IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 20, 2015 Session

STATE OF TENNESSEE v. BASHAN MURCHISON

Appeal from the Criminal Court for Sullivan County
No. S60427 Robert H. Montgomery, Jr., Judge

No. E2014-01250-CCA-R3-CD – Filed February 12, 2016

Defendant, Bashan Murchison and his Co-Defendant, Garrick Graham, were convicted by a Sullivan County Jury of numerous drug offenses. Specifically, Defendant Murchison was convicted of delivery of .5 grams or more of cocaine within 1,000 feet of a school zone (count 9), sale of .5 grams or more of cocaine within 1,000 feet of a school zone (count 10), delivery of .5 grams or more of cocaine within 1,000 feet of a daycare (count 11), sale of .5 grams or more of cocaine within 1,000 feet of a daycare (count 12), facilitation of the delivery of .5 grams or more of cocaine (count 13), sale of .5 grams or more of cocaine (count 14), sale of .5 grams or more of cocaine within 1,000 feet of a school (count 15), delivery of .5 grams or more of cocaine within 1,000 of a school (count 16), conspiracy to sell more than 26 grams of cocaine within 1,000 feet of a school (count 21) and conspiracy to deliver more than 26 grams of cocaine within 1,000 feet of a school (count 22). Count 10 charging Defendant Murchison with sale of more than .5 grams of cocaine within 1,000 feet of a school was dismissed by the trial court upon motion by the State. The trial court merged counts 11 and 12, counts 13 and 14, counts 15 and 16, and counts 21 and 22. Defendant Murchison received twelve-year sentences for counts 11, and 14. He received twenty-five-year sentences for counts 9, 15, and 21. The trial court imposed concurrent sentences for counts 11, 14, 15, and 21 to be served consecutively to the twenty-five-year sentence in count 9 for an effective fifty-year sentence. On appeal, Defendant Murchison raises the following issues: (1) that the trial court erred by admitting laboratory reports prepared by the TBI forensic scientists and forensic drug chemists concerning testing on the substances purchased by Mr. Dukes from Defendants Murchison and Graham; (2) the evidence was insufficient to support Defendant Murchison's convictions; (3) the trial court erred in denying Defendant Murchison's *Batson* challenge; (4) the trial court erred in denying Defendant Murchison's request to determine the competency of the CI; (5) the trial court erred by allowing the State to "repeatedly" show the CI his statement to refresh his recollection; (6) the State committed prosecutorial misconduct; (7) the trial court erred by not severing the offenses; and (8) the trial court incorrectly sentenced Defendant Murchison.

Defendant Graham also filed an appeal which is addressed in a separate opinion of this court. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgments of the trial court.

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

THOMAS T. WOODALL, P.J., delivered the opinion of the Court, in which D. KELLY THOMAS, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Mark A. Fulks, Johnson City, Tennessee, (on appeal), and Charles Martin, Kingsport, Tennessee, (at trial), for the Appellant, Bashan Murchison.

Herbert H. Slatery III, Attorney General and Reporter; Nicholas W. Spangler, Assistant Attorney General; Barry Staubus, District Attorney General; Lesley Foglia and Kent Chitwood, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Background

At the time of the offenses in this case, Corporal Ray McQueen of the Kingsport Police Department was the director of the Second Judicial District Drug Task Force (DTF). He was contacted by John Dukes about working as a confidential informant (CI) in the investigation of Defendant Garrick Graham and Defendant Bashan Murchison. Mr. Dukes had previously been convicted of a drug crime in Virginia and spent three months in jail. Since he was enlisted in the United States Army at the time of the offense, Mr. Dukes also spent three months in confinement as a result of a court martial. Mr. Dukes had met Defendant Graham in 2010 at the home of Mr. Dukes' sister, Keanna Duke, located at 111 Broadview Avenue in Kingsport, Tennessee. Defendant Murchison also had a relationship with Mr. Dukes' other sister. In the spring of 2011, Mr. Dukes was charged in Virginia with conspiracy to distribute cocaine. Drug agents in Virginia suggested that he contact agents in Tennessee about becoming a CI. Mr. Dukes was paid for working as an informant, and he was not made any promises by Corporal McQueen about his pending Virginia charges in exchange for working as a CI. Thereafter, Mr. Dukes arranged controlled crack cocaine buys that took place on September 1, 10, 15, and 26, 2011, and on October 12, 17, and 24, 2011, and finally on November 7, 2011. Defendant Graham was Mr. Dukes' contact for purchasing the cocaine.

Concerning the standard procedure for each of the controlled drug buys, Corporal McQueen testified: "Our deals are uniform. We try to make them all the same." He said that the CI would notify the DTF when there was an opportunity to buy drugs. At least

two DTF agents would then meet the CI at a predetermined location, and the CI would make a recorded call to the "target." Once a controlled buy was arranged, the DTF agents would search the CI and his vehicle for money, weapons, and narcotics. The CI would be given recording equipment and "buy money" to purchase the drugs. The controlled buy was then monitored by the agents. After the drug buy, the CI and DTF agents would meet at a predetermined location, and the agents would recover physical and recorded evidence, and a statement would be taken from the CI. The DTF agents would again search the CI and his vehicle. Corporal McQueen testified that the standard procedures were followed during each of the controlled buys involving Mr. Dukes and Defendants Graham and Murchison.

Mr. Dukes called Defendant Graham on September 1, 2011, to arrange the first drug buy. He met the DTF agents at the predetermined location and was given $1,000 to make the purchase. Mr. Dukes drove to his sister's house on Broadview Avenue, met Defendant Graham, and purchased twenty rocks of crack cocaine. Mr. Dukes noted that during the audio recording of the transaction, he attempted to negotiate a price for the drugs with Defendant Graham in order to build a "rapport" with him. Corporal McQueen and Mr. Dukes testified that there was no video of the buy because Mr. Dukes damaged the equipment when he dropped it. Agents observed Mr. Dukes walk into the house, and they monitored the audio of the transaction.

Agent Ashley Cummings, a forensic scientist with the Tennessee Bureau of Investigation (TBI) Chemistry Drug Identification Section, later performed chemical testing on a sample of the "rocklike substance" obtained during the controlled buy on September 1, 2011. The tested sample contained 1.46 grams of cocaine.

Mr. Dukes called Defendant Graham to arrange the second controlled buy which took place on September 10, 2011. Mr. Dukes met the agents and was given $1,300 to make the purchase. Mr. Dukes then drove to his sister's house on Broadview Avenue where he negotiated with Defendant Graham and purchased 34 rocks of cocaine for $1,250. Corporal McQueen testified that the equipment was again malfunctioning but there was an audio recording of the second drug buy. On the audio recording, Defendant Graham could be heard counting out thirty-four rocks of crack cocaine.

Agent Ashley Cummings of the TBI later tested the substance obtained during the controlled buy on September 10, 2011. The tested sample contained 1.98 grams of cocaine.

Mr. Dukes called Defendant Graham and arranged a third controlled buy on September 15, 2011. The transaction again took place at Ms. Dukes' house at 111 Broadview Avenue. This time the transaction was videotaped. Defendant Graham sold

Mr. Dukes thirty-four rocks of crack cocaine for $1,250. During the meeting Defendant Graham discussed another package of crack cocaine in his possession containing 600 rocks of cocaine. Mr. Dukes testified that the package of cocaine was in a big bag and was "[m]uch bigger than the amount he had bought from Defendant Graham.

Agent Carl Smith, a forensic scientist with the TBI, performed a chemical analysis on the "rocklike substance" purchased on September 15, 2011. He tested samples from "several small corner bags" which he determined contained .71 grams of cocaine. The gross weight of the remaining substance was 14.16 grams.

Mr. Dukes arranged a fourth buy from Defendant Graham on September 26, 2011. The two "talk[ed] back and forth," and the discussions led to a meeting at the IHOP restaurant located on East Stone Drive in Kingsport. Agents followed Mr. Dukes to the restaurant and identified a blue/green Buick LaSabre known to be Defendant Graham's vehicle in the parking lot. Lieutenant Brad Tate of the Bristol Police Department, who was assigned to the DTF, testified that he saw Defendant Graham sitting at the table with Mr. Dukes in the restaurant. While there, Defendant Graham sold Mr. Dukes 58 rocks of cocaine for $2,300. Defendant Graham also agreed to introduce Mr. Dukes to Defendant Murchison. After a short amount of time, Lieutenant Tate saw Mr. Dukes and Defendant Graham walk out of the restaurant and get into the Buick LaSabre.

Agent Jacob White, a forensic scientist with the TBI, performed chemical testing on a sample of the "rocklike substance" purchased on September 26, 2011. The substance was packaged in "58 knotted individual corner plastic bags." The substance in three of the bags tested positive for cocaine, and the total weight of the three bags was 1.01 grams. The gross weight of the other 55 bags, including the packaging, was 23.68 grams.

Mr. Dukes contacted Defendant Graham about a fifth controlled buy on October 12, 2011. Mr. Dukes met Defendant Graham at 111 Broadview Avenue. While there, Defendant Graham called Defendant Murchison on a cell phone because Defendant Graham did not have the full amount of crack cocaine that Mr. Dukes was trying to purchase. Mr. Dukes also spoke with Defendant Murchison over the phone about purchasing 21 grams of cocaine for $2,000. Mr. Dukes testified that he only had $1,800 in buy money, and Defendant Graham agreed to cover the remaining amount so that Defendant Murchison would not complain. At some point, Mr. Dukes and Defendant Graham left the house on Broadview and drove to a carwash on Lynn Garden Drive to meet Defendant Murchison. On the way, Mr. Dukes and Defendant Graham had a recorded conversation about "[g]oing to the source or cutting out the middle man."

