

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs December 18, 2007

**STATE OF TENNESSEE v. RICHARD ALLAN COX, II**

**Direct Appeal from the Criminal Court for Knox County**  
**No. 82440A     Richard Baumgartner, Judge**

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**No. E2007-00364-CCA-R3-CD - Filed April 9, 2008**

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The defendant, Richard Allan Cox, II, along with his co-defendants, was indicted on charges of first degree murder, attempted first degree murder and conspiracy to commit first degree murder. The defendant was convicted of attempted first degree murder, a Class A felony, and voluntary manslaughter, a Class C felony. The conspiracy charge against the defendant was dismissed. For his attempted first degree murder conviction, the defendant was sentenced as a Range I, standard offender to twenty-two years in confinement, and for his voluntary manslaughter conviction, he was sentenced as a Range I, standard offender to six years. The trial court ordered that his two sentences run concurrently. On appeal, the defendant argues that insufficient evidence was presented at trial to sustain his convictions. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgments of the trial court.

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

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

J. Liddell Kirk (on appeal) and Bruce E. Poston (at trial) Knoxville, Tennessee, for the appellant, Richard Alan Cox, II.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Ta Kisha Fitzgerald and Steven W. Sword, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**I. BACKGROUND**

Christopher Barger, the surviving victim, testified that he knew Demetrius Gilmore, Anthony Burnett and Dewayne Turner, the co-defendants in this case, prior to the shooting on March 28, 2005. He testified that he had been "decently close friends" with Gilmore and Burnett. Barger also

testified that he knew the defendant through the co-defendants, but was more of an acquaintance of the defendant. Barger stated that in March of 2005, he would smoke marijuana “whenever he could get it” with Gilmore and the deceased victim Jonathan Carlson. Barger testified that he was a very close friend of Carlson, and had known him since childhood. Barger admitted that he had smoked marijuana with all of the defendants at one time or another.

Barger testified that in addition to smoking marijuana, he, Gilmore and Carlson would also sell marijuana, though they were not particularly good at it. Barger stated that several months before the shooting, he and Carlson went to the defendant’s house to pick up Gilmore. After they arrived, they went downstairs to the defendant’s room. At one point the defendant went upstairs and Gilmore told Barger and Carlson that the defendant had some money in his room and that they should take it. Barger testified that he kept a lookout for the defendant while Carlson and Gilmore searched the apartment for the money. The three men found \$300 and split it three ways, each taking \$100. Barger stated that the men used the money to start their “weed business.”

Barger testified that after the money was stolen, the defendant confronted him, calling him on the phone and telling him that the money needed to be returned. Barger stated that the defendant’s father also called him and demanded that he return the money to his son. Barger denied knowing anything about the missing money and stated that despite this confrontation, he and the defendant would still hang out together on occasion.

Barger testified that several months after the theft, he was driving around with the defendant, Gilmore, Burnett and Turner. The men had just purchased some marijuana and were going to a convenience store to “buy a blunt.” Barger stated that a blunt was basically a big cigar that marijuana smokers purchase in order to remove the tobacco, fill it with marijuana, and smoke it. When they arrived at the convenience store, Barger got out of the car and went into the store to purchase the blunt. When he came back out, the defendant, Gilmore, Burnett and Turner were gone. Barger stated that he was worried for his safety because the store was located in a bad part of town. He stated that the men drove by the store where he was standing several times, and all the passengers in the car were laughing. After driving by a couple of times, the car disappeared and did not return. Barger stated that he became quite angry as a result of being left behind.

Barger testified that he was forced to call his mom to come pick him up. He then had her take him to Burnett’s house so he could collect his belongings. When he got there, Carlson was at Burnett’s house and Barger told his mom he would just hang out there. Subsequently, Burnett and Gilmore returned to the house and told Barger that the defendant had dropped them off. Gilmore informed Barger that he told the defendant to turn around and pick Barger up, but the defendant refused. Barger stated that after that episode, he remained friends with Burnett, Turner and Gilmore, but that his relationship with the defendant was a “bit more sour.”

Barger testified that about two weeks later, he was with Carlson and two other individuals in the parking lot of the Big Lots store after dark smoking marijuana. He received a phone call from Gilmore who wanted to come and hang out. Gilmore arrived a short time later, driven by the

defendant. Barger stated that he was unaware that the defendant was going to bring Gilmore. When the defendant arrived, Barger went over to the defendant's car to ask him why he had left him at the store. The defendant responded by telling Barger that all he wanted was for him to tell him who had stolen his money. Barger maintained that he did not know who took his money and told the defendant to put his hands up because he wanted to fight. The defendant refused and sat back down inside his car. Barger testified that he hit the defendant four or five times and told him not to do it again before walking away. The defendant sat in his car for a couple of minutes and then drove off.

Barger testified that the very next day, the day of the shooting, he and Carlson went over to Burnett's house to hang out. After hanging out at Burnett's house for a while, Carlson and Barger returned to Barger's house to eat and relax. Barger stated that he did not call the defendant on his cell phone, but it was possible that either Carlson or Gilmore may have used his phone to call him. That evening, he and Carlson went to the house of a female friend to smoke some marijuana. At one point Barger received a call from Turner, who was calling from the defendant's phone. Turner informed Carlson and Barger that he had taken the defendant's cell phone away from him. Turner asked if Barger wanted to come and smoke some marijuana, and he responded that he and Carlson would come join them. Barger said that when Turner asked, he believed that he was going to go smoke with Turner and Gilmore, and that they would meet them at "the spot." Barger identified the spot as a secluded area located off of a gravel road leading from the parking lot behind the Word Afire Baptist Church. Barger stated that Turner called again on the defendant's cell phone a short time later and asked if he and Carlson were coming. Barger could not recall whether he and Carlson made a stop first, or if they went straight to the spot.

Barger testified that he was driving his car, a green Ford Explorer. Barger explained that in order to get to the spot, he had to turn into the church parking lot, drive past the church building, and past a semi-trailer permanently parked behind the church. At the rear of the parking lot there was a gravel road which curved away from the parking lot and led into the woods behind the church. He stated that he and Carlson drove down the gravel road, pulled up behind Gilmore and Turner, and got into Turner's vehicle, a green Jeep Cherokee.

Barger testified that moments after he and Carlson got into Turner's car, the defendant opened the passenger door, stuck a gun inside the car, and pointed it at Turner. The defendant told Turner to give him his phone back. Barger stated that Carlson asked to get out of the vehicle. Barger testified that he had to get out of the car first in order to let Carlson out of the car because of the way they were sitting. Barger stated that when he got out, he moved toward the front fender of the Jeep on the driver's side, on the opposite side from where the defendant stood, and began slowly backing away from the vehicle. Barger also stated that when Carlson got out, he was located toward the rear of the Jeep, closer to the defendant. Barger testified that Carlson began backing away from rear of the vehicle, in the opposite direction from Barger. Barger noticed that Burnett was standing close to the defendant at that time.

Barger testified that he saw Carlson react to the defendant in "frustration" by turning around with his back to the defendant and pulling off his hat. Barger stated that after Carlson turned around,

the defendant shot Carlson and he fell to the ground. At the time the defendant shot Carlson, Carlson was not moving toward the defendant. Barger stated that he began to back up even more after he saw the defendant shoot Carlson. Barger testified that he heard a voice saying, "Don't - don't run Chris." He stopped backing away and saw the defendant move around the front of the vehicle and walk toward him with the gun raised and pointed at him. Barger stated that the defendant shot at him and hit him through the neck, causing him to fall to the ground. Barger stated that when he fell, he was able to see Carlson on the ground, on the other side of the Jeep. A few seconds later, Barger saw the defendant's feet move around his body and out of his peripheral vision. He waited and braced for the defendant to shoot and kill him. Instead, Barger heard the gun click as though it was out of bullets. Barger stated that after he heard the gun click, he struggled to get up even though he was bleeding. Barger stated that he was able to get up and go over to Carlson. Barger stated that after checking on Carlson, he went and got into his car and drove home.

Barger testified that he arrived at his house within minutes and started walking up the outside porch stairs where he was met by his mother. He told her he had been shot and that he needed to go to a hospital. He recalled turning to go back downstairs before blacking out. He woke up in the hospital a day or two later. Barger recounted that he met with Investigator Huckleby in the hospital. Although he had a tracheotomy tube in his throat and was unable to speak with Investigator Huckleby, he was able to communicate using a dry erase board. Some time after he was released from the hospital he went to the police station and made a formal statement.

On cross-examination, Barger testified that the "first sign of bad blood" with the defendant occurred after he, Gilmore and Carlson stole the defendant's money. Barger also testified that he was the only person to hit the defendant during the altercation the previous day in the Big Lots parking lot. Barger acknowledged that he had denied stealing the money while under oath in a prior juvenile proceeding. He stated that he and Carlson were not in the Jeep with Turner and Gilmore for more than a minute before the defendant walked up to the vehicle. He admitted that he would frequently go to "the spot" behind the Word Afire Baptist Church to smoke marijuana. Barger could not recall any disagreements or issues with Gilmore or Turner prior to March 28, 2005. He admitted that he became angry when it became apparent that the men were not going to return to pick him up. Barger also stated that as a result of the shooting, he has a permanent scar on his neck.

Janet Bowling testified that she worked as a registered nurse in the Emergency Room at the University of Tennessee Medical Center and assessed Christopher Barger when he arrived at the hospital. Barger was listed as a "full alert" upon arrival. Nurse Bowling explained that a "full alert" trauma is one where the patient is unstable with a life-threatening condition, and has a blood pressure of less than ninety. She stated that a full alert patient typically does not have an open airway, cannot breathe for themselves, and often requires a trauma surgeon. Two nurses and several of the trauma surgeons were present and attended to Barger. She reported that if Barger had not obtained help as quickly as he did, he could have suffered from a condition known as pulmonary edema where his lungs would fill with blood. She testified that pulmonary edema can quickly lead to death if not treated in a timely fashion.

