

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs December 3, 2019

FILED

04/24/2020

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. DARIUS MARKEE ALSTON aka "JACK"

**Appeal from the Circuit Court for Lauderdale County
No. 9775 Joe H. Walker, III, Judge**

No. W2018-00550-CCA-R3-CD

A Lauderdale County jury convicted the defendant, Darius Markee Alston, of two counts of first degree premeditated murder, two counts of felony murder, two counts of especially aggravated robbery, and unlawful possession of a firearm by a convicted felon. The trial court imposed an effective sentence of life in confinement. On appeal, the defendant challenges the sufficiency of the evidence supporting his convictions, and asserts the trial court erred by: allowing testimony of his co-defendant's nickname, allowing improper opinion testimony, denying his motion for a mistrial, and not severing his trial from his co-defendant's trial. Upon our review of the record, we affirm the judgments of the trial court.

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

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

Claiborne H. Ferguson, Memphis, Tennessee (on appeal) and David S. Stockton, Assistant Public Defender (at trial), for the appellant, Darius Markee Alston.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Mark E. Davidson, District Attorney General; and Julie K. Pillow, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The defendant's convictions stem from the September 4, 2011 shooting deaths of the victims, Eric Washington and Jonathan Jones, in Henning, Tennessee. The defendant and Mr. Washington were cousins and were expected to attend a family barbecue that day

until the defendant and his co-defendant, Darius Mitchell, lured the victims to Bethlehem Cemetery where they robbed the victims and shot them multiple times with a 12-gauge shotgun. Both victims died as a result of their injuries. For his participation in the crimes, a Lauderdale County grand jury indicted the defendant for two counts of first degree premeditated murder (Counts 1 and 2), two counts of felony murder (Counts 3 and 4), two counts of especially aggravated robbery (Counts 5 and 6), and unlawful possession of a firearm by a convicted felon (Count 7). Tenn. Code Ann. §§ 39-13-202(a)(1), (2); -403(a); § 39-17-1307(b)(1)(A). Co-defendant Mitchell was also charged in counts 1-6.¹ The defendants were tried jointly.

A. Motion in Limine

Prior to trial, the defendant filed a motion in limine to exclude any extrajudicial statements made by his co-defendant which implicated the defendant in the charged offenses. Specifically, the defendant requested the exclusion of: (1) his co-defendant's statement to law enforcement in which the co-defendant claimed he overheard the defendant admit to killing the victims and (2) statements by his co-defendant to several inmates that he and the defendant killed the victims. After conducting a hearing on the defendant's motion, the trial court ruled that, so long as co-defendant Mitchell did not testify, all prior out-of-court statements by co-defendant Mitchell implicating the defendant were inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968). The trial court noted, however, that if co-defendant Mitchell decided to testify, such statements would be admissible because the defendant would have an opportunity to cross-examine him. The parties then proceeded to the remainder of trial.

B. Trial

The evidence at trial showed that on September 4, 2011, at approximately 4:00 p.m., Hertha Barlow was driving on Tate Road near Bethlehem Cemetery in Henning, Tennessee, when she came upon a vehicle stopped in the middle of the road with its driver's door open. The roadway was impassable due to the vehicle's position, so Ms. Barlow turned around and called 9-1-1.

Officer Dan Rayner of the Ripley Police Department testified he worked for the Henning Police Department on September 4, 2011, and responded to Ms. Barlow's 9-1-1 call. At 4:09 p.m., Officer Rayner located a vehicle stopped in the middle of Tate Road with its front doors open and the engine running. Officer Rayner looked up the license plate number and discovered the vehicle was registered to Ola Faye Jones, Mr. Jones's mother. When Officer Rayner approached the vehicle, he discovered two men who had

¹ Co-defendant Mitchell was also charged in Count 8 for unlawful possession of a firearm by a convicted felon.

been shot to death, sitting in the vehicle's front seats. Mr. Washington was in the driver's seat, and Mr. Jones was in the passenger's seat.

Dr. Marco Ross, an expert in pathology, performed the autopsies of the victims. According to Dr. Ross, Mr. Jones sustained four wounds from a shotgun fired from a distance of three to four feet: two to the head, one to the left shoulder, and one to the left upper arm. Mr. Washington sustained a gunshot to the neck from a shotgun fired from a distance of three to four feet. Both men died as a result of their wounds.

