IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 4, 2018

STATE OF TENNESSEE v. JACQUEZ RUSSELL

Appeal from the Criminal Court for Shelby County
No. 14-03382 Glenn Wright, Judge

No. W2017-02184-CCA-R3-CD

The Defendant, Jacquez Russell, was found guilty by a Shelby County Criminal Court jury of attempt to commit first degree premeditated murder, a Class A felony, and employing a firearm during the commission of a dangerous felony, a Class C felony. *See* T.C.A. §§ 39-13-202 (2018) (first degree murder), 39-12-101 (2018) (attempt), 39-17-1324 (2018) (employment). The trial court sentenced the Defendant as a Range I, standard offender to consecutive terms of sixteen years for attempted first degree murder and six years for the firearm conviction, for an effective twenty-two-year sentence. On appeal, the Defendant contends that (1) the evidence is insufficient to support his convictions and (2) the trial court erred by limiting his closing argument. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Joseph A. McClusky (on appeal), Memphis, Tennessee, and Terrell Tooten (at trial), Cordova, Tennessee, for the appellant, Jacquez Russell.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Muriel Malone, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant's convictions relate to the November 16, 2013 shooting of Lemink Mitchell. At the trial, Mr. Mitchell testified that he was age nineteen and that he was age fourteen or fifteen at the time of the shooting. He said that although he recognized the Defendant, Mr. Mitchell did not know the Defendant personally. Mr. Mitchell said that, on the day of the shooting, he walked to "YaYa" grocery store to purchase cigarettes for his

sister and that as he walked inside the store, he saw the Defendant walking out of the store and getting into a car. Mr. Mitchell said that the Defendant said something, although Mr. Mitchell could not recall what the Defendant said other than it involved curse words. Mr. Mitchell said that he continued walking and that, when he left the store, he saw the Defendant hanging out of a car and shooting a gun. Mr. Mitchell said that the Defendant sat on the passenger-side window opening. Mr. Mitchell said that he was inside the store for about ten minutes and that he saw the Defendant again about ten minutes after he left the store.

Mr. Mitchell testified that the Defendant was in the passenger seat of the car and that he did not see the driver. Mr. Mitchell said that the car pulled out of the parking lot when he walked out of the store. He said that he walked across the street, that the car pulled behind him, that he heard one gunshot, that he "looked over," and that he saw "fire popping out the gun and [the Defendant]." Mr. Mitchell said that the Defendant fired five or six rounds and that the last round struck Mr. Mitchell's leg. Mr. Mitchell said that although he could not see the driver, he saw the Defendant holding the gun. Mr. Mitchell said that he fell initially but that he was able to hop to his friend's home where he "blanked out." He said that two detectives questioned him when he regained consciousness at the hospital and that he identified the Defendant in a photograph lineup. He said that he stayed in the hospital for two days and that he received 300 stitches. He said that he had lost jobs because he could not stand as long as he could before the shooting.

Mr. Mitchell testified that he did not know "Ricardo" Maxwell or Douglass Pye. Mr. Mitchell said that he had known who the Defendant was for about two months at the time of the shooting. Mr. Mitchell said that although he did not know the Defendant personally, he thought the Defendant had a problem with him when he first saw the Defendant at the store. Mr. Mitchell said that "they got into to it" with Mr. Mitchell's sister at some point before the shooting. Mr. Mitchell thought the car was "a smoke gray Avenger."

On cross-examination, Mr. Mitchell testified that the incident was not "a stop and shoot" but rather was a "drive-by" shooting. He denied speaking to police officers at the scene and said he only spoke to the police at the hospital.

Recareo Maxwell testified that he was age nineteen or twenty at the time of the shooting and that he did not know the Defendant well at the time of the shooting. Mr. Maxwell said that the night of the shooting was the first time he and the Defendant had spoken. Mr. Maxwell said that on the day of the shooting, he was at his girlfriend's home and that the Defendant and "the other dude," whom he referred to as "D.P.," were there, too. Mr. Maxwell said that the Defendant and D.P. asked if Mr. Maxwell wanted to go to the store with them. Mr. Maxwell said he agreed to go, although he did not know the Defendant and had never seen D.P. previously. Mr. Maxwell did not recall the make and model of the

car but recalled that D.P. drove the gray car and that the Defendant sat in the front passenger seat. Mr. Maxwell said that they bought cigarettes at the store and that, on the way out, the Defendant looked at someone and said, "this the n---- he got into it with" and "that . . . [he] snitched on my n---- or whatever." Mr. Maxwell did not recognize the man to whom the Defendant referred. Mr. Maxwell said that he, the Defendant, and D.P. returned to the gray car and that the Defendant hung out the passenger-side window and fired a gun. Mr. Maxwell said that although the Defendant shot toward the man they passed as they walked out of the store, the Defendant was not aiming at the man. Mr. Maxwell did not think the man had been shot initially because the man continued walking during the shooting.

Mr. Maxwell did not recall how fast the car moved during the shooting but testified that before the shooting, the Defendant said, "I'm fixin to get the n----," as D.P. drove the car. Mr. Maxwell said that after the shooting, the Defendant and D.P. wanted to purchase marijuana. Mr. Maxwell requested that the men drop him off at his girlfriend's home because he "ain't with none of this." Mr. Maxwell said he did not know the Defendant had a gun that night. Mr. Maxwell said that after the men bought marijuana, they drove him to his girlfriend's home. Mr. Maxwell identified a photograph of D.P., who drove the car. On cross-examination, Mr. Maxwell stated that he had not been charged with a crime in connection with this incident.

Memphis Police Lieutenant Kevin Brown testified that he was the lead investigator in this case and interviewed the Defendant. Lieutenant Brown stated that the Defendant denied participating in the shooting and identified "Cargo" as the shooter. Lieutenant Brown said the Defendant stated that he had just met Cargo, that he did not know why the victim was "chosen," that "they" were in a gray car, and that he sat in the front passenger seat of the car. Lieutenant Brown said that the Defendant admitted he had a .38-caliber revolver and had purchased marijuana after the shooting. Lieutenant Brown said that the Defendant described the shooting as follows:

> We went to the store. Me and D.P. got some cigars to roll our weed. The boy in the red jacket walked past us with some . . . ear phones on. I tried to get his attention to see if he knew who sold weed. He kept walking. I said . . . let's pull out. We were getting ready to go get some money. Cargo said . . . go across the street . . . . We pulled out and stopped by a stop sign. Then I heard shots and Little Mek dropped. We pulled off and got some weed. I told my girlfriend that Cargo shot someone.

Lieutenant Brown said that the Defendant identified D.P. as Douglass Pye and denied "having problems" with the victim, whom the Defendant called Little Mek. Lieutenant Brown said that he spoke to the victim at the hospital on the day after the shooting.

Memphis Police Crime Scene Officer Charles Cathey testified that he saw a blood trail on the sidewalk leading to a home and gunshots in the front window of the home. Officer Cathey said that he saw what he believed was blood on several cars and the yard of the home. He identified photographs of the blood trail, a bloody brown jacket and a shoe found outside the home, and two cartridge casings found on the street. He said that a firearm was not found but that the cartridge casings were for a nine-millimeter semi-automatic handgun. He identified photographs of the home showing two bullet holes in the windows.

Upon this evidence, the Defendant was convicted of attempt to commit first degree murder and employing a firearm during the commission of a dangerous felony. This appeal followed.

I. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his convictions. His argument refers to evidence related to identity of the perpetrator and intent. The State responds that the evidence is sufficient. We agree with the State.

As a preliminary matter, the Defendant's brief recites the appropriate legal authority related to the standard of review and to the definitions of attempted first degree murder and employing a firearm during the commission of a dangerous felony. However, the argument for relief contains neither citations to the record nor any substantive analysis relative to why the Defendant is entitled to relief for each conviction. The Defendant's argument in its entirety is as follows:

> Appellant submits that the evidence in this case does not rise to the level required for conviction. Not only was identity an issue in this case, the question of intent was also brought into question. Mr. Russell submits that the evidence is not sufficient to establish guilt beyond a reasonable doubt as to each conviction.

Tennessee Rule of Appellate Procedure 27(a)(7)(A) requires that an appellant's argument contain "citations to the authorities and appropriate references to the record . . . relied on." The rules of this court provide, "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived[.]" Tenn. Ct. Crim. App. R. 10(b). Notwithstanding the deficiency in the Defendant's brief, we will consider the issue. We caution counsel, however, that appellate review is frustrated by the failure to identify the basis in the record for the argument presented and that compliance with the Rules of Appellate Procedure is expected.

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see also State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

A. Attempt to Commit First Degree Murder

A defendant commits criminal attempt when he acts "with the kind of culpability otherwise required for the offense . . . [and] [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part[.]" T.C.A. § 39-12-101(a)(2). Relevant to this case, first degree murder is the unlawful, intentional, and premeditated killing of another. *Id.* §§ 39-13-201 (2018), 39-13-202(a)(1). In the context of first degree murder, intent is shown if the defendant has the conscious objective or desire to cause the victim's death. *State v. Page*, 81 S.W.3d 781, 790-91 (Tenn. Crim. App. 2002); T.C.A. § 39-11-106(a)(18) (2018) (defining intentional as the "conscious objective or desire to engage in the conduct or cause the result"). A premeditated act is one which is

> done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d). The question of whether a defendant acted with premeditation is a question of fact for the jury to be determined from all of the circumstances surrounding the

killing. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Proof of premeditation may be shown by direct or circumstantial evidence. *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). "It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time." T.C.A. § 39-13-202(d). As a result, the jury "may infer premeditation from the manner and circumstances of the killing." *State v. Jackson*, 173 S.W.3d 401, 408 (Tenn. 2005); *see State v. Vaughn*, 279 S.W.3d 584, 595 (Tenn. Crim. App. 2008). Our supreme court has provided a list of factors which "tend to support the existence" of premeditation and deliberation. *See Bland*, 958 S.W.2d at 660. The list includes 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*. (citing *State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992); *State v. West*, 844 S.W.2d 144, 148 (Tenn. 1997)).

"Identity of the perpetrator is an essential element of any crime." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Circumstantial evidence alone may be sufficient to establish the perpetrator's identity. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The identity of the perpetrator is a question of fact for the jury to determine. *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt[.]'" *Rice*, 184 S.W.3d at 662 (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)).

In the light most favorable to the State, the record reflects that the unarmed victim walked to the store to purchase cigarettes for his sister. As the victim entered the store, the Defendant, Mr. Maxwell, and D.P. left the store, and the Defendant cursed at the victim. Mr. Maxwell testified that the Defendant looked at the victim and said, "this the n---- he got into it with" and "that [the victim] snitched on my n---- or whatever." The victim said that the Defendant had an issue with the victim because "they got into it" with the victim's sister. Afterward, the victim left the store and walked across the street and saw a gray car behind him. The victim heard one gunshot and saw the Defendant firing a gun while sitting on the passenger-side window opening of the gray car. The Defendant fired five or six rounds toward the victim, striking the victim's leg. Mr. Maxwell stated that after leaving the store, he, the Defendant, and D.P. returned to the gray car. Mr. Maxwell heard the Defendant say, "I'm fixin to get the n----," as D.P. drove the car out of the store parking lot, and Mr. Maxwell saw the Defendant hang out of the passenger-side window and fire a gun toward the victim.

The record supports the jury's finding that the Defendant was the perpetrator who fired a gun five or six times at the victim. The victim and Mr. Maxwell each identified the Defendant as the shooter, and the verdicts reflect that the jury credited this testimony.

Likewise, the record supports the jury's determination that the Defendant acted with premeditation and with the intent to kill at the time of the shooting. The Defendant fired multiple gunshots at the unarmed victim. The Defendant's comments to Mr. Maxwell and D.P. about the victim when leaving the store reflect that the Defendant believed the victim had wronged him or the Defendant's friend. The victim, likewise, testified that an issue arose related to the Defendant and the victim's sister at some point before the shooting. Just before the Defendant began shooting at the victim, the Defendant stated that he was "fixin to get the n----," and the jury could have reasonably inferred that this was a declaration of intent to kill the victim. Furthermore, although Mr. Maxwell wanted the Defendant and D.P. to return him to his girlfriend's home immediately after the shooting, the Defendant wanted to purchase marijuana. We conclude that the evidence is sufficient and that the Defendant is not entitled to relief on this basis.

B. Employing a Firearm During the Commission of a Dangerous Felony

"It is an offense to employ a firearm during the . . . [c]ommission of a dangerous felony[.]" T.C.A. § 39-17-1324(b)(1). Attempt to commit first degree murder is defined as a dangerous felony. *Id*. § (i)(1)(A).

The record reflects that the Defendant shot at the victim five or six times. Because the evidence reflects that the Defendant used a firearm during the commission of an attempt to commit first degree murder, we conclude that sufficient evidence supports the Defendant's conviction for employing a firearm during the commission of a dangerous felony. The Defendant is not entitled to relief on this basis.

II. Closing Argument

The Defendant asserts that the trial court erred by prohibiting him from arguing that the present case involved not an attempted first degree murder but rather an aggravated assault. The State responds that the trial court did not err in this regard.

Closing argument is "a valuable privilege that should not be unduly restricted." *Terry v. State*, 46 S.W.3d 147, 156 (Tenn. 2001); *see State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001); *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998). However, closing argument "must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003); *see State v. Jordan*, 325 S.W.3d 1, 64 (Tenn. 2010). A trial court has significant discretion in controlling closing argument, and its decisions relative to the contents of argument may only be reversed upon an abuse of discretion. *Terry*, 46 S.W.3d at 156; *Cauthern*, 967 S.W.2d at 737; *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975).

During the Defendant's closing argument, counsel focused on the evidence relative to the intent to kill as an element of attempted first degree murder. Counsel argued that even if the jury determined that the Defendant was the perpetrator of the offenses, the State had failed to establish that the Defendant intended to kill the victim. Counsel argued,

> And when I say an intent to kill, and the jury instructions spells out, you have to have the intent to kill somebody. So if I intend to kill this person here, Person (A) and I accidentally kill Person (B) there's still the intent to kill because I intended to kill somebody. What you have to ask yourself is was there an intent to kill anybody after hearing the evidence and . . . do you believe that beyond a reasonable doubt. Because if the answer to that is no, then there's nothing really else to consider.
>
> Now, the reason I find that also fascinating is because when the . . . investigators and the police were getting this evidence together and reviewing it, they also reached a conclusion. If you recall that when I asked the –

The State objected, and a bench conference out of the jury's hearing was held. The prosecutor objected to counsel's arguing "in terms of charge and decisions" that were not within the police officer's discretion. Counsel said that he "referred to that" but did not state that the charging determinations belonged to the police officer. The trial court determined that counsel "seem[ed] to be implying that" and sustained the objection, and counsel continued his argument as follows:

> When the police did a review they interviewed the parties[,] right? I think we can all agree on that and they were doing interviews. When I asked [the victim] specifically what did you talk to the police about, . . . He said it was a discussion about an aggravated assault. That's what he testified to. . . .
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> . . . .
>
> My point is when [the deputies] were talking to [the victim] specifically he told this from the witness stand specifically that all the conversation he had with the police was it related to an aggravated assault which he said that [the Defendant] –

The State objected and a bench conference out of the jury's hearing was held. The prosecutor asked, "Judge, did I miss aggravated assault being charged," and the transcript reflects simultaneous talking. The prosecutor stated that counsel could not "argue something that [counsel] did not ask Your Honor to charge. Now it's not relevant." The trial court sustained the objection and stated that counsel could argue what the evidence showed and the

reasonable inferences that could be drawn from the proof. The court instructed counsel not to address "the legal part of this[.]" Counsel continued his argument as follows:

> Based on . . . the State's investigation . . . and what the State's conclusions were . . . . You don't have to take my word on it. We have one here that they have entered into evidence [referring to the Defendant's statements]. So . . . when you go back there if you ask yourself the simple question was there an intent to kill, if you reach the conclusion that there was no intent to kill, then you come back with a verdict of not guilty. And, again, as we discussed earlier, not guilty simpl[y] means that the State did not carry their burden as to what they presented before you.

At the motion for a new trial hearing, counsel argued that his failure to request a jury instruction relative to aggravated assault was not a legal basis for prohibiting him from arguing to the jury that the present case involved an aggravated assault. Counsel noted that aggravated assault is not a lesser included offense of attempted first degree murder. Counsel argued that no law prohibited him from arguing to the jury that counsel believed the evidence showed that this case was, at best, an aggravated assault. The prosecutor asserted that counsel could not instruct the jury relative to the law and that counsel attempted to argue a point of law not included in the final jury instructions. The prosecutor noted that although the trial court stopped counsel from discussing aggravated assault, the court did not provide a curative instruction telling the jurors to disregard counsel's argument and that as a result, the jury disagreed with counsel's argument.

The trial court determined that counsel was permitted to argue what the evidence showed, the inferences that could be derived from the evidence, and "anything else that . . . appears to be relevant." The court found, though, that counsel could not argue "issues that may confound or confuse the jury." The court determined that counsel's argument "about law" not included in the jury instructions "simply complicate[d] it and could [have] possibly confused the jury." The court noted that aggravated assault was not included in the jury instructions and determined that the jurors could not have known the legal definition of aggravated assault without an instruction from the court. The court found that counsel could have argued, without saying aggravated assault, that the State failed to present evidence establishing the charged offense. The court commended counsel's argument and found that the court's limiting counsel from mentioning aggravated assault had no bearing on the outcome of the case. The court believed that the reference to aggravated assault had the tendency to confuse the jury because aggravated assault was not charged in the jury instructions.

As a preliminary matter, the State argued in the trial proceedings and argues on appeal that because the defendant did not request an aggravated assault jury instruction as a lesser

included offense of attempted first degree murder, "aggravated assault was not at issue in the case" and that, as a result, the defense should not have been permitted to argue the evidence "more properly fit the elements of aggravated assault." However, aggravated assault is not a lesser included offense of attempted first degree murder, as counsel properly noted at the motion for a new trial hearing. *See Demonbreun v. Bell*, 226 S.W3d 321, 324 (Tenn. 2007) (determining that although aggravated assault is not a lesser included offense of attempted first degree murder, a defendant who sought an aggravated assault jury instruction as a lesser included offense effectively consented to an amendment of the indictment); *see also Roy Allen Scott v. State*, No. E2011-02021-CCA-R3-HC, 2012 WL 1523824, at *3 (Tenn. Crim. App. Apr. 30, 2013), *perm. app. denied* (Tenn. Aug. 17, 2012); *State v. Christopher Todd Brown*, No. M1999-00691-CCA-R3-CD, 2000 WL 262936, at *2 (Tenn. Crim. App. Mar. 9, 2000) (determining, pursuant to the *Burns* analysis, that aggravated assault is not a lesser included offense of attempted first degree murder because the statutory elements of aggravated assault are not included within the elements of attempted first degree murder), *perm. app. denied* (Tenn. Sept 10, 2001). Therefore, the issue is not whether the defense requested a jury instruction for aggravated assault as a lesser included offense of attempted first degree murder. Rather, the issue is whether counsel was permitted to argue that the evidence was consistent with a specific offense not charged in the indictment or addressed in the jury instructions.

The trial court's reasoning for prohibiting the defense from arguing that the offense established by the proof was aggravated assault, not attempted first degree murder, was that the argument would confuse the jury. Confusing and irrelevant closing arguments are prohibited. *See Burns v. State*, 591 S.W.2d 780, 785 (Tenn. Crim. App. 1979). The final jury instructions are "the sole source of the legal principles needed to guide the jury's deliberations," and, as we have discussed above, the final jury instructions in the present case did not include the legal definition and the requisite elements for establishing the commission of aggravated assault. *See Bara v. Clarksville Memorial Health Systems, Inc.*, 104 S.W.3d 1, 3 (Tenn. Ct. App. 2002); *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83 , 93-94 (Tenn. Ct. App. 1996). Absent an instruction, the jurors were not presented any means of determining whether an aggravated assault had been committed in this case. We note that, during deliberations, the jurors requested the definition of aggravated assault and submitted a question regarding the extent to which intent should be considered in determining the Defendant's guilt. Therefore, we cannot conclude that the trial court abused its discretion by prohibiting counsel from arguing that an aggravated assault occurred in this case.

However, counsel was properly permitted to argue that the prosecution had failed to establish beyond a reasonable doubt each element of attempted first degree murder, namely that the Defendant acted with the intent to kill the victim. Said differently, counsel could have argued that even if the Defendant were guilty of some other criminal offense, insufficient evidence showed that he acted with the intent to kill the victim and could not

have been guilty of attempted first degree murder. The only distinguishing feature of this argument is that the reference to aggravated assault is excluded. In any event, counsel argued after the bench conferences that regardless of the State's investigation and conclusions in this case, the verdict should have been not guilty if the jurors determined that there was no intent to kill and that a not guilty verdict only meant that the State failed to establish each element, including the intent to kill, beyond a reasonable doubt. The Defendant is not entitled to relief on this basis.

Based on the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE