IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2023 Session

STATE OF TENNESSEE v. KRISTOPHER JOHNSON

Appeal from the Criminal Court for Knox County
No. 114786 Steven W. Sword, Judge

No. E2022-00302-CCA-R3-CD

The Defendant, Kristopher Johnson, was convicted by a Knox County Criminal Court jury of two counts of facilitation of first degree felony murder, a Class A felony; two counts of criminally negligent homicide, a Class E felony; two counts of aggravated robbery, a Class B felony; tampering with evidence, a Class C felony; aggravated burglary, a Class C felony; and aggravated assault, a Class C felony. *See* T.C.A. §§ 39-11-403 (2018) (facilitation), 39-13-202(a)(2) (2018) (subsequently amended) (first degree felony murder), 39-13-212(a) (2018) (criminally negligent homicide), 39-13-402 (2018) (aggravated robbery), 39-16-503 (2018) (tampering with evidence), 39-14-403 (2018) (repealed and replaced by § 39-13-1003) (aggravated burglary), 39-13-102 (Supp. 2017) (subsequently amended) (aggravated assault). The court merged the criminally negligent homicide convictions with the facilitation of first degree felony murder convictions. The court sentenced the Defendant, a Range II offender, to thirty years for each of the counts of the facilitation of first degree felony murder, eighteen years at 85% for each of the counts of aggravated robbery, ten years for tampering with evidence, ten years for aggravated burglary, and ten years for aggravated assault. The court imposed partially consecutive sentencing, with an effective sentence of seventy years. On appeal, the Defendant contends that: (1) the evidence is insufficient to support his convictions for the homicide and robbery offenses, (2) the court erred in allowing the State to introduce evidence of the Defendant's street gang affiliation, (3) he was denied his fundamental right to cross-examine two witnesses, (4) the court erred in ruling that a witness's statement was hearsay, (5) the court erred in determining that no violation of Tennessee Rule of Evidence 615 regarding sequestration of witnesses occurred, (6) cumulative trial errors require reversal, and (7) the court erred in its application of a sentencing enhancement factor. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and KYLE A. HIXSON, J., joined.

Robert L. Jolley, Jr. (on appeal), and Forrest Wallace (at trial), Knoxville, Tennessee, for the appellant, Kristopher Johnson.

Herbert Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Charme P. Allen, District Attorney General; Nathaniel R. Ogle, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant's convictions relate to a June 22, 2017 incident in which Rico Cook shot Sergio Rivera, Jaolen Morris, and Damon Albert during a purported marijuana transaction which was, in fact, a robbery. Mr. Rivera and Mr. Morris, both age eighteen, died from their injuries. Mr. Albert, then age sixteen, was injured. The State's theory at the trial was that Mr. Cook acted at the Defendant's direction, that Deon Nolbert participated in the robbery, and that the Defendant committed additional offenses after Mr. Cook shot the victims.

The Defendant, Rico Cook, and Deon Nolbert were charged with various offenses related to the incident. Mr. Cook and Mr. Nolbert were juveniles at the time of the incident, although they were eventually transferred to Criminal Court for prosecution. The Defendant was an adult at the time of the offenses. In a separate proceeding, Mr. Cook was convicted of two counts of first degree felony murder and other offenses, and his convictions were affirmed on appeal. *See State v. Rico Cook*, No. E2020-01494-CCA-R3-CD, 2022 WL 353701, at *1 (Tenn. Crim. App. Feb. 7, 2022), *perm. app. denied* (Tenn. June 8, 2022). As part of a plea agreement, Mr. Nolbert agreed to cooperate with the State and testified at Mr. Cook's trial, after which he pleaded guilty to two counts of facilitation of first degree murder and to facilitation of attempted first degree murder, which were lesser-included offenses of some of the originally charged offenses, and the remaining charges were dismissed. As part of the plea agreement, Mr. Nolbert received assurances that the victims' families would not oppose parole and that the State would write a favorable letter to the parole board regarding Mr. Nolbert's cooperation with the prosecutions of Mr. Cook and the Defendant. The Defendant was charged with two counts of first degree felony murder, two counts of first degree premeditated murder, attempted first degree premeditated murder, two counts of especially aggravated robbery, tampering with evidence, aggravated burglary, and aggravated assault.

At the Defendant's trial, the State's evidence showed that Mr. Rivera and Mr. Morris came from Michigan to Knoxville to visit Mr. Albert, who was Mr. Morris's half-

brother. Mr. Rivera and Mr. Morris brought marijuana with them and planned to sell it in Knoxville to finance their trip and activities. Mr. Morris agreed to assist them and sent messages through a social media application to Laurissa Brockwell to inquire if she might want to purchase some of the marijuana. Although Ms. Brockwell did not have the funds to make a purchase, she connected the victims with Mr. Nolbert. After being introduced by Ms. Brockwell, Mr. Albert and Mr. Nolbert exchanged social media messages and spoke by telephone, and Mr. Nolbert agreed to purchase ten grams of marijuana from the larger quantity that Mr. Rivera and Mr. Morris possessed. After negotiation over the location for the transaction, the victims drove into the parking lot of the Montgomery Village neighborhood, where Mr. Cook and Mr. Nolbert approached the car and the Defendant sat on the porch of an apartment facing the parking lot. Mr. Nolbert stood outside the front passenger door and spoke with Mr. Morris, who was seated inside the car with the other victims. Mr. Cook entered the backseat of the car. As Mr. Rivera was about to give the marijuana to Mr. Cook, Mr. Cook fired several shots, striking each of the victims. Mr. Cook took marijuana from Mr. Rivera's hand and got out of the car.

Mr. Nolbert testified that on June 22, 2017, he was a high school student who lived in East Knoxville with his grandmother but that he had been staying with his girlfriend at her family's home in Montgomery Village in South Knoxville. He identified Mr. Cook as his girlfriend's younger brother. Mr. Nolbert said that he knew the Defendant from Montgomery Village and that the Defendant's nickname was "Money." Mr. Nolbert said that he knew the Defendant was in the "60s," which was affiliated with the Crips street gang, based upon a statement the Defendant made in Mr. Nolbert's presence and upon the Defendant's reputation in the community. Mr. Nolbert said Mr. Cook was known to be the Defendant's "do-boy." Mr. Nolbert explained that this term meant, "Send him out, tell him to do something, he'll do something," referring to criminal activity.

Mr. Nolbert said that on June 22, 2017, he received a message through a social media application from Larissa Brockwell, who inquired if he was interested in purchasing marijuana. He said that Mr. Cook was present during his message exchanges with Ms. Brockwell. Mr. Nolbert said that Ms. Brockwell connected him with the person selling marijuana, Mr. Albert, and that Mr. Nolbert and Mr. Albert exchanged messages. Mr. Nolbert said that Mr. Cook spoke by telephone with Mr. Albert about the transaction and that Mr. Cook had counterfeit $100 bills, which Mr. Nolbert and Mr. Cook intended to use to "purchase" one ounce of marijuana from the victims. Mr. Nolbert denied that he and Mr. Cook planned to "rob" the victims.

