IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 27, 2024 Session

STATE OF TENNESSEE v. SIDARIUS JACKSON

Appeal from the Criminal Court for Knox County
No. 114933 Kyle A. Hixson, Judge

No. E2022-01384-CCA-R3-CD

A Knox County jury convicted the Defendant, Sidarius Jackson, of multiple drug, gang, and gun related felonies, including murder. Before trial, the Defendant filed a motion to sever his offenses into four separate trials, and the trial granted in part and denied in part the motion. On appeal, the Defendant contends that: (1) the trial court erred when it denied his motion to suppress evidence found as the result of a warrantless search; (2) the trial court erred when it denied his motion to sever the offenses, (3) the State's gang-enhancement presentment was insufficient; (4) the criminal gang statute was not properly applied to his conspiracy and unlawful possession of a firearm conviction; (5) the trial court improperly considered acts he committed while a juvenile during sentencing; and (6) the evidence presented is insufficient to sustain his conviction for conspiracy to possess with intent to sell a controlled substance. After review, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which and TIMOTHY L. EASTER, J., joined. CAMILLE R. MCMULLEN, P.J., concurred in the results only.

Joshua Hedrick, for the appellant, Sidarius Jackson.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Ta Kisha M. Fitzgerald, Larry Dillon, and Phillip Morton, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the Defendant's participation in selling drugs from a home in Knox County and his participation in the murder of one of his fellow gang members,

Antoine Washington, who was attempting to leave the gang. For these events, and as relevant to this appeal, the Knox County grand jury indicted the Defendant for: one count of conspiracy to possess with intent to sell twenty-six grams or more of a Schedule II controlled substance, and that the conspiracy occurred within 1000' of a drug free zone; one count of employment of a firearm during the commission of a dangerous felony; two counts of violating the RICO (Racketeer Influence and Corrupt Organizations) statute; one count of first-degree murder; one count of possession with intent to sell or deliver more than twenty-six grams of a Schedule II controlled substance; and one count of possession of a firearm with the intent to go armed during the commission of a dangerous felony. The presentment also alleged that the Defendant was subject to enhanced punishment based upon the criminal gang enhancement statute as a member of the Tree Top Pirus gang for the conspiracy to sell a controlled substance charge, the possession with intent to sell or deliver charges, and the first-degree murder charge.

Pretrial and pursuant to the Defendant's motion for severance, the trial court dismissed the counts related to RICO. The Defendant was convicted in the Knox County Criminal Court for: Count 1 conspiracy to possess with intent to sell twenty-six grams or more of a Schedule II controlled substance in a drug free zone, Count 2 possession of a firearm with the intent to go armed; Count 6 facilitation of first-degree murder; Count 7 possession with intent to sell or deliver more than twenty-six grams of a Schedule II controlled substance; Count 8 possession of a firearm with the intent to go armed during the commission of a dangerous felony. In a bifurcated proceeding, the State then presented evidence that the gang enhancement sentencing statute applied, and the jury found that the gang enhancement sentencing statute applied in Count 10 to the conspiracy to possess with intent to sell or deliver a controlled substance offense, in Count 11 to the possession with intent to sell or deliver cocaine, and in Count 12 to the facilitation of first-degree murder. The trial court imposed partial consecutive sentencing for a total effective sentence of fifty-six years of incarceration.

A. Pretrial
1. Motion to Suppress

Pretrial, the Defendant filed a motion to suppress evidence found during a warrantless search of a car because law enforcement unconstitutionally stopped the vehicle. At the time of the Defendant's arrest, he was a passenger in a vehicle stopped by police, and law enforcement officers later searched that vehicle. It is about this search that the Defendant filed his motion to suppress.

The State responded to the Defendant's motion and argued that he did not have standing to contest the search of the vehicle, because the vehicle did not belong to the Defendant, and he was merely a passenger in the vehicle and had an outstanding warrant at the time.

The Defendant countered that, when police stopped the vehicle, he was a passenger and the police detained him, giving him standing to seek suppression of the evidence found in the search of the vehicle. The trial court ruled that the Defendant should have an opportunity to prove that the search was unconstitutional.

On February 28, 2020, the trial court held a hearing on the motion during which the parties presented the following evidence: The Defendant testified that he was in a Kia Optima sedan when it was stopped by law enforcement, who later found a handgun, an AK pistol, and cocaine in the vehicle. The Defendant said he had a privacy interest in the backpack and the containers in which the guns and drugs were found during a search of the vehicle.

During cross-examination, the Defendant agreed that there were four people in the vehicle when it was stopped: Quanelo Evans was in the driver's seat, Jmari Pirtle was in the front passenger seat, and Decosio Clark (street name "Cozy") was in the rear passenger seat, while the Defendant was in the passenger seat behind the driver. The Defendant said that one of the backpacks, containing one of the guns and drugs, was in the front seat and that it did not belong to him. The other backpack, located behind the back passenger and containing a gun, belonged to him.

Stephen Mercado, an officer with the Knoxville Police Department ("KPD"), testified that he was on patrol on December 31, 2017, when the KPD received a "shots-fired" call ("Holloway Shooting"). He responded to the address of the call and saw a green Toyota Camera with the back window shot out. He interviewed two witnesses at the scene, Yusean Stigall and Raymond Holloway, who described the incident, saying that Ms. Stigall was driving her Camry when someone from inside another vehicle, a newer white Chevy Malibu, shot at her and her passengers. In the Camry were Mr. Stigall, Mr. Holloway, Dejah McGill, and two of McGill's children. Ms. Stigall and Mr. Holloway saw two people in the Malibu, one of whom Mr. Holloway identified as the shooter "Sapti Ru," referring to the Defendant by his street name. Mr. Holloway opined that the other occupant in the Malibu would have been one of three other men, street names "Ville" (given name: Robert Cody), "JD," and "Yayo" (given name: Antonio Washington, the victim in this case), because he believed the shooting was in retaliation for Mr. Holloway no longer wanting to be associated with those four men. There were no injuries as a result of the shooting.

Investigator Thomas Thurman learned about the Holloway Shooting, and he was also familiar with the Defendant in part because the Defendant's home, located on Chester Street, had been shot repeatedly on January 6, 2018 ("Chester Street Shooting"). The Investigator ascertained that the Defendant was affiliated with a gang, the 400 Spruce Street Tree Top Piru gang. The Defendant's known associates included Decosio Clark, Jr. (street name "Cozy"), and he was romantically linked to Jada McNair.

On January 17, 2018, three women, Candice Mobley, Ebony Fox, and Ms. Muriel, came to the police station and indicated to Investigator Clayton Madison and Investigator Thurman that they believed that the Defendant had burglarized and/or shot their home located near Hall of Fame Drive ("Mobley Shooting"). They presented Investigator Thurman with a Facebook live video that showed the Defendant, Mr. Clark, and Ms. McNair discussing the Mobley Shooting, with the Defendant saying that he shot at Ms. Mobley's home. After seeing the video, Investigator Thurman retrieved information from internal and external databases to learn more about the people allegedly involved in the shooting. He also asked Ms. Mobley to send him the video, but she was not able to do so as the video was no longer available on Facebook.

In the early morning hours of the following day, and while the investigator was still researching the Mobley Shooting, Ms. Mobley and Ms. Fox called Investigator Thurman to report that another of their homes had been shot, this one on Groaner Street ("Groaner Shooting"). They informed the investigator that this home was equipped with video surveillance, so Investigator Thurman retrieved security footage from the location. The Defendant, Mr. Clark, and a third man named Thakelyn Tate, were implicated in this shooting.

The following day, witnesses reported a deceased person, later determined to be the victim, Antonio Washington, in the street at Beamon and Lay Avenue, which was close to Magnolia Avenue ("Washington Shooting"). Investigator Thurman and his partner, Investigator Clay Madison, went to the scene where they saw the body of the victim, who was known as "Yayo," wearing a heavy coat and sweatpants in the street. There was blood and a number of shell casings around his body.

After learning the victim's identity, Investigator Thurman ascertained that the victim had a significant other, who was the mother of his child, named Krisy Smith. Investigators Thurman and Madison located Ms. Smith, took her to the police station, and informed her of the victim's passing. She informed them that Mr. Washington (street name "Yayo") was in the Tree Top Piru gang and that two of the men that Mr. Washington oversaw, termed "little homies," were causing problems. She named the Defendant and Mr. Clark as these two men. As a result of their behavior, Mr. Washington attempted to pull away from the gang, which caused strife within the gang. Ms. Smith offered the investigator the names of some of the victim's associates, who were fellow gang members, including the Defendant and Mr. Clark. Ms. Smith told investigators that the victim was "running" with the Defendant and Mr. Clark and that they had a lot of enemies. The victim was the "big homey," or mentor, in the gang to the Defendant and Mr. Clark. Ms. Smith also told him that the men congregated at the house on Louise Avenue ("the Louise Avenue house"). He also heard about the Louise Avenue house from multiple other sources.

Investigator Thurman knew that the Defendant and Mr. Clark spent time at the Louise Avenue house and that the Defendant was in a relationship with Ms. McNair, who

lived on Dry Gap Pike. He also learned that the Defendant had multiple outstanding warrants, which appeared to be juvenile petitions.

Investigator Thurman spoke with the victim's father, who expressed his belief that this was a gang-related killing. Both Ms. Smith and the victim's father informed the officer that a man named Michael Shadden had been with the victim on the day of the shooting. The investigator expanded his investigation to include other members of the 400 Tree Top Piru gang. Investigator Madison interviewed Mr. Shadden, who said that he and Devonte Blair had been with the victim earlier in the day. Mr. Blair had an outstanding arrest warrant for aggravated assault.

Based on the investigation, on January 18, 2018, law enforcement officers were looking for: the Defendant, who had an outstanding warrant and was a suspect in a burglary, shooting, and homicide; Devonte Blair, who had an outstanding warrant and was with the victim around the time of his death; and Mr. Clark, who was a known associate of the Defendant. They were all known to be members of the 400 Tree Top Piru gang, which were known to commit shootings, robberies, and burglaries.

Investigator Madison believed that Mr. Blair, Mr. Clark, and the Defendant might have been at or near Ms. McNair's house. He asked Investigator Riddle to drive him by Ms. McNair's house on Dry Gap Pike. After making a lap around the block, Investigator Madison saw a white Kia Optima, matching the description of the vehicle involved in the shooting, parked in front of Ms. McNair's house with its brake lights illuminated. He saw who he believed to be Mr. Blair walking from the back side of the house toward the vehicle. Upon spotting the police, this man quickened his pace in an apparent attempt to evade them. Investigator Madison and Investigator Riddle exited their vehicle, asked the driver to turn off the Kia, and called for backup. While waiting for backup, Ms. McNair, repeatedly exited and returned to her home, concerning Investigator Madison.

Travis Porter, an officer with the KPD, assisted in taking the Defendant, Mr. Clark, Mr. Pirtle, and Mr. Evans into custody on January 18, 2018. When he responded to an officer call, he saw four men located inside a vehicle. For officer safety, the two responding officers waited for Officer Porter and another officer to respond before asking the men to exit the vehicle.

After Officer Porter arrived, and the men exited the vehicle, Investigator Madison learned that the man he thought was Mr. Blair was in fact Mr. Clark. Investigator Madison and Investigator Thurman asked the men to exit the vehicle. Investigator Thurman advised Mr. Evans his of *Miranda* warnings and asked Mr. Evans if he consented to a search of his Kia Optima. Mr. Evans then gave law enforcement consent. This interview was recorded and offered by the State.

Investigator Riddle, also present at the scene of this arrest, also interviewed Mr. Evans, who he learned owned the Kia Optima and confirmed that Mr. Evans gave law enforcement consent to search the vehicle. Investigator Riddle and another officer, Officer Baldwin, began searching in the vehicle after gaining consent, but, once they found a weapon, the two stopped and waited for the crime laboratory officers to come and process the car. The investigators found a backpack and a phone in the back passenger seat of the vehicle and another backpack in the front passenger seat. The backpack in the front passenger seat contained a handgun and a small quantity of crack cocaine.

Investigator Thurman spoke with the Defendant after the arrest. He said that he was familiar with the Defendant's voice, and he listened to the in-car audio of Travis Porter, a fellow officer. He was also familiar with Mr. Clark's voice, which was also on the in-car audio recording. Investigator Thurman also interviewed Jmari Pirtle.

During cross-examination, Investigator Madison explained why he went to Ms. McNair's house on Dry Gap Pike. He said that Mr. Washington's girlfriend informed him that there was internal strife in the gang, Mr. Shadden said that he had heard that a white vehicle was used in the Washington Shooting, and Ms. McNair had a white vehicle that the Defendant was believed to be driving during the Holloway Shooting.

