

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 14, 2023 Session

FILED

09/08/2023

Clerk of the
Appellate Courts

**STATE OF TENNESSEE v. ANTONIO DONTE JENKINS, A.K.A.
ANTONIO DONTE GORDON JENKINS**

**Appeal from the Criminal Court for Davidson County
No. 2018-D-2771 Angelita Blackshear Dalton, Judge**

No. M2022-00693-CCA-R3-CD

A Davidson County jury convicted the Defendant, Antonio Donte Jenkins, a.k.a. Antonio Donte Gordon Jenkins, of second degree murder and felony reckless endangerment. The trial court sentenced the Defendant to serve an effective sentence of twenty-seven years. On appeal, the Defendant argues that the evidence is insufficient to sustain his conviction for second degree murder. He also asserts that the trial court erred by (1) instructing the jury on criminal responsibility; (2) failing to declare a mistrial after a State's witness testified that the Defendant had an outstanding warrant; (3) allowing portions of a witness's testimony from the juvenile transfer hearing to be read into evidence; (4) allowing evidence that had not been presented during trial into the jury room during deliberations; and (5) imposing an excessive sentence. We respectfully conclude that the jury should not have been instructed on criminal responsibility and that the error was not harmless. For this reason, we vacate the Defendant's conviction for second degree murder and remand for a new trial. Finally, although we also affirm the Defendant's conviction and sentence for reckless endangerment, we remand for entry of an amended judgment reflecting that this sentence is not currently aligned consecutively to any other sentence.

**Tenn. R. App. P. 3 Appeal as of Right;
Judgments of the Criminal Court Affirmed in Part, Reversed in Part;
Case Remanded**

TOM GREENHOLTZ, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and J. ROSS DYER, J., joined.

Jay Norman, Nashville, Tennessee, for the appellant, Antonio Donte Jenkins, a.k.a. Antonio Donte Gordon Jenkins.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Joseph E. Clifton and Addie Askew, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A. THE TRIAL

The Defendant and his co-defendant, Jamarius D. Hill, were initially charged by a Davidson County grand jury with the first degree premeditated murder of the victim, Debriannah Begley,¹ the felony murder of Ms. Begley, and reckless endangerment. However, before trial, the indictment was amended to substitute a single charge of second degree murder for the first degree murder counts. On July 26, 2021, the Defendant proceeded to trial on the amended indictment.

1. State's Case

a. Participants

This case involves the shooting that caused the death of sixteen-year-old Ms. Begley on the evening of October 8, 2017, at the James Cayce Homes in Nashville. That day was the thirteenth birthday of Ms. Begley's brother. Ms. Begley's best friend, Ms. Kenesha James, attended the party, and toward the end of the event, the two were sitting on a porch across from Ms. Begley's house. Ms. Begley was sitting on Ms. James's right side.

While they were sitting on the porch, the pair noticed a group of five men walking on the sidewalk. Suddenly, Ms. James heard a gunshot from her right side and saw "the flash from the gun." Ms. James and Ms. Begley fled in different directions—Ms. James ran inside through a breezeway while Ms. Begley ran towards her house.

Ms. James later identified one of the five men as being "Pablo," the Defendant. She did not see anyone on the opposite end of the courtyard and believed the men were shooting down the sidewalk without targeting anyone specifically. She also could not recall the

¹ The indictment spells the victim's name "Debriannah," whereas the trial transcript uses the alternate spelling "Deberianah." We use the spelling as it appears in the indictment.

number of shots fired. She heard only one shot coming from her right side and heard nothing from her left side.

Upon hearing the shots, Ms. Begley's mother, Sahtika Begley, rushed the children inside the apartment. When the mother came back outside, she found her "daughter [lying] on the ground." Her daughter had been shot in the head "trying to run up the steps to get to her home to safety." Her daughter later passed away at the hospital.

Ms. Begley's mother said she heard shooting from two different guns. She explained, "[I]t wasn't like one to my left and one to my right, it was like boom boom boom boom boom boom boom, like they [were] trying to shoot at a door or shoot at somebody. It was like gunfire's just going back and forth."

Earlier that evening, Tomaz Kerley was with three other people, including Jamarius Hill; his cousin, LaBrian Elliott; and a friend of his cousin's. While they were walking through the neighborhood, Mr. Kerley noticed two men, including the Defendant, watching them. Mr. Kerley knew that the Defendant and Mr. Hill did not like each other, but he did not think that the Defendant "had a problem" with Mr. Hill.

As the group turned onto South 8th Street, Mr. Kerley heard Mr. Elliott yell, prompting him to take cover behind a tree. Before he got behind the tree, he saw the Defendant "stick his arm out" and shoot first. Gunshots followed. Mr. Kerley acknowledged in an interview that he "heard two different guns" and that Mr. Hill fired a shot and "almost ran into" Mr. Kerley before Mr. Kerley hid behind a tree. Mr. Kerley ran away from the scene after the shooting, wanting to distance himself from the incident. Mr. Kerley later clarified that he did not see Mr. Hill fire his gun and that his previous statement had been intended to convey that he observed Mr. Hill and the others moving backward.

b. Law Enforcement Investigation

Two officers with the Metro Nashville Police Department, Thomas Miller and Micah Wright, were responding to an unrelated call when they heard a rapid succession of gunshots from a nearby street. The two headed toward South 8th Street, where they found a crowd in a breezeway between apartment buildings. Officer Wright heard people screaming and yelling and saw others running. One woman was holding a young girl and told them that the girl had been shot. Officer Miller applied pressure to the girl's neck, while Officer Wright performed CPR until the ambulance arrived.

Danielle Connor, a crime scene investigator with Metro Nashville Police, joined fellow investigators at the scene. The investigators found ten shell casings during their

search. Two shell casings were on South 8th Street, three at the corner where the sidewalks met between the buildings, and the remaining five were along the sides of the sidewalk between 8th Street and 7th Street. All recovered shell casings were the same brand of .45 caliber bullets. Ms. Connor confirmed that they collected no firearms from the scene.

Ms. Connor located a Mitsubishi Montero Sport parked on 8th Street that had “a bullet defect” on the lower portion of the front passenger’s door. The defect indicated that the shot had been directed towards South 8th Street and appeared to be a straight-on shot. The investigators found other items at the scene as well, including medical debris, a cell phone, two sandals, and a copper jacket fragment. They also observed blood on the sidewalk near the medical debris.

Detective Matt Griffin, the lead detective on the case, walked through the scene. While he was speaking with another detective, an anonymous male walked up to them and said, “Pablo did it.” After learning that “Pablo” was the Defendant, Detective Griffin showed a lineup containing the Defendant’s photograph to Ms. Kenesha James, who confirmed that the Defendant was “Pablo.” Ms. James also confirmed that the Defendant was present at the scene of the shooting. However, she “could not recall if [the Defendant] had a gun in his hand,” though “he appeared to be more than just a mere bystander.”

The detective received information from other witnesses, including Ms. Jakiesha Dowell, who lived a block from the shooting. Ms. Dowell was on her back porch when she saw two men, one of whom she identified as “the gas station owner,” “pacing back and forth, . . . like a suspicious pace” in front of her house for thirty to forty-five minutes before the shooting. She said that both men had guns.

Ms. Dowell noted that the men stopped pacing, split up, and separately headed toward 8th Street in different directions. The shooting started approximately fifteen seconds later. Once the shooting stopped, Ms. Dowell saw the men running past her towards 6th Street “like they [were] in a track meet.” Ms. Dowell later identified Mohamed Miray from a lineup as someone she had seen before the shooting.

Detective Griffin and Detective Sergeant Daniel Henkel gathered and reviewed nearby security videos as part of the investigation. Detective Griffin noted that the Defendant and Mr. Miray did not come to the scene together but that, according to the security videos, they were together before and after the shooting. The detective observed that the Defendant and Mr. Miray sprinted toward the crime scene as Mr. Hill’s group crossed the street.

Detective Griffin also noted that Mr. Hill's group continued walking until the shooting started. According to the detective, the video showed Mr. Hill shooting and running away simultaneously. Detective Sergeant Henkel observed that a security video obtained from United Neighborhoods Health Services showed "four men walking up 8th Avenue." The video then showed "a bunch of gun flashes as they turn[ed] the corner," and they "ran off."

The Defendant voluntarily gave a statement to the police on October 19, 2017. In the interview, he admitted being present during the shooting and firing his gun "approximately twice." The Defendant admitted that he was with Mr. Miray, and although he initially claimed to have fled the scene on foot, he acknowledged that he and Mr. Miray left in Mr. Miray's car. The Defendant said that Mr. Hill and his group shot at him.

During the interview, the Defendant was asked why Mr. Hill shot at him. The Defendant responded that "he was accused of taking something from somebody's aunt[s] house that may have been related to [Mr. Hill] and his party." The Defendant also said that "he was walking along when he originally saw a group of people and he . . . felt like they were looking for him and . . . they started shooting at him."

The Defendant said that he was standing between two buildings at the time of the shooting, "kind of towards, away from South 8th Street." The Defendant heard approximately fifteen gunshots. In response to the gunshots, the Defendant used a black and silver, semi-automatic handgun to shoot twice "back in the general direction of where the shots were coming from at him." The Defendant said he buried the gun "with his hands and feet near his grandmother's residence." The police searched for the Defendant's gun but could not locate it.

Concerning Ms. Kenesha James's testimony, Detective Griffin believed that Ms. James made "a[n] honest mistake" in placing the Defendant on Ms. Begley's right side during the shooting. Instead, although he conceded that he "had no way of knowing," he presumed that the Defendant was shooting from Ms. Begley's left, that Mr. Hill was shooting from Ms. Begley's right, and that Ms. Begley was shot while running between them. He confirmed, though, that he did not know "which bullet tragically killed" Ms. Begley.

Rhonda Evans, a forensic scientist firearms examiner from the Metro Nashville Police Department, testified as an expert in firearms and tool mark identification. She confirmed that two bullets and a number of shell casings were collected as evidence from the scene and the medical examiner's office. Ms. Evans identified the bullet recovered from Ms. Begley's neck as a .45 caliber bullet and determined that all of the casings were

fired from the same weapon. However, she concluded that the two bullets were not fired from the same gun.

Finally, David Zimmerman, a physician, forensic pathologist, and medical examiner, testified that he performed Ms. Begley's autopsy. He explained that he recovered a copper-jacketed bullet from the left side of Ms. Begley's neck. The bullet's trajectory was "from right to left, upward and slightly back to front." However, he clarified that he did not know Ms. Begley's position when she was shot and could not determine "where the shooter would be[.]" Dr. Zimmerman also observed blunt traumatic injuries consistent with Ms. Begley falling to the ground after being shot. After Dr. Zimmerman testified, the State rested its case-in-chief.

2. Defendant's Case

The Defendant elected not to testify. Mr. Jamontez Gordon, the Defendant's brother, testified on the Defendant's behalf. Mr. Gordon said that on the night of October 8, 2017, he "ran into" Mr. Hill, and Mr. Hill said that "he had something for my brother." Mr. Hill "had like an anger face or something." Mr. Gordon never found the Defendant to convey the message.

On cross-examination, Mr. Gordon said he was thirteen years old at the time of the shooting, four years younger than the Defendant. He was concerned when Mr. Hill gave him the message for the Defendant. He said, "I thought they was cool because I knew [Mr. Elliott], so I thought they was cool because [Mr. Elliott] shook my hand." Mr. Gordon had never seen the Defendant with a gun before the shooting.

Claudia J. Gordon, the Defendant's grandmother, testified that on the night of the shooting, the Defendant came to her home. The Defendant was "nervous and scared," and "he wanted to call the police because there had been an incident." Based upon her conversations with the Defendant, Ms. Gordon immediately called the Defendant's lawyer. On cross-examination, Ms. Gordon explained that the Defendant did not attempt to "dodge the police" but that she urged him not to speak with the police until his attorney was available to help him.

Jodi Gordon, the Defendant's mother, testified that in October 2017, she resided in James Cayce Homes behind the building where the shooting occurred. On cross-examination, she said that she did not know the Defendant had a gun and had never seen him with a gun before. Nevertheless, she acknowledged that "he did say he shot, you know."

B. VERDICT AND SENTENCING

Based upon the foregoing proof, the jury found the Defendant guilty of second degree murder, a Class A felony, and reckless endangerment, a Class E felony. The trial court imposed consecutive sentences of twenty-five years and two years, respectively, for a total effective sentence of twenty-seven years. The trial court denied the Defendant's motion for a new trial on May 24, 2022, and the Defendant filed a timely notice of appeal on May 26, 2022.

ANALYSIS

In this appeal, the Defendant raises several issues, which we address in a different order than originally presented. He argues that the evidence is legally insufficient to sustain his conviction for second degree murder.² He also asserts that the trial court erred by (1) instructing the jury on criminal responsibility; (2) failing to declare a mistrial after a State's witness testified that the Defendant had an outstanding warrant; (3) allowing portions of a witness's testimony from the juvenile transfer hearing to be read into evidence; (4) allowing evidence that had not been presented during trial into the jury room during deliberations; and (5) imposing an excessive sentence.

We address each of these issues in turn.

A. SUFFICIENCY OF THE EVIDENCE

The Defendant first challenges the legal sufficiency of the evidence supporting his conviction for second degree murder. "The standard for appellate review of a claim challenging the sufficiency of the State's evidence 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.'" *State v. Miller*, 638 S.W.3d 136, 157 (Tenn. 2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When "making this determination, we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)). The trier of fact, not this Court, resolves "all questions

² The Defendant challenges only the sufficiency of the evidence sustaining his conviction for second degree murder. Because he does not challenge the legal sufficiency of the evidence supporting his conviction for reckless endangerment, we will not address that conviction further except as to sentencing. *See* Tenn. R. App. P. 13(b) ("Review generally will extend only to those issues presented for review.").

as to the credibility of trial witnesses, the weight and value of the evidence, and issues of fact raised by the evidence,” and this Court “may not re-weigh or re-evaluate the evidence.” *State v. Lewter*, 313 S.W.3d 745, 747 (Tenn. 2010). “The standard of review is the same whether the conviction is based upon direct or circumstantial evidence.” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (internal quotations and citations omitted).

As charged in this case, second degree murder is the “knowing killing of another[.]” Tenn. Code Ann. § 39-13-210(a)(1). Our supreme court has explained:

Second degree murder is a result of conduct offense and accordingly, [t]he nature of the conduct that causes death or the manner in which one is killed is inconsequential under the second degree murder statute. The statute focuses purely on the result and punishes an actor who knowingly causes another’s death.

State v. Brown, 311 S.W.3d 422, 431-32 (Tenn. 2010) (internal quotation marks and citations omitted). “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.” Tenn. Code Ann. § 39-11-302(b). Whether the Defendant acted knowingly in killing another is a question of fact for the jury to determine after considering factors such as “the character of the assault, the nature of the act and from all the circumstances of the case in evidence.” *State v. Davis*, 466 S.W.3d 49, 69 (Tenn. 2015) (internal quotation marks and citation omitted).

On appeal, the Defendant contends that even in the light most favorable to the State, the evidence presented at trial failed to establish anything more than the Defendant “shot a gun in the general area and direction of the deceased.” He asserts that only one person could have killed Ms. Begley because a single bullet caused her death. The Defendant argues the proof established that the bullet that killed Ms. Begley entered her body on the right side, that Mr. Hill and his group were on her right, and that the Defendant and Mr. Miray were on her left. Accordingly, he concludes that the State failed to prove that he was guilty of second degree murder under either a theory of direct or criminal responsibility.

The State at trial argued to the jury that the conviction could be sustained under either a theory of direct or criminal responsibility. On appeal, the State principally argues that the Defendant is criminally responsible for Ms. Begley’s death. Specifically, the State contends that a rational trier of fact could determine that the Defendant is criminally responsible for Ms. Begley’s death “[b]ased on the existence of a dispute between Mr. Hill and the [D]efendant.” We agree with the Defendant that the State failed to prove that he was criminally responsible for Ms. Begley’s death. However, we conclude that the

evidence is sufficient to sustain his conviction for second degree murder based upon a theory of direct responsibility.

1. Criminal Responsibility

Under Tennessee law, a person may be held criminally responsible as a party to an offense “if the offense is committed by the person’s own conduct, by the conduct of another for which the person is criminally responsible, or by both.” Tenn. Code Ann. § 39-11-401. Our supreme court has recognized that “criminal responsibility is not a separate, distinct crime. It is solely a theory by which the State may prove the defendant’s guilt of the alleged offense . . . based upon the conduct of another person.” *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999). “Criminal responsibility represents a legislative codification of the common law theories of aiding and abetting and accessories before the fact.” *State v. Dickson*, 413 S.W.3d 735, 744 (Tenn. 2013).

a. Liability under Tenn. Code Ann. § 39-11-402(2)

Our law defines three different circumstances in which a person may be held criminally responsible for the conduct of another. Tenn. Code Ann. § 39-11-402(1)-(3). As charged in this case, a person may be criminally responsible for an offense committed by another person, if

[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]

Tenn. Code Ann. § 39-11-402(2). Under this particular theory of criminal responsibility, “the evidence must establish that a defendant in some way knowingly and voluntarily shared in the criminal intent of the crime *and* promoted or assisted its commission.” *State v. Pope*, 427 S.W.3d 363, 369 (Tenn. 2013) (emphasis added) (citing *State v. Dorantes*, 331 S.W.3d 370, 386 (Tenn. 2011)). Thus, the State must prove both that the defendant’s intent *and* his or her conduct come within the language of the statute itself.

With respect to the prohibited intent, a defendant may be convicted on a theory of criminal responsibility, as charged here, only if he or she first acted “with intent to promote or assist the commission of the offense.” Tenn. Code Ann. § 39-11-402(2).³ Our

³ At oral argument in this case, the State conceded the perhaps obvious point that the Defendant did not act with the intent “to benefit in the proceeds or results of the offense.”

legislature did not define the term “promote,” either in the context of the criminal responsibility statute or in the criminal code more broadly.

The words of a statute should be interpreted in accordance with their “natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” *State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022) (citation and internal quotation marks omitted). Thus, “[i]n the absence of statutory definitions, we look to authoritative dictionaries published around the time of a statute’s enactment.” *Id.* Although the courts have looked to several different dictionaries, our supreme court has looked to the second edition of the *Oxford English Dictionary* published in 1989, as well as the sixth edition of *Black’s Law Dictionary* published in 1990, to construe our criminal statutes enacted at that time. See, e.g., *State v. Perry*, 656 S.W.3d 116, 128 (Tenn. 2022); *Deberry*, 651 S.W.3d at 927; *State v. Allison*, 618 S.W.3d 24, 46 (Tenn. 2021).

The plain meaning of the verb “to promote” means “to further, advance, encourage.” *Oxford English Dictionary* at 616 (2d ed. 1989); see also *Black’s Law Dictionary* (6th ed. 1990) (defining “promote” to mean “to forward; to further; to encourage; to advance”). Thus, in this case, the State must have proven that the Defendant “acted with intent”—or acted with a conscious objective or desire—to promote, advance, or encourage the “commission of *the* offense,” or the knowing killing of another person by Mr. Hill. However, even when viewing the evidence supporting criminal responsibility in a light most favorable to the State, and drawing all reasonable inferences in its favor, the proof at trial does not establish these basic facts.

Instead, the proof shows that the Defendant and Mr. Miray were present and armed in the same residential neighborhood as Mr. Hill and three others. Mr. Hill had a conflict with the Defendant. The Defendant and Mr. Miray waited for Mr. Hill’s group for as long as forty-five minutes, and the Defendant and Mr. Miray then split up to confront Mr. Hill’s group on 8th Street. As part of this planned confrontation, the Defendant fired at Mr. Hill’s group with a pistol, and Mr. Hill returned fire, effectively resulting in a gunfight in the street. Ms. Begley was struck and killed by a bullet fired from Mr. Hill’s weapon, as must necessarily be the case to support the Defendant’s criminal responsibility for Mr. Hill’s actions.

However, no proof offered at trial shows that the Defendant intended to promote, encourage, or advance “the offense,” or the knowing killing of Ms. Begley by Mr. Hill. To show that the Defendant’s conscious objective or desire was to advance Mr. Hill’s knowing killing of another person, the State must also have proven two essential facts: (1) that the Defendant knew or subjectively believed that Mr. Hill was armed; and (2) that he knew (or intended) that Mr. Hill would return fire in the crowded area. Both facts would be

necessary, if not essential, to show that the Defendant's conscious objective or desire was to encourage Mr. Hill to knowingly kill another person.

But the actual proof from the trial is to the contrary. First, no proof exists to show that the Defendant knew or subjectively believed that Mr. Hill was armed. Nothing in the Defendant's own statement supports this inference. Notably, even people in Mr. Hill's group, such as Mr. Kerley, did not know that Mr. Hill was armed that night until after they had been attacked.

Moreover, the nature of the attack on Mr. Hill by the Defendant and Mr. Miray does not support the inference that the Defendant intended to encourage Mr. Hill to knowingly kill another person. The Defendant and Mr. Miray approached Mr. Hill's group from different directions, and the video evidence shows that Mr. Hill's group was walking down the street until they were fired upon. In other words, Mr. Hill and his group were caught by surprise. The nature of the attack can only support the inference that the Defendant and Mr. Miray intended for Mr. Hill to be killed or incapacitated, not that the Defendant intended for Mr. Hill to shoot back at him and thereby knowingly kill another person.

And this is the point: for criminal responsibility to apply under the State's theory, the "State must establish that the defendant knowingly, voluntarily and with common intent united with the principal offender in the commission of the crime." *Little*, 402 S.W.3d at 217 (internal quotation marks and alterations omitted). No proof was offered to show that the Defendant united with Mr. Hill in the knowing murder of Ms. Begley. Nor did the proof show that the knowing killing of Ms. Begley was something the Defendant sought to bring about or, by his actions, to make it succeed. On the contrary, the Defendant and Mr. Hill were antagonists from the start, wholly adverse to each other in their respective intentions and actions.

Under the circumstances of this case, the proof does not support a finding that the Defendant acted with intent to promote the knowing killing of Ms. Begley by Mr. Hill. As such, the Defendant's conviction for second degree murder cannot be sustained on a theory that the Defendant is criminally responsible for the actions of Mr. Hill pursuant to section -402(2).

b. The Defendant's Creation of the Circumstances

To counter the statute's language, the State argues that the Defendant encouraged Mr. Hill's conduct by creating the circumstances under which Ms. Begley was killed. It asserts that because the Defendant "created the circumstances," he may be held criminally

responsible for Mr. Hill’s actions under section -402(2). We respectfully disagree for two reasons.

First, the plain language of section -402(2) requires that a defendant act with “intent” to promote the offense, meaning that the defendant’s conscious objective or desire is to promote or encourage the offense. Tenn. Code Ann. §§ 39-11-106(a)(21); 39-11-302(a). Nothing in section -402(2) allows criminal liability to be imposed simply because the Defendant “created the circumstances” that allowed someone else to commit an offense. Indeed, while the State’s argument in this circumstance may fit better with another section of the criminal responsibility statute, *see* Tenn. Code Ann. § 39-11-402(1); *Model Penal Code Commentaries* § 2.06 at 302, it is difficult to square its argument with the plain language of section -402(2).

Second, because section -402(2) requires an *intention* to promote the offense—or, considered under the State’s theory, an intention to create the circumstances under which the offense will occur—proof of recklessness or negligence will not suffice for liability. As such, even under the State’s interpretation, section -402(2) would not permit liability merely because the Defendant was aware (or should have been aware) of the risks that a gunfight would ensue and that a third party would be killed or harmed. Although the proof shows that the Defendant ignored a substantial risk of harm to others, it does not establish that the Defendant’s conscious objective was to promote, encourage, or advance Mr. Hill’s knowing killing of another person. The State’s theory under section -402(2) was simply not proven at trial.

We cannot adopt an interpretation of section -402(2) that gives its plain language “a forced interpretation that would extend [its] meaning[.]” *State v. Cavin*, 671 S.W.3d 520, 525 (Tenn. 2023) (citation omitted). As such, we respectfully disagree that a defendant can be held criminally responsible under section -402(2) simply by creating the circumstances under which another person will commit a crime, at least without additional proof that the defendant intended to promote or encourage that crime specifically.

c. Mutual Combat Theory

Finally, the State argues that because the Defendant and Mr. Hill engaged in “mutual combat,” each participant was “criminally responsible for the death of an innocent bystander.”⁴ In its brief, the State relies upon cases from other jurisdictions interpreting

⁴ The State raises this argument in the companion issue regarding the validity of the jury instruction on criminal responsibility. However, we believe that it is more appropriate to address the issue while analyzing the sufficiency of the evidence.

different statutes to conclude that the Defendant is criminally responsible here in a mutual combat situation as an “aider and abettor” of Mr. Hill. In each of these cases cited by the state, see *Alston v. State*, 662 A.2d 247, 248 (Md. 1995), *People v. Russell*, 693 N.E.2d 193, 194 (N.Y. 1998), *State v. Young*, 838 S.E.2d 516, 517 (S.C. 2020), the courts were interpreting common law or statutes that are fundamentally different from Tennessee Code Annotated section 39-11-402(2). As such, they possess little, if any, persuasive value regarding the scope of a defendant’s criminal responsibility for the conduct of another in our state.

Aside from that observation, it is important to note that the doctrine of mutual combat in Tennessee would still not salvage the Defendant’s second degree murder conviction based upon a theory of criminal responsibility. Before the 1989 criminal code revision, the doctrine’s principal use was to evaluate a defendant’s *direct* responsibility for a homicide, and it served to distinguish the *mentes rea* between second degree murder and voluntary manslaughter. However, after 1989, the doctrine effectively no longer exists in Tennessee, and the “essence” of the doctrine “has been incorporated into the elements of the voluntary manslaughter statute.” *State v. Williams*, 38 S.W.3d 532, 539 (Tenn. 2001).

In any event, the doctrine of mutual combat did not address itself to a defendant’s criminal responsibility for the conduct of another. At oral argument, the State agreed that this case must ultimately be resolved on the language of our criminal responsibility statute, and we agree. The Defendant’s conviction for second degree murder cannot be sustained on the basis of Tennessee Code Annotated section 39-11-402(2) as charged to the jury.

2. Direct Responsibility

Although the parties have primarily addressed whether the proof is sufficient to sustain the Defendant’s conviction under a theory of criminal responsibility, we must also address whether the proof is sufficient to sustain his conviction as the principal offender. See *State v. Pack*, No. W2014-00518-CCA-R3-CD, 2015 WL 3381223, at *7 (Tenn. Crim. App. May 26, 2015) (analyzing the legal sufficiency of the evidence under both theories of direct and criminal responsibility), *perm. app. denied* (Tenn. Sept. 21, 2015).

In the light most favorable to the State, the proof offered at trial established that on October 8, 2018, Ms. Begley was sitting outside with her friend, Ms. James. Ms. James saw a group of five men, one of whom was the Defendant, approaching them on the sidewalk from the right. Ms. James did not see anyone on her left.

Ms. James heard a gunshot from her right and saw a flash from a gun. Ms. James ran inside the breezeway. As Ms. Begley ran toward her house, a bullet struck her on the right side of her shoulder and neck, and she fell to the ground.

The police later recovered .45 caliber shell casings from the scene, which would have been to Ms. Begley's right, and they retrieved a .45 caliber bullet from the right side of her body. The Defendant acknowledged that he was at the scene at the time of the shooting and that he had fired his gun "approximately twice." The Defendant also admitted that he opened fire even though he was aware of the party and Ms. Begley's presence nearby.

This Court has "recognized on numerous occasions that a jury is entitled to conclude that a defendant commits a knowing killing when he pulls a gun and fires it at a person." *See State v. Olive*, No. M2019-01379-CCA-R3-CD, 2021 WL 772635, at *4 (Tenn. Crim. App. Mar. 1, 2021), *perm. app. denied* (Tenn. Oct. 13, 2021). Even if the Defendant's intended target was Mr. Hill, the statute's plain language does not require the Defendant to kill a specifically identified victim. *Cf. Millen v. State*, 988 S.W.2d 164, 168 (Tenn. 1999). We conclude that the evidence is sufficient to establish that the Defendant knowingly killed *a person*. Therefore, the evidence is sufficient to establish the Defendant's direct responsibility for the second degree murder of Ms. Begley.

We note that Detective Griffin testified that, based upon his review of the security videos, Ms. James was mistaken when she testified that the Defendant was on her right at the time of the shooting. However, it is well-established that "[i]n a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the jury as trier of fact." *State v. Miller*, 638 S.W.3d 136, 157 (Tenn. 2021), *cert. denied*, 143 S. Ct. 128 (2022). Further, "[t]he 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). In the instant case, Ms. James said that she knew the Defendant before the shooting and that she remembered he was to the right of her and Ms. Begley at the time of the shooting. No witnesses testified at trial regarding Ms. Begley's exact position at the time of the shooting, and no security video showed her being shot.

As such, the standard of appellate review is controlling here. While this evidence is circumstantial and is not overwhelming, our supreme court has emphasized that "our standard of review does not require it to be. The standard of review is highly deferential—it merely requires us to determine whether *any* rational trier of fact could have found" the essential elements of the offense beyond a reasonable doubt. *State v. Lyons*, 669 S.W.3d 775, 791 (Tenn. 2023). When the evidence is construed in a light most favorable to the

State, and when all countervailing evidence is discarded as the standard of review requires, a reasonable juror could have found the essential elements of second degree murder beyond a reasonable doubt based on Ms. James’s testimony, the Defendant’s testimony, and the crime scene evidence. We respectfully affirm the Defendant’s conviction on this basis.

B. JURY INSTRUCTIONS

The Defendant next argues that the trial court erred by charging the jury with the theory of criminal responsibility because no proof was offered at trial to support such a theory. The State responds that the trial court correctly charged the jury. We agree with the Defendant.

“Whether jury instructions are sufficient is a question of law appellate courts review de novo with no presumption of correctness.” *State v. Clark*, 452 S.W.3d 268, 295 (Tenn. 2004). A criminal defendant has a “right to a correct and complete charge of the law.” *State v. Hanson*, 279 S.W.3d 265, 280 (Tenn. 2009) (citing *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000)). As such, “the trial court has the duty to give a comprehensive instruction of the law as applicable to the facts in each case[.]” *Id.*

The Defendant objected to the trial court giving an instruction on criminal responsibility. After taking the matter under advisement, the trial court gave the jury the following instructions on criminal responsibility for the conduct of another:

A defendant is criminally responsible as a party to the offenses charged or any of the lesser included offenses, if the offenses were committed by the defendant’s own conduct, by the conduct of another for which the defendant was criminally responsible, or by both. Each party to the offense may be charged with the commission of the offense.

A defendant is criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, or to benefit the proceeds or results of the offense, a defendant solicits, directs, aids, or attempts to aid another person to commit the offense.

Notably, “[i]f guilt of the offense via a theory of criminal responsibility for the conduct of another is fairly raised by the proof, an instruction on that theory is proper.” *State v. McBee*, No. W2007-01719-CCA-R3-CD, 2009 WL 2615815, at *9 (Tenn. Crim. App. Aug. 24, 2009), *perm. app. denied* (Tenn. Feb. 22, 2010); *State v. Donaldson*, No. E2020-01561-CCA-R3-CD, 2022 WL 1183466, at *22 (Tenn. Crim. App. Apr. 21, 2022)

(“[T]he general standard for jury instructions provides that a particular instruction should be given when ‘fairly raised’ by the proof.”), *cert. denied*, No. 22-7185, 2023 WL 3571578 (U.S. May 22, 2023). Conversely, if the proof does not support a particular theory of criminal responsibility for the conduct of another, as here, an instruction on that theory is not proper. *See State v. Hatcher*, 310 S.W.3d 788, 812 (Tenn. 2010) (finding error in trial court’s instructing on theories of criminal responsibility for the conduct of another that were not raised by the proof at trial). As we identified in our analysis of the legal sufficiency of the evidence, no proof was offered at trial that supported including a jury instruction on criminal responsibility as defined by section 39-11-402(2). As such, and respectfully, this charge should not have been included.

An erroneous instruction regarding the theory of criminal responsibility is a non-structural constitutional error. *See State v. Faulkner*, 154 S.W.3d 48, 60 (Tenn. 2005) (“The failure to instruct the jury on a material element of an offense is a constitutional error subject to harmless error analysis.”). “An appellate court evaluating non-structural constitutional error determines, based upon an examination of the record, whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Qualls*, 482 S.W.3d 1, 18 (Tenn. 2016) (internal quotation marks and citations omitted). “‘If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . [the appellate court] should not find the error harmless.’” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)).

It is not clear from the record whether the jury found the Defendant guilty under a theory of direct responsibility or a theory of criminal responsibility. But, the overwhelming portion of the State’s arguments at trial concerned the Defendant’s criminal responsibility for that offense. For example, during its opening statement, the State asserted that the Defendant and Mr. Hill were equally responsible for Ms. Begley’s death and that without the actions of both men, she would still be alive. During its closing argument, the State argued that “no one has been able to conclusively tell you at trial whose bullet struck [Ms.] Begley and killed her[.]” But the State also acknowledged that “the evidence most likely shows that [Mr.] Hill’s bullet[,], it fired the fatal shot.” The State continued:

If you believe circumstantially that it was Jamarius Hill’s bullet that struck her, what I’m telling you now is that’s fine. We, we agree. We agree that Jamarius Hill is just as guilty as [the Defendant]. We agree that both of them are guilty of second degree murder.

If you believe the fatal bullet was fired by Jamarius Hill that does not make [the Defendant] any less guilty of second degree murder. . . . Even if Mr.

Hill's bullet struck and killed [Ms.] Begley, [the Defendant] is also guilty under Tennessee law.

The State contended that the Defendant and Mr. Hill engaged in "a mutual combat situation" that resulted in Ms. Begley's death.

"Because it is not clear if the jury convicted the Defendant based on the erroneous charge, we conclude that the State cannot establish harmlessness beyond a reasonable doubt." *State v. Coplin*, No. W2019-01593-CCA-R3-CD, 2021 WL 3148887, at *10 (Tenn. Crim. App. July 26, 2021), *no perm. app. filed*; see *State v. Wallace*, No. W2015-00708-CCA-R3-CD, 2016 WL 4494333, at *7 (Tenn. Crim. App. Aug. 25, 2016) (concluding that an erroneous criminal responsibility instruction was harmless because the State made no arguments regarding that theory during closing), *perm. app. denied* (Tenn. Jan. 20, 2017). Therefore, the Defendant's conviction for second degree murder must be reversed, and the case should be remanded for further proceedings. See *Clark*, 452 S.W.3d at 295 ("When a challenged instruction was so erroneous that the instruction alone infected the entire trial and resulted in a conviction that violates due process . . . such [a deficiency is] prejudicial error that require[s] reversal." (citations omitted)).

Despite this holding, we recognize the possibility that the parties may seek further appellate review. As such, we address the Defendant's remaining issues raised in this appeal. See *State v. Jones*, No. E2019-01737-CCA-R3-CD, 2021 WL 1289851, at *17 (Tenn. Crim. App. Apr. 7, 2021), *perm. app. denied* (Tenn. Aug. 4, 2021).

C. TESTIMONY ABOUT THE DEFENDANT'S ARREST WARRANT

The Defendant next argues that the trial court erred by failing to declare a mistrial after Detective Griffin testified that the Defendant had an outstanding warrant in an unrelated case. He argues that the prejudicial effect of the statement was such that a limiting instruction could not cure it. The State asserts that the trial court did not abuse its discretion by refusing to grant a mistrial. We agree with the State.

During the State's direct examination of Detective Griffin, the following discussion occurred:

Q. On October 18, 2017[,], did you receive a phone call from [defense counsel] regarding [the Defendant]?

A. Yes.

Q. And what was the nature of that phone call?

A. [Defense counsel] advised at the time that [the Defendant] had an outstanding probation violation warrant and was not—

The Defendant immediately moved for a mistrial, contending that Detective Griffin's testimony "more or less" suggested that the Defendant "has a conviction because he was on probation." The State responded that the jury "would have to take another step beyond what [Detective Griffin] said to get to what [the Defendant] is saying" but that a curative instruction would fix any concern.

The trial court noted that the State did not intentionally elicit the testimony, and it agreed with the State that the issue could be cured with an instruction to the jury. Accordingly, the trial court instructed the jury to "disregard . . . any allegations or assumptions that [the Defendant] had a warrant or probation or anything, because that is nothing for you to be concerned about[.]"

A mistrial should be declared only if there is a manifest necessity for the action. *State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004). "A manifest necessity exists when something has occurred that would prevent an impartial verdict, thereby resulting in a miscarriage of justice if a mistrial were not declared, and there is 'no feasible alternative to halting the proceedings.'" *State v. Pratt*, No. M2017-01317-CCA-R3-CD, 2018 WL 4005390, at *4 (Tenn. Crim. App. Aug. 20, 2018) (citing *State v. Land*, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000)), *no perm. app. filed*. Stated differently, if there is a feasible and just alternative remedy other than halting the proceedings, then no manifest necessity exists for a mistrial. *See State v. Smith*, 871 S.W.2d 667, 673 (Tenn. 1994).

While "[t]he party seeking a mistrial has the burden of establishing its necessity," the "decision whether to grant a mistrial lies within the discretion of the trial court." *State v. Jones*, 568 S.W.3d 101, 126 (Tenn. 2019). An abuse of discretion "occurs when the trial court 'applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.'" *State v. Johnson*, 401 S.W.3d 1, 21 (Tenn. 2013) (quoting *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010)).

As we have recognized, "Tennessee courts do not apply 'any exacting standard' for determining when a mistrial is necessary after a witness has injected improper testimony[.]" *State v. Horn*, No. E2015-00715-CCA-R3-CD, 2016 WL 561181, at *7 (Tenn. Crim. App. Feb. 12, 2016), *no perm. app.* However, in *State v. Welcome*, 280 S.W.3d 215 (Tenn. Crim. App. 2007), this Court identified three factors that should be

considered in determining whether the trial court abused its discretion in denying a motion for a mistrial: “(1) whether the State elicited the testimony, (2) whether the trial court gave a curative instruction, and (3) the relative strength or weakness of the State’s proof.” *Id.* at 222; *State v. Bell*, 512 S.W.3d 167, 188 (Tenn. 2015).

In this case, although the Defendant’s outstanding warrant was not otherwise admissible, the trial court found that the State did not deliberately elicit the detective’s testimony in this regard. As the Defendant acknowledges in his brief, the “State’s question ‘what was the nature of the phone call’ was met with an unresponsive description of an assertion by [defense counsel] as to probation, an alleged violation of probation and a warrant to the violation.” We have previously recognized that the State should not be deemed to have elicited the proof if the witness gave the testimony as part of a non-responsive and unsolicited answer or as part of a *volunteered* answer. See *State v. Dotson*, No. E2019-01614-CCA-R3-CD, 2021 WL 3161218, at *25 (Tenn. Crim. App. July 27, 2021), *perm. app. denied* (Tenn. Dec. 9, 2021); *State v. Cox*, No. E2020-01388-CCA-R3-CD, 2022 WL 325596, at *16 (Tenn. Crim. App. Feb. 3, 2022), *perm. app. denied* (Tenn. June 8, 2022). This factor does not weigh in favor of granting a mistrial.

In addition, the trial court gave a contemporaneous jury instruction to disregard the improper testimony. This curative measure properly identified the nature of the issue for the jury, and it made clear that the jury was to disregard the testimony. See *Donaldson*, 2022 WL 1183466, at *16. Because the jury is presumed to follow a trial court’s instructions, *State v. Young*, 196 S.W.3d 85, 111 (Tenn. 2006), we conclude that this factor weighs against a mistrial.

Finally, we acknowledge that the proof sustaining the Defendant’s conviction for second degree murder, while sufficient, was far from overwhelming. Nevertheless, given the brief reference to the Defendant’s probation violation warrant and the curative instruction, we cannot conclude that a manifest necessity existed to declare a mistrial or that the trial court’s decision to deny the motion resulted in a miscarriage of justice. The trial court acted within its discretion to deny the Defendant’s motion for a mistrial.

D. ADMISSION OF CO-DEFENDANT’S TESTIMONY FROM JUVENILE TRANSFER HEARING

1. Background

The Defendant next argues that the trial court erred by allowing the State to introduce portions of LaBriant Elliott’s prior testimony from a juvenile transfer hearing. As background, the charges were initially brought against the Defendant and the co-defendant,

Mr. Hill, in the Davidson County Juvenile Court. The juvenile court held a joint transfer hearing during which Mr. Elliott was called to testify on behalf of the State. During that transfer hearing, Mr. Elliott was cross-examined first by Mr. Hill and then by the Defendant.

By the time of trial, Mr. Hill's case had been severed from the Defendant's case. However, the State could not procure Mr. Elliott as a witness at the Defendant's trial, and it asked the trial court to declare Mr. Elliott to be "unavailable." The State then sought to introduce Mr. Elliott's testimony from the transfer hearing, including Mr. Hill's cross-examination.

The Defendant did not object to the admission of the State's direct examination and his own cross-examination of Mr. Elliott, but he asked the court to redact Mr. Hill's cross-examination. The Defendant noted that admitting this testimony essentially allowed a severed defendant to participate in his trial. He also argued that this testimony was developed by "a third party" with "a completely different objective," *i.e.*, to shift blame to the other co-defendant. He further identified specific portions of the testimony that were developed by leading questions; that relied on hearsay and lacked personal knowledge; and that were not responsive to the questions. The State responded that "[t]here could be no more probative evidence than an eyewitness testimony about the shooting[.]" It also noted that the Defendant cross-examined Mr. Elliott after Mr. Hill and that some of the Defendant's questions were based upon Mr. Hill's cross-examination.

The trial court held that the prior testimony could be read to the jury unredacted. The court found probative value in Mr. Elliott's testimony "at the time of what he perceived to have happened on the evening of the shooting[.]" The court also found that the questioning by Mr. Hill did not "unduly elicit bias, sympathy, hatred, or contempt or retribution or horror"; therefore, the evidence was not unfairly prejudicial.

2. Standard of Appellate Review

On appeal, we typically review questions involving the admission of evidence for an abuse of discretion. *State v. Dotson*, 254 S.W.3d 378, 392 (Tenn. 2008) (so recognizing in the context of Tenn. R. Evid. 804); *State v. Mitchell*, 343 S.W.3d 381, 389 (Tenn. 2011) (so recognizing in the context of Tenn. R. Evid. 403). However, with respect to hearsay in particular, this Court will defer to a trial court's factual findings, but will review *de novo* "whether the facts prove that the statement (1) was hearsay and (2) fits under one [of] the exceptions to the hearsay rule[.]" *State v. Jones*, 568 S.W.3d 101, 128 (Tenn. 2019); *State*

v. McGill, No. M2022-00501-CCA-R3-CD, 2023 WL 2033804, at *3 (Tenn. Crim. App. Feb. 16, 2023) (so recognizing in the context of Tenn. R. Evid. 804), *no perm. app. filed*.

Our supreme court has emphasized that “when making discretionary decisions, trial courts ‘must take the applicable law and the relevant facts into account.’” *State v. Frausto*, 463 S.W.3d 469, 481 (Tenn. 2015) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). As we stated earlier, an abuse of discretion “occurs when the trial court ‘applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.’” *Johnson*, 401 S.W.3d at 21 (quoting *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010)).

3. Admission of Former Testimony Pursuant to Tenn. R. Evid. 804

In this appeal, no party disputes that Mr. Elliott’s prior testimony was hearsay when it was offered for its truth during the Defendant’s trial. *See* Tenn. R. Evid. 801(c). As such, this hearsay was inadmissible unless it fell within one of the recognized exceptions to the hearsay prohibition or by other law. Tenn. R. Evid. 802.

As one exception to the prohibition on hearsay, our Rules of Evidence allow admission of a witness’s prior testimony when that witness is later “unavailable” at trial. *See* Tenn. R. Evid. 804(a), (b)(1). However, to be admissible, the party against whom the prior testimony is now offered must have had “both an opportunity and a similar motive to develop the [prior] testimony by direct, cross, or redirect examination.” Tenn. R. Evid. 804(b)(1).

The Defendant does not challenge that Mr. Elliott was an “unavailable” witness. He also does not challenge either the admission of the State’s direct examination or his own cross-examination of Mr. Elliott pursuant to Rule 804(b)(1). Finally, he does not raise any Confrontation Clause issue concerning Mr. Elliott’s testimony.

Instead, the Defendant asserts that allowing the State to read Mr. Hill’s cross-examination of Mr. Elliott into the record was “tantamount to allowing a severed defendant to participate” in the trial with respect to this witness. He also argues that because Mr. Elliott was a witness for the State at the transfer hearing, the Defendant “did not have a proper basis or motive at the time to object to the questions asked by [a co-defendant] for leading, relevance, etc.”

We respectfully disagree. The Defendant was present during the transfer hearing, and he had the opportunity to cross-examine Mr. Elliott fully at that time. As the Defendant

concedes, he had a similar motive to develop Mr. Elliott's testimony in that hearing as he later would at trial. Under the plain language of Rule 804(b)(1), Mr. Elliott's prior testimony was admissible against a hearsay objection, irrespective of whether that testimony was elicited by the State or from another party.

That said, we emphasize the importance of the Defendant's opportunity to cross-examine Mr. Elliott. Although the transfer hearing was a joint transfer hearing, the Defendant was offered the opportunity to cross-examine Mr. Elliott *after* Mr. Hill's examination. A much different case would be presented if the Defendant were denied the opportunity to cross-examine (or recross-examine) the witness after his co-defendant's questioning. Particularly in a case where the positions of the co-defendants are arguably antagonistic, a co-defendant's separate examination of the witness is not admissible simply under a theory that the defendants' motives to develop the proof are thought to be similar. *Cf. Neil P. Cohen et al., Tennessee Law of Evidence* § 8.35[5] (6th ed. 2011) (“[Rule 804(b)(1)] is not satisfied by the presence of a different party with a motive to examine similar to the motive of the party *against whom* it is now used.” (emphasis in original)).

But as it stands, the Defendant was not denied an opportunity to cross-examine Mr. Elliott with his co-defendant's questioning in mind. To that end, if the testimony as developed by Mr. Hill's questioning was unfavorable to the Defendant, the Defendant would have had the opportunity and a similar motive to develop the witness's testimony in his own examination. We hold that the trial court acted within its discretion in admitting Mr. Elliott's former testimony pursuant to Tennessee Rule of Evidence 804(b)(1).

4. Admission of Former Testimony Pursuant to Tenn. R. Evid. 403

The Defendant also argues that the trial court failed to address objections that he raised with respect to specific testimony in Mr. Hill's questioning of Mr. Elliott. He asserts that the trial court instead “made a ruling as to admissibility solely on an *in toto* prejudicial versus probative standard and in essence ignored the specific objections.” The Defendant takes issue with specific pieces of Mr. Elliott's prior testimony as being inadmissible—for example, whether certain testimony was the product of hearsay, lacked first-hand knowledge, or was non-responsive to the question asked—and he asserts that the trial court should have ruled on individual objections rather than looking at the cross-examination as a whole. The State does not respond specifically to this argument, but it notes the Defendant's concessions that the error is “not in and of itself [one] causing a reversal.”

It is true that former testimony that is otherwise admissible under Rule 804(b)(1) is nevertheless subject to exclusion under Rule 403 when the dangers of unfair prejudice substantially outweigh the testimony's probative value. As noted earlier, the trial court

found that Mr. Elliott's testimony was relevant. In balancing the probative value with its prejudicial effect, it held "that the line of questions by [Mr. Hill's attorney] and the responses by Mr. Elliott . . . do not unduly elicit bias, sympathy, hatred, or contempt or retribution or horror." It also noted that, while the Defendant believed that he was not able to object during the questioning by Mr. Hill, the Defendant had an opportunity afterward to cross-examine the witness.

We agree that Mr. Elliott's testimony as an eyewitness to the shooting was relevant to the issues at trial. Moreover, nothing in Mr. Elliott's testimony was unfairly prejudicial to the Defendant. In fact, much of what was covered in Mr. Hill's questioning of the witness was covered again during the Defendant's own examination. During both examinations, the witness repeatedly said that he did not recall seeing the Defendant present or seeing the Defendant fire shots. This testimony was arguably beneficial to the Defendant.

Even if we were of a different mind, we cannot say that the trial court's decision to admit the evidence over the Defendant's objections was an unacceptable choice among alternatives. *See State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019); *State v. Willis*, 496 S.W.3d 653, 729 (Tenn. 2016). As such, we conclude that the trial court acted within its discretion in allowing the entirety of Mr. Elliott's testimony to be read into the record.

E. JURY'S CONSIDERATION OF VIDEO EXHIBITS

During the trial, Sergeant Daniel Henkel testified that he was responsible for gathering surveillance video that may have captured the events. Without objection, the State submitted Exhibit 9. This collective exhibit consisted of several DVDs that contained recordings from security cameras placed in and around the James Cayce Homes.

The State played a portion of Exhibit 9 during Sergeant Henkel's testimony. In addition, Sergeant Henkel extracted various clips from the security videos in Exhibit 9 and compiled these clips into a PowerPoint presentation. The State introduced this PowerPoint presentation as Exhibit 10, and it later played Exhibit 10 during Detective Griffin's testimony.

At the close of proof, but before the jury was instructed and retired for deliberations, defense counsel objected to the entirety of Exhibit 9 going back with the deliberating jury because each video was not played in open court. After the trial court observed that the videos "were made exhibits," defense counsel argued, "[S]ee the problem is going to be if they were to take one of those [videos] out and watch it[,] I have never been able to cross-examine anybody about that [video]." The State responded that defense counsel had the

opportunity to play the videos and to conduct cross-examination based on their contents. The trial court ruled that because defense counsel had the opportunity to play the videos and conduct cross-examination, the entirety of Exhibit 9 would go to the jury room.

On appeal, the Defendant contends that the trial court erred by allowing videos into the jury room when those items were entered into evidence but were never played in open court. The State responds that the jury properly took Exhibit 9 to the deliberation room because it was introduced without objection and because portions of the exhibit were played for the jury. We agree with the State.

This Court reviews a trial court's decision to send exhibits to the jury room under an abuse of discretion standard. *State v. Davidson*, 509 S.W.3d 156, 202 (Tenn. 2016) (citing *State v. Smith*, 993 S.W.2d 6, 32 (Tenn. 1999); *State v. Jenkins*, 845 S.W.2d 787, 793 (Tenn. Crim. App. 1992)). Tennessee Rule of Criminal Procedure 30.1 provides that “[u]nless 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.” The Advisory Commission Comments to Rule 30.1 state that the rule “changes the long-standing practice in Tennessee of not allowing the jury in criminal cases to take the exhibits to the jury room for their study and examination during deliberations.” *Id.*, advisory comm’n cmts.

Citing Rule 30.1, this Court has repeatedly approved of a jury's being able to view an entire exhibit containing various video recordings when only portions of that exhibit were played during the trial. *See State v. Bingham*, No. M2017-02059-CCA-R3-CD, 2018 WL 4859046, at *10 (Tenn. Crim. App. Oct. 8, 2018), *perm. app. denied* (Tenn. Jan. 17, 2019); *State v. Pollard*, No. W2016-01788-CCA-R3-CD, 2017 WL 4877458, at *5 (Tenn. Crim. App. Oct. 30, 2017), *no perm. app. filed*; *State v. Kennedy*, No. E2013-00260-CCA-R3-CD, 2014 WL 3764178, at *59-60 (Tenn. Crim. App. July 30, 2014), *perm. app. denied* (Tenn. Dec. 16, 2014). Consistent with these cases, if a party has objections to various recordings contained in a collective exhibit, the remedy is to object to the challenged recordings when the exhibit is tendered, not to argue that the jury cannot later consider an otherwise properly admitted exhibit. *See* Tenn. R. Evid. 103(a); Tenn. R. Crim. P. 51(b); *State v. Padgett*, No. E2018-00447-CCA-R3-CD, 2019 WL 2233890, at *10 (Tenn. Crim. App. May 23, 2019) (“Thus, the point at which the entire recording was offered as an exhibit would have been the proper time to object to any specific portions of the recording. Defense counsel waited until the prosecutor played the portion of the recording showing

Defendant’s conversation with his mother before objecting. The objection was untimely, and this issue has been waived.”), *no perm. app. filed*.⁵

We note that in *State v. Henry*, No. 02C01-9611-CC-00382, 1997 WL 283735 (Tenn. Crim. App. May 29, 1997), a panel of this Court held that a trial court did not abuse its discretion in denying the jury’s request to hear audio tapes, despite their admission in evidence, where the tapes were not played for the jury. The panel’s rationale made a distinction between the admission of the recordings and the contents of those recordings, suggesting that the “contents” of the recordings were not “placed into evidence” when no party played the contents for the jury. *Id.* at *4.

We respectfully decline to follow *Henry* to require a trial court to withhold from the jury’s consideration recordings that were admitted but not played in full in open court. In some sense, *Henry* is unremarkable, as it simply recognizes the discretion that trial judges possess when sending exhibits to a jury for consideration. But it is also true that *Henry* did not discuss the requirements of Tennessee Rule of Criminal Procedure 30.1, which had only recently been enacted.

In our view, Tennessee Rule of Criminal Procedure 30.1 requires a trial court to allow the jury to examine “all exhibits and writings,” unless good cause exists not to permit the jury to examine a particular exhibit. *See State v. Holst*, No. W2013-00846-CCA-R3-CD, 2014 WL 2547760, at *15 (Tenn. Crim. App. May 29, 2014) (concluding that the trial court should have permitted the jury to examine an exhibit when good cause did not exist justifying its withholding from the jury), *no perm. app. filed*. Good cause for withholding a recording from the jury’s consideration does not exist under Rule 30.1 simply because the properly admitted recording was not played fully in open court.

In this case, all of the videos that were part of Exhibit 9 were admitted into evidence without objection, and portions of these admitted videos were played before the jury either by themselves or as part of Exhibit 10. Moreover, all parties had access to every video in Exhibit 9. No party was prohibited from examining witnesses about the contents of any video or otherwise restricted in the arguments that could be made from the admissible

⁵ In a variation on the theme, the Defendant also argues that the videos should not have been allowed into the jury room because their contents were unknown, they were not subject to cross-examination, and they were not subjected to “the test of admissibility.” The time for making objections to the admissibility of the videos, however, was when they were tendered for admission by the State. *See Padgett*, 2019 WL 2233890, at *10. Because the Defendant never objected to the admissibility of any portion of Exhibit 9, the Defendant has waived any objection to admissibility by failing to raise it at trial. *See Tenn. R. App. P. 36(a)*; *State v. Tittle*, No. M2016-02006-CCA-R3-CD, 2017 WL 4773427, at *7 (Tenn. Crim. App. Oct. 23, 2017), *no perm. app. filed*.

evidence. As such, we conclude that the trial court acted within its discretion to allow each part of Exhibit 9 to be sent to the jury room.

F. SENTENCING

1. Sentencing Hearing

Finally, the Defendant challenges the length of his effective twenty-seven-year sentence. The trial court conducted the Defendant's sentencing hearing on February 8, 2022. During the hearing, the State introduced the Defendant's juvenile record as evidence. Ms. Begley's mother also gave a victim impact statement describing her grief and reflecting upon her daughter's positive qualities. She also expressed concern for her son's well-being and the impact that her daughter's death has had upon him.

After the State's presentation, the Defendant testified about his life while he was released on bail, including fathering two children and working various jobs. He acknowledged the potential effect of a sentence on his ability to see his children. The Defendant also testified that he knew Ms. Begley and that he did not want any harm to come to her.

As to the events on the night of the shooting, the Defendant admitted to carrying a gun before Ms. Begley's death and that he knew "a gun could kill somebody." He stated that he was aware a child's birthday party was happening the same day, noting that some of his younger siblings were at the party and that he did not want to endanger them. The Defendant claimed that he could not avoid encountering Mr. Hill's group on the night of the shooting. He stated he was not aware of Mr. Hill having a weapon at the time of their encounter, but became aware when shots were fired.

The Defendant's mother testified that the Defendant "wasn't a bad kid" growing up and that their family would support him. His girlfriend testified about their relationship and his support for her family. She asserted she had never seen the Defendant act violently or possess a gun, although she later acknowledged a photo with him holding a gun. The Defendant explained that the gun in the photo was a BB gun used for play or promotional purposes.

The trial court sentenced the Defendant as a Range I, standard offender to twenty-five years for the second degree murder conviction and to two years for the reckless endangerment conviction. The court also aligned these two sentences to be served consecutively. It did so, finding that the Defendant had an extensive criminal history and

because the Defendant was a dangerous offender whose behavior indicated little or no regard for human life.

On appeal, the Defendant argues that the length of his sentence is excessive. Specifically, he asserts that the trial court misapplied enhancement factors, failed to apply mitigating factors, and did not have a proper basis for imposing consecutive sentences. The State responds that the Defendant is not entitled to relief because the trial court did not abuse its discretion when it imposed a within-range sentence. We agree with the State.

2. Standard of Appellate Review

“[W]hen a defendant challenges the length of a sentence that falls within the applicable statutory range and reflects the purposes and principles of sentencing, the appropriate standard of appellate review is abuse of discretion accompanied by a presumption of reasonableness.” *State v. King*, 432 S.W.3d 316, 321 (Tenn. 2014) (citing *State v. Bise*, 380 S.W.3d 682, 706-07 (Tenn. 2012)). As such, this Court is “bound by a trial court’s decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out” in the Sentencing Act. *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008); Tenn. Code Ann. §§ 40-35-101 and -102 (2018). While trial courts need not comprehensively articulate their findings with regard to sentencing, “sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed [on the record].” *Bise*, 380 S.W.3d at 706. Our supreme court has also recognized that the *Bise* standard applies to the review of a trial court’s determination of consecutive sentencing as well. *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013).

3. Length of Individual Sentences

We first address the Defendant’s challenge to the length of his individual sentences. The trial court found that the Defendant was a Range I, standard offender. Tenn. Code Ann. § 40-35-105. Second degree murder is a Class A felony, *see id.* § 39-13-210(c)(1), and reckless endangerment is a Class E felony, *see id.* § 39-13-103(b)(2). The sentencing range for second degree murder was not less than fifteen years and no more than twenty-five years, and the sentencing range for reckless endangerment was not less than one year nor more than two years. *Id.* § 40-35-112(a)(1) and (5). Because the trial court’s sentences

were within the applicable ranges, the sentences are entitled to a presumption of reasonableness. *King*, 432 S.W.3d at 321.

a. Enhancement Factors

The Defendant challenges three enhancement factors applied by the trial court. First, the Defendant alleges that the trial court erred in applying enhancement factor (3) to his conviction for second degree murder. A sentencing court may consider as an enhancement factor that “[t]he offense involved more than one (1) victim[.]” Tenn. Code Ann. § 40-35-114(3). The State concedes that this factor should not be applied to the Defendant’s conviction for second degree murder. We agree. Where the indictment specifies a named victim, there cannot be multiple victims for purposes of this enhancement factor. *See State v. Imfeld*, 70 S.W.3d 698, 706 (Tenn. 2002); *State v. Jackson*, No. M2020-01098-CCA-R3-CD, 2022 WL 1836930, at *36 (Tenn. Crim. App. June 3, 2022), *perm. app. denied* (Tenn. Oct. 19, 2022).

The Defendant next argues that the trial court erred in applying enhancement factor (9) to his conviction for reckless endangerment. A sentencing court may consider as an enhancement factor that “[t]he defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense[.]” Tenn. Code Ann. § 40-35-114(9). We agree that enhancement factor (9) does not apply to a reckless endangerment conviction because using a deadly weapon is an essential element of that offense. *See State v. Whited*, No. M2005-00167-CCA-R3-CD, 2006 WL 548228, at *14 (Tenn. Crim. App. Mar. 7, 2006), *perm. app. denied* (Tenn. Aug. 28, 2006). However, as noted by the State, the trial court applied enhancement factor (9) to only the Defendant’s second degree murder conviction. As this Court has previously stated, “the use of a firearm is not an element of murder in the second degree, and, if the accused commits murder in the second degree by shooting the victim with a firearm, this sentencing factor can be used to enhance the accused’s sentence.” *State v. Raines*, 882 S.W.2d 376, 385 (Tenn. Crim. App. 1994). The trial court acted within its discretion in applying enhancement factor (9) to the Defendant’s conviction for second degree murder.

Finally, the Defendant asserts that the trial court erred by applying enhancement factor (16) to both convictions. A sentencing court may consider as an enhancement factor that “[t]he defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult[.]” Tenn. Code Ann. § 40-35-114(16). The Defendant argues that as a juvenile, he pled guilty to theft under \$500, which would have been a misdemeanor, not a felony, if committed by an adult. However, the record also shows that the Defendant was adjudicated delinquent for burglary of a motor vehicle and theft of property valued at over \$10,000, both of which would have been

felony offenses if the Defendant had been an adult. The trial court acted within its discretion in applying enhancement factor (16) to both convictions.

b. Mitigating Factors

The Defendant asserts that the trial court failed to apply several mitigating factors. The Defendant first argues that no proof showed that he had any animosity toward Mr. Hill and that he began shooting only after Mr. Hill fired his weapon. From this premise, the Defendant argues that the trial court should have applied three mitigating factors: that he acted under strong provocation; that substantial grounds existed tending to excuse or justify his criminal conduct without establishing a defense; and that he played a minor role in the offense. Tenn. Code Ann. § 40-35-113(2), (3), and (4).

However, the trial court found that “there was insufficient evidence to support [the Defendant’s] claim that he was provoked into discharging his weapon” or that his role in the shooting was minor. We agree. The trial court acted within its discretion in refusing to apply these mitigating factors.

The Defendant also argues that the trial court should have applied mitigating factor (6). A sentencing court may consider as a mitigating factor that the defendant, “because of youth or old age, lacked substantial judgment in committing the offense[.]” Tenn. Code Ann. § 40-35-113(6). “The application of this mitigating factor is not determined simply by the chronological age of the offender but, rather, upon the offender’s ‘youth in context’ of various circumstances tending to demonstrate his or her ability or inability to appreciate the nature of his or her conduct.” *State v. Elder*, 982 S.W.2d 871, 879 (Tenn. Crim. App. 1998) (citing *Adams*, 864 S.W.2d at 33). The trial court found that, other than age, no evidence was presented to show that the Defendant could not appreciate the nature of his conduct. We agree. The trial court acted within its discretion in refusing to apply this mitigating factor.

Finally, the Defendant asserts that he “assisted law enforcement to some degree in clarifying different individuals[’] involvement thereby assisting in detecting other persons who had committed offenses.” From this, he argues that the trial court should have applied two mitigating factors: that he helped the authorities detect or apprehend other persons who had committed the offenses; and that he assisted the authorities in locating or recovering any property or person involved in a crime. Tenn. Code Ann. § 40-35-113(9), (10).

The trial court found that although the Defendant gave a statement to the police, the statement did not provide the police with any evidence they “did not independently gather

in their investigation.” The trial court further found that the police had identified the Defendant and Mr. Hill by interviewing several witnesses present at the time of the offense. We conclude that the trial court acted within its discretion in refusing to apply these mitigating factors.

In summary, although enhancement factor (3) should not have been applied to the second degree murder conviction, the trial court acted within its discretion in applying enhancement factor (16) to both convictions and enhancement factors (9) and (10) to the second degree murder conviction. The trial court did not abuse its discretion by refusing to apply any mitigating factors.

Importantly, 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.” *Carter*, 254 S.W.3d at 346 (internal quotation marks and alterations omitted). Instead, “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. In this case, the trial court followed the proper sentencing procedures and sentenced the Defendant to a sentence within the appropriate range for each conviction. As such, we conclude that the erroneous application of a single enhancement factor does not warrant relief.

4. Consecutive Sentencing

Finally, the Defendant argues that the trial court erred in ordering consecutive sentences because the aggregate term is not reasonably related to the severity of the offenses or necessary to protect the public from further serious criminal conduct. The Defendant also asserts that the trial court should not have found him to be a dangerous offender because the proof at trial showed that Mr. Hill was the principal offender. The State responds that the trial court imposed consecutive sentencing based on both the Defendant’s being a dangerous offender and the Defendant’s extensive criminal history. Further, the trial court determined that consecutive sentencing was necessary to protect the public from further harm and was reasonably related to the severity of the offenses. We agree with the State.⁶

The record reflects that the trial court found that consecutive sentencing was appropriate because the Defendant was an offender whose record of criminal activity was

⁶ We note that because the second degree murder conviction in Count 1 has been vacated, there is currently no sentence to which the reckless endangerment conviction in Count 3 can run consecutively. To this end, we remand Count 3 to the trial court to enter an amended judgment reflecting that this sentence is not currently aligned consecutively to any other sentence. If the Defendant is later

extensive. Tenn. Code Ann. § 40-35-115(b)(2). Specifically, the trial court found that the Defendant “had several prior juvenile adjudications for delinquent acts, including adjudications for theft of property, theft of a vehicle, burglary of a vehicle, and joyriding.” “This court has repeatedly ‘approved the consideration of a defendant’s history of juvenile adjudications in determining whether a defendant has an extensive record of criminal activity for consecutive sentencing purposes.’” *State v. Brown*, No. E2015-00899-CCA-R3-CD, 2016 WL 3633474, at *14 (Tenn. Crim. App. June 29, 2016), *perm. app. denied* (Tenn. Oct. 20, 2016). Indeed, we have affirmed consecutive sentences when the extensive criminal history consists only of juvenile conduct. *See, e.g., State v. Curry*, No. W2019-00679-CCA-R3-CD, 2020 WL 5587412, at *5 (Tenn. Crim. App. Sept. 17, 2020), *perm. app. denied* (Tenn. June 17, 2021); *State v. Wade*, No. W2017-00933-CCA-R3-CD, 2018 WL 3414471, at *6 (Tenn. Crim. App. July 13, 2018), *perm. app. denied* (Tenn. Nov. 15, 2018).

The Defendant has not challenged consecutive sentencing on the basis of his extensive criminal history. Our supreme court has recognized that, when evaluating consecutive sentences based on an extensive criminal history, trial courts should consider “those facts from which they can determine that the defendant’s record of criminal activity is considerable or large in amount, time, space, or scope.” *Perry*, 656 S.W.3d at 128. Based upon the types of criminal conduct involved, the time span over which the activity occurred, and the multiplicity of victims, we conclude that the trial court acted within its discretion in imposing consecutive sentencing on this basis. *Id.*

The trial court also imposed consecutive sentencing upon finding that the Defendant was a dangerous offender. Tenn. Code Ann. § 40-35-115(b)(5). The trial court found that the Defendant discharged a firearm, caused a death, and disregarded the presence of multiple people present for a child’s birthday party “by placing them in a zone of danger.” Our supreme court has held that “before imposing consecutive sentences based upon the dangerous offender classification, trial courts must conclude that the evidence has established that the aggregate sentence is ‘reasonably related to the severity of the offenses’ and ‘necessary in order to protect the public from further criminal acts.’” *State v. Pollard*, 432 S.W.3d 851, 863 (Tenn. 2013) (quoting *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995)). To this end, the trial court reasoned as follows:

The Court acknowledges [the Defendant’s] contention that his conduct was a result of being provoked by his co-defendant discharging his weapon in [the Defendant’s] direction. . . . [However,] while evidence supports that [the Defendant] and his co-defendant were each in opposing parties who

convicted of an offense in Count 1, the trial court may consider the possibility of aligning that sentence consecutively to Count 3.

were apparently engaged in an ongoing dispute, there was insufficient evidence to support [the Defendant's] claim that he was provoked into discharging his weapon. In considering [the Defendant's] prior criminal record and the serious nature and circumstances surrounding the shooting incident that resulted in the death of Ms. Begley and placed others present at a child's birthday party in [a] zone of danger, the Court finds that consecutive sentencing in the instant case reasonably relates to the severity of the offenses and necessary to protect the public from further criminal conduct by [the Defendant].

From our review, the trial court considered and weighed the necessary *Wilkerson* factors when imposing consecutive sentencing. We agree that the Defendant's behavior demonstrated little to no regard for human life because he endangered the lives of numerous innocent bystanders when he exchanged gunfire with Mr. Hill. The trial court acted within its discretion in imposing consecutive sentencing.

CONCLUSION

In summary, we hold that the evidence is legally sufficient to sustain the Defendant's conviction for second degree murder. However, we also hold, respectfully, that the jury should not have been instructed on criminal responsibility pursuant to Tennessee Code Annotated section 39-11-402(2) and that this error was not harmless. For this reason, we reverse the Defendant's conviction for second degree murder and remand for a new trial. Finally, although we also affirm the Defendant's conviction and sentence for reckless endangerment, we remand for entry of an amended judgment reflecting that this sentence is not currently aligned consecutively to any other sentence.

TOM GREENHOLTZ, JUDGE