Mr. Nolbert testified that he had planned to go to the front entrance of Montgomery Village to get the marijuana from the victims but that after he saw a police car, he called

Mr. Albert and instructed him to go to Parking Lot C inside Montgomery Village. Mr. Nolbert said that Mr. Albert stated that the victims would not sell marijuana to him and Mr. Cook unless one of them got into the victims' car.

Mr. Nolbert testified that as he and Mr. Cook approached Lot C, the Defendant came from the opposite direction. Mr. Nolbert said Mr. Cook ran to the Defendant and said, "[H]e got a lick," which Mr. Nolbert explained referred to a robbery. Mr. Nolbert said that as they walked to a porch which faced Lot C, Mr. Cook and the Defendant whispered to each other and that when they reached the porch, Mr. Cook and the Defendant went inside the apartment for about five minutes while Mr. Nolbert and others present remained outside. Mr. Nolbert acknowledged that in previous testimony, he had said Mr. Cook and the Defendant had a private conversation on the sidewalk and that he had not said they went inside the apartment together.

Mr. Nolbert testified that when the victims' car pulled into Lot C, Mr. Cook and the Defendant emerged from the apartment. Mr. Nolbert said he saw the Defendant hand a gun to Mr. Cook, which Mr. Cook put in his pocket. Mr. Nolbert said the Defendant sat on the porch and watched what transpired "like he was watching a movie." Mr. Nolbert said that he and Mr. Cook approached the victim's car, that Mr. Nolbert stood outside the front passenger's side talking to Mr. Morris, that Mr. Cook got into the back driver's side, and that while Mr. Nolbert talked to Mr. Morris, Mr. Cook took out the gun and began firing at the victims while saying "b----" each time he pulled the trigger. Mr. Nolbert professed his surprise at the turn of events and stated that he had no reason to think this was going to happen. Mr. Nolbert denied that he had seen anyone struggling for the marijuana but later acknowledged he had seen Mr. Cook take the marijuana.

Mr. Nolbert testified that he fled the parking lot on foot and that from a nearby field, he saw Mr. Cook give the gun to the Defendant. Mr. Nolbert denied seeing Mr. Cook give anything else to the Defendant. However, he later said he had seen Mr. Cook give a gun and marijuana to the Defendant.

Mr. Nolbert testified that Mr. Cook's girlfriend drove Mr. Nolbert and Mr. Cook to another part of town immediately after the incident and that during the ride, Mr. Nolbert asked Mr. Cook, "What the f--- was that?" Mr. Nolbert said Mr. Cook stated, "I sprayed they a--," and "I'm about to be Crip."

Mr. Nolbert testified that he had talked to the police voluntarily and that, initially, he had been untruthful with them about the incident. He said he had been scared. He said he told Detective Loeffler that Mr. Cook was a "hot boy," which he said was the same thing

as a do-boy. Mr. Nolbert said that he knew Mr. Cook robbed people and that he had been present a couple of times when Mr. Cook committed robberies.

Courtney Walker, a Montgomery Village resident, testified that on June 22, 2017, she knew the Defendant as someone she saw spending time "across the parking lot." She said that she knew him as someone who had dated a person she knew but that he did not "hang out" at her apartment. She said that on June 22, she was cleaning her apartment when she heard gunshots coming from Lot C, which faced the back of her apartment. She said her friend, Amanda Pride, was also in her apartment at the time. Ms. Walker said that she was concerned about her children, who were at a vacation Bible school program nearby, and that she looked outside her back door and then went out her front door to investigate. Ms. Walker said she saw a "white guy" screaming, bleeding, and holding his face. She said she saw the Defendant, Mr. Cook, and Mr. Nolbert, all of whom were "running around the back side over there where the fence was." She later stated that she had testified previously that she did not recall seeing Mr. Nolbert but that she knew he had been there. She also acknowledged that in her previous testimony, she had said she had seen the Defendant running but that she had not seen anyone else running.

Ms. Walker testified that she went inside her apartment and that the Defendant was "right there." She said that he was not welcome in her apartment and that she told him to get out. She said he pointed a gun at her and stated that he was not leaving. Ms. Walker said the Defendant instructed Ms. Pride and her to close the door. Ms. Walker said she did not want trouble in her apartment because she was on probation. She later acknowledged that she was on probation for fraudulent use of a credit card. She said that she asked the Defendant why he did not go to his mother's house because she lived nearby and that the Defendant said he did not want to go there because his niece lived there. Ms. Walker said she told him that her children were in her house, although she acknowledged in her testimony that they had not been home at the time.

Ms. Walker testified that the Defendant took a chair upstairs and that she and Ms. Pride left the apartment. Ms. Walker said she went to the apartment complex's office to report the Defendant's armed intrusion. Ms. Walker stated that she did not have a gun in her attic.

Ms. Walker testified that she was taken to the police station for an interview, that she had seen a news report about the Defendant's having been brought out of her apartment, and that when she returned home, she had smelled marijuana in her apartment, even though she did not smoke it.

Ms. Walker testified that the Defendant arrived at her apartment shortly after she returned home from the police station. She said he had worn Ms. Pride's pants when he returned and that he asked Ms. Pride and her what they had said to the police. Ms. Walker said the Defendant "flew up the stairs" and came back downstairs with a rolled up pair of pants and marijuana. She acknowledged that in prior testimony, she had said she had not seen the Defendant with marijuana when he came downstairs.

Amanda Pride testified that she knew the Defendant, whom she knew as "Money," from her friend, Ms. Walker's, neighborhood. Ms. Walker said she also knew Mr. Cook as someone who "[ran] around with the rest of the kids" in the neighborhood. She described Mr. Cook as someone who "was a decent person until he got around other people." Ms. Walker said that Mr. Cook "acted like he looked up to" the Defendant and that Mr. Cook and the Defendant "were just really close." She said the Defendant and Mr. Cook occasionally would "stop through" Ms. Walker's apartment, where Ms. Pride was living on June 22, 2017. Ms. Pride said that she knew the Defendant was in the Crips gang because of statements the Defendant made and because "they always throw up their sets."

Ms. Pride testified that on the morning of June 22, 2017, the Defendant had come to Ms. Walker's apartment, which Ms. Pride described as unusual. Ms. Pride said that although the Defendant used to come to the apartment when he had dated a friend of Ms. Pride's, there had been no reason for him to come to the apartment on the morning of June 22. She said the Defendant's demeanor "wasn't like normal." She said, "[W]e all kind of felt something was going to happen, but we just didn't know what." Ms. Pride said that Ms. Walker inquired what was "going on" and that Ms. Pride "knew some weed was coming," although Ms. Pride professed not to remember further details. She described the Defendant as restless and said that when he left, he said he was going to the "next parking lot." She said that she knew Mr. Cook was "over there" and that the Defendant needed to go there because Mr. Cook was there and because "there was somebody coming."