KPD Officer Todd MacFaun was also present at the scene of the arrest of the four men, and he confiscated the Defendant's phone. He explained that as he walked by Officer Porter's police cruiser, where the Defendant and Mr. Pirtle were located, he observed the Defendant on the phone. The phone had fallen to the floor and Officer MacFaun retrieved it and handed it to Officer Porter.

Based upon this evidence the trial court denied the Defendant's motion to suppress.

2. Motion to Sever

Before trial, the Defendant filed a motion to sever his offenses into four separate trials. He sought one trial on the conspiracy charges, which included firearms charges; a second trial on the RICO charges; a third trial on the murder charge; and a fourth trial for possession of cocaine and possession of a weapon with the intent to go armed. He contended that joinder was not mandatory and that, further, permissive joinder was not appropriate because they were not part of a common scheme or plan and the events supporting one charge would not be admissible at the trial of another.

The trial court granted the Defendant's motion regarding the RICO violation and dismissed Count 4 and Count 5. Counsel for the Defendant asked the court to address his motion with respect to his request to sever the counts into three trials. He sought to group the remaining charges into three trials, the first trial to be Count 1, the conspiracy to sell drugs charge with Count 2, the related firearm allegation. The second trial would be the

homicide charge in Count 6, and the third trial would be for the possession of cocaine charge in Count 7 and the related firearm possession charge in Count 8.

Investigator Thurman testified during the hearing on the motion to sever in a manner consistent with his testimony at the motion to suppress hearing. He added that the Defendant was brought to the police station for questioning after his arrest, and the Defendant was given, and waived, his rights pursuant to *Miranda*. Investigator Thurman confirmed that police confiscated both drugs and guns at the time of the Defendant's arrest.

During the Defendant's statement, the Defendant indicated that he and Mr. Clark had been with the victim in the hours before his death. The Defendant said that all three men were members of the Tree Top Piru gang, as well as Mr. Griffin (street name "Raff"), Mr. Cody, Mr. Nyane, and Mr. Tate. The Defendant informed him that the gang used the Louise Avenue house as a place for its gang members to sell drugs and hang out.

The Defendant explained the circumstances leading to the victim's death by saying that he and other gang members, including the victim, were spending time at the Louise Avenue house. The men often spent all day, every day at the Louise Avenue house, which he referred to as "the spot" or the "trap." The activities at the Louise Avenue house included smoking and selling drugs. At the house one day, the Defendant and Mr. Clark were instructed to give their firearms to Mr. Griffin and Mr. Cody, who had a higher gang rank, because Mr. Griffin and Mr. Cody said that they needed those firearms to murder the victim. The Defendant gave his gun to Mr. Griffin and Mr. Clark gave his gun to Mr. Cody.

Describing the friction that led to the determination that the victim must be killed, the Defendant said that the gang was tasked with going to California to help another faction of their gang. Neither the Defendant nor Mr. Clark could attend the task because they had not been gang members for a long enough duration. The California faction asked for a "OYG," meaning someone with longer gang experience, so the task fell to the victim, Mr. Griffin, or a member nicknamed "Myru." The victim said that he did not want to go, and Mr. Griffin privately told the Defendant to "Smash him off the hood." The Defendant opined that the victim was killed because he did not want to go to California as tasked.

After interviewing the Defendant, Investigator Thurman interviewed Mr. Clark multiple times. Between the interviews, the investigator learned that the two guns found at the time of the Defendant and Mr. Clark's arrest, a pistol and a "Draco," were positively determined to be the murder weapons. Mr. Clark told him that Mr. Griffin told the Defendant and him that they needed "to go smoke him," referring to the victim. The victim also possessed a pistol at the time of his murder.

The investigator also interviewed Lola Lakisha Garrett, who said that she was at the Louise Avenue house on the day of the victim's murder. Mr. Cody was there also,

processing crack cocaine to be sold and directing sales. Ms. Garrett recounted that Mr. Cody was effective at processing cocaine and that there were numerous sales made that day.

Investigator Thurman obtained multiple cell phones from the members of the Tree Top Piru gang. Based on the examination of the records, he determined that there were "coordinated efforts to meet up and trap, and . . . sell . . . the [drugs]." This coordinated effort led beyond drug selling endeavors and into homicide when the victim chose not to undertake the gang's California business.

After conducting his investigation, Investigator Thurman opined that the victim was having difficulty with his gang and attempted to step back. The investigator believed that the gang, in retaliation, killed him.

Phillip Jinks, an investigator with the KPD, testified that he was in the organized crime unit, narcotics division. He described his involvement in this case saying that he initially responded to a call in December 2017 regarding law enforcement's discovery of a "relatively large" amount of cocaine, firearms, and money from a residence in the Walter P. Taylor housing development ("Taylor house"). Evidence from that investigation suggested that the Tree Top Piru "criminal street gang" was involved in the manufacture and distribution of cocaine from that residence. The residence in the Taylor house was near the Louise Avenue house.

A resident of the Taylor house, Charles Arnold, informed law enforcement of the names of people selling drugs from the Taylor house. Investigator Jinks learned that some of these same people, namely the Defendant and Mr. Clark, were later involved in a homicide in January 2018. They had been taken into custody and found in possession of cocaine and firearms. His investigation into drug conspiracy involved additionally, Mr. Cody, Mr. Giffin, Mr. Tate, and Mr. Nyane.

Investigator Jinks gathered cell phone data, watched interviews with those believed to be involved, and he determined that the victim's death was related to the cocaine conspiracy. He reasoned that these actions were part of the ongoing criminal enterprise that is the Tree Top Piru criminal street gang. The investigator said that it was clear that the plan to kill the victim came to fruition while the men were engaged in the activity of selling cocaine at the Louise Avenue house.

Investigator Jinks identified a text exchange between Mr. Griffin and Mr. Cody in which the men use a "k" instead of a "c" in spelling. He said that this was indicative of membership in a gang affiliated with the Bloods because they avoided using the letter "c" as it referred sometimes to members of a rival gang, the Crips. The text messages also included multiple references to buying and selling cocaine, committing homicide, and still other references to firearms.

From all the text messages and investigation, Investigator Jinks determined that Mr. Cody was the local leader of the gang. Mr. Griffin was second in command, and the victim was of similar rank, followed by Mr. Tate. The Defendant and Mr. Clark were of lower rank in the gang.

The investigator noted some text conversations between Mr. Griffin and the Defendant around the time of the victim's murder. The day after the victim's murder, Mr. Griffin directed the Defendant to erase everything on his phone, including phone numbers.

Investigator Jinks said that, through his investigation, he found evidence that the Tree Top Piru gang distributed cocaine and that some of this distribution occurred at the Louise Avenue house. From that distribution at that residence, the plan was formed to kill the victim for violating various gang rules. As a result, his murder was ordered.

During cross-examination, Investigator Jinks said that there was also discussion that the victim had robbed a rival drug dealer and not shared the proceeds with the gang, which may have also led to the order of his murder. He also said that the funds the gang received from the illegal sales of cocaine funded their other activities.

Based upon this evidence, the trial court denied the Defendant's motion to sever.

B. Trial

The parties proceeded to trial, during which they presented the following evidence about the events giving rise to and surrounding the victim's shooting, including the evidence of drug conspiracy and possession: The victim was a member of the Tree Top Piru gang, which was a Knoxville gang affiliated with the greater Blood gang organization. At the time of his death, the victim had been affiliated with the gang for at least five years. He was living with Shantoria Smith (a/k/a "Krisy"), his girlfriend and mother of his newborn, at her grandmother's house in East Knoxville, which was close to the Louise Avenue house.

Other members of the Tree Top Piru gang included Mr. Cody (first in command in the Tree Top Piru gang), Mr. Griffin (second in command of the gang), the Defendant, and Mr. Clark (both low ranking members of the gang). The Defendant and Mr. Clark were like younger brothers to the victim, who was their "big homie" or mentor, and both frequently visited Ms. Smith and the victim in their home. The men also spent time at the Louise Avenue house, which was within a school zone.[1]

[1]Diana Roach, who worked at the Knox County KUB Geographic Information Systems, testified a that the Louise Avenue house was located within a thousand feet of both a day care center and a park.

Shortly before his murder, the victim told Ms. Smith that he had been tasked with going to California because a high-ranking gang member there had been killed, but she implored him not to go because they had just had a child, after which she asked him to decrease his gang involvement. The victim then appeared to make light of the situation as if he did not intend to go to California but simply wanted to observe her reaction to such news.

The victim's cell phone, ending in -8850, was in Ms. Smith's name. On January 17, 2018, the day of the victim's death, Ms. Smith and the victim had a conversation, and the victim asked her to prepare him a sandwich because he was coming home and indicated that his cell phone battery was low. When he did not arrive home, she attempted to contact him, but it appeared his cell phone battery had died.

A witness called on January 17, 2018, at 11:25 p.m. to report the victim's shooting. The police called Ms. Smith during the early morning hours of January 18, 2018, and informed her of the victim's death. Ms. Smith provided the names of the men she knew the victim had been with: the Defendant, Mr. Clark, Mr. Cody and Mr. Griffin.

KPD Investigator Thomas Thurman and his partner Investigator Madison were the lead investigators in this case, along with Investigator Washam. They responded to a 911 call about the shooting where they found the victim's body in the street. After taping off the crime scene and beginning the investigation, the investigators spoke with Ms. Smith, the Defendant's girlfriend, and informed her of his passing. That evening, Investigator Thurman also spoke with the victim's father, who confirmed some of the information that Ms. Smith had provided. Based on their conversation, the investigator wanted to locate Mr. Shaddon, and fellow gang members: the Defendant, Mr. Clark, and Mr. Griffin. He also wanted to speak with Ms. McNair, Mr. Evans, and Mr. Pirtle.

Before speaking with any of the people of interest, the investigators reviewed social media accounts of the people involved. Investigator Thurman also went to the autopsy of the victim's body and retrieved projectiles that were recovered from his body.

Investigator Madison learned that the Defendant's girlfriend, Jada McNair, lived off Dry Gap Pike. While Investigator Thurman was at the victim's autopsy, Investigators Madison and Riddle went to Ms. McNair's address. As they circled the back of the house, a Kia Optima pulled into the driveway. Exiting Ms. McNair's residence was a man, whom Investigator Madison thought was Devonte Blair (the last person known to be with the victim). The man walked toward the Kia Optima and, when he saw officers stop their vehicle close by, he quickened his pace toward the Kia Optima. Investigator Madison exited his vehicle, approached the Kia Optima, and asked the driver, Quaanelo Evans, to turn off the vehicle while they waited for other officers.

On January 18, 2018, the Defendant (back seat driver's side), Mr. Evans (driver), J'Marea Pirtle (front passenger), Ms. McNair, and Mr. Clark (back seat passenger side) were all arrested. Mr. Evans gave Investigator Madison consent to search his vehicle. The officers found in a pocket behind the driver's seat what was later tested to be 76.12 grams of powder cocaine and 4.57 grams of cocaine base, in rock-like form. Investigator Thurman first interviewed Quanelo Evans, Ms. McNair and Mr. Pirtle and released all of them after the interview. He then interviewed the Defendant, who waived his rights and agreed to speak with the investigator. Initially, the Defendant told him that he was not present during the victim's murder. He subsequently said that it may have been his weapon used in the murder but that it was used by one of his fellow gang members, having admitted he was part of the Tree Top Piru gang, a sect of the Blood gang.

The Defendant told Investigator Thurman that the victim was set to travel to California to do some tasks for their gang in that jurisdiction, outside Los Angeles but that he did not want to go. After their interview, the Defendant gave Investigator Thurman permission to look through his phone. Investigator Thurman interviewed Mr. Clark as well, and confiscated Mr. Clark's phone. After speaking with Mr. Clark, he also wanted to speak with Terry Thomas (street name "Tee Watts"). He returned to the homicide scene to look for casings and found a casing at the scene.

Investigator Thurman located Mr. Thomas in May 2018, after he came to the police station voluntarily. He interviewed Mr. Thomas and obtained his cell phone.

Investigator Thurman went to the Louise Avenue house because he had learned that multiple individuals that he had interviewed had stayed there or participated in activities there. He was present while crime laboratory technicians photographed the interior and exterior of the house.

Investigator Thurman obtained the cell phone records for Mr. Griffin and the victim, whose phone was in Ms. Smith's name. He obtained a cell phone extraction date for the phones associated with Defendant, Mr. Clark, Mr. Cody, Mr. Thomas, and Mr. Tate.

During cross-examination, Investigator Thurman agreed that the Defendant was cooperative. During the interview, the Defendant said that Mr. Griffin had said that the victim needed to be "beat out" of the gang. The investigator acknowledged that Mr. Clark had pleaded guilty to killing the victim and was sentenced to fifty-one years in prison. The parties then stipulated that Mr. Clark's plea only addressed "his role" in the victim's murder.

Terry Thomas, who was thirty-two at the time of trial, testified that he met the victim and Mr. Cody while attending West High School together. After Mr. Thomas and the victim graduated, they remained in contact through social media. Mr. Thomas joined a gang called the Bounty Hunter Bloods, which he described as a branch of the Blood gang.

