IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
February 5, 2014 Session

STATE OF TENNESSEE v. JEDARRIUS ISABELL

Appeal from the Criminal Court for Shelby County
No. 10-07091 W. Otis Higgs, Jr., Judge

No. W2013-00435-CCA-R3-CD - Filed July 28, 2014

The defendant, Jedarrius Isabell, was convicted by a Shelby County Criminal Court jury of attempted first degree murder, a Class A felony; aggravated assault, a Class C felony; three counts of reckless endangerment with a deadly weapon, Class E felonies; and employment of a firearm during the commission of a dangerous felony, a Class C felony, and was sentenced to an effective term of twenty-six years in the Department of Correction. On appeal, he argues that: (1) the jury was exposed to extraneous prejudicial information and outside influence; (2) the trial court improperly communicated with a deliberating jury outside the presence of the defendant and counsel; (3) the failure to name the predicate felony in the indictment for employment of a firearm during the commission of a dangerous felony voids the conviction; (4) felony reckless endangerment is not a lesser-included offense of aggravated assault as charged in Counts 3 and 4 of the indictment; (5) double jeopardy bars his convictions for felony reckless endangerment in Counts 3, 4, and 5; (6) the trial court erred in failing to define "recklessly" in its jury instructions; and (7) the evidence is insufficient to sustain his convictions. After review, we affirm the judgments of the trial court.

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

ALAN E. GLENN, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and CAMILLE R. MCMULLEN, JJ., joined.

Lance R. Chism (on appeal); Jahari Dowdy and Jennifer Fitzgerald (at trial), Memphis, Tennessee, for the appellant, Jedarrius Isabell.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Katherine B. Ratton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The defendant and a co-defendant were indicted for attempted first degree murder, three counts of aggravated assault, felony reckless endangerment, and employment of a firearm during the commission of a dangerous felony as a result of their participation in a drive-by shooting in which Theodis Pitchford, the victim,[1] was shot in the chest and a number of others were in the vicinity of the fired shots. The State's theory was that the defendant and co-defendant were the shooters and that the shooting was in retaliation for the defendant's brother being killed in a drive-by shooting just weeks prior to the incident. The defendant presented the defense of alibi.

State's Proof

At trial, Officer Charles Morrow with the Memphis Police Department testified that, on July 29, 2010 at 2:15 p.m., he responded to 3231 Ashwood Street concerning a shooting. When he arrived, there were approximately twenty people standing around outside, including women and children. Inside the residence, Officer Morrow found the victim lying on a couch with a gunshot wound to the chest. The officer secured the scene and attempted to give the victim first aid. An ambulance transported the victim to the hospital.

Officer Sam Blue, a crime scene investigator with the Memphis Police Department, testified that he also responded to 3231 Ashwood Street, where he collected evidence and documented the crime scene. He located eight nine-millimeter shell casings in front of the residence. Based on the location of the shell casings, Officer Blue surmised that it appeared someone from the house had returned fire towards the road. He also located a bullet hole through the front door of the house. The bullet traveled through the front door and lodged inside a closet in the kitchen. Officer Blue stated that a revolver does not eject shell casings.

Jerahmiah Rankin, a co-defendant, testified that on July 29, 2010, he lived on Knight Arnold Road in Memphis near the victim. On that date, Rankin was walking home from the store when he saw the victim coming down the street with two other men and two women and "[b]umped into them." Rankin said that the victim was "home boys" with someone who killed the defendant's youngest brother in a drive-by shooting a couple of weeks prior.

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[1] There are technically a number of victims in this case. As such, we will refer to the victim of the attempted first degree murder as "the victim" and the victims of the other offenses by name.

Rankin said that he continued home and got into a gold Dodge car with two friends. They drove down the street and picked up the defendant, who was outside in the front yard of a house. They then headed to catch up with the victim and his friends "[t]o go handle the whack" or "[g]o handle the business." Rankin sat in the backseat of the car on the passenger side, while the defendant sat in the front seat on the passenger side. The group drove to Ashwood Street, where they "had a shoot-out" with the victim. Rankin said that they shot at four or five people, including the victim. Rankin used a nine-millimeter gun, and the defendant used a revolver. Rankin said that they shot first, but someone at the residence returned fire.

Rankin testified that, after the shooting, they split up and he went home. Rankin admitted that he initially told the police that he did not do anything. He also told the police that the defendant had been in the car at the time of the shooting but had only fired his weapon into the air. Rankin said that the defendant had asked him "to take the charge" because Rankin was a juvenile at the time of the offenses. However, Rankin decided to tell the truth after the defendant began threatening him.

The victim testified that he lived on Knight Arnold Road on July 29, 2010. On that date, he was walking with his girlfriend, Ashley Williams; Ashley's[2] cousin, Rachelle Williams; and his friends, Darius Love and "Little Mike," when he encountered Rankin. Rankin stopped and stared at the victim, but the victim and his friends continued to walk. The group turned onto Camelot Street, and the victim saw the defendant on the porch of a house. The defendant "got on the phone and . . . called somebody."

The victim testified that he and his friends walked to Ashley's house on Ashwood Street. Once there, Ashley and Rachelle went inside the house, while the victim stood outside talking to Love, "Little Mike," and a neighbor, Jason Moss. Several children were playing basketball at the side of the house. While standing in front of Ashley's house, the victim heard a gunshot but initially did not see anything. He continued to talk to his friends and then saw a car coming around the curve in the road, "and they was out the window shooting." The victim described the car as a "tannish gold Chrysler" with four doors. The car windows were down, and the car "was creeping by." He saw three people inside the car; the defendant was in the front passenger seat and Rankin was in the backseat on the passenger side. The defendant and Rankin were shooting at the victim and his friends. The victim was shot in the chest during the incident.

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[2] Because several of the witnesses have the same last name, we will refer to them by first name only. We mean no disrespect by this practice.

The victim testified that, when the shooting began, Love ran to the back of the house past where the children were playing basketball, and Moss ran inside his own house. The victim and "Little Mike" attempted to enter Ashley's house, but the front door was stuck. When he was unable to get inside, the victim began shooting back at the car, firing about eight shots.

The victim testified that the defendant's brother, Deangelo, was killed in a drive-by shooting two or three weeks before the incident in this case. He said that Neshell Tucker had driven the car involved in the shooting of Deangelo, and the victim and Love were friends with Tucker. The victim believed that the defendant shot at him and his friends because of their friendship with Tucker.

After being shot, the victim was taken to the hospital by ambulance for treatment. He said that the bullet was still lodged in this chest and that he has a scar and still suffers from pain due to the gunshot. On cross-examination, the victim admitted that he initially lied to the police about his shooting back at the car because he was scared.

Darius Love testified that he was walking with the victim on the day of the incident when they ran into Rankin. Rankin "looked at [them], stopped, put his hand in his pants but he kept walking though." Love and the victim continued walking and, when they turned onto Camelot Street, they saw the defendant. After seeing them, the defendant got on his phone. Love knew the defendant from school, and they used to be friends. Love and the victim continued to walk to the home of the victim's girlfriend, Ashley, on Ashwood Street. Once there, Love went inside the house briefly and then joined the victim, "Little Mike," and Jason Moss in the front yard. There were also approximately thirteen children playing in the yard.

Love testified that, after he exited the house, he heard a gunshot. At the sound of the gunshot, "everybody froze," then about five seconds later more shots were fired from a four-door brown or gold Chrysler Sebring heading in their direction. The car windows were down, and Love could see three people in the car, including Rankin and the defendant. The defendant was in the front seat of the car, and Rankin was in the backseat. Love saw "a black gun aiming towards [him]" and ran to the back of the house. After the shooting stopped, Love returned to the front of the house and saw that the victim had been shot. Love stated that he did not remember telling the police in his initial statement that he did not see the defendant in the car.

Love stated that the defendant's brother was killed in a drive-by shooting about two and a half weeks before the shooting in this case. Love's friend, Neshell Tucker, was driving the car involved in the shooting of the defendant's brother. Love said that Tucker had a baby with Love's best friend.

Jason Moss testified that, at the time of the incident, he was living on Ashwood Street in a "four-plex" house and was Ashley Williams' neighbor. Shortly after 2:00 p.m., Moss saw the victim, Ashley, Rachelle, Love, and "Little Mike" walking toward the residence, and he joined them outside. Approximately twelve children were playing outside. Ashley and Rachelle went inside, and "all of [a] sudden this gold car was coming down the street and . . . I heard one shot." Moss looked around and then heard four more shots. Moss ran inside to check on his son and then went back outside and saw that the victim had been shot. Moss did not see who fired the shots. Moss stated that the defendant's brother had been killed in a shooting a couple of weeks before this incident and that the victim was friends with the two people arrested for that shooting.

Rachelle Williams testified that the victim was dating her cousin, Ashley, at the time of the offenses. She said that the victim and Darius Love were in the Vice Lords gang. About two and a half weeks before July 29, 2010, the defendant's younger brother, Deangelo, was shot and killed. The two people arrested for the murder were in the same gang as the victim and Love. The defendant's brother had been in the Grape Street Crips gang, along with Jerahmiah Rankin. The defendant was in the Gangster Disciples gang.

Rachelle recalled that, on the day of the offenses, she was walking to Ashley's house with the victim, Ashley, and other friends. The group saw Rankin while they were walking, and Rankin "bumped into Little Mike and he looked like a mug, like I got you." Rachelle told them to "[j]ust keep walking. Don't even pay him no mind." The group continued walking and, on Camelot Street, they saw the defendant on the porch of a house with another man. A gold car was sitting in the driveway. The defendant "was just looking with a mean look" at the group, and Rachelle believed that something bad was going to happen. They kept walking to Ashley's house and, once there, Rachelle and Ashley went inside because she felt that "something ain't right." Children were playing in the yard, and Ashley's family was inside the house. Ashley's family included her mother, stepfather, and five sisters and brothers.

Rachelle testified that, inside the house, she sat down on the arm of a sofa in front of the front window of the house. Ashley also sat on the sofa, and they played with Ashley's baby brother. Rachelle recalled:

> So I sat there about . . . five -- it wasn't even not long. There was a car just pulled up and boom, boom, boom. And my auntie she was like what's going on and all that. And Little Mike bashed through the door. He was like I'm hit. I'm hit. He was like they just got shooting. They start shooting at us. So I got up off the couch. My auntie she had the baby in her hands and I got

> up out the couch. And I looked outside. I came to the door and I looked and I seen [the victim] was shooting back. He was like I'm hit. I'm hit. And that's when I seen [the defendant] and Jerahmiah [Rankin] in the car.

Rachelle stated that the defendant was sitting in the front passenger seat of the car, and Rankin was in the backseat on the passenger side. She saw a total of four people in the car but did not recognize the other two individuals. The car involved in the shooting was the same gold car Rachelle saw at the house on Camelot Street where she had seen the defendant earlier.

On cross-examination, Rachelle acknowledged that, by the time she got up and looked outside, she did not actually see the defendant or Rankin shooting from the gold car.

Ashley Williams testified that she previously dated the victim and that the victim and Darius Love were members of the Vice Lords gang. About two and a half weeks before the incident in this case, the defendant's brother, Deangelo, was shot and killed in a drive-by shooting. The two people arrested for the defendant's brother's murder were also members of the Vice Lords.

Ashley testified that, on July 29, 2010, she, the victim, Rachelle, Love, and "Little Mike" walked from the victim's house to her home on Ashwood Street. As they were walking, they ran into Rankin. She recalled that Rankin "bumped into Little Mike and we had looked back at him he was looking back at us and gave us a look like he was mad or he was going to do something. But wasn't no words being said to each other. Everybody just kept it moving." The group continued walking and, when they walked down Camelot Street, they saw the defendant sitting on the porch of a house. The defendant "was looking at [them] real hard too. Then he picked back up the phone and called somebody." The group continued walking to Ashley's house.

Ashley testified that, when they got to her house, they were approximately fifteen children playing outside. Ashley went inside and sat on a couch that faced the doorway. A few minutes later, she heard gunshots, and one bullet came through the front door and lodged in a closet door. Ashley got on the floor to "duck for cover." "Little Mike" opened the door, and Ashley saw a gold car with the defendant, Rankin, and another man inside. The defendant was in the front passenger seat, Rankin was in the backseat, and the other man was driving. Ashley saw the victim, who expressed "I'm hit" and began shooting back at the gold car. Ashley had seen the gold car earlier that day in the driveway of the house on Camelot where the defendant had been sitting on the front porch.

On cross-examination, Ashley admitted that she did not mention the defendant in the

narrative describing the shooting in her statement to the police. However, on redirect, she stated that her statement to the police reflected that she did mention the defendant in the very next line of her statement. She also identified a picture that she drew for the police following the incident in which she indicated that the defendant and Rankin were in the gold car.

Tamica Williams, Ashley's mother and Rachelle's aunt, testified that she was at home at the time of the shooting. Her six children and niece, Rachelle, were in the house with her, and they were watching television in the living room. Tamica was sitting on the couch when she heard a noise that sounded like a firecracker. Shortly thereafter, she heard what she recognized as several gunshots. When the shooting began, "Little Mike" rushed inside the house and fell on the floor. He thought that he had been shot and said, "They shooting at us." During the shooting, a bullet went through the front door of her house. Tamica opened the front door all the way and heard "a car burning rubber . . . taking off." She saw that the victim had been shot and called the police. She said that, at the time of the shooting, there were approximately fourteen children playing outside her house.

Defendant's Proof

Kentron Jackson testified that the defendant was a "very close friend" of his. On the day of the shooting, the defendant was upset and crying because of his brother's death. In an attempt to lift the defendant's spirits, Jackson convinced the defendant to walk with him to Deeartist Collins' house on Camelot Street. Once there, the defendant went inside, while Jackson sat on the porch with another individual. The defendant joined them outside and, as they sat on the porch, a group including the victim and Darius Love walked by the house. Sometime between 1:00 and 2:00 p.m., Jackson heard gunshots. He said that the defendant was sitting on the porch of Collins' house when the shooting began. He also said that there were no cars in the driveway and that he did not see the defendant on the phone.

Deeartist Collins testified that he lived at 4202 Camelot Street on July 29, 2010. On that date, he got home at 2:20 p.m. in his gold, four-door Ford Taurus and saw the defendant inside on the computer. On cross-examination, Collins stated that he did not recall an investigator from the district attorney's office contacting him and did not recall telling an investigator that he was at home from 11:00 a.m. until 3:00 p.m. on the day of the shooting.

Keith Woods, Deeartist Collins' stepfather, testified that he lived in the same house as Collins on Camelot Street. On July 29, 2010, Woods did not go to work and was at home all day. Woods owned a gold, four-door Ford Taurus, which was parked in the driveway. Woods said that the defendant was at his house all day, and he saw the defendant for the last time around 3:30 or 4:00 p.m. sitting on the front porch. Woods explained that he knew the defendant did not leave because, at different times during the day, he was outside sitting on

the porch, too.

Rebuttal Proof

George Dunlap, an investigator with the district attorney's office, testified that he called Deeartist Collins on August 31, 2011, but he received no answer and left a message. Collins called him back on September 12, 2011, and they spoke about the case.

Following the conclusion of the proof, the jury convicted the defendant of attempted first degree murder as charged in the indictment, aggravated assault as charged in the indictment, two counts of reckless endangerment with a deadly weapon as included in the indictment, one count of reckless endangerment with a deadly weapon as charged in the indictment, and employment of a firearm during the commission of a dangerous felony as charged in the indictment. After a sentencing hearing, the trial court sentenced the defendant to twenty years on the attempted first degree murder conviction, five years on the aggravated assault conviction, two years on each felony reckless endangerment conviction, and six years on the employment of a firearm conviction. The court ordered that the sentences in the first five counts be served concurrently with each other but consecutively to the sentence in Count 6, for an effective term of twenty-six years.

Motion for New Trial Hearing

On September 17, 2012, the trial court conducted an evidentiary hearing on the motions by the defendant for a new trial, to set aside the jury's verdict, and for a mistrial. At the hearing, the defendant presented the testimony of three jurors who had served on his jury.

Tashika Britton testified that, during deliberations, the members of the jury had questions for the judge but were not able to ask them because the bailiff told them that "what we had in front of us was all we had. This is what we had to go by." The bailiff told them "all we had to go by was what we had in front of us, the evidence and our notes." Britton explained that the jury was "trying to decipher . . . the difference between first-degree murder and second-degree . . . ." The jury wrote down a question about "the paperwork, the indictments" and passed it to the bailiff, but Britton could not remember if they received a response to the question. She said that the jury was not brought back into the courtroom to ask its question, and the judge did not answer any questions in open court. The bailiff told the jury that it had to make a decision. Britton stated that no one provided any additional information outside what the court had provided to the jury. She said that she was not aware of anyone accessing Google during deliberations, and she did not do so.

Renee Deaver testified that, during the deliberations, someone on the jury attempted to access Google. She explained that the juror "[t]ried to" get on the internet "looking for a definition." However, she clarified that the jury never considered anything other than what the trial court gave in its instructions.

Deaver stated that the members of the jury had questions for the judge, which they were able to present to the court through the bailiff. She did not remember how the questions were presented to the court, and the only question she remembered anyone having "was something in the paperwork, the wording of it." Deaver stated that the bailiff took the question to the judge "and clarified it." She did not recall if the answer was in writing. The jury was not taken into the courtroom to be addressed by the court with the answers to its questions.

Deaver testified that the bailiff never prevented the jury from asking questions. However, at one point the jury asked the bailiff for transcripts, and the bailiff said "we had to work with the notes that we had[.]" Deaver said that the bailiff never told them that they had to make a decision.

Charity Street testified that a juror searched Google during deliberations to try to find a definition. However, the juror was not able to access the website or obtain information. She said that the jury only considered the instructions given by the judge and that "[t]here weren't any outside definitions used. The only thing that we could go by was the paper" of instructions from the judge.

Street testified that the jury had a lot of questions and provided some of those questions to the court in writing via the bailiff. The jury then received a written response from the judge. The jury was not brought into the courtroom to have its questions answered. The jury was told that "the only thing we had to go on was what we had." Street was asked, "[A]t any point did the officer ever tell you that you had to make . . . a decision?" Street responded, "Not like that per se," elaborating, "It was just really you know you have to make a decision based on what you have. You don't have anything else cause we were asking for the stuff but the only way we could make a decision was based on what we had in our notes." She said that the jury had unanswered questions.

In denying the defendant's motions, the trial court made the following findings with regard to the defendant's allegation about jurors' access to attorneys during deliberations to ask questions:

> I don't know that the defendant is entitled to -- the jurors are entitled to ask the attorneys questions.

> The allegation that it deprived the defendant a fair and impartial trial, as long as I've been around here, the jurors will ask questions of the judge or send the question to the judge in writing and judges routinely say, if it's one of those matters that the answer is in the charge and evidence, judges routinely write back you have all that you're going to get. You've got to make a decision on the basis of what you have which includes the instructions from the Court and evidence and the jurors are even told that the evidence would be delivered to you into the jury room while you're deliberating.
>
> Now, that's what they have access to under the rules. They have access to questions of the judge. As a practical matter when jurors have all that they're entitled to under the law, judges routinely write an answer, sorry, but you're not entitled to that.
>
> If I remember correctly in this case, there was a question . . . about the difference between murder first and murder second, I may be wrong about that but it occurs to me that that might have been the situation and . . . if it's true, I remember an answer in writing to those jurors look to the charge for your answer.
>
> I mean that -- that's all I can recall about this trial, look to the charge, and it may very well be that one of the deputies may have said to the question from a juror -- and they know better than to communicate with jurors. We have an able, seasoned seniority staff. They know that when jurors ask questions about -- and they will do that, as a practical matter, they'll say, well, you got all you're going [to] get. Deputy, we need a transcript of Joe Blow's testimony. Sorry but you're not entitled. That's all you're going [to] get.

The trial court also found that none of the witnesses testified that a deputy told them "you must reach a verdict," only that it had to reach a verdict with what it had before it. As to the allegation that the jurors accessed the internet during deliberations, the court stated, "I haven't heard that. I haven't heard any testimony that jurors accessed the worldwide web. What I have heard is that they had nothing other than what they had." The court further determined that none of the witnesses testified that they had questions that they were not allowed to bring to the court.

Regarding the defendant's allegation that the jury did not understand the law, the trial court noted, "[E]very single trial I've ever heard . . . jurors have questions routinely . . . . They don't go into deliberations having some . . . mystical PhD in jury deliberations, just

ordinary citizens, and they have questions." The court continued in its findings that the jury made a decision on the basis of "what they had" and that none of the witnesses testified that one of the jurors "read some definitions to us off the worldwide web and once we got that information we proceeded to reach a verdict." The court recalled that none of the witnesses "said we had any extraneous matters. What they did say is that somebody attempted to use a telephone to get some information but they never did do it, never did get it."

ANALYSIS

I. Exposure to Extraneous Prejudicial Information and Outside Influence

The defendant argues that the trial court should have granted his motion to set aside the jury verdict because the jury was exposed to extraneous prejudicial information and outside influence. He specifically claims that it was exposed to prejudicial extraneous information "when one of its members searched the internet for a legal definition" and to an improper outside influence "when the bailiff told it that it had to make a decision[.]"

A defendant is entitled to a trial "by an impartial jury," with the jurors "render[ing] their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge." U.S. Const. amend. VI; Tenn. Const. art. I § 9; see also State v. Adams, 405 S.W.3d 641, 650 (Tenn. 2013). "When a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable." Adams, 405 S.W.3d at 650.

> [E]xtraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case. An improper outside influence is any unauthorized private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.

Id. at 650-51 (internal citations and quotations omitted).

When a defendant challenges the validity of a verdict on the basis of a tainted jury, he "must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence." Id. at 651. If a defendant makes this showing, a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless. Id. (citing Walsh v. State, 166 S.W.3d 641, 647 (Tenn. 2005)). In determining whether the State has rebutted the presumption of prejudice, the trial court should consider the following factors: (1) the nature and content of the information or

influence, including whether the content was cumulative of other evidence adduced at trial; (2) the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror or jurors; and (4) the weight of the evidence adduced at trial. Id. at 654 (footnote omitted). Our supreme court has said that "[n]o single factor is dispositive. Instead, trial courts should consider all of the factors in light of the ultimate inquiry – whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict." Id.

Our review of this issue is *de novo*, with the trial court's factual findings accompanied by a presumption of correctness but no such presumption given to the trial court's conclusions of law. Id. at 656; Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001).

A. Exposure to Extraneous Prejudicial Information

The defendant argues that the trial court erred in denying his motion to set aside the jury verdict because the jury was exposed to extraneous prejudicial information. However, the defendant has failed to make the threshold showing that the jurors were exposed to extraneous prejudicial information that bore on a fact at issue in the case.

The trial court found that there was no proof that members of the jury had accessed the internet. The court noted that the witnesses testified that one juror "attempted to use a telephone to get some information but they never did do it, never did get it." The court said that the proof showed that the jury made a decision on the basis of "what they had." The trial court's findings are supported by the jurors called to testify at the hearing: Tashika Britton, Renee Deaver, and Charity Street.

Tashika Britton testified that she was not aware of anyone accessing Google during deliberations, and she did not do so. She said that no one provided any additional information to the jury outside what the court had provided to the jury. Renee Deaver testified that, during the deliberations, someone on the jury attempted to access Google. She explained that the juror "[t]ried to" get on the internet "looking for a definition." However, she did not say that the juror was successful or actually retrieved any information. She clarified that the jury never considered anything other than what the trial court gave in its instructions. Charity Street testified that a juror tried to access Google during deliberations to find a definition, but the juror was unable to access the website or obtain information. She said that the jury only considered the instructions and definitions provided by the trial court.

Accordingly, the defendant offered no proof that the jury was actually exposed to prejudicial information, and he, thus, falls short of meeting his threshold burden on the issue.

B. Improper Outside Influence

The defendant also argues that the trial court erred by failing to grant his motion based upon a claim that the jury was exposed to improper outside influence "when the bailiff told it that it had to make a decision[.]" The defendant acknowledges that he did not include this claim in his motion for new trial or amended motion for new trial. However, he asserts that he orally argued the issue at the evidentiary hearing and that "Tennessee Rule of Criminal Procedure 33(b) should not be read to stand for the proposition that oral amendments made to the motion for new trial have to be reduced to writing to be considered as having properly preserved the issue." Additionally, the defendant asserts that the bailiff's comments to the jury rise to the level of plain error. The State argues that the defendant waived this issue by failing to reduce his oral claim to writing as required by Rule 33(b), and that the issue does not rise to plain error.

Tennessee Rule of Appellate Procedure 3(e) provides that in "all cases tried by a jury, no issue presented for review shall be predicated upon . . . misconduct of jurors, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." See also State v. Lowe-Kelley, 380 S.W.3d 30, 33 (Tenn. 2012) (noting that "[a] defendant who fails to provide specific grounds for relief in a motion for new trial risks failing to preserve those grounds for appeal").

Although the defendant raised the issue orally at the motion for new trial hearing, it was not reduced to writing as required by Tennessee Rule of Criminal Procedure 33(b), which provides that "[a] motion for a new trial shall be in writing or, if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). This court has repeatedly held that a defendant's such failure results in waiver of the issue. See State v. Ronnie Joe Stokes, No. E2012-02153-CCA-R3-CD, 2013 WL 5536209, at *2 (Tenn. Crim. App. Oct. 7, 2013), perm. app. denied (Tenn. Feb. 12, 2014); State v. Terry Sanders, No. M2011-00426-CCA-R3-CD, 2012 WL 5948885, at *5 (Tenn. Crim. App. Nov. 15, 2012), perm. app. denied (Tenn. Mar. 5, 2013); State v. Bobby A. Raymer, No. M2011-00995-CCA-R3-CD, 2012 WL 4841544, at *4 (Tenn. Crim. App. Oct. 10, 2012); State v. Ronald Lee Stewart, No. M2008-00337-CCA-R3-CD, 2010 WL 2025407, at *4 (Tenn. Crim. App. May 21, 2010); State v. Mark C. Noles, No. M2006-01534-CCA-R3-CD, 2007 WL 3274422, at *11 (Tenn. Crim. App. Nov. 6, 2007), perm. app. denied (Tenn. Apr. 7, 2008); State v. Ronnie Watson, No. W2001-03084-CCA-R3-CD, 2002 WL 31258011, at *2 (Tenn. Crim. App. Sept. 16, 2002).

Thus, the defendant has waived review of this issue, absent plain error. In order for us to find plain error: (a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "'necessary to do substantial justice.'" State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). The presence of all five factors must be established by the record before we 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 factor cannot be established. Id. at 283.

We conclude there is no plain error in this case. First, the record does not clearly establish what occurred in the trial court, as the jurors who testified at the motion hearing gave conflicting testimony regarding any interaction the bailiff may have had with the jury. Tashika Britton testified that, during deliberations, the members of the jury had questions for the judge but was not able to ask them because the bailiff told them that "what we had in front of us was all we had. This is what we had to go by." The bailiff told them "all we had to go by was what we had in front of us, the evidence and our notes." She said that the bailiff told the jury that it had to make a decision. However, Renee Deaver testified that the bailiff never told them that they had to make a decision. She said that, at one point, the jury asked the bailiff for transcripts, and the bailiff said "we had to work with the notes that we had[.]" When Charity Street was asked, "[A]t any point did the officer ever tell you that you had to make . . . a decision," Street responded, "Not like that per se." She elaborated, "It was just really you know you have to make a decision based on what you have. You don't have anything else cause we were asking for the stuff but the only way we could make a decision was based on what we had in our notes." From the testimony presented, it is not clear whether the bailiff told the jury it had to make a decision or the context in which any such statement may have been communicated.

In addition, no substantial right of the accused was adversely affected, and consideration of the error is not necessary to do substantial justice. Looking at the factors in Adams, 405 S.W.3d at 654, there is no reasonable possibility that any improper outside influence altered the jury's verdict. As to this issue, the trial court found that none of the witnesses testified that a deputy told them "you must reach a verdict," only that it had to reach a verdict with what it had before it. The trial court essentially gave the same charge itself in that it charged that each juror "must decide the case for [themselves]" after consideration of the evidence. The court further explained to the jurors that they were not to "surrender [their] honest conviction as to the weight or effect of evidence . . . for the mere purpose of returning a verdict." In addition, it appears that not all jurors heard the statement from the bailiff, and, as we will explain fully below, the evidence against the defendant overwhelmingly established his guilt. Thus, any exposure to any improper outside influence would not have affected the jury's verdict and, therefore, is an additional reason there is no

plain error.

II. Communication with Jury Outside the Defendant's Presence

The defendant next argues that the trial court improperly communicated with the deliberating jury outside of his presence. He asserts that the improper communication was "via the bailiff . . . [and] it appears that the jury was simply told to work with what it already had in front of it," rather than bringing the jury "into the courtroom and address[ing] the jury's questions in front of trial counsel and the court reporter." The defendant acknowledges that he did not raise this issue in his motion for new trial but argues that this court should not treat the issue as waived because he made the argument orally at the hearing, and the court addressed it in its ruling.

Tennessee Rule of Criminal Procedure 33 allows a defendant to raise an issue orally at a motion for new trial hearing, but requires that it "be reduced to writing, within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). As noted above, this court has repeatedly held that a defendant's such failure results in waiver of the issue. See Ronnie Joe Stokes, 2013 WL 5536209, at *2; Terry Sanders, 2012 WL 5948885, at *5; Bobby A. Raymer, 2012 WL 4841544, at *4; Ronald Lee Stewart, 2010 WL 2025407, at *4; Mark C. Noles, 2007 WL 3274422, at *11; Ronnie Watson, 2002 WL 31258011, at *2.

Thus, the defendant has waived review of this issue, absent plain error, which factors we have previously detailed above. We conclude there is no plain error in this case because the error did not adversely affect a substantial right of the defendant and consideration of the error is not necessary to do substantial justice.

This court has previously stated that "[g]iven the importance of judicial impartiality and fairness in appearance as well as in fact, it is generally considered improper for the trial judge to communicate with jurors off the record and outside the presence of counsel." State v. Tune, 872 S.W.2d 922, 928 (Tenn. Crim. App. 1993). "The proper method of fielding questions propounded by the jury during deliberations is to recall the jury, counsel, the defendant(s), and the court reporter back into open court and to take the matter up on the record." State v. Mays, 677 S.W.2d 476, 479 (Tenn. Crim. App. 1984). However, the failure to follow the proper procedure is not necessarily reversible error. Tune, 872 S.W.2d at 928. To be entitled to relief, the error at issue must have caused "specific prejudice, either to [a defendant's] substantial rights or to the judicial process." Spencer v. A-1 Crane Serv., 880 S.W.2d 938, 941 (Tenn. 1994); see Tune, 872 S.W.2d at 930.

From the proof at the motion hearing, it is clear that any error on the part of the trial court to follow the proper procedure was not plain error requiring reversal in this case. Juror

Tashika Britton testified that the jury was "trying to decipher . . . the difference between first-degree murder and second-degree . . . ." The jury wrote down a question about "the paperwork, the indictments" and passed it to the bailiff, but Britton could not remember if they received a response to the question. Juror Renee Deaver testified that the only question she remembered anyone having "was something in the paperwork, the wording of it," and that the bailiff took the question to the judge "and clarified it." Charity Street testified that the jury had a lot of questions and provided some of those questions to the court in writing via the bailiff. The jury then received a written response from the judge. She said that they were told that "the only thing we had to go on was what we had." In ruling on the motion, the trial court recalled that the jury had a question about the difference between first and second degree murder, to which it answered in writing that the "jurors look to the charge for [their] answer." A review of the jury instructions on first and second degree murder shows that the trial court had already given the jury a correct charge, and the trial court did not attempt to further define the offenses. Therefore, the trial court's reply to "look to the charge" could not have prejudiced the defendant in any way. See State v. Smith, 751 S.W.2d 468, 472 (Tenn. Crim. App. 1988) (concluding that the trial court's ex parte communication with the jury did not prejudice the defendant and was harmless because the trial court did not attempt to further define the term "felonious intent" and had already given a correct charge); State v. Chesley Randell Thompson, No. 03C01-9807-CC-00238, 1999 WL 160961, at *9 (Tenn. Crim. App. Mar. 24, 1999), perm. app. denied (Tenn. Sept. 13, 1999) (finding that the trial court's method or responding to the jury's question could not have affected the verdict because the court merely referred the jury back to the original instructions and included no new or erroneous information). Accordingly, we conclude that there is no plain error in this case.

III. Failure to Name the Predicate Felony

The defendant next argues that the indictment failed to properly charge him with employment of a firearm during the commission of a dangerous felony in that it did not name the underlying predicate felony, thus voiding the conviction.

Tennessee Code Annotated section 39-17-1324 provides that "[i]t is an offense to employ a firearm during the: (1) [c]ommission of a dangerous felony; [or] (2) [a]ttempt to commit a dangerous felony[.]" Tenn. Code Ann. § 39-17-1324(b)(1), (2). The statute then provides a list of predicate offenses considered dangerous felonies. See id. § 39-17-1324(i)(1). The statute requires that a charge of its violation "be pled in a separate count of the indictment or presentment and tried before the same jury and at the same time as the dangerous felony." See id. § 39-17-1324(d). However, the statute is silent on whether the predicate dangerous felony must be named in the count charging a violation of section 39-17-1324.

In this case, the defendant was indicted for only one "dangerous felony" enumerated in the statute as possible predicate felonies – attempted first degree murder. The attempted first degree murder count of the indictment alleged that the defendant committed attempted first degree murder on July 29, 2010. The count charging employment of a firearm made reference to both sections 39-17-1324(b) and 39-17-1324(i)(1) and stated that the offense was committed on July 29, 2010. In addition, the final page of the indictment, which was signed by the grand jury foreperson, plainly lists all of the charges against the defendant. To see what specific dangerous felony would serve as the predicate offense for the employment of a firearm charge, the defendant needed to only look back to the attempted first degree murder count of the indictment, the only "dangerous felony" count in the indictment, and thus would have notice of the predicate felony relied on for the firearm charge. The situation might have been different had the defendant been charged with several "dangerous felonies" that could have served as the predicate offense for his employment of a firearm charge, but such is not the case here. See, e.g., State v. Alvin Brewer and Patrick Boyland, Nos. W2012-02281-CCA-R3-CD and W2012-02282-CCA-R3-CD, 2014 WL 1669807, at *28 (Tenn. Crim. App. Apr. 24, 2014).

In State v. Michael L. Powell and Randall S. Horne, No. E2011-00155-CCA-R3-CD, 2012 WL 1655279 (Tenn. Crim. App. May 10, 2012), this court touched on the issue of whether an indictment for employment of a firearm during the commission of a dangerous felony must specify the underlying predicate felony. See id. at *12-15. However, the panel did not ultimately decide the issue, instead arriving at a disposition on other grounds. See id. at *13-15. The Michael L. Powell panel cited State v. Christopher Ivory Williams, No. W2009-01638-CCA-R3-CD, 2011 WL 1770655, at *10 (Tenn. Crim. App. May 9, 2011), perm. app. denied (Tenn. Aug. 24, 2011), prior to resolving the case on other grounds, noting that the Christopher Ivory Williams court had held that a felony murder charge that failed to designate the predicate felony was fatally defective, but the trial court's error in failing to dismiss the charge was harmless because the defendant was also convicted of premeditated murder. However, in addition to the fact that Christopher Ivory Williams involved a different statute than the present case, the cases are also dissimilar in that the defendant in Williams was charged with two felonies that could serve as predicates for a felony murder charge and did not specify which of the two would serve as the predicate, but here there was only one possibility for the predicate offense.

We conclude that this case is most similar to State v. Demeko Gerard Duckworth, No. M2012-01234-CCA-R3-CD, 2013 WL 1933085 (Tenn. Crim. App. May 10, 2013), perm. app. denied (Tenn. Oct. 17, 2013), a case in which the defendant was indicted in a four-count indictment for two counts of first degree murder, one count of attempted first degree murder, and one count of employing a firearm during a dangerous felony. Id. at *1. The defendant in that case asserted that his firearm conviction was void because the State failed to allege

a predicate felony in the indictment. Id. at *19. This court rejected that claim, holding:

> [A]lthough each count of the indictment appears on a separate page and there are two different victims, only the charge of attempted first degree murder qualifies as a dangerous felony under Code section 39-13-1324. We believe it is "reasonably clear" that the charge of employing a firearm during the commission of a dangerous felony is connected to the count of attempted first degree murder such that the indictment is not void for lack of notice. Youngblood, 287 S.W.2d at 91. Thus, the failure of the State to specify the predicate felony in [it] does not void the indictment in this case.

Id. at *22.

We conclude, as in Demeko Gerard Duckworth, that there was no possibility of confusion in this case or lack of notice because there was only one dangerous felony that could serve as the underlying predicate felony.

IV. Felony Reckless Endangerment Not a Lesser-Included Offense of Aggravated Assault

The defendant next argues that felony reckless endangerment is not a lesser-included offense of aggravated assault as charged in Counts 3 and 4 of the indictment and, therefore, those convictions must be reversed. He admits that he did not raise this issue in the trial court but asserts the error rises to plain error, which factors we have previously detailed above.

The defendant was indicted in Counts 3 and 4 for aggravated assault, committed by "us[ing] or display[ing] a deadly weapon and caus[ing] bodily injury" to the victims. In its instructions to the jury, the trial court charged that reckless endangerment with a deadly weapon was a lesser-included offense of aggravated assault. The defendant has not shown that the trial court breached a clear and unequivocal rule of law, as required for this court to recognize plain error.

Under the test adopted in State v. Burns, 6 S.W.3d 453 (Tenn. 1999), an offense is lesser-included if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains

a statutory element or elements establishing

> (1) a different mental state indicating a lesser kind of culpability; and/or
>
> (2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
>
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
>
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Id.

In State v. Hatfield, 130 S.W.3d 40, 42 (Tenn. 2004), our supreme court specifically held that felony reckless endangerment is a lesser-included offense of aggravated assault when the aggravated assault is charged as having been committed by causing actual injury with a deadly weapon, as the case here. The court explained:

> [T]he defendant actually inflicted injury by use of a deadly weapon and did not merely cause fear of injury. When aggravated assault is charged as being committed by causing bodily injury by use of a deadly weapon, felony reckless endangerment is a lesser-included offense under part (b)(2) of Burns because actual bodily injury to another person as the result of an aggravated assault is necessarily a greater harm than the merely placing a person in danger of serious bodily injury or death. . . . Because of this, felony reckless endangerment is a lesser-included offense of aggravated assault committed by intentionally or knowingly causing bodily injury to another by the use of a deadly weapon.

Id. at 42-43.

The defendant contends that the present offenses, which occurred on July 29, 2010, are governed by the 2009 amendment to Tennessee Code Annotated section 40-18-110 and that, under that statute, felony reckless endangerment is no longer a lesser-included offense of aggravated assault. As noted by the defendant, the Tennessee General Assembly amended section 40-18-110 in July 2009 by adding subsections (f) and (g). Subsection (f) defines lesser-included offenses as those in which all the statutory elements "are included within the statutory elements of the offense charged[.]" Tenn. Pub. Acts, ch. 439, § 1; Tenn. Code Ann. § 40-18-110(f). However, the statute does not expressly abrogate Burns part (b). Moreover, although not addressing this issue, this court has recently applied the reasoning in Hatfield and concluded that felony reckless endangerment was an appropriate lesser-included offense of aggravated assault in a case where the offense occurred after the 2009 amendment to Tennessee Code Annotated section 40-18-110. See State v. Steven Shane Neblett, No. M2011-02360-CCA-R3-CD, 2012 WL 4841322, at *12-13 (Tenn. Crim. App. Oct. 9, 2012), perm. app. denied (Tenn. Jan. 22, 2013).

The defendant cannot show that the trial court violated a clear and unequivocal rule of law by instructing the jury that felony reckless endangerment was a lesser-included offense of aggravated assault because the amended statute does not expressly abrogate Burns part (b); there is controlling authority from our supreme court that provides that felony reckless endangerment is a lesser-included offense of aggravated assault under the facts of the case; and this court has applied that controlling authority, Hatfield, to an offense committed after the 2009 amendment to section 40-18-110. The defendant is not entitled to relief under the plain error doctrine.

V. Double Jeopardy Bars Convictions for Felony Reckless Endangerment

The defendant next argues that double jeopardy bars his convictions for felony reckless endangerment in Counts 3, 4, and 5. The defendant admits that he did not raise this issue in his motion for new trial but asserts the error rises to plain error, which factors we have previously detailed above. As we will discuss, the defendant is not entitled to plain error relief because double jeopardy does not bar his convictions for three counts of felony reckless endangerment.

The Double Jeopardy Clause of the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Article I, section 10 of the Tennessee Constitution similarly provides "[t]hat no person shall, for the same offence, be twice put in jeopardy of life or limb." Our supreme court has recognized that the Double Jeopardy Clause provides three separate

protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Watkins, 362 S.W.3d 530, 541 (Tenn. 2012). This case involves the last of these three categories.

"In single prosecutions, multiple punishment claims ordinarily fall into one of two categories, . . . referred to as 'unit-of-prosecution' and 'multiple description' claims." Id. at 543. "[M]ultiple description claims arise when a defendant who has been convicted of multiple criminal offenses under *different* statutes alleges that the statutes punish the same offense." State v. Smith, __ S.W.3d __, 2014 WL 2766674, at *11 (Tenn. 2014) (citing Watkins, 362 S.W.3d at 544). By contrast, unit-of-prosecution claims arise "when defendants who have been convicted of multiple violations of the *same* statute assert that the multiple convictions are for the 'same offense.'" Watkins, 362 S.W.3d at 543.

In Watkins, the Tennessee Supreme Court abandoned the State v. Denton, 938 S.W.2d 373 (Tenn. 1996), four-factor test previously employed by Tennessee courts in determining whether dual convictions violate the prohibition against double jeopardy. Instead, for multiple description claims, the court adopted the same elements test enunciated by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 304 (1932). Watkins, 362 S.W.3d at 556; see Smith, 2014 WL 2766674, at *11. Under the Blockburger test, the first step is to determine whether the convictions arise from the same act or transaction. Watkins, 362 S.W.3d at 545. If the convictions arose from the same act or transgression, the court must then determine whether the legislature intended to allow the offenses to be punished separately. Id. at 556. When the legislature has not clearly expressed its intent either to prevent or to preclude the dual convictions, the court must examine the statutes to determine whether the crimes constitute the same offense. Id. at 557. "The court makes this determination by examining statutory elements of the offenses in the abstract, rather than the particular facts of the case." State v. Cross, 362 S.W.3d 512, 520 (Tenn. 2012) (citations omitted). "[I]f each offense includes an element that the other does not, the statutes do not define the 'same offense' for double jeopardy purposes," and courts "will presume that the Legislature intended to permit multiple punishments." Watkins, 362 S.W.3d at 557.

However, "[g]enerally, we do not apply the Blockburger test when addressing a unit-of-prosecution claim." Smith, 2014 WL 2766674, at *12 (citing Watkins, 362 S.W.3d at 543). Instead, the relevant analysis involves determining what the legislature intended to be a single unit of conduct for purposes of a single conviction and punishment. Id. (citing Watkins, 362 S.W.3d at 543). Courts are to "apply the 'rule of lenity' when resolving unit-of-prosecution claims, meaning that any ambiguity in defining the unit of conduct for prosecution is resolved against the conclusion that the legislature intended to authorize

multiple units of prosecution." Watkins, 362 S.W.3d at 543 (citing Gore v. United States, 357 U.S. 386, 391-92 (1958)).

In State v. Goins, 705 S.W.2d 648, 651 (Tenn. 1986), our supreme court stated, "[G]enerally, if a criminal episode involves several victims who have personally been victimized, the evidence could sustain multiple convictions." Id. (citing State v. Irvin, 603 S.W.2d 121 (Tenn. 1980)). Previously, the court in Irvin held, "It seems illogical to us, as a general proposition, to hold that when two persons have been killed by an accused, he has committed only one homicide. Prior cases in this state so holding are overruled or modified to the extent that they conflict herewith." Irvin, 603 S.W.2d at 123; see also State v. Pelayo, 881 S.W.2d 7, 9-10 (Tenn. Crim. App. 1994) (noting that "[i]f a criminal actor displays a deadly weapon or causes serious bodily injury to more than one person, that conduct would justify convictions for each victim involved"). Additionally, this court has stated that "offenses with different named victims would not be the same for double jeopardy purposes." State v. Jason D. Pillow, No. M2002-01864-CCA-R3-CD, 2004 WL 367747, at *13 (Tenn. Crim. App. Feb. 27, 2004), perm. app. denied (Tenn. June 21, 2004).

The felony reckless endangerment statute proscribes conduct with a deadly weapon that places or may place another person in imminent danger of death or serious bodily injury. See Tenn. Code Ann. § 39-13-103(a)-(b). Our supreme court has recognized that "[w]hen permitted by the facts, the State may prosecute a defendant for criminal acts committed either against individual victims or against the public at large." Cross, 362 S.W.3d at 519 n.5 (citing State v. Payne, 7 S.W.3d 25, 29 n.3 (Tenn. 1999)). The court in Cross elaborated that the State can pursue multiple indictments for reckless endangerment, naming a distinct victim in each. Id. In other words, the State can "pursue[] multiple offenses for each of the different individuals who were put in jeopardy by [the defendant's] conduct." Id.

In this case, the defendant committed multiple discrete acts each time he pulled the trigger of his revolver, aiming and shooting at multiple named victims. Thus, the defendant's double jeopardy claim does not survive the threshold inquiry under Blockburger as his convictions did not arise from the same act or transaction.

The defendant's reliance on State v. Ramsey, 903 S.W.2d 709 (Tenn. Crim. App. 1995), is unpersuasive. Ramsey involved a defendant driving recklessly, who swerved into the oncoming lane of traffic, narrowly missing one vehicle and hitting a second one. Id. at 711. That defendant was convicted of three counts of reckless endangerment because of the number of victims in the two oncoming cars. Id. at 712. However, this court reversed two of the convictions, determining that the defendant's actions constituted a single course of conduct that could not easily be broken down into discrete acts. Id. at 713. This court noted, nevertheless, that "[w]e need not fashion a blanket rule that provides that a defendant's

continuous operation of a vehicle may *only* result in one act of reckless endangerment under the statute. Many scenarios could be created where such a rule would not be prudent." Id.

In this case, the defendant fired his gun at distinct, named individuals. Thus, double jeopardy does not bar his convictions for felony reckless endangerment in Counts 3-5 and, therefore, no clear and unequivocal rule of law has been breached. The defendant is not entitled to relief under the plain error doctrine.

VI. Trial Court's Failure to Define "Recklessly"

The defendant next argues that the trial court erred in failing to define "recklessly" in its jury instructions. He points out that the term was "contained within the definition" of his felony reckless endangerment convictions, as well as contained within some of the lesser-included offenses rejected by the jury in the attempted first degree murder and aggravated assault counts. The record reflects that, in its instructions to the jury, the trial court did not define the *mens rea* element of "recklessly." The defendant admits that he failed to object to the jury instructions at trial and failed to raise the issue in his motion for new trial but asserts that the error rises to plain error, which factors we have previously detailed above, and that his convictions must be reversed.

"It is well-settled in Tennessee that a defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001) (citing State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000); State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S .W.2d 283, 287 (Tenn. Crim. App. 1998) (citing State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). An instruction will be considered prejudicially erroneous only if it fails to submit the legal issues fairly or misleads the jury as to the applicable law. State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)). "The failure to instruct the jury on a material element of an offense is a constitutional error subject to harmless error analysis." Id. at 60.

Initially, with regard to the failure to define "recklessly" as it relates to the defendant's convictions for attempted first degree murder and aggravated assault, we determine that the error did not affect a substantial right of the defendant and that consideration of the error is not necessary to do substantial justice. In convicting the defendant of attempted first degree murder and aggravated assault, the jury found that the defendant, respectively, acted "intentionally" and "intentionally or knowingly." The trial court instructed the jury that it

was to consider and reach a unanimous verdict on the charged offense before considering any lesser-included offenses. Based on the "acquittal-first" jury instruction, the jury never considered the lesser-included offenses of attempted first degree murder and aggravated assault containing the mental state of "recklessly."

With regard to the failure to define "recklessly" as it relates to the defendant's convictions for felony reckless endangerment, we determine that consideration of the error is not necessary to do substantial justice. At trial, there was no dispute between the parties as to the culpable mental state of the perpetrator of the offenses. Instead, the defendant put forth an alibi defense, claiming that he did not commit the offenses and challenging the witnesses' identification of him as the assailant. Had the issue been properly preserved, the State would have been able to show that any error in failing to provide a definition was harmless, as the defendant's mental state was not a genuinely disputed issue below.

VII. Sufficiency of the Evidence

The defendant lastly argues that the evidence is insufficient to sustain his convictions because the witnesses establishing his identity as the person shooting out of the gold car were not credible.

In considering this issue, we apply the rule that where sufficiency of the convicting 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). The same standard applies whether the finding of guilt is predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

A criminal offense may be established entirely by circumstantial evidence. State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010). It is for the jury to determine the weight to be given the circumstantial evidence and the extent to which the circumstances are consistent with the guilt of the defendant and inconsistent with his innocence. State v. James, 315 S.W.3d 440, 456 (Tenn. 2010). In addition, the State does not have the duty to exclude every other reasonable hypothesis except that of the defendant's guilt in order to obtain a conviction based solely on circumstantial evidence. See State v. Dorantes, 331 S.W.3d 370, 380-81 (Tenn. 2011) (adopting the federal standard of review for cases in which the evidence

is entirely circumstantial).

All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. 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 stated the 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, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (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).

First degree murder is defined as "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). "Premeditation" is

> an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d).

The "element of premeditation is a question of fact" for the jury to determine based upon a consideration of all the evidence. State v. Suttles, 30 S.W.3d 252, 261 (Tenn. 2000) (citing State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997)). "[P]remeditation may be established by any evidence from which a rational trier of fact may infer that the killing was

done 'after the exercise of reflection and judgment' as required by Tennessee Code Annotated section 39-13-202(d)." State v. Davidson, 121 S.W.3d 600, 615 (Tenn. 2003). A jury may infer premeditation from circumstantial evidence surrounding the crime, including the manner and circumstances of the killing. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Addison, 973 S.W.2d 260, 265 (Tenn. Crim. App. 1997). There are several factors which our courts have concluded may be evidence of premeditation: "the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing." Bland, 958 S.W.2d at 660. Additional factors from which a jury may infer premeditation include the defendant's failure to render aid to the victim, see State v. Lewis, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000), and evidence establishing a motive for the killing. See State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998).

In cases where the defendant has been charged with the attempted commission of a crime, there must be evidence that the defendant acted "with the kind of culpability otherwise required for the offense" and acted "with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part." Tenn. Code Ann. § 39-12-101(a), (a)(2). Criminal attempt also occurs when the defendant "acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." Id. § 39-12-101(a)(3).

A person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Id. § 39-11-402(2). Criminal responsibility is not a separate offense but "solely a theory by which the State may prove the defendant's guilt of the alleged offense, . . . based upon the conduct of another person." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999).

As relevant here, a person commits aggravated assault who intentionally or knowingly causes bodily injury to another and uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102(a)(1)(A). A person commits the offense of reckless endangerment who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury. Id. § 39-13-103(a). Reckless endangerment committed with a deadly weapon is a Class E felony. Id. § 39-13-103(b)(2). Moreover, it is an offense to employ a firearm during the commission of a dangerous felony. Id. § 39-17-1324(b)(1). "'Dangerous felony' means: (A) Attempt to commit first degree murder, as defined in §§ 39-12-101 and 39-13-202[.]" Id. § 39-17-1324(i)(1)(A).

In the light most favorable to the State, the evidence is sufficient for a rational trier of fact to find that the defendant is guilty of attempted first degree murder, aggravated assault, three counts of felony reckless endangerment, and employing a firearm during the commission of a dangerous felony. The evidence shows that the defendant was sitting on the front porch of a house when he saw the victim walking down the street with his girlfriend, Ashley Williams, and other friends. The defendant "got on the phone and . . . called somebody." Soon after, the defendant got into a gold, four-door car with Jerahmiah Rankin and an unknown driver and drove toward Ashley's house "[t]o go handle the whack" or "[g]o handle the business."

The gold car's windows were down as it "creeped by" Ashley's house. The defendant and Rankin pointed their guns and fired at four or five people, including the victim. The defendant used a revolver, and Rankin used a nine-millimeter. Multiple witnesses testified that the defendant was shooting from the front passenger seat and Rankin from the back passenger seat. The victim was shot in the chest during the incident.

The State presented evidence that the defendant's brother was killed in a drive-by shooting about two weeks prior to the incident and that the victim was friends with and a member of the same gang as two of the people responsible for the murder. One of the defendant's own witnesses testified that, on the day of the incident, the defendant was upset and crying over his brother's death. The evidence shows that the defendant procured a weapon and shot at the victim multiple times, hitting him in the chest. The State also established that the defendant had a motive to kill the victim. From these facts, the jury could infer that the defendant acted with premeditation and find him guilty of attempted first degree murder.

The evidence is, likewise, sufficient to support the defendant's conviction for the aggravated assault of the victim, establishing that the defendant intentionally caused bodily injury to the victim with the use of a deadly weapon. The defendant fired a revolver at the victim multiple times as the car he was riding in drove slowly past where the victim was standing. The victim was shot in the chest and had to be taken to the hospital by ambulance. The bullet is still lodged in the victim's chest, he has a scar, and he still suffers pain.

There was also sufficient evidence to support the defendant's convictions for three counts of felony reckless endangerment; offenses against Darius Love, Jason Moss, and people inside Ashley's house. Each time the defendant fired his weapon out the window of the gold car, he recklessly engaged in conduct that placed another person in imminent danger of death or serious bodily injury. Love testified that he saw the defendant and Rankin coming down the street in a gold car and that multiple shots were fired from the car. Love specifically saw "a black gun aiming towards [him]," causing him to run to the back of the

house. Jason Moss was standing outside with the victim and Love, and he was one of the victims the defendant and Rankin shot at. The defendant's conduct also placed individuals inside Ashley's house in danger of death or serious bodily injury, as one of the shots passed through the front door and lodged in a kitchen closet. Ashley's mother, Tamica Williams, was sitting in the living room with her children when the bullet came through the front door.

Finally, there was sufficient evidence to support the defendant's conviction for employing a firearm during the commission of attempted first degree murder. Multiple witnesses saw the defendant shooting at the victim as he and Rankin drove by the victim. Rankin specifically identified the weapon used by the defendant as a revolver.

The defendant's assertion that the evidence is insufficient because the State's witnesses were not credible is without merit, as assessing the credibility of the witnesses is the province of the jury and not for this court to second-guess on appeal. Likewise, it was the province of the jury to assess the credibility of the witnesses presented by the defendant. Based on the foregoing, the evidence is sufficient to support each of the defendant's convictions.

CONCLUSION

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

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ALAN E. GLENN, JUDGE