

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2023 Session

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Appellate Courts

STATE OF TENNESSEE v. TAVARIUS GOLIDAY

**Appeal from the Circuit Court for Montgomery County
No. 63CC1-2019-CR-61 William R. Goodman, III, Judge**

No. M2022-00378-CCA-R3-CD

The Defendant, Tavarious Goliday, was convicted in the Montgomery County Circuit Court of first degree premeditated murder, conspiracy to commit first degree murder, and reckless endangerment with a deadly weapon and received an effective sentence of life in confinement. On appeal, the Defendant contends that the trial court erred by overruling his objection to evidence about a gang-related tattoo on his hand and that the evidence is insufficient to support his convictions. Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court but remand the case for correction of the judgment of conviction as to count one, first degree murder.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed,
Case Remanded**

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and TOM GREENHOLTZ, JJ., joined.

Stephanie Ritchie Mize (on appeal and at trial), Clarksville, Tennessee, for the appellant, Tavarious Goliday.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Robert G. Nash, District Attorney General; and J. Lee Willoughby and Kaila Browning, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

In June 2017, the Montgomery County Grand Jury indicted the Defendant and Michael Mimms for the first degree premeditated murder of Antonio Henson. Additionally, the grand jury charged the Defendant, Mimms, Davayon Head, and Kevonte

White with conspiracy to commit first degree premeditated murder and charged the Defendant alone with reckless endangerment with a deadly weapon. The Defendant, codefendant Mimms, and codefendant Head were tried jointly in January 2020.¹

At trial, Sergeant Joel Gibbons of the Clarksville Police Department (“CPD”) testified that on January 21, 2017, he was dispatched to Kellogg Street for a possible shooting. When he arrived, he saw a large crowd of fifty to seventy-five people. Two police officers were helping the victim, who was lying on the road. Sergeant Gibbons knew the victim by the nickname “Tinka.” After the victim was put into an ambulance, officers began trying to talk with people who may have seen the shooting. On cross-examination, Sergeant Gibbons testified that he learned three women were with the victim at the time of the shooting.

Agent Joshua Smith of the CPD testified that he primarily worked drug cases and that he responded to the scene. The shooting occurred near a house that was equipped with a video surveillance system, and Agent Smith collected a digital video recorder from the house.

Dr. Miguel Laboy of the Regional Forensic Center in Nashville testified as an expert in forensic medicine that he performed the victim’s autopsy. The victim sustained one gunshot to his back and one gunshot to his left arm. The bullet to his back perforated his spleen, stomach, diaphragm, left lung, and heart. The bullet to his arm perforated his skin and humerus. Dr. Laboy recovered both bullets. He said that the bullet wound to the victim’s back was fatal and that the victim’s cause of death was the gunshot wounds. According to Dr. Laboy’s autopsy report, the manner of death was homicide.

Detective Frederick McClintock of the CPD testified that he was the lead detective in this case and that the shooting involved a known “drug house” on Kellogg Street, which was a high crime area. The drug house was equipped with two video surveillance cameras: one mounted on the front of the residence and one mounted on the back of the residence. The front camera recorded the front yard, Kellogg Street, and a dirt parking lot across the street from the house. Another dirt parking lot was to the left of the house and out of the camera’s view. The rear camera recorded the back door. Detective McClintock obtained the recording for both cameras. He also obtained the victim’s cellular telephone, which showed that the victim and “Codeine,” who turned out to be codefendant Head, exchanged text messages before the shooting. The texts indicated that codefendant Head had supplied Brice Moore with pills and that the victim had stolen some of the pills from Moore.

¹ On August 1, 2022, this court entered an order, noting that certain original trial exhibits were included in codefendant Mimms’s appellate record but not the Defendant’s appellate record. This court stated in the order that it would take judicial notice of the original exhibits in *State v. Michael Mimms*, No. M2021-00383-CCA-R3-CD, 2022 WL 2821355 (Tenn. Crim. App. July 20, 2022), as necessary for consideration of the issues raised by the Defendant. *See State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009) (stating that this court may take judicial notice of its own records).

Detective McClintock testified that through his investigation, he identified two vehicles used by the defendants and witnesses: a white Lexus SUV and a maroon Chevrolet Malibu. The Lexus belonged to Kirstie Reynolds, who was codefendant White's girlfriend, and the Malibu belonged to Dani Bell, who was the Defendant's girlfriend.

The State played the surveillance video from the drug house for the jury while Detective McClintock narrated what was depicted in the video. The video showed the victim walking to the drug house from the dirt parking lot across the street. He walked down the driveway and toward the back door. Detective McClintock said that people usually went to the back door to buy drugs. Shortly thereafter, the front camera recorded the Malibu and the Lexus driving on Kellogg Street from right to left. Codefendant White could be seen driving the Lexus. After the Lexus and the Malibu passed the drug house, the Defendant approached the drug house on foot from the left, the direction in which the Malibu was last seen, and walked toward the back door. The rear camera recorded the Defendant, who was wearing a toboggan, brown North Face jacket, shorts, and boots, knocking on the door. The victim was standing nearby, but the Defendant and the victim did not have any contact with each other. The victim walked toward the front of the house while the Defendant remained at the back door and tied his boots. A couple of seconds later, the Defendant followed the victim toward the front of the house. The front camera captured the victim walking to the right on Kellogg Street and out of view. The Defendant walked to the front yard, and Detective McClintock noted that a scar could be seen on the Defendant's left cheek. The Defendant walked to Kellogg Street and looked toward the victim but turned left and walked in the opposite direction as the victim. The Defendant continued walking to the left and out of the camera's view. He was walking in the direction that the Malibu was last seen. About one minute later, the Malibu traveled on Kellogg Street from left to right and in the same direction as the victim.

The front camera then showed the victim walking back into view on Kellogg Street from right to left. The victim stopped briefly in front of the drug house and continued walking to the left and out of the camera's view. About fifteen minutes later, the Malibu traveled from right to left and in the same direction as the victim. Presumably, the Defendant parked the Malibu in the dirt lot to the left of the house. Less than one minute later, the Defendant walked on Kellogg Street from left to right and off the screen. Codefendant Mimms also walked from left to right on Kellogg Street and stopped in front of the drug house, where he was joined by the Defendant. Codefendant Mimms and the Defendant talked with each other and walked off screen together in the same direction as the victim and the parked Malibu. About one minute later, the victim ran from left to right on Kellogg Street, looked back over his left shoulder, and collapsed on the street in front of the drug house. Three eyewitnesses to the shooting, two of whom were later identified as Shanice and Lucretia Merriweather, ran to the victim. Surveillance video from a nearby business recorded the Malibu traveling from the direction of the shooting within minutes of a 911 call about the shooting.

After the State finished playing the video, Detective McClintock testified that the Merriweathers were cooperative throughout the investigation and that they told him the following: They saw the victim around the corner from Kellogg Street before the shooting. They started walking with him toward the drug house and saw a gray or silver car “come down the road.” The car slowed, and the driver pulled out a revolver and shot the victim several times. The victim ran, and the Merriweathers ran after him. Detective McClintock said the Merriweathers could not name the shooter. He showed them several photograph arrays, and they made several misidentifications.

Detective McClintock testified that the text messages in the victim’s cellular telephone led law enforcement to codefendant Head and that he interviewed codefendant Head in the Warren County Jail in Kentucky. During the interview, codefendant Head claimed that he sold orange Opana pills; that he provided some of the pills to Brice Moore so that Moore could sell them; and that the victim, who codefendant Head referred to as “Tinka,” failed to pay Moore for two pills. Codefendant Head said he exchanged text messages with the victim prior to the shooting but never admitted to being involved in the victim’s death. Codefendant Head talked about codefendant White and identified the white Lexus in the surveillance video. The State played codefendant Head’s audio-recorded interview for the jury.