He said that while his gang was different from the victim's Tree Top Piru gang, the two remained friends.

At one point, when Mr. Thomas was working as a bouncer at an East Knoxville social establishment called "The Malibu," he met Mr. Griffin, whom he had also seen on Facebook. Mr. Griffin introduced Mr. Thomas to Mr. Clark and the Defendant. Mr. Thomas began spending a lot of time with the Tree Top Piru gang members, even though he was still affiliated with the Bounty Hunter Bloods. Mr. Thomas said that he had been to the victim's home, met his girlfriend, and was aware that he had a newborn child.

Mr. Thomas recounted events in January 2018, saying that at the time he worked at DeRoyal making hospital items. He and his girlfriend shared a white Buick LeSabre and his girlfriend at the time drove a green Maxima. On the morning of January 17, 2018, Mr. Thomas received several text messages from Mr. Griffin. When his shift ended at 8:00 p.m., he called Mr. Griffin, who invited him to come to the Louise Avenue house. He traveled there, knocked on the door, and was greeted. Present in the home were: the victim, "Dee Barber," who was a member of the "400s" and at the house cutting hair, the Defendant, and Mr. Clark.

Mr. Griffin called Mr. Thomas into the bathroom, and told him, "Bruh got to go," while making his fingers into the sign of a gun. Mr. Thomas understood him by referring to the victim. At first, Mr. Thomas thought he meant that someone needed to go for a ride, but when he saw the gun hand gesture and the expression on Mr. Griffin's face, he knew this was serious. Mr. Griffin told him that the "little homies" were going to "handle it" and not to worry about it.

Mr. Thomas expressed his to Mr. Griffin his desire to not be involved, and he then left the bathroom and went to the living room where the victim was present, along with Mr. Clark and the Defendant. He joked and hung out with the three men and then, after his girlfriend texted him, told them that he had to leave. The victim reminded him that he was the "big homie" in a light-hearted manner and asked Mr. Thomas to give him a ride to retrieve some money. Mr. Thomas left with the victim, and the Defendant and Mr. Clark came outside to join them. Mr. Thomas discouraged the Defendant and Mr. Clark from coming, and the victim said, "No, they are my little homies. They with us tonight."

Mr. Thomas drove the three other men to a gas station, and the victim went inside. Mr. Thomas heard Mr. Clark tell the Defendant that he was going to get the victim out of the car, and the Defendant responded that he was going to "finish" the victim off. Mr. Thomas interjected and said, "Are y'all going to . . . do this for real?" The victim then returned to the vehicle. The men then drove around for some time, and Mr. Thomas never told the victim what Mr. Griffin had said or what Mr. Clark and the Defendant had said. He said that, had he mentioned it, he felt he would have been killed by someone, as they all were armed.

The victim directed Mr. Thomas to take him to the intersection of Beaman and Lay, which was to be their last stop of the evening. The victim and the Defendant got out of the vehicle, and Mr. Clark got into the front passenger seat. Mr. Clark said, "He's about to do it," and Mr. Thomas said, "Do what?" Mr. Thomas saw the Defendant raise his weapon, which was a Smith & Wesson .40 caliber weapon, and Mr. Thomas jumped into the backseat for a better view of what was happening. The Defendant shot the victim twice, although Mr. Thomas did not see the fire come from the Defendant's weapon, and the victim returned fire. Mr. Clark got out of the car and shot at the victim to "finish [the victim] off with the Draco.[2]"

Mr. Clark jumped back into the vehicle and got into the driver's seat. He drove the vehicle around the victim's body and went to pick up the Defendant, who got into the vehicle while saying, "Man, he almost shot me." Mr. Clark drove the men back to the Louise Avenue house, and Mr. Clark and the Defendant went inside. Mr. Thomas stayed in the vehicle trying to gain his composure, as he had just seen his friend be shot.

Mr. Thomas eventually went into the house and asked a young girl who was present where Mr. Clark and the Defendant had gone, and she said that they were in the back. He knocked on the bathroom door, and the men let him in. In the bathroom were, the Defendant, Mr. Clark, Mr. Cody, and Mr. Griffin. Mr. Clark informed Mr. Cody and Mr. Griffin that it was finished. Mr. Thomas said he retrieved his car keys from Mr. Clark and went home.

Mr. Griffin called Mr. Thomas repeatedly, and Mr. Thomas took one call the evening of the shooting. He saw Mr. Griffin and Mr. Cody at East Towne Mall the following day and had a conversation with them.

Mr. Thomas's parents contacted Mr. Thomas on May 19, 2018, and told him that the police were at their West Knoxville home. Mr. Thomas called Mr. Griffin to tell him that the police wanted to speak with Mr. Thomas. He then went to his parents' house and then went with Officer Jackson to the police station. At the station, he spoke with Investigator Thurman but did not initially tell him the truth because he was unsure what the police knew. He said that "on the street" there was information that he was the shooter, which he was not. He spoke with Investigator Thurman on several occasions before his arrest in 2019.

During cross-examination, Mr. Thomas testified that, although he was never "proper," or officially recognized as a member of the Tree Top Piru gang, Mr. Griffin acted as if he was affiliated with that gang. Mr. Griffin felt as if no one could tell him differently,

[2]In later testimony it was explained that the Draco was an AK-47 assault rifle that Mr. Clark was known to carry.

so he acted as if Mr. Thomas was a Tree Top Piru, although Mr. Thomas was affiliated with the Bounty Hunter Bloods. Members of the Bounty Hunters contacted Mr. Griffin and told him that this "wasn't straight," but Mr. Griffin felt powerful enough that he was not worried.

Mr. Thomas said that, in his mind, he was still a Bounty Hunter Blood. As part of his affiliation with that gang, he sold marijuana and cocaine, and he assisted in gun sales. Mr. Thomas affirmed that he was not truthful with the police when interviewed, and he told them that he was driving a different vehicle than he was diving the evening of the shooting.

During redirect examination, Mr. Thomas denied being in the bathroom when Mr. Griffin said that the victim needed to be killed. He stated that he struggled with his failure to warn the victim of the hit. Ultimately, he told the truth about being present because it was the right thing to do. He said, however, that he felt there was nothing he could do at the time because the victim "loved" the Defendant and Mr. Clark, and he did not feel that the outcome would have been different because the victim may not have believed him.

During recross-examination, Mr. Thomas said that, when he returned to the Louise Avenue house after the shooting, he walked in to hear Mr. Clark and the Defendant telling Mr. Griffin "It's finished." Mr. Griffin responded "That's what's up, that's what's up, pfonk.[3] Y'all handled the business."

Several KPD officers testified about evidence found at the crime scene. Officer Jacklyn Hale noted that the night of the victim's murder was cold, only nine degrees, with snow and ice on the ground. She photographed and sketched the scene and photographed the victim's body. The pictures showed multiple .40 caliber cartridge casings, cigarillo (a "sweetish cigar"), a Smith & Wesson .40 bullet that was found underneath the victim, and his clothing. She noted that the victim sustained multiple gunshot wounds. Officer Edward Johnson also responded to and photographed the scene. He said that the Defendant's left thumbprint was found on the drum magazine of the AK pistol and his left ring fingerprint was found on the side of the magazine of the Smith & Wesson handgun.

Investigator Hale said that she later returned to the scene with a metal detector and found a 7.62 TulAmmo cartridge casing. The investigator also processed the vehicle involved, including obtaining DNA swabs from inside the vehicle. Investigator Hale received the bullets and the fragments from the victim's body.

During cross-examination, Investigator Hale said that another investigator contacted her and told her that he believed the Buick LeSabre in this case had been involved

[3]In further redirect, Mr. Thomas explained that "pfonk" was Piru name that the members called each other.

in a crime. She therefore processed the vehicle. She said the only thing of consequence she found in the vehicle was the DNA.

Marla Newport, a Special Agent Forensic Scientist with the TBI, testified that she received for testing the victim's jacket and clothing as well as his blood standard, a Cigarillo, a swab from the vehicle, and buccal standards from the Defendant and the men who were with him at the time of his arrest. The major contributor to fluids on the victim's clothing was the victim, and the Buick swabs were consistent with two individuals, one of whom was a male identified as Terry Thomas.

Patricia Resig, an expert forensic firearms examiner with the KPD, testified that she compared fired cartridges from a .40 caliber Smith & Wesson semi-automatic pistol to eleven cartridges found at the scene. She determined that they matched. At least three of the bullets found during the autopsy of the victim's body were also fired from this weapon. Officer Resig also examined a 7.62 x 39mm caliber Zastava semi-automatic pistol and compared it to other cartridges found at the scene. She determined that the cartridges found at the scene were fired from that weapon. At least one of the bullets found during the autopsy of the victim's body was fired from the Zastava weapon. Officer Resig also examined a detachable drum magazine that contained sixty-two unfired rounds of 7.62 ammunition. Finally, Officer Resig examined the other .40 caliber weapon found at the scene and determined that it had not fired any of the casings recovered at the scene.

Dr. Amy Hawes, the Deputy State Medical Examiner, testified that the victim's body had numerous gunshot wounds. She retrieved the bullets left in his body and gave those to law enforcement officers. Dr. Hawes determined the victim's cause of death to be multiple gunshot wounds.

Several KPD officers testified about the stop and subsequent arrest of Mr. Cody. Officer Skellenger said that in June 2018 police received a call about vehicles driving around exchanging paintball gunfire. After observing a vehicle covered in paint from paintballs, they conducted a traffic stop. In the vehicle were Mr. Cody and Mr. Tate. Officer Lockmiller, a supervisor with the KPD, supervised officers after they stopped a vehicle driven by Mr. Cody because Mr. Cody had been associated with several other people who had outstanding warrants and had been investigated recently. Officers confiscated Mr. Cody and Mr. Tate's phone.

Charles Arnold testified that he was originally from Arkansas and moved to Knox County in 2008 and, more specifically, into the Taylor house in 2013. Mr. Arnold acknowledged his problem with crack cocaine, an addiction that preceded his move to Knox County. Mr. Arnold's addiction led to him allowing drugs to be sold from his home in exchange for free drugs. There were "quite a few" people who sold drugs, crack cocaine, from the Taylor house, including Mr. Cody, the Defendant, Mr. Tate, whom he knew as "Earz." The three men all gave Mr. Arnold drugs to sell, and the amount he sold increased

as time went on. Mr. Arnold estimated that the Defendant sold drugs for six months, ending around the time of his arrest in December 2017. Mr. Arnold got at least a gram-and-a-half each day, sometimes more, for the use of the Taylor house.

In September 2017, law enforcement officers went to the Taylor house looking for a gun. Mr. Arnold and "a couple of girls" were at the house; the girls were there to buy and smoke crack cocaine. Officers found a handgun at the Taylor house, but Mr. Arnold did not know it was there or to whom it belonged.

On December 12, 2017, law enforcement officers again came to the Taylor house while Mr. Arnold was sleeping. They woke him and informed him that two men had run out of his home. They then asked him about drugs on his table and who the men were. Mr. Arnold did not know the men's identities because he had been asleep, and he also did not know any details about the drugs on the table. Officers found a significant amount of what they suspected was crack cocaine, firearms, ammunition, and cash currency. They also found digital scales, a whisk, both of which are used in the manufacturing and selling process of drugs. Officers who interviewed Mr. Arnold at the scene determined that he was a severe addict and opined that it would be unusual for him to have that quantity of drugs and currency. They investigated whether someone else was distributing the money from his home.

Forensic testing showed that the evidence found at the Taylor house tested positive for cocaine in the amounts of 33.41 grams of cocaine base and 28.13 grams of cocaine powder. Other testing showed that the substance found in December was 0.44 grams of cocaine.

Robert Crowe testified that in April 2014 he had been married for forty-five years when his wife died. He suffered depression after her passing and turned to cocaine use. He met and began dating a girl, "Lola," who gave him drugs and told him that Mr. Cody wanted to use his home to sell drugs. Mr. Crowe allowed Mr. Cody, the Defendant, and Mr. Tate[4] to come into his home, make crack cocaine, and sell it in exchange for money and drugs.

There was testimony about the cell phones that law enforcement confiscated and examined in this case. Investigator Jinks testified that he received cellphones from the Defendant and Mr. Clark. The investigator said that his examination of the Defendant's cellphone led him to other individuals that the investigator believed were involved in the distribution of cocaine. Investigator Jinks also received Mr. Cody's and Mr. Tate's cellphones, which he also examined. The investigator used software to extract information from all the cellphones he confiscated. Investigator Jinks was unable to obtain Mr.

[4]Mr. Crowe referred to Mr. Tate by his street name, "Earz."

Griffin's cell phone, but he determined which cellphone number belonged to Mr. Griffin based on the content of the text messages.