Anthony Burnett testified that he knew the defendant and co-defendants. Burnett stated that he would hang out with Demetrius Gilmore in particular, and considered him his closest friend. Burnett also testified that he was very familiar with Christopher Barger and Jon Carlson. Burnett stated that he thought the money taken from the defendant's apartment had actually been stolen from the defendant's car by Christopher Barger. Burnett also testified regarding the episode in which Barger was left at the convenience store. He stated that on that day, the five men were together in the car and had obtained some marijuana from Gilmore's aunt. Burnett stated that the defendant was driving the car when Barger went into the store. Gilmore told the defendant that he would not leave Barger behind. Burnett stated that the defendant laughed after Gilmore said this, put the car in drive, and pulled off. After leaving Barger at the store, the four men drove around and even drove by Barger a few times without stopping. Eventually, the defendant drove away, leaving Barger behind. Burnett told the defendant he did not want to be responsible for leaving Barger and instructed the defendant to take him home.

Burnett testified that when he returned home, Barger and Carlson were at his house. Burnett told Barger that he told the defendant not to leave Barger behind, and demanded that the defendant drop him off at home after the defendant refused to pick Barger up at the store. Burnett stated that he was not present during the altercation between Barger and the defendant in the Big Lots parking lot.

Burnett testified that on the day of the shooting, he woke up after noon and waited until 3:30 p.m. for his mother to return home. Burnett stated that he was obligated to attend a class on drug rehabilitation because he was on juvenile probation for possession of alcohol. Burnett testified that despite this probation, he continued to routinely smoke marijuana with all three of the co-defendants and Barger and Carlson. In addition, Burnett testified that he sold marijuana to Barger, Carlson and Gilmore, and those individuals had in turn, sold marijuana to him as well.

Burnett testified that after he returned home from his class, he spoke with Gilmore who told him that the defendant was coming to pick them up so that they could obtain some marijuana. The defendant did not have any marijuana when he picked Burnett and Gilmore up, so the three men went "riding around." Burnett testified that eventually, they ended up "at some dude's house, where [Gilmore] got a gun." Burnett testified that before Gilmore got out of the car, the defendant gave him forty dollars. Burnett stated that Gilmore got out of the car, handed the money over to an individual known only to Burnett as "Maurice," who handed Gilmore a gun in return. Burnett testified that they then went and picked up Turner. Burnett stated that once they arrived at Turner's house, he stayed in the car while Gilmore and the defendant went inside and talked to Turner. A few minutes later, all three returned to the car. When they returned, Burnett was sitting on the hood of the defendant's car. He stated that Gilmore, Turner and the defendant were talking about how to get Barger and Carlson up to the spot so that the defendant could fight Barger. Burnett stated that Turner devised a plan to use the defendant's cell phone to call Barger and get him to meet him to smoke marijuana. If asked, Turner would tell Barger that he "took" the cell phone from the defendant so that Barger's suspicions would not be aroused. Burnett also testified that Gilmore pulled out the gun

and stated that this was what he had for Carlson if he attempted to intervene in the fight between Barger and the defendant. Gilmore then gave the defendant the gun.

Burnett testified that Turner and Gilmore rode together in the Jeep, and he rode with the defendant in the defendant's car to the spot. He stated that he never heard a conversation between Turner and Barger on the cell phone. Turner told the defendant not to follow him over to the spot in his car. Gilmore and Turner continued on in the Jeep down the gravel road behind the church. Burnett stated that he and the defendant parked his car close to the church and near a semi-trailer, where it was out of sight to any approaching cars.

Burnett testified that he and the defendant walked from the defendant's car, along the gravel road, back to the area where Turner's Jeep was located. Gilmore, Turner, Burnett, and the defendant talked for about fifteen minutes. At one point, Turner made a phone call to see if Barger and Carlson were still coming. Approximately two minutes after Turner made the second phone call, Barger's car was spotted. Burnett stated that he and the defendant were crouched in the grass just off of the road as Barger and Carlson pulled up next to Turner's Jeep, got out, and got into the Jeep behind the driver's side door.

Burnett testified that after Barger and Carlson got into the Jeep, the defendant opened the passenger door and pointed the gun at Gilmore and Turner. The defendant told Turner to give him his phone back. Burnett stated that Barger and Carlson got out of the Jeep. Carlson got out and moved behind and away from the Jeep, while Barger began backing away from the front of the Jeep. The defendant pointed the gun at Carlson. At the time, Burnett yelled at the defendant, asking him why he was pointing the gun at Carlson. According to Burnett, Carlson threw his arms up in the air and took a step toward the defendant and the defendant shot him. Burnett testified that Carlson was facing the defendant, approximately five feet away, and took a step toward him when the defendant fired.

Burnett testified that after he saw the defendant shoot Carlson, he turned around and ran. He stated that he heard two more shots as he ran from the scene to his house which was located nearby. Two minutes later, Gilmore and Turner arrived at Burnett's house, and Turner dropped Gilmore off. Five minutes after the shooting, the defendant arrived at Burnett's house, looking for Turner. Burnett testified that he was angry about the shooting and tried to open the defendant's door to talk to him, but the defendant locked his doors and drove away. After the defendant left, two other individuals, Robert Caldwell and Anthony Glover, came over to Burnett's house and told them that they heard that Barger had been shot. Burnett stated that prior to Caldwell and Glover's arrival, he and Gilmore had changed their clothes in an attempt to make it appear as though they had been sleeping. When Caldwell and Glover arrived, Burnett and Gilmore acted as though they had not heard anything about the incident, and expressed their desire to go to the hospital with the two men.

Burnett testified that after they arrived at the hospital, they did not tell anyone who had shot Barger. Burnett admitted that he was scared and did not want to get into trouble because he was already on juvenile probation. Burnett stated that he and Gilmore were initially questioned by

Investigator Huckleby and told him that they did not know anything. Eventually, the two left with Investigator Huckleby to try and find Carlson at either his mother's house or his brother's house. Burnett rode in the car with Investigator Huckleby, Gilmore, Caldwell, and Glover. During the search for Carlson, neither he nor Gilmore admitted that they knew where Carlson was located. After searching unsuccessfully for Carlson, the four men were taken to the police station. Burnett testified that even after Investigator Huckleby questioned him again at the police station, he continued to maintain that he did not know anything about Carlson's whereabouts. Burnett was initially released by Investigator Huckleby but was later brought back to the police station for further questioning. During the second round of questioning, Burnett finally broke down and told Investigator Huckleby what had occurred.

On cross-examination, Burnett testified that the defendant had expressed his intention to beat up Barger if he could. Burnett stated that the only reason the gun was obtained was to keep Carlson in line if Barger and the defendant got into a fight. Burnett stated that he did not know anything about guns, and he did not know where shell casings go after the bullets are fired. He also stated that he did not know how a shell casing came to be in the defendant's car. Burnett testified that the plan never included shooting or killing anyone.

Burnett testified that he pled guilty to being an accessory after the fact which carried a penalty of up to two years in confinement, and to facilitation to commit attempted first degree murder which carried a penalty of up to ten years in confinement. The two convictions were set to run concurrent to one another. In addition, Burnett stated that he also pled guilty to facilitation, conspiracy to commit first degree murder which carried a penalty of up to ten years in confinement. This conviction was set to run consecutively to the facilitation to commit attempted first degree murder and accessory after the fact convictions, giving Burnett a possible total of twenty years in confinement. Burnett stated that he had been released on bond, and was awaiting sentencing from the trial court.

Robert Caldwell testified that on the night of the shooting, he and a friend, Anthony Glover, were on the way to a friend's house when they received a call from Christopher Barger's sister who told them that Barger had been shot. Caldwell and Glover drove by Barger's house and saw police and an ambulance. They then drove to Burnett's house where they encountered Gilmore and Burnett in sleeping clothes, outside on the back porch of Burnett's house. Caldwell stated that both Gilmore and Burnett seemed surprised at the news that Barger had been shot when he told them.

Caldwell testified that Burnett and Gilmore expressed their desire to go to the hospital with them, and all four men got into Caldwell's car and went to the hospital together. Caldwell said that neither Gilmore nor Burnett said anything about Carlson. After they arrived at the hospital, Caldwell continued to call around to see if anyone had seen Carlson. Caldwell was finally able to reach Turner on the cell phone. He asked Turner if he had seen Carlson, and Turner replied, "He's dead in the parking lot." Caldwell stated that Turner would not elaborate on Carlson's location. Caldwell also stated that as soon as he got off the phone with Turner, he went and told Investigator Huckleby what he knew. Caldwell stated that Investigator Huckleby took Caldwell, Gilmore, and Burnett to

look for Turner. After receiving a return call from Turner, Investigator Huckleby picked up Turner and the five men followed Turner's directions to the spot behind the church and saw Carlson's body lying on the ground.

Larissa Morgan testified that she was the defendant's girlfriend and that the defendant was the father of her nine-month old baby. She stated that she was with the defendant until about 8:15 p.m. on March 28, 2005, when the defendant dropped her off at her house. Later that evening, she stated that the defendant called her and said "I did it." She explained that the defendant told her he shot Carlson and Barger. She stated that he sounded very upset and believed that he was crying. On cross-examination, she stated that in subsequent phone calls, the defendant would say he did it, and then say that he had not done it. She also stated that when she asked the defendant if Barger and Carlson were alright, the defendant told her that Barger got back up, ran to his car and left. The defendant told her that Carlson did not get back up.

Investigator Joseph Huckleby testified that he had worked as an investigator with the major crimes department of the Knoxville Police Department for more than eight years and had worked on approximately seventy-five to one hundred homicide cases. Investigator Huckleby stated that on March 28, 2005, he got a call to respond to a shooting. After arriving at the scene, he learned that the victim, Christopher Barger, had been taken to the hospital. Investigator Huckleby went to the hospital where he learned that Barger was undergoing surgery under general anesthesia. However, several of Barger's friends were present at the hospital.

Investigator Huckleby testified that he initially spoke with Anthony Burnett and Demetrius Gilmore, neither of whom provided him with any information regarding the shooting. Investigator Huckleby stated that he was stopped on his way out of the hospital by Robert Caldwell, one of Barger's friends. Caldwell informed him about Dwayne Turner's involvement in the shooting, and told Investigator Huckleby that another individual, Jonathan Carlson, had been shot and killed as well. Investigator Huckleby left the hospital with Caldwell, Gilmore, and Burnett and went to Turner's grandmother's house to look for Turner. He did not find Turner, but he left his cell phone number with Turner's mother and grandmother and told them that it was important that he speak with Turner immediately. Fifteen minutes after leaving Turner's grandmother's house, he received a call on his cell phone from Turner, whom he met and picked up, and drove as fast as possible to the spot behind the Word Afire Baptist Church. Investigator Huckleby testified that Turner told him that Carlson had been shot and left on the ground. Investigator Huckleby stated that he was trying to arrange for Emergency Medical Services (EMS) to meet him at the scene in case Carlson might still be alive.

Investigator Huckleby testified that upon arriving at the scene, he checked Carlson for vital signs and found none. From a quick visual inspection, it appeared that Carlson had suffered considerable blood loss from his nose and mouth. EMS arrived soon thereafter, along with other investigators. Investigator Huckleby stated that he took initial steps to secure the crime scene and began a crime scene log, recording which detectives and investigators were present at the scene, what time they arrived, and what evidence was being cataloged and collected. About an hour after



arriving at the scene, Investigator Huckleby had Turner exit the car and walk the scene with him as he told Investigator Huckleby exactly what had occurred. After walking Turner through the crime scene, Investigator Huckleby drove back to the police station with Turner, Burnett, and Caldwell and took their statements.

Investigator Huckleby testified that after taking statements from the young men, he left the police department and arrived at the defendant's home at 5:00 a.m. Upon arrival, he went downstairs to the defendant's bedroom to wake him. The defendant appeared to be asleep. The defendant's parents consented to a search of their home, which he conducted. Investigator Huckleby had the forensic crime team process the house and the defendant's car. A .22 shell casing was found inside the defendant's car. However, the police were unable to locate a gun in the defendant's house or car. The defendant was then taken to the police station.

Investigator Huckleby testified that the defendant and his parents were advised of his *Miranda* rights, voluntarily waived those rights, signed a written waiver, and agreed to talk to Investigator Huckleby without an attorney present. The defendant admitted that he and Burnett were concealed in the tall grass just off of the road where the cars were parked, and that he carried the pistol in his waistband. The defendant told Investigator Huckleby that Carlson put his hand out, and he shot him "like three times, and then seeing Chris run over there, I chased after him and shot him just - I emptied the clip - I emptied the clip, shot till there were no more bullets." Investigator Huckleby stated that the defendant never told him that Carlson was coming at him when he shot, or that he was scared of him. With regard to the gun, the defendant told Investigator Huckleby that "I just bought it off somebody over there somewhere in the hood where I knew they would be around. I started - I started asking people to get me one." The defendant told Investigator Huckleby that Barger and Carlson had stolen money from him, and the defendant told him about his fight with Christopher Barger in the Big Lots' parking lot. The defendant cited those events as reasons why he shot Barger. Investigator Huckleby stated that the defendant did not seem particularly worried or troubled during the interview as he described what had occurred.

Investigator Huckleby testified that after taking the defendant's statement, he took the defendant into custody. He then re-interviewed Anthony Burnett. Investigator Huckleby stated that during this interview, Burnett was visibly upset, crying, concerned about going to jail, troubled that the shooting had occurred, and felt bad about not having said anything when he first encountered Investigator Huckleby at the hospital. Investigator Huckleby also testified that he went back out to the scene three or four times and verified that the location of the cars were as they were reported to him by Turner, Gilmore, and Burnett.

On cross-examination, Investigator Huckleby testified that he learned that no more than three shots were fired, which contradicted the defendant's statement that he shot Carlson three times, Barger twice, and continued firing "till he emptied the clip." Investigator Huckleby admitted that he went to the location described as the house where Gilmore obtained the gun and was unable to locate a Maurice or Marquis. Investigator Huckleby stated that he met with the renters of the house

and contacted the landlord, and none of those individuals knew anyone named Marcus, Maurice or Marquis.

Dr. Darinka Mileusnic-Polchan testified that she was an Assistant Professor of Pathology at the University of Tennessee Medical Center and an Assistant Chief Medical Examiner for Knox County. Dr. Mileusnic-Polchan performed the autopsy of Jonathan Carlson and determined that Carlson died as a result of a single gunshot wound to the chest. According to Dr. Mileusnic-Polchan, the bullet traveled through the right chest wall, perforated the lung, and caused bleeding in the right chest cavity. Dr. Mileusnic-Polchan was able to recover the bullet fragment from Carlson's body. She testified that the trajectory of the bullet indicated that it traveled from right to left and slightly downward as it passed through the body. In her view, Carlson was alive for some time after he was shot and would have breathed in and swallowed quite a bit of blood as a result of his injuries. Dr. Mileusnic-Polchan opined that if Carlson had received treatment within a short amount of time, he likely would have survived. She also concluded that based upon the angle of the gunshot wound, it was her opinion that Carlson was not facing the shooter when he was shot. She also testified that based on the position of the body, he was probably crawling or moving after the shooting.

The defendant testified that he knew the co-defendants and the other victim Jonathan Carlson. He stated that he would often smoke marijuana, and that around the time of the shooting, he would smoke marijuana every day. He stated that he frequently met with the other five men at the spot to smoke marijuana. He testified that Barger, along with Gilmore and Carlson, stole \$300 from his bedroom approximately nine months before the shooting occurred. He stated that after calling Barger on his cell phone, and having his father call Barger, he was unable to get any resolution of the issue and eventually dropped it.

The defendant testified that the incident at the convenience store, where the defendant dropped Barger off and refused to pick him up, occurred approximately two weeks before the shooting. Nearly two weeks later, Gilmore and the defendant were riding together in the defendant's car when they met up with Barger and Carlson in the Big Lots' parking lot. He stated that both Carlson and Barger came over to talk to him at his car, and he attempted to get out of the car to talk to Barger. The defendant stated that Barger was irate and cussed at him, even after the defendant tried to explain that he had left Barger at the store because he wanted to know who had stolen his money. The defendant also stated that because Carlson was standing behind Barger, he sat back down in the car. Barger started hitting him in the head. He stated that he did not fight back at Barger because Carlson was standing right behind him. The defendant stated he was hit four or five times, before Barger finished by saying, "[t]hat's just a piece of it." The defendant believed that Barger intended to continue the fight at a later point. The defendant left Big Lots after the altercation.

The defendant testified that the next day, March 28, 2005, the day of the shooting, he hung out during the day with his brother-in-law and his girlfriend, Larissa Morgan. The defendant stated that he dropped Morgan off at her home around 8:00 p.m. that evening and went to Anthony Burnett's house. According to the defendant, Burnett told him to work things out with Barger, to try and talk it out. The defendant stated that Burnett suggested getting a gun in case Barger and

Carlson tried to do more than talk. Specifically, the defendant stated that Burnett told him that “if [he] had a gun, that nobody would be crazy enough to mess with [him].”

The defendant testified that it was Burnett, not Gilmore who called someone, and took the defendant over to East Knoxville where Burnett got out of the car, went up to an individual, gave him some money and the individual gave Burnett a gun. The defendant stated that he called Barger’s phone at one point, which was answered by Carlson. The defendant expressed his desire to meet and talk with Barger, and Carlson stated that he would check with Barger and he told the defendant to call back. The defendant stated that when he called back, Barger answered, cussed him out and hung up the phone.

The defendant testified that after a meeting was set up, the defendant drove to the spot with Tony Burnett, who still had the gun. The defendant stated that Burnett asked the defendant if he knew how to use the gun, and the defendant told him he did not. Burnett then showed him how to use it by cocking it, pointing it out the window and firing it as they traveled over a bridge. The defendant testified that Burnett then handed him the gun and he put it in his waistband. When they arrived at the spot, the defendant parked out of sight behind the church and close to the semi-trailer on the asphalt. His lights were off so that they would not be seen by police or anyone else.

The defendant testified that Gilmore and Turner arrived a short time later and drove down the gravel road and parked. The defendant and Burnett did not wait long before the car with Barger and Carlson arrived. He and Burnett walked over toward the gravel area. As he made his way over there, he saw Barger and Carlson get out of their car and into the car with Gilmore and Turner. The defendant stated that he walked up to Turner’s car and spoke to Barger and Carlson inside the car. The defendant told Christopher Barger that they “needed to work this out.” He stated that he did not have the gun in his hand; the gun was still in his waistband. According to the defendant, Barger and Carlson did not say anything to the defendant as they got out of the car. The defendant stated he was near the front passenger door of the car, and when Barger and Carlson got out of the car, Carlson moved toward the back side of the car and Barger moved toward the front of the car on the driver’s side. The defendant stated that Carlson was cussing at him the whole time, and the defendant believed that the two men were going to attack him.

The defendant testified that he told Carlson to stop, and lifted his sweatshirt to show him the gun. Carlson told the defendant, “I’m not scared of that f’ing gun.” The defendant backed up towards the grass, and pulled the gun out as he backed away. The defendant stated that Carlson hunched down, like a football tackle and started to leap at him. The defendant stated that he pulled the trigger one time. After shooting Carlson, the defendant stated that he saw something move out of the corner of his eye and fired at Barger. The defendant stated that after shooting at Barger, he took off running. He stated that he ran to his car and got into the car with Burnett who was already in the driver’s seat. The two drove back to Burnett’s house. Burnett demanded the gun back and the defendant gave it to him. After Burnett got out of the car, the defendant drove home to his house and pretended to be asleep until the police arrived early the next morning.

The defendant testified that when he went to the spot, he was planning on working things out with Barger and Carlson, and he had no intention of shooting them. He stated that the gun was for protection, because Burnett told him that if he had it, no one would be crazy enough to mess with him. He also stated that he lied during his statement to Investigator Huckleby in order to protect Burnett.

On cross-examination, the defendant testified that when he shot Carlson, Carlson was facing him, “crunched down like a football tackle” when he was shot. The defendant stated that he did not know how the medical examiner was able to determine that the Carlson was not facing him when he was shot. He stated that immediately after shooting Carlson, he saw movement out of the corner of his eye to the right, and he pulled the trigger while the gun was still raised. The defendant stated that it was pure coincidence that he hit Barger because he had never fired a gun prior to that day. He denied walking behind Barger after shooting him, and denied pulling the trigger again. He stated that he fired two shots, and did not remember seeing Barger get up after he shot him.

The defendant also testified on cross-examination that after dropping Burnett off at his house, he called Burnett later, and then tried to find Turner. The defendant did not recall receiving a phone call from Turner. He was also unable to recall talking to his girlfriend, Larissa Morgan, or telling her that he had shot Barger and Carlson. He admitted that out of the several calls he made after the shooting, none of them were to 911. The defendant also admitted that he told Investigator Huckleby a different version of events when he was questioned and left out a large part of the story.

After the defendant testified, the case was presented to the jury. The defendant was convicted of attempted first degree murder for the shooting of Christopher Barger, and voluntary manslaughter for the shooting and killing of Jonathan Carlson.

Christopher Barger testified at the sentencing hearing that he continued to live in fear, and that he would live with bullet fragments in his neck for the rest of his life. In addition, he stated that he had lost his best friend, Jonathan Carlson. The trial court stated that it did not find the defendant’s version of events credible and sentenced the defendant to six years for the voluntary manslaughter conviction, and to twenty-two years for the attempted first degree murder conviction. The defendant filed a motion for new trial which was denied by the trial court.

## **II. ANALYSIS**

On appeal, the defendant argues that there was insufficient evidence to support the defendant’s conviction beyond a reasonable doubt. Specifically, the defendant argues that because he was convicted of voluntary manslaughter for the death of Jonathan Carlson, it is not possible that the defendant possessed the requisite mental state to support a conviction for the attempted first degree murder of Christopher Barger.

Before addressing the merits of the defendant’s issue on appeal, we must first address the state’s argument that the defendant did not timely file his notice of appeal. It appears from the record

that the defendant filed his notice of appeal more than thirty days after the court's denial of his motion for new trial. Rule 4(a) of the Tennessee Rules of Appellate Procedure provides that "the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within thirty days after the date of entry of the judgment appealed." However, a notice of appeal "is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). Waiver should only occur when "the interest of justice" mandates waiver. *See State v. Scales*, 767 S.W.2d 157 (Tenn. 1989). Because the issue before this court concerns the sufficiency of the convicting evidence against a defendant convicted of attempted first degree murder, we conclude that waiving the timely filing requirement serves the interest of justice and we will address the defendant's claims on the merits. *See* Tenn. R. App. P. 4(a).

Upon review, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "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); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see* Tenn. R. App. P. 13(e). In contrast, the jury's verdict, approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

A defendant's capacity to form the requisite mental state to commit an offense is a proper issue in criminal prosecutions because the law in Tennessee provides that "[n]o person may be convicted of an offense unless . . . the culpable mental state required is proven beyond a reasonable doubt." Tenn. Code Ann. § 39-11-201(a)(2); *see State v. Hall*, 958 S.W.2d 679, 689 (Tenn. 1996). The defendant was convicted of attempted first degree murder. In cases where the defendant has been charged with the attempted commission of a crime, there must be evidence that the defendant "[has acted] with the kind of culpability otherwise required for the offense" and "[has acted] 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). Criminal attempt also occurs when the defendant "[a]cts with the intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." Tenn. Code Ann. § 39-12-101(a)(3).

First degree murder is defined as the “premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a)(1). A premeditated killing is one “done after the exercise of reflection and judgment.” Tenn. Code Ann. § 39-13-202(d). The statute also states:

“Premeditation” means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

*Id.*

Our supreme court has ruled that “[t]he element of premeditation is a question for the jury which may be established by proof of the circumstances surrounding the killing.” *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); *see State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003); *see also State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000). Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances of the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997). Our high court has identified circumstances which support a finding of premeditation:

There are several factors which tend to support the existence of these elements which include: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing.

*Id.* A defendant’s failure to render aid to a victim can also indicate the existence of premeditation. *State v. Lewis*, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000). Establishment of a motive for the killing is another factor from which the jury may infer premeditation. *State v. Nesbit*, 978 S.W.2d 872, 898 (Tenn. 1998). In addition, this court has previously noted that a defendant who lies in wait for a victim demonstrates the capacity for premeditation. *State v. Mabel J. Longmire*, No.1999-00260CCA-R3-CD, 2001 WL 128561, at \*5 (Tenn. Crim. App., at Jackson, Feb. 15, 2001), *perm. app. denied* (Tenn. Jun. 4, 2001).

The defendant was also convicted of voluntary manslaughter. Voluntary manslaughter is “the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” Tenn. Code Ann. § 39-13-211(a). An intentional act occurs “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 with a “knowing” mental state “when the person is aware that the conduct is reasonably certain to cause the result.” Tenn. Code Ann. § 39-11-302(b). The determination of whether “adequate provocation”

for an offense exists is a question left to the jury as the trier of fact. *See State v. Johnson*, 909 S.W.2d 461, 464 (Tenn. Crim. App. 1995).

#### **A. Christopher Barger**

Upon review of the record, we conclude that ample evidence exists to permit a rational trier of fact to find the essential elements of attempted first degree murder with regard to Christopher Barger, while also finding that the defendant was guilty of the voluntary manslaughter of Jonathan Carlson.

Viewing the evidence in a light most favorable to the state, the circumstances surrounding the shooting support a jury inference that the defendant acted with premeditation in his attack on Christopher Barger. The circumstances surrounding the offense include the defendant's motive, the scheme devised to lure Barger to the secluded area, the steps the defendant took to obtain a gun, the act of lying in wait in concealment on the side of the road with a gun as Barger arrived at the scene, the defendant's use of the gun on Barger who was unarmed, the disposal of the gun after the shooting, as well as the defendant's calmness and failure to render aid after the crime. It was also possible for jurors to infer from the evidence that it was the defendant who instructed Barger not to run before shooting him. *See Bland*, 958 S.W.2d at 660.

In his motion for a new trial, the defendant argued that the evidence could not sustain his conviction for attempted first degree murder because he had only been convicted of voluntary manslaughter for the death of Jonathan Carlson. Specifically, the defendant argued that because Carlson was shot first and the defendant was found guilty of voluntary manslaughter for his death, the heat of passion could not have dissipated in the mere seconds that passed between that shooting and the subsequent shooting of Christopher Barger. The state argued in response that if the defendant's design to kill was formed with premeditation, it was immaterial that the accused was in a state of passion when the design was carried into effect. The trial court denied the defendant's motion for a new trial and stated the following with regard to the shooting of Mr. Barger:

[The defendant] had to - after he shot Mr. Carlson, had to leave there, go around the front [of the car], and . . . testimony was suggestive that he got all the way around the car before he shot Mr. Barger and then . . . attempted to pull the trigger a couple of more times while Mr. Barger was on the ground.

I think the jury listened to all these [sic] evidence - all this evidence. I think we instructed them properly on what the state of the law is, and I'm satisfied that there was sufficient proof to justify this verdict.

The record also reflects that prior to jury deliberation, the trial court issued the following jury instruction on premeditation:

A premeditated act is one 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 pre-exists in the mind of the accused for any definite period of time.

If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill was first formed during the heat of passion, but the accused commits the act after the passion has subsided.

This jury instruction, when combined with the facts enumerated above, was sufficient to permit jurors to infer that “the intent to kill” was formed prior to the act. With the trial court’s instruction that it was “not necessary that the purpose to kill pre-existed in the mind of the [defendant] for any definite period of time,” it was possible for jurors to determine that the defendant acted with premeditation in the shooting of Christopher Barger, even if they concluded that the defendant possessed a different mental state when he shot and killed Jonathan Carlson. *See* Tenn. Code Ann. § 39-13-202(d); *see also Bland*, 958 S.W.2d at 660.

### **B. Jonathan Carlson**

Conflicting testimony and evidence exists regarding the defendant’s shooting of Jonathan Carlson. Both the defendant and Anthony Burnett testified that Carlson was facing the defendant when the defendant shot him. The defendant testified that Carlson was in a football stance, crouched as though about to tackle the defendant. The defendant also testified that he attempted to dissuade Carlson from attacking him before he shot him. Anthony Burnett testified that Carlson was facing the defendant, with his hands up and possibly reaching toward the defendant when the defendant shot him. However, according to Christopher Barger, Carlson was moving away from the defendant and had his back turned to the defendant when he was shot. This version of events was corroborated by the testimony of the medical examiner who performed the autopsy on Carlson and concluded that based upon the angle and trajectory of the bullet wound, Carlson had been shot from behind.

Because questions of fact existed regarding the circumstances under which the defendant shot Jonathan Carlson, it was possible for jurors to infer that the defendant did not possess a prior intent to shoot or kill him until he was provoked. It was possible for jurors to determine that the defendant acted “in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner,” because the defendant had not planned to shoot Carlson and was possibly afraid of being attacked by him. *See* Tenn. Code Ann. § 39-13-211(a).

Finally, because questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court, we will not disturb the jury verdict in this case. *See Bland*, 958 S.W.2d at 659. Similarly, we are prohibited from replacing the jury’s



inferences drawn from the circumstantial evidence with our own. *See Reid*, 91 S.W.3d at 277. In addition, the defendant has not satisfied his burden of demonstrating why the evidence does not support the jury's verdict in this case. *See Carruthers*, 35 S.W.3d at 557-58; *see also Tuggle*, 639 S.W.2d at 914. Therefore, we conclude that the jury did not err in finding that the sufficient evidence existed to support the defendant's conviction for the attempted first degree murder of Christopher Barger and the voluntary manslaughter of Jonathan Carlson. The defendant is without relief as to this issue.

### **CONCLUSION**

Based upon the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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J.C. McLIN, JUDGE