Nicole Pettigrew, Mr. Washington's girlfriend, testified that she and Mr. Washington were planning to attend a family barbecue on the evening of the murders. Earlier that day, Mr. Washington, the defendant, and co-defendant Mitchell participated in a dice game at Ms. Pettigrew's house. Ms. Pettigrew testified Mr. Washington was involved in selling drugs and always carried "a good amount of money." She stated that on the day of the murders, Mr. Washington possessed \$6,000 to \$7,000 in cash which he displayed during the dice game.

Later that afternoon, Mr. Washington was repairing Ms. Pettigrew's car and needed additional parts for the repair. So, he and Mr. Jones left in Mr. Jones's car to go to Auto Zone. On the way to Auto Zone, the victims encountered Sammy Haley, Mr. Washington's father, at Midway Market. Mr. Washington told Mr. Haley he was going to Auto Zone and then to buy a motorcycle with the \$6,500 in cash Mr. Washington had in his pocket.

After seeing the victims, Mr. Haley left Midway Market to go to the family barbecue which was three or four minutes away. As he was leaving, Mr. Haley saw the defendant walking by the road about two hundred yards from Midway Market. Less than an hour later, Mr. Haley was at the family barbecue when he received a phone call informing him something had happened to Mr. Washington near the cemetery. Mr. Haley insisted the defendant did not arrive at the barbecue until after the murders.

Josephine Haley, Mr. Washington's mother and Mr. Jones's cousin, testified she attended the family barbecue with Veronica Washington, the defendant's girlfriend. Mrs. Haley testified that Ms. Washington repeatedly asked her for a ride to Midway Market to get cigarettes for the defendant, who was at "Michelle's" house. On their way to Midway Market, Mrs. Haley and Ms. Washington saw an ambulance traveling toward the cemetery. After they left the market, Mrs. Haley and Ms. Washington went to Michelle's house where they gave the cigarettes to the defendant. While there, Mrs. Haley called Mr. Washington repeatedly but he did not answer. She then received a call from her son, Travis, who told her the victims had been in a car accident by the cemetery.

Mrs. Haley went to the scene where she discovered both victims had died. The defendant, who also went to the scene, hugged Mrs. Haley and told her "Goon" killed

Mr. Washington. The defendant also stated he would have killed Goon if he had a gun.² Mrs. Haley testified that Goon is her cousin and that she did not believe Goon killed Mr. Washington. After Mrs. Haley returned to the barbecue, the defendant arrived wearing a bullet proof vest. Mrs. Haley insisted the defendant had not been at the barbecue until after the murders. She also stated that Ms. Washington's eagerness to buy cigarettes for the defendant was strange and that it seemed "like [the defendant] was rushing [Ms. Washington] to get me there for an alibi."

Ola Faye Jones, Mr. Jones's mother, testified she knew co-defendant Mitchell and often saw him with Mr. Jones. She recalled two occasions when co-defendant Mitchell had threatened Mr. Jones. On one occasion, Ms. Jones and Mr. Jones were standing on co-defendant Mitchell's lawn when he threatened to kill Mr. Jones during an argument. On another occasion, Mr. Jones called Ms. Jones and told her that co-defendant Mitchell had pointed a gun at him. Ms. Jones testified that on the day of the murders, she was informed that her vehicle was involved in an incident near the cemetery on Tate Road. When she went to the crime scene, investigators had secured the scene so that she could not get close to her vehicle. Ms. Jones stated she saw the defendant at the crime scene. She noticed that, as the defendant was leaving, he removed a white t-shirt he was wearing and tossed it into a nearby ditch. Ms. Jones collected the t-shirt and gave it to investigators the next day.

Tennessee Bureau of Investigation Special Agent Mark Reynolds, who led the investigation, arrived at the crime scene around 6:00 p.m. on September 4, 2011. He noticed Mr. Washington's pants pockets were pulled inside out as if someone had gone through them, so he collected the pants for DNA analysis. In the car, investigators also located a shotgun shell on the driver's side floorboard and a baseball cap with a large hole on one side and more than half of its bill detached on the passenger's side floorboard. The next day, Agent Reynolds received a white t-shirt that Ms. Jones had recovered near the crime scene and was informed the t-shirt belonged to the defendant. Agent Reynolds submitted all of the evidence from the crime scene, including the t-shirt, to the crime lab for forensic analysis; however, the results were inconclusive.