Investigator Jinks identified the documentation from extraction of the cellphones. This included videos and images, as well as text messages. The investigator found images of Mr. Tate in the Louise Avenue house from January 11, 2018. He also identified a photograph of Mr. Tate in the Taylor house with the whisk and Pyrex that law enforcement officers later found. Also in the picture was an AK-47 that appeared identical to the one law enforcement officers confiscated on December 12, 2017. The investigator also identified several other videos taken around the time of the shooting and extracted from the cell phones that depicted the men involved in this case, including the Defendant, along with drugs, monetary cash, and guns. One image showed the Defendant and Mr. Clark on January 13, 2018, and there was the butt of a handgun sticking out of the Defendant's pants pocket. In another image, the Defendant is holding a handgun in front of his face and pointing it at the camera. Three handguns appear in the video, a black handgun, a silver Smith & Wesson, and a Draco, or AK-47 style, handgun. The trial court admitted multiple videos of the Defendant and Mr. Clark with these weapons on several dates near the time of the shooting.

Investigator Jinks identified a series of text messages between the Defendant and Mr. Griffin (the man who allegedly ordered the victim's killing). On January 14, 2018, Mr. Griffin referenced wanting to speak with the Defendant about a "lil mission," and the Defendant provided Mr. Griffin his location. On January 15, 2018, Mr. Griffin informed the Defendant by text that he was at the "spot" and to "ball" him when the Defendant awoke. The investigator explained that the Tree Top Piru members, a subset of the Blood gang, used the letter "b" in place of the letter "c" because their archrival gang was the Crips. The day that the victim was killed, January 17, 2018, at around 9:00 in the evening, Mr. Griffin encouraged the Defendant by text to ask "bro" if he was still going to the store. He encouraged him to tell the unspecified individual that he would also like to go to the store. Mr. Griffin asked the Defendant's location on several occasions and, after the murder occurred, he told the Defendant to "[e]rase everything out your phone . . . Numbers to[o]."

On January 17, 2018, between 12:26 am and 12:43 am, the Defendant texted Mr. Evans (who was the driver of the vehicle at the time of the Defendant's arrest) to "Kum get us, to which Mr. Evans responded, "ok."

Multiple text messages were exchanged between the Defendant and Mr. Clark. Those messages included inquiries about whereabouts, references to the Blood affiliation, and references to the Louise Avenue house and drug selling. In January 2018, the Defendant texted Mr. Clark to come to the Louise Avenue house and hang out with the Defendant and Mr. Cody, the leader of the Tree Top Piru gang.

Text messages between Mr. Cody, saved as "Big Homie" in the Defendant's phone, and the Defendant revealed that, when Mr. Cody asked the Defendant's location on December 17, 2017, the Defendant replied that he was at the victim's house. Other messages referenced the Draco, with Mr. Cody telling the Defendant to bring the Draco to the Trap.

During cross-examination, Investigator Jinks identified images of the victim in possession of a weapon. He also identified images of the Defendant handling the weapons involved in this case on the day before the shooting.

Officer Diondre Jackson testified that he and his partner, Officer Jordan Henderson, went to Mr. Nyane's house and found Mr. Clark present. Officer Jackson understood that Mr. Nyane was on probation and subject to probation searches, so he and Officer Jackson searched his home. They found a firearm and a cell phone.

Based upon this evidence, the jury convicted the Defendant of: Count 1, one count of conspiracy to possess with intent to sell twenty-six grams or more of a Schedule II controlled substance in a drug free zone, Count 2, the lesser-included offense of possession of a firearm with the intent to go armed; Count 6, the lesser-included offense of facilitation of first-degree murder; Count 7, possession with intent to sell or deliver more than twenty-six grams of a Schedule II controlled substance; Count 8, possession of a firearm with the intent to go armed during the commission of a dangerous felony.

In a bifurcated proceeding, the State then presented evidence that the gang enhancement sentencing statute applied in Count 10 to the conspiracy to possess with intent to sell or deliver a controlled substance offense, in Count 11 to the possession with intent to sell or deliver cocaine, and in Count 12 to the facilitation of first degree murder. After hearing the evidence presented, as will be summarized below, the jury found that the Defendant was a criminal gang member and that the offenses were committed at the direction of or in the association with or for the benefit of the Defendant's criminal gang or a member of the Defendant's criminal gang. After a sentencing hearing, the trial court imposed partial consecutive sentencing for a total effective sentence of fifty-six years of incarceration. It is from these judgments that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that: (1) the trial court erred when it denied his motion to suppress evidence found as the result of a warrantless search of the vehicle he was riding in when arrested; (2) the trial court erred when it denied his motion to sever the offenses; (3) the State's gang-enhancement presentment was insufficient; (4) the criminal gang statute was not properly applied to his conspiracy and unlawful possession of a firearm convictions; (5) during sentencing, the trial court improperly considered acts he

committed while a juvenile; and (6) the evidence presented is insufficient to sustain his conviction for conspiracy to possess with intent to sell a controlled substance.

A. Motion to Suppress

The Defendant contends that the trial court erred when it denied his motion to suppress evidence found during the search of the vehicle in which he was a passenger at the time of his arrest. He asserts that law enforcement officers went to the Defendant's home and unlawfully seized the vehicle based upon a mistaken belief that a man named Devonte Blair, who had outstanding warrants, was approaching the vehicle. He further asserts that any right that the officers had to seize Mr. Blair did not extend to the other occupants of the vehicle. The State counters that the law enforcement officers had reasonable suspicion to stop the vehicle because they saw a man, whom they believed to be Mr. Blair, get into the car in what appeared to be an attempt to avoid encountering law enforcement. This gave law enforcement a particular and objective basis to seize the automobile. We agree with the State.

On review, an appellate court may consider the evidence adduced at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. *State v. Henning*, 975 S.W.2d 290, 297-99 (Tenn. 1998). A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Jones*, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "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." *Odom*, 928 S.W.2d at 23. The application of the law to the facts as determined by the trial court is a question of law which we review de novo on appeal. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar guarantee is provided in Article 1, Section 7 of the Tennessee Constitution:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not

named, whose [offenses] are not particularly described and supported by evidence, are dangerous to liberty.

The essence of these constitutional protections is "to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *State v. Downey*, 945 S.W .2d 102, 106 (Tenn.1997) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). Under the "fruit of the poisonous tree" doctrine, evidence that is obtained through exploitation of an unlawful search or seizure must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Stopping a vehicle without a warrant and detaining its occupants constitutes a seizure. *State v. Brotherton*, 323 S.W.3d 866, 870 (Tenn. 2010). When, as here, officers seize a defendant without a warrant, the State bears the burden of demonstrating the applicability of an exception to the warrant requirement. *See, e.g., State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005); *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998). Reasonable suspicion of criminal activity on the part of one of a vehicle's occupants gives law enforcement a proper basis to seize a vehicle for a brief investigatory stop. *See State v. Levitt*, 73 S.W.3d 159, 172 (Tenn. Crim. App. 2001).

The prohibition against warrantless searches and seizures is subject only to a few specifically established and well-defined exceptions. *See Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Tyler*, 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). One exception to the warrant requirement is the brief investigatory stop and frisk authorized by *Terry v. Ohio*, 392 U.S. 1 (1968). Pursuant to *Terry*, police officers are constitutionally permitted to conduct a brief investigatory stop supported by specific and articulable facts leading to reasonable suspicion that a criminal offense has been or is about to be committed. *Terry*, 392 U.S. at 20-23; *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000). Whether reasonable suspicion existed in a particular case is a fact-intensive, but objective, analysis. *State v. Garcia*, 123 S.W.3d 335, 344 (Tenn. 2003). The likelihood of criminal activity that is required for reasonable suspicion is not as great as that required for probable cause and is "considerably less" than would be needed to satisfy a preponderance of the evidence standard. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). A court must consider the totality of the circumstances in evaluating whether a police officer's reasonable suspicion is supported by specific and articulable facts. *State v. Hord*, 106 S.W.3d 68, 71 (Tenn. Crim. App. 2002). The totality of the circumstances embraces considerations of the public interest served by the seizure, the nature and scope of the intrusion, and the objective facts on which the law enforcement officer relied considering his experience. *See State v. Pulley*, 863 S.W.2d 29, 34 (Tenn. 1993). The objective facts on which an officer relies may include his or her own observations, information obtained from other officers or agencies, offenders' patterns of operation, and information from informants. *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992).

A second exception to the general warrant requirement is consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *State v. Bartram*, 925 S.W.2d 227, 230 (Tenn. 1996); *State v. Jackson*, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993). "The sufficiency of consent depends largely upon the facts and circumstances in a particular case." *Id.* In most circumstances valid consent exists when given "either by the individual whose property is searched or by a third party who possesses common authority over the premises." *State v. Ellis*, 89 S.W.3d 584, 592 (Tenn. Crim. App. 2000) (citations omitted).

When denying the Defendant's motion to suppress, the trial court, found:

> Inv. Madison saw a man walking to the car who bore a reasonable resemblance to Mr. Blair. While Inv. Madison had information that Mr. Blair always wore red shoes, this subject wore a red h[at], which drew an association in Inv. Madison's mind. The subject was leaving Ms. McNair's home. Ms. McNair was known to spend time with [the Defendant]-- another person for whom the police were searching – and she had been directly implicated in the [Mobley Shooting] by posting the Facebook live video featuring herself, [the Defendant], and Mr. Clark. She also owned a car that matched the description of a vehicle used in a prior shooting. The subject's furtive actions after seeing the police only added to the suspicion that Inv. Madison had developed to that point.
>
> Under these circumstances, Inv. Madison was reasonably justified to seize the vehicle and its occupants to determine whether the subject was, in fact, Mr. Blair and therefore subject to arrest. To be clear, while accrediting Inv. Madison's account regarding the identification, the court reaches its conclusion today on the objective facts presented to Inv. Madison, "rather than the subjective beliefs of the officer making the stop." *Day*, 263 S.W.3d at 903. As stated in *Hill*, "subjective good-faith belief would not in itself justify either the arrest or the subsequent search." *Hill*, 401 U.S. at 804. In this case, however, the court believes that there are enough facts to objectively justify an initial detention to allow Inv. Madison to either confirm or rebut his reasonable suspicion. [FN: The objective facts indicate that the subject in question was, in fact, Mr. Clark, a man who officers undoubtedly would have seized pending further investigation, given the facts known at the time]. While Inv. Madison was ultimately incorrect as to his initial identification of Mr. Clark, his actions were objectively reasonable given the information known to him at the time in the midst of a violent and rapidly-developing course of events.

We conclude that the trial court did not err when it denied the motion to suppress considering the circumstances known to the officers at the time of the Defendant's seizure. The officers involved in this seizure were investigating multiple gang-related shootings.

Investigator Thurman learned about the December 31, 2017 Holloway Shooting and that the Defendant was implicated in that shooting. He became familiar with the Defendant when investigating a potentially retaliatory shooting at the Defendant's home on Chester Street on January 6, 2018. On January 17, 2018, the Defendant, Ms. McNair, and Mr. Clark were implicated in the Mobley Shooting based upon a Facebook video. On January 18, 2018, the Defendant was implicated in the Groaner Street shooting with Mr. Clark and Mr. Tate. That night, the victim in this case, the Defendant's "big Homie," Mr. Washington, was shot and killed. Investigator Thurman also was assigned to this shooting, and the Defendant and other gang members were implicated. Investigator Thurman was aware that the Defendant had multiple outstanding juvenile warrants and that his girlfriend, Ms. McNair, lived on Dry Gap Pike.

Investigator Thurman spoke with the victim's father, who said that the victim's shooting was a gang-related, so the investigator expanded the investigation to include "400" Tree Top Piru gang members. The victim's father said that the victim had been with Mr. Shadden the day of the shooting and, when the investigator interviewed Mr. Shadden, he said that the victim had been with Mr. Blair the day of the shooting. Mr. Blair had an outstanding warrant for aggravated assault. Officers were therefore looking for the Defendant, Mr. Clark and Mr. Blair, all of whom were believed to be members of the Tree Top Piru gang.

Investigator Thurman's partner, Investigator Madison, went to Ms. McNair's house to locate these men. While at her house, he saw a man whom he believed to be Mr. Blair exiting the house and walking toward a vehicle in which three other men were located. When the man saw the investigator, he quickened his pace in what appeared to be an effort to avoid the officers and got into the vehicle. The officers exited their vehicle and asked the driver to turn off the car. They waited for back up and seized the four men, including the man believed to be Mr. Blair, but who was in fact Mr. Clark. The owner and driver of the vehicle gave the officers consent to search the vehicle.