Ms. Pride testified that as she and Ms. Walker performed household tasks, Ms. Pride heard gunshots and that Ms. Walker came downstairs. Ms. Pride said that the Defendant "[came] flying through the [back] door." She said this was not "cool" because Ms. Walker's children were in the house. Ms. Pride said she saw two other people she did not recognize run past the door. Ms. Pride said that she and Ms. Walker tried to get the Defendant to leave, that Ms. Walker and the Defendant argued, and that he "was going off on" Ms. Walker. Ms. Pride said the Defendant had a gun when he argued with Ms. Walker. Ms. Pride stated that the Defendant was out of breath, that he paced, and that "you could tell something wasn't right." She said that the Defendant went upstairs and that she and Ms. Walker left the apartment with Ms. Walker's children. Ms. Pride said she tried to get

a male friend to convince the Defendant to leave the apartment but that the Defendant stated he would leave when he wanted to leave. She said the Defendant stated he would leave after changing clothes. Ms. Pride said that she later saw the Defendant surrender to the police outside the apartment and that he was wearing a pair of her pants.

Regarding a statement Ms. Pride made previously to Ms. Walker about Mr. Cook's "earning his stars and stripes," Ms. Pride testified that she had meant Mr. Cook had "done something that a person told him to do so he can move up the chart" in the Crips. She said that both Mr. Cook and the person at whose instructions he had acted would "move up."

Knoxville Police Department (KPD) officer Daryl Sexton testified that he received information from another officer that a man had entered a woman's apartment and hid a gun in the attic. He said he and other officers went to the apartment to do a "call out" for the man to come outside. Other evidence showed that the Defendant was the man who emerged from the apartment, which was Ms. Walker's apartment.

KPD crime scene technician Russell Whitfield testified that he went to an apartment in Montgomery Village on June 22, 2017, where he photographed a Glock nine-millimeter firearm lying on attic insulation. He said the weapon was empty but was capable of holding ten rounds of ammunition.

Knox County Sheriff's Office (KCSO) Captain Steven Patrick, a records custodian of the jail's inmate telephone system records and internal surveillance footage, testified regarding telephone calls, "video visits," and surveillance footage related to the Defendant. Captain Patrick said that he viewed a video visit made about six days earlier from an inmate's account who was not the Defendant but that Captain Patrick determined by reviewing a recording of the call and the surveillance footage that the other inmate placed the call and then handed the receiver to the Defendant. Captain Patrick said that computer analysis also determined "a high probability" existed that the inmate who spoke on the call was the Defendant. A recording of the call was played for the jury, and in it, a male voice instructed the person on the other end of the call to tell "Shell" to tell "girl" that she heard the shot around 1:00 and that she saw the man "pick up the strap." Other evidence showed that a strap referred to a gun.

KPD Detective A.J. Loeffler testified that he responded to the scene on June 22, 2017, and that Mr. Albert, who was bleeding from his head and face, "gave [Detective Loeffler] a name of Deon." Detective Loeffler said that Mr. Albert stated he had spoken with Deon by telephone and that after Mr. Albert gave Detective Loeffler the passcode to Mr. Albert's cell phone, Detective Loeffler found social media messages between Mr.

Albert and Ms. Brockwell and between Mr. Albert and Deon Nolbert. Detective Loeffler said that the Defendant was taken into custody after emerging from Ms. Walker's apartment and that officers later found a gun in the apartment's attic. Detective Loeffler said that when the officers entered the apartment, they had not searched for marijuana.

Detective Loeffler testified that he interviewed the Defendant at the police station on June 22, 2017. A recording of the interview was played for the jury. In it, Detective Loeffler encouraged the Defendant to be forthcoming about the shooting incident because two young men were dead and another was injured. Detective Loeffler told the Defendant that the Defendant could help himself and that other people would not be there for the Defendant. The Defendant waived his *Miranda* rights and agreed to speak to Detective Loeffler.

In his statement, the Defendant said that he had seen what had happened in the shooting incident from his vantage point on a nearby porch where he sat with two other men. The Defendant said he saw "two black dudes" walk down the street and then approach a blue car that pulled up. The Defendant said that a man in a white shirt stood outside the car and that a man with dreadlocks got into the backseat of the car and began firing gunshots. The Defendant said he walked away.

Later in the statement, the Defendant identified "Rico" as the person who had fired the shots from the backseat of the car but claimed he did not know the identity of the man in the white shirt who stood outside the car. The Defendant claimed he had not seen what kind of gun Rico had but stated it had not been a revolver. The Defendant stated that Rico's mother drove up and that Rico and the man in the white shirt left with her.

When Detective Loeffler asked the Defendant during the interview if the gun that had been recovered from Ms. Walker's apartment had been used in the shooting, the Defendant professed no knowledge of the gun at the apartment. After a break in the interview, the Defendant identified Mr. Cook as "Rico," the person who had been the shooter, but he did not make an identification from a second lineup of the man in the white shirt.

As the interview continued, Detective Loeffler told the Defendant that he would be unable to help the Defendant if the Defendant were not truthful in the interview and the Defendant's DNA was later identified on the gun from Ms. Walker's apartment. Detective Loeffler asked the Defendant if the Defendant had picked up the gun from the street after the shooting or if "that boy" had handed off the gun to the Defendant after the shooting. Detective Loeffler said he could help the Defendant if the Defendant were truthful now.

The Defendant continued to deny any involvement with the shooting and again claimed he had not known about the gun at Ms. Walker's apartment; however, the Defendant eventually said Mr. Cook had discarded the gun "on the side" of a building and that the Defendant had picked it up and hid it in Ms. Walker's attic because he wanted to keep it and "love[d] guns." The Defendant said that Mr. Cook had not asked him to hold or dispose of the gun and that the Defendant had not known the shooting was going to happen. The Defendant again professed not to know the identity of the man in the white shirt.

Detective Loeffler testified that after he interviewed the Defendant, he also interviewed Mr. Cook and Mr. Nolbert. Detective Loeffler said that at the end of the Defendant's interview, he did not think the Defendant had been involved in the shooting incident. Detective Loeffler said that the term "strap" was slang meaning a gun. He said that Mr. Nolbert had been the first person to say that "they" got the gun from the Defendant. He agreed that Mr. Cook and Mr. Nolbert were charged first and that the Defendant was charged several months later, but before Mr. Cook's trial.

Two stipulations were read to the jury. In the first, the parties stipulated that if called as a witness, a Tennessee Bureau of Investigation (TBI) agent, who was an expert in firearms identification, would testify that the Glock nine-millimeter pistol recovered from Ms. Walker's apartment had been test fired and that the test-fired cartridge casings were consistent with several of the cartridge casings recovered from the victims' car and bullets from Mr. Morris's body and that they had been fired from the same gun. The parties stipulated, as well, that other comparison of the test-fired cartridge casings and the remaining cartridge casings recovered from the car had been inconclusive but that the remaining recovered cartridge casings had the same class characteristics as the test-fired cartridge casings.

The parties also stipulated that if a TBI agent, who was an expert in serology and DNA evidence, were called as a witness, she would testify that comparison of swabs of the Glock nine-millimeter weapon's pistol grip and magazine with buccal swabs of the Defendant, Mr. Nolbert, and Mr. Cook had been inconclusive.

Dr. Darinka Mileusnic-Polchan, an expert in forensic pathology, testified that Mr. Morris and Mr. Rivera both died from multiple gunshot wounds and that the manner of death for both was homicide.

The Defendant elected not to present evidence. After its deliberations, the jury found the Defendant guilty of two counts of facilitation of first degree felony murder in the attempt to perpetrate theft for the homicides of Mr. Morris and Mr. Rivera, as lesser-

included offenses of first degree felony murder; two counts of criminally negligent homicide for the homicides of Mr. Morris and Mr. Rivera, as lesser-included offenses of first degree premeditated murder; two counts of aggravated robbery of Mr. Morris and Mr. Rivera, as lesser-included offenses of especially aggravated robbery; tampering with evidence; aggravated burglary of Ms. Walker's apartment; and aggravated assault of Ms. Walker. The jury acquitted the Defendant of the attempted first degree premeditated murder of Mr. Albert. The trial court merged the criminally negligent homicide convictions with the facilitation of first degree felony murder convictions. The court imposed an effective seventy-year sentence. This appeal followed.

I

Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his convictions for facilitation of felony murder, criminally negligent homicide, and aggravated robbery. He does not challenge the sufficiency of the evidence to support his convictions for tampering with evidence, aggravated burglary, and aggravated assault. The Defendant argues that the evidence failed to establish that (1) his conduct resulted in the death of Mr. Rivera and Mr. Morris, (2) he knowingly furnished substantial assistance in the commission of the offenses, (3) he intended to promote or assist Mr. Cook in the commission of the offenses, (4) he acted with the intent to benefit in the proceeds or result of the offenses, or (5) he solicited, directed, aided, or attempted to aid Mr. Cook in the commission of the offenses. The State counters that the evidence is sufficient to support the convictions. We agree with the State.

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

A. Homicide Offenses

The Defendant was convicted of facilitation of felony murder and of criminally negligent homicide related to the deaths of Mr. Rivera and Mr. Morris, and the convictions as to each victim were merged. As defined at the time of the offense and as relevant here, felony murder is "[a] killing of another committed in the perpetration or attempt to perpetrate any . . . theft[.]" T.C.A. § 39-13-202(a)(2) (2018) (subsequently amended). "A person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." *Id.* § 39-11-403 (2018). "Criminally negligent conduct that results in death constitutes criminally negligent homicide." *Id*. § 39-13-212(a) (2018).

> 'Criminal negligence' refers to a person who acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint[.]

Id. § 39-11-106(4) (2018) (subsequently amended and renumbered).

Viewed in the light most favorable to the State, the evidence shows that Mr. Cook was the Defendant's "do-boy," meaning Mr. Cook engaged in criminal activities at the Defendant's direction. Mr. Nolbert testified that he and Mr. Cook arranged to purchase marijuana from the victims, although they initially planned to use counterfeit $100 bills to complete the transaction. As Mr. Nolbert and Mr. Cook walked to the area where they planned to meet the victims, Mr. Cook ran to the Defendant and told the Defendant that Mr. Cook "got a lick," which Mr. Nolbert said meant a robbery. After being informed that Mr. Cook had an intended robbery target, the Defendant whispered with Mr. Cook before

they disappeared inside an apartment alone together for about five minutes. When they emerged, the Defendant handed Mr. Cook a gun. Mr. Cook and Mr. Nolbert approached the victims' car, and once inside, Mr. Cook shot the victims and took marijuana from Mr. Rivera. Mr. Cook got out of the car and took the gun and the marijuana to the Defendant before fleeing on foot. The Defendant ran to Ms. Walker's apartment, where he hid the gun in the attic and changed his pants before returning later in the evening to retrieve his pants and the marijuana. After Mr. Cook shot the victims, he told Mr. Nolbert that he was about to become a member of the Crips street gang, and other evidence showed that the Defendant was a member of the gang and that the Defendant would attain higher status in the gang as a result of the crimes. From this evidence, a rational jury could conclude beyond a reasonable doubt that the Defendant knew Mr. Cook intended to commit a theft, that the Defendant furnished substantial assistance to Mr. Cook in the commission of the theft, and that Mr. Cook killed Mr. Rivera and Mr. Morris in the perpetration of the theft. Likewise, a rational jury could conclude beyond a reasonable doubt that the Defendant should have been aware of a substantial and unjustifiable risk that Mr. Rivera and Mr. Morris would be shot and killed with the gun the Defendant provided to Mr. Cook and that the Defendant's providing the gun to Mr. Cook despite this known risk was a gross deviation from the standard of care that an ordinary person would exercise in the circumstances. We conclude that the evidence is sufficient to support the Defendant's homicide convictions.

B. Aggravated Robbery

"Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear[.]" *Id.* § 39-13-401 (2018). The offense becomes aggravated robbery, inter alia, if it is "[a]ccomplished with a deadly weapon" or "[w]here the victim suffers serious bodily injury." *Id.* § 39-13-402(a) (2018). "Criminal responsibility, while not a separate crime, is an alternative theory under which the State may establish guilt based upon the conduct of another." *Dorantes*, 331 S.W.3d at 386 (quoting *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999)).

> A person is criminally responsible for an offense committed by the conduct of another, if:
>
> . . .
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]

T.C.A. § 39-11-402(2) (2018). For a defendant to be convicted of a crime under the theory of criminal responsibility, the "evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission." *Dorantes*, 331 S.W.3d at 386; *see State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994).

Viewed in the light most favorable to the State, the evidence shows that Mr. Cook told the Defendant that he had an intended robbery target; that the Defendant and Mr. Cook spoke privately, after which the Defendant provided Mr. Cook with a gun; that Mr. Cook met with Mr. Rivera and Mr. Morris, during which time he fatally shot them and took the marijuana that they had planned to sell to Mr. Cook. After the incident, Mr. Cook immediately went to the Defendant and gave him the gun and the marijuana, and the Defendant hid the gun inside Ms. Walker's apartment. From this evidence, a rational jury could conclude beyond a reasonable doubt that the Defendant shared in Mr. Cook's criminal intent and that the Defendant promoted the commission of the crimes. *See Dorantes*, 331 S.W.3d at 386. The evidence is sufficient to support the Defendant's aggravated robbery convictions via a criminal responsibility theory. The Defendant is not entitled to relief on this basis.

II

Evidentiary Rulings

The Defendant challenges several of the trial court's evidentiary rulings regarding the admission and exclusion of evidence.

A. Street Gang Evidence

The Defendant contends that the trial court abused its discretion in permitting the State to offer evidence that the Defendant was a member of the Crips street gang and that after the shooting, Mr. Cook stated that he was about to become a Crip. The Defendant argues that this evidence was inadmissible character evidence which was barred by Tennessee Rule of Evidence 404(b). The State responds that the court properly admitted this evidence as probative of Mr. Cook's motive in committing the homicides and robberies and of Mr. Cook's connection to the Defendant. We conclude that the court did not abuse its discretion in admitting the evidence.

Tennessee Rule of Evidence 404(b) prohibits the admission of evidence related to other crimes, wrongs, or acts offered to show a character trait in order to establish that a defendant acted in conformity with the trait. Tenn. R. Evid. 404(b). Such evidence, though, "may . . . be admissible for other purposes," including, but not limited to, establishing identity, motive, common scheme or plan, intent, or absence of mistake. *Id*.; *see State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Before a trial court determines the admissibility of such evidence,

> (1) The court upon request must hold a hearing outside the jury's presence;
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> (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.

Tenn. R. Evid. 404(b)(1)-(4). The standard of review is for an abuse of discretion, provided a trial court substantially complied with the procedural requirements. *State v. Clark*, 452 S.W.3d 268, 287 (Tenn. 2014); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *see State v. Electroplating, Inc.*, 990 S.W.2d 211 (Tenn. Crim. App. 1998). An abuse of discretion occurs when a court "'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.'" *State v. Reynolds*, 635 S.W.3d 893, 921 (Tenn. 2021) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)).

As required by Rule 404(b), the trial court conducted a hearing on the Defendant's motion in limine seeking to exclude evidence of the Defendant's membership in the Crips street gang and of Mr. Cook's having committed offenses in order to become a member of the Crips. At the hearing, Mr. Nolbert testified that the Defendant was in the Rollin' 60s Crips gang and that Mr. Cook was often with the Defendant. Mr. Nolbert said the Defendant made statements in Mr. Nolbert's presence which indicated that the Defendant was a gang member and that the Defendant had a reputation in the community as a gang member. Mr. Nolbert agreed that Mr. Cook "was an underling" of the Defendant and that Mr. Cook "was . . . moving out in the community and in the neighborhood at [the

Defendant's] behest." Mr. Nolbert said Mr. Cook "was trying to be a member of the Crips." Mr. Nolbert said that after the crimes in the present case, he was in a car with Mr. Cook and that Mr. Cook said he was "about to be Crip."

Crediting Mr. Nolbert's testimony, the trial court found that the State had shown by clear and convincing evidence that the Defendant made statements in Mr. Nolbert's presence about being a Rollin' 60s Crips gang member and that the Defendant had a reputation in the community as being a Rollin' 60s Crips gang member. The court found that the evidence was relevant to material issues other than conduct conforming with a character trait. The court stated that, "most importantly," the evidence related to motive, in that the State theorized that the Defendant's involvement in the crimes consisted of his directing Mr. Cook's actions. The court found, as well, that the evidence was probative of the mens rea required for first degree premeditated murder. The court found that these issues were "highly, highly material" and were "the central issue[s] of the case." Further, the court found that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The court ruled that Mr. Nolbert's testimony, as well as the testimony of any other individuals with firsthand knowledge of the Defendant's gang membership or of the Defendant's reputation in the community as a gang member would be admissible. The court stated that it would give a limiting instruction at the time any such evidence was offered and again in its final jury instructions.

As we have stated above, Mr. Nolbert and Ms. Pride testified at the trial that they knew the Defendant was a member of the Rollin' 60s Crips gang based upon his statements in their presence. Ms. Pride also said she had seen the Defendant "throw[ing] up . . . sets" indicating his gang membership. Mr. Nolbert testified, as well, that the Defendant had a reputation in the community as a Rollin' 60s Crips member.

This court has recognized that evidence of gang membership is character evidence. *See, e.g.*, *State v. Cortez Lebron Sims*, No. E2018-01268-CCA-R3-CD, 2020 WL 5088737, at *7 (Tenn. Crim. App. Aug. 28, 2020), *perm. app. denied* (Tenn. Feb. 4. 2021). That said, both this court and our supreme court have held that gang membership evidence may be admissible for other purposes not related to propensity, as permitted by Rule 404(b). *See Reynolds*, 635 S.W.3d at 921; *Cortez Lebron Sims*, 2020 WL 5088737, at *7.

The Defendant acknowledges that the trial court followed the procedure required by Rule 404(b) but argues that its findings were erroneous regarding (1) the existence of a material issue other than conduct conforming with a character trait and (2) the probative value of the evidence outweighing the danger of unfair prejudice. The Defendant asserts, "The State's argument regarding [the Defendant] is essentially that he directed Mr. Cook to commit this offense in the same way that [the Defendant] was allegedly known to 'run' teenagers as a gang leader." The Defendant argues that this was evidence of conduct in conformity with a character trait and did not touch on a material issue.

To the contrary, the record reflects the trial court's finding that the Defendant's gang membership and Mr. Cook's aspiration to join the gang were relevant to show the motive for the offenses and to explain the Defendant's involvement. The jury could convict the Defendant for the shootings and robberies based upon theories of direct responsibility through his own actions or of criminal responsibility for the conduct of Mr. Cook. The gang evidence was particularly relevant and probative to show the relationship between Mr. Cook and the Defendant and Mr. Cook's motive to commit the offenses in order to become a member of the Defendant's gang. The record reflects that the court gave a limiting instruction regarding the jury's consideration of this evidence. The record supports the court's ruling that the evidence was admissible pursuant to Rule 404(b), and the court did not abuse its discretion in admitting it. *See State v. Shasta Jackson*, No. E2014-01387-CCA-R3-CD, 2015 WL 6756318, at *8-10 (Tenn. Crim. App. Nov. 5, 2015) (holding that the trial court did not abuse its discretion in admitting evidence of the defendant's "group" membership as probative of the common motive of the defendant and other group members and of the defendant's criminal responsibility for the offenses), *perm. app. denied* (Tenn. May 5, 2016); *see also Reynolds*, 635 S.W.3d at 922 (holding that the trial court did not abuse its discretion in admitting evidence of gang membership of the defendant and others as relevant to prove a connection among them and to explain how the weapon used in the homicide could end up in a car owned by a gang member who had not been present on the night of the homicide, which was probative of identity and relevant as contextual background evidence); *State v. Johnson*, 743 S.W.2d 134, 158 (Tenn. 1987) (holding that the trial court properly admitted evidence of the defendant's gang membership as relevant to witness's fear of the defendant and witness's delay in reporting the homicide); *State v. Stephen Donatae Lester*, No. E2107-02154-CCA-R3-CD, 2018 WL 6498700, at *10-13 (Tenn. Crim. App. Dec. 10, 2018) (holding that the defendant's gang membership was relevant to prove identity and the defendant's relationship to other involved parties), *perm. app. denied* (Tenn. Apr. 11, 2019). The Defendant is not entitled to relief on this basis.