Detective McClintock testified that codefendant Head’s interview led him to Brice Moore; codefendant White; and codefendant White’s girlfriend, Ms. Reynolds. Detective McClintock spoke with Moore but was unable to locate Moore for the Defendant’s trial. Deputies in Warren County, Kentucky, helped Detective McClintock locate codefendant White and Ms. Reynolds at a home on Ida Drive in Bowling Green. The white Lexus from the Kellogg Street video was parked in the driveway, and the police arrested codefendant White and Ms. Reynolds on unrelated charges. Detective McClintock interviewed them separately and deceived them to get them to reveal information about the shooting. Codefendant White told Detective McClintock “the entire story of his involvement,” and codefendant White’s and Ms. Reynolds’s stories “were very close with the exception of a couple things that Mr. White [only had] knowledge of.” Detective McClintock learned that the gun used to shoot the victim was in a pond on the Ida Drive property, so a dive team searched the pond and recovered the weapon. The firearm was a nine-shot .22-caliber revolver and was loaded with one round.

Detective McClintock testified that another officer interviewed codefendant Mimms, who denied any involvement in the victim’s death. Detective McClintock interviewed the Defendant, who also initially denied involvement. As the Defendant’s interview progressed, though, he admitted to seeing the victim, being with codefendant Mimms, being on Kellogg Street, driving the Malibu by the victim, and driving away. Detective McClintock seized the Malibu and had it processed for possible fingerprints, DNA, weapons, and gunshot residue.

On cross-examination, Detective McClintock acknowledged that the Merriweathers were close to the shooter's car and that they said the car was gray or silver. He also acknowledged that someone in another car could have shot the victim. However, he said that he thought the Merriweathers were incorrect about the color of the car and that he thought the car involved in the shooting was the maroon Malibu. The State's theory was that the Defendant was driving the Malibu, that the Defendant shot the victim, and that codefendant Mimms was the Defendant's passenger. Detective McClintock said he thought the Malibu was parked in the dirt lot beside the drug house just prior to the shooting. The police found tire tracks in the lot and made impressions of the tracks, but the tracks did not match the tire tread on the Malibu. On redirect examination, Detective McClintock testified that this case was unusual in that it was the only murder investigation he had ever worked in which the murder weapon was a .22-caliber firearm.

Dani Bell testified that in January 2017, she was dating the Defendant and worked at The Dairy Mart. It was not unusual for the Defendant to borrow her car, a Chevrolet Malibu, while she was working. On January 21, Ms. Bell worked from 10:00 a.m. to 4:00 p.m., and the Defendant borrowed her car. The Defendant picked up Ms. Bell from work, and codefendant Mimms, who was the Defendant's best friend, was with the Defendant. The Defendant never said anything to Ms. Bell about the shooting.

Shanice Merriweather testified that she was friends with the victim but that she was afraid to testify against the defendants because she still lived in the same community where the shooting occurred. On January 21, 2017, Shanice was walking with her two sisters, her young son, and the victim on Kellogg Street.² A gray car drove toward them, the driver pulled out a gun, and Shanice stated, "Who the [f*ck] is these [n*gg*rs]?" The driver immediately started shooting, and Shanice called 911.

Regarding the color of the car, Shanice testified, "I know what I saw. I mean, I saw a gray car." A few days before trial, the State played the surveillance video from the drug house for Shanice, and she identified the Defendant in the video as the shooter. She said she recognized the Defendant as the shooter by his "hat."

On cross-examination, Shanice testified that at the time of the shooting, the shooter was wearing a hoodie with the hood pulled up over the hat. The police interviewed Shanice multiple times after the shooting. She acknowledged that she made several misidentifications and that she was unable to identify the shooter until she watched the surveillance video a few days before trial.

Lucretia Merriweather testified that she went to school with the victim and that she was present when the victim was shot. She explained, "We were walking down the street

² Because two of the witnesses share a surname, we will refer to them by their first names for clarity. We mean no disrespect to the witnesses.

just having a conversation and this car pulled up and just let out shots.” She said that she thought the color of the car was gray but that “it happened so fast.” She acknowledged that she was not sure about the color of the car. A few days before trial, the State showed Lucrettia and her sister the surveillance video from the drug house. Lucrettia said she recognized the Defendant as the shooter in the video by “[t]he hat he was wearing.”

On cross-examination, Lucrettia acknowledged telling police officers that she was sure the shooter’s car was light gray or silver. She also acknowledged giving a statement in which she said the shooter was wearing a gray hoodie. She did not mention in her statement that the shooter was wearing a toboggan or that he had a scar on his face. The police made a sketch of the shooter from Lucrettia’s description, and the Defendant introduced the sketch into evidence.

Codefendant White testified that he currently was serving an eight-year prison sentence for four counts of aggravated robbery and that the Defendant was his cousin. On January 21, 2017, codefendant White drove Ms. Reynolds from Bowling Green to Clarksville in Ms. Reynolds’s white Lexus SUV. When they got to Clarksville, they picked up codefendant Head and learned that some pills had been stolen by the victim. Codefendant White, Ms. Reynolds, and codefendant Head met up with the Defendant and codefendant Mimms, who were in a separate car, and the five of them drove the two vehicles to a neighborhood known as “the bricks” to confront the victim. They left the neighborhood and planned to go back later, but Ms. Reynolds talked codefendant White out of returning. Codefendant White said that the Defendant and codefendant Mimms left and that he did not know where they went. However, the Defendant later told codefendant White that he shot the victim.

Codefendant White testified that he and Ms. Reynolds returned to Bowling Green and went to his aunt’s house. The Defendant was there and left his gun, a revolver, on a dresser. Codefendant White told Ms. Reynolds to get the gun, so Ms. Reynolds took the gun and put it in her Lexus. Subsequently, codefendant White threw the gun into a pond at Ms. Reynolds’s parents’ house.

On cross-examination by the Defendant, codefendant White testified that he did not kill anyone. He pled guilty to the four counts of aggravated robbery and agreed to testify against the Defendant in exchange for an eight-year sentence. He acknowledged telling the police that the Defendant claimed the Defendant shot the victim three times in the chest. He also acknowledged that the Defendant did not know the victim.

On cross-examination by codefendant Head, codefendant White acknowledged that codefendant Head was riding in the white Lexus with codefendant White and Ms. Reynolds on January 21 and that codefendant Head did not return to the bricks neighborhood with the Defendant and codefendant Mimms to confront the victim. Codefendant White also acknowledged that codefendant Head was not part of any conspiracy to shoot the victim.

He said he did not remember telling the police that the Defendant claimed the Defendant shot the victim to become a member of the Gangster Disciples.

Special Agent Shelly Carman of the Tennessee Bureau of the Investigation (“TBI”) Crime Laboratory testified as an expert in firearms analysis that she test-fired the revolver recovered from the pond and that another special agent conducted microscopic analysis on the test-fired bullet and the two bullets recovered from the victim. One bullet recovered from the victim was too damaged for a comparison; however, the second bullet was intact. The second bullet was a .22-caliber long rifle bullet, and it shared the same class characteristics as the revolver. The bullet also shared similar individual characteristics as the test-fired bullet, but the similarities were insufficient for a conclusive determination that the bullet was fired from the revolver.

Special Agent Russell Davis of the TBI testified as an expert in gunshot residue that he analyzed the Defendant’s brown North Face jacket and swabs collected from the maroon Malibu for gunshot residue. Agent Davis did not find any gunshot residue on the jacket, but he found gunshot residue inside the Malibu. Specifically, gunshot residue was on the driver’s door and the driver’s seat, meaning that those areas were near a gun when the gun was fired or that those areas came into contact with a recently-fired gun or cartridge case.

Kirstie Reynolds testified that she was codefendant White’s girlfriend and that she met the Defendants through him. On January 21, 2017, codefendant White was driving Ms. Reynold’s white Lexus and was showing her around Clarksville. They picked up codefendant Head at his mother’s house, and Ms. Reynolds heard codefendant White and codefendant Head talking about missing money or pills. The three of them were smoking marijuana and met the Defendant, who was driving his girlfriend’s “burgundy’ish” car. Codefendant Mimms was riding with the Defendant. The five of them parked the two cars, and the Defendant appeared to go into a house. He then came running back to his car, and they drove away. Codefendant White told Ms. Reynolds that “they needed to handle some business.” He wanted to drop her off somewhere, but she knew something bad was about to happen and “[j]ust tried talking common sense into him.” The Defendant and codefendant Mimms left in the burgundy car, but codefendants White and Head did not go with them. Ms. Reynolds said that the Defendant was driving and that codefendant Mimms was his passenger.

Ms. Reynolds testified that she later heard the Defendant say “[s]omething about making him jump out of his shoes, after three to four shots” and heard codefendant Mimms say “something about after the shots, there was screaming, crying – just loud screaming.” Ms. Reynolds, codefendant White, the Defendant, and codefendant Mimms later returned to Bowling Green. They went to the Defendant’s mother’s house, and Ms. Reynolds saw the Defendant holding a gun. When the Defendant put the gun down and went outside to smoke, codefendant White grabbed the gun and put it in Ms. Reynolds’s Lexus. Codefendant White later threw the gun into a pond that was on Ms. Reynolds’s parents’

property. On cross-examination, Ms. Reynolds testified that codefendant Head was upset that day because “some guy took or had two pills and owed him about two hundred dollars.”

The State recalled Detective McClintock to the stand, and he acknowledged that the victim was “shot out of his shoes.” A bystander took the shoes while police officers were rendering aid to the victim. At the conclusion of Detective McClintock’s testimony, the State rested its case-in-chief.

Codefendant Head recalled codefendant White to the stand. Codefendant White acknowledged giving a statement to the police three years before trial in which he said the Defendant claimed to have shot the victim. Counsel for codefendant Head asked codefendant White, “Do you remember telling the police that [the Defendant] was trying to get into the Gangster Disciples, and he killed [the victim] at the direction of a Marcus Darden?” Codefendant White answered, “Nah, I can’t remember.” Counsel for codefendant Head then asked codefendant White, “Do you recall telling the police that after the murder that Marcus Darden met [the Defendant] in the bricks to give him a reward for the shooting?” Codefendant White shook his head negatively. Counsel for codefendant Head asked if Marcus Darden paid the Defendant to kill the victim, and codefendant White answered, “I don’t know.”

On cross-examination by the State, codefendant White testified that he used to be a member of a gang known as the Eight Tray Hoovers. On cross-examination by the Defendant, codefendant White testified that he did not know Marcus Darden and that he heard a “[r]umor” Darden paid the Defendant to kill the victim.

The State recalled Agent Smith in rebuttal. Agent Smith testified as an expert in gangs and gang activity that he used to be assigned to the Gang Intelligence Unit and that his primary responsibility was to gather intelligence about local gangs and make contact with gang members. The State showed Agent Smith a photograph of a tattoo on the back of the Defendant’s right hand, and Agent Smith described the tattoo as a six-point star. He said a six-point star, particularly on the right side of the body, was a common sign or symbol for the Gangster Disciples. The State showed Agent Smith a photograph of a group of young men standing on a porch. He identified codefendant White, the Defendant, and codefendant Mimms and said some of the men in the photograph, including the Defendant, were “throwing up” gang signs with their right hands. Based on the Defendant’s tattoo and the “gang photo,” Agent Smith opined that the Defendant was a member of the Gangster Disciples. Marcus Darden was a regional leader of the Gangster Disciples. Agent Smith said he thought it was uncommon for a gang leader to order someone killed for stealing two Opanas. However, if Darden had ordered the victim killed, a gang member would have obeyed the order.

Detective McClintock also testified in rebuttal. He said that during his investigation, he heard a “rumor” that the Defendant killed the victim for Marcus Darden and that the Gangster Disciples rewarded the Defendant with gift cards for the killing. Detective McClintock never found any evidence that the victim’s death was gang-related. Instead, all of the evidence indicated that the victim’s death was related to the stolen Opana pills.

At the conclusion of the proof, the jury found the Defendant guilty as charged in the indictment of first degree premeditated murder; conspiracy to commit first degree murder, a Class A felony; and reckless endangerment with a deadly weapon, a Class E felony. The Defendant waived his right to a sentencing hearing and received an agreed sentence of life, fifteen years, and one year, respectively. All sentences were to be served concurrently.

ANALYSIS

I. Gang Tattoo

The Defendant claims that the trial court erred by overruling his objection to Agent Smith’s being allowed to examine and testify about the tattoo on the back of the Defendant’s hand because the sole purpose of the testimony was to show the Defendant participated in gang activity, which violated Tennessee Rules of Evidence Rule 403 and Rule 404(b). The State argues that the Defendant has waived his Rule 404(b) claim because he failed to raise it at trial and that, in any event, codefendant Head “opened the door” to the State’s rebuttal evidence. We agree with the State.

Codefendant White first testified for the State during its case-in-chief. On cross-examination by codefendant Head, the following exchange occurred:

Q. [The Defendant], he told you the reason he shot [the victim], didn’t he?

A. Yeah.

Q. It was because he needed a body under his belt to become a Gangster Disciple, isn’t that correct?

A. Don’t know about it.

Q. Did you not tell the police that that day?

A. Can’t remember.

After the State rested its case-in-chief, the State advised the trial court, “[Codefendant Head] intends to call, from my understanding, Mr. Kevonte White back to the stand to talk about some alternative-motive theory.” The trial court asked the defense attorneys, “Is that going to change anybody’s position?” Counsel for the Defendant responded, “I guess we’d have to see what he says then.”

Just before codefendant Head called codefendant White to the stand and while the jury was out of the courtroom, the State advised the trial court that it thought codefendant White was going to testify that the Defendant claimed to have shot the victim in order to become a gang member. The State requested that the Defendant remove a bandage that was covering a tattoo on the back of his right hand and that Agent Smith be allowed to examine the tattoo. The prosecutor said that he needed Agent Smith, a gang expert, to determine if the tattoo was gang-related so that the prosecutor could “make a decision about any rebuttal that I may put on with Agent Smith.” Defense counsel objected to Agent Smith’s being allowed to examine the tattoo and testify about it because the examination would subject the Defendant to self-incrimination. Defense counsel also argued that the tattoo was “very prejudicial.” The State responded,

I understand that evidence against their client is prejudicial, but it is not a protected Fifth Amendment right.

And if we’re going to have an alternative motive that I just found out about here in the course of this trial, and he’s got a gang-related tattoo that may fit that theory, I think it’s certainly relevant even though it is prejudicial.

The prosecutor requested that the tattoo remain uncovered in front of the jury.

Counsel for the Defendant said that she did not think the tattoo was relevant, but the trial court disagreed and ordered that the Defendant show the tattoo to Agent Smith. The trial court also ruled that the tattoo would remain uncovered. The trial transcript reflects that Agent Smith, the Defendant, and counsel for the Defendant went into a back room so that Agent Smith could examine the tattoo.

When the jury returned to the courtroom, counsel for codefendant Head called codefendant White to the stand. Counsel asked if codefendant White told the police that the Defendant was trying to become a member of the Gangster Disciples and that Marcus Darden directed the Defendant to kill the victim. Codefendant White said he did not remember, so counsel played codefendant White’s video-recorded statement. Codefendant White maintained that he did not remember telling the police that the Defendant killed the victim for Darden. Counsel then showed codefendant White his written statement and asked, “And in it you say that the reason that [the Defendant] murdered [the victim] was for a reward he was paid by M.D., correct?” Codefendant White answered, “That’s what I thought.” Codefendant White said he heard from other people that the Defendant killed

the victim for Darden. Counsel asked if the police ever investigated Darden as a possible motive for the shooting, and codefendant White said he did not know.

On cross-examination by the State, codefendant White testified that a gang member could move up in rank or be rewarded by doing what a higher-ranking gang member ordered. On cross-examination by counsel for the Defendant, codefendant White said he did not know if Darden directed the Defendant to kill the victim. Counsel asked, "Well, how did you get that information?" Codefendant White answered, "Rumor."

After codefendant White's testimony, codefendant Head rested his case. The Defendant and codefendant Mimms did not present any proof, and the State requested a jury-out hearing in order to qualify Agent Smith as a gang expert for the State's rebuttal case. Over the Defendant's objection, the trial court found that Agent Smith qualified as an expert in gangs and gang activity.

Agent Smith testified in rebuttal that the tattoo on the back of the Defendant's hand was a common symbol for the Gangster Disciples and that, based on the tattoo and the photograph of the Defendant making a gang sign, he thought the Defendant was a member of the Gangster Disciples. Detective McClintock also testified in rebuttal that he heard the Defendant may have killed the victim for Darden. Detective McClintock said, though, that he never found any evidence to support that theory.

During the State's closing arguments, the prosecutor asserted that the victim's death was not gang-related and that the defendants planned to kill the victim because the victim stole pills from Brice Moore. The Defendant argued that the gang theory was "more finger pointing" by codefendant Head. Codefendant Head argued that the gang-related motive undermined the State's case against him.

Generally, all relevant evidence is admissible. Tenn. R. Evid. 402. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Tennessee Rule of Evidence 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait but that the evidence may be admissible for other purposes. Those other purposes include identity, intent, motive, opportunity, or rebuttal of mistake or accident. *State v. Luellen*, 867 S.W.2d 736, 740 (Tenn. Crim. App. 1992). Before allowing such evidence, the following conditions must be satisfied:

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

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b).

Here, the Defendant did not object when codefendant Head cross-examined codefendant White during the State's case-in-chief and raised the possibility of another motive for the crime that previously was unknown to the State. The Defendant also did not object when codefendant White testified for codefendant Head that he heard the Defendant killed the victim at the direction of Marcus Darden in order to become a member of the Gangster Disciples. The Defendant only objected to Agent Smith's being allowed to look at the Defendant's tattoo and testify in rebuttal that the Defendant appeared to be a member of the Gangster Disciples. *See* Tenn. R. App. P. 36(a). Even then, though, the Defendant based his objection on relevance; he did not object based on bad character evidence prohibited by Tennessee Rule of Evidence 404(b) or request a 404(b) hearing. *See State v. Dooley*, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000). Codefendant White's testimony that the Defendant had his own gang-related motive for the crime arguably hurt the State's case against the codefendants. Therefore, the State could present evidence to rebut that claim. Accordingly, we conclude that the Defendant is not entitled to relief on this issue.

II. Sufficiency of the Evidence

The Defendant claims that the evidence is insufficient to support his convictions, that the trial court erred by denying his motion for judgment of acquittal at the close of the State's case-in-chief, and that the trial court erred by denying his motion for new trial. The State argues that the evidence is sufficient. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also*

Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). “The standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction.” *State v. Thompson*, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000). Moreover, “once the trial court approves the verdict as the thirteenth juror and imposes judgment,” our appellate review is limited to determining the sufficiency of the evidence. *State v. Burlison*, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993); *see* Tenn. R. Crim. P. 33(d).

First degree premeditated murder is the “premeditated and intentional killing of another.” Tenn. Code. Ann. § 39-13-202(a)(1). Premeditation “is an act done after the exercise of reflection and judgment” and “means that the intent to kill must have been formed prior to the act itself. [However,] [i]t is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time.” Tenn. Code. Ann. § 39-13-202(e).

Although there is no concrete test for determining the existence of premeditation, Tennessee courts have relied upon certain circumstances to infer premeditation. *See State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998). Specifically, the following factors have been used to support a jury’s inference of premeditation: (1) the defendant’s prior relationship to the victim which might suggest a motive for the killing; (2) the defendant’s declarations of intent to kill; (3) the defendant’s planning activities before the killing; (4) the manner of the killing, including the defendant’s using a deadly weapon upon an unarmed victim,

killing the victim while the victim is retreating or attempting escape, or killing the victim in a particularly cruel manner; and (5) the defendant's demeanor before and after the killing, including a calm demeanor immediately after the killing. *See id.* at 914-15; *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997). The offense of conspiracy is committed when two or more people, "each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense." Tenn. Code Ann. § 39-12-103(a).

The Defendant also was charged with reckless endangerment with a deadly weapon as to Shanice Merriweather, Lucretia Merriweather, Debra Webb, and a four-year-old child. A person commits reckless endangerment when the person "recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." Tenn. Code Ann. § 39-13-103(a).

"Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302(c). Reckless endangerment is a Class E felony when it is committed with a deadly weapon. Tenn. Code Ann. § 39-13-103(b)(2). A firearm is a "deadly weapon." Tenn. Code Ann. § 39-11-106(a)(6)(A).

The Defendant claims that the proof is insufficient to support his convictions because the evidence was circumstantial and inconsistent with the eyewitness testimony. In support of his claim, he asserts that there was no direct evidence of motive or preparation, that the eyewitnesses' descriptions of the shooter and the shooter's car did not match the Defendant or his car, that the police did not find gunshot residue on his jacket, that there were no communications between him and the victim before the shooting, and that codefendant White and Ms. Reynolds were in possession of the murder weapon and had reasons to lie because they were facing other charges. The Defendant also claims that the State failed to establish intent and premeditation for first degree murder.

Taken in the light most favorable to the State, the evidence shows that on January 21, 2017, codefendant Head was angry with the victim because the victim had stolen two Opana pills from Brice Moore. Codefendant Head had given the pills to Moore so that Moore could sell them. Codefendant White and Ms. Reynolds went to Clarksville and picked up codefendant Head, and Ms. Reynolds heard codefendants White and Head talking about missing money or pills. The three of them, driving Ms. Reynolds's white

Lexus, met up with the Defendant and codefendant Mimms. The Defendant was driving Dani Bell's maroon Malibu. The five of them went to Kellogg Street, and the Defendant spotted the victim. The Defendant got out of the Malibu and went to the back door of the drug house, near where the victim was standing. Video surveillance from the drug house subsequently showed the Defendant following the victim on foot and in the Malibu. Less than one minute after the Malibu was last seen traveling in the same direction as the victim, the victim ran back to the drug house and collapsed on the street from two gunshot wounds. The Merriweathers testified that they were walking with the victim when the shooter drove toward them and fired multiple gunshots at the victim.

After the shooting, Ms. Reynolds saw the Defendant with a .22-caliber revolver and heard the Defendant say that he "ma[de] him jump out of his shoes, after three to four shots." Detective McClintock confirmed that the Defendant was "shot out of his shoes." The police later found the revolver in a pond, and one of the bullets recovered from the victim shared the same class characteristics as the revolver and shared similar individual characteristics as a bullet that was test-fired from the revolver. Codefendant White testified that the Defendant claimed to have shot the victim. Although the Merriweathers' description of the shooter and the color of the shooter's car did not match the Defendant or the Malibu, the jury resolved any questions regarding the shooter's identity in favor of the State.

As to the issue of intent and premeditation for first degree murder, the State established a motive for the killing in that the victim essentially had stolen pills from codefendant Head. The Defendant followed the victim prior to the shooting, and Ms. Reynolds testified that she talked codefendant White out of returning to Kellogg Street because she knew something bad was going to happen. Nothing indicates that the victim was armed, and the victim was fatally shot in his back. Although Ms. Reynolds did not see the Defendant immediately after the shooting, she later saw him playing with the revolver "just like not a care in the world." Thus, we conclude that the evidence was sufficient for a rational jury reasonably to conclude that the Defendant acted intentionally and with premeditation when he shot the victim.

CONCLUSION

Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court. However, we remand the case to the trial court for correction of the judgment in count one, first degree murder, to reflect that the charged and convicted "Class" for the offense is "1st," not a Class A felony.

JOHN W. CAMPBELL, SR., JUDGE