The investigators had specific and articulable facts leading to reasonable suspicion that a criminal offense had been or was about to be committed. The investigators knew that the victim had been murdered, were told that it was gang-related, the Defendant, Mr. Clark, and Mr. Blair were implicated in the victim's murder, and Mr. Blair was the last person known to be with the victim before his murder. The investigators went to Ms. McNair's house and saw who they believed to be Mr. Blair avoiding them and getting into a vehicle with three other men. They stopped the vehicle to determine if Mr. Blair was in the vehicle and if the vehicle contained anyone else implicated in the victim's murder. After stopping the vehicle, Investigator Madison recognized the Defendant, who had outstanding warrants. Mr. Evans consented to the officers searching the vehicle. The trial court properly denied the motion to suppress.

B. Severance of Offenses

The Defendant contends that the trial court erred when it did not sever his offenses for trial. He argues that the indictment charged three distinct offenses: the conspiracy to distribute cocaine, the specific cocaine possession, and the murder offense. The State counters that the trial court did not err because the conspiracy and the individual act of drug possession were mandatorily joined because they were the same conduct or constituted one criminal episode. It further posits that the murder charge and conspiracy charge were properly joined as they constituted part of a common scheme or plan. We agree with the State.

A trial court's decision to consolidate or sever offenses is discretionary and will only be reversed if discretion has been abused. *State v. Shirley*, 6 S.W.3d 243, 245-47 (Tenn. 1999); *State v. Moore*, 6 S.W.3d 235, 238 (Tenn. 1999). "[A] trial court's refusal to sever offenses will be reversed only when the 'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *Spicer v. State*, 12 S.W.3d 438, 442-43 (Tenn. 2000) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)); *see also Shirley*, 6 S.W.3d at 247. Discretion is also abused when the trial court "failed to consider the relevant factors provided by higher courts as guidance for determining an issue." *State v. Garrett*, 331 S.W.3d 392, 401 (Tenn. 2011) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

The consolidation of multiple offenses against a single defendant in a single trial is governed by the interplay of Rules 8, 13, and 14 of the Tennessee Rules of Criminal Procedure. Rule 8 identifies the circumstances for mandatory joinder and permissive joinder. Under the rule for mandatory joinder:

> (a)(1) Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or the offenses consolidated pursuant to Rule 13, if the offenses are:
> (A) based on the same conduct or arise from the same criminal episode;
> (B) within the jurisdiction of a single court; and
> (C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

Offenses are part of the "same conduct" when "a single act . . . results in a number of interrelated offenses." *State v. Johnson*, 342 S.W.3d 468, 473 (Tenn. 2011). Offenses are part of the "same criminal episode" when they "occur simultaneously or in close sequence," "occur in the same place or in closely situated places," and "proof of one offense necessarily involves proof of the others." *Id*. at 475 (internal quotations and citations omitted). The Advisory Commission Comments to Tennessee Rule of Criminal Procedure 8 provide:

> This rule is designed to encourage the disposition in a single trial of multiple offenses arising from the same conduct and from the same criminal episode, and should therefore promote efficiency and economy. Where such joinder of offenses might give rise to an injustice, Rule 14(b)(2) allows the trial court to relax the rule.

Pursuant to 14(b)(2), if two or more offenses are joined or consolidated for trial pursuant to Rule 8(a), (mandatory joinder), the court shall grant a severance of offenses in any of the following situations:

> (A) Before Trial. Before trial on motion of the state or the defendant when the court finds a severance appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.
>
> (B) During Trial. During trial, with consent of the defendant, when the court finds aseverance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether--in light of the number of offenses charged and the complexity of the evidence--the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

1. Mandatory Joinder of Conspiracy and Possession Counts

When reviewing a claim regarding the mandatory joinder provision of Tennessee Rule of Criminal Procedure 8(a), this court is bound by the factual findings of the trial court unless the evidence preponderates against them, *see State v. Baird*, 88 S.W.3d 617, 620 (Tenn. Crim. App. 2001), but we review "de novo with no presumption of correctness" the trial court's application of the law to the facts, *State v. Johnson*, 342 S.W.3d 468, 471 (Tenn. 2011) (applying de novo review to the trial court's "application of [Rule] 8 to the undisputed facts").

In this case, after hearing the evidence at the motion to sever hearing, the trial court noted that the Defendant's motion related to Counts 1, 2, 6, 7 and 8. The trial court first addressed Counts 1 and 7, stating:

> [I]n those counts you have in Count 1 drug conspiracy and then in Count 7 you have the discrete act of the cocaine possession on January the 18th of 2018. Were these two counts mandatorily joined under Rule 8(a) and what you have here is Count 7 is an allegation of a discrete act of possessing over 26 grams of cocaine by the co-conspirators that are alleged in Count 1 during the pendency of that conspiracy as it's alleged in Count 1.

> These counts describe the same conduct and arise from the same criminal episode. It's a discrete act as part of the larger conspiracy. So in the Court's opinion they were mandatorily joined under Rule 8(b), and again I'm talking about Counts 1 and 7 here.

The trial court concluded that, while the counts could be severed if appropriate to promote a fair determination of guilt or innocence on each offense pursuant to Rule 14(b)(2)(A), that was not the case. The court stated "that the State obviously had a right to prove the discrete offenses and acts, the overt acts that comprised the conspiracy."

We conclude that the trial court did not err when it determined that the trial for the discrete possession of cocaine offense was subject to mandatory joinder with the trial for the conspiracy to sell cocaine offense. The Defendant contends that there is "no proof" that the drugs found in the Defendant's possession at the time of his arrest in the Kia Optima were drugs that made up the conspiracy, because law enforcement did not know the source of the supply. We disagree. The evidence showed that the Defendant, along with other gang members, processed powder cocaine and turned it into crack cocaine, which they then sold from the Louise Avenue house. The Defendant informed law enforcement that the gang used the Louise Avenue house as a place for its gang members to sell drugs and hang out. He further admitted that the backpack in the vehicle belonged to him, that he knew it contained cocaine, and that he had recently been selling cocaine from the Louise Avenue house. The gang used the profits from these sales. The fact that the Defendant possessed twenty-six grams of cocaine in a backpack at the time of his arrest, is proof of the larger conspiracy to sell cocaine. His statements at the time of his arrest about these multiple offenses (selling drugs from the Louise Avenue house and possessing cocaine) are "inextricably connected." He clearly admitted to law enforcement that he participated in the conspiracy to sell, and the actual sale of, cocaine from the Louise Avenue house. Then, at the time of arrest, which was within a day of when he was selling cocaine from the Louise Avenue house, the police found twenty-six grams of cocaine in the Defendant's possession. The trial court did not err when it found that these offenses were part of the same criminal episode.

As we previously stated, the Defendant was found in possession of more than twenty-six grams of cocaine within a day of when he told law enforcement officers that he sold cocaine from the Louise Avenue house, a house used by his gang to sell drugs regularly. The Defendant's possession of a large quantity of cocaine, in the court's opinion, clearly supports that he was a knowing participant in an ongoing conspiracy to regularly and frequently sell cocaine. He did not deny ownership of the backpack, and he admitted that he sold cocaine regularly to support himself and his gang. Accordingly, the trial court did not err when it determined that the conspiracy to sell cocaine count should be mandatorily joined with the possession of cocaine count.

The Defendant does not contend that a fair determination of his guilt required severance, but rather he only contends that the offenses were not subject to mandatory joinder. We disagree and affirm the trial court's finding that these two counts were mandatorily joined.

Even if the trial court erred when finding that the two counts were mandatorily joined, the trial court could have permissively joined the two offenses. *See e.g., State v. Jefferies*, 2019 WL 5078723, at *9 (Tenn. Crim. App. Oct. 10, 2019), *no Tenn. R. App. P. 11 application filed.*

A defendant has a right under Rule 14(b)(1) of those rules to the "severance of offenses permissively joined [under Rule 8(b)(2)], unless the offenses are parts of a common scheme or plan and the evidence of one offense 'would be admissible upon the trial of the others.'" *Spicer*, 12 S.W.3d at 443 (Tenn. 2000) (quoting Tenn. R. Crim P. 14(b)(1)).

In *Spicer*, the court confirmed that "when a defendant objects to a pre-trial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Rule 14(b)(1) [of the Tennessee Rules of Criminal Procedure], not the 'same or similar character' standard of Rule 8(b)." *Id.* "The primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed." *State v. Burchfield*, 664 S.W.2d 284, 286 (Tenn. 1984). When there is an objection to a motion to consolidate, the State bears the burden of producing evidence to establish that the consolidation is proper. *State v. Dotson*, 254 S.W.3d 378, 386-87 (Tenn. 2008); *State v. Toliver*, 117 S.W.3d 216, 228 (Tenn. 2003) (citing *Spicer*, 12 S.W.3d at 447).

The procedure is well established. Before a trial court may deny a severance request, it must hold a hearing on the motion and conclude from the evidence and argument presented at the hearing that (1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of one of the offenses is relevant to some material issue in the trial of the other offenses; and (3) the probative value of the evidence of the other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant. *Dotson*, 254 S.W.3d at 387; *Spicer*, 12 S.W.3d at 445; *see also* Tenn. R. Evid. 404(b)(3).

Tennessee Rule of Evidence 404(b) governs the admissibility of prior misconduct:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for some other purpose. The conditions which must be satisfied before allowing such evidence are:

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling and the reasons for admitting the evidence;
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Generally, it is suggested that trial courts take a "'restrictive approach of 404(b) . . . because "other act" evidence carries a significant potential for unfairly influencing a jury.'" *State v. Bordis*, 905 S.W.2d 214, 227 (Tenn. Crim. App. 1995) (omission in original) (quoting Cohen, Paine and Sheppeard, Tennessee Law of Evidence, § 404.7 at 131). The rationale behind the general rule is that admission of other wrongs carries with it the inherent risk of the jury convicting a defendant of a crime based upon his or her bad character or propensity to commit a crime, rather than the strength of the proof of guilt on the specific charge. When the defendant's prior bad acts are similar to the crime for which the defendant is on trial, the risk of unfair prejudice is even higher. As this Court has consistently cautioned, the jury should not "be tempted to convict based upon a defendant's propensity to commit crimes rather than . . . evidence relating to the charged offense." *Dotson*, 254 S.W.3d 378, 386-87; *Spicer*, 12 S.W.3d at 448.

In *State v. Graham*, No. E2014-01267-CCA-R3-CD, 2016 WL 892013, at *6-7 (Tenn. Crim. App. Mar. 8, 2016), the defendant was convicted of multiple drug sales as well as conspiracy to sell drug offenses. The defendant filed a motion to sever the offenses, and this court found:

> The record reflects that the trial court in this case did not abuse its discretion by denying Defendant Graham's motion to sever offenses. Defendant Graham participated in each of the individual cocaine transactions in this case. His role in the related conspiracy with Defendant Murchison demonstrated a continuing scheme or plan to sell to Mr. Dukes, the CI, increasing quantities of crack cocaine. This court has held that multiple drug transactions can qualify as a common scheme or plan. *State v. Mosley*, No. 01C01-9211CC-00345, 1993 WL 345542, at *4 (Tenn. Crim. App. Sept. 9, 1993) ("[I]n the case at bar, four of the indicted offenses occurred within a three-day period and the other occurred approximately six weeks later. All of the offenses involved the same controlled substance, the same defendant, the same informant and the same witnesses. It was such a continuous episode so closely related that the proof was essentially the same in each case."); *State v. Joseph Clyde Beard, Jr.*, No. 03C01-9502-CR-00044, 1996 WL 563893 (Tenn. Crim. App. Sept. 26, 1996) ("[C]ommon scheme" found

where same informant purchased similar amounts of cocaine from the same defendant for the same amount of money in the same location although the drug transactions occurred a month apart); and *State v. Patrick L. Maliani*, No. M2012-01927-CCA-R3-CD, 2013 WL 3982156, at *12-13 (Tenn. Crim. App., Aug. 5, 2013) (The "two offenses were part of a continuing criminal scheme and also important to show the identity of the Defendant.").

In this case, we conclude that the evidence that the Defendant possessed more than twenty-six grams of cocaine at the time of his arrest met the criteria for permissive joinder with the evidence that he participated in a conspiracy to sell cocaine. Possessing cocaine is a common component to selling cocaine and also a common component of conspiracy to sell cocaine. These offenses do constitute a common scheme or plan, and evidence of the offenses is relevant to a material issue of the other offense. Finally, the probative value of the evidence of the offenses outweighs any prejudicial effect. There is very little prejudicial effect by the admission of proof that the Defendant possessed cocaine when he was also charged with conspiracy to sell cocaine. *See State v. Massey*, 2014 WL 3661490, at *31-33 (Tenn. Crim. App. July 23, 2014). Accordingly, we conclude that, even if the cases were not properly subject to mandatory joinder, they were subject to permissive joinder, and the Defendant is not entitled to relief on this issue.

