

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 13, 2008 Session

STATE OF TENNESSEE v. ROBERT DONTERIOUS CONNER

**Direct Appeal from the Criminal Court for Davidson County
No. 2004-D-3081 Steve Dozier, Judge**

No. M2007-01619-CCA-R3-CD - Filed October 17, 2008

The defendant, Robert Donterious Conner, was convicted of one count of second degree murder and one count of aggravated assault. He was sentenced to twenty-three years and five years, respectively. The trial court ordered that the defendant's sentences run consecutively. On appeal, the defendant argues that there was insufficient evidence to support his convictions, the trial court erred by allowing inadmissible hearsay statements at trial, and the trial court erred by ordering his sentences to run consecutively. 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

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JJ., joined.

Michael A. Colavecchio, Nashville, Tennessee (on appeal and at trial) and Newton Holiday, Nashville, Tennessee (at trial) for the appellant, Robert Conner.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Katrin Miller and Christopher Buford, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The defendant was convicted of aggravated assault in a consolidated trial for the shooting of Keshawn Mansfield and the second degree murder for the killing of Rokeesha Roberts.¹ Keshawn testified that he and friend Kenneth Scott were walking on Creekwood Drive in Nashville when the

¹ Because this appeal arises from a consolidated trial concerning two separate incidents with two separate victims, we will refer to the victims by the first names for the sake of clarity and to avoid confusion. No disrespect is intended to either victim.

defendant drove up in a white car. According to Keshawn, the car stopped next to him under a street light. The defendant got out of the front passenger side of the car and began shooting at Keshawn and Mr. Scott. Keshawn was unable to recall how many shots were fired. Both men ran from the shooter. Keshawn stated that he was shot in the back of his left calf muscle and on the bottom of his right foot. Later, he was shown a photographic array of suspects by police officers and was able to identify a photograph of the defendant as the person who shot him. Keshawn testified that the defendant was commonly known as “Thug.”

On cross-examination, Keshawn testified that the car pulled up across the street and stopped. The defendant got out of the passenger side of the car and was walking around the car toward Keshawn when he began shooting. Keshawn was unable to recall what the defendant was wearing. He stated that he began running when he saw the defendant raise the gun in his direction. Keshawn was not familiar with the defendant’s car and did not know anything about the driver of the car, an individual identified as “Black.” He acknowledged that he did not tell detectives anything about the driver of the car. Keshawn further testified that he did not have a disagreement with the defendant prior to the shooting. He stated that he had only known the defendant for a few weeks prior to the incident. Keshawn recalled seeing the flash of the gun when the defendant fired at him and was certain that it was the defendant he saw shooting at him.

Keshawn admitted that he testified at the preliminary hearing that he heard the defendant fire at him at least five times. He could not recall whether detectives first suggested the defendant’s name, or whether he brought the defendant’s name up to the detectives when he met to talk about the case. He stated that after the defendant fired at him, the car pulled off and drove away. He also stated that he was unable to see the driver of the vehicle because it was night time and the car had tinted windows. According to Keshawn, he was able to make it to his sister’s house after being shot.

Devita Roberts testified that she was the mother of Rokeesha Roberts. She stated that her daughter was nineteen when she was shot and killed by the defendant. According to Ms. Roberts, Rokeesha, who had a one-year-old daughter, was planning to attend Tennessee State University in the fall. She stated that the defendant had been dating her daughter for about a year-and-a-half prior to her death.

Ms. Roberts testified that she had heard about the attempted shooting of Keshawn. She stated that Rokeesha knew Keshawn and had worked with Keshawn’s mother. On the day Rokeesha was killed, Ms. Roberts saw Rokeesha at her sister-in-law’s home where the family was gathered for a family birthday party. She received four phone calls from the defendant who was looking for Rokeesha. According to Ms. Roberts, Rokeesha was going home to pick up the defendant who was going to turn himself in to police for shooting Keshawn.

Ms. Roberts testified that Rokeesha told her that she was going to leave the defendant if she found out that the defendant shot Keshawn. According to Ms. Roberts, she was present when her daughter had a conversation over a speakerphone with the defendant. She stated that the defendant promised Ms. Roberts and Rokeesha that he did not shoot Keshawn. According to Ms. Roberts,

Rokeesha's last words to the defendant at the conclusion of the phone call were "[O]kay, Robert, then, if I find out that you did it, I'm leaving you." Ms. Roberts also testified that Rokeesha told her that the defendant threatened to kill her if she ever left him. Ms. Roberts stated that she did not take the defendant's threat seriously. She reiterated that on the day Rokeesha left the cookout, she believed Rokeesha was going to meet the defendant.

On cross-examination, Ms. Roberts reiterated that she was present during the speakerphone conversation between Rokeesha and the defendant. On the day Rokeesha was killed, Ms. Roberts believed that Rokeesha and the defendant's sister were going to accompany the defendant when he turned himself in to police custody. She stated that while Rokeesha and the defendant were dating, they would have disagreements, but she never saw them fight with one another.

Dwight Davis testified that he was employed as a paramedic with the Nashville Fire Department. He stated that his unit was the first to respond to the accident scene involving Rokeesha's car. He stated that as soon as he saw the bullet hole and fractured glass in the driver's side window, he realized that a shooting had occurred. When he tried to open the car doors he discovered that every door but the front passenger door was locked. After opening the front passenger door, he saw that the car was still running and in gear. He put the car in park and turned it off. According to Mr. Davis, Rokeesha was sitting in the driver's seat, slumped over the center console. She had been shot in the head. Rokeesha had no pulse or heartbeat and she was pronounced dead soon thereafter. Mr. Davis recalled that officers from the Metro Nashville Police Department arrived on the scene while he attended Rokeesha.

On cross-examination, Mr. Davis testified that he completed a crime scene report after the call. He confirmed that he was able to attach the four leads for the cardiac monitor to Rokeesha's body without moving her or disturbing the scene. According to Mr. Davis, it appeared that the car rolled down the driveway from the apartments across the street, and into the ditch where it was stopped by trees and bushes.

Olympia English testified that she knew the defendant from the Knollcrest Apartments. She also testified that she knew Rokeesha from school. She stated that she saw Rokeesha and the defendant together immediately before the shooting. Rokeesha came to her apartment and told her she was there to pick up the defendant. English recalled that Rokeesha and the defendant left in Rokeesha's car. Ms. English left the apartment a couple of minutes after Rokeesha and the defendant departed. She saw Rokeesha's car go into the grass across the street with the brake light on. She then saw the defendant run from the car. Ms. English testified that she told the woman next door to call the police.

On cross-examination, Ms. English testified that she did not see anything for a minute or two after the defendant and Rokeesha got into Rokeesha's car because she turned around and went back inside her apartment. She admitted that she did not hear a gunshot. She stated that she did not see where the defendant went after exiting Rokeesha's car. She also stated that the next day, police officers showed her a photographic array of suspects and she was able to identify the defendant to

police officers. She stated that when Rokeesha came to pick up the defendant, both individuals seemed to be in a good mood and did not appear to be fighting.

Verdell Williams testified that he was driving up the hill to the apartment complex in his car when he saw Rokeesha's car stopped in the bushes across the street. He stated that he opened the passenger door, got into the car, and tried to assist Rokeesha. He recalled that Rokeesha's eyes were "rolling," but she was unable to communicate. He then got out of Rokeesha's car, got back into his car, and drove to Rokeesha's mother's house. Unable to find Rokeesha's mother, he told his own mother about what he had seen before going back to Rokeesha's car. He informed police at the crime scene that he had touched the passenger door and the inside the car in his attempt to aid Rokeesha.

Mr. Williams testified that he gave a statement about the defendant to police officers almost two weeks prior to the shooting. Mr. Williams then declined to answer any more questions asked by the prosecutor. The court granted the prosecutor permission to treat Mr. Williams as a hostile witness. Specifically, Mr. Williams declined to state whether the defendant told him prior to the shooting that he was planning to kill two people. He also declined to state whether the defendant called him after the shooting to see if Rokeesha was dead. After refusing to answer any more questions from the prosecutor, the prosecutor asked to have the witness declared unavailable. The prosecutor also requested that he be permitted to play a tape of Mr. Williams' preliminary hearing testimony.²

On cross-examination, Mr. Williams testified that he was present on one occasion when the defendant put a gun to his own head and threatened to kill himself. Mr. Williams testified that he was aware of a situation in which other individuals had threatened to kill the defendant, but he did not elaborate any further.

On re-direct examination, Mr. Williams reiterated that the defendant always carried a gun. He stated that the defendant was always arguing and "getting into it with people." He stated that he, the defendant, and Rokeesha were the only people present during an incident in which the defendant put a gun to his own head and threatened to kill himself. Mr. Williams stated that he, the defendant, and Rokeesha were in Rokeesha's car, and Mr. Williams was in the back seat. He knew of no disagreement between the defendant and Rokeesha. Mr. Williams was unable to state with any certainty whether the defendant threatened anyone else in the car with the gun because he was on drugs. He admitted that he previously testified that this incident occurred approximately a week prior to the shooting of Rokeesha. Mr. Williams denied testifying that the defendant made a statement to him about threatening to kill two people at the preliminary hearing. He admitted that a couple of hours after the shooting of Rokeesha, the defendant called him and asked him if

² The record reflects that after the testimony of Investigator Fleak, a jury-out hearing was held regarding the state's request to play a portion of videotape of Mr. Verdell Williams's testimony at the defendant's preliminary hearing. After the hearing, the court allowed the jury to view the videotape of Mr. Williams's testimony. However, we note that neither a copy of the videotape nor a transcript of that testimony was included in the appellate record.

Rokeesha was dead. Mr. Williams also testified that he had known the defendant since the defendant was eight years old. He stated that he and Rokeesha were friends and he had come to know her through the defendant.

Demeka Carlton testified that she knew the defendant and Rokeesha.³ She stated that she was friendly with Rokeesha, but not with the defendant. She stated that the couple argued at times. Ms. Carlton testified that the defendant was controlling toward Rokeesha. She testified that about two weeks before the shooting, she witnessed an incident between Rokeesha and the defendant which caused her to believe the defendant was dangerous. Ms. Carlton and Rokeesha were in the kitchen of Ms. Carlton's apartment when the defendant walked in and approached Rokeesha's daughter. The defendant took a gun from his pants as he held Rokeesha's one-year-old daughter, placed the gun in the child's hands, and told her to point it at Rokeesha and Ms. Carlton and say "bam, bam, bam." According to Ms. Carlton, Rokeesha was visibly upset with the defendant and told him not to do that again.

On cross-examination, Ms. Carlton testified that she had a child of her own. She admitted that Rokeesha's brother was the father of her child and Rokeesha was her child's aunt. She acknowledged that she informed detectives who investigated the case about the occurrence after the shooting. She stated that the defendant controlled Rokeesha by always telling her what to do and how to do it. According to Ms. Carlton, the defendant wanted Rokeesha around him all the time and was afraid Rokeesha would leave him for someone else. Ms. Carlton stated that Rokeesha told her that she wanted to leave the defendant and that she was tired of him. On re-direct examination, Ms. Carlton stated that she told a detective about the incident with Rokeesha's daughter and the gun prior to the shooting.

James Fuqua testified that he was a detective with the North Investigative Unit of the Metro Nashville Police Department when he was called to investigate a shooting on July 17, 2004. When he arrived at the scene, Detective Fuqua saw a black, four-door Pontiac Grand Prix up against a tree on the opposite side of the street. He saw a bullet hole in the driver's side window. Looking through the front windshield, he saw Rokeesha slumped over in the driver's seat of the car. She had what appeared to be a gunshot wound to the left side of her head. Detective Fuqua spoke to individuals gathered at the scene and was told that an individual named "Thug" was involved in the shooting. Detective Fuqua testified that "Thug" was the defendant's nickname. Shortly thereafter, Detective Derry Baltimore of the Murder Squad arrived at the crime scene and took over as lead investigator.

Dr. Amy R. McMaster testified that she was the Chief Medical Examiner for Davidson County and specialized in forensic pathology. According to Dr. McMaster, the cause of Rokeesha's death was a single gunshot wound to the head. The bullet entered the right temple and exited through the left temple. The bullet traveled through Rokeesha's head from right to left with no

³ Prior to Ms. Carlton's testimony, the defendant objected to Ms. Carlton's proposed testimony under Tennessee Rule of Evidence 404(b). A jury-out hearing was held in accordance with Rule 404(b) after which the court ruled that it would allow Ms. Carlton's testimony about a specific instance of conduct by the defendant.

significant up or down or side to side deviation. She opined that the gunshot wound was not accidental based on the appearance, location and direction of the wound. The wound was consistent with a person holding the gun straight and shooting Rokeesha in the head. She stated that she did not detect any gunpowder stippling, soot, or gunshot residue near the entrance wound.

On cross-examination, Dr. McMaster testified that she did not test Rokeesha's hair for gunshot residue or gunpowder stippling as a part of the autopsy she performed. She stated that those tasks were assigned to the crime scene laboratory. She acknowledged that if Rokeesha's hair covered the entrance wound at the time of shooting, it may have been possible to detect soot or gunpowder in Rokeesha's hair. Dr. McMaster was informed that Rokeesha was found dead in the front seat of her car with a gunshot wound and she stated that as a part of the autopsy, she would review photographs of the deceased and the crime scene before issuing her report.

Warren Fleak testified that he was a crime scene investigator with the Metro Nashville Police Department. When he arrived at the scene, Rokeesha was still in the car, and he began a search of the surrounding area for shell casings or other evidence. Police officers were unable to find any shell casings. They were able to find glass remnants from the driver's side window across the street from where the car was found. The presence of glass across the street from the car indicated that Rokeesha was shot there before the car rolled across the street and was stopped.

Investigator Fleak testified that all the doors on the car were locked with the exception of the front passenger door. He was able to ascertain that once Rokeesha's Pontiac Grand Prix was put into drive, the doors on the car automatically locked. As long as the car remained in drive, the door could only be unlocked by manually pushing the unlock switch. He was also able to ascertain that the bullet came from inside the vehicle and exited the window.

On cross-examination, Investigator Fleak testified that Rokeesha's body was slumped toward the center console and away from the driver's side window. According to Investigator Fleak, officers did not find any shell casings, but they were able to find a live round in the pocket at the bottom of the front driver's door. He acknowledged that he was unable to determine what caliber of bullet was used to shoot Rokeesha.

Derry Baltimore testified that he worked as a Detective in the Murder Squad for the Metro Nashville Police Department. He stated that he was the lead detective in the investigation into Rokeesha's death. After arriving at the scene, he was given the defendant's name as a possible suspect in the shooting. Two days after the shooting, Detective Baltimore received a call from the defendant's attorney who stated that the defendant wanted to turn himself in to police. The defendant made a statement to Detective Baltimore which was videotaped and played for the jury.

Detective Baltimore testified that during the interview the defendant did not admit being in Rokeesha's car. The defendant also did not admit that he shot Rokeesha accidentally and did not provide Detective Baltimore with the location of the gun. Detective Baltimore stated that no gun was ever recovered. He also stated that Keshawn was able to identify the defendant as the man who

shot him on Creekwood Drive two weeks before the shooting of Rokeesha. Detective Baltimore stated that he never threatened to place Mr. Williams in jail if he failed to testify in court.

On cross-examination, Detective Baltimore testified that it appeared that Rokeesha was shot from the right to the left because the bullet exited the driver's side window. It also appeared that whoever shot her had to have been in the car with her because the shot came from inside the car and the only unlocked door was the front passenger door. He stated that he relied on the crime scene investigators and the medical examiner to tell him about the path of the bullet, the positioning of the body, and the cause of death.

On cross-examination, Detective Baltimore testified that Mr. Williams cooperated with the police investigation. Mr. Williams informed Detective Baltimore that prior to the shooting, the defendant told him that he was possibly going to kill two people. Mr. Williams also told Detective Baltimore that a week before the shooting, the defendant pointed a gun at Rokeesha and Mr. Williams and threatened to shoot them.

Detective Baltimore testified that he also interviewed Olympia English who told him that the defendant got into the passenger side of the car with Rokeesha. Detective Baltimore stated that Ms. English told him that Rokeesha spoke to her briefly before the two drove away. Less than a minute later, Ms. English told Detective Baltimore that she walked back outside, saw the car roll to a stop, and saw the defendant run from the car.

The defendant testified on his own behalf. The defendant stated that on the day of the shooting, he called Rokeesha to come and pick him up at Olympia English's house. According to the defendant, Rokeesha came into the apartment and told the defendant it was time to go. He stated that as the two drove away from the apartment, he was getting two guns out of his pocket just as Rokeesha reached for a CD case. Rokeesha was bent over a little bit when one of the guns the defendant removed from his pocket went off. The defendant ran because he was panicked and afraid. He contacted his attorney the following day and his attorney arranged for him to turn himself into police. The defendant said he did not tell Detective Baltimore that the shooting was an accident during the interview because he was scared.

The defendant testified that he was in the car that pulled up on Keshawn at Creekwood Drive two weeks before the shooting of Rokeesha. He stated that an individual named "Black" was driving the car. The defendant stated that he used to shoot dice with Black and that they were just out riding around. According to the defendant, when Black saw Keshawn and Mr. Scott, he stopped the car, jumped out, and started shooting at the two men. The defendant claimed that he never got out of the car. The defendant did not recall having a conversation with Rokeesha and her mother over the telephone about the incident with Keshawn. The defendant denied that the incident with Rokeesha and her daughter ever occurred. The defendant testified that he never really had a disagreement with Rokeesha.

On cross-examination the defendant testified that he had a .38 caliber revolver and a .40 caliber automatic pistol in his pocket. He stated that he accidentally shot Rokeesha with the revolver. He admitted that he obtained the revolver from Cortez Bell, an individual he shot the day before he shot Rokeesha. He stated that the revolver was already cocked in his pocket and his finger was on the trigger as he pulled it out of his pants. He acknowledged that he did not tell his attorney what happened until the day after his interview with Detective Baltimore. He admitted that he saw blood come out of Rokeesha's head. The defendant denied that he ever called Mr. Williams after the shooting to see if Rokeesha was dead.

On further cross-examination the defendant testified that he got rid of the guns. He did not tell Detective Baltimore or his own attorney where the guns were located, or whether he gave them to anyone. The defendant was unable to explain how the bullet could have gone straight through Rokeesha's head if, as he claimed, Rokeesha was bending over and reaching for a CD case.

The defendant was convicted by jury of aggravated assault for the shooting of Keshawn Mansfield. He was also convicted of second degree murder for shooting Rokeesha. He was sentenced as a standard offender to five years for aggravated assault, a Class C felony. He was also sentenced to twenty-three years as a standard offender for his conviction for second degree murder, a Class A felony. The trial court ordered that the defendant's sentences run consecutively.

II. ANALYSIS

A. Sufficiency

On appeal, the defendant argues that the evidence was not sufficient to support his convictions for second degree murder and aggravated assault.

Upon review, we recognize the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "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 State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see also* Tenn. R. App. P. 13(e). The jury's verdict, once approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

Second degree murder is “[a] knowing killing of another.” See Tenn. Code Ann. § 39-13-210(a)(1). A knowing act requires one to be “aware of the nature of the conduct” and “aware that the conduct is reasonably certain to cause the result.” *Id.* § 39-11-302(b). “[A] result-of-conduct crime does not require as an element that an actor engage in a specified course of conduct to accomplish the specified result.” *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000).

A person commits aggravated assault when he or she intentionally or knowingly commits assault as defined below and causes serious bodily injury to another; or uses or displays a deadly weapon. See Tenn. Code Ann. § 39-13-102(a)(A), (B). A person commits assault who:

- (1) Intentionally, knowingly or recklessly causes bodily injury to another;
- (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
- (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Tenn. Code Ann. § 39-13-101(a)(1)-(3).

In challenging the sufficiency of the evidence as to his conviction for second degree murder, the defendant argues that the state failed to prove that the defendant knowingly committed second degree murder. The defendant asserts that the gun discharged accidentally and therefore the crime committed was either negligent or reckless homicide at worst.

We disagree with the defendant’s argument that the evidence did not support his conviction for second degree murder. First, we note that the physical and forensic evidence contradicts the defendant’s assertion. Dr. McMaster, the medical examiner, opined that the path of the bullet straight through Rokeesha’s head from temple to temple was inconsistent with an accidental shooting. Specifically, Dr. McMaster noted that “the gunshot wound was directly right to left with no deviation up or down or front or back.” Investigator Fleak noted that the bullet exit site was in the middle of the driver’s side window. The defendant himself was unable to explain how the injury could have occurred if, as he claimed, Rokeesha was bending over in the car to retrieve a CD case when the gun accidentally discharged.

Second, we note that the testimony of witnesses at trial established the knowledge, motive and intent of the defendant. Rokeesha informed the defendant in the presence of her mother that she would leave him if she found out he was responsible for the shooting of Keshawn. The defendant made statements to Mr. Williams about possible plans to shoot two people. Mr. Williams also told Detective Baltimore about an incident where the defendant threatened him and Rokeesha with a gun. Additionally, the defendant used Rokeesha’s child to threaten Rokeesha shortly before the shooting. Jurors were able to assess the defendant and evaluate his credibility. Because we do not re-evaluate

decisions made by the jury, we conclude that the evidence submitted at trial was sufficient to sustain the defendant's conviction for second degree murder. *See Reid*, 91 S.W.3d at 277 (Tenn. 2002). Therefore, the defendant is not entitled relief.

With regard to the defendant's conviction for the aggravated assault of Keshawn Mansfield, we first note that the defendant does not contest that the state established the required elements of aggravated assault. Rather, the defendant argues that the state failed to prove identity; namely, that the defendant was the individual who shot Keshawn. Keshawn testified that he recognized the defendant. He stated with certainty that the defendant was the individual that shot him. Keshawn stated that the street on which the attack took place was well-lit and he was able to clearly see the defendant as he started shooting. Additionally, jurors were able to assess Keshawn and evaluate his credibility.

It is well-established that questions of identity are "question[s] of fact for the jury." *State v. Vaughn*, 29 S.W.3d 33, 40 (Tenn. Crim. App. 1998) (citing *State v. Phillips*, 728 S.W.2d 21, 25 (Tenn. Crim. App. 1986)). In addition, questions about the credibility of witnesses who make identifications are also jury questions. *See State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003). Upon review, it appears that the jury accredited Keshawn's testimony and declined to credit the defendant's testimony. Again, because such determinations are within the province of the jury and because we do not re-weigh or re-evaluate the evidence, we conclude that the evidence is sufficient to support the defendant's conviction for aggravated assault. *See Reid*, 91 S.W.3d at 277 (Tenn. 2002). Therefore, the defendant is not entitled relief as to this issue.

B. Witness Testimony

As his second issue on appeal, the defendant argues that the trial court erred by admitting portions of Devita Roberts and Demeka Carlton's testimonies into evidence. Specifically, the defendant argues that Devita Roberts's testimony regarding what Rokeesha told her about the defendant's threat was inadmissible. Additionally, the defendant argues that a statement he made to Rokeesha and Devita Roberts over a speakerphone was inadmissible hearsay. The defendant further argues that Demeka Carlton's testimony that she was present during an incident in which the defendant threatened Rokeesha by placing a gun in the hands of Rokeesha's daughter was improperly admitted under Tennessee Rule of Evidence 404(b).

Upon review, we first note that Ms. Roberts' testimony concerning statements made to her by Rokeesha or by the defendant are hearsay. "'Hearsay' is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is inadmissible unless it falls under one of the enumerated exceptions to the hearsay rule. *See* Tenn. R. Evid. 802. Those exceptions are defined under Tennessee Rules of Evidence 803 and 804. Specifically, Tennessee Rule of Evidence 803(3) provides that the following is not excluded by the hearsay rule:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

However, "only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception." *Id.*, Advisory Comm'n Cmts.; *see also State v. Hutchison*, 898 S.W.2d 161, 171 (Tenn. 1994).

Upon review of the record, it appears that Devita Roberts testified regarding three separate hearsay statements. First, Ms. Roberts testified about a statement made by Rokeesha that she would leave the defendant if she found out that he was involved in the shooting of Keshawn Mansfield. From the record, it appears that Ms. Roberts testified about this statement in two separate contexts. In the first context, Ms. Roberts testified that Rokeesha made this statement to Ms. Roberts only. In the second context, Ms. Roberts testified that she was present during a conversation between Rokeesha and the defendant over a speakerphone during which Rokeesha informed the defendant directly that if she found out he was involved in the shooting of Keshawn she would leave him. We conclude that under Rule 803(3), the statement to Ms. Roberts in both contexts was evidence of Rokeesha's then-existing intent to end her relationship with the defendant and was therefore admissible under Rule 803(3). *See State v. Ray*, 880 S.W.2d 700 (Tenn. Crim. App. 1993).

Second, Ms. Roberts testified about a hearsay statement made by the defendant. While on the speakerphone with Ms. Roberts and Rokeesha, the defendant expressly denied shooting Keshawn Mansfield. Because Ms. Roberts was present during the speakerphone call and able to hear the defendant make the statement, the defendant's statement was admissible as a party-opponent admission. Tennessee Rule of Evidence 803(1.2)(A) states that a hearsay statement is not excluded by the hearsay rule if it is: "[a] statement offered against a party that is (A) the party's own statement in either an individual or representative capacity." Accordingly, the trial court did not err in allowing the testimony.

Third and finally, Ms. Roberts testified that Rokeesha told her that the defendant threatened to kill her if she left him. We conclude upon review of the record that this statement is inadmissible hearsay within hearsay. Tennessee Rule of Evidence 805 states that "[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law." In other words, both the defendant's statement to Rokeesha, and Rokeesha's statement to her mother must qualify under a recognized hearsay exception in order for the statement to be admitted. We do not dispute that the defendant's statement to Rokeesha qualifies as a party-opponent admission under Rule 803 (1.2)(A). However, in our view, Rokeesha's recitation of the defendant's statement to her mother, the testifying witness, does not fall under a recognized hearsay exception. Therefore, we conclude that the trial court erred in admitting Rokeesha's statements to her mother about the defendant's intent to kill Rokeesha should she ever leave him.

Although we conclude that Rokeesha's statement to Ms. Roberts about the defendant's threat to kill her was improperly admitted, we conclude that there is an abundance of other admissible evidence of the defendant's guilt. Therefore, we conclude that the statements did not affect the verdict, but rather, constitute harmless error. *See State v. Rodriguez*, 254 S.W.3d 361, 370-371 (Tenn. 2008); *see also* Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

The defendant next argues that the trial court erred by allowing testimony by Demeka Carlton into evidence. Specifically, the defendant argues that Ms. Carlton's testimony about the incident involving Rokeesha's daughter prior to her death was improperly admitted under Tennessee Rule of Evidence 404(b). Evidence of other crimes, wrongs or acts may be admissible where it is probative of a purpose other than the accused's propensity. Tenn. R. Evid. 404(b). Although Rule 404(b) does not explicitly list the exceptions under which evidence of prior crimes, wrongs or acts may be admitted, our courts have held that such evidence may be admissible to show another purpose such as: motive, intent, guilty knowledge, identity of the defendant, absence of mistake or accident, or the existence of a common scheme or plan. *See, e.g., State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004); *Collard v. State*, 526 S.W.2d 112, 114 (Tenn. 1975). To admit such evidence, Rule 404(b) specifies the following:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Should a review of the record indicate that the trial court substantially complied with the requirements of Rule 404(b), the trial court's admission of the challenged evidence will remain undisturbed absent an abuse of discretion. *State v. James*, 81 S.W.3d 751, 759 (Tenn. 2002); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997). When attempting to exclude otherwise admissible and relevant evidence, the individual seeking exclusion bears a "significant burden of persuasion." *James*, 81 S.W.3d at 757-58.

Upon review of the record, we conclude that the court fulfilled the necessary prerequisites to permit it to rule on potential 404(b) evidence. Specifically, a jury-out hearing was held to determine whether a material issue existed for the admission of the evidence other than proving conduct conforming with a character trait. After argument by the parties, the court concluded that the testimony was offered to prove the defendant's intent, premeditation, and the absence of mistake

or accident. The court also found that the defendant opened the door to the admission of Ms. Carlton's testimony by eliciting contradictory testimony from Ms. Roberts and Mr. Williams on cross-examination. The court stated:

. . . I think it's admissible under 404(b), notwithstanding that I do think [the defendant], in the issues that have raised [sic] here before the Jury, has opened the door to this particular witness testifying by the questioning of Ms. Roberts. I'm sure, apparently, Ms. Roberts testified the best she could when she was asked had ever – had she ever seen the defendant exhibit any violent tendencies toward Rokeesha or you never saw the defendant exhibit any violent tendency. The insinuation or the message the Jury is asked to take from that is, there were no problems between these two people. Well, apparently, according to Ms. Carlton, there were. And it's something that's two to three weeks before the shooting. I think that, coupled with the issue brought up with Mr. Williams, the inmate witness, about this other gun situation and he's really just – he, [the defendant], is just contemplating suicide and not meaning to intend in any way to hurt [Rokeesha], that, also, is an issue that could be – and like I said, I don't know what the Jury will accept or discredit – but could be relevant and has been raised by the defendant.

So, for those reasons, I'll allow, if the State chooses to, Ms. Carlton to testify as to that one specific incident.

We detect no abuse of discretion by the trial court in allowing the testimony of Demeka Carlton at trial. Ms. Carlton's testimony was offered for the purpose of showing intent and the absence of mistake or accident. *See Berry*, 141 S.W.3d at 582. The incident about which Ms. Carlton testified was close in time to the shooting of Rokeesha. We also agree with the court that the defendant opened the door to Ms. Carlton's testimony through the testimony elicited on cross-examination from Rokeesha's mother, Ms. Roberts, and from Mr. Williams. Therefore, we conclude that the trial court did not err in permitting Demeka Carlton's testimony under Tennessee Rule of Evidence 404(b).

C. Consecutive Sentencing

The defendant argues that the trial court erred by ordering that the defendant's sentences for aggravated assault and second degree murder run consecutively. Specifically, the defendant argues that the trial court failed to make the required findings under Tennessee Code Annotated section 40-35-115.

When a defendant challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However,

if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts. We will uphold the sentence imposed by the trial court if: (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. See *State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); see also Tenn. Code Ann. § 40-35-210(f).

A trial court may impose consecutive sentencing upon a determination by a preponderance of the evidence that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. Therefore, pursuant to this code section, a trial court may impose consecutive sentencing if it determines any one of the following criteria apply:

- (1) The defendant is a professional criminal who has knowingly devoted such 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 victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Id. The enumerated criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing. However, if the trial court imposes consecutive sentencing based upon a finding that the defendant is a dangerous offender, the court must also determine whether the sentences imposed are reasonably related to the severity of the offenses and necessary to protect the public from further criminal activity by the defendant. *State v. Wilkerson*, 905 S.W.2d

933, 939 (Tenn. 1995). Additionally, the trial court should consider general sentencing principles, including whether the length of a sentence is justly deserved in relation to the seriousness of the offense. *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). It is within the sound discretion of the trial court whether to impose consecutive sentences. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

In ordering consecutive sentences, the trial court found the following:

I do think under 40-35-115 – I’m not sure without factoring in his juvenile record, that his record of criminal convictions is extensive, but the statute reflects that consecutive sentencing is appropriate for an offender whose record of criminal activity is extensive. So, I mean, he’s had criminal activity back since he was thirteen, according to him, involving weapons. In terms of juvenile adjudications for five years, possibly even back – he’s got a violation of probations back in ‘98, adjudications back into ‘98. So, I mean, he’s had criminal activity for a number of years. So that factor could be found and would be found.

But, additionally, I do find that he – based on the circumstances of this particular case, which cannot, in and of themselves, be a basis for consecutive sentencing, but can be factored in along with a few other factors that I’ll mention here under *State v. Wilkerson* – can be factored in in [sic] determining whether 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. That is present in the incident involving [Keshawn]. I don’t even have to get into the incident involving Mr. Bell. I’ve not heard about that, other than he shot somebody, he claims, in self-defense. But may or may not have been the case. But the convictions for which he’s been sentenced on, I do think indicate that, obviously, the Court has to attempt to factor in an aggregate term of sentencing that takes both victims into account and takes into account the necessity in protecting the public from further serious criminal conduct; that being further carrying around weapons and whatever happens as a result of that happens. I can’t let that happen under the statute and case law.

Based on our review of the record, we conclude that the trial court did not err in imposing consecutive sentences. A review of the defendant’s pre-sentencing report and juvenile record shows that the defendant had multiple adjudications for assault, disorderly conduct, theft, violation of probation, aggravated assault, aggravated robbery, and handgun possession. The defendant also had single juvenile adjudications for evading arrest, violation of curfew, and vandalism. After reaching the age of majority, the defendant was convicted for evading arrest, driving with a suspended license, possession of drugs, contributing to the delinquency of a minor, and criminal trespassing. The pre-sentencing report also indicates that the defendant was never employed. The record supports the court’s finding that the defendant had an extensive criminal history. This finding alone justifies consecutive sentencing. *See* Tenn. Code Ann. § 40-35-115(b)(2).

Similarly, we perceive no error in the court's finding that the defendant was eligible for consecutive sentencing because he was a dangerous offender. It is our view that the court articulated its reasons for finding that the defendant was a dangerous offender, including why the sentences imposed reasonably related to the seriousness of the offenses and were necessary to protect the public from further criminal activity by the defendant. As the court pointed out, the defendant shot Keshawn and shot and killed Rokeesha. The court indicated that it was aware of at least one other instance in which the defendant shot another individual immediately before shooting Rokeesha, purportedly in self-defense. The court made specific findings regarding the defendant's lack of regard for human life and propensity for violence. Accordingly, we discern no error in the imposition of consecutive sentencing, and therefore, the defendant is not entitled to relief.

CONCLUSION

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

J.C. McLIN, JUDGE