

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
November 6, 2018 Session

FILED

02/15/2019

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. JOHNNY JENKINS**

**Appeal from the Criminal Court for Shelby County**  
**No. 17-00858      Glenn Ivy Wright, Judge**

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**No. W2017-02222-CCA-R3-CD**

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A Shelby County grand jury indicted the defendant, Johnny Jenkins, for second degree murder (Count 1), employing a firearm during the commission of a dangerous felony as related to Count 1 (Count 2), attempted second degree murder (Count 3), and employing a firearm during the commission of a dangerous felony as related to Count 3 (Count 4). After trial, a jury convicted the defendant of employing a firearm in Counts 2 and 4, voluntary manslaughter in Count 1, and attempted voluntary manslaughter in Count 3. Upon the defendant's motion for new trial, the trial court dismissed Count 2 but upheld his remaining convictions. The defendant now challenges the sufficiency of the evidence supporting his convictions and several rulings of the trial court relating to the admission of evidence and jury instructions. Based upon our review of the record, we reverse and vacate the defendant's conviction in Count 1 for voluntary manslaughter. However, because the proof is sufficient to support the lesser-included offense of reckless homicide, which was charged to the jury, we remand this matter to the trial court for entry of an amended judgment reflecting a conviction for reckless homicide and for resentencing on this modified conviction. The defendant's convictions for attempted voluntary manslaughter in Count 3 and employing a firearm in Count 4 are affirmed. Accordingly, the trial court's judgments are affirmed in part and reversed in part, and the case is remanded for a new sentencing hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part, Reversed in Part, and Remanded**

J. ROSS DYER, J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and TIMOTHY L. EASTER, JJ., joined.

Lance R. Chism, Memphis, Tennessee, for the appellant, Johnny Jenkins.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Muriel Malone and Lora Fowler, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

### *Facts and Procedural History*

The defendant shot and killed Felisha Pitman during a gathering at her apartment on December 26, 2014. Prior to Ms. Pitman's death, the defendant fought with Trenall Hughes, another guest at the gathering. The fight culminated with the defendant pulling a gun out of his boot, aiming the gun at Ms. Hughes, firing through a wall, and shooting Ms. Pitman in the head, resulting in her death. For his actions, the defendant was charged with the second degree murder of Ms. Pitman (Count 1) and employing a firearm during the commission of the same (Count 2). The defendant was also charged with the attempted second degree murder of Ms. Hughes (Count 3) and a correlating charge of employing a firearm (Count 4).

At trial, the State presented testimony from several guests who attended the gathering on December 26, 2014, each of whom detailed the events leading to Ms. Pitman's death from their perspectives. Ms. Hughes explained she had several interactions with the defendant prior to the shooting. Upon entering Ms. Pitman's apartment, Ms. Hughes sat on the couch in the living room with Ms. Pitman. The defendant approached Ms. Hughes and questioned why she did not speak to him when he saw her at the grocery store. The conversation ended with the defendant stating "something like, 'you don't love me,'" to which Ms. Hughes responded, "What are you talking about, I don't even know you." Ms. Hughes realized the conversation "was getting kind of hostile," so she left the living room and entered the kitchen. The defendant followed her into the kitchen with "some money in his hand." He told Ms. Hughes "that he was going to take [Ms. Hughes] and [she] and [another] girl was going to have sex with him and make [them], at least, suck his penis and stuff like that." Ms. Hughes challenged the defendant to repeat his sexual demands, which he did. The defendant then flinched at her and Ms. Hughes pushed him. Ms. Hughes noted the defendant "got a little upset" when she pushed him, but others in the kitchen broke up the interaction. The defendant, however, continued to "steadily" make "sexual remarks" to Ms. Hughes that she repeatedly rejected. Because the defendant refused to leave her alone, Ms. Hughes poured a beer on him. The defendant took off his shirt and went to Ms. Pitman's bedroom while Ms. Hughes began cleaning up the beer.

When the defendant exited the bedroom approximately ten minutes later, he reentered the kitchen and "hit [Ms. Hughes] with his fist." Charles Hoskin, Kelvin

Carpenter, and Terrence Carpenter<sup>1</sup> separated the defendant and Ms. Hughes by pushing the defendant further into the kitchen. According to Ms. Hughes, when “everyone” broke up the altercation, the defendant fell to the floor as she believed the defendant “had been drinking a lot.” Ms. Hughes next saw the defendant pull a “small and black” gun from his boot as he tried to get up off the floor. The defendant raised the gun and pointed it at Ms. Hughes, and she believed he “was going to shoot [her].” Ms. Hughes “immediately” exited the kitchen and entered the living room where she announced the defendant had a gun. She then heard a gunshot and “just took off.” The State entered into evidence a photograph showing a bullet hole in the wall of the kitchen. Ms. Hughes explained when she heard the gunshot she could not see the defendant “because of the wall” separating the kitchen and the living room.

Kelvin Carpenter also witnessed the confrontations between Ms. Hughes and the defendant. Kelvin explained the defendant “was trying to have intercourse” with Ms. Hughes and “he wouldn’t leave her alone.” The defendant’s unwanted advances led to “a big altercation” consisting of “just a few licks . . . passed, mostly words.” Mr. Hoskin broke up the altercation, and the defendant went to the bedroom. When the defendant returned from the bedroom, “he threw something at [Ms. Hughes] and she swung at him and at that time [the defendant] fell and that is when he pulled a gun out and shot and that was it.” Kelvin did not know who the defendant aimed the gun at prior to firing but noted Ms. Hughes was in the kitchen at the time. After the shooting, the defendant waited for the police but when they arrived, he “tried to run.” Subsequently, Kelvin identified the defendant as the shooter in a photographic lineup. In his statement to police, Kelvin noted the defendant “was trying to shoot [Ms. Hughes] and shot [Ms. Pitman].”

Similarly, Terrence Carpenter noticed Ms. Hughes and the defendant arguing in the kitchen while at Ms. Pitman’s apartment. He saw that the two “got physical” and “something got wasted” on the defendant who then went to the bedroom and took off his “wet” shirt. When the defendant left the bedroom, “he tried to hit” Ms. Hughes. The two began fighting, and Mr. Hoskin “tried to just pull them apart and that’s when the [defendant] fell on the ground.” Simultaneously, Ms. Pitman got off the couch in the living room “and that’s when [Terrence] heard the shot and [Ms. Pitman] fell on the ground” with a gunshot wound to the head. Terrence did not see the defendant fire the gun because of the wall separating the kitchen and the living room, but afterwards he did see the defendant “at the kitchen table with a gun on the table.” When the police arrived, the defendant “ran, threw the gun in the bushes and the police got him and got the gun.”

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<sup>1</sup>Because both Terrence and Kelvin Carpenter testified at trial, we will refer to each by his first name to avoid any confusion. No disrespect is intended.

After the shooting, Terrence provided a statement to police and reviewed a photographic lineup where he identified someone other than the defendant as the shooter. In doing so, he wrote “This is the person I saw shoot [Ms. Pitman]” under the picture. During re-direct examination, Terrence explained he informed the police of his uncertainty regarding the picture he circled during the photographic lineup.

Mr. Hoskin lived with his sister, Ms. Pitman, on December 26, 2014, and witnessed the altercations between Ms. Hughes and the defendant that night. During the first altercation, Mr. Hoskin saw Ms. Hughes push the defendant and saw the two “tussling and fighting.” Mr. Hoskin “stepped between them” in order to break up the fight. Both the defendant and Ms. Hughes hit each other during their initial altercation, causing the defendant’s beer to spill. According to Mr. Hoskin, after the initial fight, Ms. Pitman “told everybody to get out.” As people started to leave the apartment, Mr. Hoskin saw the defendant go to the back to “get the beer off of him.” Two or three minutes later, the defendant threw his shirt on the kitchen table, and he and Ms. Hughes began to fight again.<sup>2</sup> Mr. Hoskin broke up the second fight, and Ms. Hughes entered the living room. Mr. Hoskin and the defendant talked in the kitchen as Ms. Hughes and Ms. Pitman talked in the living room. As people began leaving the apartment, Ms. Hughes walked back toward the kitchen, and Mr. Hoskin saw the defendant with a pistol. Mr. Hoskin believed the defendant fired the pistol in the direction of Ms. Hughes.

After the shooting, Mr. Hoskin surveyed the apartment, noting with twelve people packed closely inside, “somebody’s going to get hit.” He realized Ms. Pitman had been shot “somewhere in the face, because of all the blood.” Mr. Hoskin saw the defendant pacing in the kitchen and heard him call his wife. According to Mr. Hoskin, approximately forty-five minutes elapsed between the first altercation between Ms. Hughes and the defendant and the shooting. Mr. Hoskin later identified the defendant as the shooter in a photographic lineup.

Veronica Washington also recalled “an altercation” between the defendant and Ms. Hughes on December 26, 2014. The defendant wanted to have sex with Ms. Hughes and another woman, “[b]ut, [Ms. Hughes] was not really willing to give in.” Ms. Hughes told the defendant that “she dates only females” and the defendant “got very angry” and “punched [Ms. Hughes].” Afterwards, the intoxicated defendant fell to the floor and “grabbed the gun from his right sock.” Ms. Washington then “heard someone saying, ‘He’s got a gun,’ so everybody ran.” Ms. Washington believed the defendant aimed the gun at Ms. Hughes who was in the kitchen, but hit Ms. Pitman who was in the living room.

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<sup>2</sup>We note, during cross-examination, Mr. Hoskin stated the defendant stayed in the back of the apartment for approximately fifteen to twenty minutes before returning to the kitchen.

After the shooting, Ms. Washington heard the defendant state, “Oh, I done messed up, I done messed up.” The defendant placed the gun on the kitchen table and “called someone on his cell phone and told them that he messed up.” The defendant remained in the apartment until the police arrived, after which “he tried to run then, but they caught him as soon as he walked out of the door.” Ms. Washington identified the defendant as the shooter in a photographic lineup.

Officer Kevin Tharpe responded to “a shooting call” at Ms. Pitman’s apartment located at 2860 Kimball Avenue in Memphis, Tennessee. As he approached the apartment, Officer Tharpe saw the defendant exiting with a gun in his hand. Officer Tharpe “started giving [the defendant] commands to stop, drop the weapon, get down on the ground,” but the defendant refused. The defendant walked approximately thirty to forty feet before throwing the gun into the bushes at the end of the apartment complex. According to Officer Tharpe, he and the other officers on the scene told the defendant to drop the gun “more than two or three times,” and after giving the defendant “several commands . . . he did comply.” Officer Tharpe recovered the gun from the bushes and arrested the defendant. Photographs of both the gun and the area where the defendant threw the gun were entered into evidence.

Upon entering the apartment, Officer Tharpe saw Ms. Pitman with a gunshot wound to the head. Memphis Fire Department arrived on the scene and pronounced her dead. Penne Davis testified that her sister, Ms. Pitman, was thirty-six years old at the time of her death.

Through Officer Lee Walker, the State introduced evidence collected from the crime scene including photographs, sketches, the gun found in the bushes, a magazine and eight live rounds collected from the bushes, and a nine millimeter spent casing found near the kitchen door. Officer Walker explained the bullet entered and exited through the wall separating the kitchen and living room before hitting Ms. Pitman.

Prior to testimony from forensic pathology expert, Dr. Zachary O’Neill, the defendant objected to the entry of the autopsy photographs of Ms. Pitman. The defendant argued the photographs were more prejudicial than probative as “the cause and manner of death [was] not contested in this case.” The State asserted the autopsy photographs were relevant in proving the victim’s cause of death. The trial court ruled in favor of the State, noting the autopsy photographs were “not gruesome” and were relevant to the case.

Dr. O’Neill then testified. He detailed injuries revealed during Ms. Pitman’s autopsy, explaining:

There was a gunshot wound of the head. There was an entrance gunshot wound . . . on the left cheek, just below the nose and just to the side of the nose, that was the entrance wound. The track then went through the head and through the brain and there was a gunshot exit wound on the right side of the head, just above the right ear.

Dr. O'Neill opined Ms. Pitman died from a perforating, or "through and through," gunshot wound to the head that fractured multiple bones and damaged "the interior, or the bottom part of the brain on the right side." Photographs depicting Ms. Pitman's entrance and exit wounds were entered into evidence over the defendant's renewed objection. At the conclusion of Dr. O'Neill's testimony, the State rested its case.

The defendant elected not to testify, but entered a stipulation into evidence stating "on December 26, 2014, [the defendant] possessed a valid Tennessee handgun carry permit." The defendant moved for a judgment of acquittal, asking the trial court to specially consider dismissing Count 2 as it relied on a non-enumerated dangerous felony offense and therefore did not charge a crime under the applicable statute, but the trial court denied the same. The trial court sent the case to the jury as charged. During their deliberations, the jury informed the trial court they were "stuck between two charges under count one" and questioned if they could "find the defendant guilty of count two with any of the verdicts under count one." The trial court, after discussing the jury's question with both parties, responded by stating: "The answer is; You can only find him guilty of voluntary manslaughter with that count two, that is the only charge in count one that you can find him guilty of, do you understand that?" The jurors agreed, continued deliberating, and then convicted the defendant of voluntary manslaughter for the death of Ms. Pitman in Count 1 and employing a firearm during the commission of the same in Count 2. In Counts 3 and 4, the jury convicted the defendant of attempted voluntary manslaughter and employing a firearm during the same for the crimes against Ms. Hughes. The trial court imposed an effective ten-year sentence for the four convictions.

The defendant filed a motion for new trial followed by two amendments wherein he argued, in part, he "was entitled to an acquittal of Count 2 of the indictment, since the indicted offense does not exist." The trial court agreed, granted the motion for new trial as to Count 2, and dismissed the charge. The defendant's motion for new trial was denied in all other respects and this timely appeal followed.

## *Analysis*

### *I. Sufficiency of the Evidence*

On appeal, the defendant challenges the sufficiency of the evidence as it relates to his convictions for the voluntary manslaughter of Ms. Pitman (Count 1), the attempted voluntary manslaughter of Ms. Hughes (Count 3), and employing a firearm during the commission of the attempted voluntary manslaughter of Ms. Hughes (Count 4). We will first discuss the sufficiency of the evidence supporting the convictions for the crimes against Ms. Hughes.

*a. Counts 3 and 4*

Regarding Count 3, the defendant asserts the evidence is insufficient to support his conviction as “no reasonable juror could have found that adequate provocation existed in this case.” The State disagrees, noting evidence of adequate provocation exists in the record. As to the employing a firearm during the commission of a dangerous felony conviction of Count 4, the defendant argues because insufficient evidence exists to support his conviction in Count 3, insufficient evidence exists to support Count 4. The State again disagrees. We agree with the State as to both convictions and will discuss each in turn.

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *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 has 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*, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

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

In Count 3, the jury convicted the defendant of the attempted voluntary manslaughter of Ms. Hughes. “Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” Tenn. Code Ann. § 39-13-211(a). “[T]he jury is responsible for reviewing the evidence to determine whether it supports a finding of adequate provocation.” See *State v. Lajaun Harbison*, No. E2015-00700-CCA-R3-CD, 2016 WL 4414723, at \*21 (Tenn. Crim. App. Aug. 18, 2016), *rev’d on other grounds*, 539 S.W.3d 149 (Tenn. 2018) (citing *State v. Williams*, 38 S.W.3d 532, 539 (Tenn. 2001)). Voluntary manslaughter is considered a result-of-conduct offense. *State v. Page*, 81 S.W.3d 781, 788 (Tenn. Crim. App. 2002). Within this context, a person acts intentionally “with respect . . . to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Tenn. Code Ann. § 39-11-302(a). “A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.” Tenn. Code Ann. § 39-11-302(b). Upon establishing the requisite intent, one is guilty of attempted voluntary manslaughter when he acts “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)(2). "If an offense is defined in terms of causing a certain result, an individual commits an attempt at the point when the individual had done everything believed necessary to accomplish the intended criminal result." Tenn. Code Ann. § 39-12-101, Sent. Comm'n Cmts.

Here, sufficient evidence exists to support the jury's finding that the defendant intentionally or knowingly attempted to kill Ms. Hughes after adequate provocation. The record indicates the defendant and Ms. Hughes engaged in two separate altercations prior to the shooting. The first altercation resulted after the defendant solicited Ms. Hughes for sex. After rejecting the defendant's advances, Ms. Hughes pushed him. The defendant continued to engage Ms. Hughes, and she poured a beer on him. Mr. Hoskin testified the defendant and Ms. Hughes were "tussling and fighting" during the initial altercation, while Terrence Carpenter noted the two "got physical," and Kelvin Carpenter stated "a few licks [were] passed." The two separated for some time before engaging in a second altercation which began after the defendant got "very angry" and "hit [Ms. Hughes] with his fist." During the ensuing fight, the defendant fell to the ground. While on the ground, the defendant pulled a gun from his boot and aimed it at Ms. Hughes. He fired the gun through the kitchen wall missing Ms. Hughes and hitting Ms. Pitman in the living room. In reaching its verdict, it is clear the jury found the defendant's altercations with Ms. Hughes prior to the shooting served as adequate provocation, a task that fell within their province as the trier of fact. *See Lajaun Harbison*, 2016 WL 4414723, at \*21. Though, on appeal, the defendant asserts he alone provoked Ms. Hughes prior to the shooting, the jury disposed of this contention in reaching its verdict, and we will not reweigh the evidence or substitute any inferences for those of the jury. *Id.*; *Dorantes*, 331 S.W.3d at 379. Accordingly, the evidence is sufficient to support the defendant's conviction for the attempted voluntary manslaughter of Ms. Hughes.

The jury also found the defendant guilty of employing a firearm during the commission of the attempted voluntary manslaughter of Ms. Hughes. As charged in Count 4, "[i]t is an offense to employ a firearm during the . . . [c]ommission of a dangerous felony." Tenn. Code Ann. § 39-17-1324(b)(1). One such "dangerous felony" is attempted voluntary manslaughter. Tenn. Code Ann. § 39-17-1324(b)(2), (i)(1)(C). As explained above, sufficient evidence exists in the record showing the defendant committed the attempted voluntary manslaughter of Ms. Hughes as he aimed a gun at her and fired the gun in her direction after two altercations. Accordingly, sufficient evidence also exists to support the firearm conviction of Count 4 since it is clear the defendant employed a gun during the attempted voluntary manslaughter of Ms. Hughes. The defendant is not entitled to relief.

*b. Count 1*

The defendant also argues the evidence was insufficient to support his conviction for the voluntary manslaughter of Ms. Pitman in Count 1, asserting the doctrine of transferred intent cannot sustain a conviction for the same. The defendant asserts “no proof was presented establishing that [Ms. Pitman] provoked [the] [d]efendant in any manner.” The State argues “[t]he current statute defining voluntary manslaughter does not require that the victim of voluntary manslaughter be the person who provoked the defendant” and, as a result, sufficient evidence exists to sustain the conviction. Upon our review of the record and applicable law, we agree with the defendant and vacate his conviction for the voluntary manslaughter of Ms. Pitman. In reaching this conclusion, however, we determine sufficient evidence exists to support a conviction for the lesser-included offense of reckless homicide. As such, we reduce the defendant’s conviction accordingly and remand the case to the trial court for entry of a judgment and sentencing in Count 1. We will explain our reasoning below.

The jury convicted the defendant of the voluntary manslaughter of Ms. Pitman based upon his interactions with Ms. Hughes prior to the shooting. However, “it has long been held under Tennessee law, and at common law, that a murder will only be reduced to voluntary manslaughter when the provocation was caused by the victim.” *Lajaun Harbison*, 2016 WL 4414723, at \*23 (citing *State v. Tilson*, 503 S.W.2d 921 (Tenn. 1974); *State v. Chris Jones*, No. W2009-01698-CCA-R3-CD, 2011 WL 856375, at \*11 (Tenn. Crim. App. Mar. 9, 2011); *State v. Antonius Harris*, No. W2001-02617-CCA-R3-CD, 2002 WL 31654814 (Tenn. Crim. App. Nov. 7, 2002); *State v. Khristian Love Spann*, No. 1230, 1989 WL 86566, at \*7 (Tenn. Crim. App. Aug. 3, 1989); see also *Commonwealth v. LeClair*, 840 N.E.2d 510 (Mass. 2006) (providing a history of the rule at common law and citing supporting cases from other jurisdictions); 40 C.J.S. Homicide § 114 (2010); 40 Am. Jur. 2d Homicide § 53 (2010)). Here, as noted by the defendant, no evidence exists in the record to demonstrate Ms. Pitman provoked the defendant in any way prior to her death. Rather, the evidence showed only Ms. Hughes acted in a provocative manner towards the defendant prior to the shooting as she engaged in two separate altercations with him. The record indicates the defendant aimed the gun at Ms. Hughes before pulling the trigger, and either his position from the ground or his level of intoxication caused him to fire through the kitchen wall into the living room, which resulted in Ms. Pitman’s death. Because Ms. Pitman, the defendant’s unintended victim, did not provoke the defendant prior to the shooting, insufficient evidence exists to support a conviction of voluntary manslaughter for her death, and the conviction must be reversed. *Id.*

However, in reviewing the record before us, it is clear sufficient evidence does exist to sustain a conviction for the lesser-included offense of reckless homicide against the defendant for the death of Ms. Pitman. Reckless homicide is the reckless killing of

another and is considered a result-of-conduct offense. Tenn. Code Ann. § 39-13-215(a); *State v. Davis*, 466 S.W.3d 49, 70 (Tenn. 2015) (citing *State v. Parker*, 350 S.W.3d 883, 910 n.16 (Tenn. 2011)). A reckless act occurs regarding “the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.” Tenn. Code Ann. § 39-11-302(c). In this context, “[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.” *Id.*

Here, the defendant shot Ms. Pitman in the head after fighting with Ms. Hughes. Not only was the defendant intoxicated when he pulled a gun from his boot during a fight, but he also consciously disregarded the risk of injury to others by firing a gun into an apartment filled with guests. As such, the record makes clear the defendant acted recklessly in killing Ms. Pitman. “When an appellate court finds the evidence insufficient to support a conviction for the charged offense, it can direct a trial court to enter judgment on a lesser-included offense when the lesser-included offense was necessarily charged and proven at trial.” *State v. Robert Grisham*, No. E2015-02446-CCA-R3-CD, 2017 WL 1806829, at \*25 (Tenn. Crim. App. May 5, 2017), *appeal denied* (Sept. 20, 2017) (citing *Parker*, 350 S.W.3d at 910. Accordingly, we reverse and vacate the defendant’s conviction for voluntary manslaughter in the death of Ms. Pitman. In doing so, we instruct the trial court to amend the judgment order to reflect a conviction for reckless homicide and to conduct a sentencing hearing on the newly imposed conviction.

## II. Jury Instructions

### a. Counts 1 and 2

The defendant next asserts the trial court tainted the verdict in Count 1 by instructing the jury on employing a firearm during the commission of a dangerous felony in Count 2 because it “was a defective count.” The State insists “the instruction correctly state[d] the law and was not misleading; the fact that [Count 2] was ultimately dismissed does not render the instruction erroneous.” We agree with the State.

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 only be considered prejudicially erroneous 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)). “In order to determine whether a conviction should be reversed on the basis of an erroneous instruction to the jury, this Court ‘must consider whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.’” *State v. James*, 315 S.W.3d 440, 446 (Tenn. 2010) (quoting *State v. Rimmer*, 250 S.W.3d 12, 31 (Tenn. 2008) (internal quotations omitted)).

The defendant submits “the jury only convicted [the] [d]efendant of voluntary manslaughter in [C]ount [1] so that it could also convict [the] [d]efendant of the firearm charge in [C]ount [2].” However, as noted by the State, this is mere speculation. While it is clear from the record the jury questioned the trial court during its deliberations regarding the relationship between Counts 1 and 2, the trial court responded by referring the jurors to the jury instructions and by providing them with an accurate statement of the law in that only voluntary manslaughter could support a conviction in Count 2. At the motion for new trial hearing and in light of its dismissal of Count 2, the trial court also stated its belief that Count 2 “did not influence the jury’s decision [be]cause [the defendant] also was charged with the same count in [C]ount [4] and I don’t think there was any additional evidence that influenced the jury’s decision at all because we had a [C]ount [2] in this case.” As noted, the record indicates the trial court delivered an accurate statement of the law when instructing the jury on employing a firearm during the commission of a dangerous felony in Count 2. Although the trial court ultimately dismissed the same, because it provided a proper statement of the law in instructing the jury on Count 2, the instruction was not misleading and the defendant is not entitled to relief.<sup>3</sup> *Faulkner*, 154 S.W.3d at 58 (citing *Vann*, 976 S.W.2d at 101).

In reaching this conclusion, however, we must also point out the trial court erred in instructing the jury on voluntary manslaughter for the death of Ms. Pitman in Count 1. In instructing the jury, the trial court provided an accurate statement of the law

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<sup>3</sup>In reviewing this issue, we note the trial court correctly dismissed Count 2 because second degree murder, the underlying felony upon which Count 2 relied, is not an enumerated dangerous felony under Tennessee Code Annotated section 39-17-1324. This Court has previously stated “that ‘[a]llowing the State to indict a defendant for a non-enumerated dangerous felony offense and to rely on that offense as a basis for obtaining a conviction for a violation of Code section 39-17-1324 in the event a jury convicts a defendant of an applicable lesser included offense deprives a defendant of adequate notice of the alleged offense.’” *State v. Angela Ayers*, No. W2014-00781-CCA-R3-CD, 2016 WL 7212576, at \*11 (Tenn. Crim. App. Dec. 13, 2016) (citing *State v. Angela Ayers*, No. W2014-00781-CCA-R3-CD, 2015 WL 4366633, at \*15 (Tenn. Crim. App. July 16, 2015), *abrogated by State v. Duncan*, 505 S.W.3d 480 (Tenn. 2016)).

surrounding voluntary manslaughter. However, based upon the evidence produced at trial, it is clear the facts did not warrant the instruction. As explained in our review of the sufficiency of the evidence supporting Count 1, no evidence existed to suggest Ms. Pitman engaged in any behavior with the defendant that could be considered “adequate provocation” to lead the defendant to shoot her. Rather, the testimony indicated only Ms. Hughes and the defendant fought prior to the shooting and Ms. Pitman’s death was an unintended consequence of the defendant’s actions. Because transferred intent does not apply in cases of voluntary manslaughter, the trial court erred in instructing the jury on voluntary manslaughter as a lesser-included offense as it related to Ms. Pitman’s death. *See Lajaun Harbison*, 2016 WL 4414723, at \*23. While error exists in this regard, it does not warrant reversal as the proof of the defendant’s culpability in Ms. Pitman’s death was undisputed and it cannot be shown that the erroneous instruction so infected the trial. Additionally, the trial court remedied the error by dismissing Count 2 and sufficient evidence exists to support a conviction of reckless homicide in Count 1. *See Angela Ayers*, 2016 WL 7212576, at \*11. The defendant is not entitled to relief.

*a. Counts 3 and 4*

Regarding Count 3, the defendant argues the trial court committed plain error by failing to instruct the jury on misdemeanor reckless endangerment as a lesser-included offense of attempted second degree murder. Similarly, the defendant suggests his employment conviction of Count 4 should be reversed, arguing if properly instructed on misdemeanor reckless endangerment, “the jury would have, in all likelihood, convicted [the] [d]efendant of misdemeanor reckless endangerment in [C]ount [3]” and because “misdemeanor reckless endangerment is not a ‘dangerous felony,’ the jury would have acquitted [him] in [C]ount [4].” The State contends “any error in failing to instruct the jury on [misdemeanor reckless endangerment] was not plain” as “[i]t is highly unlikely that any reasonable jury would have convicted the defendant of misdemeanor reckless endangerment because he used a deadly weapon.” We agree with the State.

First, we note the defendant waived this issue for failing to include it in his motion for new trial. Tenn. R. App. P. 3 (e).<sup>4</sup> Though the defendant admits waiver, he nonetheless asserts the issue warrants plain error review because “the proof in the present case, no doubt, supported [the] instruction” as “a reasonable juror could have concluded

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<sup>4</sup>The record indicates the defendant filed a pre-trial motion requesting an instruction on the lesser-included offense of misdemeanor reckless endangerment, but he did not object to the missing instruction at trial. Accordingly, as noted by the State, any present objection to the jury instructions in this regard has also been waived pursuant to Rule 36 of the Tennessee Rules of Appellate Procedure, which provides: “Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Regardless, we will address the defendant’s plain error argument.

that [the] [d]efendant -- not having the intent to aim at a specific person -- recklessly fired his gun into the wall that evening.” Despite the apparent waiver, “when necessary to do substantial justice,” this Court may “consider an error that has affected the substantial rights of a party” under plain error analysis. Tenn. R. App. P. 36 (b); see also *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010). Plain error relief is “limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial.” *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994).

The following five factors must be met for plain error relief to be granted: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is “necessary to do substantial justice.” *Id.* at 640-41; see also *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (Tennessee Supreme Court formally adopted the *Adkisson* standard for plain error relief). When it is clear from the record that at least one of the factors cannot be established, this Court need not consider the remaining factors. *Smith*, 24 S.W.3d at 283. The defendant bears the burden of persuasion to show that he is entitled to plain error relief. *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007). “Where the defendant asserts that the trial court committed plain error by failing to instruct the jury on a lesser-included offense, the defendant must show a reasonable probability that ‘a reasonable jury would have convicted the defendant of the lesser-included offense instead of the charged offense.’” *State v. Martin*, 505 S.W.3d 492, 505 (Tenn. 2016) (citing *State v. Richmond*, 90 S.W.3d 648, 662 (Tenn. 2002)).

Here, the defendant cannot show the trial court’s failure to instruct the jury in Count 3 as to misdemeanor reckless endangerment as a lesser-included offense of attempted second degree murder adversely affected any of his substantial rights. While misdemeanor reckless endangerment is a lesser-included offense of attempted second degree murder, the defendant cannot show that a reasonable jury would have convicted him of misdemeanor reckless endangerment if so charged. *Id.*; *State v. Rush*, 50 S.W.3d 424, 432 (Tenn. 2001), *as amended* (July 25, 2001). Misdemeanor reckless endangerment results when one “recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.” Tenn. Code Ann. § 39-13-103 (a). A distinction between misdemeanor reckless endangerment and felony reckless endangerment is the use of a deadly weapon or a firearm.<sup>5</sup> The defendant’s actions on December 26, 2014, by his own admission, did not constitute misdemeanor

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<sup>5</sup>Tennessee Code Annotated section 39-13-103 (2) and (3) provides: “(2) Reckless endangerment committed with a deadly weapon is a Class E felony. (3) Reckless endangerment by discharging a firearm into a habitation, as defined under § 39-14-401, is a Class C felony, unless the habitation was unoccupied at the time of the offense, in which event it is a Class D felony.”

reckless endangerment as it is undisputed the defendant fired a gun inside Ms. Pitman's apartment. Further still, the record demonstrates the defendant fired the gun after two separate altercations with Ms. Hughes. As such, the facts produced at trial warranted instructions on attempted second degree murder and the lesser-included offense of attempted voluntary manslaughter in Count 3. As seen in the record, the trial court properly instructed the jury on both. Sufficient evidence exists in the record to show the defendant used a gun during his crimes and to support the jury's finding of adequate provocation prior to the same. Accordingly, it is unlikely the jury would have considered misdemeanor reckless endangerment as a viable outcome. Based upon the above-outlined reasoning, we conclude the defendant's argument as to Count 4 is without merit. The defendant is not entitled to relief.

### *III. Autopsy Photographs*

The defendant argues the trial court erred in admitting into evidence the autopsy photographs of Ms. Pitman, suggesting the photographs "had extremely low probative value since the defense was not disputing the cause of death, and the medical examiner was able to adequately describe the position of the entry wound and exit wound." The defendant further suggests because the photographs were "unpleasant," they likely "invoked emotion from the jury." The State contends the trial court properly admitted the photographs "as they were not gruesome and their probative value outweighed any danger of unfair prejudice." We agree with the State.

The trial court retains "discretion regarding the admissibility of photographs, and a ruling on this issue 'will not be overturned on appeal except upon a clear showing of abuse of discretion.'" *State v. Pruitt*, 415 S.W.3d 180, 239 (Tenn. 2013) (citing *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978)). To be admissible, a photograph "must be 'verified and authenticated by a witness with knowledge of the facts'" and it "must be relevant to an issue that the jury must determine." *Id.* (citations omitted). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence, including photographs, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Unfair prejudice refers to evidence with "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one." *Pruitt*, 415 S.W.3d at 239 (quoting *Banks*, 564 S.W.2d at 951). "Photographs must never be used 'solely to inflame the jury and prejudice them against the defendant.'" *Id.* (quoting *Banks*, 564 S.W.2d at 951).

Prior to admitting the autopsy photographs of the victim, the trial court carefully considered their relevancy and potential prejudicial effect of the same. The trial court stated:

Okay. The State does have the burden of proof that this is a homicide case and I think that these photographs of the deceased are relevant. They are not gruesome. They have just a little blood, I don't think that they are inflammatory and I think that if the State wants to introduce it, then it's relevant. There's nothing that I can present (sic) them from doing so I'm going to overrule the objection.

We agree with the trial court's assessment of the admissibility of the autopsy photographs. Though it was undisputed Ms. Pitman died from a gunshot wound to the head, the State was still required to prove the defendant shot and killed her. The photographs, which depicted the entrance and exit wounds suffered by Ms. Pitman, aided in this effort and were relevant to the State's case. Only two photographs were entered into evidence and neither was particularly gruesome or inflammatory. Nothing in the record suggests the trial court abused its discretion in admitting the autopsy photographs into evidence. *Pruitt*, 415 S.W.3d at 239. The defendant is not entitled to relief.

### ***Conclusion***

Based upon the foregoing authorities and reasoning, we affirm the defendant's convictions in Counts 3 and 4 but reverse and vacate his conviction in Count 1. In doing so, we impose a conviction for the lesser-included offense of reckless homicide in Count 1 and remand the case to the trial court for a sentencing hearing on the newly imposed conviction. We affirm the trial court in all other respects.

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J. ROSS DYER, JUDGE