2. Permissive Joinder of Drug Counts with Murder Count

The Defendant contends that the trial court erred when it permissively joined the homicide case with the drug cases. He asserts that there is no over-arching plan that covers both of these allegations and no common goal that is accomplished by these offenses. As they are unrelated matters, he posits, the trial court erred when it did not sever these offenses for trial. The State counters that the homicide case and conspiracy charges were part of a common scheme or plan and that the evidence of one would be admissible at the trial of the other. It contends that the evidence showed that there was a narcotics operation staffed by members of the Tree Top Piru gang, which included a hierarchical structure. The two top ranking members ordered the Defendant, a lower-ranking member, to murder the third ranking member because of his unwillingness to participate in gang business. The common plan was to further the interests of the gang through the sale of drugs as well as ensuring that its members followed orders and were punished when not serving the best interests of the gang.

When addressing this issue, the trial court found that the counts were permissively joined, meaning that the Defendant had a right to severance unless the State could make the required showing pursuant to Rule 14(b)(1), which was a three-part test. The trial court stated:

> So the first question the Court must answer, were these offenses part of a common scheme or plan? And as I said I think the sub-set that we find

in the appellate law in *Denton* and some other cases, *Spicer*, the cases that [the Assistant District Attorney] mentioned, is that this is true if they are part of a later, continuing plan or a conspiracy.

And what do we know about what was taking place here based upon the proof developed at this hearing? That the Tree Top Pirus are a local sub-set of what is really a nationally organized criminal enterprise.

And at the time that was alleged here for this conspiracy, the epicenter of that here locally was at [the Louise Avenue house], and then today we also hear the [Taylor house] was another trap house that was used to further his effort.

And what do we know about what was taking place at those two addresses, and I'm focusing specifically on [the Louise Avenue house]. We've heard the recorded statement of [the Defendant] and it was referred to multiple times today by Investigator Jinks. There was selling, trapping. It was going on every day or on the regular, as he would say.

[The Defendant] certainly gave the indication that being at [the Louise Avenue house], selling cocaine was just something that happened on a very regular basis on an everyday basis and that was consistent with what Lola Garrett said from her statement which has also been entered into evidence. So we know that these individuals, this would be part of the State's case, are using [the Louise Avenue house] to make money by selling crack cocaine.

So what do you have? A local sub-set of a nationally organized criminal enterprise regularly selling cocaine out of a residence sometimes in broad daylight in the middle of the city. And how does that enterprise continue without detection?

I think the proof in this case indicates two factors; number one factor being organization, and the number two factor being violence. What do we know about the organization of the operation that was taking place at [the Louise Avenue house]? This was a highly organized set of affairs. You have ranks . . . we heard about lieutenants, we've heard of OYGs, we've heard of soldiers, and there are protocols.

There are rules as [the Defendant] said in his statement referring to the order that was given [about the victim]. Orders – there are rules, orders are given. Orders must be followed. And no one can ignore these orders or leave the organization.

Now, why is that? Because any such person who did that would demonstrate weakness in the organization. They would be a kink in the armor, so to speak, and it would be a liability to the ongoing security and success of the criminal enterprise that was taking place.

And that – the proof would show here leads us directly to [the victim] and the second factor that I mentioned earlier and that being violence. Violence or at least the threat of violence is the fuel for this enterprise.

This record reflects that there were regularly a large number of gang members at this home. Their presence alone in the numbers that they were there guarding this operation would provide a measure of protection to the operation that was taking place there.

Proof indicated that [the Louise Avenue house] operated, it sounded somewhat like an armory. The number of guns that were in and out of that house, the trading of guns that would take place, how there's proof that people would trade guns and take those out to use them for certain acts and that was the proof as to the guns that were used against [the victim] based upon [the Defendant's] statement.

And two of those guns we know from . . . Investigator Thurman, the guns that were allegedly found on [the Defendant] and Mr. Clark the day after the homicide out at the house on Dry Gap have been forensically linked to the murder of [the victim] the night before.

It's important to note that those weapons according to [the Defendant's] statement, were brought from [the Louise Avenue house] to the homicide scene and then returned to [the Louise Avenue house] following the murder. That was part of [the Defendant's] statement.

So the State would seek to show that [the victim] according to this record failed to follow an order to travel to California to take care of some business for the uppers, the headquarters for lack of a better term. His failure to follow that order from the organization simply could not be left unattended as it served as a threat to the organizational structure of the enterprise and therefore the cocaine enterprise at [the Louise Avenue house] itself.

The State it seems will allege at trial that these weapons and personnel were dispatched from the [Louise Avenue house] by Mr. Griffin, it seems from the State's proof, to deal with this threat and that that resulted in the death of [the victim].

For these reasons the Court does find that the death of [the victim] was part of a common scheme or plan and that his homicide furthered the larger continuing plan or conspiracy to continue the drug trade that was taking place at [the Louise Avenue house] without detection or disruption.

Brings me to the second factor. Is the evidence of one of the offenses relevant to some material issue in the trial of the other offenses. And as I go along I'm going to incorporate many of the findings that I make in the first factor into this one because I think they are relevant and they do apply.

But in addition to the facts that I've already mentioned above, the preservation of the gang and the preservation of the conspiracy, the State is alleging part of the motive for this homicide. The gang, the strength of the gang, that was the life blood of the drug conspiracy. Simply put [the victim's] failure to follow an order of the gang weakened the gang and therefore imperiled the conspiracy.

[The Defendant] stated and I said earlier, there are rules in the gang. You have these two guns found the day after the homicide that were forensically linked to the homicide originating from the [Louise Avenue house].

[The Defendant] and Mr. Clark along with a large amount of cocaine which Mr. Clark said in his statement he had been "selling with everybody," . . . presumably from the trap house on Louise when it's placed in context with the other evidence. This cocaine and the guns that were on the scene there, of course, are the basis for the charges in Count[s] 7 and 8.

Simply put, the homicide charge here is inextricably linked to both the discrete drug and gun charges as well as the conspiracy of the drug and gun charges and the evidence of each of these will be relevant in the trial of the other.

So then that brings the Court to the final portion of this analysis and that is the 404(b) portion that we've referred to. Is the probative value of this evidence of the other offenses outweighed by the prejudicial effect that the admission of the evidence would have on the defendants. And we're speaking specifically of Mr. Griffin and [the Defendant] here, of course.

And as an initial matter the Court must find that the probative value of the drug offenses as it relates to the homicide offense is very high in this particular instance. The money that was being made and the regularity with

which that money was being made creates a very high incentive for anyone who is engaged in that type of conduct to continue with that type of conduct.

And I think if the proof comes in at trial as it's been set forth here by the State, the State will argue that the drug trade and the conspiracy itself – not just the discrete act the day after, which would certainly be relevant and probative because that's where the guns were – but the entire conspiracy itself, the preservation of that is highly probative in this instance as a motive for the murder of [the victim].

I do not find that the probative value will be outweighed by the prejudicial effect. The evidence of the drugs simply has to come in the evidence of the homicide. There is just no way around that and then vis-a-vie of course the evidence of the homicide is relevant and probative in the trial for the drugs because it shows the lengths that these men would go to preserve the integrity of the gang and to preserve the integrity of what was happening there at Louise.

I don't think that any juror hearing proof of a drug conspiracy would be overly shocked or view the defendants with prejudice to know that they have engaged in a homicide or vice versa that someone engaged in a homicide of this particular nature would be shocked and would hold that to the prejudice of the defendants that they were also engaged in a drug conspiracy.

So for all of these reasons, the motions to sever the offenses as to all defendants are respectfully denied.

Tennessee law is clear that an appellate court reviews a trial court's decision to deny severance of permissibly joined offenses under an abuse of discretion standard. *State v. Eady*, 685 S.W.3d 689, 709 (Tenn. 2024) (citing *Denton*, 149 S.W.3d at 12; *Spicer*, 12 S.W.3d at 442; *Shirley*, 6 S.W.3d at 247. "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Id.* (citing *Harmon*, 594 S.W.3d at 305 (quoting *Lee Med., Inc*., 312 S.W.3d at 524); *see also Garrett*, 331 S.W.3d at 401). The decision to sever permissibly joined offenses pursuant to Rule 14(b)(1) requires a fact-intensive inquiry and "will necessarily turn on the facts of a particular case." *Id.* (citing *Shirley*, 6 S.W.3d at 247).

As set forth above, Rule 14(b)(1) permits consolidation of offenses only upon the satisfaction of two prerequisites: one, "the offenses are part of a common scheme or plan" and, two, "the evidence of one would be admissible in the trial of the others." Tenn. R.

Crim. P. 14(b)(1). Thus, before a trial court orders consolidation pursuant to this rule, the trial court must conclude from the evidence presented at the hearing that:

> (1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of one of the offenses is relevant to some material issue in the trial of the other offenses; and (3) the probative value of the evidence of the other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant.

Dotson, 254 S.W.3d at 387 (citing *Spicer*, 12 S.W.3d at 445; Tenn. R. Evid. 404(b)(3)) (footnote omitted); *See also Eady*, 685 S.W.3d at 709 (Tenn. 2024).

As to the first prong requiring that the offenses be part of a common scheme or plan, "a common scheme or plan for severance purposes is the same as a common scheme or plan for evidentiary purposes." *Moore*, 6 S.W.3d at 240 n.7. As our supreme court has recognized, there are three types of common schemes or plans: "(1) offenses that reveal a distinctive design or are so similar as to constitute 'signature' crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction." *Shirley*, 6 S.W.3d at 248.

As to offenses alleged to be part of a larger plan, our supreme court has explained that "[a] larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal." *Denton*, 149 S.W.3d at 15. That is, "[t]he larger, continuing plan category encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose." *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993); *see also* Neil P. Cohen et al., Tennessee Law of Evidence § 4.04[12][c] (5th ed. 2005) ("The unifying concept of crimes admitted under this theory is not their high degree of similarity but the common goal or purpose toward which each crime is directed."). "In such circumstances, the proof sought is of a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial." *State v. Harris*, No. M2004-00049-CCA-R3-CD, 2005 WL 2255488, at *7 (Tenn. Crim. App. Aug.23, 2005) (citations omitted). Thus, this Court previously has recognized that "the larger, continuing plan category has typically been restricted to cases involving crime sprees, where the defendant commits several crimes quite closely in time to one another." *State v. Blye*, No. E2001-01375-CCA-R3-CD, 2002 WL 31487524, at *6 (Tenn. Crim. App. Nov.1, 2002) (citing *State v. Hall*, 976 S.W.2d 121, 146 (Tenn. 1998)), *perm. app. denied* (Tenn. Mar. 10, 2003). When the State fails to demonstrate a "working plan" whereby the subsequent offenses are predictable or probable from the defendant's determination to commit the initial offenses (or vice versa), the subsequent offenses cannot be classified as parts of a larger, continuing plan. *See id.*

We emphasize that the consolidated offenses each must serve or further the overarching goal or plan that existed at the time the first offenses were committed. *See,*

e.g., Hall, 976 S.W.2d at 121 (consolidation of multiple murders, burglaries and thefts committed by escapees of Kentucky prison was proper because "the various crimes and the sequence of their occurrence were part of a greater plan to leave the country and to avoid capture by the Kentucky authorities"); *State v. Shelton*, No. E2005-02014-CCA-R3-CD, 2006 WL 3246100, at *4 (Tenn. Crim. App. Nov.9, 2006) (consolidation of aggravated kidnapping and vandalism offenses with murder offense proper where defendant detained kidnapping victims in house, including vandalizing vehicles to prevent their leaving, in order to lure murder victim there so he could kill murder victim; defendant announced plans to kill murder victim while detaining kidnapping victims; and defendant continued in his efforts to find and kill the murder victim, succeeding the next morning; establishing "a clear example of a larger, continuing plan"), *perm. app. denied* (Tenn. Mar. 12, 2007); *State v. Ramsey*, No. M2001-02735-CCA-R3-CD, 2003 WL 21658589, at *9 (Tenn. Crim. App. July 15, 2003) (consolidation of aggravated robbery and theft offenses proper, even though four months separated the offenses, where "there was substantial evidence that both the theft and vandalism of the vehicle and the aggravated robbery of [the victim] were committed for the same purpose of retaliating against [the victim's husband]"), *perm. app. denied* (Tenn. Dec. 22, 2003).

Just as with the phrase "common scheme or plan," the language of Rule 14(b)(1) does not speak specifically to what constitutes a larger, continuing plan or conspiracy. *Eady*, 685 S.W.3d at 711. Our Supreme Court has acknowledged that the concept of a later, continuing plan is not always straightforward. *Id.* The *Eady* Court instructed:

> The appeal of evidence that separate crimes were parts of a common plan lies in how it can establish a logical connection between instances of criminal conduct so as to support an inference that because a defendant engaged in certain conduct, he was likely engaged in other conduct.

Id. (citing Leonard*, section* 9.1, at 555 for the proposition that ("A person who has devised a plan is more likely to act consistently with that plan than is a person who does not have such a plan."). Further, "the defendant's behavior is the product of a commitment to a course of conduct of which each offense is only a part. The evidence of multiple offenses is permissible when it shows the larger goal rather than merely the defendant's propensity to commit crimes. *Id.* at 711-12 (citations omitted). Courts must typically infer the existence of a plan from the evidence as a whole. *Id.* at 712. It is not necessarily the similarity between offenses that establishes a larger, continuing plan, "but [rather] the common goal or purpose at which they are directed." *Denton*, 149 S.W.3d at 15 (quoting *State v. Hoyt,* 928 S.W.2d 935, 843 (Tenn. Crim. App. 1995), *overruled on other grounds by Spicer*, 12 S.W.3d at 447. Courts should look to whether there is "evidence that the defendant had a working plan operating towards the future such as to make probable the crime with which the defendant is charged." *Eady*, at 713.

Our court and the Tennessee Supreme Court have held that obtaining money to obtain drugs is not sufficient to establish a common scheme or plan. *Eady*, 685 S.W.3d at 713; *State v. Adams*, 859 S.W.3d 359 (Tenn. Crim. App. 1992). The Tennessee Supreme Court has also held that "sexual release" or gratification of a defendant does not constitute a common scheme or plan. *Denton*, 149 S.W.3d at 15.

In contrast, in *State v. Massey*, this court addressed multiple counts permissively joined by the trial court, including allegations of murder, conspiracy to sell drugs, and the sale of drugs. In *Massey*, the State's theory was that the defendant was involved with several other people in an ongoing business of dealing cocaine. We held that:

> Count Two alleged that the Defendant and Gardner "acting in concert and each being a party to the offense with each other, on or about November 18, 2005, . . . did unlawfully, feloniously, and knowingly [possess]20 with intent to sell or deliver twenty-six (26) grams or more of a substance containing Cocaine." (Footnote added). The State established at the hearing that the cocaine forming the basis of this charge was that taken from [the murder victim] Nolan in conjunction with Nolan's homicide and robbery. Thus, there was a sufficient nexus between Count Two and the offenses alleged in the Second Presentment to support the trial court's finding that this offense was part of a larger plan that included the offenses against Nolan.

Massey, 2014 WL 3661490, at *33.

We note that the federal government by statute provides for the prosecution of crimes committed by criminal enterprises, resulting in the ability to prosecute members of these criminal enterprises together and for a variety of offenses. Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. § 1962, Violent Crimes in Aid of Racketeering ("VICAR") statute, 18 U.S.C. § 1959. Judicial economy favors prosecuting members of these criminal enterprises for their offenses in furtherance of the criminal enterprises together. These federal statues have been used to federally prosecute members of the Blood organization, as well as other similar criminal enterprises. *See e.g., Williamson v. United States,* No. 3:16-CV-00075, 2021 WL 1516226, at *2 (M.D. Tenn. Apr. 16, 2021), *aff'd sub nom*. *Hall v. United States,* No. 21-5062, 2023 WL 1991891 (6th Cir. Feb. 14, 2023); *United States v. Davis,* No. 4:18-CR-00011, 2019 WL 3307235, at *3 (W.D. Va. July 23, 2019)

In application to this case, we conclude that the trial court did not abuse its discretion when it determined that the murder and drug allegations against the Defendant were part of a common scheme or plan because they were offenses that were part of a larger, continuing plan or conspiracy. A local sect of the Blood gang, the Tree Top Pirus, used the Louise Avenue house to conduct the processing and sale of cocaine, obtaining money then used by the gang and its members to further its enterprise. The gang also kept weapons

in the house. There was testimony about the gang, including rank ("big homie" and "little homie"), the need for loyalty, the importance of carrying out assigned tasks ("put in work"), all of which were designed to promote the health and welfare of the criminal enterprise. The criminal enterprise relied upon each gang member to execute assigned tasks, including shootings, and participating in transporting, cooking, and selling drugs. The relevant gang members were not gainfully employed and appeared to be funded solely by the sale of drugs.

The Defendant specifically explained the circumstances leading to the victim's death by saying that he and other gang members, including the victim, were spending time at the Louise Avenue house. The victim, the number three ranking gang member, had been asked to go to California to carry out a shooting for another sect of the Blood gang located in California. There was testimony that this was a way for the different sects of the gang to avoid criminal detection. The victim, a new father, did not want to execute the task assigned to him. Mr. Griffin and Mr. Cody, the highest-ranking gang members, said that the victim had to "go" for his non-compliance. They ordered the Defendant and Mr. Clark to "smash [the victim] off the hood." Mr. Clark told Investigator Thurman that Mr. Griffin told the Defendant and him that they needed "to go smoke him," referring to the victim. They both opined that the victim was killed because he did not want to go to California as tasked by the gang.

The trial court did not err when it determined that the conspiracy to sell narcotics, possession of narcotics, and murder of a member not complying with gang rules, was part of a larger, continuing plan among gang members to protect the health and well-being of the Tree Top Piru gang. Each of these offenses was done in furtherance of the criminal enterprise. This goal was intrinsic to at least one of the offenses and each crime was an integral part of an over-arching plan. *See Eady*, at 714 (citations omitted). Further, the evidence of each of these offenses would be admissible at the trial for the others. The murder was ordered while the Defendant was "trapping" (or selling drugs) at the Louise Avenue house. The Defendant was arrested the day after the murder and found in possession of a large quantity of cocaine. These offenses occurred not only close in time but in a manner so that they are inextricably interwoven.

Further, even if we found error, we would deem any error harmless. On appeal, the denial of the severance will not be reversed unless it appears that the defendant was clearly prejudiced. *State v. Coleman*, 619 S.W.2d 112 (Tenn. 1981). A trial court's decision to grant or deny a severance motion under Tennessee Rule of Criminal Procedure 14(b)(1) primarily involves an evidentiary question. The effect of an error in denying a severance motion is determined based upon the same standard as other non-constitutional evidentiary errors in that "'the defendant must show that the error probably affected the judgment before reversal is appropriate.'" *Denton*, 149 S.W.3d at 15 (quoting *Moore*, 6 S.W.3d at 242). The line between harmless error and prejudicial error is directly proportional to the degree by which the evidence exceeds the standard required for conviction. *Garrett*, 331

S.W.3d at 405 (citing *Spicer*, 12 S.W.3d at 447). "'The more the proof exceeds that which is necessary to support a finding of guilt beyond a reasonable doubt, the less likely it becomes that an error affirmatively affected the outcome on its merits.'" *Dotson*, 254 S.W.3d at 388 (quoting *Toliver*, 117 S.W.3d at 231). However, this court must focus not only on the weight of the evidence, but on "'the actual basis of the jury's verdict.'" *Garrett*, 331 S.W.3d at 405 (quoting *State v. Rodriguez,* 254 S.W.3d 361, 372 (Tenn. 2008)). Thus, "[t]he key question is whether the error likely had an injurious effect on the jury's decision-making process. If the answer is yes, the error cannot be harmless." *Dotson*, 254 S.W.3d at 389.

In this case, the proof against the Defendant was overwhelming, as will be detailed below when we review the sufficiency of the evidence. Further, the trial court in this case minimized the risk of prejudice by instructing the jury as follows:

> The crime charged in each count is a separate and distinct offense. You must decide each charged offense for each defendant separately on the evidence and the law applicable to the charged offense and to each defendant. A defendant may be found guilty or not guilty of any or all of the offenses charged and included within each count, however, you can find a defendant guilty of only one offense in each count.

See State v. Maliani, No. M2012-01927-CCA-R3-CD, 2013 WL 3982156, at *12-13 (Tenn. Crim. App. Aug. 5, 2013). The jury is presumed to follow its instructions. *State v. Shaw*, 37 S.W.3d 900, 904 (Tenn. 2001). The Defendant is not entitled to relief on this issue.

C. Gang-Enhancement Presentment

The Defendant contends that the indictment in this case included the State's intent to seek enhanced punishment under the gang enhancement statute. He asserts, however, that this notice was not sufficient because it did not allege that there was any nexus between the gang and the underlying offenses. He asserts that the grand jury did not find that a nexus existed, at least as far as the indictment indicated. The State counters that the presentment cited to the gang enhancement statute, which satisfies the constitutional and statutory mandates for a presentment.

An accused is constitutionally guaranteed the right to be informed of the nature and cause of the accusation. U.S. Const. amend. VI, XIV; Tenn. Const. art. I, § 9; *Wyatt v. State*, 24 S.W.3d 319, 324 (Tenn. 2000). Our courts have interpreted this constitutional mandate to require an indictment or presentment to "1) provide notice to the accused of the offense charged; 2) provide the court with an adequate ground upon which a proper judgment may be entered; and 3) provide the defendant with protection against double jeopardy." *Wyatt*, 24 S.W.3d at 324 (citations omitted). Further, an indictment or

presentment is statutorily required to "state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." T.C.A. § 40-13-202. The question of the validity of an indictment or presentment is one of law and, as such, our review is de novo. *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997).

The criminal gang enhancement statute applies if the defendant is a criminal gang member who commits a criminal gang offense that is at the direction of, in association with, or for the benefit of the defendant's criminal gang or a member of the defendant's criminal gang. *See* T.C.A. § 40-35-121. According to section (b) of that statute:

> (b) A criminal gang offense committed by a defendant shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed if:
>
> (1) The defendant was a criminal gang member at the time of the offense; and
> (2) The criminal gang offense was committed at the direction of, in association with, or for the benefit of the defendant's criminal gang or a member of the defendant's criminal gang.

T.C.A. § 40-35-121 (b)(1)-(2). A motion alleging a defect in the indictment must be made prior to trial, "but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense." Tenn. R. Crim. P. 12(b)(2)(B). An objection which is required to be raised pretrial is waived if it is not timely made. Tenn. R. Crim. P. 12(f)(1).

The Sixth and Fourteenth Amendments to the United States Constitution require the accused "to be informed of the nature and cause of the accusation." *See also* Tenn. Const. art. I, § 9. Further, an indictment "will be deemed valid if it provides sufficient information '(1) to enable the accused to know the accusation to which [an] answer is required, (2) to furnish the court [with an] adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy.'" *State v. Duncan*, 505 S.W.3d 480, 484-85 (Tenn. 2016) (quoting *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997)). Additionally, "indictments which achieve the overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements." *State v. Hammonds*, 30 S.W.3d 294 (Tenn. 2000).

In *State v. Cody*, No. E2022-00947-CCA-R3-CD, 2023 WL 9006670, at *11-12 (Tenn. Crim. App. Dec. 28, 2023), *no Tenn. R. App. P. 11 application filed*, we addressed this same argument presented by Mr. Cody, who was one of the men who ordered the victim's murder. We stated:

> [Mr. Cody] argues that count ten fails to allege whether the gang offense was committed (1) at the direction of the criminal gang; (2) in association with the criminal gang; or (3) for the benefit of the criminal gang. He states that "[w]ithout this factual allegation, we cannot know which nexus was found by the Grand Jury, and we cannot be certain that [Defendant] was convicted of what was found by the Grand Jury when it returned the [p]resentment in this case." However, the State was not required in the presentment to "allege the specific theory" by which it intended to prove the nexus between [the defendant's] gang membership and his criminal offense. *See Hammonds*, 30 S.W.3d at 301. As pointed out by the State, count ten of the presentment was sufficient by its reference to the statute defining the offense. *Duncan*, 505 S.W.3d at 488.
>
> Additionally, the purpose of the gang enhancement statute is to put [a defendant] on notice that the State is seeking to enhance his sentence based on membership in the listed gang. *See id*. § 40-35-121(g). To enhance a defendant's sentence, the State must prove at trial that "the defendant's alleged gang meets the statutory definition of a 'criminal gang,' which requires a showing that the defendant's organization "'engaged in a pattern of criminal gang activity.'" *Id.* § 40-35-121(a)(1), (g)–(h). Accordingly, the notice provision requires the State to specify the gang members and convictions it will use to show a pattern of criminal gang activity. The State did that in this case, and therefore met the statutory requirements of section 40-35-121. *State v. Shackleford*, 673 S.W.3d 243, 253 (Tenn. 2023). Defendant is not entitled to relief on this issue.

In the case under submission, the State, in the presentment, cited to the gang enhancement statue it intended to use against the Defendant, Tennessee Code Annotated section 40-35-121(b)(2). As stated in *Cody*, it did not need to specify its theory of prosecution under this statute. Even if the State had improperly omitted an element in the presentment, however, we noted that "the failure to specifically allege an element of the offense is not fatal if the elements are necessarily implied from the allegations made." *State v. Hancock*, 678 S.W.3d at 235-36 (citation and internal quotation marks omitted). In that case, we observed that the indictment cited the applicable statute, quoted a portion of the statute that only applied to the offense created by subsection (a)(2), and identified that the Defendant was charged with a Class E felony offense. *Id.* at 236. From these circumstances, the Court concluded that the "Defendant was surely provided with sufficient notice to surmise which section of the statute she was accused of violating." *Id.* Accordingly, the Defendant is not entitled to relief on this issue.

With respect to the Defendant's argument alleging deficiencies with the grand jury's findings, we are not permitted to review the grand jury's deliberation processes, whether

to evaluate its findings or to determine what evidence it may have considered. *See State v. Carruthers*, 35 S.W.3d 516, 532-33 (Tenn. 2000) ("Where an indictment is valid on its face, it is sufficient to require a trial of the charge on the merits to determine the guilt or innocence of the accused, regardless of the sufficiency or legality of the evidence considered by the grand jury."); *State v. Welch*, 586 S.W.3d 399, 403-04 (Tenn. Crim. App. 2019) ("[T]he courts of this state follow the ancient rule that the court will not review the judgment of the grand jury for the purpose of determining whether or not the finding was on sufficient evidence." (citation and internal quotation marks omitted)). Indeed, "[t]he grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Kaley v. United States*, 571 U.S. 320, 328 (2014). Because it is well-established that "the sufficiency and legality of the evidence considered by a grand jury is not subject to judicial review," *State v. Dixon*, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992), we affirm the trial court's denial of the Defendant's motion to dismiss the indictment. The Defendant is not entitled to relief on this issue.

D. Application of Criminal Gang Statute to Conspiracy and Firearm Conviction

The Defendant contends that the trial court erred when it applied the gang enhancement to his drug possession and conspiracy convictions because the proof of gang involvement was integral to the facts of his conviction. As these were facts forming the basis of his conviction, he posits that they should not be used to enhance his sentence. The State counters that the criminal gang enhancement statute is not an enhancement factor but a statutorily created punishment for those offenses committed by gang members. It further states that there was significant proof beyond gang membership that supported the conspiracy conviction.

In a bifurcated proceeding at trial, the State then presented evidence that the gang enhancement sentencing statute applied in Count 10 to the conspiracy to possess with intent to sell or deliver a controlled substance offense, in Count 11 to the possession with intent to sell or deliver cocaine, and in Count 12 to the facilitation of first degree murder.

The State presented the testimony of KPD Investigator Mark Taylor, who was in the Organized Crime Unit of that department. After describing his experience, the trial court admitted him as an expert in the field of gang investigations and identifications. He said that his determination of whether someone was a gang member was based upon the person's own statements, who they associated with, and whether they commit criminal acts. He also said that gang members often bore brands and tattoos consistent with their gang membership.

Investigator Taylor identified eight men whom he had determined were members of the Tree Top Piru gang based upon the aforementioned factors, including Mr. Griffin. He based Mr. Griffin's status as a gang member on his branding and tattooing, documented

associates, correspondence, and felony criminal history. The State introduced evidence of six certified judgments of conviction for six different individuals who were all identified as Tree Top Piru gang members. The convictions were for first-degree murder, second-degree murder, aggravated assault, attempted aggravated arson, and possession with intent to sell a controlled substance.

The investigator reviewed documentation regarding the Defendant, including his Knox County gang file. The Defendant associated with known Tree Top Piru gang members and had been arrested on previous occasions with other known Tree Top Piru gang members. He had a felony criminal history for conduct consistent with gang activity. The Defendant had "extensive" branding and tattooing associated with the Tree Top Piru gang and had "significant" tattooing claiming and advertising his Tree Top Piru gang membership.

The Investigator said that, further, the Defendant had admitted his gang affiliation during his interview with Investigator Thurman. He told Investigator Thurman that he was both a member and engaged in narcotics trafficking. He also knew the other members of the gang, including being able to name the main or higher-ranking members.

Investigator Taylor also reviewed a video of the Defendant in an area of Knoxville known to be an area of a rival gang. In the video, he refers to the "Rollin' 60 Crips". He had a weapon and was openly disrespecting the rival gang. He challenged the other gang to "pull up and get dumped," which Investigator Taylor interpreted to mean get killed.

The State then asked the investigator if the Defendant's gang membership had a nexus to the offenses for which the jury had convicted him, namely conspiracy, the possession of a weapon during a dangerous felony, and the solicitation of first degree murder. The investigator opined that there was a "strong nexus" with the gang offense because weapons are the tools that are used to maintain turf, protect illegal drug trafficking, and robberies, which were a source of income for the gang. Guns, he said, were also used to protect the gang from rival gang members or to retaliate against rival gang members. Investigator Taylor further opined that gang members were expected to put in "work," which included in some instances murder. The gang, he said "comes before your family, your girlfriend, and before anything." The Tree Top Piru gang, specifically, believed that if you do not "put in your work, then you will become your work." Finally, Investigator Taylor said that drugs were a primary source of income for the gang, so the drug-related charges were associated with the Defendant's gang activity.

Based upon this evidence, the jury found that the Defendant was a criminal gang member and that the offenses were committed at the direction of, in the association with, or for the benefit of the Defendant's criminal gang or a member of the Defendant's criminal gang.

The criminal gang enhancement statute applies if the defendant is a criminal gang member who commits a criminal gang offense that is at the direction of, in association with, or for the benefit of the defendant's criminal gang or a member of the defendant's criminal gang. *See* T.C.A. § 40-35-121. One convicted by a jury pursuant to this statute "shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed if: (1) The defendant was a criminal gang member at the time of the offense; and (2) The criminal gang offense was committed at the direction of, in association with, or for the benefit of the defendant's criminal gang or a member of the defendant's criminal gang." T.C.A. § 40-35-121 (b)(1)-(2).

This Court has previously stated in the context of the Confrontation Clause issue:

> Despite simply being dubbed by the General Assembly as "enhanced punishment," the factual requirements of Section 40-35-121 are elements of the underlying criminal gang offenses because the statute increases the prescribed range of penalties applicable to a defendant by automatically increasing the underlying offense's sentencing classification by at least one range, raising both the maximum and minimum ends of the range. *See People v. Sengpadychith*, 26 Cal.4th 316, 26 Cal.4th 1154A, 109 Cal.Rptr.2d 851, 27 P.3d 739 (Cal. 2001) (holding that *Apprendi* applies to certain felonies subject to gang enhancement). We think it necessarily follows that the protections of the Confrontation Clause of the Sixth Amendment also apply to the presentation of any proof within the constitutional scope of a jury trial. Accordingly, the "gang enhancement" portion of the proceeding in this case was an extension of the actual guilt phase of the trial on the underlying criminal offenses; it was not a merely a sentencing hearing.

State v. Bonds, 502 S.W.3d 118, 150-51 (Tenn. Crim. App. 2016).

We have also previously held that the gang enhancement proceeding does not violate provisions of double jeopardy because it is prosecution for a separate offense:

> [T]he jury's finding in the bifurcated gang enhancement proceeding that Defendant was a criminal gang member does not violate double jeopardy. Jeopardy attached before the jury was sworn in before the guilt phase of the trial, and the bifurcated proceeding was not a "second prosecution for the same offense." *See Thompson*, 285 S.W.3d at 847; *State v. Harbison*, 539 S.W.3d 149, 167 (Tenn. 2018). It "was an extension of the actual guilt phase of the trial on the underlying criminal offenses." *State v. Bonds*, 502 S.W.3d 118, 151 (Tenn. Crim. App. 2016); *see also Nash*, 294 S.W.3d at 551 ("It is settled that two-stage proceedings, such as those provided for in capital cases and DUI cases, do not pose a double jeopardy problem."). Defendant was

not "twice" put in jeopardy for the same offense concerning the gang enhancement in count ten. U.S. Const. V, XIV; Tenn. Const. art. I, § 10.

State v. Cody, No. E2022-00947-CCA-R3-CD, 2023 WL 9006670, at *19 (Tenn. Crim. App. Dec. 28, 2023), *no Tenn. R. App. P. 11 application filed*.

In this case, because the criminal gang statute is more than a sentencing enhancement factor, the defendant was entitled to constitutional protections pertaining to the criminal gang statute during his trial. As they are separate offenses, with separate elements, the proof supporting the gang enhancement statute is not integral to the facts of the Defendant's other convictions. The Defendant's gang membership, and the membership being a nexus to the underlying offenses, was not inherent in or integral to the underlying offenses, and the State was required to prove it separately in a bifurcated proceeding which was the procedure here. The Defendant is not entitled to relief on this issue.

E. Juvenile Acts Considered in Sentencing

The Defendant next contends that at sentencing the trial court improperly considered acts he committed while a juvenile. He asserts that the owner of the Louise Avenue house testified that the Defendant had not been involved in a drug sale between June 2017 and December 2017. Because he did not turn 18 until December 28, 2017, the trial court wrongfully allowed the jury to consider any juvenile offenses that occurred before December 28, 2017, to support its finding that the criminal gang enhancement statute applied. The State counters that, while there were some references to actions that occurred before the Defendant turned 18, the trial court instructed the jury that it could not consider those actions. The State further asserts that the trial court used special verdict forms to ensure the jury was not basing its guilty determination on the Defendant's juvenile actions.

The Defendant correctly notes that Tennessee's juvenile courts have jurisdiction over criminal acts committed by a minor unless the juvenile court transfers the minor to criminal court. T.C.A. § 37-1-103. In this case, the trial court instructed the jury that the Defendant "could not be held criminally liable for conduct occurring before" he turned eighteen and that the jury could not rely upon events that occurred before the Defendant turned eighteen to find him guilty. The trial court also gave the jury a verdict form that required that the jury find that the events upon which it was basing the Defendant's conviction occurred after his eighteenth birthday. As we previously stated, the jury is presumed to follow the trial court's instructions. *State v. Shaw*, 37 S.W.3d 900, 904 (Tenn. 2001). Further, the trial court ensured that the jury followed the instructions by requiring a specific verdict form addressing whether the events for which the Defendant was being convicted occurred after his eighteenth birthday. The Defendant is not entitled to relief on this issue.

F. Sufficiency of Evidence

In his final issue, the Defendant contends that the evidence presented is insufficient to sustain his conviction for conspiracy to possess with intent to sell a controlled substance. He asserts that, while there was proof that he sold drugs from the Louise Avenue house, there was no proof that he did so as part of an agreement with any other person. The State counters that the proof supported the jury's verdict. We agree with the State.

When an accused challenges the sufficiency of the evidence, this court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). "The standard of review [for sufficiency of the evidence] 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (quoting *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary

> instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This court must afford the State the "'strongest legitimate view of the evidence'" contained in the record, as well as "'all reasonable and legitimate inferences'" that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

In the case under submission, the Defendant contends that the evidence is insufficient to sustain his conviction for conspiracy to possess with intent to sell a controlled substance. The Defendant was charged and convicted of conspiracy to sell cocaine. T.C.A. § 39-17-417(a)(3), (4) (stating it is an offense for a person to knowingly sell or possess a controlled substance); T.C.A. § 39-17-408(b)(4) (defining cocaine as a controlled substance); T.C.A. §39-12-103(a) (defining conspiracy).

> Conspiracy requires:
>
> (a) The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense.
>
> (b) If a person guilty of conspiracy, as defined in subsection (a), knows that another with whom the person conspires to commit an offense has conspired with one (1) or more other people to commit the same offense, the person is guilty of conspiring with the other person or persons, whether or not their identity is known, to commit the offense.
>
> (c) If a person conspires to commit a number of offenses, the person is guilty of only one (1) conspiracy, so long as the multiple offenses are the object of the same agreement or continuous conspiratorial relationship.
>
> (d) No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of the conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.

T.C.A. § 39-12-103(a)-(d). To prove the existence of a conspiratorial relationship, the State may rely upon a "mutual implied understanding" existing between or among the parties. *State v. Shropshire*, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993). The conspiracy need not be proven by production of an official or formal agreement, in writing or otherwise. *Id*. The conspiracy may be demonstrated by circumstantial evidence and the deportment of the participants while undertaking illegal activity. *Id*. Conspiracy connotes harmonization of design, not coequal participation in the minutia of every criminal offense. *Id*.

Evidence viewed in the light most favorable to the State proved that the Defendant was a member of the Tree Top Piru gang, a sect of the Blood gang. The gang and its members relied upon a hierarchical structure of governance, had defined roles and rules, and obtained funding through illegal activity, including the sale of cocaine. The gang used the Louise Avenue house for the sale of cocaine, as well as the storage of weapons, and, specifically, the Defendant sold cocaine from the Louise Avenue house. This house was located in an area affiliated with the territorial gang. One of the high-ranking members of the gang was the best, but not the only, "cook." This meant that he was talented at turning powder cocaine into crack cocaine for resale. Law enforcement officers found evidence of this process occurring at the Louise Avenue house. The Defendant, who admitted to selling crack cocaine, was found in possession of more than twenty-six grams of cocaine at the time of his arrest. He was with three other known members of the Tree Top Piru gang. We conclude that this evidence supported the jury's conclusion that the Defendant was guilty of conspiracy to sell cocaine. He is not entitled to relief on his issue.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE