IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 7, 2023 Session

STATE OF TENNESSEE v. DERRICK JOHNSON

Appeal from the Criminal Court for Shelby County
No. 18-01743, C1802846 Glenn Wright, Judge

No. W2022-00425-CCA-R3-CD

A Shelby County Criminal Court jury convicted the Defendant, Derrick Johnson, of conspiracy to possess with the intent to sell 150 grams or more of heroin in Count 1 and conspiracy to possess with the intent to deliver 150 grams or more of heroin in Count 2, and the trial court imposed an effective sentence of eighteen years. On appeal, the Defendant argues (1) the evidence is insufficient to sustain his convictions; (2) the trial court abused its discretion in allowing the State to present evidence of the November 19, 2017 phone conversations on redirect examination; (3) the trial court abused its discretion in failing to replay the October 25, 2017 phone recordings for the jury; (4) the trial court abused its discretion in denying his motion for a mistrial after the prosecutor, during its rebuttal closing argument, improperly commented on the Defendant's constitutional right to remain silent; and (5) the trial court abused its discretion in imposing an effective eighteen-year sentence. After review, we remand the case for entry of corrected judgment forms in Counts 1 and 2 as specified in this opinion. In all other respects, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed; Case Remanded for Entry of Corrected Judgments

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

Lance R. Chism (on appeal) and Thomas Hansom (at trial), Memphis, Tennessee, for the Defendant-Appellant, Derrick Johnson.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Chris Scruggs, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In 2018, the Shelby County Grand Jury indicted the Defendant and twenty-four co-conspirators for the offenses of conspiracy to possess with intent to sell more than 150 grams of heroin in a school zone and conspiracy to possess with intent to deliver more than 150 grams of heroin in school zone.

At trial, Lieutenant Michael Jackson testified that in 2017 he was assigned to the Memphis Police Department's Organized Crime Unit (OCU), an undercover unit that investigated long-term cases. Around that time, the OCU began receiving complaints that a man called "Pharaoh" was selling fentanyl and heroin in the medical district of Memphis. As a part of the investigation, the OCU obtained several warrants allowing it to monitor different cell phones. Lieutenant Jackson explained that around thirteen phones were monitored in this investigation, with two of these phones belonging to the Defendant, Derrick Johnson. Over the course of the investigation, the OCU determined that "Pharaoh" was Courtney Malone, a street-level drug dealer who belonged to the "Dixie Homes group." The OCU then obtained a search warrant to monitor Malone's phone and over the course of nearly two years worked their way up the drug distribution chain, which resulted in the OCU monitoring the other phones that were involved in this drug operation. Lieutenant Jackson said that over the course of his investigation, he discovered that the Defendant and Rodney Chism were supplying more than 150 to 200 grams of heroin to the Dixie Homes group.

On cross-examination, Lieutenant Jackson said he observed Stanley Durham go to the Defendant's home two or three times. He was able to determine that the two phone numbers belonged to the Defendant by listening to calls from Stanley Durham to the Defendant and by conducting visual surveillance of the two men. He also said that he observed the Defendant using one of the cell phones at issue. Lieutenant Jackson confirmed that Stanley Durham was the only co-conspirator in contact with the Defendant.

Detective Courtney Hendricks testified that in 2017 she worked as an undercover officer for the OCU. She purchased heroin and fentanyl from Courtney Malone, who went by the name of "Pharaoh," more than ten times. Detective Hendricks acknowledged that although different people answered Malone's cell phone, the Defendant never answered Malone's phone.

Officer Dennis Evans testified that he managed the Memphis Police Department's wiretapping system. He stated that he set up a wiretap to monitor the phone conversations of Courtney Malone, Demarqual Jackson, Carlos Royal, and Stanley Durham.

Detective Ian James, with the OCU, testified as an expert in the "field of narcotics investigation." He stated that he was the case agent who managed this case and that the

investigation began in spring 2017 and ended in December 2017. Detective James said that this investigation initially began when he received complaints of people overdosing on drugs sold by Courtney Malone in the "Dixie Homes area." He said the OCU undercover agent assigned to this case started buying drugs from Malone and once the OCU obtained enough evidence to establish probable cause, it obtained a search warrant and began listening to Malone's phone conversations. After conducting additional investigation, the unit began listening to the phone conversations of Demarqual Jackson, Carlos Royal, and Stanley Durham.

Detective James said that on September 1, 2017, at 6:29 p.m., Demarqual Jackson called Courtney Malone and asked whether any of Malone's customers had complained about the quality of the drugs. Malone replied that the product smelled like "spoiled baby milk" but that no one had complained. Detective James explained that Jackson was "cutting the heroin or fentanyl with an unknown substance," which was "why it smelled like [spoiled] baby milk." He stated that individuals will often "use a variety of different other powder substance[s] that look similar to [the drugs] to stretch [the drugs] out so they can make more money." Detective James stated that 100 grams of heroin is worth approximately $10,000.

On September 1, 2017, at 9:19 p.m., Jackson called Malone a second time, and they again discussed the quality of the drugs. During this conversation, one of them talked about waiting on "Unc" to get back. Detective James explained that "Unc" is the "street term for an older somebody that they're using to get supply from." He added that the "Unc" referred to in this case was "Rodney Chism on part of it and [the Defendant] on another part of it."

On September 1, 2017, at 9:33 p.m., Malone called Jackson and asked how much of the product he had left. When Jackson replied that he had "a hundred" grams left, Malone told him to save that for him. Jackson told Malone he would "give it to [him] tomorrow." Detective James explained that Jackson wanted to save the 100 grams of drugs for Malone to distribute it to his customers because Malone's customers were not complaining about the drugs.

On September 2, 2017, at 1:11 p.m., Jackson called Malone and asked if he still wanted "that whole th[i]ng," meaning did he want the whole 100 grams. Malone said he only had "7000" but that he still wanted to get the "whole th[i]ng[.]" Detective James said this meant that although Malone was a little short on cash, he still wanted the entire 100 grams of drugs.

On September 3, 2017, at 1:57, Malone called Jackson and said that he could not get his other money but had about "6 thousand" on him now, and Jackson replied that he

could give him the rest of it later. Detective James interpreted this to mean that Jackson would give him the 100 grams of drugs and that Malone could pay him the rest back later.

On September 6, 2017, at 3:09 p.m., Jackson called Malone and asked where he was, and Malone replied that he was "in the room" at "Quality." Jackson asked if Malone wanted him to "bring it up there," and Malone told Jackson that he would meet him "at the house with Vikki." Detective James explained that dealers often liked to meet their customers in hotel rooms to sell them narcotics because it kept the police guessing where they would be.

Also on September 6, 2017, at 3:34 p.m., Malone called Jackson and told him to meet him "at the white junt." Jackson informed Malone that he was already in front of Malone's home, and Malone told him to "pull in the back." Detective James stated that Malone did not have to give an address or street name because Jackson knew where "the white junt" was located. He said that the white junt was Malone's family's home, where he commonly distributed narcotics, and that Malone's own home was located in the medical district off of Poplar and Decatur in Memphis.

On October 19, 2017, at 12:45 p.m., Jackson called Malone and asked if he wanted to "down the rest of the s[--]t," and Malone replied, "What[']s that a trick question[?]" Jackson said you "don't want to have too much," and Malone stated, "I[']m ready to get on what I can get." Jackson said that he could give Malone the "rest of" it, which was "like 84 left," which would be "200[.]" Detective Jackson explained that Malone was "confident and cocky" and knew he could sell whatever drugs Jackson brought him.

On October 23, 2017, at 3:41 p.m., Royal called Jackson and said that "Stan" wanted to know what time he thought it would happen, and Jackson responded that "Cor Cor just said tomorrow." Royal then said that "Unc ain[']t answer[ing] the phone," and Jackson stated, "Just tell him tomorrow," and then said, "Unless you want to give him some of Unc s[--]t and put it with it. Until they get st[r]aight tomorrow." Detective James explained that Royal and Jackson were on the same level in the drug distribution organization. He said, "Jackson has some people that he distributes to and Carlos Royal has his people that he distributes to[.]" He said that when Jackson stated, "Cor Cor said tomorrow," this meant that Courtney Malone was going to have his money for the drugs tomorrow. When Jackson said, "Just tell him tomorrow," Detective James interpreted this to mean that Royal and Jackson anticipated getting additional drugs the next day so they wanted to make sure everyone had their money ready. Detective James said that the reference to "Unc" not answering the phone meant Rodney Chism, although when they mentioned "Unc" later in that conversation, they were referring to the Defendant.

On October 23, 2017, at 4:51 p.m., Royal called Jackson and stated, "Unc said a little later on." When Jackson asked if he was going to wait on him, Royal said "yes" and that he would see him later on. Jackson then said, "They'll have that tomorrow for Stan so just tell Stan tomorrow." Detective James said this conversation meant that the men were putting the drug transaction off to the next day.

On October 24, 2017, at 5:58 p.m., Royal called Stanley Durham and said, "It will be about 9:30 or 10." Durham said okay, but he will be at work if everyone wants to do it in the morning. Royal asks what time, and Durham answers, "Before 10," and Royal says, "Let me call him." Detective James said that Royal and Durham were trying to set up a time for the drug transaction and that Royal intended to let the people with whom he deals drugs know what time to be ready.

On October 24, 2017, at 5:59 p.m., Royal called Jackson and said, "Dude will probably be at work then" and that "he'll just try to do it in the morning at 9:30 [or] 10."

On October 25, 2017, at 9:20 a.m., Stanley Durham texted Royal, "He up?" Detective James said that Durham was asking Royal whether the people he is expecting to get drugs for were ready.

On October 25, 2017, at 11:55 a.m., Jackson called Royal and said "Cor Cor said his auntie['s] house at 2:00[,]" which is "where he got all his money at." Royal asked "what time you want me to tell him[,]" and they agreed on "3:00." Royal said that he was going to "call and tell him." Detective James said that this meant that Malone was getting his money together so that he could buy the drugs and that Royal told Stanley Durham what time Malone would have the money ready to make the drug buy.

On October 25, 2017, at 11:58 a.m., Durham called Royal and said, "He ain[']t ready yet," and Royal replies, "He said about 3[.] He waiting for his auntie to get off" work. Durham said, "Alright[.] It'll be right on time then." Detective James said that this meant that Courtney Malone was waiting for his aunt to get off work so he could get his money.

On October 25, 2017, at 3:20 p.m., Royal called Jackson and asked if he had talked to him yet, and Jackson said, "I'm waiting on him now, I'm on Breedlove waiting on him now." Detective James said this meant that Jackson was waiting on Courtney Malone so that Malone could get the money.

On October 25, 2017, at 3:44 p.m., Durham sent a text message to Royal, stating, "U going to be ready before they go work[?]" Detective James said that Durham wanted to ensure that they did not "hold whoever this other person [was] up because they ha[d] to

go to work." At 3:47 p.m., Royal responded, "He getting the money now," which Detective James said meant that Jackson was waiting on Malone at Malone's aunt's home to get the money. Durham immediately texted, "What try get[?]," and at 3:48 p.m., Royal replied, "Probably same or half." Detective James said this meant that Durham was asking how much they were trying to get, and Royal replied that they were going to buy a half a kilo or more of heroin.

On October 25, 2017, at 4:49 p.m., Royal called Jackson and asked if he was "still up town" and Jackson replied, "He just leaving the house now," and then said, "I already have everything else." Detective James said this meant that Jackson had all the money he needed and was waiting on Malone to bring his money in so they could "conclude this deal" because they knew they had somebody waiting on the other side of this deal. During this conversation Royal stated, "You know these folks be having to be at work by 6." Royal then said he was going "to call these folks and see what time they suppose[d] to be at work," and Jackson replied, "He has to take that to him and get that," and Royal says, "Yeah." Detective James said Royal was telling Jackson to hurry Malone "so they can get the money, they can get the deal done, because somebody has to be [at] work at six."

On October 25, 2017, at 5:35 p.m., Jackson called Royal and asked, "What it supposed to be," and Royal responded, "25-5." Detective James interpreted the "25-5" to mean twenty-five thousand five hundred dollars, which was the money "they're going to use to complete this deal."

On October 25, 2017, at 5:39 p.m., the Defendant called Durham and told him that he did not "even know where the junt at" and that "it[']s around here somewhere." Durham replied that he was "about to grab on that change" and was "coming [his] way," and the Defendant said, "I[']ll be here waiting." Detective James said "that change" referred to Malone's obtaining the money from his aunt's home and giving it to Jackson, who was about to meet Durham, who would then come to meet the Defendant. Detective James stated that after this conversation at 5:39 p.m., he personally witnessed Durham go to Jackson's apartment to pick up the money before taking this money to the Defendant.

On October 25, 2017, at 5:59 p.m., Royal texted Durham, "Half." Detective James said this text referred to half a kilo of heroin, which is "a large quantity to purchase at one time."

On October 25, 2017, at 6:01 p.m., Durham texted the Defendant, "H[a]lf ti[m]e." Detective James said this meant that Durham was confirming with the Defendant that they wanted "[a] half a brick" or a half a kilo of heroin.

On October 25, 2017, at 6:02 p.m., the Defendant texted Durham, "okay."

On October 25, 2017, at 6:10 p.m., Durham texted the Defendant, "U in house." Detective James asserted that Durham was asking the Defendant if he was home, and that after Durham sent this text message to the Defendant, a "pole cam[era]" across the street from the Defendant's home took photographs of Durham, with the money, walking up to the Defendant's house.

On October 25, 2017, at 6:11 p.m., Durham called the Defendant and asked, "Where you at in the house D," and the Defendant said, "Yeah, I[']m in the house[.] Come to the front door." Detective James stated that Durham called the Defendant "D," which is "short for Derrick."

On October 25, 2017, at 7:05 p.m., Durham texted Royal, "He there," and Royal immediately responded, "Yeah." Detective James interpreted these texts to mean that the men were confirming that "everything is going okay."

Also, on October 25, 2017, at 7:05 p.m., Royal called Jackson and stated, "He on the way." Detective James said this call meant that Royal was telling Jackson that Durham is bringing the heroin to Jackson's apartment.

On October 25, 2017, at 7:37 p.m., Durham texted Royal, "Here." Detective James said this meant that Durham was telling Royal that he was back at Jackson's apartment. He explained that at the same time this text message was sent, he personally observed and photographed Durham with the narcotics arriving at the door to Jackson's apartment.

At the same time, Royal called Jackson and stated, "He at the door." Detective James interpreted this to mean that Royal was telling Jackson that Durham was at the door to Jackson's apartment.

On October 25, 2017, at 7:39 p.m., Durham texted the Defendant, "Good." Detective James stated that this text signified that Durham was letting the Defendant know that "the drugs made it to the delivery point."

On October 25, 2017, at 7:41 p.m., Defendant texted Durham, "ok."

On October 25, 2017, at 7:58 p.m., Royal called Durham and asked, "What was it[?,]" and Durham replied that it was "halftime." Detective James said Royal was asking Durham what was the weight of the narcotics.

On October 25, 2017, at 8:00 p.m., Jackson called Royal, and Royal said he was on his way to meet Jackson and for Jackson to "fix up 29 and 75," and Jackson replied,

"Alright." Royal then told Jackson, "You can put 30 in that 75 about 35." Detective James said that this meant that they were ready to distribute the heroin. He noted that the drugs usually arrived in "a large brick or large chunks" and that Royal's remark meant that he was telling Jackson to break the drugs into 29 grams and 75 grams so Royal could "distribute [them] to whoever he's selling it to."

The next day, on October 26, 2017, at 10:38 a.m., Malone called Jackson and informed him that he "probably got about 10 grams." Jackson said that he was "working two of these folks." He then said he only trusted Malone and someone named "D-Bo" and then asked Malone how long it would take him and D-Bo to "take care of them folks over there." Malone replied, "About a week and a half." Detective James stated that Jackson's reference to "two of these folks" meant 200 grams and that Jackson was telling Malone that he is going to give him 200 grams because he knew that Malone could sell that amount quickly.

On October 26, 2017, at 2:52 p.m., Jackson called Malone, and they discussed what part of town they were currently in. Malone asked if Jackson was "getting it all ready" and when Jackson responded affirmatively, Malone asked when he was "leaving out with it." Jackson and Malone agreed to meet at Malone's house, and Malone said he would be there soon, and Jackson told him "to hit him up." Detective James explained that Jackson and Malone were setting up a meeting that day to conduct the drug transaction.

On October 26, 2017, at 2:59 p.m., Malone gave Jackson the gate code for his apartment complex during a phone conversation.

On October 26, 2017, at 4:01 p.m., Jackson tells Malone that he is "out there" during a phone conversation.

On October 27, 2017, at 6:45 p.m., Royal, during a phone conversation, told Jackson "to fix up a Z-Bo and a 200" because he is on the way. Detective James explained that "Z-Bo" referred to Zach Randolph, who wore the number 50 when he played for the Memphis Grizzlies; therefore, Royal was telling Jackson to get together 50 grams and 200 grams of heroin in separate bags to go to two different customers.

Detective James stated that the OCU executed a search warrant at Jackson's apartment on December 14, 2017. He identified seven photographs taken at Jackson's apartment, which depicted individually bagged narcotics for different buyers, a digital scale to weigh the narcotics before they were distributed, some baggies, some scissors to cut the baggies, a marker to mark the baggies, a cutting agent to stretch the narcotics to make more money, and $76,000 in currency.

Detective James said that on December 15, 2017, the OCU executed a search warrant at the Defendant's home at 416 Goodland Avenue. Among other things, officers found at this home the Defendant's expired Tennessee driver's license with the "416 Goodland Cir." address, a bowl with a powder substance in it that appeared to be a cutting substance to stretch narcotics to make more money, plastic baggies, vacuum sealed bags, a drug scale hidden from plain sight, bank records belonging to the Defendant, an MLGW light bill in the Defendant's name, and 2010 tax documents belonging to the Defendant.

Detective James noted that the "street level guys" were "always easy to capture" but the OCU had to monitor phone lines to determine the men who were operating higher up the chain in the drug organization, including the actual supplier of the drugs. He said that thirteen phones were monitored by the OCU, with the first phone being monitored in August/September 2017 and the last phone belonging to the Defendant. Detective James stated the Defendant had two different cell phones. The Defendant used the first one to talk with Durham during the October 2017 phone calls. After Durham met the Defendant and then "went back to the other guys in the chain," the OCU "decided to come up with a plan to verify [the Defendant]" and "take him into custody" during one of the Defendant's other drug transactions." Detective James explained what happened during a later drug transaction involving the Defendant:

> During this transaction our surveillance was compromised and [the Defendant] saw us. We heard him discussing hi[s] seeing us during this [surveillance], so we pulled back. That drug transaction was not completed, so we were unable to take [the Defendant] down and locate drugs actually in his possession at that time. [The Defendant] also talked about not wanting to use the phone anymore because he saw the police following him at that time.

Detective James said that after this incident, the Defendant stopped using the first cell phone, and they were unable to monitor any more phone calls for that part of the operation. Later, he said they were able to track down a second cell phone that the Defendant used, which was the very last phone that the OCU monitored in this case [180]. Detective James confirmed that the Defendant was "the end of the line for this investigation."

On cross-examination, Detective James confirmed that the jury had not yet heard the recorded call in which the Defendant realized that he was under surveillance by the OCU. When defense counsel asked Detective James to provide that recorded call "at some point today" and asked "who the Defendant was talking to at the time," Detective James replied, "I will be able to tell you that when I get ready to play the phone call for you. I'll be able to explain it to you in detail[.]" Defense counsel said, "Then we'll come back to that."

Thereafter, Detective James testified that while there was a drug transaction on October 25, 2017, there were also "drug transactions in November[,]" specifically one on "November the 19th" that he could play if defense counsel wanted to hear them.

Defense counsel then asked if the October 25, 2017 transaction was when Durham and the Defendant talked about "half time," and Detective James confirmed that it was. Detective James examined the photographs taken on October 25, 2017, and confirmed that they depicted Durham arriving at Jackson's home "to pick up money." Detective James then stated:

> As I explained to you yesterday, these pictures alone . . . don't really say much, but you have to take the conversations along with these pictures. We were there before . . . this picture, we were listening to the conversations, we knew Stanley Durham was going to this location, we were there to meet him when he arrived. He also called to verify what we were seeing [187].

Detective James said that at 5:39 p.m. on October 25, 2017, Durham told the Defendant that he was about to grab "that change" and head "your way." He also confirmed that at just after 6:11 p.m., Durham talked to the Defendant, asked if the Defendant was home, came to the Defendant's home, and the Defendant instructed him to come to his front door.

Detective James acknowledged that he did not have a video recording of what happened between Durham and Jackson at Jackson's apartment; however, he stated, "We monitored the phone calls and we knew what was going to take place according to the phone calls." Detective James also confirmed that his surveillance team followed Durham from Jackson's apartment to the Defendant's home, where he arrived at 6:11 p.m. on October 25, 2017. He stated that Durham did not make any stops between Jackson's apartment and the Defendant's home. He asserted that Durham was at the Defendant's home for less than five minutes and that after that, there was the conversation about "half time." In response to defense counsel's questioning, Detective James acknowledged that October was football season, with professional games played on Mondays and Thursdays nights and college football games played on other days of the week.

Detective James summarized the surveillance conducted on October 25, 2017:

> Our objective for this [surveillance] was to follow the money. At this point we knew the money was going to come from Courtney Malone earlier in the day. If you recall the conversation[,] Courtney wanted to go to his auntie's house to get the money. This deal was supposed to take place around three

> o'clock and Courtney Malone did not even make contact until, if I remember correctly, about four o'clock. Then that's when the trail started going from there, but it moved a little slow. They changed times, . . . meeting times, a couple of times. We followed Demarqual Jackson to Courtney Malone to pick up the money. Demarqual Jackson went back home. Stanley Durham then went to [Jackson's] apartment to pick up the money.

He added that the OCU then followed Durham "from [the Defendant's] home back to Demarqual Jackson's apartment[,]" where he stayed for approximately "five minutes." He said that the surveillance showed that when Durham left Jackson's apartment Durham went back to his own apartment. Detective James said that the OCU ended its surveillance of Durham when Durham returned home. He denied that Durham went home, was there a brief time, and then went to the Defendant's home to watch a football game.

Detective James explained that the term "Unc" was what "the younger dealers call[ed] an older—it's call[ed] an old head." He said that it was "a term of affection" that showed "respect" because the person was "older" and "more mature and wiser." Detective James asserted that "in this investigation there were two Uncs[,]" namely "Rodney Chism and [the Defendant]." He explained that "Courtney Malone did not know who [the Defendant] was" because it was a "way to safeguard the person that's supplying the [drug] chain." He added, "Everybody does not need to know who everybody is because it keeps everybody safe." Detective James said that Carlos Royal used the term "Unc" and that Royal knew who the Defendant was but did "not have direct contact with [the Defendant]" because Royal went "through Stanley Durham."

Defense counsel asked about Durham's text to Royal sent at 3:44 p.m. on October 25, 2017, which asked if Royal would be ready "before they go to work." Detective James said the "they" in that text referred to the Defendant. He also said that there was a call from Royal to Jackson at 4:49 p.m. on October 25, 2017, where they discussed how "these folks" had to be at work by 6:00 p.m. on October 25, 2017. He confirmed that "these folks" also referred to the Defendant. Detective James admitted that at 6:11 p.m. on October 25, 2017, the Defendant was at home, and not at work, when Durham called him and that the Defendant was also at home when Durham came to the Defendant's house a short time later. He also admitted that although the OCU followed the Defendant to his job, the OCU never contacted the Defendant's employer to determine whether the Defendant was scheduled to work on October 25, 2017 at 6:00 p.m.

Detective James stated that the scales found in the Defendant's home were "commonly seen in drug houses." When asked if the scales could be used by people who are on a diet to weigh their portions, Detective James replied, "In all my years of doing

search warrants, I've never seen [scales used by someone on a diet]—these are commonly used [to weigh drugs]. They're used all the time." He also said that he did not know what the substance was that he found in the Defendant's home that was identified as a cutting agent.

Detective James agreed that the OCU's theory was Durham picked up the drugs from the Defendant and that Durham then delivered the drugs to Jackson, who was a drug distributor. He confirmed that when the OCU executed the search warrant on Jackson's apartment, it found $75,000 in cash and narcotics. He acknowledged that the OCU did not execute a search warrant on Durham's home, so he was unable to testify about whether Durham had narcotics or cash at his residence. Detective James admitted that when the OCU executed the search warrant on the Defendant's home, it did not find a lot of cash and did not find even a trace of narcotics there. He also acknowledged that the Defendant's bank records showed that he had less than $1000 in his bank accounts.

On redirect examination, Detective James confirmed that the digital scale, which was found during the execution of the search warrant at the Defendant's home, was located on the bottom shelf of a bar.

During Detective James's redirect examination, a November 19, 2017 phone call between Royal and Durham was played for the jury. During this call, Royal wanted to get more of the same product that he received earlier, so he asked Durham "if they still have some hanging on there." Durham replied that he thought they were only "going to have gray," and Royal said that he was going to get someone to check it out that day. Detective James explained that "[h]eroin is gray" and "tan" and some drug users have "a different color that they like." He also said that Royal was saying that he would get one of his users to test the product out to make sure it was what they liked.

A second November 19, 2017 call between the Defendant and Durham was played for the jury. In it, Durham told the Defendant that Royal was going to try the product with one of his users later on to make sure the user liked it, and they made plans to meet later that day.

A third November 19, 2017 call was played for the jury, wherein Durham told Royal about the conversation he just had with the Defendant.

In addition, a November 19, 2017 text message was admitted, wherein Durham told the Defendant, "At the door." Detective James said that this meant Durham was at the Defendant's home to pick up heroin on November 19, 2017.

Detective James stated that, as requested by defense counsel, he had located the November 30, 2017 recorded call, wherein the Defendant said he knew he was being followed. This recorded call was played for the jury. Detective James then explained the OCU's surveillance that day:

> At that time we had decided to try to . . . take [the Defendant] down, tr[ied] to complete a deal. As so on this day we knew that [the Defendant] was going to make a transaction, somebody he was getting the narcotics from. Before he . . . got into a vehicle and left his house we got in the area to follow him to his next location. And as he was leaving his neighborhood he saw us following him and that's the call that you hear. The plan was to take him down the moment he got the drugs in his possession[,] but we had to pull back because he saw us and we could no longer complete that task.

Detective James acknowledged that the OCU executed the search warrant on Jackson's apartment on December 14, 2017, because the unit knew that Jackson "had a significant amount of narcotics in his possession." The OCU then executed the warrant on the Defendant's home the next day "to see if he had additional narcotics[,]" although they did not find any additional narcotics there.

Detective Ben Locke, with the Memphis Police Department, testified that on December 14, 2017, he executed the search warrant on Jackson's apartment. During this search, he discovered several substances that appeared to be narcotics, and he collected them and brought them to the Tennessee Bureau of Investigation (TBI) for testing.

Special Agent Rachel Strandquist with the TBI was accepted as an expert in forensic science. She testified that the tan powder she tested weighed 209.6 grams and containing heroin and fentanyl. She also said the eleven white tablets were Oxycodone. She confirmed that none of the six substances she tested were gray in color.

Following the close of the State's proof, the trial court during a jury-out hearing entered a "directed verdict" to redact the school zone enhanced penalty for the charged offenses, in light of the State's failure to satisfy its burden of proof based on the amendments to the Drug Free School Zone Act. See Tenn. Code Ann. § 39-17-432(b). The trial court later instructed the jury on the charged offenses without these enhanced penalties.

The Defendant did not testify on his own behalf at trial.

At the conclusion of trial, the jury convicted the Defendant of both counts. At the sentencing hearing, the trial court imposed a sentence of eighteen years for each count and then merged both counts, for an effective eighteen-year sentence.

Thereafter, the Defendant filed a premature, but considered timely, motion for new trial, contending that the circumstantial evidence offered by the State was insufficient to sustain his convictions, that although a "conversation relating to a November incident was . . . played to the jury over the objection of the Defendant," the disk of this conversation was not admitted as an exhibit, that the trial court erred in not replaying the October phone recordings and in telling the jury that it must rely on its memory of these recordings during deliberations, and that the trial court erred in refusing to grant a mistrial and in failing to give a curative instruction after the State asserted during its rebuttal closing argument that the Defendant never explained the "halftime" comment. Following a hearing, the trial court entered an order denying the motion for new trial. The Defendant then timely filed a notice of appeal.

ANALYSIS

I. Sufficiency of the Evidence. The Defendant argues that the evidence is insufficient to sustain both of his convictions because there was no clear evidence linking him to the cell phone used in the conspiracy. He asserts that even if this court concludes that there was sufficient proof showing that he was the person on the phone engaging in these conversations and texts, the evidence is still insufficient to support his convictions. Accordingly, the Defendant contends that based on the totality of this record, no reasonable jury could have convicted him of Counts 1 and 2 of the indictment. In response, the State argues that ample evidence established that the Defendant conspired to possess more than 150 grams of heroin with the intent to deliver and sell it. We agree with the State.

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." State v. Hanson, 279 S.W.3d 265, 275 (Tenn. Feb. 23, 2009) (citing State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)). "Appellate courts evaluating the sufficiency of the convicting evidence must determine '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.'" State v. Wagner, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. State v. Davis, 354 S.W.3d 718, 729 (Tenn. 2011).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Sutton, 166 S.W.3d 686, 691 (Tenn. 2005); State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). 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 Hanson, 279 S.W.3d at 275). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. State v. Campbell, 245 S.W.3d 331, 335 (Tenn. 2008) (citing Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, and the inferences to be drawn from this evidence and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury. Dorantes, 331 S.W.3d at 379. When considering the sufficiency of the evidence, this court "neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury." Wagner, 382 S.W.3d at 297 (citing State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997)).

"[T]he identity of the perpetrator is an essential element of any crime." State v. Miller, 638 S.W.3d 136, 158 (Tenn. 2021). The State has the burden of proving the identity of the defendant as the perpetrator beyond a reasonable doubt. State v. Cribbs, 967 S.W.2d 773, 779 (Tenn. 1998). Identity may be established by direct evidence, circumstantial evidence, or a combination of the two. State v. Thompson, 519 S.W.2d 789, 793 (Tenn. 1975). "The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made." State v. Radley, 29 S.W.3d 532, 537 (Tenn. Crim. App. 1999) (citing State v. Strickland, 885 S.W.2d 85, 87-88 (Tenn. Crim. App. 1993)). The identification of the defendant as the perpetrator is a question of fact for the jury after considering all the relevant proof. Strickland, 885 S.W.2d at 87.

Pursuant to Tennessee Code Annotated section 39-17-417(a)(4), it is an offense for a person to knowingly possess a controlled substance with intent to manufacture, deliver, or sell the controlled substance. Heroin is classified as a Schedule I controlled substance. Tenn. Code Ann. § 39-17-406(c)(11). "Knowing" refers to an individual

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

Id. § 39-11-302(b).

> In addition, a conspiracy exists when:
>
> two (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense.

Id. § 39-12-103(a). "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." Id. § 39-12-103(d). Conspiracy to possess 150 grams or more of heroin with the intent to deliver or sell is a Class A felony. Id. § 39-17-417(j)(1).

This court has described a conspiracy as "an agreement to commit a crime" and has stated that "a conspiracy requires a knowing involvement." State v. Shropshire, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993) (citations omitted). A conspiracy can be proven through circumstantial evidence:

> To prove a conspiracy, it is not necessary that the State show a formal agreement between the parties to do the unlawful act, but a mutual implied understanding is sufficient, although not manifested by any formal words, or by a written agreement. The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprise. Conspiracy implies concert of design and not participation in every detail of execution.

Randolph v. State, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978).

When addressing the circumstantial nature of the case at the motion for new trial hearing, the trial court stated:

> Yes, it was . . . for the most part circumstantial evidence. And the law does allow—it doesn't say you can only have direct evidence. It says you can have both. You can have direct or circumstantial evidence. You can have somebody come in and testify, yeah, we saw him delivering drugs. We saw

> him selling drugs. We observed him doing it. That would be direct evidence of drug dealing. But you can also have circumstantial . . . evidence that suggests that he was dealing drugs[,] although you don't actually see it.
>
> And when you have those telephone calls and you have the folks following Mr. Durham who was a codefendant in this case, and then following these folks where drugs and money were actually discovered, and you combine that with the telephone calls, it does point to guilt of the defendant of being involved in this conspiracy. It just—it does.

Here, the Defendant asserts that the evidence is insufficient to sustain his convictions because there was no proof linking him to the phones used in the offenses. Alternatively, he claims that even if this court concludes that he was the individual engaging in the phone conversations and text messages at issue, the proof is still insufficient to support his convictions. He notes that because the State's proof showed he was not at work at 6:00 p.m. on October 25, 2017, he could not be the drug supplier. He also asserts that the conversations and messages at issue were "quite vague" because they did not "clearly and specifically discuss illegal narcotics, money, or [drug] weight."

We conclude that the State presented substantial evidence that the Defendant conspired to knowingly possess 150 grams or more of heroin with the intent to deliver and sell it. The proof established that the Defendant was part of the conspiracy involving Malone as the street-level dealer, Jackson and Royal as the next-level dealers, Durham as their suppliers, and the Defendant at the very top of the chain.

Detective Hendricks testified that she bought heroin from someone called "Pharaoh," later identified as Courtney Malone, more than ten times in 2017, which was when the conspiracy in this case occurred. In addition, both Lieutenant Jackson and Detective James testified that the OCU received multiple complaints in 2017 that Malone was selling heroin and fentanyl in the medical district area of Memphis. This proof establishes that Courtney Malone was a street-level heroin dealer.

Regarding the next-level dealers that were one step up in the drug distribution chain, the State presented several phone conversations between Malone and Jackson, occurring on September 1-6, 2017, and October 19, 2017, which established that Malone was routinely obtaining heroin from Jackson. These conversations showed that Jackson sold 100 grams of heroin to Malone, so he could distribute it to his customers. In addition, these conversations showed that Jackson was clearly concerned about what Malone's customers said about his heroin and about how quickly Malone could sell additional amounts of heroin, which established an ongoing business relationship between them.

Going up one more step in the chain, several phone conversations and text messages from October 23-25, 2017, as well as police surveillance and photographs, showed the following: (1) Jackson and Royal anticipated getting additional heroin and wanted to ensure that everyone, including Malone had their money ready; (2) Malone and others provided Jackson with enough money to purchase half a kilo of heroin; (3) Royal communicated with Durham to set up the deal; (4) Durham went to Jackson's apartment to collect this money; and (5) Durham ultimately went to the Defendant's home to give the Defendant the money in exchange for the heroin.

Specifically, on October 23, 2017, Jackson and Royal discussed when Malone would have his money ready so they could complete the drug buy with the Defendant.

