IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 6, 2013

# STATE OF TENNESSEE v. TERRANCE DEMOND MOSES

**Appeal from the Circuit Court for Dyer County**
**No. 11-CR-371 Lee Moore, Judge**

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**No. W2012-02530-CCA-R3-CD - Filed November 20, 2013**

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The defendant, Terrance Demond Moses, was convicted by a jury of first degree (premeditated) murder and of the Class E felony of possession of a handgun after having been convicted of a felony. He was sentenced to life imprisonment for the first degree murder conviction and to a concurrent four years' incarceration for the handgun possession. On appeal, the defendant challenges the sufficiency of the evidence; asserts that the gun was admitted into evidence in error; and contends that the trial court erred in permitting the State to exercise a peremptory challenge against a prospective juror. Having reviewed the record, we discern no error and affirm the judgments of the trial court.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the Court, in which THOMAS T. WOODALL and CAMILLE R. MCMULLEN, JJ., joined.

James E. Lanier, District Public Defender, and Timothy Boxx, Assistant District Public Defender, for the appellant, Terrance Demont Moses.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel E. Willis, Senior Counsel; and C. Phillip Bivens, District Attorney General, for the appellee, State of Tennessee.

## OPINION

## FACTUAL AND PROCEDURAL HISTORY

The defendant was indicted for the murder of seventeen-year-old Jaron[1] Collins, who

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[1]The bulk of the transcript spells the victim's name "Jeron" but the victim is identified as "Jaron"
(continued...)

was shot in the early morning hours of July 30, 2011 at the Parks Thurman housing project in Dyersburg; the defendant was also charged with possession of a handgun after having been convicted of a felony. At trial, the State's theory of the crime was that the defendant had been involved in a dispute with Travis O'Neal, a man who bore a strong resemblance to the victim, and that the defendant had shot the victim, mistaking him for Mr. O'Neal. Casings found at the scene were linked to a gun connected with the defendant; the gun was also linked to casings from a separate incident where the defendant had allegedly fired shots. The defendant argued that Mr. O'Neal, who was unaccounted for at the time of the crime, had fired shots into the home of the defendant's ex-girlfriend and then had shot at the defendant, killing the victim, who was a bystander.

At trial, the State presented the testimony of Angela Nelson, who had had an intermittent romantic relationship with the defendant since her teenage son was a baby. Ms. Nelson testified that, prior to the crime, the defendant had told her that Travis O'Neal had shot at him. On July 29, 2011, Ms. Nelson and the defendant had gone to a friend's house in her blue Buick, and Ms. Nelson's son, DeMarcus, had gone to a party. Ms. Nelson fell asleep and found the defendant had taken her car when she woke up. She contacted him, he returned with her car, and she drove home to her mother and son. Someone then shot into Ms. Nelson's home. She called the police and, while she was speaking to two officers, a dispatch came through regarding a shooting in Parks Thurman.

Ms. Nelson and her son, out of curiosity, went to Parks Thurman and saw the victim's body. Ms. Nelson thought the body was Travis O'Neal, whom she had known all his life and who was a friend of her son's, because of a similarity in hairstyles. The defendant contacted her later that day asking for clothes, which she brought to the home of the defendant's cousin, Taneka Yarbrough Williams. The defendant returned to his girlfriend's home in Milan, where he had been staying. Ms. Nelson then texted him to let him know that he was accused of shooting the victim and of "doing all that shooting in McIver last weekend," to which the defendant responded, "I shot in McIver but ain't killed nobody." On cross-examination, Ms. Nelson testified that when she brought him clothing, the defendant did not seem hurried, did not ask her to take him out of town, and did not ask her to dispose of a gun. He was just returning home to Milan from his visit in Dyersburg.

DeMarcus Nelson, who was nineteen at the time of the trial, testified that the defendant had known him since he was born and been like a father to him. He was aware that the defendant believed that Travis O'Neal had shot at him a few weeks before the homicide. On July 29, 2011, Mr. Nelson was at a party also attended by Mr. O'Neal when

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[1](...continued)
on the indictment.

Mr. Nelson saw his mother's car drive up. The defendant and another man got out of the car. Although Mr. Nelson did not catch everything the defendant said, he heard the defendant say something "about somebody going to die" or heard the "die tonight part." Mr. Nelson did not see a gun but saw the defendant pull at his waist. After Mr. Nelson had returned home to his mother and grandmother, shots were fired into his home. Overhearing the dispatch to a shooting, Mr. Nelson and his mother went to the scene and saw the victim, whom he mistook for Mr. O'Neal because the two looked alike and had similar hairstyles and because Mr. O'Neal lived near the site of the shooting. The victim had been "tight" with Mr. O'Neal and had not had problems with anyone.

The State then questioned Mr. Nelson regarding an incident in which shots were fired at an apartment complex from which police collected casings tied to the victim's shooting. Mr. Nelson testified that he had been at the McIver Apartments on July 24, 2011, and witnessed the defendant and Jeremy White firing shots. The defendant fired two or three times and was not firing at anyone. Another man, Aaron Stewart, who was investigated by police regarding the McIver shooting, was present, but Mr. Nelson did not know if he fired any shots; Mr. Nelson did not see Travis O'Neal there.

Derricka Mayberry, Travis O'Neal's sister, was eighteen at the time of the trial and also present at the party on July 29, 2011. She saw the defendant arrive and pull up his shirt displaying what appeared to be a gun. She immediately began looking for her brother and left the party to continue looking when she saw he was not there. She found him and took him home around midnight. Mr. O'Neal was gone when she got a phone call at 3:30 a.m. from an aunt who had been told by Tenille Mosley that Mr. O'Neal was dead. She woke her mother, and they went to the crime scene, where they learned it was not Mr. O'Neal. Mr. O'Neal was at the house when they returned. Ms. Mayberry acknowledged having told an investigator that she did not know if the defendant had facial hair because when she saw him at the party, he was too far away for her to tell. Ms. Mayberry testified that after she brought Mr. O'Neal home, she left her home and went to a friend's house, heard some gunshots, and received a call from Mr. O'Neal asking if she was OK. She acknowledged having told investigators that, at around 1:30, she returned home and Mr. O'Neal was not there but just arriving home again.

Travis O'Neal, who was twenty at the time of trial, testified that he was a friend of the victim, whom he first met at a party celebrating Mr. O'Neal's release from jail. Mr. O'Neal wore his hair in dreadlocks. So did the victim. Mr. O'Neal was aware that the defendant believed that Mr. O'Neal had shot at him on a previous occasion, but he testified that, although he had been in the area and heard shots, he had not been the one to shoot at the defendant. On the night of the shooting, Mr. O'Neal had left the party for Dodge's Store when he heard from his sister that the defendant was waving a gun and looking for him. She

begged him to go home with her in her car. He asked a friend to take his mother's car to his house and went home with his sister. He then got a call a little after 4:00 a.m. telling him his best friend, Jerome, had been killed. He dressed and left. He then ran into his cousin, who told him it was the victim, Jaron, who had been killed and who told him to go home because the victim had been killed because he had been mistaken for Mr. O'Neal.

On cross-examination, Mr. O'Neal testified that he was out at around 1:30 a.m. but that he did not leave the house after he came home from the store until he received the call around 4:00 a.m. He remembered calling a friend who had been with the victim around 12:00 a.m. and telling him it was not safe to be out and that "if you find a blue car you're going to find Terrance Moses." He volunteered the fact that he had been smoking and drinking but denied receiving calls telling him that the defendant was out walking alone.

Charlotte Osby lived on Lipford Circle. On the night of the shooting, Ms. Osby had gotten up to use the bathroom when she heard a "big boom bang" and then three shots. She called 911. She confirmed on cross-examination that she was positive she had heard three shots and stated that the first noise sounded like someone might have hit a big tree outside.

Eric Jackson's cousin lived in Parks Thurman, and Mr. Jackson was on the porch of his cousin's apartment in the early morning of July 30, 2011. He heard three or four shots and saw a man dressed in black and wearing a black do-rag running. The man ran out of his sight behind a fence, and he heard two additional, quieter shots. The man returned to his line of sight and went to the apartment of a woman named Tenille. He spoke to someone inside in an animated manner while pointing at Mr. Jackson. Mr. Jackson posted something on Facebook about the shooting and then looked up to see a black Ford truck leaving. He saw the truck return around 6:00 a.m. through the back way because police had blocked the drive.

Tenille Mosley, the girlfriend of the defendant's brother, "Shun," also lived at the Parks Thurman housing project. She testified that the defendant knocked loudly on the door in the early morning hours of July 30th. He was wearing black and might have had on a do-rag. He asked his brother to take him to the house of his cousin Taneka because people were shooting at him. The defendant's brother accompanied him and took Ms. Mosley's black Ford Ranger. When Ms. Mosley saw that the police had arrived, she went out and then saw that someone had been killed. She mistook the body at first for Terry Hill. When she recognized the victim, she called his aunt, who lived next door to her.

Dominquez "Shun" Moses testified that he was staying with Ms. Mosley on July 30, 2011, when his brother, dressed in dark clothes and a hat (not a do-rag) knocked on the door at around 3:50 a.m. The defendant's brother was aware that someone had previously shot at the defendant, but the defendant had not identified the shooter to him. The defendant's

brother got dressed to take the defendant to Taneka Yarbrough Williams's house, and he saw someone whom he assumed to be drunk lying on the ground. He thought it might be Terry Hill because of the dreadlocks. He asked the defendant if he had a gun but could not remember the defendant answering. The defendant's brother returned through the back because his drive was cordoned off.

Sherice Cates testified that her nephew, the seventeen-year-old victim, had been staying at her home for less than a month. He had gone to a party on the night of the 29th, and her family had gone to bed. She was awoken in the morning by Ms. Mosley calling to tell her that her nephew was lying dead in the street. She called his phone, and an officer answered. She then went to where the body lay covered and recognized the victim by his hair and shoes.

Travis Bradshaw, who was nineteen at the time of trial, had driven the victim from the party to a friend's house. He was driving the victim home when they ran into other friends near the victim's house. The victim volunteered to walk the rest of the way so that others could ride in the car.

Sergeant Jason Alexander testified that, on July 30, 2011, he was dispatched to Ms. Nelson's home regarding the shots fired into the home. He was then dispatched to Parks Thurman to investigate more shots fired. It took him approximately two minutes to arrive, and he did not meet any vehicles leaving. The victim was lying on his back. Sergeant Alexander had also investigated a shooting at the 600 building of the McIver Apartments about six days before the homicide, and he had collected a casing from that shooting.[2] He acknowledged that a witness from that shooting had described the gunman as five feet seven inches and with silver teeth, and that this description did not match the defendant. Officer Chris Simpson had accompanied Sergeant Alexander on the morning of July 30, 2011, and confirmed his testimony.

Albert Williams, who is married to the defendant's cousin, Taneka Yarbrough Williams, testified that the defendant came to his home in the early morning hours of July 30th. The defendant's sister and her children were also staying the night there and were asleep on a mattress in the living room. The defendant did not mention any shooting but told some jokes and went to sleep. Before he left the next day, Mr. Williams was cleaning up and found a gun under the couch near where the defendant had slept. He described the gun as black. He was concerned that he had touched it because he was on probation so he wiped off his fingerprints with a dark toboggan, wrapped it in the toboggan, put it in a plastic bag,

[2]Apparently, this was the same shots-fired incident after which twelve casings were collected by Sergeant Billy Buck. The record does not reveal why this casing was collected separately.

and got it away from his house. He later showed Kenyatuah Harris where the gun was and discussed selling the gun to him. Weeks after the shooting, police brought him in, and he identified a gun as the one he had recovered from his living room.

On cross-examination, he acknowledged having made two recorded statements to police that the gun was chrome with black handles. He testified that the police were constantly coming to his house and that he had threatened to have a lawyer accompany him for his next statement. He acknowledged having told the defense that he was a heavy drinker and drug user at the time. He also agreed that he had told defense counsel that at the time he gave his unrecorded third statement, in which he identified the black gun – with no chrome – as the weapon he had found, he had been threatened with revocation of his probation if he did not identify the black gun as the weapon. He stated that the gun had been hidden in the air conditioning unit when he gave police permission to search his home two or three days after the shooting, and he then moved it to a wooded area. It was there for a few weeks, and he did not see it again. On redirect, he testified that when Sergeant Joyner showed him a gun, it was "the same gun" and was wrapped in the toboggan and the bags he had used.

Kenyatuah Harris testified that Mr. Williams had approached him about a firearm. Two weeks later, they were driving and Mr. Williams told him to stop the car. Mr. Williams went far off the road and got a brown plastic grocery store bag knotted around a black cloth. Mr. Harris told him not to get in the car with it, and Mr. Williams put it down. Later, the police played Mr. Harris a recorded statement of Mr. Williams saying that Mr. Harris had the gun. Mr. Harris denied ever touching the gun and found the bag for the police. He testified he did not know the defendant or Travis O'Neal. He testified that he would have been at work during the shooting. On cross-examination, he clarified that after the police approached him about the gun, he independently went to the woods and found that the bag was still there. He then called police, and they came to the woods and got it.

Sergeant Jim Joyner testified that he was called to the scene of the homicide, and, when he arrived, he thought the body was Travis O'Neal because of the hairstyle and the victim's size. He was aware of the allegations that Mr. O'Neal had fired shots at the defendant. When the body was moved, two casings were found underneath; no other casings were found at the scene. Sergeant Joyner collected and sealed them and placed them in an evidence locker. Sergeant Joyner testified that at first the defendant's cousin and Mr. Williams denied that the defendant had been to their home, but they subsequently told him the defendant had been there and ultimately revealed the defendant's location at his girlfriend's home in Milan, Tennessee.

According to Sergeant Joyner, the defendant at first told police during questioning that

he had been at his cousin's house all night long and that Ms. Nelson had dropped him off there. He maintained during two hours of questioning that he had not been anywhere in the area of Parks Thurman that night. He also initially denied going to the party but later acknowledged attending.

Sergeant Joyner testified that Mr. Harris told them that he might know where the gun was, left, and then called them shortly to say he had it. Sergeant Joyner testified that Mr. Harris handed him a gun wrapped in a black toboggan in one or more grocery bags.[3] The outside bag, which Sergeant Joyner testified he believed was yellow, was tied in a knot. Sergeant Joyner showed the package to Mr. Williams, who indicated that it was the package he had put the gun in. Mr. Williams also identified the gun as the one he had found in his home. Sergeant Joyner testified that he sealed the gun into a package and put the evidence into an evidence locker to which only he and the evidence technicians had keys. He testified that an evidence technician would remove the evidence for testing and that he had obtained the gun and its packing materials from the evidence technician for trial.

The defense objected to the admission of the toboggan, plastic bags, and gun on the basis that they had been abandoned out-of-doors and that this period of time constituted a break in the chain of custody. The trial court ruled that the items were admissible and that the defendant's objections went towards the weight of the evidence.

Sergeant Joyner acknowledged that Mr. Williams, in his second interview, had described the gun as chrome with black handles. He did not record Mr. Williams's third interview. He denied that Mr. Williams was threatened with revocation of his probation.

Sergeant Joyner testified that, at the crime scene, a large area was taped off and that the grass was searched with a metal detector because more shots were reported than casings found. He stated that the location of the casings, under the victim's body, was unusual. The victim's clothing was not tested for gunshot residue. Sergeant Joyner acknowledged that the bullets were not recovered and that the only thing tying the casings to the victim was the fact that the body was lying on the casings. He also testified that while Mr. O'Neal's sister and mother had told police that Mr. O'Neal was not at home during the time of the shooting, Mr. O'Neal had insisted in his interview with law enforcement that he was in his home. Sergeant Joyner testified that if the defendant was shot at, he would suspect either Mr. O'Neal or John Caneal of being the shooter.

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[3] At trial, Sergeant Joyner identified the sealed evidence container which held the bags and toboggan. Inside were several plastic bags, a paper bag, and the toboggan. He then testified that the gun was wrapped in the toboggan, placed in the paper bag, and finally placed in several plastic bags.

Officer Chris Hamm testified that the defendant was sought in Dyersburg and ultimately located in Milan, Tennessee, where he was arrested on the front porch of a residence.

Sergeant Shane Anderson, an evidence technician with the Dyersburg Police Department, testified that when evidence is collected by an officer, it is placed into the individual officer's locker. The officer and evidence technicians have keys. Sergeant Anderson and the other evidence technician accept evidence from the lockers after checking that it is properly sealed and labeled. The evidence is logged as accepted in the computer and moved to a locked evidence area, and Sergeant Anderson transports it to the Tennessee Bureau of Investigation and back as needed. He testified that the package containing the bullet casing Sergeant Alexander recovered from the McIver shooting was in the same sealed condition it would have been when it came into his possession but that the Tennessee Bureau of Investigation had opened and subsequently sealed the other end. He testified that he was the one who took it for testing.

Sergeant Thomas Langford, the evidence custodian with the Dyersburg Police Department, confirmed Sergeant Anderson's testimony regarding evidence procedures and testified that the black toboggan and bags had not left the evidence room until they were released to Sergeant Joyner for trial. He testified he took the two casings recovered under the victim to the crime lab and that the crime lab opened the package from the bottom and sealed it with their own tape. He also testified that he received a sealed box used to store a gun from Sergeant Joyner, took it to the crime lab for testing, returned it to the evidence room opened at the bottom and resealed by the Tennessee Bureau of Investigation, and that he checked the box out to Sergeant Joyner for trial. He testified he also took evidence collected by Sergeant Billy Buck to the Tennessee Bureau of Investigation and retrieved it opened and resealed by the TBI. Sergeant Langford testified that he retrieved the bullet fragment recovered during the autopsy and delivered it to the lab for analysis.

Sergeant Dan Wilson participated in the interview of the defendant, who at first denied being at the party on the night of the 29th or near Parks Thurman and insisted he had been at his cousin's house since early in the day. When confronted with a recording of his brother informing police of his presence near the shooting, he denied it was his brother.

Sergeant Billy Buck testified that at 3:42 a.m. on July 24, 2011, he investigated a shooting at the McIver Apartments, where he collected twelve bullet casings and one live round. He sealed them and placed them in his evidence locker.

Dr. Marco Ross, a medical examiner for Shelby County, testified that the five-foot-eleven-inch victim was shot twice. One bullet entered his upper left chest, went

down through the lung, and exited the middle of the right side of his back. There was not soot or stippling on this wound. Dr. Ross testified it was possible for clothing to intercept soot or gunpowder. The second bullet entered the left side of the victim's upper back and exited through the top of his right shoulder, leaving a small fragment. Dr. Ross testified that the victim died from gunshot wounds to his left and right lungs. Dr. Ross characterized the second wound as "more survivable" because less lung tissue was damaged. He could not determine the order in which the bullets had been fired. He testified that it would have been possible for the victim to move several hundred feet or even yards before collapsing. The wounds were consistent with wounds caused by a handgun, not a rifle.

Cervinia Braswell, a forensic scientist with the Tennessee Bureau of Investigation, testified that fingerprints would not be recoverable from a fired casing because the heat of firing the bullet would burn off the oils. Ms. Braswell identified the box with the gun Sergeant Joyner had taken into evidence; the box contained a 9 millimeter semi-automatic pistol, a Federal brand cartridge containing a copper-jacketed bullet, and magazine. The handgun did not contain any chrome. Ms. Braswell had fired the gun and testified that it would eject casings to the right side between two and four feet. Ms. Braswell examined the two spent casings recovered from under the victim's body and determined that they were fired from the handgun. The fired casings were the same brand as the unfired casing that accompanied the gun. She also determined that a casing recovered by Sergeant Alexander and the nine spent Federal brand cartridges recovered by Sergeant Buck were fired from the same weapon. The three fired Winchester casings recovered by Sergeant Buck were fired from a different 9 millimeter weapon. Ms. Braswell was not able to determine whether the copper-jacketed fragment recovered from the victim was fired from the weapon. Ms. Braswell testified that soot from a gun would travel about one foot, and stippling could be present if a gun were fired up to four feet away. On cross-examination, Ms. Braswell testified that she was not asked to analyze the victim's clothing and had drawn no conclusions regarding whether the clothing exhibited stippling or the presence of soot. She testified that the width of a street would be a long way for a casing to bounce. She also testified that copper-jacketed bullets were common.

The defense presented one witness, Officer Lynn Waller, who testified that he had investigated the shooting at McIver Apartments on July 24, 2011. He testified that he went to the apartments eighteen hours after the early-morning shooting to investigate Aaron J. Stewart, who had been identified as the shooter by a resident. Mr. Stewart had denied involvement in the shooting and had told Officer Waller that he had not been in Dyersburg, although Officer Waller had seen him at a club that night.

## ANALYSIS

### I. Sufficiency of the Evidence

Under Tennessee Rule of Appellate Procedure 13(e), an appellate court must set aside a finding of guilt if the evidence is insufficient to support the finding of guilt beyond a reasonable doubt. The appellate court must consider "whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (quoting *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). The reviewing court may not reweigh the evidence or substitute its inferences for those of the trier of fact. *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000). Instead, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from it. *Id.* "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Questions regarding the credibility of witnesses, the weight and value of the evidence, or factual issues raised by the evidence are resolved by the trier of fact. *Reid*, 91 S.W.3d at 277. The appellant bears the burden of showing that the evidence was insufficient to sustain the verdict, and the presumption of innocence is replaced by a presumption of guilt. *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). The standard of review is the same for circumstantial and direct evidence, and the prosecution has no duty to rule out every hypothesis save that of guilt beyond a reasonable doubt. *State v. Dorantes*, 331 S.W.3d 370, 379, 381 (Tenn. 2011).

The defendant was convicted of first degree (premeditated) murder, which is a "premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2010). An act is intentional when it is the actor's "conscious objective or desire to engage in the conduct or cause the result." T.C.A. § 39-11-302(a). A premeditated act is:

> an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill 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.

T.C.A. § 39-13-202(d). Because the requirement that the act be intentional requires the State

to prove only the intent to kill, not the intent to kill the victim in particular, an accused may be convicted of first degree premeditated murder even if the victim of the murder was not the intended target but merely an innocent bystander. *Millen v. State*, 988 S.W.2d 164, 165 (Tenn. 1999). While such a crime may be prosecuted as felony murder committed in the course of an attempted first degree premeditated murder, the statutory definition of first degree premeditated murder also encompasses the crime. *Id.* at 167-68.

The evidence at trial, seen in the light most favorable to the State, established that the defendant had a feud with Mr. O'Neal and believed Mr. O'Neal had fired shots at him. The defendant went to a party attended by teenagers and exhibited what appeared to be a gun. He said something to indicate that someone would "die tonight." The victim, who bore a strong resemblance to Mr. O'Neal and was in an area frequented by Mr. O'Neal, was shot that night. A witness heard the shooting and saw a man matching the defendant's description running up to an apartment where the defendant's brother was staying. The defendant's brother testified that the defendant came to that apartment around the time of the crime and that he took the defendant to a cousin's house. The next day, at the defendant's cousin's house, Mr. Williams found a gun. The gun, which he packaged in a particular manner and hid, was recovered by police and was determined to be the weapon which had fired casings recovered from under the victim. The gun had also fired shots at the McIver Apartments, where Mr. Nelson had seen the defendant shooting a gun and where the defendant admitted shooting a gun in a text message to Ms. Nelson. The evidence is sufficient to permit a rational trier of fact to conclude that the defendant, after the exercise of reflection and judgment, intended to kill Mr. O'Neal and, as a result, did kill the victim.

## II. Admissibility of the Weapon

The defendant next objects to the trial court's decision to admit into evidence the gun which Mr. Harris procured for the police. Authentication issues, including those determining whether the chain of custody has been established, are reviewed under an abuse of discretion standard. *State v. Mickens*, 123 S.W.3d 355, 376 (Tenn. Crim. App. 2003); *see State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). The trial court's decision will be reversed only if it applied an incorrect legal standard or reached a decision which went against logic or reasoning and caused an injustice to the complaining party. *State v. Cannon*, 254 S.W.3d 287, 295 (Tenn. 2008).

Although the defendant frames this issue as a challenge to the chain of custody, his argument appears to be an objection to the authentication of the weapon. The defendant makes no allegation that the gun was mishandled by investigators or forensics experts after the police obtained control of it. Indeed, although a chain of custody is not necessarily defective because not every person to handle the evidence testifies, *Cannon*, 254 S.W.3d at

296, it appears that the State introduced the testimony of all of the witnesses who handled the weapon after it was obtained from Mr. Harris.

"[T]he period of time during which custody must be shown runs from the time initially related to the cause of action, such as when evidence was confiscated or otherwise obtained, until the time of trial if the item is to be introduced into evidence." Neil P. Cohen et al., 1-9 *Tennessee Law of Evidence* § 9.01[13][e] (2012) (citing *State v. Goad*, 692 S.W.2d 32, 36 (Tenn. Crim. App. 1985) (concluding that the chain of custody was properly established where the State accounted for certain pieces of evidence "from the time they were recovered until they were introduced at the trial")). Accordingly, we conclude there was no defect in the chain of custody.

The defendant's argument, instead, appears to be that the weapon was not properly authenticated – that it was not what it purported to be, i.e., that it was not the weapon found by Mr. Williams under the couch on which the defendant spent the night after the shooting. Under Tennessee Rule of Evidence 901(a), the requirement of authentication "is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." To properly authenticate evidence, the proponent need not exclude all possibility of tampering or prove the identity of tangible evidence beyond all possibility of doubt; it is sufficient if the circumstances establish the identity and integrity of the evidence with reasonable assurance. *Scott*, 33 S.W.3d at 760; *State v. Ferguson*, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987). "Authentication can be properly established by the testimony of a witness with knowledge that the 'matter is what it is claimed to be.'" *Mickens*, 123 S.W.3d at 376 (quoting Tenn. R. Evid. 901(b)(1)). "[W]hen the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence." *Cannon*, 254 S.W.3d at 296.

The weapon introduced at trial purported to be the gun which Mr. Williams discovered under his couch after the defendant came from the scene of the shooting to his home and spent the night. Mr. Williams testified that he packaged the gun in a unique manner, wrapping it in a black toboggan and then placing it in bags.[4] Mr. Williams testified that he then hid the gun in the woods and showed Mr. Harris where it was. Mr. Harris testified that Mr. Williams showed him the gun, that Mr. Harris subsequently went to the spot where Mr. Williams had put it, and that he discovered the bag containing the gun. He turned it over to police. The bag contained a gun packaged in the particular manner described by

[4]Mr. Williams's testimony on direct examination was that he wrapped the gun in a dark toboggan and put it in a plastic bag. He later agreed that the gun Sergeant Joyner showed him was the same gun, in the same toboggan and "bags."

Mr. Williams: wrapped in a toboggan in a plastic bag. When shown the gun at the police station, Mr. Williams identified it as the weapon he had found in his home. At trial, he described the gun he found as black. The fact that the gun was unsecured in the woods, that Mr. Williams initially described is as partially chrome, and that he stated he had been threatened with revocation of probation if he failed to identify the weapon are certainly circumstances that allow for the possibility of tampering. However, the identity of the evidence need not be proven beyond all possible doubt; it is sufficient if the facts and circumstances "reasonably establish the identity and integrity of the evidence." *Cannon*, 254 S.W.3d at 296. Mr. Williams's unequivocal testimony that the gun Sergeant Joyner showed him was the one he found under the couch, his description of the weapon at trial as black, the unique manner in which the weapon had been packaged, and the testimony of Mr. Williams, Mr. Harris, and Sergeant Joyner regarding its whereabouts were sufficient to establish its integrity and allow its admission into evidence. Beyond that, the weight to be given to the evidence was a question for the jury, which were free to disregard the evidence. *See* Cohen, et al., 1-9 *Tennessee Law of Evidence* § 9.01[2][c].

Moreover, we note that the weapon introduced at trial was established, by expert testimony, to be the same weapon which had fired the two spent casings recovered from under the victim's body – the only casings at the scene. Is was also determined that this weapon was fired at the McIver Apartments and witnesses there linked the defendant to that shooting. As a weapon which was shown to be connected to both the shooting and the defendant, the gun was admissible. Accordingly, the trial court did not abuse its discretion in admitting the weapon into evidence.

## III. *Batson* Challenge

The defendant's final issue is a challenge to the removal of Prospective Juror Partee by the State's exercise of a peremptory challenge. The prospective juror had revealed during voir dire that five or six years before the trial, the attorney for the State had prosecuted his son for a drug offense. The prosecutor confirmed that Prospective Juror Partee's son had the same name as Prospective Juror Partee and went by the nickname "June Bug." The next question the prosecutor asked during voir dire was whether anyone knew the defendant or his brother. Prospective Juror Partee responded that the defendant's brother was a relative of his wife. He stated that he would not have a problem being fair and impartial in the trial due to either his connection with the defense or his connection with the prosecution. On the fourth round of challenges, the State used two peremptory challenges, including one to remove Mr. Partee. The defense objected and the prosecutor, according to the somewhat garbled transcript, responded, "I challenge all of those individuals was [sic] is a black male, one is a white female because he knows (indiscernible)–." The trial court found that the reason given was "neutral," and the defense again objected because only one

African-American remained on the panel.

"Peremptory challenges, along with challenges for 'cause,' are the principal tools that enable litigants to remove unfavorable jurors during the jury selection process." *State v. Spratt*, 31 S.W.3d 587, 598 (Tenn. Crim. App. 2000) (quoting *United States v. Annigoni*, 96 F.3d 1132, 1137 (9th Cir. 1996) *overruled on other grounds as recognized in U.S. v. Lindsey*, 634 F.3d 541, 544 (9th Cir. 2011)). A peremptory challenge allows the removal of jurors who may exhibit hostility or bias but who are not removable for cause. *Id.*

Exercising a peremptory challenge to remove a juror based on race, however, violates the Equal Protection Clause of the Fourteenth Amendment. *Powers v. Ohio*, 499 U.S. 400, 409 (1991). In *Batson v. Kentucky*, the United States Supreme Court established a three-step inquiry that a trial court must undertake in order to determine whether a juror was improperly challenged on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986). First, the demonstration of a prima facie case of purposeful discrimination is a threshold inquiry. *State v. Ellison*, 841 S.W.2d 824, 825 (Tenn. 1992). While *Batson* required the defendant to show both that he was a member of a cognizable racial group and that other members of that racial group were excluded from the jury, the United States Supreme Court subsequently held that the defendant need not be a member of the same racial group as the improperly excluded juror. *Batson*, 476 U.S. at, 96; *Powers*, 499 U.S. at 406. "Under *Powers*, a defendant establishes a prima facie case of purposeful discrimination merely by demonstrating that the prosecution excluded members of a cognizable racial group from the jury pool." *State v. Echols*, 382 S.W.3d 266, 281 (Tenn. 2012). The defendant must show that the relevant circumstances raise an inference that the State was employing its peremptory challenges for the purpose of excluding jurors on the basis of race. *Batson*, 476 U.S. at 96. Although a disproportionate number of challenges directed at members of a particular racial group may establish a prima facie case, *State v. Kiser*, 284 S.W.3d 227, 255 (Tenn. 2009) (citing *Miller–El v. Cockrell*, 537 U.S. 322, 331 (2003)), "the exercise of even one peremptory challenge in a purposefully discriminatory manner would violate equal protection." *Ellison*, 841 S.W.2d at 827.

Once the defendant has established a prima facie case of discriminatory challenges, the burden shifts to the State to articulate a neutral reason for excluding the juror or jurors. *Batson*, 476 U.S. at 97. While a prosecutor's bare assertion that the strike was not discriminatory will not suffice, *Ellison*, 841 S.W.2d at 827, the reason given does not have to prove persuasive or even plausible to satisfy the second step, *Kiser*, 284 S.W.3d at 255. Of course, the explanation need not provide a reason that would justify excusing the juror for cause. *Batson*, 476 U.S. at 97.

If the second step has likewise been satisfied, "the trial court must then determine,

from all of the circumstances, whether the defendant has established purposeful discrimination." *State v. Hugueley*, 185 S.W.3d 356, 368 (Tenn. 2006) (citing *Batson*, 476 U.S. at 98). This requires an examination of the prosecution's reasoning to ensure it is not pretextual. *Id.* In deciding whether challenges were motivated by discriminatory purposes, courts have examined the number of challenged jurors belonging to a particular racial group; whether other members of that racial group remained on the jury panel; and whether there existed a race-neutral reason for challenging the jurors. *See State v. Butler*, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990). To allow for proper appellate review, the trial court should articulate specific findings regarding whether a prima facie case has been presented, whether a neutral explanation was offered, and whether the totality of the circumstances support a finding of purposeful discrimination. *Hugueley*, 185 S.W.3d at 369.

The determination of whether a prima facie case of discriminatory intent has been established in the first step is a question of law. *Butler*, 795 S.W.2d at 687. However, "determination of the prosecutor's discriminatory intent or lack thereof turns largely on the evaluation of the prosecutor's credibility, of which the attorney's demeanor is often the best evidence." *Kiser*, 284 S.W.3d at 255 (quoting *State v. Smith*, 893 S.W.2d 908, 914 (Tenn. 1994)). Accordingly, a trial court's credibility determinations regarding whether the prosecutor's intent was discriminatory will be upheld on appeal unless clearly erroneous. *Kiser*, 284 S.W.3d at 256.

The only facts in the record on appeal regarding the racial makeup of the county, the venire, the jury panel, or the challenged jurors are that Prospective Juror Partee was African-American and that after his dismissal, only one African-American juror remained on the incomplete panel.[5] The trial court did not make the specific findings required by *Hugueley*, and it is not clear from the record whether the trial court overruled the objection based on the defendant's failure to present a prima facie case or whether it concluded, under the third step, that the prosecutor had not challenged the juror with discriminatory intent. The prosecution volunteered a race-neutral reason for excluding the juror before the defense even articulated that the basis for its objection was a *Batson* violation, so it is not clear that the trial court had even proceeded to the second step of the inquiry. Despite the deficiency in the trial court's findings, we affirm its decision on the basis that the defendant did not make a prima facie showing of discriminatory intent. The record, as well as the appellate brief, is completely devoid of any facts or allegations that would "raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96. The record contains nothing beyond the bald fact that one African-American prospective juror was excused through the State's peremptory challenge.

[5] Four jurors were dismissed during the fourth round of challenges, and additional prospective jurors were called for voir dire.

The "relevant circumstances" also reveal at least two race-neutral reasons for challenging the juror. *Id.* Accordingly, we conclude that the defendant did not meet his burden to show a prima facie case of discriminatory purpose and affirm the judgment of the trial court.

## CONCLUSION

Because we conclude that the evidence was sufficient to support the convictions, that the evidence of the gun was not admitted in error, and that the trial court did not abuse its discretion in permitting the challenge to the juror, we affirm the judgments of the trial court.

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JOHN EVERETT WILLIAMS, JUDGE