When they arrived at the car wash, Mr. Dukes got into Defendant Murchison's vehicle, and Defendant Murchison's wife, Teresa Holder, was also in the vehicle with him. Defendant Graham remained outside and washed Defendant Murchison's vehicle. In a recorded conversation while in the vehicle, Defendant Murchison and Mr. Dukes discussed how $150 to $200 could be made by selling .5 grams of crack cocaine. Mr. Dukes testified that they also discussed: "[Y]ou know, I was making so much money, you know, pushing what he just gave me, that I should give him some money to - - - when he goes back to his source to get more to bring back more." Mr. Dukes also told Defendant Murchison that he thought Defendant Graham had been taking advantage of Mr. Dukes because there was a lot of "shake" in a couple of buys that Mr. Dukes had made from Defendant Graham. Mr. Dukes then paid Defendant Murchison $2,000 for crack cocaine.

Agent John Scott, a forensic scientist with the TBI, performed chemical testing on the sample of the "rocklike substance" purchased on October 12, 2011. The sample tested positive for crack cocaine. The total weight of the substance was 26.34 grams.

Mr. Dukes arranged for a sixth controlled buy with Defendant Graham on October 17, 2011. He spoke with Defendant Graham by phone, and they discussed Mr. Dukes purchasing 21 grams of cocaine for $2,000 which Mr. Dukes felt was too expensive. Mr. Dukes said, "I'm paying almost street value what a crack head would pay." Mr. Dukes then called Defendant Murchison to negotiate a price for the cocaine. Mr. Dukes spoke to Defendant Graham again, and Defendant Graham indicated that if Mr. Dukes "bought two ounces sitting at 24 grams [he would] only have to pay $1,800 a piece." They discussed that the two ounces would be purchased from Defendant Murchison. Mr. Dukes testified that the numbers given to him by Defendant Graham came from Defendant Murchison.

Mr. Dukes later met Defendant Murchison at the IGA parking lot located on West Sullivan Street, and Defendant Murchison got into the car with him. Corporal McQueen observed Defendant Murchison get into the vehicle. Defendant Murchison's wife or fiancée was in Defendant Murchison's vehicle. They had a discussion about 28 grams of cocaine, and whether Mr. Dukes had brought the correct amount of money. Mr. Dukes testified that he purchased crack cocaine from Defendant Murchison, and on the video of the transaction, Defendant Murchison could be heard counting the money that had been given to Mr. Dukes by the DTF. Officer Grady White of the Kingsport Police Department assisted the DTF on October 17, 2011. He followed a silver Subaru Outback for a short distance and then made a stop of the vehicle for changing lanes without using a signal. Defendant Murchison was driving the vehicle, and Teresa Holder was in the passenger seat.

Agent Sharon Norman, a forensic drug chemist with the TBI, performed chemical testing of the substance purchased on October 17, 2011. The substance tested positive for cocaine and weighed 20.93 grams.

Mr. Dukes arranged a seventh controlled buy with Defendant Graham, and they met at 111 Broadview Avenue on October 24, 2011. They discussed Defendant Murchison's cocaine prices and amounts. At Defendant Murchison's request, Mr. Dukes then drove to the Perfect Pair, a business located on Stone Drive and owned by Defendant Murchison and Teresa Holder. Defendant Graham arrived at the business after Mr. Dukes. Mr. Dukes then gave Defendant Murchison $1,950 to purchase crack cocaine, and Defendant Murchison gave the drugs to Defendant Graham. Mr. Dukes drove back to 111 Broadview Avenue, and Defendant Graham delivered the cocaine to him. Mr. Dukes noted that the cocaine appeared to be wet.

Agent David Holloway, a forensic drug chemist with the TBI, performed chemical testing on the substance purchased on October 24, 2011. The substance tested positive for cocaine and had a total weight of 25.31 grams.

Mr. Dukes arranged an eighth controlled buy on November 7, 2011. He initially called Defendant Graham, who did not answer. Mr. Dukes then spoke to Defendant Murchison. He later met Defendant Murchison at the Perfect Pair and purchased a one-half ounce "chunk" of crack cocaine for $1,000. Since Defendant Murchison did not have the full amount of drugs that Mr. Dukes had requested, Mr. Dukes called Defendant Graham and began negotiating another drug transaction in Defendant Murchison's presence. Defendant Graham offered to sell Mr. Dukes 22 rocks of cocaine for $1,700. Mr. Dukes testified that Defendant Murchison did not want anything that he (Defendant Murchison) said, during Mr. Dukes' conversation with Defendant Graham, relayed to Defendant Graham. Mr. Dukes told Murchison that Graham had 22 rocks for $1,700. Mr. Dukes then overheard Defendant Murchison talking on the phone to Defendant Graham. Later that day, Mr. Dukes drove to the carwash located at 525 Lynn Garden Drive. Defendant Murchison then arrived at the carwash and sold Mr. Dukes an additional 22 rocks of cocaine for $900. Mr. Dukes testified that he knew the 22 rocks of crack cocaine came from Defendant Graham because of the "way it looked." The 22 rocks that Mr. Dukes had purchased earlier from Defendant Graham were individually wrapped.

Agent Michael Bleakley, a forensic drug chemist with the TBI, tested the "rocklike substance" purchased on November 7, 2011. One "larger piece" of the substance weighed 6.62 grams and tested positive for cocaine. The substance in two "small corner bags" had a gross weight, including packaging, of 8.69 grams. Agent Bleakley testified that the total weight of the substance submitted was less than 26 grams.

Steven Starnes is the Geographic Information Systems (GIS) analyst and principle cartographer for the City of Kingsport. He is an expert in the fields of cartography and GIS analysis for the City of Kingsport. Mr. Starnes testified that he created "drug buffer" maps for use in the present case. The maps demonstrated that the IHOP Restaurant located at 1201 East Stone Drive was within 1,000 feet of the Boys and Girls Club of Kingsport, which is a recreational center. The carwash located at 525 Lynn Garden Drive, where the controlled drug buy on October 12, 2011, occurred, is within 1,000 feet of the Andrew Jackson Elementary School. Another map prepared by Mr. Starnes demonstrated that the IGA store located at 433 West Sullivan Street is within 1,000 feet of the Play Center, which is a child daycare facility.

Analysis

I. Admission of Eight TBI Laboratory Reports

Defendant Murchison argues that the trial court erred by admitting laboratory reports prepared by the TBI forensic scientists and forensic drug chemists concerning testing on the substances purchased by Mr. Dukes from Defendants Murchison and Graham in this case. We disagree.

First, we point out that Defendant Murchison failed to object to any of these reports, which waives plenary review of this issue on appeal. *See* Tenn. R. App. P. 36(a) (providing that relief is not required for a party who failed to take reasonably available action to prevent or nullify an error); *State v. Little*, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992) (holding that the defendant's failure to object to the State's alleged misconduct during closing argument waives that issue). Thus, by failing to make a contemporaneous objection, Defendant has not properly preserved this issue, and he is not entitled to relief on appeal unless the admission of the laboratory reports constitutes "plain error."

In determining whether an alleged trial error constitutes "plain error," we consider five factors: 1) the record must clearly establish what occurred at trial; 2) a clear and unequivocal rule of law must have been breached; 3) a substantial right of the defendant must have been adversely affected; 4) the defendant did not waive the issue for tactical reasons; and 5) consideration of the error is "necessary to do substantial justice." *See State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994). Ultimately, the error must have "had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *Id*. at 642. "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at

least one of the factors cannot be established." *State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000).

Initially, we note that the record clearly establishes what occurred in the trial court. Next, we find that a clear and unequivocal rule of law was not breached in this case. As a general rule, hearsay is not admissible at trial except as provided by a rule of evidence or otherwise by law. Tenn. R. Evid. 802. However, Tenn. R. Evid. 803(6) provides that the following is not excluded by the hearsay rule:

> Records of Regularly Conducted Activity. – A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

At the motion for new trial hearing, the State argued: "[T]hat it is a record of regularly conducted activity. These agents testified about their job, their job duties, and that this report – these reports were prepared pursuant to their job." In denying Defendant Murchison's motion for new trial, the trial court noted that Defendant Murchison did not object to the admission of the laboratory reports. The trial court further found:

> In fact, I don't think it's ever been objected to in my court with regard to a - - a drug test by the TBI lab person. You know, the - - I know there's been . . . I'm sitting here trying to think.
>
> That a couple of times in - - in murder cases the defense has objected to the admission of the autopsy as being hearsay. And I think that those have generally come in because they were prepared in the regular course of business of the medical examiner's office, and they're filed. I mean, they're - - they're a public filing. They're not - - they're not private. So they've - - they've generally - - I mean, I've . . .

Those have always come in as far as I know, unless there's something in there that - - in and of itself that might be hearsay. I mean, the - - you know, the TBI, you know, it – the. . .

Obviously a TBI certificate would not - - analysis, certificate of analysis would not come in normally without the testing expert, because our U.S. Supreme Court has ruled that that violates the - - the confrontation clause.

I was trying to remember.

Do you have a TBI certificate, General?

* * *

Just want to look at - - I want to look at one for a second. I mean, they're all obviously in evidence, but I haven't looked at one lately. I just wanted to see one of those.

* * *

* * *

Well, I mean, you know, we've not - - I mean we've not discussed it here today. I was sitting up here looking at the – the certificate on the bottom of . . .

The "*Official Forensic Chemistry Report*," TBI, says,

[Reading] "*I hereby attest that this document is the proper record it purports to be. Designated Representative, Director of the TBI*." And then it makes two references to - - to two statutes: [T.C.A. §§] 38-6-107 and 55-10-410. And [T.C.A.] 38-6-107 says, "*The director is authorized to establish a procedure for the official attestation, sealing, and certification* - - "

I think that's the right pronunciation,

"- - *of the records, reports, documents, and actions of the bureau that may be required or authorized by law to designate the person responsible for the certification* ."

> And then the - - it also notes to decisions. It - - it says,
>
> "*The procedure to supply records of standard procedures for testing approved breath testing instruments to any interested party conform with the provisions of Tennessee Rules of Evidence 803.8 as an exception to the hearsay evidence rule*,"
>
> And they talk about the - - the Sensing - - Sensing, S-E-N-S-I-N-G, decision which was the - - the one which allowed officers to basically testify as to the results of a breath test.
>
> So it may fit, but I'm not ruling on that today. But, so it may fit. Because again it was - - there was no objection at - - at trial and - - and it - - I mean, it . . .
>
> It's a report of what the person testified to. I mean, I know your argument was that it was kind of hard to know what they were testifying to, and I'm not - - you know, I don't . . .
>
> I don't think it was - - it was such - - or so confusing that it affected the - - the jury's verdict, if - - if, indeed , that was the - - that was the case.

In order for evidence to be admitted under Tenn. R. Evid. 803(6), the proffered documents must meet the following five requirements:

1. The document must be made at or near the time of the event recorded.
2. The person providing the information in the document must have firsthand knowledge of the recorded events or facts;
3. The person providing the information in the document must be under a business duty to record or transmit the information;
4. The business involved must have a regular practice of making such documents; and
5. The manner in which the information was provided or the document was prepared must not indicate that the document lacks trustworthiness.

Alexander v. Inman, 903 S.W.2d 686, 700 (Tenn. Ct. App. 1995). The rule additionally requires that the foundation for admission of the proffered documents be provided by the custodian or other qualified witness.

Defendant Murchison argues that the laboratory reports in this case are inadmissible hearsay pursuant to Tenn. R. Evid. 803(8) because they are reports prepared by law enforcement officers. However, a panel of this court has previously held:

> The exclusion typically applies to police reports, which are excluded because information contained in police reports "is hearsay and is a mere opinion or conclusion not based on personal observation" and because "if the report contains an opinion or conclusion relating to the cause of or responsibility for an accident or injury, such evidence invades the province of the jury as to the very matters to be determined." *McBee v. Williams*, 56 Tenn. App. 232, 405 S.W.2d 668, 671 (Tenn. Ct. App. 1966).

State v. Christopher Allen McBryar, No. E2000-00417-CCA-R3-CD, 2001 WL 208505, at *9 (Tenn. Crim. App. Mar. 2, 2001). In *McBryar,* this court held that TBI records indicating the defendant's noncompliance with the requirements of the Sexual Offender Registration and Monitoring Act were introduced through an affidavit rather than a witness, therefore they did not fall within the business records exception to the hearsay rule. Tenn. R. Evid. 803(6). However, this court held that the records fell within the *public records* exception to the hearsay rule. Tenn. R. Evid. 803(8). In considering whether the TBI sex offender records were akin to police reports, this court held: "The records in this case are routinely kept records which do not contain opinion or conclusion not based on personal observation." *Id*.

The same applies to the TBI laboratory reports in this case. Each of the reports was prepared by a forensic scientist or forensic chemist with the TBI laboratory and was based on their personal testing and observation of the substances submitted to them by law enforcement. Each of the witnesses testified that their responsibilities as a forensic scientist or chemist for the TBI was to analyze submitted evidence for the presence or absence of a controlled substance, to testify in court, and prepare forensic chemistry reports concerning the substances submitted. The witnesses also testified that they performed their duties on a daily basis and that they had equipment and instruments to assist in analyzing the evidence for the presence of a controlled substance. Therefore, the reports do not contain an opinion or conclusion that is not based upon personal observation.

In *State v. Vernon Dewayne Waller*, No. M2001-02414-CCA-R3-CD, 2002 WL 1949696, at *3-4 (Tenn. Crim. App. Aug. 23, 2002), the defendant argued that the trial court erred by admitting into evidence "a genuine sample of cocaine and the accompanying laboratory report prepared by Laura Hodge, a Tennessee Bureau of

Investigation (TBI) forensic scientist, which were obtained from an unrelated case." The evidence was admitted through the testimony of a police officer for the purpose of illustrating to the jury similarity in appearance between crack cocaine and the substance sold by the defendant. The trial court admitted the laboratory report as a business record of the TBI. The defendant asserted that because the report was prepared solely for the purpose of litigation (in another case), its reliability was suspect. This court held that the "laboratory report was made in the regular course of the TBI's business, although, obviously, such records might be used in legal proceedings." This court further concluded that "the laboratory report was admissible as a business record." *Waller*, 2002 WL 1949696 at *5. *See also State v. Bobby Wells, Jr*., No. E2000-01496-CCA-R3-CD, 2001 WL 725305, at *5(Tenn. Crim. App. June 28, 2001)(TBI crime laboratory evidence form admissible as a business record of the TBI). Therefore, the laboratory reports in this case were properly admitted as business records of the TBI.

Because Defendant Murchison cannot show that all five plain error factors are satisfied, we do not need to consider the remaining factors. Defendant Murchison is not entitled to relief on this issue.

II. Sufficiency of the Evidence

Defendant Murchison contends that the evidence was insufficient to support his convictions for sale or delivery of more than 0.5 grams of cocaine and conspiracy to sell or deliver more than 26 grams of cocaine within 1,000 feet of a school. We find that the evidence is sufficient beyond a reasonable doubt to support the convictions.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate 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); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. *Id.* Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

A guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *State v. Marable*, 203 Tenn. 440, 313 S.W.2d 451, 457 (Tenn. 1958)). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

The sale of a controlled substance includes the following elements: (1) that the defendant sold a controlled substance; and (2) that the defendant acted knowingly. T.C.A. § 39-17-417(a). "Sale" is a bargained-for offer and acceptance and an actual or constructive transfer or delivery of the controlled substance. *See State v. Holston*, 94 S.W.3d 507, 510 (Tenn. Crim. App. 2002). The delivery of a controlled substance includes the following elements: (1) that the defendant delivered a controlled substance; and (2) that the defendant acted knowingly. T.C.A. §39-17-417(a). "Delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. T.C.A. § 39-17-402(6). A "controlled substance" includes any drug, substance, or immediate precursor in Schedules I through VIII of T.C.A. § 39-17-403 to T.C.A. § 39-17-416. *See* T.C.A. § 39-17-402(4). Crack cocaine is a Schedule II controlled substance. T.C.A. § 39-17-408(a), (b)(4). A person acts knowingly with respect to certain conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. T.C.A. § 39-11-302(b). A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. *Id.*

Conspiracy requires that "two (2) or more people, each having the culpable mental state required for the offense which 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 which constitutes such offense." T.C.A. § 39-12-103(a). Some overt act in the pursuance of the conspiracy must be proved to have been done by the defendant or another member of the conspiracy. Id. § 39-12-103(d); *State v. Thornton*, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999).

To prove the existence of a conspiratorial relationship, the State may show that a "mutual implied understanding" existed between the parties. *State v. Shropshire*, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993). A formal agreement is not necessary. *Id.*

The conspiracy may be demonstrated by circumstantial evidence and the conduct of the parties while undertaking the illegal activity. *Id.* "'Conspiracy implies concert of design and not participation in every detail of execution.'" *Id*. (quoting *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978).

Defendant Murchison does not contest that he sold cocaine to Mr. Dukes on October 12, October 17, and October 24, 2011. Rather, he argues that the State did not prove how much of the substances sold contained cocaine because the TBI agents who tested the substances did not testify that the tested samples and the untested portions of the substances were the same. He also asserts that the convictions were based on inadmissible laboratory reports. However, since we have already determined that the laboratory reports were properly admitted, this portion of Defendant Murchison's argument is without merit.

The evidence viewed in a light most favorable to the State establishes that the transaction on October 12, 2011, between Mr. Dukes and Defendant Murchison occurred at the carwash on Lynn Garden Drive. While at the carwash, Mr. Dukes got into Defendant Murchison's vehicle, and Defendant Murchison sold Mr. Dukes crack cocaine for $2,000. Agent John Scott testified that he performed chemical testing on a sample of the "rock-like" substance, and it tested positive for crack cocaine. He noted that the "entirety of the sample [he] received appear[red] to be consistent." The total weight of the substance from which the sample was taken was 26.34 grams. Although Agent Scott did not test all of the "rocklike substance" a jury could reasonably conclude that the remainder of the untested substance was likewise crack cocaine.

On October 17, 2011, Mr. Dukes met Defendant Murchison at the IGA store located on West Sullivan Street. They had a discussion about 28 grams of cocaine and whether Mr. Dukes had brought the correct amount of money. Mr. Dukes then purchased crack cocaine from Defendant Murchison. Agent Sharon Norman performed chemical analysis on the substance purchased on October 17, 2011. She testified:

> When I retrieved the item from the evidence receiving unit I made visual identification, markings on the evidence as well as in my notes. I noted that it was in a sealed condition and then I opened the outer bag to retrieve the inner evidence, made markings on it, made notes of the seal and the packaging until I obtained a weight of the sample and then proceeded to analyze the sample.

Agent Norman testified that the net weight of the sample was 20.93 grams. After weighing the sample, she then performed an analysis of the substance and concluded that it "contained cocaine base." Again, a jury could reasonably conclude that any untested

substance was crack cocaine. Additionally, as pointed out by the State, the sample weighed 20.93 grams which is well over the .5 grams to support the conviction.

Finally, the proof shows that on October 24, 2011, Mr. Dukes met Defendant Murchison at the Perfect Pair. Mr. Dukes gave Defendant Murchison $1,950 to purchase cocaine, and Defendant Murchison gave the cocaine to Defendant Graham for delivery to Mr. Dukes. Agent David Holloway performed chemical analysis on the substance purchased on October 24, 2011. Concerning the testing on the substance, Agent Holloway testified:

> In this particular instance I ran the sample neat which means I didn't extract it or do anything to it to clean it up, just ran it neat, put that in the instrument. It scans the infrared range of the spectrum and produces a pattern of absorbencies.

Agent Holloway determined that the substance weighed 25.31 grams, and a sample of the substance tested positive for cocaine base.

In *State v. Leon Goins*, No. W1999-00157-CCA-R3-CD, 2000 WL 527763, at *3(Tenn. Crim. App. May 2, 2000) this court held that "[t]ests on discrete units or samples of alleged controlled substances are generally a sufficient basis for an expert witness's conclusions regarding the total weight of that sample." This court has also held that "[r]andom sampling of large quantities of drugs can survive sufficiency of the evidence challenges." *State v. Thomas Booker*, No. 01C01-9508-CR-00264, 1997 WL 254238, at * 7(Tenn. Crim. App. May 16, 1997); *See also State v. Selph, Jr.*, 625 S.W.2d 285, 1(Tenn. Crim. App. 1981)(random sample of five methaqualone tablets out of 5,000 tablets was sufficient to support the defendant's conviction for selling over 200 grams of methaqualone); and *State v. Mark Moore*, No. 03C01-9403-CR-00098, 1995 WL 548786, at *3 (Tenn. Crim. App. Sept. 18, 1995)(a random sample of 24 "rocks" containing crack cocaine was sufficient to establish that 2400 similar in appearance also contained crack cocaine). Therefore, the evidence is sufficient in this case to support Defendant Murchison's convictions for sale or delivery of more than 0.5 grams of cocaine (Counts 9, 11 and 14).

The evidence is also sufficient to support Defendant Murchison's conspiracy convictions. Initially, Defendant Murchison's brief incorrectly states that the offense is for the sale or delivery of more than 300 grams of cocaine within 1,000 feet of a school zone. However, the indictments for these two counts indicate that they were amended by agreement on April 15, 2013, to the sale or delivery of more than 26 grams. The proof shows that Defendant Graham and Defendant Murchison conspired to sell or deliver more than 26 grams of cocaine within 1,000 feet of a school zone. No formal agreement

is necessary to show a conspiracy, and the State may show that a "mutual implied understanding" existed between the parties. Also, participation in every detail of the execution of the conspiracy is not necessary. *Shropshire*, 874 S.W.2d at 641.

Defendant Graham sold Mr. Dukes crack cocaine on September 1, 10, 15, and 26, 2011. During the buy on September 26, 2011, Defendant Graham agreed to introduce Defendant Murchison to Mr. Dukes as a drug supplier. When Mr. Dukes contacted Defendant Graham about a fifth buy on October 12, 2011, Defendant Graham did not have the full amount of cocaine that Mr. Dukes requested. Defendant Graham then contacted Defendant Murchison to arrange a transaction between Defendant Murchison and Mr. Dukes. Mr. Dukes spoke with Defendant Murchison over the phone about purchasing 21 grams of cocaine for $2,000. Mr. Dukes only had $1,800 for the purchase, and Defendant Graham agreed to cover the rest. Mr. Dukes and Defendant Graham then left the house on Broadview Avenue where they had met and drove to a carwash on Lynn Garden Drive to meet Defendant Murchison. The car wash is located within 1,000 feet of Andrew Jackson Elementary School. While at the carwash, Mr. Dukes got into the vehicle with Defendant Murchison and gave him $2,000 for crack cocaine. Defendant Graham waited outside during the transaction and washed Defendant Murchison's vehicle. Agent Scott testified that the total weight of the crack cocaine purchased on October 12, 2011, was 26.34 grams.

On October 17, 2011, Mr. Dukes arranged for a sixth controlled drug buy. He spoke with Defendant Graham by phone about purchasing 21 grams of crack cocaine for $2,000, which Mr. Dukes felt was too expensive. Mr. Dukes then called Defendant Murchison to negotiate a price for the cocaine. Mr. Dukes spoke to Defendant Graham again and Graham indicated that if Mr. Dukes "bought two ounces sitting at 24 grams [Mr. Dukes would] only have to pay $1,800 a piece." Defendant Graham and Mr. Dukes also discussed that the two ounces would be purchased from Defendant Murchison. Mr. Dukes specifically testified that the numbers given to him by Defendant Graham came from Defendant Murchison. Mr. Dukes later met Defendant Murchison at the IGA parking lot on West Sullivan Street, and Defendant Murchison got into the car with Mr. Dukes and sold him crack cocaine. Agent Norman testified that the cocaine purchased weighed 20.93 grams.

A seventh controlled buy was arranged between Defendant Graham and Mr. Dukes on October 24, 2011. The two discussed Defendant Murchison's cocaine prices and amounts, and at Defendant Murchison's request, Mr. Dukes drove to the Perfect Pair, a business owned by Defendant Murchison. Defendant Graham arrived at the business after Mr. Dukes. Mr. Dukes then gave Defendant Murchison $1,950 in exchange for crack cocaine. Defendant Murchison gave the cocaine to Defendant Graham who later

delivered it to Mr. Dukes at the house on Broadview Avenue. Agent Holloway testified that the cocaine purchased on October 24, 2011, weighed 25.31 grams.

A final buy took place on November 7, 2011. Mr. Dukes first called Defendant Graham who did not answer his phone. Mr. Dukes then spoke with Defendant Murchison, and he later met Defendant Murchison again at the Perfect Pair. Mr. Dukes purchased a one-half ounce "chunk" of crack cocaine for $1,000. Since Defendant Murchison did not have the full amount of crack cocaine that Mr. Dukes wanted to buy, Mr. Dukes called Defendant Graham and negotiated another drug transaction in Defendant Murchison's presence. Defendant Graham offered to sell Defendant Murchison 22 rocks of crack cocaine for $1,700. Mr. Dukes then overheard Defendant Murchison talking to Defendant Graham. Mr. Dukes later drove to the carwash on Lynn Garden Drive and met Defendant Murchison. He sold Mr. Dukes an additional 22 rocks of cocaine for $900. Mr. Dukes testified that he knew the rocks of cocaine came from Defendant Graham due to the "way it looked." He noted that the 22 rocks that Mr. Dukes had purchased from Defendant Graham were individually wrapped. Agent Bleakley testified that the "larger piece" of the substance purchased on November 7, 2011, weighed 6.62 grams and tested positive for cocaine. The substance in two "small corner bags" had a gross weight, including packaging, of 8.69 grams.

In the present case, Defendant Murchison personally sold cocaine to Mr. Dukes on several occasions, and he communicated with Defendant Graham about selling cocaine to Mr. Dukes, and they discussed cocaine quantities and prices. When Defendant Graham was unable to supply Mr. Dukes with the requested amount of cocaine, Defendant Graham contacted Defendant Murchison who supplied the additional drugs. Defendant Graham also transported crack cocaine to Mr. Dukes on behalf of Defendant Murchison. Defendant Murchison argues that the State failed to prove the amount of the drugs involved in the transaction on October 12, 2011, however, we have already determined that this issue is without merit. The evidence in this case was sufficient to show that a "mutual implied understanding" existed between Defendants Murchison and Graham. *Shropshire*, 874 S.W.2d at 641.

In his brief, Defendant Murchison also argues that his convictions are based on improperly admitted evidence in the form of TBI laboratory reports that he contends were hearsay. He further argues that this violated his "due process right to a fundamentally fair determination of guilt." We have already determined that these reports were properly admitted, and the issue is without merit. In his argument, Defendant Murchison goes on to suggest that Tennessee Supreme Court's ruling in *State v. Longstreet*, 619, S.W.2d 97 (Tenn. 1981) should be overruled by this court. As an intermediate appellate court, it is beyond our statutory function to overrule the holdings of the Tennessee Supreme Court. *See Thompson v. State*, 958 S.W.2d 156, 173 (Tenn. Crim. App.1997).

We conclude that the evidence is sufficient to find Defendant Murchison guilty of conspiracy to sell more than 26 grams of cocaine within 1,000 feet of a school zone and conspiracy to deliver more than 26 grams of cocaine within 1,000 feet of a school zone. Defendant Murchison is not entitled to relief on this issue.

III. Batson Challenge

Relying on *Batson v. Kentucky*, *476 U.S. 79 (1986)*, Defendant Murchison argues that the exclusion of the only African-American member of the venire from the jury violated his constitutional right to equal protection under the law. We disagree.

The record establishes that Defendant is African-American. At the beginning of the voir dire, the following exchange took place:

> THE COURT: All right, Ms. Skaggs, are you okay today?
>
> MS[.] SKAGGS: I have an infection in my eye.
>
> THE COURT: Okay, are you okay to be able to serve on a jury or are you under medical treatment?
>
> MS[.] SKAGGS: I just finished dealing with - - - trying to figure out what it is. I just got my stitches out.
>
> THE COURT: Can the attorneys approach here just a second?
>
> * * *
>
> THE COURT: She doesn't look particularly good.
>
> [PROSECUTOR]: And she appears to have been asleep back there.
>
> THE COURT: Probably more health issues. I mean I think we ought to excuse her. She's got an infection. I don't know if it's catching or - - - I don't want the other jurors to be alarmed by that. Do you have any problem with that? I mean she's the only African American - - -

[GRAHAM'S COUNSEL]: Which leads me to the - - what I will bring to the Court's attention after we set the jury or whatever, but - - -

THE COURT: I mean she's the only African [-] American and I'm not trying to use it for that reason but - - -

[PROSECUTOR]: We had meant to cause to strike her anyway. She wasn't here when - - she was late today. She appears to have been asleep - - -

THE COURT: I can put her under oath - - -

[GRAHAM'S COUNSEL]: Because of - - - I'm not - - -

THE COURT: Well, the Court is concerned about her medical situation but on the other hand if you want me to inquire [further] I can ask the rest of the jury to step out and we can talk to her individually.

[GRAHAM'S COUNSEL]: Judge, in the long run if the Court would be kind enough to do that.

THE COURT: Okay, I'll bring her up. Ms[.] Skaggs, can you come up here just for a second. I need to ask you to raise your right hand because you weren't in here this morning when I put people under oath - - -

MS[.] SKAGGS: No, sir.

THE COURT: - - -for jury selection so if you'll raise your right hand. Do you solemnly swear or affirm that you will answer truthfully all quest[i]ons touching upon your competency to serve as a juror in this case.

MS[.] SKAGGS: Yes, sir.

THE COURT: All right, now I can see obviously your eye is swollen a great deal. Are you under the care of a doctor?

MS[.] SKAGGS: Uh-huh (affirmative).

THE COURT: When did - - - did you have an operation?

MS[.] SKAGGS: I had a biopsy and I said the wrong word. It's inflammation. It's a mass of inflammation. It's not an infection.

THE COURT: All right, when did you have your surgery?

MS[.] SKAGGS: On the 10th.

THE COURT: The 10th? Okay, so that was last Wednesday?

MS[.] SKAGGS: Uh-huh (affirmative), and I had the stitches removed today.

THE COURT: Okay, are you still - - - are you in pain?

MS[.] SKAGGS: No, it don't [sic] even hurt.

THE COURT: Well, I'm just asking. Okay, so you don't have an infection then?

MS[.] SKAGGS: No, it's inflammation.

THE COURT: Are you off work or do you work?

MS[.] SKAGGS: No, I go every night.

THE COURT: Okay, where are you working?

MS[.] SKAGGS: FedEx.

THE COURT: Okay, well I guess one of the questions I ask is, again you said infection but you say it's not an infection.

MS[.] SKAGGS: That's right, I said it wrong. I'm sorry.

THE COURT: No, no, there is a little bit of a difference.

MS[.] SKAGGS: Yeah.

THE COURT: Do you feel that you would be able to serve as a juror in this case?

MS[.] SKAGGS: I do[n]'t see why not.

THE COURT: Okay, now have you heard me as I've talked a little about this case. You came in a little bit late. I know you weren't here when I called - - -

MS[.] SKAGGS: No, I - - -

THE COURT: Have you heard me as I've introduced these individuals?

MS[.] SKAGGS: Yes.

Ms. Skaggs indicated that she did not know Defendant Graham or Defendant Murchison or any of the other individuals involved in the case. The prosecutor then asked if Ms. Skaggs was able to see okay because the case involved "a lot of video" evidence. Ms. Skaggs responded: "That might be kind of - - you know, I suppose just a little problem. If I have to read or something like that." She indicated that she could see out of one eye and that she only wore reading glasses. The court then conducted a jury-out hearing regarding the State's request to excuse Ms. Skaggs as a juror. Defense counsel for Defendant Murchison joined in Defendant Graham's objection to the State's request to strike Ms. Skaggs noting that she was the only African-American on the venire.

In the jury-out hearing, the prosecutor stated the following reason for excluding Ms. Skaggs as a juror:

> Judge, and I think from my observation today, number one she was late to court; one, maybe two individuals out of the entire venire that was late. Number two, based on my observation as an officer of the court she appeared to be asleep. Now, I know she's got a problem with one of her eyes but appeared to have both eyes closed during - - - every time I'd look back Judge. Now, she testified she had stitches out today. Based again on

> my observation, there's something green seeping out of her eye and it's swollen quite a bit. When asked at the bench whether she'd have trouble reading she said that she might have trouble reading. Based on all those reasons, Judge, that's why we would strike her.

The co-prosecutor also said:

> And I would just add that when we were up at the bench and you were asking what other jurors were left and who was here to be a juror on the case there were several individuals that raised their hand. She didn't. She seemed completely out of it. She obviously wasn't paying attention and, you know, can't follow instructions.

The trial court then noted that Ms. Skaggs only showed up for court after someone from the clerk's office called her.

The following exchange then took place:

> [GRAHAM'S COUNSEL]: I would like to say that the State's excuse is pre-textual and inadequate. General Chitwood indicates that at our bench conference that he was concerned about her eyesight yet if I am - - - I may be mistaken at this late moment, we have a juror who complained early on that she had motion sickness and if I'm not mistaken that's juror number 4 and she's still on the panel so we have someone with some concern about her being able to see. She said she may close her eyes but she can always listen to the audio. That[] was what was discussed at the bench. The same thing can apply to the juror in question now. Also, General Chitwood commented that she came in late. Judge, again, at this late date I may very well be confused but if I'm not mistaken juror number 10, who we just sat, also came in late because you had to swear her but yet she made the box. I would say that consequently those two excuses are inadequate because we have jurors. The juror in question states at [the] bench that she sees without glasses, she can see out of one of her eye[s]. Mr. Chitwood indicates that he saw her with her eyes shut. I don't know that that's any indication that she was asleep. Certainly that would have been a question to her. I have no knowledge of that. She answered, came up and seems quite lively and I don't see why she needs to be struck and, Your Honor, [Defendant Murchison's counsel] joined into my objection.
>
> * * *

[MURCHISON'S COUNSEL]: Your Honor, I have very little to add other than to say that it was apparent to me that Ms[.] Skaggs was in complete control of her faculties at the bench conference. She answered your questions promptly and clearly and thoughtfully and intelligently.

* * *

[PROSECUTOR]: Number one, Judge, I don't think the defense counsel touched on this, [co-prosecutor's] point when you asked the individuals in the audience who were potential jurors it was my understanding she did not raise her hands like the others did. She sat there, either did not understand and I think you asked - - - you had to ask it twice and then she still did not raise her hand but the other individuals did. The Court I think can take judicial notice of that fact, that she either did not understand your question, could not hear your question or was not paying attention or whatever reason, was the only one of the potential jurors who was nonresponsive to that. Secondly, the individual who allegedly has motion sickness, I have asked her twice in voir dire about that extensively and she said that she could watch it and if it became a problem she'd raise her hand and I still have concerns about it, however, I mean that's what they are, concerns, but that's different than someone who physically will not be able to read, which is what she stated at the bench. She's going to have trouble reading is what this juror stated and again, while she was late and another juror was late if that was all that would not be the reason we were striking her, it's the totality of it. She was late. She was nonresponsive to your questions. She says she'd have trouble reading and I think the Court could take judicial notice of this, she has a swollen eye. She said she just had her stitches removed today and something is seeping from her eye and based on all of that, Judge, I would strike any juror who looked like that on the day of trial.

THE COURT: All right, well let me just state a few things for the record. First of all I did call Ms. Skaggs in the first group of 18. She was not here when I called her name and I gave it to the clerks and the clerks informed me that they contacted her and so she appeared later. The other individual I remember specifically coming in during the early stages when the first 18 were in the box and she was just a few minutes later but for just the record I mean I'm in a position of observing that. The other thing that I would state too for the record, certainly I think - - -

as I said a moment ago, Ms[.] Skaggs is the only African[-]American that I saw in the venire and of course both Defendant Graham and Defendant Murchison are both African [-] American so I do note that for the record as well. Now, the State has indicated that she was late. I mean I think it's clear from looking at the witness that her right eye, in fact that was what alerted me to ask questions, call her up individually, was her right eye is essentially swollen shut. I mean it's very puffy and I think both counsel for the defense would agree with that, would you not, [Graham's counsel]?

[GRAHAM'S COUNSEL]: Yes, Judge, it appears puffy to me.

THE COURT: And almost to the point where it's closed shut.

[GRAHAM'S COUNSEL]: I saw that, Judge, yes.

THE COURT: I mean obviously there's no picture that we have here but I mean I want to make sure that I'm not seeing something that the attorneys are not seeing as well. The State has indicated that she was later, had to be called in. Their observations of her while she was in court was that she appeared to be asleep, that she did not respond and I think that was clear and the Court observed that as well when I was asking questions about the remainder of the panel and she didn't appear to acknowledge that she was a juror until after I'd asked at least twice; maybe three times. I maybe even called her name to double check. Also, she has indicated that she - - - I asked her if she might have any problems serving and she said she may have trouble seeing; again that's something that she personally acknowledged. Now, I inquired further about glasses and other things but that was a statement that she had made. In my opinion the State has set out what I consider to be a clear reasonably specific and a challenge reasonably related to a particular case to be tried. I mean this is a case that's going to involve lots of witnesses. It's going to go for several days. I mean it's not just a one day case but at least for another five days; also the fact that there's going to be a lot of video because we've already talked about that that will be involved in this case and in my opinion the defense [sic]has established what I consider to be a neutral reason for that and of course - - -

* * *

> THE COURT: The State, excuse me, the State has established a neutral reason. Now, I will point out, too, that I mean while I certainly acknowledge what [Graham's Counsel] said that in a sense because you strike the only African [-] American on the panel that in turn it establishes a prima facie or at least an inference that there is discrimination that's occurred, other than that I've not seen anything else raised with regard to the way the State has proceeded in this case or otherwise that would seem to indicate that the State had a discriminatory intent in striking an African [-] American[] from the panel.

In Batson, the United States Supreme Court held that a state's use of peremptory challenges to intentionally exclude potential jurors of the defendant's race violates the defendant's right to equal protection. *Batson,* 476 U.S. at 89; 106 S.Ct. at 1719. "A criminal defendant may object to a race-based exclusion of a juror, effected through peremptory challenges, regardless of whether the defendant and the excluded juror share the same race." *State v. Carroll,* 34 S.W.3d 317, 319 (Tenn. Crim. App. 2000) (citing *Powers v. Ohio,* 499 U.S. 400, 415-16, 111 S.Ct. 1364, 1373-74, 113 L.Ed.2d 411 (1991)).

The procedure for invoking a *Batson* challenge was discussed in *Carroll* as follows:

> *Batson* provides a three step process for the evaluation of racial discrimination claims in jury selection. First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770–71, 131 L.Ed.2d 834 (1995); *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712, 1722–24. If the defendant satisfies this initial burden, the burden then shifts to the prosecutor to articulate a race-neutral explanation for excluding the venire member in question. *Purkett*, 514 U.S. at 767, 115 S.Ct. 1769, 1770–71; *Batson*, 476 U.S. at 94, 106 S.Ct. 1712, 1721. Third, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 97–98, 106 S.Ct. 1712, 1723–24; *Hernandez v. New York*, 500 U.S. 352, 358–59, 111 S.Ct. 1859, 1865–66, 114 L.Ed.2d 395 (1991). In making its determination of whether use of a peremptory challenge was discriminatory, the trial court must articulate specific reasons for each of its factual findings. *Woodson*, 916 S.W.2d at 906. The trial court's findings are imperative for rarely will a trial record

> alone provide a legitimate basis from which to substitute an appellate court's opinion for that of the trial court. Thus, on appeal, the trial court's finding that the State excused a venire member for race-neutral reasons will not be reversed unless it is clearly erroneous. *See Woodson,* 916 S.W.2d at 906 (citations omitted).

Carroll, 34 S.W.3d 319-20.

As the United States Supreme Court observed in *Hernandez v. New York,* "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges [without prompting] and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez,* 500 U.S. at 359, 111 S.Ct. at 1866. The issue in the second step of the *Batson* process rests upon "the facial validity of the prosecutor's explanation." *Id.* at 360, 111 S.Ct. at 1866. "A neutral explanation . . . means an explanation based on something other than the race of the juror." *Id.* "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* In the second phase of the inquiry, the prosecutor's explanation is not required to be "persuasive or even plausible." *Puckett,* 514 U.S. at 768, 115 S.Ct. at 1771.

In the case *sub judice,* the prosecutor offered several explanations for the challenge. First, the prosecutor, along with the trial court, noted that Ms. Skaggs was late to court. The trial court had observed that Ms. Skaggs did not show up to court until someone from the clerk's office called her. Second, the prosecutor pointed out that Ms. Skaggs appeared to be asleep during voir dire. Third, the prosecutor noted that Ms. Skaggs had stitches removed from her eye before court, and there was something green seeping out of her eye, which was swollen. Ms. Skaggs had also indicated that she might have trouble reading due to her eye-related problems. The co-prosecutor also pointed out that when the trial court asked what other jurors were left, and who was there to be a juror, Ms. Skaggs did not raise her hand, and she "seemed completely out of it," that she obviously was not paying attention, and "can't follow directions."

The determination of a discriminatory intent on the part of the prosecutor "largely will turn on evaluation of credibility." *Baston,* 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21. "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Hernandez,* 500 U.S. at 365, 111 S.Ct. at 1869.

We conclude that the prosecutor's basis for the use of a peremptory challenge against Ms. Skaggs was sufficiently race-neutral to withstand a *Batson* challenge. The trial court accepted this racial neutral reason for exercising a peremptory challenge. Determination of a discriminatory intent depended largely on the evaluation of the prosecutor's credibility in this case. Defendant Murchison has not shown that the trial court erred in accrediting the State's racially neutral explanation for excusing the prospective juror. Defendant is not entitled to relief on this issue.

IV. Competency of the Confidential Informant to Testify

Defendant Murchison argues that the trial court erred by failing to determine the competency of Mr. Dukes, the CI, to testify. However, we find that the trial court did not abuse its discretion concerning this issue.

Rule 601 of the Tennessee Rules of Evidence provides that "[e]very person is presumed competent to be a witness except as otherwise provided in these rules or by statute." "Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons." Tenn. R. Evid. 601, Advisory Commission Comment. Rule 603 of the Tennessee Rules of Evidence provides that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." A party may attempt to impeach a witness by demonstrating his or her impaired capacity either at the time of the occurrence which is the subject of the testimony or at the time of the testimony. Tenn. R. Evid. 617; *State v. Barnes*, 703 S.W.2d 611, 617-18 (Tenn. 1985). "The question of witness competency is a matter for the trial court's discretion, and the trial court's decision will not be overturned absent an abuse of that discretion." *State v. Nash*, 294 S.W.3d 541, 548 (Tenn. 2009)(citing *State v. Caughron*, 855 S.W.2d 526, 538 (Tenn. 1993)).

In this case Mr. Dukes was presumed to be a competent witness. He was "duly sworn" and met all of the requirements to testify. During Mr. Dukes' direct examination, defense counsel for Defendants Graham and Murchison requested that the trial court voir dire Mr. Dukes out of the presence of the jury "with regard to whether the witness is on drugs or alcohol." The following exchange took place:

> THE COURT: No, I'm not going to do that.
>
> [GRAHAM'S COUNSEL]: Thank you, your honor. It just has been brought to our attention that he's thick-tongued and slow in response.

> THE COURT: I mean a witness is, is what a witness is, and there's no basis for me to make inquiry about that.

We agree with the trial court. There is nothing in the record to indicate that Mr. Dukes was incompetent or too intoxicated to testify at trial, and he was presumed competent to testify. Both Defendant Graham and Defendant Murchison had the opportunity during cross-examination to attempt to impeach Mr. Duke by demonstrating any alleged incapacity to testify. Neither defense counsel questioned Mr. Dukes about whether he was under the influence of drugs or alcohol at the time of his testimony. He was merely asked about his past drug and alcohol use. We note that in his closing statement, counsel for Defendant Graham said:

> Mr. Dukes struggled with what happened. Mr. Dukes struggles with the truth of his life whether he was or wasn't consuming alcohol. I think Mr. Dukes had a hard time remembering. Lastly Mr. Dukes, his closing comments was he reminded us that he would do absolutely anything to stay out of jail and it's my suggestion he did.

Although Mr. Dukes could not remember some details of the transactions, and his memory was refreshed during his testimony with his previous statements, this does not preclude him from being a competent witness. His inability to remember certain details does not address Mr. Duke's competency to testify but goes to the weight and value of his testimony, which is reserved for resolution by the trier of fact. "So long as a witness is of sufficient capacity to understand the obligation of an oath or affirmation, and some rule does not provide otherwise, the witness is competent." *State v. Caughron*, 855 S.W.2d 526, 538 (Tenn. 1993); *Johnnie W. Reeves v. State*, No. M2004-02642-CCA-R3-PC, 2006 WL 360380, at *9 (Tenn. Crim. App. Feb. 16, 2006). This issue is without merit.

V. Allowing Witness to Refresh Recollection

Defendant Murchison argues that the trial court erred by allowing the State to "repeatedly" show Mr. Dukes his statement to refresh his recollection during his direct examination. We disagree.

Initially, as pointed out by the State, Defendant Murchison did not object to allowing Mr. Dukes to use his statement to refresh his recollection about one of the drug buys in this case. Therefore, this issue is waived. While counsel for Defendant Graham did object to the use of the statement, this does not preserve appellate review of the issue for Defendant Murchison. *State v. Thomas*, 158 S.W.3d 361, 400-01 (Tenn.

2005)("[T]he objection by a co-defendant fails to preserve the issue on appeal for [d]efendant.").

Rule 612 of the Tennessee Rules of Evidence provides the following:

> If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires; in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

The Advisory Commission Comments further provides:

> Only if a witness' memory requires refreshing should a writing be used by the witness. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory.

A party may establish the factual foundation that is needed to refresh a witness' memory either before or after the actual "refreshing." *State v. Mathis*, 969 S.W.2d 418, 421 (Tenn. Crim. App. 1997).

In any event, this issue is without merit. Although Defendant Murchison states in his brief that the trial court allowed the State to "repeatedly" refresh Mr. Dukes' memory, he only cites to one such instance in his brief. The trial transcript reflects that prior to the incident cited by Defendant Murchison in his brief, Mr. Dukes asked to see his statement concerning the controlled buy on November 7, 2011. Mr. Dukes testified:

> I already purchased the half for $1,000, the half ounce for $1,000 and I can't remember who it was that I was talking to that I was going to give the other $900.00 to. I know it was - - - I can't remember. Can I see the statement?

Mr. Dukes also asked if the audio of the transaction could be replayed. The following exchange then took place:

> [Prosecutor]: Yes we can. If you can pass me that back. Now, you can look at it longer if you need to. Do you want to look it over again? Just take your time if you need to read it. Okay, we'll replay the audio for you.
>
> [Mr. Dukes]: Okay.
>
> [Prosecutor]: We'll start at the beginning.
>
> (Continued playing of recording)
>
> [Prosecutor]: Now, have you had a chance to listen to it again? Can you tell the jury what's going on in that clip?
>
> [Mr. Dukes]: I'm on the phone. Murchison is standing behind me. I mean there was a couple of people that showed up, Jay - - - or Todd Dixon and Virgil had showed up to the store and we were all standing outside and I was on the phone with Garrick Graham during that time negotiating prices for what he had, which was 22 rocks is what I ended up getting but I was always trying to get more and at the end of that tape right there I was telling Murchison what Garrick was trying to offer me because Murchison for some reason didn't want to tell Garrick what we were doing at that time so - - -
>
> [Prosecutor]: All right, now I think initially when I asked you about this transaction you seemed pretty clear that you went to the Perfect Pair but then you were unsure of where you went after that. After you reviewed your statement do you know where you went after you left the Perfect Pair?
>
> [Mr. Dukes]: No.
>
> [Prosecutor]: Okay would you like to review your statement?
>
> [Mr. Dukes]: Yeah.

[Prosecutor]: And the statement you gave, you gave at the time this occurred, right?

[Mr. Dukes]: I did.

[Prosecutor]: Okay.

[Mr. Dukes]: That deal was so long, I remember it taking all day. It was an all day thing.

[Graham's Counsel]: Your Honor, I would object to the continuous giving the witness his statement to get the answer that the prosecution wants. Either the witness at this point knows or he doesn't.

[Prosecutor]: Well, Judge, because he bought drugs so many times from these individuals it's confusing - - -

[Trial Court]: Well, I'm going to overrule your objection but the witness can use his prior statement to refresh his recollection.

[Prosecutor]: Have you had a chance to refresh your memory?

[Mr. Dukes]: Yes.

In this case, the State did not violate Tenn. R. Evid. 612 by allowing Mr. Dukes to refresh his memory by reviewing his statement that he had given to police after the drug buy on November 7, 2011. It is not clear from the record whether Mr. Dukes retained his statement while testifying but we find that this would be harmless error given the entire context of the case. *See State v. Ronald Mitchell*, No. 02C01-9702-CC-00070, 1997 WL 567913, at *5 (Tenn. Crim. App. Sept. 15, 1997)(Because the witness' notes were not taken back, "there appears to have been an error by the manner in which they were used." However, any error was "clearly harmless in the content of the entire record."). Defendant Murchison is not entitled to relief on this issue.

VI. Prosecutorial Misconduct

Defendant contends that the State engaged in prosecutorial misconduct by improperly vouching for Mr. Dukes' credibility and commenting on the evidence. The State responds that Defendant has waived this issue by failing to object to the prosecutor's comments. The State further asserts that Defendant Murchison failed to establish that the prosecutor's comments amounted to plain error. We agree.

As noted in a previous issue, in determining whether an alleged trial error constitutes "plain error," we consider five factors: 1) the record must clearly establish what occurred at trial; 2) a clear and unequivocal rule of law must have been breached; 3) a substantial right of the defendant must have been adversely affected; 4) the defendant did not waive the issue for tactical reasons; and 5) consideration of the error is "necessary to do substantial justice." *See State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994). Ultimately, the error must have "had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *Id*. at 642. "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000).

Initially, we note that the record clearly establishes what occurred in the trial court. We find that Defendant Murchison has failed to establish that a clear and unequivocal rule of law was breached. It is improper for a prosecutor to "engage in derogatory remarks, appeal to the prejudice of the jury, misstate the evidence, or make arguments not reasonably based on the evidence." *State v. Bates*, 804 S.W.2d 868, 881 (Tenn. 1991). In *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003), this court outlined "five general areas of prosecutorial misconduct":

(1) intentionally misleading or misstating the evidence;
(2) expressing a personal belief or opinion as to the truth or falsity of the evidence or defendant's guilt;
(3) making statements calculated to inflame the passions or prejudices of the jury;
(4) injecting broader issues than the guilt or innocence of the accused; and
(5) intentionally referring to or arguing facts outside the record that are not matters of common public knowledge.

"In determining whether statements made in closing argument constitute reversible error, it is necessary to determine whether the statements were improper and, if so, whether the impropriety affected the verdict." In connection with this issue, we must also examine the following factors:

(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case[;]
(2) the curative measures undertaken by the court and the prosecution[;]

(3) the intent of the prosecutor in making the statement[;]
(4) the cumulative effect of the improper conduct and any other errors in the record[; and]
(5) the relative strength or weakness of the case.

State v. Pulliam, 950 S.W.2d 360, 367 (Tenn. Crim. App. 1996) (quoting *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). Even if a prosecutor's comments, however, are found to be improper, whether the misconduct amounts to reversible error depends on whether the comments had a prejudicial effect on the jury. *State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999).

In this case, Defendant Murchison complains of the prosecutor's comment that took place during the following exchange from Mr. Dukes' direct examination:

> [Mr. Dukes]: That deal was so long, I remember it taking all day. It was an all day thing.
>
> [Graham's Counsel]: Your Honor, I would object to the continuous giving the witness his statement to get the answer that the prosecution wants. Either the witness at this point knows or he doesn't.
>
> *[Prosecutor]: Well, Judge, because he bought drugs so many times from these individuals it's confusing* - - -
>
> [Trial Court]: Well, I'm going to overrule your objection but the witness can use his prior statement to refresh his recollection.

It is improper for a prosecutor to assert his or her personal opinion as to the credibility of a State's witness. *See Thornton*, 10 S.W.3d at 235. "Whether a statement qualifies as misconduct often depends on the specific terminology used." *Id.* Words such as "I submit" or "in my view" before the prosecutor's challenged observation are not the equivalent of a personalized opinion. *Id*. In this case we find that the prosecutor's comment was not improper and does not amount to prosecutorial misconduct. The prosecutor did not express a personal belief or his opinion about Mr. Dukes' credibility nor did the prosecutor improperly comment on the evidence. Additionally, at that point in the trial, the State had introduced evidence of eight drug transactions through Mr. Dukes. Even if the prosecutor's comment amounted to prosecutorial misconduct, Defendant Murchison has in no way demonstrated that the comment affected the outcome of the trial given the overwhelming amount of evidence. Defendant is not entitled to relief on this issue.

VII. Denial of Motion to Sever Offenses

Defendant Murchison argues that he is entitled to appellate relief because the trial court erred by denying his motion to sever the multiple drug offenses in this case. We disagree. As pointed out by the State, Defendant Murchison did not file a motion to sever prior to trial, and he did not join in Defendant Graham's motion to sever. Tenn. R. Crim. P. 12(b)(2)(E) provides that "a Rule 14 motion to sever or consolidate charges or defendants" *must* be made before trial. Failure to do so results in a waiver of this issue. Tenn. R. Crim. P. 12(F)(1); *State v. Woods*, 806 S.W.2d 205, 210 (Tenn. Crim. App. 1990). Therefore, Defendant Murchison has waived this issue, and he is not entitled to plain error review because we determined in Defendant Graham's appeal that there was no error in the denial of his motion to sever. *See State v. Garrick Graham*, No. E2014-01267-CCA-R3-CD, 2016 WL _____, (Tenn. Crim. App. _____, 2016).

VIII. Sentencing

Defendant Murchison challenges both the length of his sentences and the trial court's order of consecutive sentencing.

Appellate review of the length, range, or manner of service of a sentence imposed by the trial court are to be reviewed under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). In sentencing a defendant, the trial court shall consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. *See* Tenn. Code Ann. §§ 40-35-102, -103, -210; *see also Bise*, 380 S.W.3d at 697-98. The burden is on the appellant to demonstrate the impropriety of his sentence. *See* Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c).

Although the trial court should consider enhancement and mitigating factors, the statutory enhancement factors are *advisory only*. *See* Tenn. Code Ann. § 40-35-114; *see also Bise*, 380 S.W.3d at 701; *State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). Our supreme court has stated that "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." *Carter*, 254 S.W.3d at 345. In other words, "the trial court is free to select *any sentence within the applicable range* so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" *Id*. at 343 (*emphasis added*). Appellate courts are "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 sections -102 and -103 of the Sentencing Act." *Id*. at 346.

The applicable sentencing range for a Range I offender convicted of: a Class A felony is 15 to 25 years; a Class B felony is 8 to 12 years; and a Class C felony is 3 to 6 years. T.C.A. § 40-35-112(a)(1)-(3). The trial court imposed the highest sentence within each range for each of Defendant's convictions.

The trial court stated on the record its findings regarding applicable enhancement and mitigating factors. The trial court found four enhancement factors applicable to Defendant Murchison: (1) that the defendant has a previous history of criminal convictions or behavior, in addition to those necessary to establish the appropriate range; (2) that the defendant was a leader in the commission of an offense involving two (2) or more criminal actors; (3) that the defendant before trial or sentencing failed to comply with the condition of a sentence involving release in the community; and (4) that the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114 (1), (2), (8) and (10). The trial court did not find any mitigating factors.

In *Bise* our supreme court held:

> We hold, therefore, that 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. So long as there are other reasons consistent with the purposes and

> principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld.

Bise, 380 S.W.3d at 706 (*emphasis added*). In its conclusion, the supreme court pointed out that in sentences involving misapplication of enhancement factors (even in those cases where *no* enhancement factor actually applies) the sentences must still be affirmed if the sentences imposed are within the appropriate range, and the sentences are in compliance with statutory sentencing purposes and principles. *Id*. at 710.

Our General Assembly has enacted twenty-five (25) statutory sentencing enhancement factors; however, they are not binding upon the trial courts. T.C.A. § 40-35-114 (Supp. 2015). The standard of review established in *Bise* provides that the minimum sentence can be imposed even if the trial court correctly applies all twenty-five enhancement factors, or the maximum sentence imposed even if no statutory enhancement factors are applicable, as long as the sentence is within the correct range and the sentence complies with other sentencing purposes and principles. Accordingly, appellate review of enhancement factor issues is mostly unnecessary when reviewing the length of a sentence.

Having reviewed the record before us, we conclude that the trial court clearly stated on the record its reasons for imposing the sentences imposed, and all of Defendant's sentences are within the appropriate ranges. The record reflects that the trial court considered the purposes and principles of the Sentencing Act. Therefore, the trial court's imposition of the maximum sentences is presumed reasonable.

Defendant Murchison mentions alternative sentencing in his brief. However, he has failed to cite to authority or the record in support of his argument. Therefore, the issue is waived. Tenn. R. Crim. App. 10(b). In any event, the length of his sentences make him ineligible for probation. T.C.A. § 40-35-303. He is also not presumed to be a favorable candidate for alternative sentencing due to the nature of his offenses. T.C.A. § 40-35-102(6)(A). This issue is without merit.

Our supreme court has also extended the standard of review enunciated in *State v. Bise*, abuse of discretion with a presumption of reasonableness, to consecutive sentencing determinations. *State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013). Tennessee Code Annotated section 40-35-115 sets forth the factors that are relevant in determining whether sentences should run concurrently or consecutively. The trial court may order consecutive sentences if it finds by a preponderance of the evidence that one or more of the seven statutory factors exist. *Id*. § -115(b). Imposition of consecutive sentences must be "justly deserved in relation to the seriousness of the offense." T.C.A. § 40-35-102(1).

The length of the resulting sentence must be "no greater than that deserved for the offense committed." T.C.A. § 40-35-103(2).

Tennessee Code Annotated section 40-35-115(b) provides that a trial court may order sentences to run consecutively if it finds any one of the following criteria by a preponderance of the evidence:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation;
> or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b).

In *Pollard*, the court reiterated that "[a]ny one of these grounds is a sufficient basis for the imposition of consecutive sentences." 432 S.W.3d at 862. "So long as a trial court properly articulates its reasons for ordering consecutive sentences, thereby

providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal." *Id.*; *Bise*, 380 S.W.3d at 705.

In this case, the trial court found two statutory factors, either of which alone would be sufficient to support the imposition of consecutive sentencing. The trial court found that Defendant was a professional criminal who has knowingly devoted his life to criminal acts as a major source of livelihood and that Defendant was an offender whose record of criminal activity is extensive. With regard to the consecutive sentencing, the trial court found:

> Of course there's nothing by law that requires consecutive sentencing but the two factors that I want to look at whether or not I find by a preponderance of the evidence, one apply that he is a professional criminal who has knowingly devoted [his] life to criminal acts as a major source of livelihood or that he has an extensive record of criminal activity and/or both. In reviewing these it would appear from the record that I've heard and also from the testimony at trial that Defendant Murchison's only source of income has been that's reported here is from disability. He has not worked and has been on disability since 1997.
>
> * * *
>
> There is, January of 1997 so he's been on disability since 1997 and he clearly denies on here any use of any non-prescribed or illegal drugs so he's not a cocaine user, he's not a cocaine or drug abuser or user and there's nothing to indicate anywhere in this record that he's doing this and involved in this other than for the money and in fact he clearly has stated in the statement that he gave to probation that he was trying to survive, that his mother had passed away and he had to pay for her funeral expenses and medical bills; that his daughter was pregnant and "I had more than I could handle and I was trying to take care of my family." I mean that's what this says, that that's all that was going as part of this process. And it's not like - - - we're only talking about a one month period of time in here. While, yes, in this particular case the times that we're looking at are between October and November of 2011, but then clearly we're showing in March of 2009 that he's involved in cocaine. I mean that's what this case that I've received a copy of where he plead guilty to possession of .5 ounces of cocaine. I mean it's just possession of cocaine, it's not for resale. But we know in 2009 he was involved in cocaine in some aspect. It's an illegal drug and yet here is

involved with others, not just by himself but with others with regard to cocaine. And as I say he's not - - - and while I read - - - while the report says knowingly devoted his life to criminal acts as a major source of livelihood I don't think that the legislature or the courts indicated that since you turned 18 that to be a professional criminal that you'd have to have done it your entire life. I just don't really think that that's what the legislature was saying. I think that they were saying was, is that what you're doing and I think from the amount of cocaine that's involved, almost an ounce in each one of these cases, the amount of money that's involved, 1800 in one incident, 1950 in another, 1950 in another, 1900, I mean almost over $7,000 in a period of a little less than a month, you know, when you're talking about $7,000 to a person who in this case is receiving disability in the amount of $67[0].00 a month, so over two months you're talking about 13 and when you compare 1300 or so in disability to almost $8,000 in sale of cocaine I think that's pretty significant in my opinion. I do think that that's a very significant amount and unless Defendant Murchison is the most unluckiest person in the world that he happened to pick the four times that he happened to have close to an ounce of cocaine that it happened to be the only person that was available to distribute, for which he could distribute this cocaine and receive cash, it happened to be a confidential informant, I just think that that's - - - would be an incredible argument for anybody to make. So while Mr. Martin you've talked about the fact that it's a - - - that term that you used of sentence entrapment, I just don't think that applies in this kind of case when you're dealing with this amount of cocaine and this amount of money on the issue of whether or not he's a professional criminal and so I find that. I think that's what he was doing during this time period and I think based on his statements in here he was trying to raise as much money as he could for whatever, bills, family. I mean that's all that's in there but be that as it may I also find an extended record of criminal activity. You know, we're not talking about just one sale or delivery of over a half a gram of cocaine. I mean we're talking about almost an ounce, 26 or so grams of cocaine and we're talking about not just one time, we're talking about four different times and so I find by a preponderance of the evidence that that in my opinion, when you couple that with his other drug conviction in 2009, even though a misdemeanor, I find that that creates in my opinion is an extensive record of criminal activity and by a preponderance of the evidence and so I find that, too, and so I find that he is eligible for consecutive sentencing so as a result of that I'm going to make a determination about consecutive sentencing in this case.

The record supports the trial court's findings. The record reflects that Defendant Murchison received disability benefits of $670 per month and that child support for two of his children is deducted from his social security check. Although there was testimony at trial that Defendant Murchison and Teresa Holder owned a business called the Perfect Pair at the time of the offenses, there was no testimony about any income generated by the business other than it was the location of two of the controlled buys in this case. In the presentence report, Defendant Murchison admitted that he sold cocaine in order to "get by" and provide for his family. *See State v. Marques Sanchez Johnson*, No. M2012-00163-CCA-R3-CD, 2012 WL 5188136, at *4 (Tenn. Crim. App., Oct. 18, 2012)(Trial court correctly found that defendant was a professional criminal who had knowingly devoted his life to criminal acts as a major source of livelihood. "Indeed, there was testimony in the record that [defendant] committed the thefts in part to provide for himself and his family."). We also note that in the presentence report, Defendant Murchison reported that he had never used any "non-prescribed or illegal drugs."

The trial court also correctly found that Defendant Murchison's record of criminal activity is extensive. This factor alone supports consecutive sentencing. "This factor has been interpreted to include not only the convictions presently before the sentencing court but also prior offenses." *State v. Palmer*, 10 S.W.3d 638, 647-49 (Tenn. Crim. App. 1999). As noted above, Defendant Murchison has convictions for simple possession of cocaine, driving on a revoked license, and a traffic offense for "no driver's license." In the present case, Defendant was convicted of five additional felony drug-related offenses. Therefore, he is an offender with an extensive criminal history. *See State v. Cummings*, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992)(Consecutive sentencing upheld where a defendant with no criminal history was convicted of eight offenses in a single trial based on a finding that his record of criminal activity was extensive.).

Defendant Murchison also argues that the trial court erred by ignoring the principles of "sentence entrapment" in imposing partial consecutive sentences in this case. This court addressed the issue of "sentence entrapment" in *State v. John Derrick Martin*, No. 1C01-9502-CR-00043, 1995 WL 747824 (Tenn. Crim. App., Dec. 19, 1995). In *Martin*, the trial court ordered the defendant's four drug convictions to run consecutively to each other, and an unrelated Kentucky sentence, for an effective sentence of forty years. On appeal this Court concluded that although the defendant qualified as a professional criminal and committed the offenses while on probation, the defendant's forty-year sentence for the drug offenses was not reasonably related to the severity of the four crimes. This court held:

> Because these were controlled buys, the officers dictated the number of counts. As such, the severity of the crimes could vary significantly

> depending upon the specific number of buys the officers chose to conduct and the amounts purchased in each buy. For this reason, we are of the opinion that a total sentence of twenty years for the drug cases is appropriate. Therefore, we modify the consecutive nature of the sentences such that the two ten-year sentences on similar counts one and two will run concurrently with each other and concurrently with all of the other counts including the two misdemeanor offenses. The remaining sentences will run consecutively to each other.

In *State v. Richard Lynn Norton*, No. E1999-00878-CCA-R3-CD, 2000 WL 1185384 (Tenn. Crim. App., Aug. 22, 2000), the defendant was convicted of three drug offenses and received three consecutive sentences. Relying on *Martin*, the panel in *Norton* reduced the defendant's sentence from thirty-six to twenty-four years reasoning that the "imposition of three consecutive sentences would permit investigating officers to dictate the length of a sentence based upon the number of controlled buys they arrange and the amounts purchased. *Norton*, 2000 WL 1185384, at *9. In *State v. William Lewis Houston*, No. M1999-01430-CCA-R3-CD, 2000 WL 1793088 (Tenn. Crim. App. Dec. 7, 2000), the defendant was convicted of eight drug offenses and one count of aggravated assault. He received an effective seventy-two-year sentence. Based on *Martin* and *Norton*, this court concluded that the defendant should serve four of his sentences rather than six consecutively reducing the effective term of seventy-two years to forty-six years. This court further said:

> We recognize that this sentence is higher than those imposed in *Norton* and *Martin*. However, this defendant's drug and other criminal activity is more egregious. Two of the cases involved well over 26 grams of cocaine; namely, 49.1 grams and 80.5 grams. Five other cases involved well over 0.5 grams, namely, 1.9 grams, 6.7 grams, 13.9 grams, 20.3 grams and 17.2 grams. The counterfeit cocaine case was supposed to involve two ounces of cocaine. Furthermore, the evidence in this case reveals that defendant had drug contacts across the United States. We conclude that an effective sentence of forty-six years is appropriate under all the circumstances.

Houston, 2000 WL 1793088, at *13.

However, all of these cases precede the Tennessee Supreme Court's decision in *Bise* and *Pollard*, which imposes greater appellate deference to a trial court's sentencing determinations. In any event, these three cases do not undermine the imposition of partial consecutive sentencing in this case and Defendant Murchison's fifty-year sentence. In this case, given the number of offenses as well as the amount of drugs involved in the

offenses, the imposition of partial consecutive sentencing resulting in Defendant Murchison's fifty-year sentence is reasonably related to the severity of the offenses. All but one of the controlled buys in which Defendant Murchison participated involved more than 20 grams of cocaine. This issue is without merit.

We conclude that the trial court did not abuse its discretion in sentencing Defendant. Accordingly, the judgments of the trial court are affirmed.

_____

THOMAS T. WOODALL, PRESIDING JUDGE