IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
April 2, 2019 Session

STATE OF TENNESSEE v. CORDERRO AVANT and DAVARIO FIELDS, aka DAVARIO McNEARY

Appeal from the Criminal Court for Shelby County
No. 14-04590 Carolyn W. Blackett, Judge

No. W2018-01154-CCA-R3-CD

Defendants, Corderro Avant and Davario Fields, aka Devario McNeary, appeal from their convictions for one count of first degree murder, one count of attempted first degree murder resulting in seriously bodily injury, nine counts of attempted first degree murder, and eleven counts of employing a firearm during the commission of a dangerous felony after shots were fired at a house in Memphis. As a result of the resulting convictions, Defendants were sentenced to effective sentences of life plus twenty-one years. In their direct appeal, Defendants challenge: (1) the trial court's limitation of cross-examination regarding activity at the home prior to the shooting; (2) the trial court's decision to allow the alleged child victims to sit in the courtroom; (3) the trial court's decision to allow the State to use cell phone location data obtained without a warrant; (4) the dismissal of a juror after he told the trial court that he recognized a person identified as an unavailable witness; (5) the trial court's comments to the jury about deliberation; and (6) the sufficiency of the evidence.[1] After hearing oral arguments and a full review, we affirm.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and ALAN E. GLENN, J., joined.

Charles Mitchell (at trial) and John Catmur (on appeal), Memphis, Tennessee, for the appellant, Corderro Avant.

Missy Patience Branham, Memphis, Tennessee, for the appellant, Davario Fields.

[1] We have reordered Defendants' issues on appeal.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Colin Campbell and Sarah Poe, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Defendants were indicted in September of 2014 by the Shelby County Grand Jury in a multi-count indictment for their roles in a shooting on Patterson Street in Memphis in August of 2014. The mayhem resulted in the death of Dominique Thomas, the victim, and the injury of Jarvis Clayborn. Defendants were indicted for one count of first degree premeditated murder, eleven counts of attempted first degree premeditated murder, and eleven counts of employing a firearm during the commission of a dangerous felony.

At trial, Deputy Justin Brock of the Shelby County Sheriff's Department explained that he responded to a call about a "shooting and disturbance" at a home on Patterson Street in Memphis on August 22, 2014. This was not the first time Deputy Brock had responded to a call at the residence. When he arrived, "several people [were] standing outside the residence," and there were also people inside the residence. He observed more than twenty shell casings of different calibers "in the street, on the driveway, in the front yard, [and] up around the front door." The glass in the front door of the residence was "on the ground," and the windows were "shot out on the front part of the house." Deputy Brock saw the victim and a handgun on the couch and "lots of blood." As he assessed the scene, he found several small children in the front bedroom of the residence and Mr. Clayborn in the northeast bedroom. The home was equipped with a closed circuit TV system with cameras on both the front and the back of the home, but Deputy Brock was not aware if the cameras were capable of recording anything.

Deputy Brock helped to secure the scene, detaining people who "were on the scene when the shooting actually took place." Officers placed people into some of the approximately ten to fifteen squad cars that arrived on the scene.

Antonio Hicks testified that he lived at the home on Patterson. He explained that he sold cars and "had a lot of cars being broke[n] in[to] and [his] house shot up a few times due to my nephew's[2] little gang affiliation." These, according to Mr. Hicks, were the reasons the home was equipped with "a basic little camera with a monitor." He further explained that there were monitors in the living room that displayed images captured by the three cameras on the outside of the home.

[2] Mr. Hicks identified his nephew as Brandon Brookings.

On August 22nd, the following people were living at the home with Mr. Hicks: his fiancée, Mistie Thomas; his step-daughter, Cadedra Thomas; and his step-son, Mr. Clayborn. The victim was also living at the house temporarily. She was the best friend of Mistie Thomas. According to Mr. Hicks, the victim "visited very much" and was "actually staying with us a few days" with her four children because "[s]he was about to get her an apartment."

Mr. Hicks knew both Defendants "[t]hrough mutual friends in the neighborhood." He also knew a person known as "Tank," whose real name was Demarius Johnson.[3] "Tank" was "affiliated"[4] with Mr. Hicks's nephew and "used to come by" the house on occasion. All three of the men—Tank, Defendant Avant, and Defendant Fields—had been to the home on Patterson before.

Mr. Hicks got a call "about 3:00, maybe 4:00" in the afternoon from "DD," whom he initially identified as Defendant Avant but later identified as Defendant Fields. Mr. Hicks admitted that the call log actually showed that the telephone call came in at 1:57 p.m. The parties stipulated that the call came from Defendant Avant's phone number. Specifically, Mr. Hicks recalled:

> [Defendant Fields] asked me was Tank at my house, I told him no. And he said, he better not be. He was fixing to come and shoot my house up. I told him to keep it in the streets. Tank no longer comes around my house. I got kids at my house. I got my family there. Y['all] keep it where y['all] - - when y['all] see each other. And that was it. He hung up the phone.

After the call, Mr. Hicks left the home on his "motor scooter" and went "around the corner" to a friend's house. Mr. Hicks referred to this friend as "92" but did not identify him by name. According to Mr. Hicks, he left his home about twenty minutes prior to the shooting. While standing outside of his friend's home, Mr. Hicks saw "two cars line up in front of [his] friend's house"—a white Toyota Camry and a gray Chevrolet Impala. There were "[a]t least three" people in the Camry. Mr. Hicks later admitted that he "didn't actually get a visual look" at the people in the Camry but that he "saw silhouettes of the guns, and [he] knew the car." He saw the windows of the Camry were "cracked maybe halfway," and there were "guns in the air." They were "[b]ig guns, assault rifle kind of guns." Mr. Hicks told his friend to "call the police, they're about to

[3] Roger Nelson, a criminal investigator for the Shelby County District Attorney's Office, served a subpoena on Mr. Johnson to appear at trial. Mr. Johnson did not appear at trial. According to the State, his whereabouts were unknown at the time of trial.

[4] Mr. Hicks explained on cross-examination that "[the Defendants and 'Tank'] claim [to be members of the] Bloods and Crips."

shoot my house up." Seconds later, the cars "hit the corner," and Mr. Hicks "heard gunshots."

Mr. Hicks's "reaction was to make it back home, but [his] friend kind of just told [him], lay down on the ground." When the shooting subsided, Mr. Hicks ran to his house. When he arrived, his fiancée was coming out of the house. The people who were shooting at the home from the cars were already gone. Mr. Hicks did not get to go back into his house because police officers were already on the scene. They placed him in a police car. Mr. Hicks saw his stepson "bleeding out the back" when he came out of the house.

When Mr. Hicks finally returned to his house three or four days later, there were bullet holes everywhere, "all in the bricks." However, Mr. Hicks admitted that there were bullet holes in the house prior to the August 22 incident. Mr. Hicks also explained that he had one gun in his home for "protection" along with "some personal marijuana." Mr. Hicks denied that there were any other drugs in the house but admitted that a review of text messages on his phone indicated that he received text messages from people asking for "soft" and "dust," both street names for cocaine. Mr. Hicks, however, maintained that he was not a drug dealer.

Mr. Clayborn testified that at the time of the shooting, he was fifteen years old and attending school. He recalled that on the day of the shooting, he "left school early" because he was expelled. Mr. Clayborn was sitting on the couch and talking to other people that were staying in the house, including his mother and the victim. Mr. Clayborn "tried to get up and go in [his] room" when the shooting started. He was shot in the "side." He had no recollection of how many shots were fired because everything "went black" after he heard "the first couple" of shots. The bullet that hit Mr. Clayborn did not exit his body. He was able to walk out of the house and had to step over the victim's body to get outside. Mr. Clayborn was eventually taken to the hospital where he remained for nine days after doctors removed his spleen. Mr. Clayborn admitted that he used to be a "Blood" but was no longer affiliated with the gang.

Ms. Thomas testified that the following people were at the house the day of the shooting: the victim and her four children (Brennan Thomas, Brycen Thomas, Jakiya Thomas, and Jarvis Thomas),[5] Mr. Clayborn, Mr. Brookings, Cadedra Thomas, Takenya Young, and Fred Ware. Ms. Thomas had worked that morning from 4:30 a.m. until around 11:00 a.m. or "no later than 12:00" p.m. When she got home from work, she was "in the house just sitting around" while the victim was packing to move into her apartment. They were also "watching TV, doing normal things with the kids," and

[5] Ms. Thomas identified at least two of the victim's children who were present at the time of the shooting and were seated in the courtroom at trial over objection of defense counsel.

smoking marijuana. At one point, she heard Mr. Hicks "outside on the phone yelling." Mr. Hicks left the house after the phone call. The next thing she "heard was gunshots coming through the house." There were too many gunshots to count. "Everybody just ducked and began to run towards the back where all the kids were." She did not see the victim get shot, but she was running in the hallway with Mr. Clayborn when he was hit by a bullet.

Frederick Ware was also present at the home on Patterson the day of the shooting. He was seventeen years old at the time. By the time of trial, he was twenty-one and was in custody on a charge of aggravated assault. Mr. Ware knew both of the Defendants at the time of the incident but "[n]ever had a beef with them." In fact, the Defendants had come to the home on a different occasion to pick up both Mr. Ware and Mr. Brookings, his "homeboy." Mr. Ware also knew "Tank" because Tank was his girlfriend's brother. Mr. Ware was aware that "Tank and Little C[6] got to fighting" at the home "[a] couple days, [to] a week" prior to the shooting. They "got into a tussle" and "slammed each other" before Defendant Avant left the house. According to Mr. Ware, "Ted, Little C, Tank, and Little B" were present during the altercation.

On the day of the shooting, Mr. Ware was seated in a white chair on the porch of the Patterson house and was talking on the phone for "probably about an hour after school let out." Mr. Ware saw "a gray Impala pull up [outside the home] and a white Camry." The passenger side of the cars were closest to the home. He knew the Camry because it was "Little C's girlfriend's car." Mr. Ware saw three people in the white car, including "Little C" in the front seat and "DD" in the back passenger side. He did not identify the third person in the car. Mr. Ware saw two "big guns" and a handgun in the white car before the shooting started. He described the big gun as an "AK, Draco." They "got to blasting," and he "balled up" and started to fire the "9" he carried on his hip at the white Camry. He emptied his weapon and ran into the house. When he ran inside, the victim called his name. She was "on the floor holding her stomach." Mr. Ware "called her name a couple of times" before "blood started running out of her mouth." Mr. Ware covered the victim up and ran to the back of the house where he discovered Mr. Clayborn had been "shot in the rib" and was crying. He told "the kids" to hold a towel on Mr. Clayborn's gunshot wound, and he "dipped" or ran because he was "scared . . . and didn't want nothing to do with nothing." Mr. Ware identified both Defendants in a photographic lineup. On cross-examination, Mr. Ware admitted that he was a Blood until "Little C and them say I'm snitching," and he "can't be [a] Blood no more."

Desaree Brown, Defendant Avant's girlfriend, testified that she drove a white Toyota Camry. She confirmed that Defendant dropped her off at work the morning of the shooting and drove away in her car. She did not see her car again. The car was

[6] Mr. Ware identified Defendant Avant as "Little C."

eventually discovered by Memphis police at a "Pull-A-Part" junkyard in Memphis. Police discovered that the car was purchased by Tracy Lynn Henderson from Willie Harris on September 2, 2014. Mr. Henderson sold the car to "Pull-A-Part." A certified copy of an application for title and license for the Toyota Camry was entered into evidence. Ms. Brown was listed as the owner. The car was processed by Memphis Police Department in late September 2014. The car had bullet holes on both the driver's and passenger's side doors.

Officers from the Memphis Police Department processed the crime scene. They located multiple cartridge casings, bullets, and bullet fragments. The ammunition found by officers at the crime scene was in four different sizes—7.62, 9 mm, .40, and .45 caliber. The medical examiner, Dr. Erica Curry, reported that the victim had three different gunshot wounds. One bullet entered in her vaginal area and went into the right shoulder; one bullet entered her right thigh; and one bullet entered her left leg on the side of the left ankle, fracturing both bones in the lower leg. Neither of the leg wounds themselves would have been fatal, but the gunshot into the vagina ultimately went through the small and large intestine, the liver, the diaphragm, the heart, and the right lung before exiting the body and re-entering into the soft tissue of the right shoulder. Dr. Curry opined that this was the fatal wound, killing the victim within minutes from blood loss.

Defendants Avant and Fields were apprehended in Houston, Texas. Before leaving Texas, they were advised of their *Miranda* rights by Detective James Sewell of the Memphis Police Department. Detective Sewell was responsible for transporting the Defendants back to Tennessee. During a stop at a truck stop, Detective Sewell bought the Defendants some cigars. Detective Sewell told the Defendants that he thought Tank was involved in the crime. Both men responded that they wanted to fight Tank and asked if they could put "Tank" in the backseat so they could beat him up. Defendants Avant and Fields disclosed to Detective Sewell that they were not at the scene at the time of the shooting and that "Tank" drove a white Toyota Camry. At that point, Detective Sewell had not mentioned what types of cars were involved in the incident.

Once they returned to Tennessee, Defendant Avant told Detective Sewell that he was engaged in a fight with "Tank" at the home on Patterson just two days prior to the shooting. Defendant Avant claimed that "Tank" showed up at the house and "started running his mouth." The men went outside where "Tank" hit him with a "sucker punch." Defendant Avant told the detective that he beat "Tank" up. Then, when "Tank" went back into the house, Defendant Avant claimed he heard "guns being racked and stuff." Defendant Avant left the house at that time.

The parties stipulated that a cell phone found in possession of Defendant Avant, with a phone number ending in 3278, and a cell phone found in possession of Defendant

Fields, with a phone number ending in 3361, were taken from the Defendants and given to officers. The phones were not tampered with or altered in any way prior to the "dump" by Detective Roosevelt Twilley of the Memphis Police Department. Detective Twilley explained that "[d]umping a phone is transferring information from the operators of the phone at the time and putting it to where the investigators can read what was on the phone." In other words, the "dump" gave police access to call logs, text messages, emails, pictures, music videos, and whatever else might be stored on the phone.

Cell phone records from both Defendant Avant's phone and Defendant Fields's phone were analyzed by Kelly Walker, an expert in the area of radio frequency engineering. According to Mr. Walker, when a cell phone tower transmits a cell phone signal, the cell phone is within two miles of the tower at the time of the transaction. The home on Patterson was within the radius of towers designated as Sector One of Tower 5798 and Sector Three of Tower 5816. According to records from Sprint Corporation, Defendant Avant's cell phone transmitted an outgoing call from Sector Three of Tower 5816 at 4:48 p.m. on the day of the incident and made another call from Sector One of Tower 5798 at 4:50 p.m. The first 911 call reporting the incident came in at 4:42 p.m.

Special Agent Kasia Lynch of the Tennessee Bureau of Investigation ("TBI") determined that all thirteen 9 mm casings found at the crime scene were fired from the same gun. She was unable to determine if the two .45 caliber casings were fired from the same gun. With regard to the six 7.62 by 39 mm cartridge casings, Special Agent Lynch determined that five could have been fired from the same gun, but the sixth casing "did not leave enough marks" to definitively determine whether it was fired through the same weapon. The bullet recovered from the body of the victim was a 7.62 caliber bullet.

At the conclusion of the proof, the jury found Defendants Avant and Fields guilty of the first degree murder of Dominique Thomas in Count One; attempted first degree murder resulting in serious bodily injury of Jarvis Clayborn in Count Two; not guilty of attempted first degree murder of Jarvis Clayborn in Count Three; and attempted first degree murder of victims Fred Ware, Brandon Brookings, Mistie Thomas, Jarvis Thomas, Brennon Thomas, Bryson Thomas, Cadedra Thomas, Jakiya Thomas, and Takenya Thomas in Counts Four through Twelve. The jury also found the Defendants guilty of employing a firearm during the commission of a dangerous felony in Counts Thirteen through Twenty-Three. The trial court merged the conviction for employing a firearm during the commission of a dangerous felony in Count Thirteen with the conviction for first degree murder in Count One. Defendants were sentenced to a sentence of life plus twenty-one years.

After the denial of a motion for new trial, both Defendants filed a notice of appeal. Defendant Fields's notice of appeal was untimely, but this Court granted a motion to allow for the late filing of the notice of appeal. Defendants raise several identical issues

on appeal,[7] including: (1) whether the trial court improperly denied cross-examination of Deputy Brock regarding calls to the home about illegal drug activity; (2) whether the trial court improperly allowed alleged child victims to sit in the courtroom; (3) whether the trial court improperly allowed the State to use cell phone location data that had been obtained without a warrant; (4) whether the trial court improperly dismissed a juror who disclosed knowledge of an unavailable witness; (5) whether the trial court improperly forced a deadlocked jury to reach a verdict on a Saturday night; and (6) whether the evidence was sufficient to support the convictions.

Analysis

I. Cross-examination of Officer Brock

Defendants argue that the trial court erred by limiting the cross-examination of Deputy Brock. Specifically, Defendants Avant and Fields argue that it was appropriate to ask whether the officer had knowledge of "many shootings" at the home in order to show that some of the "shells collected by the crime scene officers were actually older than August 22, 2014." According to Defendants, this information was crucial to show that the State could not prove how many shots were fired, when they were fired, or by whom they were fired. In response, the State argues that the officer did not testify about any other shootings but testified about drug activity and disturbance calls to the residence. Additionally, the State argues that Defendants have failed to provide references to the record or citation to any legal authority in support of their claim, so the issue is waived. In the alternative, the State contends Defendants are not entitled to relief because the trial court properly limited the cross-examination

It is true, as noted by the State, that the argument section of Defendants' appellate briefs with respect to this issue do not include specific citations to the record. However, the statement of the facts section adequately describes the testimony of Deputy Brock and the objection made by the State to cross-examination about prior calls to the home, all with citations to the relevant transcript volume and page numbers. Because Defendants' briefs make "appropriate references to the record" in support of this issue, *see* Tenn. Ct. Crim. App. R. 10(b), this issue is not waived on that basis. However, Defendants fail to cite any legal authority to support their argument as required by Tennessee Court of Criminal Appeals Rule 10(b). Therefore, the issue is waived due to an inadequate brief, albeit for a different reason than that asserted by the State.

[7] The briefs submitted by both Defendants, from the Statement of the Facts section on, are identical. In fact, Defendant Avant's brief actually claims that the evidence is insufficient to support whether "Devario Fields" had the requisite intent to commit the specific crimes for which he was convicted. We assume Defendant Avant actually meant to substitute his name in the place of Defendant Fields. Though Defendant Avant's appellate counsel did not represent him at trial, we find it somewhat egregious that counsel would submit a brief to this Court with such an obvious error.

II. Victims in the Courtroom

Defendants argue that the trial court improperly allowed the "alleged" child victims to sit in the courtroom during trial. Specifically, Defendants argue that it was "overly prejudicial" to allow Ms. Thomas to point out the children seated in the courtroom. Again, Defendants fail to offer any legal argument or cite any legal authority to support their claim. *See* Tenn. Ct. Crim. App. R. 10(b). This issue is waived.

III. Cell Phone Location Testimony

Defendants argue that it was error for the trial court to admit testimony with regard to cell phone location data because the State failed to obtain a warrant prior to securing the Defendants' "cell-site records." Defendants acknowledge that they failed to object during trial, failed to raise the issue during closing, and failed to raise the issue in a motion for new trial but that the issue is "ripe for plain error review" based on *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018). The State insists that Defendants waived the issue by failing to seek suppression of the records prior to trial and that they are not entitled to plain error relief because no clear and unequivocal rule of law was breached.

Tennessee Rule of Criminal Procedure 12(b)(2)(C) requires that a motion to suppress evidence based on an illegal seizure be filed prior to trial. Failure to do so results in a waiver of that defense unless the trial court finds good cause to grant relief. Tenn. R. Crim. P. 12(f)(1). Furthermore, Tennessee Rule of Appellate Procedure 3(e) prohibits an appellant from basing an appeal on an issue that was not presented in a motion for new trial. *See also* Tenn. R. App. P. 36(a) (stating that no appellate relief is required for "a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"). Our appellate courts have consistently maintained that we will not entertain new issues on appeal when the trial court was not presented with an opportunity to consider those issues in the first instance. *See, e.g.*, *State v. Bishop*, 431 S.W.3d 22, 43 (Tenn. 2014); *State v. Aguilar*, 437 S.W.3d 889, 899 (Tenn. Crim. App. 2013). Because Defendants did not raise this argument in the trial court, they have waived it.

However, Tennessee Rule of Appellate Procedure 36(b) provides that, "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." We will not grant relief on the basis of plain error unless the following five requirements are satisfied:

"(a) the record clearly establishes what occurred in the trial court;

(b) a clear and unequivocal rule of law was breached;

(c) a substantial right of the accused was adversely affected;

(d) the accused did not waive the right 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)). "[C]omplete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283. The burden is on the defendant to persuade the appellate court that the trial court committed plain error and that the error was of "such a great magnitude that it probably changed the outcome of the trial." *Id.* (quoting *Adkisson*, 899 S.W.2d at 642); *see also* Tenn. R. App. P. 36(b) (relief may be granted when an "error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process"). "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *State v. Page*, 184 S.W.3d 223, 231 (Tenn. 2006).

Both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution guarantee the right to be free from unreasonable searches and seizures. Tennessee's constitutional protections regarding searches and seizures are identical in intent and purpose to those in the federal constitution. *State v. Turner*, 297 S.W.3d 155, 165 (Tenn. 2009). "[A] warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

As best we can gather, the thrust of Defendants' argument is that the Memphis Police did not obtain a warrant before securing the "cell-site records" for the Defendants' cell phones. While Defendants insist that a clear and unequivocal rule of law was breached, citing *Carpenter*, and that Defendants' fundamental right to a fair trial was affected, we cannot reach the issue because, in our view, the record is not clear as to what happened in the trial court. First, the search warrant does not appear in the record even though Detective Sewell testified that after he took possession of the cell phones during the arrest in Texas, he "[s]ecured a search warrant, and asked [Mr. Twilley] to see what was inside the phone." Second, we note that there are several pages missing from the transcript during the testimony of Larry Pierce, the RF engineer who testified about Defendants' location on the day of the incident from the cell phone location information.

Specifically, the transcript skips from page 548 to page 560. Neither party points out this discrepancy in the transcript. Defendants are not entitled to plain error relief.

IV. Dismissed Juror

Defendants' entire explanation and argument with regard to the next issue is one sentence: "The [t]rial [c]ourt erred in dismissing Juror Michael Johnson." We assume Defendants are referring to the following, which happened during a break at trial. Juror Michael Johnson informed the trial court that he knew the person the State referred to as "Tank" because an ex-girlfriend "used to buy drugs from him." Mr. Johnson had not seen "Tank" since "[a]round 2003, 2004" and actually thought that "Tank" was deceased. Mr. Johnson admitted that he told other jurors that he recognized someone but insisted that he could remain impartial. Mr. Johnson expressed some fear for his safety because he was worried that some of the other witnesses would recognize him and think he was "snitching." The State moved to excuse the juror. The trial court expressed concern about whether the juror could "be fair and objective" and was bothered by the juror's explanation that he was scared for his own safety. The trial court ultimately chose to dismiss the juror. By failing to provide any argument, citation to authority, or even identify how the trial court erred by dismissing the juror, Defendants have waived consideration of this issue. *See* Tenn. Ct. Crim. App. R. 10(b).

V. Jury Deliberation

Defendants argue that it was an abuse of discretion for the trial court to "forc[e] a deadlocked jury to come to a verdict late on a Saturday night" after they had already been sequestered for an entire week. The State counters that Defendants have waived this claim by failing to make a contemporaneous objection at trial.

The record does not indicate at what time the jury retired to deliberate after four days of trial. The transcript does not contain the closing jury instructions or closing statements and indicates that "[d]eliberations to begin Saturday morning, February 17, 2018). At some point during deliberations, the jury asked if they had "to be unanimous on [a] verdict before moving to a lesser charge?" The trial court instructed the jury that this information "[w]as said to you a number of times during the jury instructions, and also during the final closing arguments. The answer is in the jury charge when it starts talking about how you deliberate. It's very specific, and that's all I can tell you, okay?" The jurors were excused to continue to deliberate, and a discussion ensued between counsel and the trial court, during which the trial court noted that the jury started deliberation around 9:00 a.m. and that it appeared to be around 3:00 p.m.

Next, after a short discussion between counsel and the trial court about the "mindset" of the jury and whether they would ever reach a decision, the trial court

commented that the jury had "been deliberating for six hours" and had not "even had time to read the [lengthy] jury charge," so it was not "appropriate to declare a mistrial on the first time that they come and say they can't - - they can't make up their minds." The trial court received a second question from the jury, stating that they were "currently unavailable [sic] to reach a unanimous verdict for the first count of the Indictment of First Degree Murder." The trial court commented:

> I'm going to have to ask each and every one of you to try again.
>
> I know that it's been a long week, but you need to read through this. Everything that you need to have, you have back there. If you would take the time to read through the jury instructions, it gives you what you should do if you get to a point that people have different opinions. It tells you how to get to something, okay?
>
> And the other thing is that technically speaking, you've only been deliberating for about four or five hours, although you've been back there. But you had lunch. You had to get yourselves together, things like that, and we're prepared to stay here for as long as we have to, okay? And I'm asking each and every one of you to do the very best that you can looking at the law, remembering your - - the evidence, the testimony, looking at your notes, and listening to the attorneys and pull things together.
>
> We're not telling you in any way whatsoever what the verdicts should be at all, but we explained to you very carefully that it was going to have to be unanimous. We went over that. So that was already known by you. So I think the jury instructions as long as they are, but there are certain parts in there [that] address[] what you should do in a situation like this. And I'm sending you all back, because at this point, we're not ready at all to accept any type of mistrial on this, okay? Thank you.

About three hours later, around 6:00 p.m., the trial court called the jury back in to the court room to poll the jurors and "kind of find out where" they were in reaching a verdict. The jurors each individually confirmed that they would be able to come to a unanimous verdict if "given an opportunity to continue to deliberate further." The trial court asked the jurors whether they would like to "bring dinner in" and then commented:

> I do need to tell you that – and I'm not trying to put any pressure on you whatsoever, but I think that everybody needs to know what's going on. It's Saturday, for a lot of purposes, mostly because people have different religious beliefs and religious observations, I don't work on Sunday.

> Sunday's not available, okay? Unfortunately, on Monday is President's Day. The Prosecutors as well as myself, it's a holiday.
>
> Now, that kind of puts us at Tuesday. I'm not putting any pressure on you, but I think it's fair - - only the fair thing that I can do is just let you know what we know that we're up against at this point. We don't have a problem staying here, but we just want you to be honest with us and let us know, because that's what we're up against at this point, okay?
>
> So if there's any change, let us know. We're going to progress forward, because what I heard was each and every one of you say that you could reach a unanimous verdict on this Indictment. So we're going to sit here and wait, and the only question that I have at this point is whether or not you would prefer us to order in, and what - - if anybody has any preferences. This is not a lot. . . .
>
> I hope I've answered everybody's questions. I hope I have not boxed anybody in, because I wanted you to be fair and honest with me when I asked that question, okay? Thank you very much. You may return back to the jury room.

The next entry in the technical record indicates that the jurors were excused and that the court was in recess. Then, an unspecified amount of time later, the jury announced their verdict. There was no objection by either party to the procedure employed by the trial court.

Defendants both cite *State v. Walls*, 537 S.W.3d 892 (Tenn. 2017), to support their argument that the trial court abused its discretion in "keeping the jury late on Saturday night." In *Walls*, our supreme court considered "whether the trial court erred by allowing the jury . . . to deliberate late into the night and early morning on the last day of trial." *Id.* at 894. *Walls* was a first degree murder case in which the trial lasted from Monday through Thursday, about the same amount of time as the trial herein. *Id.* The trial court in *Walls* was prepared to read the charge to the jury when the defendant had a medical emergency at around 4:00 p.m. *Id.* at 897. The trial court suspended the matter until the defendant returned from seeking medical treatment, at around 6:30 p.m. *Id.* at 898. The jury started deliberating around 7:00 p.m. and submitted a question to the trial court at around 10:40 p.m. *Id.* The jury asked for food while they were waiting on the answer to their question. At around 11:15 p.m., the trial court answered the jury's question. The jury returned a verdict at 1:05 a.m. *Id.* at 898. On direct appeal, this Court determined that the defendant properly preserved the issue for review and reversed the convictions on the basis of the late-night jury deliberations. The supreme court determined that the defendant did not properly preserve the issue for review because he failed to object or

move the trial court to adjourn the trial for the day. The court went on to determine that plain error relief was unavailable because no clear and unequivocal rule of law was breached. *Id.* at 902. Our supreme court determined that the time was ripe to set forth the "correct legal standard for reviewing whether a trial court errs in conducting late-night proceedings" as abuse of discretion. *Id.* at 905.

Applying *Walls* to Defendants' case, the record is clear that neither Defendant Avant nor Defendant Fields objected to the continuation of jury deliberation. In fact, the trial court asked counsel for both Defendants if "[e]verybody is wanting them to get done?" Counsel for Defendant Fields answered "[y]es." In our view, by failing to object to the continuation of deliberations, Defendants have waived the issue. *See id.* at 903-04. Moreover, in our view this case is more about whether the trial court gave a "dynamite" charge – an impermissible, judicially mandated majority verdict. *See State v. Bowers*, 77 S.W.3d 776 (Tenn. Crim. App. 2001). The record is not entirely clear what happened in the trial court. There is no time-stamp on the technical record to indicate at what time the jury returned with the verdict. Defendants' briefs allege that the verdict was returned at 11:00 p.m., but claims made in a brief are not evidence and cannot be considered as such by this Court. "The law is clear that statements of fact made in or attached to pleadings [or] briefs . . . are not evidence and may not be considered by an appellate court unless they are properly made part of the record," i.e., approved by the trial court. *Threadgill v. Bd. of Pro'l Resp.*, 299 S.W.3d 792, 812 (Tenn. 2009). Moreover, we cannot conclude that the trial court breached a clear and unequivocal rule of law by abusing its discretion. While certainly a less-than-ideal situation, the sequestered jury began deliberations on a Saturday. The trial court explained candidly to the jury and to the parties that there would be no deliberation on Sunday and that Monday was a State holiday. The trial court did not force the jury to continue deliberation on Saturday night or tell the jury that they had to make a decision in the case that evening. Because the record is not clear what happened in the trial court and the trial court did not breach a clear and unequivocal rule of law, Defendants are not entitled to plain error relief.

VI. Sufficiency

Defendants argue on appeal that the evidence is not sufficient to support the convictions. Specifically, Defendants argue that "all of the[] counts are victim specific and the evidence is not sufficient" because there "was no proof as to any premeditation" and no proof other than the testimony of Ms. Thomas that victims Jarvis Thomas, Brennon Thomas, Bryson Thomas, Cadedra Thomas, Jakiya Thomas, and Takenya Thomas were even at the home during the shooting. With respect to Counts Thirteen through Twenty-Three, Defendant Fields argues that there is no evidence that he

"knowingly and willingly employed a firearm" against the named victim.[8] The State disagrees.

Well-settled principles guide this Court's review when a defendant challenges the sufficiency of the evidence. A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). The burden is then shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, "the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003). As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). "In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (citing *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973)). We may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *Dorantes*, 331 S.W.3d at 379 (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

Defendants were convicted of one count of first degree premeditated murder in Count One; one count of attempted first degree murder resulting in serious bodily injury in Count Two; nine counts of attempted first degree murder in Counts Four through Twelve; and eleven counts of employing a firearm during the commission of a dangerous felony in Counts Thirteen through Twenty Three.

A. First Degree Murder

[8] Again, Defendant Avant's brief actually states that there is no evidence that "Devario Fields knowingly and willingly employed a firearm against" each particular person named in Counts Thirteen through Twenty-Three. We assume, for purposes of this appeal, that Defendant Avant meant to argue that the evidence was insufficient to support his own convictions rather than the convictions of his codefendant.

First degree murder is the premeditated and intentional killing of another person. T.C.A. § 39-13-202(a)(1). A person acts intentionally "when it is the person's conscious objective or desire to engage in the conduct or cause the result." T.C.A. § 39-11-106(a)(18). Premeditation is defined as "an act done after the exercise of reflection and judgment." T.C.A.§ 39-13-202(d). This section further defines premeditation as follows:

> "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. The State must establish the element of premeditation beyond a reasonable doubt. *See State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Premeditation may be proved by circumstantial evidence. *See, e.g.*, *State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992). The existence of premeditation is a question of fact for the jury and may be inferred from the circumstances surrounding the killing. *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000). Such circumstances include, but are not limited to, the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, the infliction of multiple wounds, threats or declarations of an intent to kill, a lack of provocation by the victim, failure to aid or assist the victim, the procurement of a weapon, preparations before the killing for concealment of the crime, destruction and secretion of evidence of the killing, and calmness immediately after the killing. *State v. Kiser*, 284 S.W.3d 227, 268 (Tenn. 2009); *State v. Leach*, 148 S.W.3d 42, 53-54 (Tenn. 2004); *State v. Davidson*, 121 S.W.3d 600, 615 (Tenn. 2003); *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Larkin*, 443 S.W.3d 751, 815-16 (Tenn. Crim. App. 2013).

Viewing the evidence in the light most favorable to the State, the evidence presented at trial showed that Defendant Fields's cell phone initiated a call to Mr. Hicks the same day before the shooting. Mr. Hicks testified that he recognized Defendant Fields's voice on the phone and that Defendant Fields asked if "Tank" was at the house because he was "fixing to come and shoot [the] house up." Mr. Ware saw the Defendants arrive outside the house in the Toyota Camry with multiple weapons before they fired numerous shots at the home. The police investigation located two .45 caliber cartridge casings and six 7.62 millimeter cartridge casings as well as numerous bullet strikes in the house. The victim was shot three times, and the bullet that most likely killed the victim was a 7.62 millimeter bullet.

Defendants take issue with the fact that there was no proof presented at trial that they intended to kill the victim. We disagree. The common law doctrine of transferred

intent, which provides that "a defendant who intends to kill a specific victim but instead strikes and kills a bystander is deemed guilty of the offense that would have been committed had the defendant killed the intended victim," has been applied to first degree premeditated murder. *State v. Ely*, 48 S.W.3d 710, 723-24 (Tenn. 2001); *Millen v. State*, 988 S.W.2d 164, 166-67 (Tenn. 1999). The "statute simply requires proof that the defendant's conscious objective was to kill a person, i.e., 'cause the result.'" *Millen*, 988 S.W.2d at 168; *but see State v. Roy Len Rogers*, No. E2011-02529-CCA-R3-CD, 2013 WL 5371987, at *23 (Tenn. Crim. App. Sept. 23, 2013) (explaining that transferred intent does not apply in a case where the defendant was charged with alternate theories of first degree premeditated murder and felony murder), *perm. app. denied* (Tenn. Apr. 11, 2014). The proof showed that Defendants fired multiple shots into a house after calling the home to see if a particular person was at the house. The fact that they did not kill their intended victim is irrelevant. The evidence is sufficient to support the first degree murder conviction.

B. Attempted First Degree Murder Resulting in Serious Bodily Injury

As relevant here, a person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense, "[a]cts 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[.]" T.C.A. § 39-12-101(a)(2). We note that serious bodily injury is not an element of attempted first degree murder. However, if a defendant is found guilty of attempted first degree murder "where the victim suffers serious bodily injury as defined in § 39-11-106," the defendant is not eligible for release until he serves 85 percent of his sentence. T.C.A. § 40-35-501(k)(5). Serious bodily injury is defined as bodily injury that involves (A) a substantial risk of death; (B) protracted unconsciousness; (C) extreme physical pain; (D) protracted or obvious disfigurement; (E) protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) a broken bone of a child who is twelve years of age or less. T.C.A. §§ 39-11-106(a)(34)(A)-(F). This Court has held that the subjective nature of pain is a fact to be determined by the trier of fact. *State v. Eric A. Dedmon*, No. M2005-00762-CCA-R3-CD, 2006 WL 448653, at *5 (Tenn. Crim. App. Feb. 23, 2006), *no perm. app. filed*.

The State asserts that Mr. Clayborn's serious bodily injury is supported by both (C) and (E) and that Defendants both waived the issue for failure to cite legal authority. Defendants claim there is neither proof that Mr. Clayborn felt "the pain of being shot" nor that he had "permanent injury." Defendants cite no legal authority, save the standard of review with regard to sufficiency of the evidence to support their argument. Albeit a far from perfect argument section, their citation of legal authority with respect to this issue allows this Court to address it.

In our view, the proof supported a finding by the jury that Defendants had the requisite intent to attempt to commit first degree murder. They opened fire on a home with people inside and were seen by Mr. Ware firing shots from the car. While the proof does not indicate which Defendant actually fired the shot that injured Mr. Clayborn, both defendants are criminally responsible for the conduct of the other. *See* T.C.A. § 39-11-402(2) (a defendant is criminally responsible for an offense committed by the conduct of another if the defendant "solicits, directs, aids, or attempts to aid another person to commit the offense" while "[a]cting with [the] intent to promote or assist the commission of the offense."). Additionally, the proof supports the finding that Mr. Clayborn suffered the loss of a bodily organ. T.C.A. § 39-11-106(E). He testified that doctors had to remove his spleen. Defendants are not entitled to relief.

C. Attempted First Degree Murder

With respect to Count Four, Defendants argue that there was "no intent or any premeditation" to support the conviction with respect to victim Mr. Ware and that Mr. Ware was not a credible witness. With respect to Count Five, Defendants claim that the only evidence the victim Mr. Brookings was at the house came from Mr. Hicks. With respect to Counts Six through Eleven, Defendants complain that Mistie Thomas was the only witness, that there was no proof as to premeditation or intent to kill, and that there was "no testimony of these children showing any signs of fear or [of] being in danger or [even] being in the room where all of the bullet holes were found." With respect to Count Twelve, Defendants argue that there was "no evidence" that Takenya Thomas was at the scene when the shots were fired.

As we have already noted, there was sufficient evidence to support the jury's determination that Defendants fired shots into the home with the intent to kill. Mr. Ware testified that he was outside the home and recognized Defendants. Mr. Hicks testified that his nephew, Mr. Brookings, was at the home when shots were fired. Mistie Thomas testified that Jarvis Thomas, Brennon Thomas, Bryson Thomas, Cadedra Thomas, Jakiya Thomas, and Takenya "Young"[9] were at the home on the day of the shooting. The testimony from the officers indicated that at least eleven bullet strikes were located outside the home and six 7.62 millimeter casings and two .45 caliber casings from the crime scene were delivered to the TBI for analysis. The jury is charged with weighing the credibility of the witnesses, and we will not reweigh the evidence or substitute our inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. Moreover, a defendant can be convicted on the basis of the uncorroborated testimony of one witness. *State v. Wyrick*, 62 S.W.3d 751, 767 (Tenn. Crim. App. 2001). Defendants are not entitled to relief.

[9] While Mistie Thomas identified this victim as Takenya Young, the indictment identified her as Takenya Thomas.

D. Employing a Firearm During a Dangerous Felony

Defendants argue that there was no evidence presented at trial to show that "Devario Fields knowingly employed a firearm against that particular person" in Counts Thirteen through Twenty-three. Again, we can only assume that Defendant Avant also argues that the proof was insufficient to sustain his convictions for the same offenses because the brief ineptly omits his name from this argument. The State insists that the issue is waived for failing to cite authority or support the issue with argument. Again, the only citations to authority with respect to Defendants' sufficiency claims are to the basic cases outlining the standard of review for sufficiency of the evidence. Defendants' briefs do not set forth any argument as to how the evidence was insufficient to support each particular conviction.

Despite the shortcomings of the Defendants' briefs, we note that the State set forth evidence at trial from which the jury could determine that both Defendants employed a firearm during a dangerous felony. In order to sustain a conviction, the State had to show that Defendants employed a firearm during the omission of or attempt to commit a dangerous felony. T.C.A. § 39-17-1324(b)(1), (2). Attempt to commit first degree murder is a dangerous felony. *Id.* at (i)(1). The proof at trial showed that both defendants showed up at the home armed with guns and shot at the house with the intent to kill the people inside. The uncontroverted testimony at trial named the people who were in the home at the time the shots were fired. The evidence was sufficient. Defendants are not entitled to relief.

VII. Cumulative Error

Lastly, Defendants argue that cumulative error should entitle them to relief. Because we have found no error in the trial court, Defendants are not entitled to relief. *See State v. Hester*, 324 S.W.3d 1, 77 (Tenn. 2010) ("To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings.").

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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TIMOTHY L. EASTER, JUDGE