IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 22, 2023 Session

STATE OF TENNESSEE v. SHAQUIL MURPHY

Appeal from the Criminal Court for Knox County
No. 117124 Steven Wayne Sword, Judge

No. E2022-00605-CCA-R3-CD

The Defendant, Shaquil Murphy, was convicted by a Knox County Criminal Court jury of attempted first degree premeditated murder, attempted second degree murder, unlawful possession of a firearm by a convicted felon, two counts of aggravated assault, and two counts of employing a firearm during the commission of a dangerous felony. On appeal, the Defendant challenges the sufficiency of the evidence for the attempted murder and employing a firearm convictions and argues that the trial court erred by not dismissing the employing a firearm counts of the indictment and by including duty to retreat language in the jury instruction on self-defense. Based on our review, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J. and ROBERT W. WEDEMEYER, J., joined.

Joshua Headrick, Knoxville, Tennessee (at trial and on appeal), for the appellant, Shaquil Murphy.

Herbert H. Slatery III, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Charme P. Allen, District Attorney General; and Heather Good and Ta Kisha Fitzgerald, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

This case arises out of an August 29, 2019, shooting that occurred on the grounds of Morningside Hills, formerly known as Prince Hall, a Knoxville Housing Authority apartment complex. Shortly before the shooting, the Defendant was involved in a verbal and physical confrontation with Shane Garner. At trial, the State presented evidence to show that the Defendant retrieved two guns before locating Mr. Garner at the apartment complex and attempting to shoot him at close range with an old .22 revolver. The gun failed to fire, and Mr. Garner fled on foot, eventually running for help toward the apartment complex's maintenance supervisor, Howard Crowe. The Defendant ran to the car in which he had arrived, drove to a position to intercept Mr. Garner, exited the car, and fired multiple gunshots with a .38 revolver at Mr. Garner and Mr. Crowe. Mr. Crowe returned fire with his .9mm semi-automatic pistol, striking the Defendant. The Defendant was subsequently indicted for two counts of attempted first degree premeditated murder, two counts of employing a firearm during the commission of a dangerous felony, unlawful possession of a firearm as a convicted felon, two counts of aggravated assault, and five counts under the gang enhancement statute. The State, however, later opted not to proceed with the gang enhancement counts of the indictment.

State's Proof

Michael Mays, custodian of the records for the Knox County Emergency Communications District, identified a 911 call about the shooting that was placed at 3:44 p.m. on August 29, 2019.

Casey Cutshaw, who described herself as a good friend of the Defendant, testified that early on the morning of August 29, 2019, the Defendant was with her in her dark blue Chevrolet Impala when she picked up her friend, Shane Garner, to take Mr. Garner to court. Afterward, Mr. Garner, who rode in the back seat, had her drive him several different places. The Defendant, who was riding in her front passenger seat, slept during most of that time. However, at some point after Mr. Garner boasted about $100 he had just obtained from a robbery, the Defendant told Mr. Garner that he should give some money to Ms. Cutshaw as reimbursement for her gasoline and cigarettes. Although the Defendant was not aggressive and his voice was not raised, Mr. Garner "all of a sudden" lunged "over the front seat" with a "Crocodile Dundee" style hunting knife and repeatedly attempted to stab the Defendant. Ms. Cutshaw testified that she used her elbow to block Mr. Garner as she pulled her car over. The Defendant quickly exited and began walking away, and she and Mr. Garner had an argument in which she scolded him for his actions. In the meantime, the Defendant had walked to a corner service station. She and Mr. Garner drove there, and she convinced the Defendant to get back in her car.

Ms. Cutshaw testified that Mr. Garner wanted her to drive him several other places, but she instead drove toward the apartment complex she knew as Prince Hall. Mr. Garner suddenly began "screaming" for her to stop the car, so she stopped in the middle of the street and Mr. Garner "jumped out" and walked across the street. After Mr. Garner's exit, she drove the Defendant to the home of the Defendant's friend so that the Defendant could get some marijuana to "calm his nerves." The Defendant wanted her to wait for him while he went to get the marijuana, but she did not feel comfortable doing that. She was angry and went "stomping off" down the street, hoping that the Defendant would follow in her car to pick her up, but he did not. After sitting on a curb for some time, she saw multiple police vehicles, a fire truck, and an ambulance pass. She then returned to the location she had last seen the Defendant and found her car with its trunk and doors open and "covered in yellow tape."

On cross-examination, Ms. Cutshaw testified that after they left court, Mr. Garner asked her to take him to pawn shops, different houses, and to a needle exchange, where Mr. Garner "supposedly robbed three little guys." She stated that Mr. Garner's knife attack against the Defendant was unprovoked. On re-direct examination, she testified that there was no further conflict between the men after she convinced the Defendant to get back into her car. On re-cross-examination, she testified that, although the men did not argue, the mood between them was very tense.

The parties stipulated that prior to the shooting in the instant case, the Defendant had been convicted of a felony offense that prohibited him from possessing a firearm.

Howard Keith Crowe, maintenance supervisor at the apartment complex at the time of the shooting, testified that he was sitting in his pickup truck removing a piece of glass from his finger while his technician was completing a window replacement when he heard a loud crash and looked up to see a white man running out a door. He said the white man slipped and fell as two other individuals came running out the same door and got into a dark-colored car. The white man got up and continued running up the hill, but the dark-colored car pulled around and stopped at the top of the hill, cutting off the white man's path.

Mr. Crowe testified that the white man turned around and ran back down the hill toward Mr. Crowe. Someone got out of the dark-colored car and ran to the corner of a building, and the white man ran up to Mr. Crowe and said, "Help me. He's trying to kill me. He's trying to kill me." At about that time, the man who had run to the corner of the building started shooting at them. Mr. Crowe testified that he initially froze in shock. He said the gunman then ran back to the top of the road, turned, and began shooting at them again.

Mr. Crowe testified that he had a handgun carry permit and kept his handgun in his pickup truck. He said he reached for his gun at the same time that a bullet went through his driver's door. He stated that, had he not moved in that instant, he would have been struck by the bullet "dead center chest." He said he grabbed his gun and ran to the other side of his pickup truck and that bullets followed him as he ran. He then aimed "where [he] could see the bullets coming from and [] shot five times." He heard someone say, "I'm hit[,]" and saw the gunman get back into the dark-colored car, which then left the apartment complex. Mr. Crowe identified photographs of the scene, including of the bullet hole in the driver's door of his pickup truck. He said the courtyard behind him was full of small children at the time of the shooting. He stated that neither the white man nor the gunman were residents of the complex and that he had never seen either one before that day. He said the white man did not have a gun.

On cross-examination, Mr. Crowe testified that the white man had a large knife. On redirect examination, he testified that the white man was holding the large knife inside a sheath as he ran up to Mr. Crowe.

Knoxville Police Department ("KPD") Officer Jacklyn Hale, the crime scene investigator who processed Ms. Cutshaw's car, identified photographs of a blood trail and bloody clothing found with the car.

David Dixon, who described himself as an acquaintance of the Defendant, testified that on August 29, 2019, the Defendant, who had a bloody mouth, came to his home, said a white man had "just sucker -punched" him, and asked Mr. Dixon to ride with him to Prince Hall. When they reached the apartment complex, the Defendant saw the white man in a breezeway, got out of the car, and ran up to the white man. Mr. Dixon was unable to see what happened, but he assumed that the Defendant and the white man fought in the breezeway. He said he saw the white man run out of the breezeway and up the sidewalk, followed by the Defendant, who ran back to the car and got into the driver's seat. He stated that the Defendant drove to the top of the hill and stopped, where the Defendant saw the white man again. The Defendant got out, and Mr. Dixon assumed he intended to resume the fight. However, Mr. Dixon then heard gunshots and saw the Defendant exchange gunfire with someone until the Defendant was shot.

Mr. Dixon testified that he remained in the car during the shooting. He said he never saw the maintenance man or anyone other than the Defendant with a gun. After the shooting, he saw the Defendant's two guns, which he described as an "old kind of gun," and a .38 revolver. He stated that he panicked after the Defendant was shot. He knew the Defendant needed medical help, but he did not want to call for help because he had parole violations, so he drove the Defendant to his girlfriend's house and had his girlfriend call an ambulance.

On cross-examination, Mr. Dixon testified that the Defendant did not tell him that he had a gun. He said he understood that the Defendant's intention was to fight the white man, and that he accompanied the Defendant to the apartment complex to ensure that it remained a one-on-one fight. He did not see the Defendant shooting until he heard the first shot, turned to look, and saw the Defendant shooting back. He did not know who fired the first shot.

Shane Garner testified that on the morning of August 29, 2019, his long-time friend, Ms. Cutshaw, who was the Defendant's girlfriend, came with the Defendant to pick him up for a court date in Blount County. He explained that approximately one month earlier, he and Ms. Cutshaw had been pulled over by the Alcoa Police Department, which had found a methamphetamine pipe in the car. He stated that he was supposed to "take the meth pipe charge and cut [Ms. Cutshaw] loose," but when they got to court, the judge appointed them each a lawyer and set another court date. The Defendant was angry about the situation and started an argument with him in the car as they left court. In an attempt to appease the Defendant, he gave the Defendant his last ten dollars so that the Defendant could get something to eat from Popeyes.

Mr. Garner testified that the three then stopped at a store for beer and cigarettes. Afterward, the Defendant "just flipped out again[,]" bringing up the same argument about what had happened in court. He and the Defendant began fighting, and the Defendant got out of the car. Ms. Cutshaw started crying and asked him to persuade the Defendant to get back into the car, so he got out, walked to the Defendant, apologized, and convinced the Defendant to get back inside.

Mr. Garner testified that he continued to apologize to the Defendant after they were back in the car, but the Defendant "didn't want to hear it." He said he "didn't like the vibe [he] was getting[,]" and asked Ms. Cutshaw where they were going. She told him she did not know but it would be all right. He then asked the Defendant if the Defendant was taking him somewhere to kill him. Instead of answering, the Defendant just turned and looked at him without saying anything.

Mr. Garner testified that when they came to a four-way stop, he saw a friend and jumped out of the car's window. He told his friend he thought the Defendant was going to retrieve a pistol to kill him, and his friend took him to the home of the friend's mother in "the projects." Mr. Garner testified that the friend's mother was talking to him in a breezeway of the apartment complex when he looked up to see the Defendant with a revolver pointed directly at his face. The Defendant pulled the trigger twice, but the gun did not fire. The Defendant then looked back at a car and held the gun up. At that point, Mr. Garner "took off running[,]" dove into a bush, and pretended to be grabbing for a weapon. The Defendant saw him, ran to the car, and got inside. As the car "took off," Mr.

Garner saw the Defendant and other individuals inside "shuffling back and forth doing something[.]"

Mr. Garner testified that he saw a maintenance man who was wearing a gun at his back, ran up to him, and said, "Thank you, Lord Jesus." At about that time, he heard Ms. Cutshaw yelling from the back seat of the car, "[H]e ain't got no pistol. He's lying." He stated that the car pulled off and came around the side of the building, and that the Defendant jumped out and "c[a]me running" toward him while shooting at him. He testified that the maintenance man, who was standing beside him, then pulled out his pistol and shot the Defendant.

Mr. Garner testified that he had an antique Civil War knife in a "full steel sheath" with him that day, which he had been planning to pawn because he did not have any money. He denied that he pulled it out of its sheath or threatened the Defendant with it. On cross-examination, he testified that he was currently in prison for "[a]uto theft" and acknowledged he had a history of substance abuse, which had led him into a life of crime. He said he was certain the maintenance man had his gun in a holster at the small of his back. He was also certain that, at the time of the shooting, Ms. Cutshaw was in the back seat of the car and "some black guy" was in the front passenger seat. He did not think he was carrying the knife when he ran to the maintenance man because he did not recall retrieving it from the bush in which he had hidden it until after the shooting. He acknowledged that he told the police investigator that he had taken the knife off the Defendant. He further acknowledged that he asked the investigator for help with his pending Maryville charges.

KPD Investigator Chaz Terry testified that three firearms were collected in the case: a Rohm RG10 .22 revolver, which was found on the ground; a Smith and Wesson .38 Special revolver with six spent casings in the cylinder, which was found on the ground near the .22 caliber revolver; and a Ruger semi-automatic .9mm, which was retrieved from Mr. Crowe. He identified the DVD of his September 28, 2019 interview with the Defendant, which was played for the jury and admitted as an exhibit. He also identified a photograph of Mr. Crowe taken at the police station and testified that the object visible on Mr. Crowe's hip was a cell phone in a cell phone holster. He stated that the Defendant would not disclose Mr. Dixon's name, but he was able to determine Mr. Dixon's identity by latent fingerprints lifted from Ms. Cutshaw's car.

On cross-examination, Investigator Terry agreed that the knife recovered in the case, labeled as a "bayonet" in the list of trial exhibits, was designed for killing and would be a lethal weapon at close quarters. He acknowledged that the .22 revolver was "an old weapon that [was] in bad shape[,]" that it was not loaded, and that no .22 bullets or .22 shell casings were found at the scene. On redirect examination, he testified that the Defendant told him

that Mr. Garner held the knife up and verbally threatened him but never said that Mr. Garner attempted to stab him with the knife.

Defendant's Proof

David Dixon, recalled as a witness for the Defendant, testified that Ms. Cutshaw was not in the car with him and the Defendant during the shooting. He acknowledged having told both Investigator Terry and defense counsel that the maintenance man fired first. On cross-examination, he conceded that he did not see who fired the first shot.

The Defendant's hospital records, which reflected that the Defendant had a gunshot wound to his "posterior right shoulder and posterior neck" were admitted as an exhibit.

The twenty-eight-year-old Defendant testified that on August 29, 2019, he and Ms. Cutshaw, a close friend whom he described as his "sugar momma," picked up Mr. Garner to take Mr. Garner to court in Blount County. When they left court, Ms. Cutshaw drove Mr. Garner several different places in Blount County, and the Defendant fell asleep in the front passenger seat of the car. When he awakened, Ms. Cutshaw had the car stopped outside a needle exchange in Knox County waiting for Mr. Garner to emerge. Mr. Garner suddenly jumped in the car yelling for Ms. Cutshaw to lock the doors and to go. Almost immediately, another man ran up and attempted to open the front passenger door. After Ms. Cutshaw drove off, Mr. Garner told them that he had just robbed that man.

The Defendant testified that when he suggested that Mr. Garner reimburse Ms. Cutshaw for her gasoline and cigarettes, Mr. Garner became "hostile, yelling and carrying on." He said Mr. Garner called him a "n*****[,]" told him he would kill him, pulled out a bayonet, and raised the bayonet "as if he was going to stab [him] with it." The Defendant stated that he told Ms. Cutshaw to stop the car to let him out, and Ms. Cutshaw responded that Mr. Garner was not going to do anything. However, Mr. Garner was still being "very aggressive[,]" and the Defendant "felt like [Mr. Garner] was actually trying to kill [him]" so he opened his car door to exit. Ms. Cutshaw abruptly braked, and Mr. Garner leaned forward without warning and punched him in the mouth with his right hand.

The Defendant testified that he exited the car and began walking away. Ms. Cutshaw convinced him to get back in, but the mood inside was very tense as they drove to the Prince Hall apartment complex. When they arrived, he got out of the car, and Mr. Garner exited behind him and approached in an aggressive manner. Because he believed Mr. Garner intended to fight, he quickly got back in the car and drove approximately a block and a half away to recruit Mr. Dixon to "back [him] up just in case anything [went] down." The Defendant explained that he wanted Mr. Dixon present "to make sure that it was fair and nobody jump[ed] in . . . on [Mr. Garner's] side." He stated that he was

"frustrated and angry" at Mr. Garner's unprovoked attack and wanted to hurt Mr. Garner "as bad as" Mr. Garner had hurt him. He elaborated that he wanted to either hit Mr. Garner in the mouth "or punch on [Mr. Garner] until he felt satisfied."

The Defendant testified that he and Mr. Dixon drove back to the apartment complex, where he retrieved from his aunt's apartment the two guns he had earlier bought from someone at Montgomery Village. He said he bought the guns, despite knowing he was not supposed to have a firearm, because he felt the need for protection due to the area in which he lived, where "innocent people . . . end up getting shot for no reason." He stated that he retrieved the guns in preparation for his fight because he wanted a fair fight. He explained that if Mr. Garner pulled his knife during the fight, he intended to show his gun to "let [Mr. Garner] know to put the knife down and [that they were] going to fight like men."

The Defendant testified that he met Mr. Garner as he was exiting the building. He and Mr. Garner argued, and he thought Mr. Garner was about to pull his knife, but Mr. Garner ran. As Mr. Garner ran away, Mr. Garner called out asking the Defendant if the Defendant thought he was the only one with a gun and stating that he had "something for [the Defendant's] a** and stuff of that nature." The Defendant testified that he got back in the car to leave, but as he pulled out of the driveway, Mr. Garner cut him off, so he got out again. By that time, the maintenance man was reaching into his pickup truck, grabbing his pistol, running to the other side of the pickup truck, and lying across the hood of the pickup truck with his gun pointed at the Defendant.

The Defendant testified that he did not have his gun out at that time. He said he turned to tell Mr. Dixon that the maintenance man had a gun, turned back, heard Mr. Garner yell, "shoot that motherf*****[,]" and the shooting started. He stated that he was shot in the right shoulder and in the back of his right arm and that the bullet that entered his shoulder exited his neck. He testified that he lied to Investigator Terry about not knowing Mr. Dixon because he did not want to get Mr. Dixon in trouble. He repeated that his plan had been to "beat [Mr. Garner] up" and said that he never intended to kill him. When asked what his intentions were when he fired his gun, he responded, "I shot when I heard the gunshots and then when I felt like my life was in danger by [Mr.] Crowe, when the bullets started getting close, 'cause I noticed that he was trying to aim for my head, nowhere else."

On cross-examination, the Defendant acknowledged that Mr. Garner never displayed or threatened him with the knife in the apartment complex. He said he had a vague memory from the police interview of saying that he shot at Mr. Garner after Mr. Garner told the maintenance man to shoot him and shot at the maintenance man after the maintenance man fired at him. He stated he was on pain medication and indicated that he was confused during the interview. He acknowledged that Mr. Crowe was not involved in

his conflict with Mr. Garner but disagreed with the prosecutor's characterization of Mr. Crowe as an innocent person.

Following deliberations, the jury convicted the Defendant of attempted first degree premeditated murder, attempted second degree murder, two counts of employing a firearm during the commission of a dangerous felony, two counts of aggravated assault, and one count of unlawful possession of a firearm by a convicted felon. The trial court merged the aggravated assault convictions into the corresponding attempted murder convictions and sentenced the Defendant to an effective term of thirty years in the Department of Correction. Following the denial of his motion for new trial, the Defendant filed a timely notice of appeal to this court.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to sustain his convictions for attempted first degree premeditated murder, attempted second degree murder, and employing a firearm during the commission of a dangerous felony. 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 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).

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 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). "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).

The Defendant was convicted of the attempted first degree premeditated murder of Mr. Garner, the attempted second degree murder of Mr. Crowe, and employing a firearm during the commission of those dangerous felonies. "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[.]" Tenn. Code Ann. § 39-12-101(a)(2)(2018). First degree premeditated murder is "[a] premeditated and intentional killing of another." *Id.* at § 39-13-202 (a)(1).

> "[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist 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. at 39-13-202(e). Second degree murder is defined as "[a] knowing killing of another." *Id.* at 39-13-210(a)(1). Tennessee Code Annotated section 39-17-1324 makes it an offense for someone to employ a firearm or antique firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony. Tenn. Code Ann. at § 39-17-1324(b)(1) (Supp. 2019). Both attempted first degree murder and attempted second degree murder are included in the list of dangerous felonies covered by the statute. *Id.* at 39-17-1324(i)(1)(A), (B).

In support of his argument that the evidence was insufficient for the jury to find him guilty of the offenses, the Defendant cites his own testimony that he intended only to fist fight with the Defendant, as well as the medical records, which he asserts contain "key evidence" that he "was shot from behind." However, when viewed in the light most favorable to the State, the evidence established that the Defendant, who was angry at being threatened with a knife and "sucker-punched" by Mr. Garner, retrieved two guns, sought out Mr. Garner at the apartment complex, came upon him as he was engaged in conversation with a friend's mother, and attempted to shoot him in the face at close range with his .22 revolver. When the gun failed to fire and Mr. Garner fled, the Defendant ran

to his girlfriend's car, drove to a position to cut off Mr. Garner's escape, quickly exited the car, and fired multiple gunshots with his .38 revolver at both Mr. Garner and Mr. Crowe, narrowly missing striking Mr. Crowe in the center of his chest. From this evidence, a rational jury could have reasonably found that the Defendant attempted to commit an intentional and premeditated killing of Mr. Garner, attempted to commit a knowing killing of Mr. Crowe, and employed a firearm during his attempts to commit those dangerous felonies. We, therefore, conclude that the evidence is more than sufficient to sustain the Defendant's convictions.

II. Employing a Firearm During Commission of Dangerous Felony

In a pretrial motion that was denied by the trial court, the Defendant sought to have the employing a firearm during the commission of a dangerous felony counts of the indictment dismissed, arguing that they were prohibited by subsection (c) of Tennessee Code Annotated section 39-17-1324 because his use of a firearm was a necessary element of the attempted murder counts as charged in his indictment. The State argues that subsection (c) does not prohibit the Defendant's convictions for employing a firearm during the attempt to commit a dangerous felony because the State need not prove that a defendant possessed or employed a firearm, or any other weapon, to prove attempted first or second degree murder. We agree with the State.

Subsection (c) of Tennessee Code Annotated section 39-17-1324 provides:

> A person may not be charged with a violation of subsection (a) or (b) if possessing or employing a firearm or antique firearm is an essential element of the underlying dangerous felony as charged. In cases where possession or employing a firearm or antique firearm are elements of the charged offense, the state may elect to prosecute under a lesser offense wherein possession or employing a firearm or antique firearm is not an element of the offense.

Tenn. Code Ann. § 39-17-1324(c) (Supp. 2019).

In support of his argument that the employing a firearm counts were prohibited, the Defendant relies on *Anthony D. Byers v. State*, No. W2011-00473-CCA-R3-PC, 2012 WL 938976 (Tenn. Crim. App. Mar. 15, 2012), *perm. app. denied* (Tenn. Aug. 15, 2012), in which this court concluded that a petitioner's conviction for possession of a firearm during the commission of a dangerous felony was void because "deadly weapon" was an essential element of the predicate felony of especially aggravated kidnapping, and "the deadly weapon at issue was clearly and solely a firearm[.]" *Id.* at *9. The Defendant acknowledges that neither attempted first degree murder nor attempted second degree murder require proof of any kind of weapon and that this court "has reached a different

result in cases where the weapon is not a specific enumerated element of the offense." Nonetheless, the Defendant urges us to reverse his convictions for employing a firearm during the commission of a dangerous felony, asserting that it was "impermissible to put him to trial on both the attempted first degree and the employing a firearm counts."

We are unpersuaded by the Defendant's argument. As the State points out, *Byers* is readily distinguishable from the case at bar because the underlying dangerous felony in *Byers* contained the use of a deadly weapon as an essential element. Here, by contrast, the State was not required to prove the Defendant possessed or employed a firearm to prove him guilty of attempted murder. The Defendant is not entitled to relief on the basis of this issue.

III. Self-Defense Jury Instruction

The Defendant contends that the trial court erred by "affirmatively instructing the jury that [the Defendant] had a duty to retreat before using deadly force." The State responds that the trial court's instruction was a proper statement of the law and appropriate under the facts in this case. 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) (citations omitted). 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 erroneous jury instruction may deprive the defendant of his constitutional right to a jury trial. *State v. Garrison*, 40 S.W.3d 426, 433-34 (Tenn. 2000). As part of their instructions in criminal cases, trial courts must describe and define each element of the offense or offenses charged. *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). An instruction will be considered prejudicially erroneous only if it fails to submit the legal issues fairly or misleads the jury as to the applicable law. *Id.* at *9 (citing *State v. Vann*, 976 S.W.2d 93, 101 (Tenn. 1998)). We review the propriety of the jury instructions *de novo* with no presumption of correctness. *State v. Perrier*, 536 S.W.3d 388, 403 (Tenn. 2017).

At the time of the offenses, Tennessee Code Annotated section 39-11-611(b)(2) provided as follows:

> (2) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:

(A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;

(B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and

(C) The belief of danger is founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611(b) (2018).

In *State v. Perrier*, 536 S.W.3d 388, 403 (Tenn. 2017), our supreme court held that the trial court, as part of its threshold determination of whether to charge self-defense, should decide whether to charge the jury that a defendant did not have a duty to retreat. As part of that decision, "the trial court should consider whether the State has produced clear and convincing evidence that the defendant was engaged in unlawful activity such that the 'no duty to retreat' instruction would not apply." *Id.*

The Defendant concedes he was not entitled to the "no duty to retreat" language afforded to a defendant who was not engaged in criminal activity at the time of the offense. He argues, however, that the trial court erred by not following the pattern jury instructions by simply removing the "no duty to retreat" language from the self-defense instruction. Instead, over the Defendant's objection, the trial court not only omitted the "no duty to retreat" language but also included the following additional language:

> In this case, the law of self-defense requires the defendant to have employed all means reasonably in his power, consistent with his own safety, to avoid danger and to avert the necessity of taking another's life. This requirement includes the duty to retreat in this case, if, and to the extent, it can be done in safety.

The Defendant acknowledges that panels of this court have approved of similar language in other cases, including *State v. Kevin Wayne Newson*, No. M2021-00444-CCA-R3-CD, 2022 WL 2251303, at *10 (Tenn. Crim. App. 2022) and *State v. Shannon Bruce Foster*, No. E2020-00304-CCA-R3-CD, 2021 WL 3087278, at *21, 24 (Tenn. Crim. App. July 21, 2021), but points out that other panels of this court, in *State v. Vana Mustafa*, No. M2020-01060-CCA-R3-CD, 2022 WL 2256266, at *24-25 (Tenn. Crim. App. June 23, 2022), *State v. Keontis Dontrell Cunningham*, No. M2020-00874-CCA-R3-CD, 2021 WL 382418, at *8 (Tenn. Crim. App. Aug. 27, 2021), and *State v. Yancey Lee Williams*, II, No. M2019-00091-CCA-R3-CD, 2020 WL 4345504, at *14 (Tenn. Crim. App. July 29, 2020), have approved of instructions that followed the pattern jury instruction's example of

omitting the "no duty to retreat" language without the inclusion of any additional language about a defendant's having a duty to retreat. The Defendant argues that this court "should resolve this conflict by approving the Pattern [Jury] Instruction's treatment of the issue."

We disagree that there is a conflict in the above opinions that needs resolution by this court. Our holdings in M*ustafa*, *Cunningham*, and *Williams*, in which we concluded that self-defense jury instructions that followed the pattern jury instruction were proper, are not adverse to our holdings in other opinions, in which we concluded that a trial court's inclusion of additional language on the duty to retreat of a defendant who was engaged in unlawful activity at the time of the offense was a correct statement of the law under the facts of those cases. As we have often noted, a trial court is not limited to the pattern jury instructions. *See State v. James*, 315 S.W.3d, 440, 446 (Tenn. 2010) ("Trial courts are not limited to the mere recitation of the pattern instructions.") (citation omitted); *State v. Hodges*, 944 S.W.2d 346, 354 (Tenn. 1997) ("[P]attern jury instructions are not officially approved by this Court or by the General Assembly and should be used only after careful analysis. They are merely patterns or suggestions."). Under the facts of this case, the trial court's instruction about the Defendant's duty to retreat was a correct statement of the law. The Defendant is not entitled to relief on the basis of this issue.

CONCLUSION

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

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JOHN W. CAMPBELL, SR., JUDGE