IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 2, 2023

STATE OF TENNESSEE v. KYANEDRE OSHEA-MALIK BENSON

Appeal from the Circuit Court for Haywood County
No. 7744 Clayburn Peeples, Judge

No. W2022-00703-CCA-R3-CD

The Defendant, Kyanedre Oshea-Malik Benson, was convicted in the Haywood County Circuit Court of one count of employing a firearm during the attempt to commit voluntary manslaughter, a Class C felony; one count of possession of a firearm by a convicted felon, a Class C felony; one count of attempted voluntary manslaughter, a Class D felony; ten counts of reckless aggravated assault, a Class D felony; and one count of reckless endangerment with a deadly weapon, a Class E felony. After a sentencing hearing, he received an effective sentence of sixty-two years in confinement. On appeal, the Defendant claims that the evidence is insufficient to support his convictions of attempted voluntary manslaughter and employing a firearm during the attempt to commit voluntary manslaughter and that the trial court erred by refusing to merge one of his convictions of reckless aggravated assault into his conviction of attempted voluntary manslaughter. Upon review, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and KYLE A. HIXSON, JJ., joined.

Daniel J. Taylor, Jackson, Tennessee, for the appellant, Kyanedre Oshea-Malik Benson.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Garry G. Brown, District Attorney General; and Jerald Campbell and Jason C. Scott, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

This case relates to a shooting that occurred at a party at the National Guard Armory in Brownsville on January 27, 2017. In August 2017, the Haywood County Grand Jury returned a twenty-count indictment, charging the Defendant with three counts of attempted first degree premeditated murder, three corresponding counts of employing a firearm during the attempt to commit first degree murder and the Defendant had a prior felony conviction, ten counts of aggravated assault with a deadly weapon and causing bodily injury, two counts of aggravated assault with a deadly weapon and causing fear of bodily injury, one count of possession of a firearm by a convicted felon, and one count of reckless endangerment with a deadly weapon. The victims named in the counts for attempted first degree murder were Ricderrius Long and K.D.M.[1] The victims named in the counts for aggravated assault with a deadly weapon and causing bodily injury were Xavier Ballard, Quentin Childress, C.H., Ricderrius Long, Corwin Mitchell, K.M., Adrevious Rayner, Kaliyah Rivers, Cierra Robinson, and Kaylen Smith. The victim named in the counts for aggravated assault with a deadly weapon and causing fear of bodily injury was K.D.M.[2] The Defendant went to trial in June 2021.

At trial, Patrick Shields testified that he was a member of the National Guard and that he occasionally supervised events at the National Guard Armory in Brownsville. On the night of January 27, 2017, Mr. Shields was supervising a high school party in the Armory. About one hundred people were at the party, and a disc jockey was playing music in the "drill hall," which was one thousand to fifteen hundred square feet in size. The crowd consisted mostly of teenagers sixteen to eighteen years old, but some adults also were present.

Mr. Shields testified that about 11:15 p.m., he was outside conducting a "walkthrough" in the parking lot when he heard someone yell. He ran back into the Armory, entered the drill hall, and saw "a scuffle like at the far end of the building." He ran toward the scuffle while people ran toward him to get away from the disturbance. He then heard another scuffle and gunshots behind him. Mr. Shields went toward the gunshots

[1] Because some of the victims and witnesses were or may have been minors at the time of the shooting, we will refer to them by their initials to protect their identities.

[2] K.D.M was named as the victim in two of the three counts of attempted first degree premeditated murder and both counts of aggravated assault with a deadly weapon and by causing fear of bodily injury. In opposing the Defendant's motion for judgment of acquittal at the close of the State's proof, the State said it was going to argue that the Defendant shot at K.D.M. inside the Armory and again outside the Armory. However, the Defendant did not include a transcription of the closing arguments in the appellate record. "As this court has repeatedly stated, it is well-established that closing arguments, in which the State would have explained its theory of the case to the jury, is an important tool for both parties during a trial. It is also an important tool for this court." *State v. Zakkawanda Zawumba Moss*, No. M2014-00746-CCA-R3-CD, 2016 WL 5253209, at *19 (Tenn. Crim. App. Sept. 21, 2016).

and saw flashes from a gun muzzle. He said that the overhead lights in the drill hall were off but that the lights on the walls were on and that he saw the shooter "eye to eye." Another man approached the shooter, and Mr. Shields saw the two of them "scuffling trying to get out of the armory." The shooter and the second man ran toward the exit with gunshots "still going off." Mr. Shields also exited the building and continued to hear gunshots in the south end of the parking lot. However, he could no longer see the shooter.

Mr. Shields testified that he heard seven or eight gunshots inside the building and three or four gunshots outside for a total of ten to twelve shots. People were injured, so he called 911. Someone later showed Mr. Shields a photograph of the Defendant, and he identified the Defendant as the shooter. He said that due to the passage of time, he did not recognize the shooter at the time of trial.

On cross-examination, Mr. Shields testified that when he saw the shooter in the drill hall, the shooter "wasn't aiming at any particular thing . . . . It was like he was just shooting." He acknowledged that the lights on the walls of the drill hall were not bright enough to light the room. He also acknowledged that the shooting occurred "very quickly" and "a distance" from him. After the shooting, Mr. Shields described the shooter to the police as "a black male," who was about five feet, seven inches to five feet, eight inches tall. He could not describe the shooter's clothing, and the police never showed him a photographic array.

Lieutenant Patrick Black of the Brownsville Police Department testified that he responded to the Armory about 11:30 p.m. The scene was "chaos," and the parking lot was full of people and vehicles. The wounded victims had been transported to the hospital, and the police blocked the driveways to try to stop people from leaving the area. Lieutenant Black looked for evidence and spoke with witnesses, and the Tennessee Bureau of Investigation ("TBI") was called to the scene. Law enforcement found shell casings in the parking lot and a semi-automatic handgun in the grass at the south edge of the parking lot. The slide of the gun was in the open position, and no ammunition was in the weapon.

Special Agent Josh Carter of the TBI testified that he responded to the Armory in the early morning hours of January 28 and that he and another agent processed the scene. A small pool of blood and a "pristine" bullet were outside the front doors. Bloodstains were in the foyer of the building; blood, clothing, and a bullet fragment were in the area between the foyer and the drill hall; and blood, spent cartridge casings, and bullet fragments were in the drill hall. Special Agent Carter received a firearm. The gun magazine was in the weapon, and the slide of the gun was open, "likely meaning [the gun] was fired until no more bullets" were left. Special Agent Carter learned Sadonia Fisher owned the gun, and she provided him with a receipt for the firearm. The Defendant became a suspect, and Special Agent Carter obtained a buccal swab from him.

On cross-examination, Special Agent Carter testified that law enforcement recovered a total of nine spent cartridge casings: seven in the drill hall and two outside. The gun was a semi-automatic and ejected cartridge casings when fired. The gun had a capacity of ten rounds, and one spent casing was never found.

Twenty-five-year-old Sadonia Fisher testified that she met the Defendant in high school and that they had two children together. On the night of January 27, 2017, Ms. Fisher drove to the Armory because the Defendant was supposed to perform at the party. When Ms. Fisher arrived, police were "everywhere," so she did not go inside. She said that the gun found by the police was her nine-millimeter pistol and that she bought the gun at a pawn shop in December 2016. On the night of the shooting, the gun was in the glove compartment of her car, which was parked at the Defendant's mother's house. Ms. Fisher drove the Defendant's gold Impala to the Armory, and she did not know how the gun ended up at the Armory. She acknowledged giving a statement to Special Agent Carter about ten days after the shooting but said the statement probably was not true because she used to be "heavy on drugs." Ms. Fisher denied seeing a fight inside the Armory.