Agent Reynolds interviewed the defendant in September 2011 at the defendant's aunt's house. The defendant claimed he was at the family barbecue when the murders occurred. Agent Reynolds noted that the defendant was "very nervous" and that his "voice cracked when he tried to talk" during the interview. The defendant "would always kind of repeat the question to [me] before he gave [me] an answer." According to Agent Reynolds, "[t]his is indicative of someone trying to think of something to say or give a correct answer." Agent Reynolds also noted that Ms. Washington was present during the interview and that she "had a look on her face that she knew different of what [the

² The record does not identify Goon's real name.

defendant] was telling us.” Despite having suspicions the defendant was lying about his whereabouts, Agent Reynolds did not arrest the defendant at that time.

As part of his investigation, Agent Reynolds reviewed surveillance footage from Midway Market which showed the victims at the market on September 4, 2011, at 3:38 p.m. Mr. Washington was seen outside the market talking to Mr. Haley, and Mr. Jones was seen walking out of the market wearing the baseball cap that investigators recovered from the vehicle at the crime scene.

After reviewing the surveillance footage, Agent Reynolds interviewed Mr. Haley. While Agent Reynolds did not disclose the details of their conversation, he testified that Mr. Haley’s statement contradicted the defendant’s alibi and that the timeline of events provided by Mr. Haley was corroborated by the video footage from Midway Market. Agent Reynolds’s interview with Mr. Haley led to the development of co-defendant Mitchell as a person of interest. Agent Reynolds interviewed co-defendant Mitchell but did not obtain information about the murders. Due to insufficient evidence, the case remained unsolved for nearly three years until several inmates, including Terence Scales, Terrance Yarbrough, Mardrakous Sugars, and Marwan Muex, came forward with information.

Terence Scales testified he had been incarcerated with the defendants in federal custody in 2013. During that time, co-defendant Mitchell confessed he had participated in a double murder by the cemetery on Tate Road. Mr. Scales recalled co-defendant Mitchell saying he and an accomplice “set the victims up” by inviting them to the cemetery for a drug transaction and then killed them. After killing the victims, they “took what they wanted to take” and “left [the victims] slump[ed] in the car.” According to Mr. Scales, the defendant was present during one of the conversations Mr. Scales had with co-defendant Mitchell about the murders. Mr. Scales stated the defendant expressed he had been disgruntled with Mr. Jones for switching gang affiliation. On October 29, 2014, Mr. Scales sent a letter to the District Attorney’s Office reporting his conversations with co-defendant Mitchell and the defendant. Mr. Scales denied receiving a reward in exchange for providing the information.

Terrance Yarbrough testified he had been incarcerated with the defendant in 2013 for about six months to a year. He and the defendant were close friends who spoke daily. According to Mr. Yarbrough, the defendant confided in him after the defendant’s mother died of cancer. The defendant told Mr. Yarbrough that he believed his mother’s death happened as a result of karma for “what [the defendant] had done.” The defendant admitted to Mr. Yarbrough that he and an accomplice, known as “Murder,” had “set [the defendant’s] cousin up.” Mr. Yarbrough testified the defendant named Mr. Washington, also known as “E-Dubb,” as the cousin whom they had set up. According to Mr. Yarbrough, the defendant rode to the cemetery in the back seat of a vehicle with the victims, who were going to the cemetery for a Vice Lords’ meeting. Mr. Yarbrough

testified the defendant had expressed concern that one of the victims' fathers had seen him enter the vehicle. When they reached the cemetery, the defendant and his accomplice robbed the victims, and the defendant killed Mr. Jones. Mr. Yarbrough stated the defendant admitted he stole less than \$10,000 from the victims. Mr. Yarbrough was also incarcerated with co-defendant Mitchell. During that time, Mr. Yarbrough overheard co-defendant Mitchell tell another inmate that he "did E-Dubb." According to Mr. Yarbrough, these conversations occurred in 2013. In May 2017, he disclosed the information to authorities but did not receive a reward in exchange for doing so.

Mardrakous Sugars testified he was co-defendant Mitchell's cellmate in 2013 for about two weeks. During that time, co-defendant Mitchell told Mr. Sugars that he lured the victims to the cemetery where he planned to rob them but the robbery "went bad." Mr. Sugars stated that co-defendant Mitchell had animosity toward the victims because the victims "wouldn't give [co-defendant Mitchell] his piece of the pie." Eight months to a year after learning this information, Mr. Sugars disclosed co-defendant Mitchell's admissions to law enforcement but did not receive a reward in exchange for doing so.

Marwan Muex testified he and co-defendant Mitchell were cellmates for about a month in late 2013 or early 2014. Co-defendant Mitchell told Mr. Muex that he and his "partner" had tricked the victims into going to the cemetery for a Vice Lords' meeting. According to Mr. Muex, co-defendant Mitchell claimed he shot the victims because he was jealous that they "had been doing better financially" than him. Mr. Muex stated, "[i]magine he get mad over something like that, what else he'll do. Just imagine how he got his nickname Murder." Mr. Muex stated he contacted law enforcement about co-defendant Mitchell's admissions two to three months before co-defendant Mitchell and the defendant's trial. He denied receiving a reward in exchange for disclosing the information.

While the defendant chose not to offer any evidence, co-defendant Mitchell testified in his own defense. He testified he was at his house with Jeremy Hurdle when the murders happened. He stated he was standing outside when his police scanner broadcasted a "wreck or something" near the cemetery involving a car registered to Ms. Jones. Co-defendant Mitchell went to the scene where he discovered the victims had been shot to death.

Co-defendant Mitchell insisted that the witnesses who testified against him provided false testimony. He testified Ms. Jones lied when she stated that co-defendant Mitchell threatened to kill Mr. Jones. He also claimed that he did not know any of the inmates who testified and that he was never housed in the same unit as the defendant or Mr. Scales. Co-defendant Mitchell denied being cellmates with Mr. Muex and could not recall being cellmates with Mr. Sugars. He also denied that his nickname was "Murder" or that he was a member of the Vice Lords.

On cross-examination by the State, co-defendant Mitchell acknowledged that in April 2014, he gave a statement to Agent Reynolds at the United States Attorney's Office in exchange for time served on a sentence in an unrelated conviction. In his statement, co-defendant Mitchell stated the defendant had admitted to several people that the defendant murdered the victims. The defendant was given an opportunity to cross-examine co-defendant Mitchell but chose not to do so.

The State presented rebuttal proof wherein both Ms. Jones and Mrs. Haley testified that co-defendant Mitchell's nickname was "Murder" and that Mr. Jones and co-defendant Mitchell were members of the Vice Lords. Mr. Haley also testified that co-defendant Mitchell's nickname was "Murder." In addition, Mr. Haley stated that as he was driving away from Midway Market just moments before the murders, he saw a black truck driving toward the cemetery with Jeremy Hurdle in the passenger's seat. He stated he saw the truck at the same time co-defendant Mitchell claimed to be at his house with Mr. Hurdle.

Agent Reynolds testified he was present for co-defendant Mitchell's statement in April 2014 when co-defendant Mitchell stated that the defendant had admitted to several people that he shot the victims with a 12-gauge shotgun and left the victims at the cemetery. Agent Reynolds testified that this information was consistent with the crime scene and that a 12-gauge shotgun shell was recovered from the scene. He also stated that the crime scene was guarded by investigators and that the caliber of weapon and the nature of the victims' injuries were kept classified. Therefore, according to Agent Reynolds, co-defendant Mitchell could not have known the victims were shot with a 12-gauge shotgun unless he had first-hand knowledge of the murders. The State also introduced a document through Agent Reynolds which verified that co-defendant Mitchell and Mr. Muex were cellmates.

The State also re-called Mr. Sugars and Mr. Muex, who reiterated their previous testimony about their conversations with co-defendant Mitchell. However, upon being re-called, they revealed that co-defendant Mitchell implicated the defendant in those same conversations. Mr. Sugars testified co-defendant Mitchell told him that co-defendant Mitchell and the defendant had planned to rob the victims at the cemetery, but the robbery "end[ed] up going bad." Mr. Muex testified co-defendant Mitchell admitted he shot the victims at the cemetery and that the defendant was his accomplice. Mr. Muex also testified co-defendant Mitchell is a member of the Vice Lords. Mr. Sugars and Mr. Muex both testified they knew co-defendant Mitchell by the nickname "Murder."

Following deliberations, the jury found the defendant guilty on all counts as charged. The trial court imposed life sentences for the two first degree murder convictions and the two felony murder convictions. The trial court then merged the two felony murder convictions with the two first degree murder convictions. The defendant also received forty years for each of his especially aggravated robbery convictions, and

fifteen years for his unlawful possession of a firearm conviction. The defendant filed a motion for new trial which was denied by the trial court, and this timely appeal followed.

Analysis

On appeal, the defendant argues the trial court erred in denying his motion for new trial because: (1) the evidence was insufficient to support his convictions; (2) he was prejudiced by the introduction of co-defendant Mitchell's nickname; (3) Agent Reynolds presented improper lay opinion testimony about the defendant's state of mind; (4) the State introduced testimony in violation of the defendant's right to confront witnesses against him under *Bruton*; and (5) the trial court should have severed the defendant's trial from co-defendant Mitchell's trial after co-defendant Mitchell testified. The State contends: (1) the evidence was sufficient to support the defendant's convictions; (2) the defendant has waived his challenge to the introduction of co-defendant Mitchell's nickname; (3) Agent Reynolds was properly allowed to testify about inferences he made based on his personal observations of the defendant; (4) any alleged *Bruton* violation was cured when co-defendant Mitchell testified; and (5) the defendant has waived his argument that his trial should have been severed from co-defendant Mitchell's trial. We agree with the State.

I. Sufficiency

The defendant argues the evidence at trial was insufficient to support his convictions, asserting that no physical evidence or eyewitness testimony linked him to the crime scene and that the only evidence tying him to the crimes was testimony from unreliable witnesses. The State contends the evidence was sufficient to prove the defendant was a perpetrator of the charged offenses.

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court has stated the following rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere, and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977); *Farmer v. State*, 343 S.W.2d 895, 897 (Tenn. 1961)). The standard of review for sufficiency of the evidence “is the same whether the conviction is based upon direct or circumstantial evidence.” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses’ testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury. *Dorantes*, 331 S.W.3d at 379 (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). This Court, when considering the sufficiency of the evidence, shall not reweigh the evidence or substitute its inferences for those drawn by the trier of fact. *Id.*

“The identity of the perpetrator is an essential element of any crime.” *Rice*, 184 S.W.3d at 662 (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). The burden is on the State to prove the identity of the defendant as the perpetrator beyond a reasonable doubt. *State v. Cribbs*, 967 S.W.2d 773, 779 (Tenn. 1998). The identification of the defendant as the perpetrator is “a question of fact for the jury upon its consideration of all competent proof.” *State v. Bell*, 512 S.W.3d 167, 198 (Tenn. 2015) (citing *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005)).

As charged in this case, first degree murder is “a premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a)(1). In this context, premeditation is “an act done after the exercise of reflection and judgment.” Tenn. Code Ann. § 39-13-

202(d). The question of whether a person acted with premeditation is a question of fact for the jury. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Proof of premeditation may be shown by direct or circumstantial evidence. *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). First degree felony murder, as charged here, is a killing of another in the perpetration of a robbery. Tenn. Code Ann. § 39-13-202(a)(2). Robbery is “the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a). Robbery becomes especially aggravated when it is accomplished with a deadly weapon and results in serious bodily injury. Tenn. Code Ann. § 39-13-403(a). Unlawful possession of a firearm by a convicted felon occurs when any person who has previously been convicted of a felony involving the use of or attempted use of force, violence, or a deadly weapon subsequently unlawfully possesses a firearm. Tenn. Code Ann. § 39-17-1307(b)(1)(A).

Here, the proof adduced at trial established that between 3:30 and 4:00 p.m. on September 4, 2011, the defendant and co-defendant Mitchell lured the victims to the cemetery, shot them to death with a 12-gauge shotgun, and robbed them. At approximately 3:30 p.m., Mr. Haley saw the victims at Midway Market in Mr. Jones’s car. Mr. Washington had \$6,500 in his pockets, which according to Ms. Pettigrew the defendant was aware of from the dice game earlier that day. When Mr. Haley left Midway Market, he saw the defendant walking nearby. At approximately 4:00 p.m., the victims were found in Mr. Jones’s car by the cemetery. Both men had been shot, and Mr. Washington’s money had been stolen. Mr. Yarbrough testified that the defendant confessed to him that the defendant and an accomplice had “set up” the victims, murdered them, and stolen less than \$10,000. The defendant also told Mr. Yarbrough that he rode with the victims to the cemetery and was concerned because one of the victims’ fathers had seen the defendant enter the car. Mr. Scales testified that co-defendant Mitchell admitted he and an accomplice invited the victims to the cemetery under the pretext of a drug transaction and that they killed the victims, robbed them, and left them “slump[ed] in the car.” Both Mr. Sugars and Mr. Muex testified co-defendant Mitchell admitted he and the defendant lured the victims to the cemetery and murdered them over jealousy and animosity. While the defendant claimed he was at the family barbecue when the murders occurred, both Mr. and Mrs. Haley insisted the defendant was not there until after the murders. Finally, co-defendant Mitchell gave a statement to law enforcement in April 2014 in which he claimed the defendant confessed to several people that the defendant lured the victims to the cemetery and killed them with a 12-gauge shotgun. Agent Reynolds testified co-defendant Mitchell’s statement was consistent with the crime scene and could have only been known by someone who had first-hand knowledge of the murders.

From these facts, a rational trier of fact could have found the defendant guilty of first degree premeditated murder, especially aggravated robbery, and unlawful possession

of a firearm by a convicted felon.³ Mr. Haley, Mr. Washington's father, saw the defendant within close proximity of the victims just moments before the defendant entered the back seat of Mr. Jones's car. Likewise, the defendant told Mr. Yarbrough he was concerned one of the victims' fathers saw him enter the car just moments before he murdered the victims at the cemetery. Several inmates testified they heard the defendant and/or co-defendant Mitchell admit to murdering and robbing the victims after luring them to the cemetery. The defendant suggests the inmates testified against him in order to "help their predicaments;" however, the defendant presented no evidence to support this assertion, and the inmates testified they did not receive a reward in exchange for their testimony. Although the defendant argues that the proof was merely circumstantial and uncorroborated by physical evidence and that several witnesses were not credible, the trier of fact is entrusted with determining the weight to be given to circumstantial evidence and evaluating the credibility of witnesses, and, based on the verdicts, the jury weighed the testimony of the informants and reconciled the evidence in favor of the State. *Campbell*, 245 S.W.3d at 335; *Dorantes*, 331 S.W.3d at 379. This Court will not reweigh the evidence. *Dorantes*, 331 S.W.3d at 379. Accordingly, sufficient evidence exists to establish the defendant as a perpetrator of the charged offenses beyond a reasonable doubt. The defendant is not entitled to relief.

II. Use of co-defendant Mitchell's nickname

The defendant argues the trial court erred in allowing the State to elicit co-defendant Mitchell's nickname, "Murder," from several witnesses. He argues that co-defendant Mitchell's nickname was irrelevant and created a danger of unfair prejudice by providing an improper basis for the jury to find the defendant guilty. The State contends the defendant has waived this issue by failing to object at trial. We agree with the State.

Evidence introduced at trial must be relevant to the issues of guilt or innocence of the accused. Tenn. R. Evid. 401. Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* Even relevant evidence "may be excluded if its probative value is substantially outweighed by . . . the danger of unfair prejudice." Tenn. R. Evid. 403. This Court has suggested that "[n]icknames should generally be avoided" during a trial and that a "trial judge should closely monitor any misuse." *State v. Zirkle*, 910 S.W.2d 874, 886 (Tenn. Crim. App. 1995).

³ During a bifurcated trial, the State introduced proof of the defendant's criminal record, including his previous convictions for attempted second degree murder and aggravated assault. Based on these prior felony convictions involving the use or attempted use of violence, his possession of a firearm in this case was unlawful. Tenn. Code Ann. § 39-17-1307(b)(1)(A).

Several witnesses referred to co-defendant Mitchell by his nickname, “Murder,” at trial. Mr. Yarbrough testified the defendant admitted he and an accomplice, known as “Murder,” lured the victims to the cemetery and killed them. Mr. Muex testified, “just imagine how [co-defendant Mitchell] got his nickname ‘Murder.’” On rebuttal, when Mr. Haley, Mr. Sugars, and Ms. Jones were asked if they were aware of co-defendant Mitchell’s nickname and what it was, all of them replied, “Murder.” Despite having numerous opportunities to object to the introduction of his co-defendant’s nickname, the defendant failed to do so. Accordingly, the defendant failed to preserve this issue for appeal, and the issue is waived. *State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000); *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”). Notwithstanding waiver, the defendant has not demonstrated that he was unfairly prejudiced by the use of co-defendant Mitchell’s nickname. The nickname was relevant because it was the name by which several witnesses knew co-defendant Mitchell, and most references to the nickname were introduced to rebut co-defendant Mitchell’s testimony that it was not his nickname. Moreover, the nickname was used to refer only to co-defendant Mitchell, not the defendant. Therefore, the defendant has failed to prove how references to his co-defendant’s nickname were unfairly prejudicial to him. The defendant is not entitled to relief.

III. Opinion testimony by Agent Reynolds

The defendant argues the trial court erroneously allowed Agent Reynolds to testify regarding his observations of the defendant when he was interviewing the defendant. The defendant contends Agent Reynolds was not qualified as an expert and the testimony “went beyond stating objective behavioral observations and stated [Agent Reynolds’s] own behavioral interpretation as fact.” The State contends Agent Reynolds’s testimony was rationally based on his observations of the defendant’s behavior. We agree with the State.

Unless qualified as experts, lay witnesses may not testify to observations that are “based on scientific, technical, or other specialized knowledge which would qualify the witness as an expert under Rule 702.” *State v. Timothy Murrell*, No. W2001-02279-CCA-R3-CD, 2003 WL 21644591, at *6 (Tenn. Crim. App. July 2, 2003); Tenn. R. Evid. 702. However, lay witnesses may offer testimony in the form of opinions or inferences which are both “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.” Tenn. R. Evid. 701(a). “If an opinion is based upon a lay witness’s own observations, his or her conclusions require no expertise and are within the range of common experience, the opinion is admissible.” *State v. Samuel*, 243 S.W.3d 592, 603 (Tenn. Crim. App. 2007). When the admission of opinion evidence is challenged on appeal, it is reviewable only for an abuse of discretion. *State v. Gray*, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997).

The trial court did not abuse its discretion in allowing Agent Reynolds's testimony. Agent Reynolds testified that when he interviewed the defendant in September 2011, the defendant was "very nervous" and his "voice cracked when he tried to talk." The defendant would "repeat the question to you before he gave you an answer" which indicated to Agent Reynolds that the defendant was "trying to think of something to say or give a correct answer." Agent Reynolds's testimony that the defendant appeared nervous was rationally based on his perception of the defendant and was helpful to the jury in determining the credibility of the defendant's alibi, a central issue in this case. In addition, the defendant's tendency to repeat questions before answering them provided a rational basis for Agent Reynolds to infer that the defendant was "trying to think of something to say or give a correct answer." See *State v. Thomas Dee Huskey*, No. E1999-00438-CCA-R3-CD, 2002 WL 1400059, at *181 (Tenn. Crim. App. June 28, 2002) (concluding that a police officer's statement that the victim was "nervous" and "upset" was rationally based on the officer's perception of the victim and helpful to the jury in determining the victim's credibility); Tenn. R. Evid. 701(a). We conclude that Agent Reynolds's opinion was based on his own observations, was within the range of common experience, and did not require expertise or specialized knowledge. See *Samuel*, 243 S.W.3d at 603. Therefore, the testimony was admissible, and the defendant is not entitled to relief.

IV. *Bruton* violation

The defendant argues the trial court erred by not granting a mistrial after Mr. Yarbrough introduced an extrajudicial statement made by co-defendant Mitchell which violated the defendant's right to confront witnesses against him under *Bruton*, 391 U.S. 123. The State contends that any *Bruton* violation was cured when co-defendant Mitchell testified at trial. We agree with the State.

In *Bruton*, the Supreme Court of the United States held that introduction of a statement of a non-testifying co-defendant which expressly incriminates the complaining defendant violates the complaining defendant's constitutional right of confrontation. 391 U.S. at 126; see U.S. Const. amend. VI; Tenn. Const. art. 1, § 9. This rule is violated "only where the out-of-court hearsay statement is that of a [co-defendant] who is unavailable at the trial for 'full and effective' cross-examination." *Nelson v. O'Neal*, 402 U.S. 622, 627 (1971).

Prior to trial, the defendant filed a motion in limine to exclude extrajudicial statements made by co-defendant Mitchell which implicated the defendant. The trial court held that prior out-of-court statements made by co-defendant Mitchell implicating the defendant were inadmissible under *Bruton* so long as co-defendant Mitchell did not testify at trial. At trial, the State asked Mr. Yarbrough to describe a conversation he overheard in prison between co-defendant Mitchell and another inmate. Mr. Yarbrough

stated, “[co-defendant Mitchell] was saying, man, [the defendant] keep blabbing off at the mouth about --.” Before Mr. Yarbrough finished the statement, the defendant objected and, in a jury-out hearing, requested a mistrial based on a violation of the trial court’s ruling on his motion in limine and a violation of *Bruton*. The trial court sustained the objection and instructed Mr. Yarbrough not to testify about statements made by one co-defendant against another; however, the trial court denied the request for a mistrial. After the State rested, co-defendant Mitchell decided to testify, giving the defendant an opportunity to cross-examine co-defendant Mitchell, which the defendant declined. Though the defendant claims Mr. Yarbrough testified concerning statement’s co-defendant Mitchell made against and implicating the defendant, a review of the record reveals no such testimony was introduced. Rather, Mr. Yarbrough was interrupted by an objection prior to testifying to as to what co-defendant Mitchell told him what the defendant had said about the murders. Thus, there is no *Bruton* violation, and the defendant is not entitled to relief. Furthermore, even if Mr. Yarbrough’s mentioning of the defendant’s first name during when quoting co-defendant Mitchell implicated the defendant, the rule in *Bruton* is only violated when the statement was made by a co-defendant who “does not testify and cannot be tested by cross-examination.” *Bruton*, 391 U.S. at 136; *see also O’Neal*, 402 U.S. at 627. Therefore, because co-defendant Mitchell testified and was available for cross-examination, there was no *Bruton* violation, and the defendant is not entitled to relief.

V. Severance

Finally, the defendant argues the trial court failed to exercise an “independent duty” to sever the defendants’ trials “after [co-defendant] Mitchell’s testimony, because [the defendant] was clearly prejudiced by his co-defendant’s statements and behavior.” The State argues the defendant has waived this issue on appeal by failing to file a timely motion for severance. We agree with the State.

We review a trial court’s decision to grant or deny severance under an abuse of discretion standard. *State v. Dotson*, 254 S.W.3d 378, 390 (Tenn. 2008). A trial court abuses its discretion in denying severance if the record demonstrates “the defendant was clearly prejudiced to the point that the trial court’s discretion ended and the granting of severance became a judicial duty.” *State v. Burton*, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988) (quoting *Hunter v. State*, 440 S.W.2d 1, 6 (Tenn. 1969)). Tennessee Rule of Criminal Procedure 14(a)(1)(A) provides the procedure for severance as follows: “A defendant’s motion for severance of offenses or defendants shall be made before trial, except that a motion for severance may be made before or at the close of all evidence if based on a ground not previously known. A defendant waives severance if the motion is not timely.” *Id.*

Prior to trial, during a hearing on the defendant’s motion in limine, the defendant conceded that severance was not in his best interest and agreed to proceed to a joint trial.

Then, at no point during trial did the defendant request a severance. Rather, the defendant raised this complaint for the first time in his motion for new trial. Accordingly, the defendant has waived this issue on appeal. *State v. Calvin Person*, No. W2011-02682-CCA-R3-CD, 2013 WL 5883796, at *13 (Tenn. Crim. App. Oct. 31, 2013) (“The first time that [the defendant] raised the issue of severance was in his motion for new trial. Thus, we find that his complaint is untimely and, therefore, waived.”), *perm. app. denied* (Tenn. March 5, 2014). The defendant is not entitled to relief.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

J. ROSS DYER, JUDGE