On October 24, 2017, Jackson and Royal discussed the possibility of having to move the drug buy to the following day in order to have time to collect all the money, Royal talked to Durham about when they would have the money, and then Royal called Jackson back to confirm that the drug buy would occur the next day.

On October 25, 2017, around noon, Jackson and Royal discussed when Malone would have the money from his aunt's home, and later that afternoon, Durham and Royal, and Royal and Jackson, communicated about when Jackson was to receive the last of the money from Malone. Still later, Durham communicated with the Defendant about how he was about to "grab on that change" and head his way. Photographs of Durham going into Jackson's apartment were admitted at trial. Thereafter, Durham confirmed with Royal that they were purchasing half a kilo of heroin, and Durham passed that confirmation on to the Defendant when he texted, "H[a]lf ti[m]e." Ten minutes later, Durham called the Defendant to let him know he was at the Defendant's house, and the Defendant told him to come to his front door. Police followed Durham to the Defendant's home, and photographs of Durham arriving at the Defendant's home were also admitted at trial. The evidence established that the OCU knew that it was the Defendant's phone that Durham had called and texted because the OCU had been monitoring that particular cell phone and had observed the Defendant and others acting in accordance with the conversations and text messages they had been monitoring.

Going back down the chain after the drug buy was completed, Durham stayed at the Defendant's home for less than five minutes, and the police followed him and photographed Durham immediately returning to Jackson's home. Durham texted Royal to let him know everything was okay. Then Royal texted Jackson to let him know that Durham was "on the way" to bring the heroin to Jackson's apartment and that Durham was "at the door" to Jackson's apartment. After Durham delivered the heroin to Jackson, he texted the Defendant a confirming "good," and the Defendant acknowledged the completion of the drug transaction by replying, "[O]k."

A few minutes later, Durham confirmed to Royal that the drug transaction involved "halftime," or half a kilo of heroin. Almost immediately thereafter, Royal told Jackson to "fix up" separate bags of 29 and 75 grams of heroin.

The next day, on October 26, 2017, Jackson sold 200 grams of heroin to Malone.

On December 14, 2017, the OCU executed a search warrant at Jackson's apartment. During the search, officer found individually bagged narcotics, some of which tested positive for 209.6 grams of heroin and fentanyl. They also found a digital scale, plastic baggies, a cutting agent to stretch the narcotics farther to make more money, and $76,000. On December 15, 2017, the OCU executed a search warrant at 416 Goodland Avenue, where they found a digital scale, a bowl with a powder substance that appeared to be a cutting agent, plastic baggies, vacuum sealed bags, and identification, bank records, a light bill, and tax documents in the Defendant's name.

The fact that Durham purchased "gray," another term for heroin, from the Defendant for Royal on November 19, 2017, further proves this drug conspiracy, although we conclude that there was sufficient evidence to sustain the Defendant's convictions, even without the proof regarding the November 19, 2017 drug transaction.

Interestingly, the Defendant does not challenge the fact that there was a conspiracy involving the phone that OCU determined belonged to him. Instead, he makes an identity argument, claiming that there was insufficient evidence linking him to the phone. Specifically, the Defendant claims that there was no proof that anyone saw him on the phone at the time he was allegedly engaged in the conversations and text messages at issue. He also asserts that no witnesses testified that they heard his voice on these phone calls, and no witnesses said his name during these calls. The Defendant also asserts that there was no proof that the cell phone at issue was registered to him through the phone company or that he lived at the 416 Goodland Avenue address. In addition, he emphasizes that no drugs were found at this address during the execution of the search warrant. The Defendant argues that even if this court concludes that he lived at the Goodland Avenue address, the State still failed to establish that he was the person on the phone making the drug deals.

The Defendant asserts that several of the items found at the 416 Goodland Avenue address fall short of establishing that he was living at that address. Specifically, he asserts that the bank statement recovered was from 1999 and contained no address, the federal tax return listed the Defendant's address as 3273 Yale Avenue, and the checkbook listed the Defendant's address a 4250 Plum Valley Cove. He claims these documents suggest that he could have been living somewhere other than 416 Goodland Avenue. While the Defendant acknowledges that several items found at this address contained his name and

the 416 Goodland Avenue address, including an undated piece of mail from the Lending Company, a 2010 bank document, and an expired driver's license, he asserts that "[t]he mere fact that these documents were found at the Goodland address does not prove that [he] ever lived at the Goodland address and certainly does not prove that he was living at the Goodland address in October 2017." Instead, the Defendant claims that it is "more logical to conclude that Martha Johnson was the person living at the Goodland residence" because the utility bill found at the home was addressed to her. Although the Defendant contends that no evidence conclusively connected him to the phone in question or established that he lived at the 416 Goodland Avenue home, we conclude that a rational jury could have found that it was the Defendant who was on the phone on October 25, 2017, telling Durham that he was home and instructing him to go to the front door of the house at 416 Goodland Avenue that contained the Defendant's driver's license, tax returns, bank statements, and mail, many of which listed 416 Goodland Avenue as the Defendant's address.

We next address the Defendant's claim that even if this court concludes that he was, in fact, the individual on the phone engaging in the texts and phone calls at issue, the evidence is still insufficient to sustain his convictions because the phone conversations and text messages were vague and never "clearly and specifically discuss[ed] illegal narcotics, money, or [drug] weight." We note that the jury had heard substantial testimony from Detective James, who was accepted as an expert in the field of narcotics investigation, regarding the meaning of various terms used in the texts and phone calls admitted at trial. The jury, as was its prerogative, simply accredited Detective James's expert testimony concerning the meaning of the terms used in these calls and texts over the defense's evidence and argument to the contrary. We will not re-weigh this evidence. Wagner, 382 S.W.3d at 297.

Lastly, the Defendant argues the evidence is insufficient because in the October 25, 2017 phone calls and text messages, Durham and Royal talk about the drug supplier having to be at work at 6:00 p.m., referring to this supplier only as "they" and "these folks," and the State presented proof that the Defendant let Durham into his home after 6:00 p.m. The Defendant argues that the fact that he was not at work at 6:00 p.m. suggests that he was not the drug supplier for this operation. However, the jury, by its verdicts, resolved any conflicts in this evidence in favor of the State. See Campbell, 245 S.W.3d at 335.

Viewing all the evidence in the light most favorable to the State, a rational jury could have found beyond a reasonable doubt that the Defendant conspired with Durham, Royal, Jackson, and Malone to possess more than 150 grams of heroin with the intent to sell it and to possess more than 150 grams of heroin with the intent to deliver it. We likewise conclude that at a minimum, Durham, Jackson, and Malone committed several overt acts in

furtherance of the conspiracy. Because the evidence is sufficient to sustain these convictions, the Defendant is not entitled to relief on this issue.

II. New Evidence During Redirect Examination. The Defendant also contends that the trial court abused its discretion in allowing the State, during its redirect examination of Detective James, to present proof of the phone conversations concerning the November 19, 2017 drug transaction. He asserts that the trial court's error was not harmless because the November 19, 2017 phone call between the Defendant and Durham contained comments that were extremely damaging to him. He also claims that if this phone call had not been played for the jury, then it is more probable than not that the jury would have acquitted him on both counts. See Tenn. R. App. P. 36(b). The State responds that the Defendant waived this issue by failing to raise it in either his original or amended motion for new trial and that the Defendant failed to establish all five factors required for plain error relief. See Tenn. R. App. P. 3. We conclude that the defense opened the door to this evidence, and that even if this was not the case, the trial court acted within its discretion in allowing the State to ask Detective James on redirect about the November 19, 2017 drug transaction.

The Defendant specifically argues that the defense never "opened the door" to this evidence during its cross-examination of Detective James. Instead, he claims that Detective James effectively opened the door by volunteering this evidence at trial and that the trial court rewarded Detective James's inappropriate behavior by allowing the State to play the November 19, 2017 phone conversations for the jury. Alternatively, the Defendant asserts that even if the defense somehow opened the door to this evidence, the trial court erred in allowing the State to play the November 19, 2017 phone recordings, rather than simply allowing Detective James to testify about the November 19, 2017 drug transaction. He also asserts that this proof was not admissible as an omitted question by the State.

The State, on direct examination, asked Detective James if the Defendant had more than one phone involved in this drug operation, and Detective James replied that the Defendant actually used two cell phones. He said that the Defendant used the first phone during the October 25, 2017 drug transaction and that the Defendant used his second phone in later drug transactions after the Defendant realized that he was under surveillance by law enforcement. Detective James stated that the OCU's plan was to "verify [the Defendant] and take him into custody during one of his other drug transactions." However, he explained,

> During this transaction our surveillance was compromised and [the Defendant] saw us. We heard him discussing hi[s] seeing us during this, so we pulled back. That drug transaction was not completed, so we were unable to take him down and locate drugs actually in his possession at that time.

[The Defendant] also talked about not wanting to use the phone anymore because he saw the police following him at that time.

Thereafter, the trial court asked the parties to approach the bench, and the following exchange occurred:

Trial Court: Now, is there any evidence of this—this transaction, drug transaction, that he said was not completed?

[State]: There's more calls about that, yeah.

Trial Court: Well, I mean, he has to establish that there was another drug transaction. He just can't say that without establishing that.

[State]: I'll try to get to the point.

Trial Court: Okay.

Following this bench conference, Detective James testified that after this incident in which the Defendant observed law enforcement, the Defendant began using a different cell phone.

During Detective James's cross-examination, defense counsel asked him where in all the recorded conversations did the Defendant talk about observing the surveillance, and Detective James said, "I can play the phone calls for you. Yes, sir." Defense counsel then said, "You find it—because you didn't read that [conversation] to the jury yesterday; did you?" and Detective James replied that the "[t]he packet that I showed you and the calls that we heard were just a small, small snippet of the information that we provided." Defense counsel then stated, "Well, you said you're going to be able to find that for us. I'm going to ask you to do that at some point today; okay?"

As defense counsel's cross-examination of Detective James continued, the following exchange occurred:

Q. [L]et me ask you then because we spent a whole lot of time about the timeline. And there's a date of significance, October the–is it 25th? Am I right without looking at my note[s]?

A. What's your question?

Q. Is it October 25th, was that the date where the conversations between the defendant and Mr. Durham take place?

A. They have conversations many more days than that.

Q. Well, we're talking about drug transactions.

A. Okay.

Q. Was that October 25th?

A. We have a drug transaction on October 25th. **I also have drug transactions in November also that I can play for you also if you would like to hear it. I can explain that drug transaction from front to back just like the other ones.**

Q. Okay.

A. **On November the 19th.**

Q. All right. And I -- and I appreciate that. Is that something else you forgot to tell the jury about yesterday?

A. I did not–

Q. One of those small snippets. I'm sorry.

A. I did not forget to tell you all about the case. But, again, there's a lot of information that–that we can listen to.

Q. Okay. Let me say, sir, if you will listen to my question and answer my question we'll move a little faster.

Trial Court: Just ask the question, [Defense Counsel].

Near the end of this cross-examination, defense counsel mentioned that there were "a couple of things" Detective James was going to look up for him, and the trial court asked that the jury be excused. Thereafter, the following discussion occurred during the jury-out hearing:

Trial Court: [Defense Counsel], hold on . . . what is the question that you have for the witness he can be working on? The question you had–

[Defense Counsel]: The two questions he was going to find in there that he–

Trial Court: What are those two questions so we know what they are?

[Defense Counsel]: He heard [the Defendant] say that he had picked up on surveillance.

[The State]: I found those calls.

[Defense Counsel]: And that's when he changed [cell phones]–

Trial Court: Okay. And what was the second one?

[The State]: The second [was the] drug deal from November 19th.

[Defense Counsel]: Right.

[The State]: I found those too.

When the jury returned to the courtroom and cross-examination resumed, defense counsel asked a few questions about a couple of phone calls and text messages from October 25, 2017, and about the search warrants that were executed on December 14-15, 2017, but never asked about the recording of the phone call when the Defendant remarked that he was being followed by law enforcement or the recordings of the calls regarding the November 19, 2017 drug transaction.

During the State's redirect examination of Detective James, the following exchange occurred:

[The State]: Detective, do you recall being asked on cross-examin[ation] about another possible deal that . . . this group was trying to participate in on November the 19th?

[Defense Counsel]: May we approach?

Trial Court: Okay.

(Bench conference commenced.)

[Defense Counsel]: Sorry. I misplaced it. I'm looking for it.

May it please the Court, my recollection is [Detective James] wasn't asked about it. The witness volunteered that, among many things in his testimony.

Trial Court: Okay. What's the question going to be to the witness?

[The State]: Well, the full picture. The full picture was counsel asked oh, and you can provide those calls and you can provide those line sheets in this investigation. And then we adjourned for 10 or 15 minutes so he could find those things and present them. I found them. Your request for adjournment was based on the fact that you wanted these two things answered.

Trial Court: That's my recollection.

[Defense Counsel]: The point was that the proof from the State up to this point revolves around and relates to transactions October 25th. In that area.

Trial Court: Correct.

[Defense Counsel]: [Detective James] throws in or volunteers things. He wasn't asked. He threw in things about this was said and that was said. Obviously from a Defense standpoint we believe it's got to relate to what the proof the State has presented was, which is relating to the October 25th.

[Detective James] then goes on to talk about transactions [on] November the 19th, which there wasn't one bit of proof in this record about it. There wasn't one [bit of] testimony.

[The State]: He opened the door to it.

. . .

Trial Court: Has there been any proof about a [November 2017 drug] transaction?

[The State]: Not yet.

Trial Court: Okay.

[The State]: But there's been a discussion about it.

Trial Court: [W]hat . . . are you trying to ask the witness now? What are you—

[The State]: I'm going to show him the transaction that counsel asked for.

Trial Court: Tell me about the transaction. What is it?

[The State]: There was a [drug] transaction spoke[n] about on November the 19th.

Trial Court: Tell me about it.

. . . .

[The State]: . . . Mr. Royal asked . . . Mr. Durham if they still have some more of that laying around. "They" being [the Defendant]. Stanley [Durham] says, "Yeah, I think so. So they're talking about acquiring even more drugs. . . .

Trial Court: Now, who is "they"? "They" are talking.

[The State]:	Stanley Durham . . . and Carlos Royal. Then Stanley Durham calls [the Defendant] and asked him if he has any more of that. They have a lengthy conversation about the color of it.
Trial Court:	All right. The jury will be excused. Y'all can step out.

During the jury-out hearing, the trial court asked the court reporter to allow it to listen to defense counsel's cross-examination of Detective James in order to decide whether defense counsel asked questions about the November 19, 2017 drug transaction. After hearing the recording, the trial court made the following ruling:

> All right. All the parties are present. I was not able to locate what was the exact testimony that was testified to, so I'm going to allow this. I'm going to allow . . . the State to ask a question about the November transaction even—either it was brought up in the course of cross-examination. And if it was not directly brought up, I think that I'll allow it as an omitted question; okay? [The prosecutor is] still in his case in chief, so there's no problem with asking that question. So he will be allowed to ask the witness . . . .

When the State continued its redirect examination of Detective James, it played three phone calls that occurred on November 19, 2017, for the jury. The first call was between Royal and Durham, wherein Royal was attempting to obtain more of the same product he had received earlier, so he asked Durham "if they still have some hanging on there." Durham replied that he thought they were only "going to have gray," and Royal said that he was going to get someone to check it out that day.

The second call was between Durham and the Defendant, wherein Durham asked the Defendant for more drugs and the two discussed the color of the drug and how the Defendant could change the color of the drug. During this conversation, the Defendant asserted that he could have the product ready in less than an hour.

A third November 19, 2017 call was played for the jury, wherein Durham told Royal about the conversation he just had with the Defendant.

There was also a text message admitted from Durham to the Defendant on November 19, 2017, which stated, "At the door." Detective James asserted that this text

message meant that Durham had arrived at the Defendant's home at 416 Goodland Avenue to pick up the heroin.

In his motion for new trial, the Defendant argued in paragraph two:

> Defendant respectfully submits that this Court erred in permitting the State to present an expert witness in summarizing, interpreting and translating numerous telephone conversations between individuals where Defendant Derrick Johnson's name or identification was not mentioned nor was Defendant a party to such conversations, all of which was permitted over the timely objection of the Defendant. Moreover, said expert was permitted to testify as to the single conversation played for the jury in which Defendant was a party during the October incident as well as certain texts between the Defendant and a Co-Defendant. The disk containing the numerous conversations of Co-Defendants, but not the texts, was admitted into evidence and therefore available to the jury. **Though [a] conversation relating to a November incident was likewise played to the jury over the objection of the Defendant, the disk of these conversations was not introduced nor made a part of the evidence**.

Regarding the State's assertion that this issue is waived, the Defendant contends that because he argued in his motion for new trial that he objected to the State's playing for the jury the conversation regarding the "November incident," he properly preserved the issue of whether the trial court abused its discretion in allowing the State to present evidence regarding the November 19, 2017 drug transaction during its redirect examination of Detective James. While the issue identified in the Defendant's motion for new trial is somewhat unclear, we nevertheless conclude that it is sufficient to preserve this issue for review.

Here, the Defendant rejects the State's claim that he opened the door to the proof regarding the November 19, 2017 drug transaction. He asserts that defense counsel never asked Detective James about the November 19, 2017 transaction and only asked about the October 25, 2017 drug transaction but that Detective James "took it upon himself to volunteer information about the November 19, 2107 transaction." Alternatively, the Defendant claims that the trial court abused its discretion when it allowed the State to inquire into the November 19, 2017 drug transaction as an omitted question, even if defense counsel had not opened the door. The Defendant maintains that because the State chose to only put on proof of the Defendant's involvement in the October 25, 2017 drug transaction, the State did not inadvertently omit the November 19, 2017 drug transaction during its direct examination of Detective James. Consequently, the Defendant asserts that the trial

court should not have allowed the State to put on proof of the November 19, 2017 drug transaction during its redirect examination of Detective James.[1]

"'[O]pening the door' is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence." State v. Vance, 596 S.W.3d 229, 250 (Tenn. 2020); State v. Gomez, 367 S.W.3d 237, 246 (Tenn. 2012). "[T]he remedy sought after a party has opened the door should be both relevant and proportional," and "the otherwise inadmissible evidence sought to be introduced by the opposing party should be limited to that necessary to correct a misleading advantage created by the evidence that opened the door." Vance, 596 S.W.3d at 250-51. In other words, a person who opens the door by raising a particular issue at trial "'expand[s] the realm of relevance,' and the opposing party may be permitted to present evidence on that subject." Gomez, 367 S.W.3d at 246 (internal citations omitted).

We conclude that the defense opened the door to the evidence regarding the November 19, 2017 drug transaction when defense counsel asked Detective James for the date of the drug transactions, and Detective James replied that a drug transaction took place "on October 25th" but that there were also "drug transactions in November" that he could play for him. Defense counsel also opened the door to proof regarding the November 19, 2017 drug transaction when, near the end of Detective James's cross-examination, defense counsel mentioned that there were "a couple of things" Detective James was going to look up for him. During the related jury-out hearing, defense counsel acknowledged that the November 19, 2017 drug transaction was one of the things Detective James was going to look up for him. Because the record shows that defense counsel opened the door to this evidence, the State was free to ask Detective James on redirect examination about the November 19, 2017 drug transaction.

Moreover, even if defense counsel somehow did not open the door to this evidence, we conclude that the trial court did not abuse its discretion in allowing the State to ask Detective James on redirect about the November 19, 2017 drug transaction. See State v. Chearis, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999) ("The admissibility of testimony and other evidence, as well as the scope of redirect examination, is within the discretion of the trial court, whose ruling will not be reversed absent an abuse of that discretion."). "[I]t is within the discretion of the trial court to allow a party on redirect examination to supply testimony omitted by oversight, or to clarify testimony given on direct examination, or, where the facts thus developed are not inconsistent with his previous answers to ask a witness to expand his testimony." State v. Barnard, 899 S.W.2d 617, 624 (Tenn. Crim.

[1] The Defendant acknowledges that defense counsel opened the door to the November 30, 2017 phone call, wherein the Defendant is allegedly saying that he is being followed by law enforcement, by asking Detective James to retrieve that phone call.

App. 1994) (citing 98 C.J.S., Witnesses, § 419, at 223). The trial court also has discretion to allow a witness on redirect to testify about new facts that were not mentioned during direct or cross-examination. State v. Clayton, 535 S.W.3d 829, 861 (Tenn. 2017). Because Detective James's testimony regarding the November 19, 2017 drug transaction "can be seen as a clarification or expansion of [his] testimony on direct" specifically referencing the Defendant's later drug transactions, we conclude that the trial court did not abuse its discretion in allowing the State to ask Detective James about it. Barnard, 899 S.W.2d at 624.

Lastly, even if the admission of Detective James's testimony about the November 19, 2017 drug transaction was error, we conclude the Defendant has failed to establish that that the trial court's error "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); see State v. Rodriguez, 254 S.W.3d 361, 375 (Tenn. 2008) (applying harmless error review to trial court's erroneous admission of evidence). Even without the evidence of the November 19, 2017 drug transaction, judgments in this case would not have been affected.

III. Failure to Replay Recordings for Jury. The Defendant argues that the trial court abused its discretion by failing to replay the October 25, 2017 phone recordings for the deliberating jury and claims that this error is not harmless. He asserts that because these phone recordings were admitted as exhibits, the trial court should have allowed the jury to listen to them. He also maintains that a "fair reading of the record shows that defense counsel's objection was to the replaying of the November 2017 phone calls, not the October 25, 2017 phone calls." The State counters that the Defendant "invited the claimed error by agreeing that the court should inform the jurors to rely on their recollection" and that "any error in failing to re-play the phone calls was harmless." We conclude that the Defendant came perilously close to waiving this issue by not objecting after the trial court held that the jury would have to rely on its memory for both the October and November 2017 conversations involving the Defendant. In any case, we conclude that if the trial court committed error in failing to play the October phone calls, this error was harmless.

After the State rested its case-in-chief and the Defendant's Momon hearing had been completed, the following exchange occurred during a jury-out hearing:

> [The State]: I realize I neglected to enter as an exhibit any kind of storage device that has those [November 2017] calls that were played to the jury during my redirect of Detective Ian James, but I propose to create a disc that includes those . . . records.

Trial Court: And mark it as an exhibit?

[The State]: And mark it as an exhibit.

[Defense Counsel]: And my response to that would be the State rested its case. It's up to the State to mark into evidence whatever they want to. . . .

Trial Court: I thought y'all had made an agreement. Y'all don't have an agreement on it? Okay.

[Defense Counsel]: . . . And while I don't question it might be an accurate recording, it's not part of the evidence that was introduced in the State's case in chief . . . so I object to a disk being put in at this time as an exhibit.

Trial Court: I'm going to sustain that. You have no witness to put it in through. He's rested and so I'm going to sustain it.

Immediately prior to the jury beginning its deliberations, the trial court made the following statement to the jury:

> Now, we do have a number of exhibits. We'll give those exhibits to take back with you. There w[ere] some tapes that were played during the trial. We are working on our new jury room so that you can listen to those things back in the back, but right now you cannot. If you want to hear an exhibit just write down which one you want to hear and we'll bring you back in the courtroom and play it for you; okay?

After the jury had been deliberating for short period of time, the following exchange occurred:

Trial Court: All right. Lawyers, I received a question from the jury. A request rather. And it reads: We would like to listen to all phone call conversations that [Defendant] was involved in. Okay? Can that be set up?

[The State]: Yeah, if I can do it.

. . . .

[Defense Counsel]: The ones that are the exhibits. That's correct.

Trial Court: What do you mean the ones that are exhibits?

[Defense Counsel]: If the Court may recall, they played some conversations from November [2017 that] were not made exhibits to the evidence, were not put in the record.

Trial Court: Okay. I remember that. Those are telephone calls to [the Defendant]?

[Defense Counsel]: Yes, your Honor. There were—I think there were one or two—and I'm not looking at my notes—that are in November [2017]. And those were played for the jury [during Detective James's redirect examination] but the disc was not placed into evidence. And therefore I'd submit that what they can hear is what's in the evidence that they took back to the jury room, and that would be the disc of the phone [conversations]—otherwise, they've got to rely on their recollection and notes.

Trial Court: How do you respond to that?

[The State]: I think [defense counsel] is accurate . . . well, let me say I have those [November 2017 conversations], I can play them, but he's accurate as far as they have not been admitted into evidence. . . .

. . . .

[Defense Counsel]: If they're asking for the phone conversations in which [the Defendant]'s involved, if they want to clarify and s[ee] text messages as well, you

know, but the fact is I think they're limited to what evidence is admitted.

[The State]: I mean, I'm fine just telling them they're going to have to use their notes and memory.

Trial Court: [Defense counsel], are you fine with that?

[Defense Counsel]: Yes, your Honor. They're going to have to go with their memory is my position.

[The State]: Because really there's –

Trial Court: That's just opposite of what I told them, but bring them in.

. . . .

(At 11:04 a.m., the jury returned to the courtroom and the following proceedings were had:)

Trial Court: . . . [N]otwithstanding what I said earlier about the tapes, you will have to go with your recollection as to what you think the conversations were; okay? There are technical reasons why; okay? All right. The jury be excused.

Upon hearing this statement from the trial court, defense counsel raised no additional objections.

In the motion for new trial, the Defendant alleged the following with regard to this issue:

> . . . [D]uring the jury deliberations, the jury specifically asked to hear the recordings [involving the Defendant] and the Court had previously assured them that this would be made available. Upon reviewing the written request **and upon the Defendant's objection to replaying any recording of the November incident as it had not been admitted into evidence, the Court simply told the jury that they must rely on their memories and did not allow them to hear the October recordings.** Defendant

> respectfully notes that the quality and clarity of the recordings was poor and difficult to comprehend, but was the basis of the State's expert's interpretation and testimony to the jury and therefore the basis of the State's "circumstantial" case.

At the motion for new trial hearing, the trial court provided the following oral ruling regarding this issue:

> [The jury] asked to hear the tape [of the recorded phone conversations involving the Defendant] during deliberations, because I had already told [the jurors] that they are free and able to listen to all of the tapes and request all the exhibits. And we were told that one of those conversations[, the November 2017 conversation involving the Defendant,] had not been marked into evidence and there's no way the jury could see it. Well, that doesn't . . . mean there was an error committed. Just means that that evidence was not available for them to listen to during deliberations. That quite frankly, I think helps the defense because that evidence was damning to the defense.
>
> That—the telephone call that I remember that I felt that was damning was this conversation about graying. There was some testimony or some testimony that was referenced to dope [being the color] gray. And my recollection was that's what those telephone calls that we don't have in evidence were talking about. I thought that hurt the defense. And the State now having marked [the October 2017 recorded conversations] as an exhibit, I thought that helped the defense. They couldn't hear it. So I don't think that was error, and I don't think it hurt the defense.

The Defendant argues that the trial court abused its discretion by failing to replay the October 25, 2017 phone recordings for the jury. He claims that because these phone recordings were introduced as an exhibit, the trial court should have allowed the jury to listen to them. He also asserts that a fair reading of the record shows that he objected to the replaying of the November 2017 phone calls, not the October 25, 2017 phone calls. The Defendant also contends that this error is not harmless because the substance of the October 25, 2017 recorded phone calls were vague. See Tenn. R. App. P. 36(b). He claims that if the jury had been allowed to rehear these phone calls, then it would have been reminded "how scant the proof was against the Defendant in this case," and the jury, more probably than not, would have acquitted the Defendant of both counts. See State v. Long, 45 S.W.3d 611, 625 (Tenn. Crim. App. 2000).

Here, there were only two October 25, 2017 phone calls involving the Defendant, one that occurred at 5:39 p.m. and another that occurred at 6:11 p.m. on October 25, 2017. Although the State acknowledges that the trial court should have replayed these two phone calls for the jury, it argues that the Defendant is not entitled to relief on this issue because he invited this error. See State v. Garland, 617 S.W.2d 176, 186 (Tenn. Crim. App. Feb. 10, 1981); see Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). The record shows that after discussing which of the Defendant's phone calls had been admitted and therefore were available to replay for the jury—namely the two October 25 calls but not the November 19 calls—the prosecutor suggested that the trial court instruct the jury that they would have to use their notes and memory. Before implementing the State's suggestion, the trial court checked with defense counsel, who replied, "They're going to have to go with their memory is my position." The State asserts that defense counsel never made a distinction between the October 25 phone calls and the November 19 phone calls, which were not in evidence that therefore could not be replayed. Instead, the State asserts that defense counsel "gave blanket approval to the prosecutor's proposal." After carefully evaluating the record on this issue, we conclude that while the Defendant came perilously close to waiving this issue by not re-raising the issue when the trial court told the jury it would have to rely on its memory for both the October and November 2017 conversations involving the Defendant, we will nevertheless review this issue on the merits.

The State also argues that the Defendant is not entitled to relief given that more probably than not, the trial court's failure to replay the two October 2017 phone calls in which the Defendant was a party did not affect the judgments and did not result in prejudice to the judicial process. See Tenn. R. App. P. 36(b). The State asserts that prior to commenting on the two calls at trial, Detective James "repeated word-for-word what the [D]efendant and Mr. Durham said." Consequently, the State insists that the jury knew the contents of the calls independent of hearing the calls themselves. In addition, the State argues that the Defendant's guilt was compelled by the proof, aside from these calls, and that replaying the calls would have only resulted in further harm to the Defendant. It notes that the Defendant's own text messages admitted that he was selling "half time," or half a kilo of heroin, to Durham and that the heroin had been delivered back down the drug distribution chain following the sale. The State also asserts that it further proved the conspiracy through the evidence of undercover heroin purchases from Malone, phone calls among the different members of the conspiracy, text messages among the different members of the conspiracy, and photographs of Durham at the pivotal steps of picking up the money from Jackson, picking up the heroin from the Defendant, and then delivering the heroin to Jackson. The State argues that this evidence clearly established that the street-level dealer, Malone, provided Jackson with the money to purchase half a kilo of heroin

from the Defendant on October 25 and that the heroin was then delivered back down the distribution chain for Malone to sell.

Tennessee Rule of Criminal Procedure 30.1 provides, "Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence." Tenn. R. Crim. P. 30.1. The Advisory Commission Comment to Rule 30.1 states:

> This rule, applicable in criminal cases, is mandatory unless the judge, either on motion of a party or sua sponte, determines that an exhibit should not be submitted to the jury. Among the reasons why a particular exhibit might not be submitted are that the exhibit may endanger the health and safety of the jurors, the exhibit may be subjected to improper use by the jury, or a party may be unduly prejudiced by submission of the exhibit to the jury.

Tenn. R. Crim. P. 30.1, Advisory Comm'n Cmt.

A trial court's decision to allow a deliberating jury to examine exhibits is reviewed under an abuse of discretion standard of review. State v. Davidson, 509 S.W.3d 156, 203 (Tenn. 2016); see State v. Smith, 993 S.W.2d 6, 32 (Tenn. 1999). In State v. Jenkins, 845 S.W.2d 787, 793 (Tenn. Crim. App. July 17, 1992), this court stated:

> We believe that the decision to allow a jury to review any evidence submitted at trial, whether it be an exhibit or testimony, should be left within the discretion of the trial court as limited by ABA Standard 15–4.2 in its entirety. The full standard is as follows:
>
> > (a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to reexamine the requested materials admitted into evidence.
> >
> > (b) The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its

> discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> Under this standard the trial court would have the discretion to take such action as necessary, including denying the jury's request, to insure that the jury's determination of a factual issue would not be distorted by undue emphasis on particular evidence.

Here, the trial court decided to replay neither the October 2017 nor November 2017 conversations involving the Defendant after it determined that the November 2017 conversation, which was initially played to the jury during Detective James's testimony, was never entered as an exhibit.

The record indicates that the trial court likely made this decision in an attempt to ensure that the jury's determination of the relevant facts would not be distorted by undue emphasis on the October 2017 conversations, without the benefit of the November 2017 conversation. The trial court specifically noted at the conclusion of the motion for new trial hearing that it felt the November 2017 conversation was the most damning for the defense and the October 2017 conversations, that were entered exhibits, helped the defense. Given these facts, the trial court could have found that the State may have been "unduly prejudiced" by submission only of the October 2017 conversations involving the Defendant. See Tenn. R. Crim. P. 30.1, Advisory Commission Cmt. Accordingly, we conclude that the trial court did not abuse its discretion in denying the jury's request to rehear the October 2017 conversations involving the Defendant.

Even if the trial court's failure to replay the October 2017 recorded conversations involving the Defendant was somehow error, this error is harmless. The Defendant cites Long, 45 S.W.3d at 625, for the proposition that the jury's rehearing of the October 2017 recordings involving the Defendant would have reminded the jury of "just how scant the proof was against" him. However, as detailed above, the proof of the Defendant's guilt, while mainly of a circumstantial nature, was substantial. Moreover, Long is distinguishable from the Defendant's case. In Long, "[t]he concerns voiced by the Advisory Commission [we]re not present" and there was no "other legitimate reason why the tape should not have been re-played." Id. However, in the Defendant's case, the record suggests that the trial court was concerned either that the State might be unduly prejudiced by replaying just the October 2017 conversations to the jury or that the jury might place undue emphasis on the October 2017 conversations if the jury was unable to also rehear the November 2017 conversation involving the Defendant. In any case, the jury heard all the recordings of the October 2017 conversations to which the Defendant was a party during trial and then heard Detective James's almost word-for-word recounting of the

October 2017 conversations during his testimony. Because any replaying of the two October 25, 2017 phone calls involving the Defendant merely supplemented the other significant evidence of the Defendant's guilt, we conclude that any error in preventing the jury from re-hearing these calls was harmless.

IV. Denial of Mistrial. The Defendant contends that the trial court abused its discretion in denying his motion for a mistrial after the prosecutor, during its rebuttal closing argument, improperly commented on the Defendant's constitutional right to remain silent. The State responds that the trial court properly refused to grant a mistrial because (1) the prosecutor's argument did not amount to a comment on the Defendant's failure to testify, (2) the trial court provided an appropriate curative instruction, (3) the jury charge instructed the jury that it could not place significance on the Defendant's failure to testify, and (4) strong proof "compelled the jury's verdicts." We conclude that the trial court properly denied the motion for a mistrial.

The Defendant acknowledges that the State had a right, during its rebuttal closing argument, to tell the jury that Detective James never testified that a football game was being played on October 25, 2017. However, he contends that the State's argument, that no proof had been offered regarding the specific game being played on that date, necessitated a mistrial because this statement constituted a comment on the Defendant's failure to testify and identify which football game he was watching on October 25, 2017. The Defendant claims he was the only person who could have offered proof that he was watching football the night of October 25, 2017.

The Defendant also argues that the trial court's erroneous denial of his request for a mistrial was not harmless beyond a reasonable doubt. He claims that because the prosecutor's remarks were made during rebuttal closing argument, the defense had no opportunity to mitigate the damage caused by the State. He also asserts that the trial court's special instruction the following day was detrimental to him because it highlighted the Defendant's silence, which he claims was worse than if the trial court had given its special instruction the same day as the State's rebuttal closing argument. The Defendant insists that if the State had not commented on his failure to testify, the jury would have acquitted him on both counts in light of the State's purely circumstantial evidence.

During the cross-examination of Detective James, defense counsel asked him whether it was true that college and professional football games were played the month of October, and Detective James agreed this was true. During the defense's closing argument, defense counsel asserted, "First of all, Mr. Durham said 'half time' to him. The officer said well, that in the trade means half a kilo. You know what? Half time also means half time." A short time later, defense counsel argued during his closing, "Well, what about

watching Mr. Durham? Did he come back? Even the expert says yes, football is on tonight."

During its rebuttal closing argument, the State made the following comments:

> Now, is it more reasonable to believe that this man is innocent based on everything you've heard? Or is it more reasonable to believe that once he figures or thinks that he's under surveillance and being looked at that he might clean out his residence, leaving only the scales and a small bag of cutting agent? As far as being [on] Jenny Craig on a diet, again, who keeps their supplements in [a] twist off, torn off sandwich bag in the closet and then keeps [their] scales under the bar?
>
> **And did anybody hear what game was being played on October the 25th? Or is that just a red herring? Half time, yards, hundred. Does anybody know what game was played that night?**

Defense counsel immediately asked to approach, and at the ensuing bench conference, the following exchange occurred:

[Defense Counsel]:	I believe that makes reference to defendant's silence. They asked—the question was asked of the witness if there was a football game. The State's witness. He didn't know, he didn't remember. He acknowledged there were games on. Defendant had no obligation to testify that it was a game that night. For the State to argue as they have I submit is a comment on his failure to testify or silence and I would respectfully move for a mistrial.
Trial Court:	How do you respond to that?
[The State]:	He asked the question. He put it out there. Was there a game[?] I don't know if there was or not.
Trial Court:	Okay. I don't think that it implicates his right to remain silent, so I'm going to overrule your objection.

Later, during its final jury charge, the trial court provided the following instruction:

> Defendant not testifying. The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. He is presumed innocent and the burden is on the State to prove him guilty beyond a reasonable doubt. He is not required to take the stand in his own behalf and his election not to do so cannot be considered for any purpose against him nor can any inference be drawn from such fact.

The next day, just before the jury began its deliberations, the trial court provided the following curative instruction to the jury:

> Let me take care of a couple of housekeeping matters. Yesterday[, the State] made a statement in response to something [defense counsel] said about presenting no proof of a football game. Either side may present proof or evidence in the case, okay, but the State has the burden of proof at all times. Defendant is not required to put on any proof and he's certainly not required to testify, as I told you; okay?

Thereafter, at the motion for new trial hearing, the trial court made the following oral ruling pertaining to this issue:

> The request for a mistrial based on the statement that . . . [the State] said during closing argument, [which was] in response to [defense counsel] saying we don't have any evidence where there was a football game going on at the time or this conversation about halftime. The inference being that it could've been a conversation about a football game. And then [the State] got up in closing statement and said something like, Well, we hadn't heard any proof from the other side about halftime. And [defense counsel] objected to it and I overruled the objection.
>
> And of course, the defendant does not have any burden. [The] State has the burden at all times, and the defendant certainly is not required to testify. And although I didn't instruct the jury at that time, the next day before they deliberated, I did tell them that—I mentioned the conversation

> that [the State] had and said that either side can put on proof if they so choose to, . . . but the State is the one required to prove this case. The State has the burden at all times, and I told them that.
>
> Defense is not required to prove anything. The defendant does not have to testify. So I think that—if there was some mistake by [the State], and I'm not sure that it was because he was responding to what [defense counsel] said [in closing], I think I've sufficiently explained that to the jury so that it was not error.

"'The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict.'" State v. Reid, 164 S.W.3d 286, 341-42 (Tenn. 2005) (quoting State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)). The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Nash, 294 S.W.3d 541, 546 (Tenn. 2009); State v. Robinson, 146 S.W.3d 469, 494 (Tenn. 2004). A trial court should declare a mistrial "only upon a showing of manifest necessity." Robinson, 146 S.W.3d at 494 (citing State v. Saylor, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "'In other words, a mistrial is an appropriate remedy when a trial cannot continue, or a miscarriage of justice would result if it did.'" Saylor, 117 S.W.3d at 250 (quoting State v. Land, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000)). The party seeking a mistrial has the burden of establishing the necessity for a mistrial. Reid, 164 S.W.3d at 342 (citing Williams, 929 S.W.2d at 388).

The United States and Tennessee constitutions protect a defendant's right to remain silent. U.S. Const. amend. V; Tenn. Const. art. I, § 9. "While closing argument is a valuable privilege that should not be unduly restricted, . . . comment upon a defendant's exercise of the state and federal constitutional right not to testify should be considered off limits to any conscientious prosecutor." State v. Jackson, 444 S.W.3d 554, 590 (Tenn. 2014) (citations and internal quotation marks omitted). Both direct and indirect comments on a defendant's failure to testify can violate this right. Id. at 587.

The Tennessee Supreme Court outlined "a two-part test for ascertaining whether a prosecutor's remarks amount to an improper comment on a defendant's exercise of the constitutional right to remain silent and not testify." Id. Under this test, this court must consider: "(1) whether the prosecutor's manifest intent was to comment on the defendant's right not to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify." Id. at 588. Claims of impermissible prosecutorial comment on a defendant's right not to testify are reviewed de novo. Id. A prosecutor's comment on a defendant's right to remain silent is a non-structural constitutional error, and to avoid reversal, the State has the burden

of establishing that the error is harmless beyond a reasonable doubt. Id. at 591. When determining whether the State has met its burden, this court "should consider the nature and extensiveness of the prosecutor's argument, the curative instructions given, if any, and the strength of the evidence of guilt." Id. (footnote omitted).

The record shows that the prosecutor's argument was made in response to the defense counsel's claim during closing that (1) Durham's statement of "half time" to the Defendant did not refer to half a kilo of narcotics but referred to half time of a football game and (2) Detective James testified that football was on that night. The prosecutor then stated, "And did anybody hear what game was being played on October the 25th? Or is that just a red herring? Half time, yards, hundred. Does anybody know what game was played that night?"

Here, it does not appear that the prosecutor's manifest intent was to comment on the Defendant's right not to testify. See id. at 588. Based on the transcript of closing arguments, the prosecutor's comment and behavior in the Defendant's case were not nearly "as direct or animated as those of the prosecutor in Jackson." State v. Colvett, 481 S.W.3d 172, 208 (Tenn. Crim. App. 2014). The prosecutor never argued that the Defendant should have testified about the game he was watching the night of October 25. See Jackson, 444 S.W.3d at 589.

We also do not believe that the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify. Id. at 588. The prosecutor made his comment regarding the lack of evidence of a football game to highlight the State's uncontradicted proof that "halftime" referred to half a kilo of drugs, not to comment on the Defendant's decision not to testify on his own behalf. The record shows that the prosecutor's comment, which was brief and isolated, was simply a response to the defense's argument that Durham and the Defendant were talking about a football game rather than drugs. We note that "prosecutorial responses to defense arguments are clearly permitted[.]" Id. at 587; State v. Sutton, 562 S.W.2d 820, 823-24 (Tenn. 1978) ("Where the criminal defendant raises an issue in his defense, he cannot complain of references to the issue by the prosecution, or argument on that issue, so long as the argument is fairly warranted by the facts and circumstances of the case."). Moreover, a prosecutor is free to argue reasonable inferences from the evidence presented at trial. See State v. Thomas, 818 S.W.2d 350, 364 (Tenn. Crim. App. 1991) (reiterating that "[m]ere argument by the State that proof on a certain point is unrefuted or uncontradicted is not an improper comment upon a defendant's failure to testify" (citation and internal quotation marks omitted)); United States v. Collins, 78 F.3d 1021, 1040 (6th Cir. 1996) (stating that a prosecutor "must be given leeway to argue reasonable inferences from the evidence" and "[w]here there is conflicting testimony, it may be reasonable to infer, and accordingly to argue, that one of the two sides is lying").

We also note that the trial court's jury charge and its later curative instruction made it clear that the Defendant was not required to present any proof at trial and that a Defendant's failure to present proof could not be held against him. See Jackson, 444 S.W.3d at 588. The jury is presumed to have followed the trial court's instructions. State v. Banks, 271 S.W.3d 90, 137 (Tenn. 2008); Robinson, 146 S.W.3d at 494; Reid, 164 S.W.3d at 346. We recognize that proof of a football game being played on October 25, 2017 was not known only to the Defendant and could have come in through any witness. We agree with the State that "there is no reason why the jury would necessarily have taken the prosecutor's argument as referring to the failure of the [D]efendant—as opposed to all the other witnesses—to provide the information." The State rightly notes that "the prosecutor did not point to the absence of evidence that the [D]efendant was watching football that evening; the prosecutor pointed more generally to the absence of evidence that a football game was played that evening," which was "evidence that any witness could have supplied." Finally, we reiterate that the evidence of the Defendant's guilt in this case was substantial.

Because it does not appear that the prosecutor's manifest intent was to comment on the Defendant's right not to testify or that the jury would necessarily have taken the prosecutor's brief remark to be a comment on the Defendant's failure to testify, we conclude that this comment was not error. However, even if the prosecutor's comment was somehow error, it was most certainly harmless beyond a reasonable doubt in light of the substantial proof of the Defendant's guilt, the isolated nature of the prosecutor's comment, and the trial court's charge and curative instruction. Accordingly, the trial court did not abuse its discretion in denying the Defendant's motion for a mistrial.

V. Sentencing. Lastly, the Defendant argues that the trial court abused its discretion in imposing an effective eighteen-year sentence. Specifically, he asserts that the trial court misapplied enhancement factors (6) and (9) and failed to consider some of the mitigating evidence offered by the defense. He also claims his sentence was "greater than that deserved for the offenses committed" and was not "the least severe measure necessary to achieve the purpose for which the sentence [was] imposed." Tenn. Code Ann. § 40-35-103(2), (4). Accordingly, the Defendant requests a sentence of fifteen years as a Range I offender. The State counters that the trial court properly sentenced the Defendant to a within-range sentence after determining that three enhancement factors and no mitigating factors applied. Alternatively, it contends that even if the trial court misapplied an enhancement factor, the Defendant's sentence is not invalidated because the sentence did not wholly depart from the sentencing act. We conclude that the trial court did not abuse its discretion in imposing the Defendant's effective eighteen-year sentence.

Pursuant to State v. Bise, 380 S.W.3d 682, 707 (Tenn. 2012), this court reviews sentencing decisions under "an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." The 2005 amendments to the sentencing act "served to increase the discretionary authority of trial courts in sentencing." Id. at 708. In light of this broader discretion, "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed." Id. at 706. The amendments to the sentencing act also "rendered advisory the manner in which the trial court selects a sentence within the appropriate range, allowing the trial court to be guided by—but not bound by—any applicable enhancement or mitigating factors when adjusting the length of a sentence." Id.

Although the application of these factors is advisory, a court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114." Tenn. Code Ann. § 40-35-210(b)(5). In addition, the trial court must place on the record "[w]hat enhancement or mitigating factors were considered, if any," as well as "[t]he reasons for the sentence" in order to "ensure fair and consistent sentencing." Id. § 40-35-210(e).

Pursuant to the 2005 amendments to the sentencing act, a trial court must consider the following when determining a defendant's specific sentence:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
> (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.
> (8) The result of the validated risk and needs assessment conducted by the department and contained in the presentence report.

Id. § 40-35-210(b). The defendant has the burden of showing the impropriety of the sentence on appeal. Id. § 40-35-401, Sentencing Comm'n Cmts. The trial court shall impose "a sentence justly deserved in relation to the seriousness of the offense[.]" Id. §

40-35-102(1). The court must also consider the defendant's potential for rehabilitation or treatment. Id. §§ 40-35-102(3)(C), -103(5). In addition, the court must impose a sentence "no greater than that deserved for the offense committed" and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Id. §§ 40-35-103(2), (4).

At the sentencing hearing, Detective Ian James testified that the Defendant was "at the top of this drug trafficking organization." He explained that there were so few conversations between the Defendant and the other co-conspirators because the Defendant was "insulated from the street-level dealers." He added that while law enforcement would hear hundreds or thousands of deals at the street level, on the Defendant's level officers would hear "very few [deals], one or two a month." Detective James said that the Defendant communicated only with Stanley Durham, who "filtered information down to the street-level guys," which was how the Defendant "insulated himself."

Detective James noted that the Defendant earned only $40,000 a year as a forklift operator but lived in a large home, which led him to conclude that the Defendant was living beyond his means. However, he admitted that the OCU never investigated the economic status of the person on the deed to the home where the Defendant was living. He also said that after the Defendant commented during a November 2017 call that he believed he was being followed by police, the Defendant bought a new car and changed his phone number, which was indicative of someone engaging in illegal activity. Detective James acknowledged that there were fatal and non-fatal overdoses from heroin in this investigation, but because there were two supply lines for heroin, the overdoses could not be directly attributable to the Defendant.

On cross-examination, Detective James said that while there were probably some drug cartels who were supplying the large amounts of drugs to the Defendant, he was unable to identify the members of these drug cartels, despite wire tapping the Defendant's phones. He also acknowledged that he and the OCU never determined how the Defendant might have acquired the heroin and fentanyl to distribute it and admitted that no narcotics were found in the Defendant's home when the search warrant was executed.

Detective Timothy Bogue with the OCU testified that in 2017, he started to see "a large uptick in overdoses in the medical district area" of Memphis. At the time, many of the victims of these non-fatal overdoses said they had purchased the drugs from Pharaoh, who was later identified as Courtney Malone. He stated that Malone was "the street-level distributor . . . for heroin and fentanyl that was ultimately obtained and sourced through [the Defendant]."

Detective Bogue said that in 2016, there were forty-seven non-fatal overdoses and nine fatal overdoses in the medical district area. He added that in 2017, there were eighty non-fatal overdoses, which represented a "big uptick," and eleven fatal overdoses in the same area. In 2018, during the six-month period after the co-conspirators in this case had been arrested, there were only eight non-fatal overdoses and two fatal overdoses in the same area. In addition, during the entire year of 2018, there were twenty-one non-fatal overdoses and seven fatal overdoses in the same area. He asserted that the investigation and arrest of the co-conspirators in this case had an "incredibly drastic" effect on non-fatal and fatal overdoses in this area. Detective Bogue said that he began seeing the combination of heroin with fentanyl around the end of 2017 to the middle of 2018 and that it was this mixture of heroin and fentanyl that correlated with the jump in fatal and non-fatal overdoses. A computerized graph depicting these statistics was admitted as an exhibit at the sentencing hearing.

The Defendant, as a Range I, standard offender was subject to a sentencing range of fifteen to twenty-five years at thirty percent for his Class A felony convictions for conspiracy to possess with intent to sell more than 150 grams of heroin and for conspiracy to possess with intent to deliver more than 150 grams of heroin. See id. §§ 39-12-103, 39-17-406(c)(11), 39-17-417(j)(1), 40-35-112(a)(1).

The trial court stated that it had considered the proof presented at trial, which consisted mainly of Detective James "testifying to the conversations he heard and his observations from conducting surveillance" of the individuals in this case. The court also considered Detective James's testimony at the sentencing hearing as well as the information in the presentencing investigation report.

The trial court noted that the Defendant was fifty-nine years old, had a work history, had completed a high school education and some college, and had family in Memphis, some of whom were presented at the sentencing hearing. The court stated that the Defendant's criminal history consisted of "driving without a license, a reckless driving, . . . simple possession twice, and violation of the mud flap law." The court noted that the "violation of the mud flap law" appeared to be "a felony because he got one year for it" and that this conviction was apparently the Defendant's only felony. The court noted that while the Defendant did not have a "really serious criminal history," it had nevertheless considered his history. The court said it also considered "the nature of the criminal conduct[,]" which involved "the sale and delivery of large amounts of illegal drugs."

The court applied enhancement factors (1), (6), and (9) to the convictions. The trial court applied factor (1), that the Defendant had "a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range," based on the Defendant's criminal history. See id. § 40-35-114(1). The court also applied

enhancement factor (6), that "[t]he personal injuries inflicted upon . . . the victim was particularly great," based on evidence of the drug overdoses in the Memphis medical arts district, where Courtney Malone sold the heroin mixed with fentanyl. See id. § 40-35-114(6). The court noted that it specifically considered Detective Bogue's testimony in applying this enhancement factor, noting that "prior to the arrest of the defendants in this case there were a lot of overdoses in that area" and that after the arrest of these defendants, "there was a significant drop in overdoses in that area." While the court recognized that someone other than Malone could have been selling drugs in this area, it held that "circumstantially" it appeared that these defendants "did impact that area" with their mixture of heroin and fentanyl, which was "just deadly." Lastly, the court applied enhancement factor (9), that the Defendant "possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense," because a gun was found "near or around him at the house," which was "enough for an enhancement for possession of a weapon." See id. § 40-35-114(9). The court declined to apply any mitigating factors in this case.

The trial court recognized that it had to impose a sentence that was no greater than what was deserved and the least severe measure to achieve the purpose for which the sentence was imposed. Thereafter, it sentenced the Defendant as a Range I, standard offender to an effective sentence of eighteen years.

First, the Defendant asserts that the trial court misapplied enhancement factor (6), that "[t]he personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great[.]" He claims that the State failed to present evidence specifically linking the Defendant's drugs to the overdoses. He also argues that although Detective Bogue testified that the victims of the non-fatal overdoses attributed them to Courtney Malone, Detective James testified at trial that both Rodney Chism and the Defendant were the primary suppliers in the chain that eventually passed the drugs down to Courtney Malone. After carefully considering Detective Bogue's testimony at sentencing, which detailed the dramatic reduction in overdoses in the relevant area following the Defendant's arrest in this case, we conclude that the trial court did not err in applying enhancement factor (6).

Second, the Defendant claims that the trial court misapplied enhancement factor (9), that the Defendant "possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense[.]" He asserts that the State failed to show that he possessed a gun during the commission of the offense and argues that the mere existence of a gun at 416 Goodland Avenue does not prove that he possessed the gun. The Defendant claims the State failed to prove that he lived at 416 Goodland Avenue or that he committed a criminal offense at that address. He also argues that no

drugs were found at that address. Consequently, the Defendant argues that the State failed to prove that the he possessed a gun during the commission of these offenses.

As to this factor, the prosecutor noted that law enforcement had "found a pistol in [the Defendant's] home when they executed the search warrant." Although defense counsel acknowledged that a gun was found at that residence during the search, he argued that there was "no proof of who owned the gun" or of "who else lived at that residence" and there was no proof that there were any drugs near that gun inside the residence. He reminded the court that law enforcement did not find even the residue of drugs inside this residence and that there was "nothing to indicate that drugs and that gun had been anywhere near one another." The trial court ultimately found that although the gun was not found on the Defendant's "person," it was found "near or around him at the house," which was "enough for an enhancement for possession of a weapon."

In determining whether the trial court properly applied enhancement factor (9), we note that several documents, including the Defendant's driver's license, tax returns, bank statements, and mail, were found at 416 Goodland Avenue where the gun was recovered. Accordingly, we conclude that there was sufficient evidence to support the court's finding that the Defendant lived at this address and possessed the gun during the commission of the drug offenses in this case. We also note that even if the trial court misapplied enhancement factors (6) and (9), "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." Bise, 380 S.W.3d at 706.

While the Defendant admits that the trial court properly applied enhancement factor (1), he asserts that his criminal convictions occurred between 1985 and 1995, which was more than two and a half decades ago. See Tenn. Code Ann. 40-35-114(1). He also asserts that most of his criminal history consists of misdemeanor offenses and that there are no violent convictions on his record. We note that this court has upheld the trial court's application of enhancement factor (1) based on a defendant's history of misdemeanor convictions, which included several convictions for traffic offenses among others, and the defendant's regular use of marijuana. See State v. Mitchell, No. M2013-00265-CCA-R3-CD, 2013 WL 6388405, at *9 (Tenn. Crim. App. Dec. 4, 2013). In addition, this court has rejected a defendant's claim that a misdemeanor record should receive less weight than a felony record. State v. Franklin, No. M2018-01958-CCA-R3-CD, 2020 WL 4280692, at *24 (Tenn. Crim. App. July 27, 2020). Here, the Defendant's criminal history consisted of one felony and several misdemeanors. Based on this criminal history, we conclude that the trial court properly applied enhancement factor (1) and was free to give it any weight that it thought appropriate.

The Defendant additionally asks this court to consider that he is fifty-nine years old, graduated from high school, attended some college, and has a strong employment history. Even if the trial court should have given weight to this mitigating evidence, we "cannot reverse a sentence based on the trial court's failure to adjust a sentence in 'light of applicable, but merely advisory, mitigating or enhancement factors.'" State v. Carter, 254 S.W.3d 335, 346 (Tenn. 2008).

The Defendant's eighteen-year sentence was within the appropriate range and was consistent with the purposes and principles of the sentencing act. Although the Defendant claims the trial court failed to abide by Code section 40-35-210(c) in imposing his sentence, we conclude that the trial court made sufficient findings regarding the applicable enhancement factors and that the Defendant's sentence was not excessive given the proof at trial and sentencing. Accordingly, we conclude that the trial court did not abuse its discretion in imposing the sentence in this case. The Defendant is not entitled to relief.

As a final note, we detect some clerical errors in the judgment forms that require correction. The judgment forms for Counts 1 and 2 state only that Count 1 is merged with Count 2, that Count 2 is merged with Count 1, and that "Counts 1 & 2 are merged" in the Special Conditions box for each judgment; however, these judgment forms do not state which conviction is the greater or surviving conviction following the merger of the convictions. In a case such as this one, when two convictions merge, it is proper for the trial court to determine which conviction is the greater or surviving conviction. See State v. Berry, 503 S.W.3d 360, 364 (Tenn. 2015) (order for publication summarily granting the application of the defendant under Rule 11 of the Tennessee Rules of Appellate Procedure and reversing a portion of the judgment of the Tennessee Court of Criminal Appeals) ("The judgment document for the greater (or surviving) conviction should reflect the jury verdict on the greater count and the sentence imposed by the trial court. The judgment document for the lesser (or merged) conviction should reflect the jury verdict on the lesser count and the sentence imposed by the trial court. Additionally, the judgment document should indicate in the 'Special Conditions' box that the conviction merges with the greater conviction. To avoid confusion, the merger also should be noted in the 'Special Conditions' box on the uniform judgment document for the greater or surviving conviction."). Accordingly, we remand this case to the trial court for entry of corrected judgment forms in Count 1 and Count 2. On remand, the trial court should impose separate sentences for the convictions in Count 1 and Count 2; should place these sentences on separate, completed judgment forms; and should note in the "Special Conditions" box on each judgment form whether Count 1 or Count 2 is the greater or surviving conviction following merger. See id.

CONCLUSION

The case is remanded for entry of corrected judgment forms in Counts 1 and 2 as specified in this opinion. In all other respects, the judgments of the trial court are affirmed.

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CAMILLE R. MCMULLEN, PRESIDING JUDGE