IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 20, 2019 Session

STATE OF TENNESSEE v. BETH ANNE MANIS

Appeal from the Criminal Court for Hawkins County
No. 16CR192 John F. Duggar, Jr., Judge

No. E2018-02098-CCA-R3-CD

The Defendant, Beth Anne Manis, was convicted by a jury of one count of voluntary manslaughter, a Class C Felony. See Tenn. Code Ann. § 39-13-211(a). Thereafter, the trial court denied the Defendant's request for judicial diversion and ordered the Defendant to serve five years, six months in confinement as a Range I, standard offender. On appeal, the Defendant contends that (1) the evidence was insufficient to negate her claim of self-defense; (2) the trial court erred by declining to give a special jury instruction on self-defense; (3) the Defendant's constitutional rights were violated by the absence of a jury verdict form regarding self-defense; and (4) the trial court erred by denying judicial diversion. Upon a thorough review of the record and the applicable law, we affirm the judgment of the trial court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Greg W. Eichelman, District Public Defender; and J. Todd Estep, Assistant Public Defender, for the appellant, Beth Anne Manis.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Senior Assistant Attorney General; Dan E. Armstrong, District Attorney General; and M. Ryan Blackwell, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

This case arises from the October 1, 2016 shooting death of Brittany Murray ("the victim"). The victim, who was the Defendant's niece by marriage, had argued with the

Defendant in text messages exchanged earlier that evening. The substance of the argument related to the Defendant's confronting Gary Murray,[1] the victim's father, about his allegedly spreading a rumor that the Defendant and Gary had previously had a sexual relationship.

The victim's mother, Tammy Stapleton, drove the victim and the victim's boyfriend, John Michael Cook, from Kingsport to the Defendant's trailer in Church Hill. It was undisputed that the victim exited her mother's car in the road in front of the Defendant's trailer and that shortly thereafter, the Defendant stepped out onto her front porch and shot the victim. The Defendant's neighbors, Wendy and David Carter, were standing near the Defendant and intervened. Mr. Carter took the Defendant's gun, unloaded it, pushed the Defendant inside, and prevented Ms. Stapleton and Mr. Cook, who had become enraged and were attempting to break into the trailer, from getting through the front door. Ms. Carter stayed outside and spoke to a 9-1-1 operator using Ms. Stapleton's cell phone.

At a June 1, 2018 pretrial hearing, the Defendant informed the trial court that she would be pursuing a self-defense theory at trial. The State noted that it had filed a motion requesting the court not to instruct the jury on self-defense and that the court had previously stated it would "have to wait and see what the facts in evidence" were. The court noted that it would have a self-defense jury instruction ready. The Defendant averred that self-defense, and possibly "a defense of a third party," would be raised by the evidence. After addressing other pretrial motions, the court returned to the topic of jury instructions and stated that it would issue the pattern jury instruction on self-defense. The State requested that a portion of the instruction relating to a defendant's right to use force against "somebody in the residence" be redacted, as it was not applicable to the case. The Defendant also noted that the "self-defense statute ha[d] slightly different wording and definitions" not included in the pattern instruction. The court stated that the parties could draft proposed language and submit it for consideration.

At trial, two recorded 9-1-1 telephone calls were played for the jury. In the first recording, Ms. Stapleton told the operator that her daughter had been shot in the head. Ms. Stapleton was also speaking to Ms. Carter, to whom she handed the telephone. Ms. Carter explained to the operator that "they were coming up here to fight my friend and my friend [came] out with a gun and a girl's been shot." Ms. Carter identified the Defendant as the shooter. Ms. Carter noted that they could not find a pulse and that she thought the victim was deceased. Ms. Carter spoke to Ms. Stapleton and the victim, telling them that she was sorry and that she "didn't know that was going to happen." Ms.

[1] During the testimony, Gary Murray, the Defendant's brother-in-law, and Christopher Murray, the Defendant's husband, were both referenced. Because they share a surname, we will refer to them by their first names for clarity. We intend no disrespect.

Carter stated that "they're flipping out" and asked the operator to "[h]urry up [and] get the police here" because "they're about ready to kill this girl that did the shooting." Ms. Carter said that the Defendant was inside her house with Mr. Carter, who had taken the gun and placed it inside the house. Ms. Carter again noted, "They were coming to confront her. Beat her up. They were coming here to beat her up." When the operator asked the subject of the argument, Ms. Carter said, "I'm not sure, they were fighting over the phone [.] . . . I don't know."

Ms. Carter narrated events to the operator as she observed them. She said, "[H]e's flipping out, he's—they're going to kill her too, the one that did the shooting. They're going to kill her . . . [. T]hey just busted her window out." Ms. Carter stated that there was a fight and "[t]hey're throwing s--t up and breaking her windows and everything[.]" Ms. Carter noted that Ms. Stapleton was a nurse and that the victim was deceased. Ms. Carter expressed her disbelief at the Defendant's actions. Ms. Carter said that there was "blood everywhere" and that the victim had a three-month-old baby. Ms. Carter continued to speak to Ms. Stapleton and apologize to her and ask the operator when help would arrive. The operator asked Ms. Carter where "she" was in the trailer court, and Ms. Carter stated that she was in "the middle of the road." Although it was not reflected in the transcript, Ms. Stapleton could be heard saying, "She had barely got out of the car and she had shot her." Ms. Carter told an unidentified person to stay away, that the victim had been shot and that the person did not "want to see this." Ms. Stapleton exclaimed in the background that she was going to "kill that w--re." Ms. Stapleton and an unidentified male were audible in the background at intervals crying and yelling. Ms. Carter was audibly upset and crying throughout the call.

The second recording reflected the Defendant's 9-1-1 call from inside the trailer. She stated that she had "fired a .357 at [the victim] and her mother who pulled up here." The Defendant said that she believed the victim was still alive and that she fired at the victim "because they jumped out of the car and [the Defendant had] witnesses. Rushing to [her] door." The Defendant noted that her neighbor had also called 9-1-1. The Defendant stated that she was in her kitchen, and she told the operator to listen because "[t]hey [were] trying to kick [her] door down right now" and had "just broke[n her] window." Unidentifiable noises were audible in the background. The Defendant averred that she "had to defend" herself, that "they" were continuing to try to break in, and that Mr. Carter was inside the house trying to hold the front door shut. The Defendant stated that the people trying to break into her house had been "telling [the Defendant] she's gonna come over and kick [the Defendant's] a--. All this stuff. A car pulled up and two women got out." The Defendant told the operator that the people were kicking her windows and door; she stated that if they came in the back door, she would "shoot again" and that she had "to defend [her]self again." The Defendant said that children were present in the house with her and that she was afraid. The Defendant noted that she "told

them to get back in the car and they kept coming" and that "they kept charging." The Defendant stated that her gun was on a couch and that Mr. Carter had taken it from her.

The Defendant told the operator that the people "drove from downtown Kingsport to Church Hill for [the Defendant.]" The Defendant told the operator, "I think the one I shot is named Brittany. I don't know what her mom's named but she just got arrested for driving under the influence with her grandson in the car so you guys probably have it." She noted that her husband was related to the victim and the victim's mother. The Defendant stated that although her gun was loaded, she did not know how to load or unload it. She told the operator that Mr. Carter had unloaded the gun and had the bullets in his pocket. The Defendant said that she told the women to get back in their car or she was going to shoot, but the victim "kept coming, so [the Defendant] shot." The Defendant stated that "these people [were] crazy" and that she did not know why they had driven to her house. She further stated that she hoped the victim was "okay." The Defendant repeatedly said that she had witnesses to the incident. The Defendant noted that the people had tried to kick in the door and had broken her window. The Defendant was mostly calm as she spoke, but periodically became more emotional.

Hawkins County Sheriff's Detective Ken Sturgill testified that he was called to the crime scene around 9:35 p.m. Detective Sturgill identified photographs of the crime scene and the victim's body. The photographs reflected that the grass in front of the trailer was narrow; the trailer had a small wooden front porch with two steps leading to the grassy area. The victim's body was located in front of a white sedan, which was parked on the side of the road opposite the Defendant's trailer.

Detective Sturgill noted that the victim was unarmed and that no weapons were found in the car or with Ms. Stapleton or Mr. Cook. He further noted that no blood was found on the scene other than the blood on and near the victim. Detective Sturgill spoke to the Defendant inside her home, and after receiving the Defendant's consent, he examined her cell phone. He saw text messages sent by the Defendant that he "believed [were] threatening in nature," and as a result, he stopped searching. Detective Sturgill also collected the victim's cell phone from her purse inside Ms. Stapleton's car.

About twelve hours later, Detective Sturgill took the Defendant's formal statement, which the Defendant signed. The Defendant's statement was as follows:

> On Saturday, 10/1/16, at about noon I had started drinking vodka and took about three or four shots. I have been drinking about a pint every day since around January of 2016. A little while after noon my husband Chris[topher] and I were arguing about him not helping me around the house. At about 3:30 or 4:00 p.m. my husband poured out my liquor, so my neighbor, Wendy Carter, and I went to the liquor store and I bought another pint of vodka. I took another two or three shots and started texting

> Gary Murray over a rumor that he and I had slept together in the past. Gary must have told his daughter [the victim] about the accusations because [the victim] had started calling me and texting me. Gary told me that I had better shut up "before my daughter gets there." It was dark when I heard a knock at my door. It was my neighbor Wendy and she said "I think that's them." I ran to my bedroom and grabbed my gun because I'm afraid of [the victim]. When I got back to my front door [the victim], Jon [sic] (her boyfriend), and her mom were out of the car and coming towards me. I told [the victim], "You better stop" and [the victim] said something but I didn't hear it and I raised my gun and just shot and ran into the house. I called [9-1-1]. I was hoping they would stop when they [saw] the gun. I pointed the gun at [the victim] to stop her, not to kill her. I just wanted to scare her. I haven't fired a gun since I was [eighteen years] old when I took about [one] semester of criminal justice when I lived in Huntington Beach[,] California. I had firearms training at the Huntington Beach Police firing range as part of the course.

Detective Sturgill identified the Defendant's gun, a .357-caliber magnum revolver, and noted that when the hammer was cocked, it was easier to pull the trigger and "[it] steadie[d] the sights." Four .357-caliber hollow point bullets and one spent shell casing were recovered with the gun. Detective Sturgill identified photographs of the Defendant's front window and door, both of which reflected broken glass and damage. He further identified a chart of the crime scene with measurements between various points. He noted that the distance between the Defendant's front doorway and the victim's head was thirty-three feet, two inches.

On cross-examination, Detective Sturgill testified that he did not know whether the witnesses were separated after they were transported to Church Hill Police Department. He acknowledged that no ballistics testing was performed to ensure that the Defendant's gun was "actually operational." Detective Sturgill acknowledged that a photograph showed brown-colored stains on the Defendant's door. He stated that he did not look for blood on the door; that if there was blood on the door, DNA swabs were not collected; and that there was no way to tell now whether the stains were blood. Detective Sturgill noted that to his knowledge, Mr. Cook was the only other witness with blood on him, and he left the crime scene before Detective Sturgill arrived. Detective Sturgill noted that if "a substance" were on the door, he would have photographed it. Detective Sturgill agreed that no gunshot residue testing was performed inside the Defendant's home and that he "took her word for it" that she was standing in the doorway when she fired the gun. He identified photographs of the victim's arm and Ms. Stapleton's car, which reflected reddish-brown smudges or smears. Detective Sturgill acknowledged that he did not photograph the ground between the victim's body and the porch or the view of the crime scene from the Defendant's perspective. He further acknowledged that the

crime scene perimeter log reflected three names printed in a different color ink and that the "medicolegal investigator," Kevin Brown, was not reflected on the log in spite of having been at the crime scene.

Detective Sturgill acknowledged that he did not utilize "triangulation" when measuring the distance between the Defendant's doorway and the victim in order to facilitate crime scene reconstruction. He admitted that his measurements did not reflect the position in which the victim's body was found or accurately depict the dimensions of the victim's body. He stated that although he had a department-issued cell phone, he did not record the Defendant's police interview and that only his notes documented their discussion. He did not notate the questions he asked her. He said, though, that "[e]verything that [the Defendant] told [Detective Sturgill] that day" was contained in his notes and the written statement.

Hawkins County Sheriff's Sergeant Sam Wilhoit testified that he and Deputy Jesse Williams were the first to respond to a "shots-fired call" at the Defendant's address. When they arrived, Sergeant Wilhoit saw a "vehicle sitting kind of off to the left side of the roadway," a woman lying in the road "with what appeared to be a blood pool around her, [and] another female and a male over top of her . . . attempting to do CPR." Deputy Williams went inside to "secure" the Defendant, and Sergeant Wilhoit began to perform CPR on the victim. Sergeant Wilhoit noted that the victim was obviously deceased and that the officers performed CPR "for face." After several minutes, Deputy Williams brought out the Defendant's gun and took over performing CPR, and Sergeant Wilhoit went inside to stay with the Defendant until another officer arrived. He did not interview any of the witnesses.

Sergeant Wilhoit testified that he did not move the victim's body or "one of her arms." He acknowledged that it took about twelve minutes to arrive at the scene and that he did not know "who might have come or gone" during that time. Sergeant Wilhoit denied touching the victim's head or arms. Sergeant Wilhoit agreed that his name did not appear on the crime scene log or any written statement other than his report. Sergeant Wilhoit denied seeing blood or "drag marks" on the ground between the victim's body and the Defendant's door. He acknowledged, though, that he did not look for either of those things.

Deputy Williams testified that there was no indication the victim's body had been moved, although he acknowledged that he did not know what had occurred prior to his arrival.

Kingsport Police Detective Sergeant Martin Taylor testified that he extracted data from the victim's cell phone using Cellebrite, which was a "set of programs" used to remove information from cell phones. The Cellebrite report reflected seven text messages exchanged between the Defendant and the victim in the hours before the

victim's death.[2] The Defendant was listed in the victim's telephone as "Beth (Uncle Chris' wife)."

The text messages read as follows:

Sent from	Time sent on 10/1/2016	Time stamp reflected on the victim's cell phone	Message[3]
Defendant	8:51:13 p.m.	8:51:16 p.m.	"I don't know you so . . . f--k off and s--k your own d--k anyways."
Victim	[blank]	9:01:10 p.m.	"B--ch, you best keep my young-un's name, my dad's name, and my grandma's name out of your mouth. You better put the f--king bottle down and get your facts straight. My dad wouldn't touch your skanky a-- with a bum's d--k so believe me he would never ever claim to have f--ked you. All yak and no back, huh? You can run that p--sy-licker over text message but you can't answer the phone, just like a f--king blue belly [Y]ankee. Dad wants his gun and his carpet shampooer."
Defendant	9:08:36 p.m.	9:08:39 p.m.	"If'n this is rit [sic] . . . , call Chris, he'll tell you how Gary said you were so effed up on pills if he hadn't saved . . . your son from smothering [he'd be] dead. Ask him."

[2] The parties referenced outside the presence of the jury that a vast quantity of communications between the victim and the Defendant, some thousands of messages, were recovered by the computer program. However, the trial court determined that the seven messages eventually introduced at trial were the only admissible communications. The pretrial hearing in which this determination was made is not present in the appellate record.

[3] We have included the transcription of the text messages as read into the record by Detective Taylor. The original text messages are spelled and punctuated in such a manner that they are difficult to read. We have verified that the spoken descriptions of the messages accurately reflect their contents.

Defendant	9:10:28 p.m.	9:10:30 p.m.	"That's right. I've never FI [sic] your dad. LMFAO. You know where I live. Come on, Honey. Cussing [on the phone] is lame. Come here physically. Have a plastic surgeon lined up. Only trash."
Defendant	9:14:21 p.m.	9:14:23 p.m.	"Only trash I know, RE you, is what your loser alcoholic dad and limp-a-- uncle tell me. Too bad. You molested your own brothers, you sick w--re."
Defendant	9:20:31 p.m.	9:20:56 p.m.	"Too bad. Carpet shampooer is busy cleaning your c-m from molesting, you're gross, and your daddy's c-m since he likes your a--, B--ch."
Defendant	9:32:54 p.m.	Marked Unread[4] 10/4/2016 10:45:24 a.m.	"Why? What you going to do? You know where I live. Maybe your baby daddy, Gary said he left your a--, can watch so you can come on over, C-nt, B--ch, W--re. Hahahahaha."

Detective Taylor noted that the final message was received by the victim's cell phone but was marked unread.

On cross-examination, Detective Taylor acknowledged that there was no way to know who opened the text messages on the victim's cell phone. Detective Taylor explained that the "network" time stamp reflected the time a text message was "actually sent and time[-]stamped from the network." He noted that when he received the victim's cell phone, it was "literally bent" such that the screen was broken and there was a problem with plugging in the cell phone to the police computer. He further noted that the screen did not display anything other than intermittent illuminated areas. By "luck," Detective Taylor bent the cell phone such that the phone connected to the computer and the data could be retrieved.

Ms. Stapleton testified that she was the victim's mother. On October 1, 2016, Ms. Stapleton went to the victim's house after work. The victim, Mr. Cook, their infant son,

[4] Detective Taylor noted that he could not explain the date the victim's telephone received the last message. He speculated that the police could have charged the victim's telephone on that date.

and the victim's father Gary were present. Ms. Stapleton stated that later, she drove the victim and Mr. Cook "to get her father's stuff from his brother's house." Ms. Stapleton noted that the Defendant was married to Christopher and that Ms. Stapleton had never been to the Defendant's trailer before. The victim directed Ms. Stapleton. When they arrived at the trailer park, the victim told Ms. Stapleton to "whip around and just park across the road[.]" During the drive, Ms. Stapleton noticed the victim's sending text messages.

Ms. Stapleton testified that when she parked the car, Mr. and Ms. Carter came out of their trailer, and Ms. Carter "ran across the yard" with Mr. Carter following behind her. Ms. Carter "beat on" the Defendant's front door. The Defendant was not outside when they arrived. Ms. Stapleton stated that she, the victim, and Mr. Cook exited the car. The victim, who had been sitting in the front passenger seat, walked toward the front of the car. Ms. Stapleton looked toward the Defendant's trailer and saw the Defendant "standing on the porch with a gun in her hand[s.]" Ms. Stapleton said, "Oh, my God. She's got a gun." Ms. Stapleton saw that the Defendant was aiming the gun at the victim, and Ms. Stapleton heard a shot. After the shot, Ms. Stapleton said that the Defendant "kind of like went backward but she was . . . smiling" and that Ms. Stapleton did not "know how else to describe it." Ms. Stapleton heard Mr. Cook scream, "No," and Ms. Stapleton ran around the car and saw the victim lying on the ground "midway in front of the car." Ms. Stapleton denied that the victim stepped onto the Defendant's property. Ms. Stapleton began to perform CPR and stopped when the victim regained a pulse.

Ms. Stapleton testified that she saw a "little place come up" on the victim's head and that she hoped the wound was superficial; however, Ms. Stapleton raised the victim's head and blood began "pouring" out. Mr. Cook was standing near the victim's head, screaming and crying. Ms. Stapleton did not remember retrieving her cell phone, although she remembered calling 9-1-1 and giving the phone to Ms. Carter.

Ms. Stapleton testified that no one, including the Defendant, spoke before the Defendant shot the victim. She denied that anyone threatened the Defendant or that the Defendant told them to stop. Ms. Stapleton denied that the victim or anyone in the car was armed. She also denied that anyone moved the victim's body before the police arrived.

On cross-examination, Ms. Stapleton testified that she and Mr. Cook did not go back into her car. Ms. Stapleton did not recall how long it took her to drive to the Defendant's house. Ms. Stapleton denied moving the victim's arm from on top of her head, and she did not see Mr. Cook do so. When Ms. Stapleton picked up the victim's head, she did not turn it. After reading her police statement, Ms. Stapleton acknowledged telling the police that when the Defendant came out of the house, she "said something," but Ms. Stapleton did not know what she said. Ms. Stapleton did not remember throwing something at the Defendant's window but acknowledged her police statement that she

threw a "rock hitting a window on the door trying to get in." Ms. Stapleton did not recall her statement as recorded in the 9-1-1 call that she intended to kill the Defendant. Ms. Stapleton denied being at the Defendant's trailer "for a fight," and she stated that she was there to retrieve a carpet shampooer and a gun. On redirect examination, Ms. Stapleton denied that anyone threw a rock or brick at the Defendant's house prior to the Defendant's coming out onto the porch.

Mr. Cook testified that on October 1, 2016, he lived with the victim and their infant son. They had spent the day with Gary, who was visiting from out of town. In the evening, Ms. Stapleton arrived, and soon thereafter he, the victim, and Ms. Stapleton left to "recover" from the Defendant a carpet shampooer and .357 revolver. Mr. Cook had met the Defendant several times, had been to her house, and agreed that they had a "decent" relationship. Mr. Cook noted that he was uncertain whether the .357-caliber revolver would be functional. Mr. Cook stated that during the drive, he sat in the backseat behind the victim and that the victim's phone "died," so he put it in her purse in the backseat. He did not see anyone use a cell phone in the car.

When they arrived at the Defendant's trailer, Ms. Stapleton parked facing the "main road" across the street. Mr. Cook saw a neighbor outside the Defendant's trailer, but he did not see the Defendant. Mr. Cook, the victim, and Ms. Stapleton exited the car. Just before Mr. Cook exited the back passenger-side door, he heard Ms. Stapleton exclaim that "she" had a gun. Mr. Cook continued to exit the car and saw the Defendant holding a gun "right in her doorway." The victim walked toward the front of the car, and as Mr. Cook shut his door, he heard a gunshot. Mr. Cook estimated that only a "couple of seconds" passed between the time the Defendant came out of the front door and when she fired the gun. Mr. Cook denied that the Defendant said anything, issued a warning, or told them to get back into the car before shooting the victim. He also denied that anyone in his group threatened the Defendant.

Mr. Cook testified that after the gunshot, he crouched down behind the car; he saw the victim fall down immediately. Mr. Cook ran around the car to the victim, saw that she had been shot in the head, and "grabbed her right hand" with the intention of helping her to safety. However, he realized that the victim was deceased and saw blood coming from her head. He stated that no one moved the victim's body after she was shot. Mr. Cook denied that the victim had stepped onto the Defendant's property. He denied that he, the victim, or Ms. Stapleton were armed.

On cross-examination, Mr. Cook acknowledged that he had prior convictions for identity theft, forgery, and felony theft. He denied that he or Ms. Stapleton reentered the car after the shooting. Mr. Cook said that when he grabbed the victim's right hand, it was on her abdominal area; he agreed that after he moved her arm, it was outstretched as documented in the crime scene photographs. He averred that the victim was on her back with her face up. He did not remember Ms. Stapleton's picking up the victim's head.

Mr. Cook testified that the Defendant held the gun with one hand. Mr. Cook denied that Ms. Stapleton threw something at the trailer; he did not remember clearly, but thought that he broke a window beside the front door. He recalled that Ms. Stapleton "beat on the door" and attempted CPR on the victim afterward. Mr. Cook agreed that he and Ms. Stapleton were not separated before giving their police statements. Although Mr. Cook acknowledged that various family members arrived at the police station and that they spoke to one another, he stated that "it wasn't like an open discussion[.]" On redirect examination, Mr. Cook denied that anyone threw anything at the Defendant's house before she shot the victim.

Mr. Carter testified that he was the Defendant's neighbor and that the Defendant was close with Ms. Carter. On October 1, 2016, he and Ms. Carter became aware that the Defendant and her husband had been arguing, and they went to the Defendant's trailer to "kind of ease the flow a little bit and just hang out." He stated that the sun had not yet set and that as they walked up a hill to the Defendant's trailer, a car pulled into the trailer community and passed them. Ms. Carter recognized the car's occupants and said, "Oh[,] that's them." Mr. Carter told Ms. Carter to "[w]ait just a minute"; Ms. Carter responded, "Well, don't tell me what to do"; and Ms. Carter continued walking to the Defendant's trailer. Mr. Carter followed and noted that the car had stopped in front of the Defendant's trailer. Ms. Carter knocked on the front door and identified herself; Mr. Carter walked to the steps leading to the front porch. He heard someone from the car say, "That's right. You tell her we are here to kick her a--." To Mr. Carter's knowledge, the Defendant was still inside at the time.

Mr. Carter testified that a young woman had exited the car and was "walking around, coming toward [the Defendant's] house, and . . . she wasn't strolling, she was walking . . . like she was coming to fight." Mr. Carter noted that the young woman was "angry." Mr. Carter saw the Defendant come out the front door, and initially, he thought that she was pointing at the young woman. Mr. Carter heard someone say, "She has a gun. Watch out, she has a gun." Mr. Carter turned and saw the Defendant holding a silver revolver with a black handle; he walked up "to get the gun" and saw that the revolver's hammer was cocked. The Defendant fired the gun when Mr. Carter was between one and one-half and two feet away from her. Mr. Carter was "shocked," but he grabbed the Defendant by the wrist, raised her hand into the air, and walked her back into the trailer. Mr. Carter noted that he initially thought the shot was "high" and did not know whether anyone was hit. Mr. Carter denied seeing the victim with a weapon, although he noted that once he was alerted to the presence of a gun, his focus was on the Defendant. Mr. Carter denied that the victim was ever close enough to strike the Defendant. Similarly, he denied that the victim was ever on the Defendant's porch or that the Defendant left her porch.

Jerri Babb, one of the Defendant's neighbors, testified that on October 1, 2016, she was inside her home when she heard a gunshot. She looked out her window and saw a body lying in the road, a man performing CPR on the body, and a woman throwing a rock through a window. She noted that she only looked out the window for two or three seconds.

Dr. Nicole Masian, an expert in forensic pathology, testified that the victim's cause of death was a "partially perforating, indeterminate-range gunshot wound" to the head, and the manner of death was homicide. Dr. Masian explained that due to the absence of soot and gunpowder stippling, she could not determine from how far away the shot was fired. She agreed that her findings were consistent with a shot fired from thirty-three feet away. Dr. Masian stated that the victim would have been rendered immediately unconscious by the shot and that there would have been "extensive[]" bleeding. The absence of blood in the victim's lungs indicated that she never took more than a few shallow breaths before she died. Dr. Masian noted that the bullet fragmented inside the skull and "blew her skull apart." Dr. Masian stated that based upon the crime scene photographs and the autopsy, the victim fell on her left side, struck the side of her head on the ground, and was rolled over onto her back. Dr. Masian denied that any evidence indicated the victim's body was moved.

On cross-examination, Dr. Masian acknowledged that in Mr. Brown's medicolegal report, he estimated that the victim was twenty feet from the Defendant's front door. She stated that the blood droplets on the victim's forehead were inconsistent with the victim's falling straight onto her back. Dr. Masian agreed that if blood were present in the grass closer to the Defendant's house, she would have considered it as part of her opinion on whether the body had been moved. Dr. Masian further agreed that blood transfer smears were present on one or both of the victim's arms. She stated that it was possible a "marking" in the gravel near the victim's body had been created when the victim was rolled over. When asked whether a photograph of the crime scene depicted reddish-brown spots in the grass near the Defendant's trailer, Dr. Masian stated that the spots in question were brown grass. Dr. Masian agreed that a lack of stippling or soot was consistent with any shot fired from more than three or four feet away, depending on the type of gun.

At the rest of the State's case-in-chief, the trial court found for the record that the Defendant had raised self-defense and that the Defendant was not engaged in unlawful activity prior to the shooting. The court asked if there was "[a]nything else" before the Defendant presented her case, and defense counsel stated that the Defendant was ready to proceed.

Detective Sturgill was recalled as a witness by the Defendant and testified that the back of the victim's shirt, which was not photographed by police, and the victim's shoes reflected pieces of "debris," including a one-quarter-to-one-half-inch piece of grass and

one longer blade of grass. He agreed that the victim's shirt was soaked in blood and that "anything that that person would have been dragged through would have stuck to it[.]"

Danny Lawson, another of the Defendant's neighbors who lived across the street, testified that on October 1, 2016, he was watching television when his wife "heard somebody hollering." Mr. Lawson heard a gunshot, and when he looked out his back door, he saw a young woman lying "in the yard there." Mr. Lawson stated that when he initially saw the young woman, she was "back toward the deck in the yard," but by the time he put on a pair of pants and walked outside, she was "up towards the road, to the road." Mr. Lawson marked on the crime scene photographs the place where he initially saw the victim's body; the mark was in front of the steps to the porch. He noted that he did not see any blood until "they" started performing CPR, at which point blood began to come from the back of the victim's head. Mr. Lawson spoke to a police officer, but he was never contacted afterward. He noted that "it was a while" before crime scene tape was put up and that "[e]verybody was just mingling around" in the meantime, including "[n]eighbors and . . . whatnot[.]" He agreed that people walked in the grass between the Defendant's trailer and the victim's body "[s]everal times" until the tape was put up to prevent them from doing so.

On cross-examination, Mr. Lawson did not recall the name of the officer with whom he spoke. Mr. Lawson noted that the officer was asking whether anyone at the scene was armed and that he gave the officer his pocketknife. Mr. Lawson initially stated that he did not tell anyone his observations, but later admitted that he spoke to "several people," including the Defendant and coworkers. When asked whether he spoke to the police, Mr. Lawson said they never asked him for his observations. Mr. Lawson acknowledged that he spoke to "Mr. Cobb," a defense investigator, about one month before the trial. Mr. Lawson stated that he did see blood in the grass where he saw the victim's body initially, but clarified that "there was no blood pumping out of her until they started doing CPR."

The Defendant testified that she and Christopher had been married for three and one-half years. On October 1, 2016, she was at home with her son, who was a toddler. She stated that when she was eighteen years old, she took two firing classes as part of an administration of justice program at a college in California. The Defendant said that she did not complete the first class and that she withdrew from the second class; she also said that she "never even went to those classes at all." The Defendant agreed that the class was the last time she fired a gun. When asked about any skills she acquired as a result of her classes, the Defendant stated that in the first class, she "never got a turn to even fire a weapon" and that in the second class, she "didn't enjoy it, it was intimidating and [she] wasn't good and just . . . never went back to that class. So they gave [her] an F."

The Defendant identified the gun she used to shoot the victim and stated that she had never held or shot the gun before that night. She said that on a previous occasion,

Gary brought the gun to her house, loaded it, and gave it to Christopher; the gun was placed in Christopher's closet, and the Defendant was shown where it was located. The Defendant explained that Gary owed them money and paid his debt with the gun. At the time of the shooting, the gun had been in the closet for three and one-half years. The Defendant averred that she did not think about it and that with children in the house, it remained on a "very high" shelf and was not moved.

The Defendant testified that she and the victim had only met once, had "always gotten along," and had "never had a problem." She noted that she and Gary also never had a problem with one another. The Defendant and Christopher went to Christopher's mother's home regularly to help care for her; the victim lived with Christopher's mother, and the Defendant met Mr. Cook there a few times. Ms. Stapleton and Gary were divorced.

The Defendant stated that according to Christopher and Christopher's sister, "there was a rumor on my husband's side of the family . . . that Gary had been bragging about us having . . . had a sexual relationship." The Defendant was upset and asked Christopher to "address it with" Gary, but Christopher told her not to worry about it. The day of the shooting, Gary called the Defendant's house "out of the blue," and she hung up after telling him that Christopher was not home. The Defendant sent Gary a text message afterward asking him why he was "saying this stuff."

The Defendant testified that the victim then began sending her text messages in which the victim "said horrible stuff" and called her "a nasty w--re, you know, vulgar things." The Defendant stated that her feelings were hurt and that she "thought of the most horrible things that [the Defendant] could say to [the victim] to hurt her back, and it[was] vulgar and it was wrong but it ended there." The Defendant said that she received a text message from Gary reading, "You better shut the f--k up before my daughter gets there."

The Defendant stated that after "several texts back and forth," her telephone began ringing "off the hook" because the victim was calling her. When asked why the Defendant sent the text message in which she told the victim to "bring her plastic surgeon," the Defendant stated that she was "exasperated" by the repeated telephone calls and text messages. The Defendant averred that she was "trying to look . . . tough or respond in kind" to the victim's statements. The Defendant further averred that she did not expect the victim to come to her house.

The Defendant testified that after "[f]our hours went by," she was in bed watching videos of trains with her son when Ms. Carter called her. The Defendant told Ms. Carter that there was "nothing to worry about. [The Defendant had not] talked to them and they ha[d]n't talked to [her, so Ms. Carter did not] need to come down here, and [the

Defendant] went back to bed." Five to fifteen minutes later,[5] Ms. Carter knocked on the Defendant's door.

The Defendant testified that she saw Ms. Stapleton's car and asked Mr. and Ms. Carter who "those people" in the car were. The Defendant said that Ms. Carter stepped off of the front porch and that the driver's side door of the car opened; the Defendant noted that she heard what sounded like loud "heavy metal" music playing in the car.

The Defendant testified that Ms. Stapleton "jumped out of" the car and said, "That's right, we're here to kick your f---ing a--, B--ch." Ms. Stapleton further stated that she would "stomp [the Defendant's] skull" and "something that ended in 'put you down.'" The Defendant stated that Ms. Carter held her hands up and attempted to dissuade Ms. Stapleton. The Defendant then described the relevant events as follows:

> As this is happening and I realize this is [Ms. Stapleton] and I can see in the car [the victim] was in the passenger front seat and [Mr. Cook] was . . . behind the driver seat . . . . He started to get out of the car. It was like . . . every part of my body in one second just sizzled and I took off running. I knew they were there to cause me harm because they were telling me, "We're going to stomp your skull. We're here to kick your a--." I was . . . terrorized and I was in just a complete panic. Just a panic. And I took off for my gun because they were jumping out in my yard screaming what they were going to do to me and they are there [ten] feet from me.

The Defendant noted that her son was in her bedroom, which was visible from the front door. When the Defendant returned to the doorway, she saw Ms. Stapleton in her yard and the victim "coming around the car charging." Ms. Stapleton stated that the Defendant had a gun, and Ms. Stapleton grabbed the victim's arm. The Defendant noted that "everybody was screaming" and that the Defendant told "her," "Stop. I will shoot you. Get in your effing car," as well as, "Go away." The Defendant said that the victim threw Ms. Stapleton to the left and "charged straight at" the Defendant. The Defendant stated that the victim "was about four strides and that [was] when [she] shot her."

The Defendant testified that Mr. Carter grabbed her arm and pushed her back through the door. The Defendant called 9-1-1 and "sat in the chair and tried to just tell them what was going on because there was a gun." She stated that she needed "them there now because people were now trying to break into [her] house" and that she did not want "them to come in shooting at [her] thinking" she had a gun. When asked whether she thought someone had a gun, the Defendant responded that the victim owned a gun "and her boyfriend wore it sometimes as well. So [the Defendant] didn't know who had a gun or not. If [the victim] would have it, if [Mr. Cook] would have it or maybe [Ms.

[5] The Defendant also stated in reference to the time between returning to bed and Ms. Carter's knocking on the door, "[T]hat all happened in like [thirty] seconds."

Stapleton] would have it." The Defendant stated that she believed that the victim had "beaten up" Gary and other people "[s]everely" in the past. The Defendant agreed that she believed that "one of them" had a gun and that her life and her son's lives were in danger.

The Defendant testified that she recalled thinking that she did not want to be beaten by three people in front of her son or be beaten to death. She noted that she feared for her son's safety if "they went to him to shut him up." The Defendant stated that "the rage and craziness, the height of their just frantic rage was over the charts, off the scale." The Defendant opined that "they had to be totally high on something to be at that level as they were jumping out of the car already screaming like a banshee or a heavy metal thrash singer."

The Defendant testified that before the police arrived, "they were throwing bricks, they were screaming from the outside, 'We're going to kill you,' and beating on the door and the window at the top of the door as well." The Defendant said that the door came open twice and that Mr. Carter "had to use his might" to close it. The Defendant did not see who was at the window or door, but heard breaking glass and the statement, "We're going to kill you."

The Defendant testified that when Detective Sturgill interviewed her, she volunteered to speak to him because she wanted to be "truthful and forthcoming with the situation." She stated that she requested for the interview to be videotaped, but Detective Sturgill told her that was "not the policy." The Defendant then asked for the interview to be audio recorded, and Detective Sturgill "fiddled" with his cell phone. The Defendant stated that Detective Sturgill held the cell phone in one hand and wrote notes on a legal pad with the other, leading her to assume he recorded the interview. The Defendant said that she gave Detective Sturgill information about her previous firing classes in response to his asking her when she last fired a gun. He did not ask her about her performance in the class.

The Defendant testified that on the day of the shooting, between 12:30 p.m. and 6:00 p.m., she drank about five shots of vodka. She stopped drinking to cook dinner and get her son and herself ready for bed. When asked whether the dispute with the victim "had lasted for one day," the Defendant stated that "it started and lasted six texts and then it was over with. When [the Defendant] received a text from Gary . . . that whole thing just fell off the wall."

When asked how the Defendant felt about the victim's death, she stated that it was "the most tragic thing that has ever happened, in [her] family's life and [her] husband's family's life." She said that she "loved" the victim and did not want to kill her, but that she wanted to protect herself and her son. The Defendant opined that she "had to stop her

or they would have, all three of them, beat [the Defendant] down because that's what they told [her] they were going to do[.]"

On cross-examination, the Defendant acknowledged her statement to the police that she drank three or four shots of vodka around noon and later drank two or three additional shots. She agreed that her statement was accurate. The Defendant stated that she was alone with her son at her trailer beginning at 5:30 p.m., when Christopher brought him home from the park. She also stated, though, that her adult daughter was home in the afternoon.

The Defendant testified that after Christopher poured out her liquor "earlier in the afternoon," he left to visit a friend; that he returned with a pint of vodka, that the Defendant rejected it because she was upset with him; and that he left again to take their son to the park. She said that she and Ms. Carter had already returned from the liquor store when Christopher returned the first time.

When asked whether she got "mean" when she drank alcohol, the Defendant responded that her husband said she was "mean sometimes" and that "[on] this occasion, the rude things [she] said on those texts was because she was . . . belligerent." The Defendant acknowledged sending the vulgar text messages to the victim. When asked whether the statements in the text messages were something the Defendant would say to a person she was "terribly frightened of, that [she knew] to have a violent temper and that [she was] scared to death of," she responded that even though she told the victim to come to her house, it was not an invitation and that she did not believe the victim "would ever come" to her house. The Defendant characterized her statements as "stupid talking on a phone." The Defendant commented that "[t]hey're the ones that drove to [the Defendant's] house when [she] was home with [her] baby and jumped out of the car telling [her that they were] getting [her] down, beat [her], beat [her]." The Defendant denied that she "lure[d]" the victim to her house.

The Defendant testified that she told Ms. Carter to call 9-1-1 and that Ms. Carter was "inside when the tall officer" sat with the Defendant. The Defendant stated that she could hear Ms. Carter speaking to the 9-1-1 operator. The Defendant agreed that she told the 9-1-1 operator that her neighbor had also called 9-1-1, but she did not know why she stated such. The Defendant averred that she did not know with certainty that the shooting had been reported. She thought that she was the first one to call 9-1-1.

The Defendant testified that when she came outside, Ms. Stapleton and Mr. Cook were "already on [her] porch or in the grass area" and that the victim "was coming around the car fast" at that time. Although the Defendant agreed that Ms. Stapleton and Mr. Cook were "way closer" to her when the victim was in front of the car, she stated that the victim was closest to her out of the three people when she shot the victim. When

asked to describe the positioning of the relevant people further, the Defendant stated as follows:

> [The victim] had already come past the passenger headlight and moving around the car like across the grille in the direction of my home. [Ms. Stapleton] started from where like the tire well and the driver door meet and started going left saying, "She's got a gun, she's got a gun," and grabbed [the victim]. And for a second I thought it was going to be okay, she would put her in the car and they would leave. [The victim] looked at me, recognized I had a gun and she like grew up a foot and that's when she slung her mom to the left.

The Defendant stated that the victim "charged straight at" the Defendant before the Defendant shot her.

When asked whether her written police statement accurately reflected the information she gave Detective Sturgill, the Defendant responded, "Well, the interrogation was kind of odd to me." She noted that she had been "sobbing" continuously since "the minute of the incident" and that she was in shock when she was interviewed. The Defendant stated that she "wish[ed] he would have written more of it down." She noted that when she reviewed the statement, she was "in a different state of mind" and "really traumatized." The Defendant acknowledged that her police statement reflected only her telling the victim she had "better stop," the victim's saying something the Defendant could not hear, and the Defendant's firing the gun. She testified that she did not know whether the hammer was cocked when she came out. When asked whether the gun was stored with the hammer cocked, the Defendant said that the gun did not have a safety mechanism and that Christopher told her "the first shot you don't have to pull that trigger thing." The Defendant agreed that she intentionally went to the bedroom, retrieved the gun, went onto her front porch, and shot the victim in the head.

On redirect examination, the Defendant testified that after Mr. Carter pushed her into the house, she did not know whether she hit the victim because she was both nearsighted and farsighted and had astigmatism. Ms. Carter informed the Defendant after the police arrived that the victim was deceased. The Defendant noted that she had not purchased eyeglasses in some years and that her eyesight was 20/300. The Defendant stated that she could see the victim's body but "not in detail" and that she aimed the gun toward "her entire body in her direction." The Defendant testified that she said, "Stop, stop"; that she "still didn't fire" the gun; that Ms. Stapleton grabbed the victim; and that when the victim "slung [Ms. Stapleton] to the left," the Defendant fired.

When asked about the "confusion" regarding the Defendant's police statement, she stated that "the reason that [she] was so complacent" in accepting the statement as written and not asking to change it was because she "had been arrested for murder, [she]

had just had to do something terrible to protect [her]self and [her] son." The Defendant denied that she intended to kill the victim.

At the close of the proof and after closing arguments, the trial court instructed the jury on self-defense. The portion of the instruction relevant to this appeal is as follows:

> A defendant using force intended or likely to cause death or serious bodily injury within a residence is presumed to have a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting, or a person visiting as an invited guest, when that force is used against another person who unlawfully and forcibly enters or has unlawfully and forcibly entered a residence and the defendant using defensive force knew or had reason to believe that an unlawful and forcible entry occurred . . . .
>
> Enter means an intrusion of any part of the body, or an intrusion of any object in physical contact with the body, or any object controlled by a remote control, electronic or otherwise.
>
> Force means compulsion by the use of physical power or violence.
>
> Violence means evidence of physical force unlawfully exercised so as to damage, injure or abuse. Physical contact is not required to prove violence. Unlawfully [pointing] a deadly weapon at an alleged victim is physical force directed towards the body of the victim.
>
> Imminent means near at hand, on the point of happening.
>
> Residence means a dwelling in which a person resides either temporarily, or permanently, or is visiting as invited guest; or any dwelling, building, or other appurtenance within the curtilage of such residence.
>
> Curtilage means the area surrounding a dwelling that is necessary, convenient and habitually used for the family purposes and for those activities associated with the sanctity of a person's home.

Upon the foregoing evidence, the jury found the Defendant guilty of the lesser-included offense of voluntary manslaughter. At the sentencing hearing, the State expressed that it "strongly oppose[d]" the Defendant's request for diversion. After hearing victim impact statements and testimony from character witnesses on the Defendant's behalf, the trial court found that "this [was] a really sad case for everybody involved." Relative to the Defendant's request for judicial diversion, the court stated that it had considered the seven factors mandated by Tennessee Code Section 40-35-313.

Assessing the amenability to correction factor, the trial court found that the record reflected that the Defendant smoked marijuana for thirty-five years and was drinking "a

pint of vodka about every day" at the time of the offense. Although the Defendant had presented evidence that she had abstained from alcohol after the trial, the court stated that "[t]he jury [was] still out on that . . . whether [she was] to be amenable to correction." The court noted, "[T]he day after this trial when I told you don't do anything, alcohol or drugs, you go and smoke pot the day after the trial." It further noted, "[O]ld habits, [thirty-five] years, are hard to break."

Relative to the circumstances of the offense factor, the trial court found that they were "terrible" and commented that "there's an old saying: Alcohol and gunpowder don't mix." The court further stated,

> You had been taking shots of vodka all day, these text messages back and forth with the victim and you. And your lawyer[] says, Well, there's no evidence that [the victim] saw what was on her phone, that you invited her down there, and if she was to come she better bring a plastic surgeon . . . . So maybe she didn't see that, but we know what . . . was in your mind at the time . . . . You should have said better bring a mortician when you're there with a .357 revolver. And the evidence was that the victim got out of the car, hurried[] around the front of the car in the road and you shot her in the forehead with a .357 and she's unarmed. In front of her mother and boyfriend and neighbors that were there. Terrible, terrible facts.

The court noted that if the Defendant had been sober, she might have done "[w]hat a reasonable person would have done" and chosen to call the police instead of retrieving a gun. The court found that the circumstances of the offense did not reflect well on the Defendant's request for judicial diversion "at all." The court noted that the victim's child lost his mother, that Ms. Stapleton lost her only daughter, and that if the roles were reversed, the Defendant's family would not want the victim to receive judicial diversion. The court further noted that the jury "was very kind to" the Defendant and remarked regarding the verdict, "[T]he only thing you can surmise by the evidence is, you don't drive from out of county to somebody's house to threaten to whip them in Hawkins County. You don't drive from another county to fight somebody at their own house[.]"

The trial court found that the Defendant did not have a criminal record. Relative to past criminal behavior, the court found that the Defendant smoked marijuana the day after the jury trial and admitted to smoking marijuana for thirty-five years.

Relative to the Defendant's social history, the trial court found that it was "[n]ot too good" and that although the Defendant raised daughters who had done well and had their own children, she also drank one pint of vodka per day for "months" and smoked marijuana for thirty-five years. The Defendant's mental health was "okay" according to the presentence report, and the court found that her physical health was "not good."

Relative to the deterrence value to the Defendant and others, the trial court remarked that more people carried guns than had previously and that "[p]eople need[ed] to be deterred not to pull that gun out for the least little thing, and surely not to be drinking alcohol and pulling out guns . . . [T]his [was] the classic case. Other people need[ed] to be deterred." The court found that, in addition, "other people need to be deterred from doing what [the Defendant] did: Inviting people to fight." The court noted that text messaging and continuous communication "rev[ved] it up" and that the situation was not helped by the Defendant's drinking alcohol. The court stated, "I can't find that a judicial diversion will be a deterrent value to the [D]efendant as well as others. I mean, I told you not to smoke pot and the next day you did."

Relative to whether judicial diversion would serve the interest of the public as well as the Defendant, the trial court stated that if other people heard that the Defendant received diversion, "They'll say nothing happened to [the Defendant]. She shot [the victim] in the forehead with a .357 and [the victim was] in the road unarmed." The court concluded that in light of all the factors, the Defendant was not entitled to judicial diversion. The court ordered a sentence of five years, six months, in light of the enhancement factors and the mitigating factor of the Defendant's remorse.

In the motion for a new trial, relevant to the issues raised on appeal, the Defendant averred that the trial court erred by not giving "the requested special jury instruction Motion 16 filed on June 20, 2018"; that the trial court erred by denying diversion; and that the evidence was insufficient "to support a conviction of voluntary manslaughter rejecting self-defense." The trial court summarily denied the motion, and the Defendant timely appealed.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant contends that the evidence was insufficient to negate her claim of self-defense. The State responds that the evidence is sufficient.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal 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). This court does not reweigh the evidence, rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

A guilty verdict "removes the presumption of innocence and replaces it with a presumption of guilt, and [on appeal] the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Bland, 958 S.W.2d at 659; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). A guilty verdict "may not be based solely upon conjecture, guess, speculation, or a mere possibility." State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). However, "[t]here is no requirement that the State's proof be uncontroverted or perfect." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Put another way, the State is not burdened with "an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 326.

The foregoing standard "applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of [both] direct and circumstantial evidence." State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). Both "direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence." State v. Dorantes, 331 S.W.3d 370, 381 (Tenn. 2011). The duty of this court "on appeal of a conviction is not to contemplate all plausible inferences in the [d]efendant's favor, but to draw all reasonable inferences from the evidence in favor of the State." State v. Sisk, 343 S.W.3d 60, 67 (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 person acts intentionally with respect to the nature of the conduct or 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). Voluntary manslaughter is a result-of-conduct offense. State v. Page, 81 S.W.3d 781, 788 (Tenn. Crim. App. 2002). Furthermore, the jury is responsible for reviewing the evidence to determine whether it supports a finding of adequate provocation. State v. Williams, 38 S.W.3d 532, 539 (Tenn. 2001).

When a defendant relies upon a theory of self-defense, the State bears the burden of proving that the defendant did not act in self-defense. State v. Sims, 45 S.W.3d 1, 10 (Tenn. 2001). Further, it is well-settled that whether an individual acted in self-defense is a factual determination to be made by the jury as the sole trier of fact. See State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); State v. Ivy, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). "Encompassed within that determination is whether the defendant's belief in imminent danger was reasonable, whether the force used was reasonable, and whether the defendant was without fault." State v. Thomas Eugene

Lester, No. 03C01-9702-CR-00069, 1998 WL 334394, at *2 (Tenn. Crim. App. June 25, 1998) (citing State v. Renner, 912 S.W.2d 701, 704 (Tenn. 1995)). It is within the prerogative of the jury to reject a claim of self-defense. See Goode, 956 S.W.2d at 527. Upon our review of a jury's rejection of a claim of self-defense, "in order to prevail, the defendant must show that the evidence relative to justification, such as self-defense, raises, as a matter of law, a reasonable doubt as to his conduct being criminal." State v. Clifton, 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994).

In this case, the jury acquitted the Defendant of premeditated first degree murder, thereby crediting her testimony to some degree and finding that the Defendant was adequately provoked by the victim to act in an irrational manner. However, the jury, as was its prerogative, also rejected the Defendant's claim that her use of lethal force was reasonable under the circumstances. The jury was free to accredit portions of the testimony at trial and reject others.

In the light most favorable to the State, the evidence showed that after arguing with Gary about a family rumor, the victim and the Defendant sent inflammatory text messages to one another. The Defendant continued to send vulgar and insulting messages to the victim, who did not respond, but rather came to the Defendant's house with Ms. Stapleton and Mr. Cook. Neighbors heard one of the people in the car state that they were there to assault the Defendant. The Defendant, who had been drinking heavily that day,[6] retrieved a revolver from her closet and shot the victim as she walked around the front of Ms. Stapleton's car. The jury heard expert testimony that the victim's injury would immediately have bled profusely, and the photographs of the crime scene did not show a blood trail between the small front yard and the gravel road where the victim's body was located when police arrived. Dr. Masian testified that it was impossible for the victim's body to have been dragged backward given the lack of a blood trail in the crime scene photographs.

In addition, although the Defendant testified regarding her fear of the victim and the victim's reputation for violence, the Defendant also sent multiple inflammatory text messages, whereas only one message from the victim appeared in evidence. Moreover, the Defendant was calm during the 9-1-1 call, which supported a finding that she was not placed in actual fear of imminent bodily harm. The evidence is sufficient to support the jury's determination that the Defendant did not act in self-defense—either because she

[6] We note that contrary to the Defendant's assertion in her appellate brief that the victim was "under the influence," the autopsy report reflected that although the victim's urine tested positive for an undetermined amount of cannabinoids, nicotine, and prescribed buprenorphine, the victim's blood toxicology panel was negative for alcohol and drugs. Other than the Defendant's uncorroborated testimony that the group in the car "had to be high" to be as angry as they were, no evidence was offered to indicate that the victim was intoxicated.

did not have a reasonable, actual fear of imminent bodily harm, or because her use of lethal force was not reasonable when she shot the unarmed victim before the victim set foot on her property. The Defendant is not entitled to relief on this basis.

II. Jury Instructions

The Defendant contends that the trial court erred by not amending the pattern jury instruction on self-defense to refer to a "residence and its curtilage," arguing that the pattern instruction did not clearly explain how curtilage related to a residence in the context of this case. The State responds that the Defendant has waived this issue for failure to request a ruling on her motion during trial and, alternatively, that the jury was properly instructed.

Before trial, the Defendant filed a motion for a special jury instruction regarding self-defense. The motion requested, in relevant part, that all references to a residence be changed to the "residence and its curtilage" in the section of the instruction articulating the presumption of reasonable fear arising when a defendant uses force against an intruder in the defendant's home. The State likewise filed two motions requesting that the self-defense instruction be eliminated entirely and, alternatively, that the court exclude the portion of the instruction relating to a defendant's residence, arguing that the victim did not enter the Defendant's trailer. The court deferred ruling on the issue until the close of the proof. The court ultimately decided at trial to instruct the jury using the pattern instruction. The court also found that the Defendant was not engaged in unlawful activity for purposes of the instruction. The court asked if the parties had any other issues to address, and the Defendant did not address her previous motion or otherwise object to the self-defense instruction.

Because the Defendant did not pursue a ruling on her pretrial motion or object at trial to the jury instruction, she has waived plenary review of the issue. "The failure to make a contemporaneous objection constitute[s] waiver of the issue on appeal." State v. Gilley, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008); see Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error").

Moreover, plain error relief is not warranted. The doctrine of plain error applies when all five of the following factors have been established:

(a) the record must clearly establish what occurred in the trial court;
(b) a clear and unequivocal rule of law must have been breached;
(c) a substantial right of the accused must have been adversely affected;

(d) the accused must not have waived the issue for tactical reasons; and
(e) consideration of the error must be "necessary to do substantial justice."

State v. Page, 184 S.W.3d 223, 230-31 (Tenn. 2006) (quoting State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003)) (internal brackets omitted). "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." Id. at 231.

In this case, the Defendant has not demonstrated that a clear and unequivocal rule of law was breached. A defendant in a criminal case "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. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000); see State v. Leath, 461 S.W.3d 73, 105 (Tenn. Crim. App. 2013). When reviewing jury instructions on appeal to determine whether they are erroneous, this court must "review the charge in its entirety and read it as a whole." State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997). A jury instruction is considered "prejudicially erroneous," only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." Id.

The trial court instructed the jury on the definition of curtilage, which was referenced in the definition of a residence and defined immediately afterward. The pattern instruction provides an accurate statement of the law, that a presumption of reasonable fear arises when a forcible invasion of a defendant's residence occurs, which includes a "dwelling, building or other appurtenance" inside the curtilage. See Tenn. Code Ann. § 39-11-611(a)(3), (a)(8), (c). We note that throughout the trial, defense counsel thoroughly examined the witnesses to further the theory that the victim had entered the Defendant's small front yard and that the victim's body was moved before the police arrived; counsel also discussed the definition of curtilage and its application to the Defendant's case during closing argument. The jury had the benefit of both an accurate description of the law in the pattern instruction and counsel's highlighting the sections of those instructions benefitting the defense theory. The trial court did not breach a clear and unequivocal rule of law by denying the Defendant's request for a special jury instruction, and she is not entitled to relief on this basis.

III. Jury Verdict Form

The Defendant raises for the first time on appeal that her constitutional right to a unanimous verdict was violated by the lack of a special jury verdict form addressing self-defense. The State responds that this issue has been waived.

The Defendant did not object at trial to the jury verdict forms, request a special verdict form addressing self-defense, or raise the issue in her motion for a new trial. "The failure to make a contemporaneous objection constitute[s] waiver of the issue on appeal." Gilley, 297 S.W.3d at 762. Therefore, the issue has been waived. See Tenn. R. App. P. 36(a).

Moreover, the Defendant is not entitled to plain error relief because she has not demonstrated that a clear and unequivocal rule of law was violated. The Defendant's appellate brief does not cite any legal authority to support her assertion that a special verdict form is required in cases involving a self-defense argument. This court has previously concluded, and recently reiterated, that a jury verdict form is not deficient for failure to include "a space for the jury to mark 'not guilty by reason of self-defense.'" State v. Joshua W. Chambers, No. M2019-00694-CCA-R-3CD, 2020 WL 1493940, at *21 (Tenn. Crim. App. Mar. 26, 2020) (quoting State v. Inlow, 52 S.W.3d 101, 109 (Tenn. Crim. App. 2000)). The Defendant is not entitled to relief on this basis.

IV. Denial of Diversion

The Defendant contends that the trial court erred by denying her judicial diversion and "relying on allegations expressly rejected by the jury." The Defendant submits that the trial court improperly relied upon the fact that a death occurred and improperly considered the jury's leniency in its verdict given the circumstances of the case. The Defendant cites her progress toward sobriety, her traumatic childhood, and her previous good reputation in the community as "[a]mple proof" of her amenability to correction. The Defendant also avers that the circumstances of the offense should have been weighed in her favor because the jury's verdict reflected that she acted under adequate provocation. The Defendant argues, "The jury spoke and their words were clear. [The Defendant] reacted, but after adequate provocation . . . . [W]hat voluntary manslaughter case is appropriate for judicial diversion if not this one?" The State responds that the trial court did not abuse its discretion by denying diversion.

There is no dispute that the Defendant was eligible for judicial diversion. See Tenn. Code Ann. § 40-35-313(a)(1)(B). However, simply because a defendant meets the eligibility requirements does not automatically entitle him or her to judicial diversion. State v. Bonestal, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993). "Traditionally, the grant or denial of judicial diversion has been left to the sound discretion of the trial court." State v. King, 432 S.W.3d 316, 323 (Tenn. 2014). When deciding whether judicial diversion is appropriate, a sentencing court must consider seven common-law factors in making its determination. Those factors are:

> (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history,

> (e) the accused's physical and mental health, and (f) the deterrence value to the accused as well as to others. The trial court should also consider whether judicial diversion will serve the ends of justice—the interests of the public as well as the accused.

State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998) (citing State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996)); see also King, 432 S.W.3d at 326 (reaffirming that the Electroplating requirements "are essential considerations for judicial diversion"). The trial court must weigh the factors against each other and explain its ruling on the record. King, 432 S.W.3d at 326 (citing Electroplating, 990 S.W.2d at 229). If the trial court adhered to these requirements, "the determination should be given a presumption of reasonableness on appeal and reviewed for an abuse of discretion." Id. at 319. This court will "not revisit the issue if the record contain[ed] any substantial evidence supporting the trial court's decision." Electroplating, 990 S.W.2d at 229; see also Parker, 932 S.W.2d at 958.

A trial court is "not required to recite all of the Parker and Electroplating factors when justifying its decision on the record in order to obtain the presumption of reasonableness." King, 432 S.W.3d at 327. However, "the record should reflect that the trial court considered the Parker and Electroplating factors in rendering its decision and that it identified the specific factors applicable to the case before it." Id. If the trial court "fails to consider and weigh the applicable common law factors, the presumption of reasonableness does not apply and the abuse of discretion standard . . . is not appropriate." Id. "In those instances, the appellate courts may either conduct a de novo review or . . . remand the issue for reconsideration." Id. at 328.

The record reflects that the trial court considered the Parker and Electroplating factors in rendering its decision and that it identified the specific factors applicable to the case before it. See King, 432 S.W.3d at 327. The court placed particular weight on the "terrible" circumstances of the offense; the Defendant's thirty-five-year history of using marijuana, including the day after the court had instructed her to abstain from alcohol and illegal drugs; and the deterrence value to the Defendant and others.

Contrary to the Defendant's assertion that the trial court focused solely on the fact that a death occurred, the court spoke at some length about the circumstances of the offense and the Defendant's escalation of the situation. The Defendant sent multiple text messages to the victim with vulgar insults and the invitation to come to her house and "bring a plastic surgeon." When the victim did, in fact, come to the Defendant's trailer, the Defendant immediately shot the unarmed victim before she set foot on the Defendant's property. The Defendant had been abusing alcohol for several months by her own admission, and she had imbibed at least six or seven shots of vodka in the hours preceding the shooting. The court noted that if the Defendant had been sober, she might

have done "[w]hat a reasonable person would have done" and chosen to call the police instead of retrieving a gun.

Only after this discussion did the trial court note the victim's family's loss, and it did so in the context of a remark that the Defendant's family would not want the victim to receive diversion if the victim had killed the Defendant. The court further noted that the jury "was very kind to" the Defendant and stated, "[T]he only thing you can surmise by the evidence is, you don't drive from out of county to somebody's house to threaten to whip them in Hawkins County. You don't drive from another county to fight somebody at their own house[.]"

The court found that diversion would not have deterrent value to the Defendant because she had violated the court's order to abstain from alcohol and illegal drugs within one day of the guilty verdict. Relative to the deterrence value to others, the trial court found that more people carried guns than had previously and that the public needed to be deterred from inviting others to fight, drawing their guns "for the least little thing, and surely not to be drinking alcohol and pulling out guns." The court noted that text messaging and continuous communication "rev[ved]s it up" and that the situation was not helped by the Defendant's drinking alcohol.

Relative to whether judicial diversion would serve the interest of the public as well as the Defendant, the trial court stated that if other people heard that the Defendant received diversion, "They'll say nothing happened to [the Defendant]. She shot [the victim] in the forehead with a .357 and [the victim was] in the road unarmed." The court concluded that in light of the relevant factors, the Defendant was not entitled to judicial diversion.

The trial court's remarks regarding the jury's lenient verdict were an implicit finding that the Defendant committed a greater offense than the one for which she was convicted. See, e.g., State v. Cory Willis, No. W2008-02720-CCA-R3-CD, 2010 WL 3583961, at *5 (Tenn. Crim. App. Sept. 15, 2010) (noting the fact that the defendant could have been convicted of a greater offense as a proper consideration when taking into account the public's interests). There was ample proof for the trial court to consider the Defendant's behavior leading to the original charges, even though the trial court affirmed the jury's verdict as thirteenth juror. "[F]acts relevant to sentencing need be established only 'by a preponderance of the evidence and not beyond a reasonable doubt.'" State v. Cooper, 336 S.W.3d 522, 524 (Tenn. 2011) (quoting State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000)).

The record reflects that the trial court carefully considered each factor relevant to the appropriateness of judicial diversion in this case. We note that the court reduced the length of the Defendant's sentence based upon her demonstrated remorse. However, the

circumstances of this offense, particularly the seriousness of the Defendant's conduct in escalating a family squabble to lethal violence; the Defendant's immediate disregard of the court's instructions; and the need to deter the public from engaging in similar behavior weighed strongly against granting diversion in this case. The record contains substantial evidence supporting the court's decision to deny diversion, and the Defendant is not entitled to relief on this basis.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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D. KELLY THOMAS, JR., JUDGE