B. Evidence Related to Mr. Nolbert's Plea Agreement and Sentencing

The Defendant contends that the trial court denied his fundamental constitutional right to cross-examine witnesses by ruling that he could not cross-examine Mr. Nolbert and Detective Loeffler about the potential sentence Mr. Nolbert faced if Mr. Nolbert had been convicted at a jury trial and about the sentence Mr. Nolbert received as a result of his guilty plea and cooperation with the State. The State responds that the court did not abuse its discretion by limiting cross-examination based upon Tennessee Code Annotated section 40-35-201(b), pertaining to the prohibition against the judge instructing or attorneys commenting on the possible penalties for an offense and any lesser included offenses. The State argues that no exception from the general purpose of section 40-35-201(b) should be

permitted for attorneys to elicit this otherwise-prohibited information from the witnesses. We conclude that no abuse of discretion has been shown.

When cross-examining Mr. Nolbert during the State's case-in-chief, defense counsel asked Mr. Nolbert about Mr. Nolbert's decision to plead guilty and cooperate with the State and about the terms of the agreement. After the State objected, the trial court ruled that defense counsel could not ask Mr. Nolbert about the sentence or release eligibility percentage Mr. Nolbert would have faced if he had gone to trial. The court permitted cross-examination about Mr. Nolbert's eligibility for parole the upcoming year. The court reasoned that information about the sentence Mr. Nolbert faced if he had gone to trial was inadmissible because Mr. Nolbert had been charged with the same offenses as the Defendant, and the jury was not permitted to know the possible punishment for a defendant's charges. Defense counsel cross-examined Mr. Nolbert about the specific lesser-included offenses to which he pleaded guilty, his having received a sentence that was "significantly less" than what he faced if convicted of the charged offenses, and his having avoided the possibility of consecutive sentencing. Counsel also questioned Mr. Nolbert about the State's agreement to write a favorable letter to the parole board and about the victims' families' agreement not to oppose parole.

During the cross-examination of Detective Loeffler, the trial court ruled that defense counsel could not ask the witness what the witness had meant when he said, "This is going to save the rest of your life," during the recorded interview. The court stated its belief that the defense was "wanting to get in the fact that [Detective] Loeffler knew it was a life sentence you're looking at" and ruled that the evidence regarding the witness's meaning was inadmissible.

Evidence is relevant and generally admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401, 402. Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* 403.

"The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense." *State v. Brown*, 29 S.W.3d 427, 432 (Tenn. 2000); *see Washington v. Texas*, 388 U.S. 14, 119 (1967). Likewise, due process protects a criminal defendant's right to confront and cross-examine witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *see Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995). "[A] denial of the right to an effective cross-examination is 'constitutional error of the first magnitude

and amounts to a violation of the basic right to a fair trial.'" *Dishman*, 915 S.W.2d at 463 (quoting *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980)). "The propriety, scope, manner, and control of cross-examination of witnesses, however, remain within the discretion of the trial court." *State v. Echols*, 382 S.W.3d 266, 285 (Tenn. 2012). In that regard, a court may limit cross-examination due to such factors as "harassment, prejudice, issue confusion, witness safety, or merely repetitive or marginally relevant interrogation." *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. 1994).

Our supreme court has said, "[P]roof suggesting that a witness received or had reason to expect leniency from the State typically constitutes relevant evidence of bias." *Echols*, 382 S.W.3d at 285. Tennessee Code Annotated section 40-35-201(b) provides:

> In all contested criminal cases, except for capital crimes that are governed by the procedures contained in §§ 39-13-204 and 39-13-205, and as necessary to comply with the Tennessee Constitution, article VI, § 14 and § 40-35-301, the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.

The Defendant argues that resolution of this issue is controlled by our supreme court's decision in *Echols*, in which the trial court allowed the State to redact portions of the defendant's recorded statement because the interviewing detective made references to the defendant's either spending "the rest of [his] life" in prison or serving "a little bit of time," depending on the defendant's truthfulness in the interview. *See Echols*, 382 S.W.3d at 287-88. The trial court in *Echols* did not allow the defendant to cross-examine the detective who conducted the interview about the redactions, and the court based its decision upon its earlier ruling that the confession had been given voluntarily and upon the basis that the parties were "not going into punishments" in accord with Code section 40-35-201(b). *Id.* at 288. The supreme court held that Code section 40-35-201(b) did not prohibit admission of a suspect's statement made before the suspect was charged that the suspect could face a life sentence or a short sentence, depending on the content of the statement the suspect made. *See id.* The supreme court also held that the trial court had abused its discretion in limiting cross-examination of the detective but that the error was harmless beyond a reasonable doubt because the jury was otherwise aware, in considering the truthfulness of the defendant's statement, that the interviewing detective had used "interrogation techniques designed to elicit an incriminating statement" and that the Defendant's statement had been consistent with his defense theory at the trial. *See id.* at 289.

In the present case, the trial court distinguished *Echols* on the basis that the defendant in that case sought to cross-examine the detective about the redacted statements the detective made to the defendant in order to address "why [the defendant] would give a

statement." On the other hand, the trial court reasoned, the defense in the present case "want[ed] to get in the fact that [Detective] Loeffler knew it was a life sentence you're looking at," rather than any issue regarding the circumstances in which the statement was given. The court was also concerned that because the Defendant was on trial for the same offenses with which Mr. Nolbert was originally charged, inquiry into the sentencing consequences of Mr. Nolbert's original charges would inform the jury of the sentencing consequences the Defendant faced, contrary to Code section 40-35-201(b).

We acknowledge our supreme court has said that nothing in Code section 40-35-201(b) bars cross-examination about whether a suspect might face a lengthy or short sentence, depending upon the information the suspect provided to the police. *See id.* at 288. However, a defendant's constitutional right to cross-examine witnesses remains subject to general rules of relevance and concerns such as presentation of cumulative or marginally relevant information. *See* Tenn. R. Evid. 403; *Reid*, 882 S.W.2d at 430. Ultimately, "the Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fenstereer*, 474 U.S. 15, 20 (1985); *see Ritchie*, 480 U.S. at 53; *State v. Rimmer*, 623 S.W.3d 235, 290 (Tenn. 2021).

The jury in the present case heard the statements Detective Loeffler made during the Defendant's interview about possible punishments. The defense was allowed to cross-examine Mr. Nolbert about the offenses with which he had been charged and the offenses to which he had pleaded guilty pursuant to the plea agreement. The defense was also allowed to cross-examine Mr. Nolbert about his cooperation with the State and the fact that he had received a very favorable resolution to his case, as compared with the conviction and sentencing exposure he faced if he had been convicted at a jury trial. Any further information about the specific sentence Mr. Nolbert received as a result of his plea agreement and the potential sentence he would have faced if he had been convicted at a jury trial was of minimal additional probative value in impeaching his credibility and in showing any bias he had in favor of the State. Given the facts of the present case, we conclude that the trial court did not abuse its discretion in limiting cross-examination of Mr. Nolbert about further specifics of his actual and potential sentences and that the Defendant was not deprived of due process by the court's limits on cross-examination.

Regarding the propriety of the trial court's ruling relative to cross-examination of Detective Loeffler, the court found that the defense's purpose in asking Detective Loeffler what he meant by, "This is going to save the rest of your life," was to inform the jury of the possibility of a life sentence, not to probe the voluntariness of the Defendant's statement. The record reflects that defense counsel made vigorous attempts to cross-examine Mr. Nolbert about the specifics of his actual and potential sentences and that cross-examination elicited many details, the most significant of which was that Mr. Nolbert received a very favorable disposition of his case predicated upon his cooperation with the

State in the prosecutions of Mr. Cook and the Defendant. After the court sustained the State's objections to defense counsel's questions to Mr. Nolbert about the granular details of the actual and potential sentences, defense counsel later sought to elicit substantially similar information from Detective Loeffler. The court was concerned that this question was designed to highlight the possibility of a life sentence. Detective Loeffler's statement itself was part of the evidence the jury heard, and it could infer from it that any cooperation Mr. Nolbert provided to the authorities would be to his advantage. Given that the statement itself was evidence the jury heard, Detective Loeffler's subjective intent or "meaning" in making the statement was not relevant. *See* Tenn. R. Evid. 401, 402. The court did not abuse its discretion in sustaining the State's objection to defense counsel's question about Detective Loeffler's meaning about Mr. Nolbert's opportunity to "save [his] life," and the Defendant's right to due process was not violated by the court's ruling.

C. Exclusion of Evidence of Any Alleged Benefit to Laurissa Brockwell from the Robbery

The Defendant contends that the trial court erred in excluding as hearsay Detective Loeffler's prospective testimony that Ms. Brockwell, who did not testify, told Detective Loeffler that she had been supposed to receive a portion of the robbery proceeds. The Defendant argues on appeal that the evidence was admissible under Tennessee Rule of Evidence 803(3), the hearsay exception for evidence of the declarant's then-existing state of mind. The State responds that the Defendant has waived consideration of the evidence as admissible under Rule 803(3) because he did not assert this basis for admissibility in the trial court. We agree with the State.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is inadmissible unless it qualifies as an exception. Id. at 802. Tennessee Rule of Evidence 803(3) provides:

> Hearsay Exceptions. – The following are not excluded by the hearsay rule:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition. – A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

A trial court's factual findings and credibility determinations relative to a hearsay issue are binding upon an appellate court unless the evidence preponderates against them.

Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015). The determination of whether the statement in question is hearsay and whether a hearsay exception applies are questions of law that are reviewed de novo. Id.

At a bench conference during the trial, the defense argued that Dectective Loeffler should be permitted to testify about Ms. Brockwell's purported statement to Detective Loeffler that she was going to receive one-half of the robbery proceeds. Defense counsel posited, "I think it goes toward motive and intent on behalf of Deon Nolbert. If they're joined at the hip, you know, if they enter into this scheme together and she's the one that connects him to these guys that are coming in." The trial court ruled that under this theory, the evidence was inadmissible hearsay because it would be introduced to prove the truth of the matter asserted. The Defendant first asserted that the evidence was admissible under Rule 803(3) in his amended motion for a new trial. It is well-settled that after advancing an unsuccessful theory of admissibility at the trial, a party may not thereafter advance an alternative theory in the motion for a new trial or on appeal. *See, e.g.*, *State v. Vance*, 596 S.W.3d 229, 253 (Tenn. 2020) (citing *State v. Adkisson*, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994); *State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016). The issue is waived.

In reaching this conclusion, we have considered the Defendant's argument in his reply brief that the defense argued at the trial that questioning Detective Loeffler about Ms. Brockwell's purported statement "would highlight 'motive and intent of Deon Nolbert,'" and that "[r]ead alongside Tenn. R. Evid. 803(3), this argument by . . . trial counsel is a clear and unequivocal invocation of the exact language of the applicable hearsay exception." The problem with the Defendant's argument in this respect is that even if we were to accept this strained interpretation of the record, "only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception." Tenn. R. Evid. 803(3) (Advisory Comm'n Cmts.). Thus, the Defendant's argument is that Ms. Brockwell's statement is relevant and admissible evidence to show Mr. Nolbert's state of mind. The Advisory Commission Comments demonstrate the fault in the Defendant's theory of admissibility.

Finally, we have considered the Defendant's argument in his reply brief that he was denied a fair trial by the trial court's ruling. Again, this issue is waived because it was not advanced in the trial court. *See Howard*, 504 S.W.3d at 277.

The Defendant is not entitled to relief on this basis.

III

Sequestration of the Witnesses Pursuant to Tenn. R. Evid. 615

The Defendant contends that the trial court failed to find that a violation of Tennessee Rule of Evidence 615 occurred and to impose sanctions. The Defendant does not advocate that the court should have imposed any specific remedy and merely contends that the combined effect of this and other alleged trial errors deprived him of a fair trial. The State responds that the court did not err in determining that no Rule 615 violation occurred and, therefore, did not abuse its discretion by not imposing any sanction or remedy. We agree with the state.

Rule 615 provides, in pertinent part:

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness.

If a trial court finds that a violation of the rule has occurred, the court has the discretion to impose a sanction or remedy tailored to the circumstances. *State v. Black*, 75 S.W.3d 422, 424 (Tenn. Crim. App. 2001). An appellate court will not revisit the issue in the absence of an abuse of discretion and prejudice to the complaining party. *Id.* at 424-25.

The record reflects that after a lunch break in the trial proceedings, the court stated that an unidentified person had approached a member of the court's staff and stated that Ms. Pride and Ms. Walker had discussed their testimony during the break. Ms. Walker had already testified, and the lunch break took place in the middle of cross-examination of Ms. Pride.

The trial court permitted the defense to offer evidence related to the allegation. The defense called Michelle Maxwell, a friend of the Defendant's family, who testified that during the break, she had seen Ms. Pride and Ms. Walker outside the courtroom. Ms. Maxwell said that she saw Ms. Pride and Ms. Walker smoking and talking to each other but that she was unable to hear their conversation.

The trial court called Ms. Pride as a witness, and she testified that during the break, she and Ms. Walker had not discussed Ms. Walker's testimony. Ms. Pride stated that she and Ms. Walker had been upset and that Ms. Pride was "on a time limit at home" and needed to leave court promptly. Ms. Pride said that Ms. Walker had been tearful for a

reason that Ms. Pride did not know and that Ms. Pride told Ms. Walker, "[W]e can't talk." Ms. Pride said an unidentified man approached them and said they could not talk to each other. When questioned further, Ms. Pride said,

> Ms. Walker came out there, asked for a cigarette and was, like, calm down. Stop crying. It's okay. I was, like, no, 'cause all this is, like, crazy. It's crazy. It's obvious what all happened. And it's crazy that everybody has to put their life back out there.
>
> . . . .
>
> I said, all this is crazy. We all don't have to come back to court years later over this. It's all crazy. No one discussed what was talked about in here. No one talked about what anyone else knows.

After receiving the evidence, the trial court found that no violation of Rule 615 had occurred. The Defendant has not articulated any prejudice he alleges he suffered from these facts, and none is apparent. Likewise, he has failed to articulate any remedy he contends the court should have fashioned to address any purported prejudice. Although the record reflects that Ms. Walker and Ms. Pride, who were friends, spoke to each other during the trial, the evidence does not preponderate against the court's determination that no violation of Rule 615 occurred. The court did not abuse its discretion in denying relief. The Defendant is not entitled to relief on this basis.

IV

Cumulative Error

The Defendant contends that he is entitled to a new trial because the record reflects that he was prejudiced by multiple errors which occurred during the trial. The State responds that the Defendant is not entitled to relief because he has not shown that multiple errors occurred during the trial, from which he suffered cumulative prejudice. We agree with the State.

The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76–77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("'[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.'") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)).

We have rejected each of the Defendant's allegations of trial error. He is not entitled to relief on the basis of the prejudicial effect of multiple errors.

V

Sentencing

Finally, the Defendant contends that the trial court abused its discretion in sentencing him because it erroneously found that he was a leader in the commission of the offenses. *See* T.C.A. § 40-35-114(2) (Supp. 2016) (subsequently amended). He challenges the application of this factor to the offenses involving Mr. Rivera and Mr. Morris. The State responds that the record supports the application of the "leader in the commission of the offense" enhancement factor and that the court acted within its discretion in sentencing the Defendant. We agree with the State.

This court reviews challenges to the length of a sentence within the appropriate sentence range "under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). A trial court must consider any evidence received at the trial and sentencing hearing, the presentence report, the principles of sentencing, counsel's arguments as to sentencing alternatives, the nature and characteristics of the criminal conduct, any mitigating or statutory enhancement factors, statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee, any statement that the defendant made on his own behalf, the potential for rehabilitation or treatment, and the result of the validated risk and needs assessment. T.C.A. §§ 40-35-103 (2019), -210 (2019); *State v. Ashby*, 823 S.W.2d 166, 168 (Tenn. 1991); *State v. Moss*, 727 S.W.2d 229, 236 (Tenn. 1986); *State v. Taylor*, 744 S.W.2d 919, 920 (Tenn. Crim. App. 1987); *see* T.C.A. § 40-35-102 (2019).

Likewise, a trial court's application of enhancement and mitigating factors are reviewed for an abuse of discretion with "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *Bise*, 380 S.W.3d at 707. "[A] trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Id*. at 706. "So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed . . . within the appropriate range" will be upheld on appeal. *Id.*

The abuse of discretion with a presumption of reasonableness standard also applies to the imposition of consecutive sentences. *State v. Pollard*, 432 S.W.3d 851, 859 (Tenn.

2013). A trial court has broad discretion in determining whether to impose consecutive service. *Id*. A trial court may impose consecutive sentencing if it finds by a preponderance of the evidence that one criterion is satisfied in Tennessee Code Annotated section 40-35-115(b)(1)-(7) (2019) (subsequently amended). In determining whether to impose consecutive sentences, though, a trial court must ensure the sentence is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. § 40-35-103(2), (4) (2019); *see State v. Desirey*, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995).

At the sentencing hearing, the trial court received the presentence report and certified copies of the Defendant's prior convictions. The court heard the arguments of the parties. In an allocution, the Defendant acknowledged that he "gave these people a gun." He apologized to the victims' families. The court found that the Defendant was a Range II offender. In considering the statutory enhancement factors, the court found that the Defendant had an extensive history of criminal convictions or behavior, that the Defendant was a leader in the commission of an offense involving two or more criminal actors, that the personal injuries or property damage inflicted upon a victim were particularly great as to the homicide offenses, that the Defendant possessed or employed a firearm during the commission of the homicide offenses, and that the Defendant had no hesitation to commit the offenses when the risk to human life was high. *See* T.C.A. § 40-35-114(1), (2), (6), (9), (10). The court declined to apply any mitigating factors. *See id.* § 40-35-113 (2019). With respect to consecutive sentencing, the court found that the Defendant's history of criminal activity was extensive and that his behavior showed little regard for human life and no hesitation to commit an offense when the risk to human life was high. *See id.* § 40-35-115(b)(2), (4). The court found, as well, that the circumstances of the offenses were aggravated and that an extended period of confinement was necessary to protect the public from the Defendant. *See State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). Based upon these findings, the court imposed an effective seventy-year sentence.

As we have stated, the Defendant's sole argument on appeal is that the trial court erred in enhancing the length of his individual sentences based upon its application of the enhancement factor for his having been a leader in the commission of the offenses in which Mr. Rivera, Mr. Morris, and Mr. Albert were the victims. Accordingly, we limit our consideration to the propriety of the court's finding in this regard. The record reflects that Mr. Cook and Mr. Nolbert arranged a transaction with the victims, whereby Mr. Cook and Mr. Nolbert were going to "buy" marijuana with counterfeit $100 bills from the unsuspecting victims. Before the planned meeting, Mr. Cook told the Defendant that he had a "lick," and after they conversed privately, the Defendant provided Mr. Cook with a gun. The Defendant watched from a nearby vantage point as Mr. Cook and Mr. Nolbert approached the victims, and Mr. Cook shot the victims and took the marijuana from Mr. Rivera. The Defendant's injection of the gun into the encounter escalated the situation and the ultimate danger to the victims. After the shootings and the robbery, Mr. Cook gave the

gun and the marijuana to the Defendant, and the Defendant hid the gun and left the marijuana in Ms. Walker's apartment after threatening her with the gun when she told him to leave. Thus, the Defendant concealed evidence of an instrumentality of the crimes. The evidence showed that Mr. Cook wanted to join the Defendant's street gang and that he committed the offenses in order to be inducted into the gang, which would enhance both his own and the Defendant's stature. The evidence does not preponderate against the trial court's application of the "leader in the commission of the offense" enhancement factor.

Because the record supports the trial court's application of the challenged enhancement factor, the Defendant has not shown that the trial court abused its discretion in sentencing him. He is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE