed, which is also a proper consideration in determining whether sentence alternatives other than probation are appropriate. See Tenn. Code Ann. § 40-35-103(5) (1997).

In sum, we find that Defendant failed to carry her burden of showing that the sentence imposed is improper and that probation would be in the best interest of the Defendant and the public. We also conclude that the State successfully rebutted the statutory presumption favoring alternative sentencing under the circumstances presented and that the need for deterrence in this case, combined with Defendant's refusal to accept any responsibility for her part in Britt's escape, is more than sufficient to warrant the sentence imposed. Defendant is not entitled to relief on this issue.

CONCLUSION

Accordingly, we AFFIRM the judgment of the trial court.

_____

THOMAS T. WOODALL, JUDGE