The State recalled Special Agent Carter to the stand. He testified that he took Ms. Fisher's written statement at her home on February 6, 2017, that she signed the statement, and that she did not appear to be under the influence of any substance. Ms. Fisher told Special Agent Carter as follows: On the night of the shooting, Ms. Fisher drove the Defendant's mother's truck to the Armory, and Ms. Fisher's gun was in the truck's glove compartment. Ms. Fisher went into the Armory, and she saw an altercation break out between the Defendant and another person. Someone hit the Defendant on the back of his head, and the Defendant pulled out a gun and started shooting. Ms. Fisher went outside and heard more gunshots, but she did not know if the Defendant fired the gun outside. She did not know the Defendant had removed her gun from the glove compartment.

TBI Special Agent Cathy Ferguson testified that she went to the hospital to interview victims and photograph their injuries, and the State introduced the photographs and the victims' medical records into evidence. The following witnesses sustained gunshots wounds: K.M. to her right thigh; Cierra Robinson to her left calf; Corwin Mitchell to his left leg; Quintin Childress to his left leg; C.H. to her left leg; Adrevious Rayner to his left leg; Kaylen Smith to his right arm; Kaliyah Rivers to her buttocks; Xavier Ballard to his right leg; and Ricderrius Long to his abdomen. Special Agent Ferguson was unable to photograph Mr. Long's gunshot wound because Mr. Long was in surgery. On cross-examination, Special Agent Ferguson testified that K.D.M., who was named in the indictment as a victim of attempted first degree murder, was not at the hospital because he was not injured.

Donna Nelson, the Regional Supervisor for the TBI's Crime Laboratory, testified as an expert in forensic biology that she swabbed the gun found at the Armory and its magazine for DNA. She then compared the DNA on the gun and the magazine to the DNA obtained from the Defendant's buccal swab. DNA on the magazine was a mixture of at least three individuals, and at least one individual was a male. However, due to the limited profile of the DNA, Ms. Nelson could not match the DNA to the Defendant. DNA on the gun's grip, trigger, and slide also was a mixture of at least three individuals, one of which was a male. Ms. Nelson was able to conclude that the Defendant was a major contributor to the mixture. On cross-examination, Ms. Nelson testified that she did not know when the Defendant touched the gun.

TBI Special Agent Kasia Lynch testified as an expert in firearms identification that she test-fired the gun found at the Armory and that she microscopically compared the markings on the test-fired spent cartridge case and bullet to the spent cartridge cases and bullet found at the Armory. All nine spent cartridge cases and the bullet were fired from the gun.

Eighteen-year-old A.B, who attended the party but was not injured, testified that it was dark inside the Armory but that she saw "a bunch of rumbling" before the shooting. She said she did not remember seeing the Defendant with a gun or telling the police that she saw him with a gun. The State showed A.B. an aerial photograph of the Armory, and she acknowledged writing details about the shooting on the photograph for the police. A.B. wrote on the photo that she ran outside after the shooting; that the Defendant "'ran by'" her; and that he "'still had the gun.'" She also wrote on the photo that the Defendant shot toward a silver car and that he yelled, "'I've got you, Bitch.'" On cross-examination, A.B. testified that she spoke with the police because two or three officers came to her high school and took her out of class. She said she did not see the Defendant fire the gun.

The State recalled Special Agent Carter to the stand. He testified that he spoke with A.B. at her high school on February 2, 2017, and that she gave a "very, very detailed" written statement. According to the statement, Xavier Ballard and K.D.M. got into an altercation with the Defendant, the Defendant reached into his pants, and the Defendant pulled out a gun and fired two times into the air. A.B. said that people began running and that the Defendant pointed the gun at Mr. Ballard and began shooting. A.B. stated that the Defendant fired the gun four or five times inside the Armory and that "it seemed like he was trying to shoot the people in the vicinity of Xavier Ballard who was a victim in this case." A.B. told the police that she saw the Defendant run out of the back of the building, that she also exited the building, and that she heard the Defendant say, "'I've got you, Bitch.'" Special Agent Carter said that A.B. wrote details about the shooting on an aerial photograph of the Armory and that A.B. used the photograph to explain what happened during the shooting.

Twenty-three-year-old Dymond Haley, who attended the party but was not injured, testified that she did not see a fight inside the Armory but that she heard gunshots and saw everyone running. Ms. Haley ran outside and hid between two cars. She saw a man with a gun. She said that she had known the Defendant for years but denied telling the police that the gunman was the Defendant or that he pointed the gun at her. On cross-examination, Ms. Haley testified that she did not recognize the gunman and that the gunman was not the Defendant.

The State again recalled Special Agent Carter to the stand. Special Agent Carter testified that he took Ms. Haley's statement after the shooting, that he read her statement back to her, and that she signed her statement. Ms. Haley was "very specific" in saying that she saw the Defendant with a gun and that he pointed the gun at her. She also said he lowered the weapon when he realized she was not a threat to him. Ms. Haley did not say she saw the Defendant fire the weapon.

Felicia Stacy, a special agent with the TBI, testified that she and Special Agent Carter took Ms. Haley's written statement. Ms. Haley signed her statement, and her statement was not altered. On cross-examination, Special Agent Stacy testified that Ms. Haley's statement was "a summary" of Ms. Haley's interview with the TBI. The statement did not include "every word" she said.

Nineteen-year-old C.H. testified that she was fifteen years old in January 2017 and that she attended the party. She knew the Defendant and K.D.M and saw them fighting inside the Armory. She explained that as the Defendant was walking to the restroom, K.D.M. hit the Defendant's face. K.D.M.'s friend, "Deruntarius," then "jumped in." K.D.M.'s girlfriend broke up the fight, but C.H. "started hearing gunshots." C.H. ran outside, realized she had been shot in her left ankle, and ran to a car so she could get a ride to the hospital. C.H. and the Defendant argued by the car. C.H. told the Defendant, who was her friend, that he had shot her, but the Defendant was angry and did not care. The Defendant ran away, and C.H. heard more gunshots. A few days after the shooting, the Defendant texted C.H. to check on her.

C.H. acknowledged testifying at the Defendant's preliminary hearing on April 11, 2017, that she saw the fight inside the Armory, that she saw the Defendant shooting inside the Armory, and that the Defendant was shooting at K.D.M. and Deruntarius. C.H. also testified at the hearing that she saw the Defendant shooting outside at K.D.M and Ricderrius Long. She told the jury, though, that she did not know who the Defendant was shooting at because "they wasn't on the same side of the car." C.H. also told the jury that she saw the Defendant shoot Mr. Long and that she thought the Defendant shot him in the stomach. C.H. helped Mr. Long into Cierra Robinson's car, and Ms. Robinson drove them to Jackson General Hospital. C.H. said that Mr. Long had come to the party with K.D.M.

and Deruntarius and acknowledged that Mr. Long "was in the same group that was fighting with the [D]efendant." However, she later acknowledged that Mr. Long "was not part of the fight inside the armory."

On cross-examination, C.H. acknowledged that two people "attacked" the Defendant. She also acknowledged that the Defendant had no reason to shoot her. C.H. saw other people with guns in the Armory, and she heard more than ten gunshots inside the building and six or seven gunshots outside. At the conclusion of C.H.'s testimony, the State rested its case.

Adrevious Rayner testified that he was twenty-one years old in January 2017 and that he went to the party to pick up his sister. It was dark inside the Armory, but Mr. Rayner saw "a group of people . . . jumping on one person." He described the fight as "[t]his whole jury on" the Defendant. He said the Defendant defended himself and "shot in the . . . air or whatever towards the crowd." Mr. Rayner said that more than one person had a gun and that more than one person fired gunshots.

Mr. Rayner testified that he was shot during the melee and that he went to the hospital. He did not remember speaking with a TBI agent at the hospital and did not remember telling the agent that he saw two men fighting near the restroom. Mr. Rayner gave a statement at his home on February 9, 2017, but was under the influence of Percocet for pain at that time. In his statement, Mr. Rayner said that he saw eight men fighting one man but that he did not see the Defendant shoot anyone. Mr. Rayner later told the Defendant's attorney that he saw the Defendant fire the first gunshots. However, Mr. Rayner reiterated to the jury that he never saw the Defendant shoot anyone. Mr. Rayner acknowledged that his memory on the night of the shooting was better than his memory at trial.

On redirect-examination, defense counsel had Mr. Rayner review his hospital statement. Mr. Rayner said that according to his statement, "one guy with dreads was getting beat up . . . by a crowd of people." The Defendant and another man pulled out guns and started shooting. In Mr. Rayner's February 9 statement, he said that he saw eight men jump on one man, that he could not see who was fighting, that the man who was getting beat up started shooting into the air, and that more than one person fired a gun. Mr. Rayner testified that the Defendant was not one of the shooters.

K.M. testified that she was fifteen years old in January 2017 and that she attended the party. She had just arrived and was near the front entrance when she saw "somebody fighting." She heard gunshots and ran. K.M. knew the Defendant prior to the shooting but did not see him fire a gun. K.M. was shot in the right thigh and went to the hospital. She gave a statement at the hospital in which she said that she did not recognize the shooter but

that she would recognize him if she saw him again. K.M. gave a written statement to the police at her home on February 17, 2017. According to that statement, the Defendant was wearing a white shirt, camouflage pants, and a green hat and was with a "light skinned guy." K.M. said in her statement that Xavier Ballard "jumped on" the Defendant, that several men were fighting, and that the shooting followed. K.M. also said in her statement that she thought two people were firing guns but that she did not see the shooters.

On cross-examination, K.M. testified that she was shot as she was running away and that she did not see the person who shot her. She acknowledged that she grew up with the Defendant but denied ever referring to him as her "brother."

Ricderrius Long testified that he was eighteen years old in January 2017, that he went to the party with a friend, and that he currently was in confinement for 2020 convictions in Madison County. Mr. Long said that it was dark inside the drill hall but that he saw people fighting and heard gunshots. He did not see who was fighting or who was shooting. Mr. Long ran outside and was shot. He looked in the direction of the shooter and saw that the shooter was wearing a gray hoodie. Mr. Long knew the Defendant, and the Defendant was not the person who shot Mr. Long. Mr. Long said that he heard about ten gunshots outside and that he did not know if more than one person was firing a gun. He later gave a statement to the TBI and told agents he did not know what happened. The agents kept asking him questions and kept trying to get him to say the Defendant shot him, so Mr. Long started answering every question with "'I don't know.'"

On cross-examination, Mr. Long acknowledged that he was shot in the lower left quadrant of his abdomen and said that he was in the hospital a few days. He said that he "got shot from the side" and that the shooter was "[a] taller, light-skinned guy." Mr. Long gave a statement in the hospital and told the TBI agent that he did not see the shooter's face but that the shooter was wearing a gray hoodie. He also told the agent that he did not think the shooter meant to shoot him. Mr. Long testified that he knew K.D.M. but that he was not in the parking lot with K.D.M.

The Defendant chose not to testify and rested his case-in-chief.

Special Agent Stacy testified in rebuttal for the State that she interviewed K.M. on February 1, 2017, and that K.M. referred to the Defendant as her "brother." On cross-examination, Special Agent Stacy testified that K.M. said "Xay" and the Defendant were fighting and that K.M. thought two people were firing guns. On redirect-examination, Special Agent Stacy testified that K.M. said she did not see anyone shooting.

Special Agent Ferguson testified in rebuttal that she took a brief statement from all of the victims in the hospital. K.M. told Special Agent Ferguson that she did not know the

shooter. Mr. Long said that he did not know the shooter and that the shooter was wearing a gray hoodie.

Special Agent Carter testified in rebuttal that he interviewed well over one hundred people in this case and that Adrevious Rayner and K.M. were the only witnesses who claimed there was more than one shooter. Special Agent Carter said that Mr. Long was not cooperative during his interview and that Mr. Long "was very combative and wouldn't even acknowledge the fact that he was at the armory."

At the conclusion of the proof, the jury convicted the Defendant of attempted voluntary manslaughter of Mr. Long as a lesser-included offense of attempted first degree murder; the corresponding count of employing a firearm during the attempt to commit voluntary manslaughter and the Defendant had a prior felony conviction; ten counts of reckless aggravated assault as a lesser-included offense of aggravated assault with a deadly weapon and causing bodily injury; reckless endangerment with a deadly weapon as charged in the indictment; and possession of a firearm by a convicted felon as charged in the indictment. The jury acquitted the Defendant of the two counts of attempted first degree premeditated murder of K.D.M., the two corresponding counts of employing a firearm during the attempt to commit first degree murder, and the two counts of aggravated assault of K.D.M.

After a sentencing hearing, the trial court sentenced the Defendant to ten years to be served at one hundred percent for employing a firearm during the attempt to commit voluntary manslaughter, a Class C felony; six years for possession of a firearm by a convicted felon, a Class C felony; four years for attempted voluntary manslaughter, a Class D felony; four years for each count of reckless aggravated assault, a Class D felony; and two years for reckless endangerment with a deadly weapon, a Class E felony. The trial court ordered that the Defendant serve the sentences consecutively for a total effective sentence of sixty-two years in confinement.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant claims that the evidence is insufficient to support his conviction for the attempted voluntary manslaughter of Mr. Long and, therefore, insufficient to support his corresponding conviction of employing a firearm during the attempt to commit voluntary manslaughter because Mr. Long testified at trial that he saw the person who shot him and that the Defendant was not the shooter. The Defendant also contends that the evidence is insufficient because the State did not present any proof that Mr. Long provoked

the Defendant prior to the shooting. The State argues that the evidence is sufficient. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, 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 finding 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).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). 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. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "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).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

Voluntary manslaughter is defined as "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). As noted by the Defendant, "[i]t 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." *State v. Torvarius E. Mason*, No. W2017-01863-CCA-R3-CD, 2019 WL 350756, at *4 (Tenn. Crim. App. Jan. 28, 2019) (citing *State v. Tilson*, 503 S.W.2d 921 (Tenn. 1974)). Criminal attempt occurs when a person, acting with the kind of culpability otherwise required for the offense:

> (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) 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; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a)(1)-(3).

Taken in the light most favorable to the State, the evidence shows that a group of men jumped the Defendant in the Armory, that he pulled a gun out of his pants, and that he began firing into the air and at the men as they fled. Everyone ran outside, and the Defendant continued shooting at the men who had jumped him. The Defendant's own witness, Mr. Rayner, testified that he saw a group of people fighting the Defendant prior to the shooting. Moreover, Mr. Rayner said in his statement, made less than two months after the shooting, that he saw eight men jump on the Defendant. C.H. testified that she ran to a car, that she saw the Defendant shoot Mr. Long in the abdomen, and that she helped Mr. Long into the car. C.H. also testified that Mr. Long had come to the party with the two men who started the fight and that Mr. Long was outside with them when the Defendant shot Mr. Long. C.H. acknowledged that Mr. Long "was in the same group that was fighting with the [D]efendant." Therefore, a reasonable jury could have found that Mr. Long was in the group of men who jumped the Defendant in the Armory or that the Defendant at least thought Mr. Long was in the group. Accordingly, the evidence is sufficient to show provocation and, thus, is sufficient to support the Defendant's conviction of attempted voluntary manslaughter and the corresponding conviction of employing a firearm during the attempt to commit voluntary manslaughter.

II. Merger

The Defendant claims that the trial court erred by refusing to merge his reckless aggravated assault conviction in count ten into his attempted voluntary manslaughter conviction because the offenses were part of the same incident and involved the same victim, Mr. Long. The State argues that the trial court properly refused to merge the convictions. We agree with the State.

Under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Similarly, article I, section 10 of the Tennessee Constitution states that "no person shall, for the same offence, be twice put in jeopardy of life or limb." The Double Jeopardy Clauses of the United States and Tennessee Constitutions protect an accused from "'(1) a second prosecution following an acquittal; (2) a second prosecution following a conviction; and (3) multiple punishments for the same offense.'" *State v. Allison*, 618 S.W.3d 24, 43 (Tenn. 2021) (quoting *State v. Watkins*, 362 S.W.3d 530, 541 (Tenn. 2012). The Defendant's issue concerns the third category, protection against multiple punishments for the same offense in a single prosecution. "Multiple punishment claims fall into one of two categories: (1) unit-of-prosecution claims; or (2) multiple description claims." *State v. Hogg*, 448 S.W.3d 877, 885 (Tenn. 2014) (citing *Watkins*, 362 S.W.3d at 543). Unit-of-prosecution claims involve multiple violations of the same statute whereas multiple description claims involve multiple offenses under different statutes, as in this case. *Allison*, 618 S.W.3d at 43 (citing *Watkins*, 362 S.W.3d at 543-44).

In determining whether multiple convictions under different statutes violate double jeopardy, we first look to legislative intent. *Id*. at 43-44. When the General Assembly expressly intended that multiple convictions be allowed, the multiple convictions should be upheld. *Id.* at 44. When the legislative intent is unclear, we look to whether the convictions arose from the same act or transaction. *Watkins*, 362 S.W.3d at 556-57. If the convictions did not arise from the same act or transaction, the inquiry ends and multiple convictions are permitted. *Id*. at 557. However, if the convictions arose from the same act or transaction, a double jeopardy violation may exist. *State v. Itzol-Deleon*, 537 S.W.3d 434, 441-42 (Tenn. 2017). The question then becomes "whether each offense includes an element that the other does not—if so, there is a presumption that the General Assembly intended to permit multiple punishments; if not, the presumption is that multiple punishments are not permitted." *State v. Feaster*, 466 S.W.3d 80, 84 (Tenn. 2015) (citing *Watkins*, 362 S.W.3d at 557).

"It is well settled in Tennessee that, under certain circumstances, two convictions or dual guilty verdicts must merge into a single conviction to avoid double jeopardy implications." *State v. Berry*, 503 S.W.3d 360, 362 (Tenn. 2015) (order). "Whether multiple convictions violate double jeopardy is a mixed question of law and fact that we review de novo with no presumption of correctness." *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014).

Turning to the present case, the statutes for voluntary manslaughter and aggravated assault do not show an expressed intent to permit or preclude multiple punishment. *See* Tenn. Code Ann. §§ 39-13-102, -211. As to whether the convictions arose from the same

act or transaction, Mr. Long was the victim of both offenses, and the Defendant was charged with committing both offenses on January 27, 2017, "without reference to any specific or discrete acts." *Watkins*, 362 S.W.3d at 558. Thus, the potential for a double jeopardy violation exists. *See id*. We note that the State does not argue on appeal that the convictions did not arise from the same act or transaction. Instead, the State argues that merger is not appropriate because each offense contains an element that the other does not.

As stated previously, 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). Relevant to this case, reckless aggravated assault occurs when a person recklessly causes bodily injury to another and uses or displays a deadly weapon. Tenn. Code Ann. §§ 39-13-101(a)(1), -102(a)(1)(B)(iii).

Our supreme court has already determined that dual convictions of attempted voluntary manslaughter and aggravated assault by intentionally causing serious bodily injury do not violate double jeopardy because "each of those offenses contains numerous elements that the other does not." *Feaster*, 466 S.W.3d at 87 (comparing Tenn. Code Ann. §§ 39-13-211(a), -12-103(a)(3) with Tenn. Code Ann. §§ 39-13-101(a)(1), -102(a)(1)(A) (2010)). Likewise, attempted voluntary manslaughter and aggravated assault by recklessly causing bodily injury and using a deadly weapon each contain numerous elements that the other does not. Accordingly, the Defendant's dual convictions do not violate double jeopardy, and the trial court did not err by refusing to merge the convictions.

CONCLUSION

Based upon our review, we affirm the judgments of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE