IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 20, 2016

STATE OF TENNESSEE v. RONALD TURNER

Appeal from the Criminal Court for Knox County
No. 105481 Steven Wayne Sword, Judge

No. E2016-00651-CCA-R3-CD

The Defendant, Ronald Turner, was convicted of three counts of attempted second degree murder when he fired a single shot through a glass door at his child, the mother of his child, and her roommate. The Defendant was also convicted of three counts of employing a firearm in the commission of a dangerous felony and one count of unlawful possession of a handgun with the intent to go armed in a public place where at least one person is present. The Defendant's convictions for the three counts of attempted second degree murder and the conviction for possession of a handgun were enhanced after the jury found that the gang enhancement statute applied. The Defendant appeals, challenging the sufficiency of the evidence and the constitutionality of the gang enhancement statute. We conclude that the evidence is insufficient to support two of the convictions for attempted second degree murder, and we reverse these convictions and the weapons offenses predicated on them. The Defendant raised the constitutional argument for the first time in the motion for a new trial, and the State argues that the issue is waived. We conclude that the statute is unconstitutional and that the Defendant is entitled to relief from the gang enhancement applied to his sentences. We affirm the judgments of the trial court in all remaining respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part; Reversed in Part; Case Remanded

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and JAMES CURWOOD WITT, JR., J., joined.

J. Liddell Kirk (on appeal), and Michael Graves (at trial), Knoxville, Tennessee, for the appellant, Ronald Turner.

Herbert H. Slatery III, Attorney General and Reporter; Nicholas W. Spangler, Assistant Attorney General; Charme Allen, District Attorney General; and Ta Kisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

After firing a shot through a glass door toward the three victims, the Defendant was charged with three counts of attempted first degree premeditated murder, three counts of employing a firearm during the commission of a dangerous felony, and one count of carrying a handgun with the intent to go armed at a place open to the public where at least one person was present. The Defendant was also charged under the gang enhancement statute for the three counts of attempted first degree murder and the count charging possession of a handgun. Prior to trial, the State dismissed a charge of aggravated burglary and charges for employing a firearm in a dangerous felony and gang enhancement which were predicated on the aggravated burglary charge. At trial, the State presented testimony and physical evidence tending to establish that the Defendant fired a gun through a glass door leading to the balcony of the home where his child and the mother of his child lived.

Ms. Bredaisha Walden testified that she lived in an apartment with Ms. Jahdaiah Cody on December 10, 2014. Ms. Cody and the Defendant had a three-year-old son. Ms. Walden testified that she was taking a bath when she became aware of raised voices; in particular, she heard Ms. Cody saying, "[S]top." Ms. Walden got dressed. When Ms. Walden emerged from the bathroom, she did not see anyone other than Ms. Cody and her son in the home, and she noticed Ms. Cody's hand had a cut that had not been there when Ms. Walden went into the bathroom. Ms. Walden decided to look out of the glass door leading from the kitchen to the balcony because she was worried about her own safety. She went to the glass door in the kitchen, and the Defendant's three-year-old son followed her and stood beside her at the glass door. Ms. Walden testified that she did not know the Defendant well but was familiar with his face from seeing pictures on Ms. Cody's Facebook page and from seeing him at the McDonald's restaurant where she worked. Ms. Walden saw the Defendant outside walking quickly with Tamon Stapleton; they both wore black. The Defendant was approximately five feet from the balcony. The Defendant turned around and "just looked at [Ms. Walden] for a second." He then raised a gun and shot toward Ms. Walden and his child. Ms. Walden testified that Ms. Cody was behind them but in another room. The bullet hit a microwave and deflected onto the floor. According to Ms. Walden, the bullet would have traveled toward Ms. Cody if the microwave had not stopped it. Ms. Walden saw the Defendant run. She took the child to

the bathroom for safety while Ms. Cody called 911. Ms. Walden was able to identify the Defendant from a photographic lineup.

The defense asked Ms. Walden how she knew the name of the Defendant's companion, and she stated that Ms. Cody told her "who both of them were" and agreed that she "didn't know [herself] until [Ms. Cody] told [her] who it was … out the door." On redirect examination, she clarified that Ms. Cody had told her that the two were in the house prior to the shooting but that Ms. Walden saw the Defendant and recognized him as he shot at her. When she was again cross-examined, Ms. Walden clarified that Ms. Cody had told her who the two were "before all this happened," "in school."

The State did not anticipate being able to introduce the testimony of Ms. Cody, who had been avoiding process. However, she was located during trial, and she testified regarding the shooting. Ms. Cody testified that the Defendant came into her home and that they got into a fight in the hallway. She testified that she "fought back." Ms. Cody stated that the Defendant pushed her into a closet off the hallway, pulled his gun out, pointed it at her head, and pulled the trigger. The gun did not go off. She stated that after the Defendant left, Ms. Walden and Ms. Cody's child were standing by the window, and she was in the hallway behind Ms. Walden. She testified that the Defendant shot through her window and into a microwave. She called 911 because she was concerned about her child. She picked the Defendant as the shooter out of a photographic lineup. Ms. Cody acknowledged that in her statement to police, she said that the Defendant came through her balcony, pushed her into the closet and pulled the trigger, cut her hand with a knife and hit her in the head, walked out, and finally shot through the window at Ms. Walden and her son.

On cross-examination, Ms. Cody described the altercation as "he pushed me, I pushed him, that's about it." However, she also acknowledged that she had a knife, that she tried to cut the Defendant with it, and that that was "probably" when he pulled out the gun. Ms. Cody also acknowledged that she did not see the Defendant shoot because she was standing behind Ms. Walden and her son. She testified that the Defendant and Mr. Stapleton looked "[l]ike twins."

The State introduced the testimony of Michael Mays to establish that Ms. Cody made a telephone call to 911 at 12:28 p.m. on December 10, 2014. Officer Russell Whitfield with the Knoxville City Police Department forensic unit photographed the crime scene. Officer Whitfield recovered a bullet from the kitchen floor and photographed a hole in a vertical blind next to a glass door and a hole in a microwave where the bullet had hit. The bullet ultimately came to rest approximately thirty inches from the glass door. Officer Whitfield testified that when he arrived on the scene, he was advised that the area had been searched and that no further evidence was found.

However, he returned shortly before 4:00 p.m. to collect a bullet casing from the sidewalk outside the balcony.

On cross-examination, Officer Whitfield agreed that the area had been left unsecured for approximately three hours prior to the collection of the casing. He acknowledged that the bullet casing could have been moved or kicked closer to the building while the area was unsecured. He noted that the casing was ultimately recovered on a sidewalk, and photographs show that the location was down a set of steps from the area where Ms. Walden indicated the Defendant was standing when he shot. Officer Whitfield testified that the bullet entered the home at an angle.

Officer John Pickens arrested the Defendant on January 3, 2015. At that time, Officer Pickens collected a firearm that the Defendant carried in his waistband.

Officer Patricia Resig, a firearms examiner in the forensic unit of the Knoxville Police Department, examined the bullet from Ms. Cody's kitchen, the bullet casing from the sidewalk, and the firearm from the Defendant's waistband. She was able to determine that the bullet and casing had both been fired by the Defendant's semiautomatic pistol. She demonstrated that, after the magazine was placed into the gun, a bullet would not be present in the chamber until the slide had been pulled back. The gun would then be ready to fire a bullet. Once the gun had fired, another cartridge would automatically be loaded if the magazine contained one.

The Defendant testified that Ms. Cody was the mother of his child and that, although she had another boyfriend at the time, he "took care of her." According to the Defendant, he and Mr. Stapleton came to the house that day and waited for Ms. Cody to open the door because it was locked, although he usually would enter without knocking. The Defendant testified that he had left a package of marijuana in his three-year-old son's room because he did not feel it would be safe at his house. He had instructed Ms. Cody not to let anything happen to the marijuana. He testified that Ms. Cody did not smoke or sell marijuana.

The Defendant did not see Ms. Cody with a knife when she opened the door. However, as he started to walk down the hallway to get the package of marijuana, Ms. Cody produced a knife and began to yell that the drugs were not there. The Defendant testified that Ms. Cody swung the knife at him. Ms. Cody told the Defendant that he should never have left marijuana there. The Defendant testified that he pulled the gun out after Ms. Cody got too close to him with the knife. He at first acknowledged pointing the gun at her, but later stated that he did not point it at her but held it up as though to strike her with it. He denied attempting to fire the gun, and he did not recall being in a closet. Although he testified that Ms. Cody did not put up a fight and was "submissive," he also

stated that he had to grab the knife from her, resulting in a cut on her hand. The Defendant was aware that Ms. Walden was in the bathroom but did not see her. He saw that his son was there. Ms. Cody told the Defendant that her boyfriend would arrive at 10:00 p.m., and the Defendant and Mr. Stapleton left through the front door, planning to return then to try to recover the marijuana. The Defendant testified that he was "not really upset" but would have been upset if he had returned at 10:00 p.m. and had not gotten "some answers."

The Defendant testified that he and Mr. Stapleton were walking outside when Mr. Stapleton saw Ms. Walden at the window. According to the Defendant, Mr. Stapleton fired the shot. The Defendant stated that Mr. Stapleton shot because he thought Ms. Walden was smiling, and the Defendant stated he did not see his son standing there due to the blinds. According to the Defendant, Mr. Stapleton shot Mr. Stapleton's own gun, not the gun the Defendant had brandished in the apartment. Because residents of the complex were emerging from their homes, the Defendant pretended he was being shot at, and the two left. The Defendant stated he was angry with Mr. Stapleton for shooting because his son was in the home and because Ms. Cody was pregnant at the time. The Defendant would not let Mr. Stapleton get in the car until Mr. Stapleton gave him the gun used in the shooting. Four days later, the Defendant returned Mr. Stapleton's gun to him. The Defendant reacquired the gun when, during Mr. Stapleton's incarceration, the Defendant's brother was shot in the head in the presence of Mr. Stapleton's brother. Mr. Stapleton's brother gave the Defendant the Defendant's brother's belongings, and the gun was among them. The Defendant testified that he was wearing maroon on the day of the shooting. He did not have a permit to carry a gun. Mr. Stapleton was deceased at the time of the trial.

The Defendant acknowledged that he had spoken to Ms. Cody's brother about the case, that he told Ms. Cody's brother the case was not dismissed because Ms. Walden had come to the preliminary hearing, and that he never mentioned to Ms. Cody's brother that he was not the shooter. The Defendant explained that Ms. Cody's brother was aware that the Defendant was not the shooter. The Defendant agreed that Mr. Stapleton's hair was "a little" longer than the Defendant's at the time of the crime. He stated that they had on hats. Photographs of the Defendant and Mr. Stapleton were introduced into evidence. The Defendant acknowledged that, during testimony in a prior case regarding possession of a firearm, he had stated that he was in Chicago on December 10, 2014. He explained that he believed the prosecution was mistaken about the date of the offenses.

The prosecution argued in closing that the Defendant's act of firing the gun at the glass door supported the three counts of attempted first degree premeditated murder, as well as the firearms offenses. The jury convicted the Defendant of three counts of the

lesser-included offense of attempted second degree murder. The Defendant was convicted as charged of the offenses involving firearms.

In the second phase of the trial, the State introduced records regarding seven defendants who were convicted of fifteen felonies and one Class A misdemeanor between the years of 2009 and 2012. The State also presented the expert testimony of Thomas Walker, supervisor of the Homeland Security Gang Intelligence Unit in the Knox County Sheriff's Office. Mr. Walker testified that the Vice Lords were a gang that originated in Chicago in the 1950s and belonged to the People Nation with other gangs like the Bloods or Latin Kings. He stated that the gang was present in Knoxville and had subsets including the Unknown Vice Lords or Ghost Vice Lords.

Mr. Walker stated that before the Gang Intelligence Unit would classify someone as a member of a gang, the person would have to score at least ten points on a point system used by the Tennessee Gang Investigator Association, and the person would additionally have to meet the state law definition of a gang member. Mr. Walker testified that points were awarded for tattoos, graffiti, hand signs, wearing gang colors, felony criminal history, known gang associations, confirmation from an outside source, and admission of gang membership. He specified that wearing colors was awarded only one point because it was only loosely affiliated with gang membership. An admission of gang affiliation would be awarded nine points, just one point shy of the number required for classification as a gang member. Mr. Walker testified that the seven persons whose criminal convictions had been introduced into the record had all been identified as members of the Vice Lords gang, and he detailed the basis for identifying each as a gang member.

Mr. Walker testified that the Vice Lords had a membership of forty-two persons in the city and that the gang had a mission of committing crimes. He testified that the Defendant was a member of the Vice Lords. Mr. Walker stated that the Defendant was identified as a gang member based on pictures of him "throwing hand signs," pictures of the Defendant wearing gang colors, the Defendant's felony criminal history, his gang-specific tattoos, his arrest for violent crimes and weapons possession, and his admission of gang membership.

Mr. Walker specifically pointed to a photograph of the Defendant's tattoo of a five-pointed crown, which Mr. Walker stated was a symbol of the People Nation. He also pointed to a tattoo of a "2" on one of the Defendant's arms and a "1" on the other. Mr. Walker testified that the two and one were read together to signify the twenty-first letter of the alphabet, "u," which stood for "Unknown Vice Lord." He identified the Defendant's tattoo of a stop sign on the corner of two streets, Augusta and Monticello,

which he testified was "literally … the street corner of the Vice Lords from Chicago." He identified other tattoos which the Defendant had that were not gang-related.

He also introduced photographs of the Defendant wearing a red hoodie with a five-pointed star, which he testified was a symbol of the People Nation, and red shoes, which he stated were gang colors. He identified another picture of the Defendant wearing a red shirt and fanning out several hundred dollar bills, and a separate photo of the Defendant fanning out money and holding up five fingers, which he testified was a number significant for the Vice Lords. He identified the Defendant in a photograph with other known gang members, including Mr. Stapleton. He also identified the Defendant in a photograph with others "throwing the Unknown Vice Lord hand sign." The photograph was taken from Facebook where one user had commented "Gs For my Ghost Squad," which Mr. Walker testified was another name for the Unknown Vice Lords. He also identified a hand-drawn picture posted to the Defendant's Facebook page as graffiti which included symbols for the gang.

Mr. Walker testified that the Defendant, after his arrest, saw an officer who was part of the gang investigation team. He yelled to her, "[W]hat's up, gang unit, you've got me for life, congratulations, I hope you're f***ing happy." The officer asked him if he was affiliated with a gang, and he responded, "[Y]es, why do you think I'm here[?]"

Mr. Walker acknowledged that the Defendant's hoodie was mass manufactured and that anyone could wear red or request a tattoo without being the member of a gang. He acknowledged that someone else had posted the graffiti on the Defendant's Facebook page. He also stated that he did not have any information connecting the Defendant with the gang members whose convictions had been introduced.

The Defendant testified that he was not a member of the Vice Lords gang and that he did not know any of the offenders whose crimes had been made part of the records. He stated that some of his tattoos were from a song, that the "2" and "1" stood for "two chances and one decision," and that he had not asked for a five-point crown tattoo but the non-professional who was tattooing the "2" and "1" tattooed it to show his skill. He stated that the street corner was the address of his grandfather. He also explained that there was no significance in his red shoes or the hoodie, which belonged to someone else. He denied the others in his photographs were gang members. He stated the hand gestures were not gang signs but meant "East Side." He denied that he had admitted gang membership while in prison.

The jury found that the gang enhancement applied to the three attempted second degree murder convictions and the unlawful possession of a weapon conviction. At the Defendant's request, the trial court held a sentencing hearing and heard the motion for a

new trial on the same date. The trial court sentenced the Defendant to serve fifteen years for each attempted second degree murder conviction, six years for each employment of a firearm in the commission of a dangerous felony conviction, and one year for the unlawful possession of a handgun conviction.[1] The convictions for employing a firearm in the commission of a dangerous felony were run consecutively to the underlying felonies by law, but were to run concurrently with one another. The three attempted second degree murder convictions were also run concurrently with one another and with the possession of a handgun conviction, for an effective sentence of twenty-one years, to be served consecutively to a prior conviction. In his motion for a new trial, the Defendant asserted that the gang enhancement statute was unconstitutional. The State did not object to the Defendant's raising the issue for the first time at the hearing, and the trial court ruled that the statute was constitutional, noting that this court was considering the issue at the time. The trial court denied the motion for a new trial, and the Defendant appeals.

ANALYSIS

I. Sufficiency of the Evidence

A. Attempted Second Degree Murder

The Defendant contests the sufficiency of the evidence, in particular asserting that the evidence does not support multiple convictions of attempted homicide for the act of firing one bullet. The State responds that the evidence supports multiple convictions.

This court must set aside a finding of guilt if the evidence is insufficient to support the finding of guilt beyond a reasonable doubt. Tenn. R. App. P. 13(e). The question before the appellate court is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013). This court will not reweigh or reevaluate the evidence, and it may not substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004). A jury's verdict of guilt, approved by

[1] The Defendant was convicted under Tennessee Code Annotated section 39-17-1307(a)(2)(C), and the trial court at the sentencing hearing orally sentenced the Defendant to eleven months and twenty-nine days for this conviction. However, the jury found that the gang enhancement applied to this conviction, which would elevate it from a Class A misdemeanor to a Class E felony. *See id.*; T.C.A. § 40-35-121(b)(2014). The judgment form reflects that the sentence was one year for a Class E felony. Our conclusion that the gang enhancement should not have been applied to the Defendant's convictions necessitates resentencing on this conviction in any event.

the trial court, resolves conflicts of evidence in the State's favor and accredits the testimony of the State's witnesses. *State v. Smith*, 436 S.W.3d 751, 764 (Tenn. 2014). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). "This Court affords the State the strongest legitimate view of the evidence presented at trial and the reasonable and legitimate inferences that may be drawn from the evidence." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012). A guilty verdict replaces the presumption of innocence with one of guilt, and on appeal, the defendant bears the burden of demonstrating that the evidence is insufficient to support the conviction. *State v. Cole*, 155 S.W.3d 885, 897 (Tenn. 2005). "Circumstantial evidence alone is sufficient to support a conviction, and the circumstantial evidence need not exclude every reasonable hypothesis except that of guilt." *Wagner*, 382 S.W.3d at 297.

Second degree murder is a knowing killing of another. T.C.A. § 39-13-210(a)(1). Second degree murder is a result-of-conduct offense because the statute "'focuses purely on the result and punishes an actor who knowingly causes another's death.'" *State v. Brown*, 311 S.W.3d 422, 431-32 (Tenn. 2010) (quoting *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000)). Attempt, as charged in this case, requires the Defendant to act with the intent to cause the knowing killing of another and to believe his "conduct will cause" the killing without further conduct on the Defendant's part. T.C.A. § 39-12-101(a)(2); *State v. Bonds*, 502 S.W.3d 118 (Tenn. Crim. App. 2016), *perm. app. denied* (Tenn. Aug. 18, 2016). A person acts intentionally "when it is the person's conscious objective or desire to … cause the result." T.C.A. § 39-11-302(a). "Intent, which can seldom be proven by direct evidence, may be deduced or inferred by the trier of fact from the character of the assault, the nature of the act and from all the circumstances of the case in evidence." *State v. Inlow*, 52 S.W.3d 101, 105 (Tenn. Crim. App. 2000).

The Defendant's brief is inadequate in that it does not cite any legal authority for the proposition that the criminal act of firing one gunshot cannot support multiple convictions for attempted homicide. The State contends that firing a single shot may support multiple attempted homicide convictions. We note initially that the State's citation to *State v. Henry Mitchell Dixon*, No. E2002-00731-CCA-R3-CD, 2003 WL 22432415, at *7 (Tenn. Crim. App. Oct. 22, 2003) does not support this conclusion. In *Henry Mitchell Dixon*, the two attempted homicide convictions rested on two separate acts of the defendant: shooting one victim in the hip and holding the gun pointed at the other victim while producing a "clicking noise" in an attempt to fire it. *Id.* at *6-7. Accordingly, the State does not present any authority that one shot is sufficient to uphold multiple attempted homicide convictions.

The scope of the issue before us is whether a single shot may support multiple attempted second degree murder convictions. This is true despite the fact that the evidence presented at trial supports the conclusion that the Defendant engaged in a separate attempted homicide of Ms. Cody when he pointed a gun at her head in the closet and pulled the trigger. The prosecution, in closing argument, elected to proceed on the single shot fired at the balcony to support all three attempted homicide charges. The prosecutor, in summarizing the elements of attempted first degree murder, argued that the jury could find premeditation from the fact that the gun had previously not fired and that a firearms expert testified that the shooter would have "to rack it." The prosecutor argued that the premeditation consisted of "walking out into the courtyard," "fixing the gun," "pulling the gun out," "looking up, … raising the gun, and … applying enough pressure to that trigger in order to pull that trigger with enough force for that bullet to come out." The prosecutor argued that these facts supported a finding of premeditation and "that is why he is charged with three counts of attempted first degree murder, employing a firearm during the commission of a dangerous felony, and since he has no handgun carry permit, unlawful possession of a firearm." Accordingly, based on the State's closing argument to the jury, we analyze whether the Defendant's act of firing one single shot toward the three victims is sufficient to support all three of the attempted second degree murder convictions.

We begin by observing that some courts have analyzed similar claims under the principles of double jeopardy. *See*, *e.g.*, Anne Bowen Poulin, *Double Jeopardy Prot. from Successive Prosecution: A Proposed Approach*, 92 Geo. L.J. 1183, 1239 n.299 (2004). Courts have generally found no double jeopardy violation when a single bullet kills or injures more than one victim. *See*, *e.g.*, *State v. Barraza*, 238 S.W.3d 187, 194 (Mo. Ct. App. 2007); *People v. Washington*, 368 N.E.2d 536, 538 (Ill. App. Ct. 1977); *contra People v. Potcher*, 325 N.E.2d 753, 757-58 (Ill. App. Ct. 1975) (affirming murder conviction but vacating other convictions when a single shot killed one victim and wounded another).

However, some courts have found that double jeopardy principles prevent multiple convictions in the case of an inchoate crime. *See*, *e.g.*, *State v. Collins*, 329 S.E.2d 839, 845-46 (W. Va. 1984) (reversing multiple robbery convictions when the defendant showed a firearm to two clerks but left the store without any property and noting "it is in the area of attempted robbery that the double jeopardy issue becomes even more attenuated because of the lack of any factual predicate to warrant a conclusion that more than one attempted robbery occurred"). The dissent in *State v. Person*, in a model of brevity, summarized: "One gun, one shot, one felonious assault." 881 N.E.2d 924, 932 (Ohio Ct. App. 2007) (Painter, P.J., dissenting) (adding that "[n]othing has changed since … the Double Jeopardy Clauses of the Ohio and the United States Constitutions became effective, except for misguided and bizarre Ohio court decisions that defy logic, law, and

common sense" (footnote omitted)) (citation omitted); *compare Albrecht v. State*, 658 A.2d 1122, 1130-31 (Md. Ct. Spec. App. 1995) (concluding that "the unit of prosecution remains each individual subjected to the harm or risk of harm" and affirming multiple convictions for reckless endangerment resulting from mishandling of a weapon).

We note that a double jeopardy challenge under similar facts has been rejected by this court. In *State v. Joseph Jackson, Jr.*, the defendant fired a single shot at the intended victim but injured the unintended victim, and he was convicted of two counts of attempted first degree murder. No. W2001-02779-CCA-R3-CD, 2002 WL 31887657, at *1-2 (Tenn. Crim. App. Dec. 17, 2002). The defendant in *Joseph Jackson, Jr.* challenged the two convictions, but his challenge was limited to the theory that the convictions violated the principle of double jeopardy. *Id.* at *6. This court rejected the contention, concluding that the multiple victims allowed for multiple units of prosecution. *Id.* at *6-7; *see also State v. Dwayne Kent*, No. 87-125-III, 1988 WL 1728, at *2 (Tenn. Crim. App. Jan. 13, 1988) (noting that there was no double jeopardy violation because the defendant was convicted of two separate offenses, neither of which was a lesser-included offense of the other, and of only one offense per victim when he fired multiple shots into a trailer).

The Defendant here does not raise a double jeopardy challenge; instead, we analyze the evidence to determine whether it is sufficient to uphold the multiple convictions. *See State v. Irvin*, 603 S.W.2d 121, 123 (Tenn. 1980) (concluding that elements of the offense, rather than defendant's intent or number of acts, determines the number of vehicular homicides of which he can be convicted and holding that multiple homicide convictions can arise from one automobile accident); Nancy Ehrenreich, *Attempt, Merger, & Transferred Intent*, 82 Brook. L. Rev. 49, 86 n.172 (2016) (concluding that there is no merger issue in a case in which a defendant attempts to kill one victim and endangers but does not harm either the intended and unintended victim, and analyzing instead whether applying transferred intent to convict of two crimes in such cases results in disproportionate punishment because the punishment would be the same as that of a defendant who committed two separate acts, intending to kill two separate people, but was unsuccessful in both).

The State, relying on *State v. Samuel Glass*, argues that the evidence is sufficient to support multiple crimes under the theory of transferred intent. *See* No. E2012-01699-CCA-R3-CD, 2013 WL 4677654 (Tenn. Crim. App. Aug. 28, 2013). This court in *Samuel Glass* held that, so long as the proof demonstrated that the defendant intended to cause a death, a conviction for the attempted homicide of an unintended victim would be upheld. *Id.* at *12. The court concluded that the trial court erred in concluding that transferred intent could not apply to inchoate offenses and in setting aside the defendant's

convictions for the attempted second degree murder of two bystanders to the shooting. *Id.*

In *Samuel Glass*, however, the defendant's multiple convictions rested on the separate acts of firing multiple shots. *Id.* at *4 (summarizing testimony that there were five to six shots). The opinion in *Samuel Glass* likewise cites other opinions in which transferred intent was applied to attempted homicide when multiple shots were fired. *See id.* at *12 (citing *State v. Fabian Claxton*, No. W2009-01679-CCA-R3-CD, 2011 WL 807459, at *1, 5 (Tenn. Crim. App. Mar. 7, 2011) (defendant fired into the air and then fired several times into a crowd, injuring the intended victim and also the three unintended victims of the attempted first degree murder charges); *State v. Horace Demon Pulliam*, No. M2001-00417-CCA-R3-CD, 2002 WL 122928, at *5 (Tenn. Crim. App. Jan. 23, 2002) (defendant fired several times, killing the intended victim, and injuring one of the two victims of the attempted second degree murder); *State v. Tarrence Parham*, No. W2009-00709-CCA-R3-CD, 2010 WL 2898785, at *11 (Tenn. Crim. App. July 26, 2010) (defendant fired three shots, injuring the unintended victim of the attempted second degree murder)).

In *State v. Lajaun Harbison*, the defendant had fired two bullets and was criminally responsible for several other shots fired. No. E2015-00700-CCA-R3-CD, 2016 WL 4414723, at *22-23 (Tenn. Crim. App. Aug. 18, 2016), *perm. app. granted* (Tenn. Dec. 14, 2016). He argued that a conviction for attempted voluntary manslaughter of an injured bystander could not be supported by transferred intent. *Id.* at *23. This court concluded that the evidence of an attempt to kill the intended targets could transfer to the unintended target but found the evidence insufficient to support a finding of provocation by the unintended target. *Id.* (citing cases in which multiple shots were fired for the proposition that attempted first and second degree murder of unintended victims could be established by mens rea present for intended victim); *see also State v. Arterious North*, No. E2015-00957-CCA-R3-CD, 2016 WL 6248598, at *19 (Tenn. Crim. App. Oct. 26, 2016) (applying the reasoning in *Harbison* to Harbison's co-defendant's convictions and overturning conviction for attempted voluntary manslaughter).

These cases have relied on the theory of transferred intent despite the fact that in *Millen v. State*, 988 S.W.2d 164, 165 (Tenn. 1999), the Tennessee Supreme Court concluded that the statutory definition of premeditated first degree murder dispensed with the necessity of employing the doctrine of transferred intent because the statute did not require the State to prove that the victim was the intended victim but only that the defendant intended to kill a person and did so. *Id.* at 168. *Millen* concluded that the homicide of an unintended victim committed during an attempted homicide of the intended victim would satisfy the statutory requisites of first degree premeditated murder without resort to the doctrine of transferred intent. *Id.* However, the *Millen* court

specifically noted that this fact pattern would best be prosecuted as a felony murder committed in the attempt to commit first degree premeditated murder. *Id.* at 167.

The question we are faced with is whether mens rea establishing an intent to commit a crime against the intended victim is sufficient to uphold multiple convictions when the defendant is charged with a single act (firing one shot) as constituting an inchoate crime against both the intended and any unintended victims. As another court has put it, it is an "inquiry into whether a doctrine developed to handle special problems in cases of consummated homicide should be extended to cases of inchoate homicide." *Harvey v. State*, 681 A.2d 628, 634 (Md. Ct. Spec. App. 1996). In *Harvey v. State*, the Maryland Court of Special Appeals concluded that mens rea is "an elastic thing of unlimited supply." *Id.* at 637. The court reasoned, however, that it was "of critical legal significance" whether the unintended victim was killed or only endangered. *Id.* at 638. The court observed that the law of Maryland universally recognized that "[w]hen what is being considered is a charge of inchoate homicide – attempted murder, attempted voluntary manslaughter, or assault with intent to murder – and the unintended victim has *not* been hit or injured in any way, there will be *no* 'transfer' of intent from the intended victim to the unintended victim." *Id.* at 639 (footnote omitted).

A similar conclusion was reached by the court in *People v. Bland*, 48 P.3d 1107, 1116 (Cal. 2002). In *Bland*, the court cited prior precedent which had concluded that transferred intent should not apply at all to attempted homicides because the inchoate crime against the *intended* victim could be punished. *Id.* "'[W]here a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated independently as to each victim, and the jury should not be instructed to transfer intent from one to another.'" *Id.* (quoting *People v. Czahara* 203 Cal. App.3d 1468, 1471 (1988). The *Bland* court concluded that "[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." *Id.* at 1116-17. "[T]ransferred intent should not turn one criminal intent into two (or more)." Ehrenreich, 82 Brook. L. Rev. 86 n.172. We note, however, that the *Bland* court, in its analysis, concluded that attempt was victim-specific, i.e., that the "defendant must intend to kill the alleged victim, not someone else." *Bland*, 48 P.3d at 1117.

The *Bland* analysis also concluded that a defendant may have "concurrent intent" – that is, the nature of the crime may demonstrate that the defendant had the concurrent intent to kill everyone in a "kill zone" in order to ensure the death of the primary victim, for instance by detonating a bomb or raining down a "hail of bullets." *Id.* at 1118 (citing *Ford v. State,* 330 Md. 682, 625 A.2d 984 (1993)). After concluding that the doctrine of transferred intent could not apply to attempted murder, *Bland* held that the "flurry of bullets" fired by the defendant virtually compelled the inference that the defendant

entertained a concurrent intent to accomplish the deaths of all surrounding the primary victim. *Id.* at 1119; *see also* 8 A.L.R. 4th 960 (reciting cases in which courts have concluded that a single physical act affecting multiple victims may constitute multiple assaults or homicides dependent upon the intent of the accused); *Ogletree v. State*, 525 So. 2d 967, 970 (Fla. Dist. Ct. App. 1988) (concluding that a charge of attempted premeditated first degree murder may be tied to the number of intended victims and noting there was a "serious question that the state's evidence was sufficient to prove the charges of attempted premeditated murder" when the defendant fired one shot endangering nine people, but declining to review the issue due to waiver); *Callaghan v. State*, 462 So. 2d 832, 833 (Fla. Dist. Ct. App. 1984) (noting in dicta that act of firing single shot at girlfriend who was holding infant son could have supported multiple counts of attempted murder); *Jackson v. State*, 492 A.2d 346, 350-51 (Md. Ct. Spec. App. 1985) ("Provided the State can prove that appellant, in firing only one shot at the moving police car, intended to murder or cause grievous bodily harm to each officer and that each officer had a reasonable fear of such consequences, we see no bar to multiple prosecutions."), *rev'd on other grounds sub nom. Cherry v. State*, 506 A.2d 228 (Md. 1986); *see also* Ehrenreich, 82 Brook. L. Rev. at 78 ("Thus, allowing the use of transferred intent to support attempt charges whenever an actor creates risks to bystanders opens the door to truly limitless potential liability.").

Some courts, without employing the concept of transferred intent, have found insufficient evidence to support multiple convictions when only one shot was fired. See *Ladner v. United States*, 358 U.S. 169, 177-78 (1958) (concluding that statute authorized only one punishment for firing single shotgun blast at two officers, noting that "an interpretation that there are as many assaults committed as there are officers affected would produce incongruous results"); *Ramsey v. State*, 56 P.3d 675, 681 (Alaska Ct. App. 2002) (reversing conviction for attempted first degree murder of unintended injured victim and noting that "[t]he problem with the State's argument is that its logic leads to the conclusion that Ramsey could have been found guilty of the attempted murder of everyone in the school."); *Foreman v. State*, 51 So. 3d 957, 959-60 (Miss. 2011) (concluding that evidence was insufficient to support multiple convictions because "the attempt to discharge the gun one time does not support the inference that he intended to injure four individuals"); *State v. Buck*, 445 N.E.2d 720, 721-22 (Ohio Ct. App. 1982) (noting that firing single bullet through window when several officers stood outside could only support one conviction because "the state adduced proof of only one animus"). We note that in such a case, the offender may be prosecuted for other crimes, such as reckless endangerment, against the uninjured bystanders.

Other courts have come to the opposite conclusion. In *State v. Gillette*, the defendant placed poison in a soft drink in an attempt to poison the intended victim, and the intended victim as well as two unintended victims drank from the soft drink but were

unharmed. *State v. Gillette*, 699 P.2d 626, 634 (N.M. Ct. App. 1985). The court concluded that because "a murder conviction will be upheld even though the specific intent to kill was directed at someone other than the unintended victim, it follows that an attempted murder conviction may be upheld on the same grounds." *Id.* at 635. We note that the *Gillette* court nevertheless conditioned the convictions on the fact that the "defendant's felonious intent to kill is transferred to others who *foreseeably* may also ingest the poison." *Gillette*, 699 P.2d at 636 (emphasis added). We think that this reasoning accords with the "concurrent intent" cited by the court in *Bland*.

Tennessee courts, while not directly determining the issue before us, have upheld multiple convictions based on a single shot. After the court rejected the defendant's double jeopardy argument on direct appeal in *State v. Joseph Jackson, Jr.*, the defendant filed a habeas corpus petition, and this court, while acknowledging that *Millen* did not specifically address the attempted murder statute, reaffirmed its prior analysis, observing that "it has been specifically determined on direct appeal that the Petitioner could be convicted of two criminal attempts based on the intent to merely kill one." *Joseph Jackson, Jr., v. State*, No. W2006-00606-CCA-R3-HC, 2007 WL 273649, at *4 (Tenn. Crim. App. Jan. 31, 2007). While the issue of sufficiency was not raised in *Steven A. Pugh, Jr., v. State*, this court denied post-conviction relief on the petitioner's guilty pleas to two counts of attempted first degree murder for firing a shot into his pregnant girlfriend's stomach. No. E2012-02649-CCA-R3-PC, 2013 WL 4806964, at *1 (Tenn. Crim. App. Sept. 9, 2013); *see also State v. Thomas J. Faulkner, Jr.*, No. E2000-00309-CCA-R3-CD, 2001 WL 378540, at *8-9 (Tenn. Crim. App. Apr. 17, 2001) (holding that defendant did not need to have specific intent with regard to each person in the house when he fired multiple shots at a house, intending to kill "everyone" in it, but was not aware of how many people were inside). We note that in both *Thomas J. Faulkner, Jr.* and *Steven A. Pugh, Jr.*, the evidence supported the conclusion that the defendant's criminal act was intended and sufficient to injure or kill multiple victims.

In summary, our review of the cases mentioned above leads to the conclusion that the doctrine of transferred intent is on life support in Tennessee with a barely perceptible heart rate. Indeed, the doctrine is not useful in assessing the criminal liability of one who fires a single shot at an individual who is accompanied by others who are not injured by the shot fired. The offense of reckless endangerment more properly addresses such a scenario. So, we reject as inapplicable any theory of transferred intent; the question remains, however, whether a wayward single-shot scenario that results in no injuries may ever result in multiple convictions for attempt to commit a murder. Such a question is resolved by analyzing the circumstances of each given case. *See*, *e.g.*, *Steven A. Pugh, Jr.*, 2013 WL 4806964, at *1.

In the case at bar, we analyze whether the Defendant's sole act of firing one bullet toward the occupants of the apartment is sufficient to support three convictions for attempted second degree murder. The State had to prove that the Defendant acted with the conscious objective or desire to cause the knowing killing of the three victims and believed his conduct would cause the killings without further conduct on his part. *See* T.C.A. § 39-12-101(a)(2); T.C.A. § 39-13-210(a)(1); T.C.A. § 39-11-302(a). The Defendant is charged with multiple inchoate crimes. The circumstances of the act are that the Defendant fired one shot through a glass door where Ms. Walden was standing next to Ms. Cody's child, and Ms. Cody was behind them but in another room. Ms. Cody was not in a position to see the shot fired, and the bullet travelled through vertical blinds which were in place over the glass door before striking a microwave. We conclude that the evidence is not sufficient to show that the Defendant acted with the conscious objective or desire to cause the knowing killing of the three victims or that he believed the act of firing one bullet would cause the killing of three separate victims, who were spread out across two rooms, without further conduct on his part. The nature of the act and the circumstances of the case do not lead to the inference that the Defendant committed three inchoate crimes. *See Inlow*, 52 S.W.3d at 105. We distinguish a case such as *Steven A. Pugh, Jr.*, in which the facts could lead to the inference that the defendant intended to commit multiple homicides through a single criminal act. 2013 WL 4806964, at *1 (defendant fired one shot into his pregnant girlfriend's stomach).

Accordingly, we affirm the conviction for the attempted second degree murder of Ms. Walden, who, according to the evidence, was standing visibly in the window and made eye contact with the Defendant before the Defendant shot. The jury was charged with attempted first degree premeditated murder, attempted second degree murder, and only one other lesser-included offense: attempted voluntary manslaughter. While the facts of the case would support a conviction for reckless endangerment by discharging a firearm into a habitation or reckless endangerment committed with a deadly weapon, these crimes are not lesser-included offenses of attempted second degree murder. *See* T.C.A. § 39-13-103(b)(2), (3); *State v. Rush*, 50 S.W.3d 424, 431 (Tenn. 2001), *op. amended* (July 25, 2001). Because the evidence is insufficient to support the attempted second degree murder convictions for crimes committed against all three victims, we reverse the convictions for the attempted second degree murders of Ms. Cody and of the Defendant's son and dismiss those charges.

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

Because we have reversed the attempted second degree murder convictions against Ms. Cody and her son, which were the predicate felonies for the convictions for employing a firearm in the commission of a dangerous felony in Counts 2 and 4, the

Defendant's convictions in Counts 2 and 4 should likewise be reversed and these charges dismissed.

We note here that multiple convictions for this offense under these facts would in any event have run afoul the Fifth Amendment of the United States Constitution and article I, section 10 of the Tennessee Constitution, which protect against multiple punishments for the same offense. *See State v. Hogg*, 448 S.W.3d 877, 885 (Tenn. 2014); *see State v. Watkins*, 362 S.W.3d 530, 542 (Tenn. 2012) (concluding that unit-of-prosecution claims rise or fall based on the court's determination of what the Legislature intended to be a unit of conduct for the purposes of punishment under the statute).

In *State v. Lajaun Harbison*, this court addressed the propriety of multiple convictions under this statute for offenses committed during a single transaction. 2016 WL 4414723, at *25. There, the defendant fired two shots, co-defendants for whose actions he was criminally responsible fired several more shots, and the defendant was convicted of four counts of employing a firearm during the commission of a dangerous felony, one for each count of attempted voluntary manslaughter of which he stood convicted. *Id.* at *9, 22. This court concluded that double jeopardy principles prohibited multiple convictions for the employment of a firearm during the commission of a dangerous felony where multiple felonies are committed as part of a single transaction. *Id.* at *27. The opinion cited *State v. Richardson*, 875 S.W.2d 671, 673-74 (Tenn. Crim. App. 1994), in which this court concluded that only one conviction for possession of a deadly weapon with the intent to employ it in the commission of an offense could be sustained where the defendant fired one shot at his target, hitting an unintended victim, and then shot the intended victim with a second shot.

In *State v. Arterious North*, this court addressed the convictions of Harbison's co-defendant. Concluding that the evidence was insufficient to support a finding of provocation by the unintended victim, this court reversed the convictions for manslaughter and the accompanying weapons conviction. *Arterious North*, 2016 WL 6248598, at *19. The defendant in *Arterious North* did not argue that the entry of multiple convictions for the employment of a firearm by himself and his co-defendants during the shooting was a violation of double jeopardy principles. *Id.* This court began by "acknowledg[ing] the reasoning of [the *Lajaun Harbison*] panel that the unit of prosecution of that statute necessitates that only one conviction may stand for each weapon possessed." *Id.* The court differed from the panel in *Lajaun Harbison*, however, by concluding that "each time a weapon is 'employed' during the commission of a dangerous felony, such employment is an adequate basis for a conviction for employing a firearm during the commission of a dangerous felony." *Id.* The court ultimately concluded that firing a weapon multiple times, or being criminally responsible for multiple shots, could support multiple convictions because the statute "does not require

proof that the Defendant possessed … multiple firearms but, rather, that the Defendant employed a firearm multiple times, with each time occurring during the commission of a dangerous felony." *Id.*

Lajaun Harbison, *Arterious North*, and the cases cited in *Arterious North* all involved crimes in which several bullets were fired. *See Lajaun Harbison*, 2016 WL 4414723, at *25; *Arterious North*, 2016 WL 6248598, at *19. In the case at bar, the Defendant fired a single shot, resulting in three weapons convictions, one for each victim. Under the reasoning of either *Lajaun Harbison* or *Arterious North*, the Defendant here only "employed" the firearm one time and multiple convictions would in any event run afoul the prohibition against double jeopardy.[2] We affirm the conviction for employing a firearm in the commission of a dangerous felony in Count 6, where the predicate felony is the attempted second degree murder of Ms. Walden.

II. Constitutionality of the Gang Enhancement Statute

A. Waiver

The Defendant asserts that he is entitled to reversal of the gang enhancement of his convictions because Tennessee Code Annotated section 40-35-121 (2014) is unconstitutional. The State asserts on appeal that the Defendant waived any consideration of his constitutional issue by failing to raise it in a pretrial motion. The Defendant first raised the issue of the constitutionality of the statute prior to sentencing, in his motion for a new trial, where he noted that the issue was under consideration by this court. The State did not assert waiver, and the trial court denied the motion. After the denial of the motion for a new trial, this court issued its opinion in *State v. Bonds*, 502 S.W.3d 118 (Tenn. Crim. App. 2016), *perm. app. denied* (Tenn. Aug. 18, 2016), holding that the statute was unconstitutional because the lack of a requirement that there be a nexus between the gang activity and the crime at issue was a violation of substantive due process. *Id.* at 161. This court reaffirmed the conclusion that the statute was not constitutional shortly thereafter in *State v. William Jermaine Stripling*, No. E2015-01554-CCA-R3-CD, 2016 WL 3462134, at *8 (Tenn. Crim. App. June 16, 2016) *no perm. app. filed*. While holding that the statute did not violate the defendant's First Amendment rights, the court in *William Jermaine Stripling* concluded that the lack of a nexus requirement was constitutionally fatal. *Id.*

The State notes that the appellate court in *William Jermaine Stripling* raised the possibility of waiver, although the court declined to apply it. 2016 WL 3462134, at *5.

[2] During closing arguments, the State argued that the Defendant "employed" the firearm by firing it at the glass door in the attempt to commit the three charged counts of attempted homicide.

The constitutional issue was first raised at sentencing in *William Jermaine Stripling*.[3] *Id.* The *Stripling* court noted that the State did not argue waiver either at sentencing or on appeal, and it proceeded to address the merits of the question. *Id.*; *see also State v. Jayme Conkin*, No. E2015-01286-CCA-R3-CD, 2016 WL 4708356, at *9 (Tenn. Crim. App. Sept. 7, 2016) *no perm. app. filed* (concluding that the challenge to a statute's constitutionality was waived but addressing issue because State did not raise a waiver argument).

There is conflicting authority regarding whether a challenge to a statute's constitutionality is waived for failure to raise it pretrial. On the one hand, there is authority to support the proposition that an unconstitutional statute does not confer subject matter jurisdiction and is subject to mandatory review. In *Edwards v. Allen*, the Tennessee Supreme Court reaffirmed that Tennessee generally follows the doctrine of void ab initio, where an unconstitutional act is void from its inception, but the Court noted an exception to the rule in the zoning context when there has been reliance and the attack is based on procedural irregularities. 216 S.W.3d 278, 290-91 (Tenn. 2007); *see Archer v. State*, 851 S.W.2d 157, 160 (Tenn. 1993) (noting that the writ of habeas corpus "is available to contest convictions imposed under unconstitutional statutes, because an unconstitutional law is void and can, therefore, create no offense"); *State v. Dixon*, 530 S.W.2d 73, 74 (Tenn. 1975) (noting that act "was void from the date of its enactment, and there could be no valid conviction under the Act"). Accordingly, there is a line of cases analyzing a challenge to the constitutionality of the statute under the theory that the conviction would be void due to lack of subject matter jurisdiction. *See State v. Marvin Hugghis*, No. W2006-01149-CCA-R3-CO, 2007 WL 1002864, at *2 (Tenn. Crim. App. Apr. 3, 2007) (analyzing habeas corpus claim that statute was not properly enacted and void, thereby defeating the court's subject matter jurisdiction); *John H. Williams, Jr., v. Kevin Myers*, No. M2002-00855-CCA-R3-CO, 2002 WL 31852857, at *4 (Tenn. Crim. App. Dec. 20, 2002) (analyzing habeas corpus claim that statute was void for vagueness and noting that an unconstitutional statute would be void, the court would have no subject matter jurisdiction, and the conviction would be void); *Jimmy Wayne Wilson v. State*, No. 03C01-9806-CR-00206, 1999 WL 420495, at *6 (Tenn. Crim. App. June 24, 1999) (noting that claim that statute was unconstitutional could be raised in habeas corpus action because a void statute would not confer subject matter jurisdiction); *Isaac Lydell Herron v. Fred Raney*, No. 02C01-9805-CC-00153, 1998 WL 725797, at *1 (Tenn. Crim. App. Oct. 19, 1998) (same).

On the other hand, there is authority that such a statute is merely voidable. *See Taylor v. State*, 995 S.W.2d 78, 80, 85 (Tenn. 1999) (concluding that a sentence was

[3] At the Defendant's request, the trial court in the instant case held the sentencing hearing and hearing on the motion for a new trial simultaneously.

voidable rather than a void when it was imposed under a statute which was subsequently declared unconstitutional with the effect of reviving an earlier statute); *Franks v. State*, 772 S.W.2d 428, 431 (Tenn. 1989) (applying in a civil suit the proposition that "the unconstitutional act was voidable until condemned by judicial pronouncement"); *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516, 540 (Tenn. 1977) (stating in a civil suit that an unconstitutional law is merely voidable). Indeed, it has often been held that statutes are presumed to be constitutional. *State v. Taylor,* 70 S.W.3d 717, 721 (Tenn. 2002); *State v. Robinson,* 29 S.W.3d 476, 479-80 (Tenn. 2000).

There is, separately, authority for the proposition that a constitutional challenge to a statute may be raised on appeal even though it was not presented to the trial court. In *Veach v. State*, the Tennessee Supreme Court addressed a constitutional challenge to a statute even though it was raised for the first time on appeal. 491 S.W.2d 81, 83 (Tenn. 1973). The Court concluded that "a constitutional question may be raised at any time," and that waiver would not apply "in cases involving the deprivation of life or liberty." *Id.* (reversing conviction but noting that the decision invalidating the statute had preceded the conviction); *see also State v. Goins*, 705 S.W.2d 648, 650 (Tenn. 1986) (analyzing double jeopardy violation and noting that "this Court may correct constitutional errors to prevent manifest injustice").

In *Capri Adult Cinema v. State*, the defendants pled guilty and paid a fine under a statute subsequently held unconstitutional. 537 S.W.2d 896, 898 (Tenn. 1976). The defendants, who were on notice that the statute was under review pursuant to a constitutional challenge, had initially challenged the statute's constitutionality but ultimately decided to plead guilty. *Id.* at 897-98. Distinguishing a case in which a defendant had unsuccessfully litigated a statute's constitutionality but was convicted, the Court noted that the defendants had not appealed their convictions nor sought supersedeas. *Id.* at 899. While describing an unconstitutional law as inoperative and "'as though it had never been passed,'" the Court refused to overturn the plea agreement. *Id.* at 899-900 (quoting *Roberts v. Roane County*, 23 S.W.2d 239, 243 (1929)). The Court reiterated that constitutional issues could be raised for the first time on appeal and noted that an unconstitutional statute was void from the date of its enactment, but concluded that relief was not appropriate because the defendants waived the right to appeal and took no action until after the judgment had been fully executed. *Id.* at 900. The Court also noted that a different result might obtain if the defendants had been imprisoned or if they had sought post-conviction relief. *Id.* at 901.

These cases allowing constitutional challenges not raised in the trial court to be raised on appeal are perhaps best understood as conducting plain error review. In *State v. Adkisson*, this court set forth the standard we employ in granting plain error review. 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994). In analyzing precedent related to the

review of issues not preserved or presented, *Adkisson* noted that lack of subject matter jurisdiction was subject to mandatory review. *Id.* at 638. *Adkisson* also noted that discretionary review could be applied for various other reasons, including "to prevent manifest injustice." *Id.* at 638-39. The opinion cited to *Veach*, 491 S.W.2d at 83 as an example of plain error review conducted to prevent manifest injustice. *Id.* at 639 n.47. Accordingly, a constitutional challenge which was not raised during trial has also been analyzed for plain error. *See State v. Marvin Davis*, No. W2013-00656-CCA-R3-CD, 2014 WL 1775529, at *5 (Tenn. Crim. App. May 1, 2014) (concluding that challenge to statute's constitutionality was waived but conducting a plain error review); *State v. Draper*, 800 S.W.2d 489, 497 (Tenn. Crim. App. 1990) (concluding that a constitutional issue may be raised at any time and that an appellate court may consider any issue to prevent needless litigation, injury to the public interest, prejudice to the judicial process, or if necessary to do substantial justice); *see also State v. Michael L. Smith*, No. C.C.A. 150, 1990 WL 157421, at *4 (Tenn. Crim. App. Oct. 19, 1990) (considering under plain error a double jeopardy claim dependent on a decision rendered after the defendants' judgments became final).

The Tennessee Supreme Court has likewise conducted plain error review of a challenge to the constitutionality of a statute. In *State v. Gomez* (*Gomez I*), the defendants challenged their sentence enhancement based on judicially-found facts. 163 S.W.3d 632, 648 (Tenn. 2005), *vacated by Gomez v. Tennessee*, 549 U.S. 1190 (2007). While the defendants had not preserved the issue in the lower court based on state law, they asserted it on appeal, after the United States Supreme Court's decision was rendered in *Blakely v. Washington,* 542 U.S. 296 (2004). *Gomez I*, 163 S.W.3d at 648-49. The Tennessee Supreme Court concluded that plain error review was appropriate because even if *Blakely* had announced a new rule of law, the defendants would only be entitled to plenary review for "pipeline" cases if they had preserved the issue. *Id.* at 650. On plain error review, the Court concluded that no clear and equivocal rule of law was breached because "the defendants' sentences were not imposed in violation of the Sixth Amendment." *Id.* at 661. Refusing to accept the State's concession that Tennessee's sentencing scheme was constitutionally impermissible, the Tennessee Supreme Court concluded that the statutory scheme was constitutional. *Id.* at 654, 661. The United States Supreme Court vacated the decision, and on remand, the Tennessee Supreme Court again conducted plain error review. *State v. Gomez (Gomez II)*, 239 S.W.3d 733, 737 (Tenn. 2007). In doing so, the Court addressed the argument of the defendants and of amicus curiae that plenary review was appropriate. *Id.* The Court concluded that "[b]ecause we have determined that the Defendants are entitled to relief for plain error, we decline to readdress whether the Defendants properly preserved their Sixth Amendment claim for plenary review." *Id.* The Court concluded that a clear and unequivocal rule of law was breached but cautioned that it was "compelled to draw this conclusion in light of the Supreme Court's order of remand" despite the fact that

numerous cases had been necessary to clarify the constitutionality of determinate sentencing schemes. *Id.* at 740-41, 741 n.9.

In conducting plain error review, the cases above concluded that the litigants had waived plenary review by failing to raise the issue in the lower court. Under Tennessee Rule of Criminal Procedure 12(b)(2)(B), a motion alleging a defect in the indictment, presentment, or information must be brought before trial unless the claim alleges that there was a lack of jurisdiction in the court. *William Jermaine Stripling* relied in part on *State v. Farmer* in addressing the waiver issue. *William Jermaine Stripling*, 2016 WL 3462134, at *5. In *State v. Farmer*, this court held that the defendants' failure to challenge a statute in a pretrial motion for being broader than its title in violation of article II, section 17 amounted to waiver. 675 S.W.2d 212, 214 (Tenn. Crim. App. 1984). We note that the *Farmer* opinion went on to state that "the codification of the statute cured any defect in the caption." *Id.*

Likewise, in *State v. Rhoden*, this court held that a challenge to the constitutionality of a statute was waived when it was not raised pretrial. 739 S.W.2d 6, 10 (Tenn. Crim. App. 1987). On post-conviction review, this court again concluded that the issue could not be addressed due to waiver, although it went on to note that it concluded the statute was constitutional. *Rhoden v. State*, 816 S.W.2d 56, 61 (Tenn. Crim. App. 1991). On federal habeas review, the District Court found that the procedural default applied in Rhoden's case was not "strictly and regularly followed" because the state courts frequently addressed constitutional challenges in spite of a failure to raise them pretrial, and the federal court addressed the claim on the merits. *Rhoden v. Morgan*, 846 F. Supp. 598, 607 (M.D. Tenn. 1994).

In *State v. Smith*, the constitutionality of a statute was not challenged until the motion for a new trial. 48 S.W.3d 159, 162 n.1 (Tenn. Crim. App. 2000). Citing *State v. Seagraves*, 837 S.W.2d 615, 623 (Tenn. Crim. App. 1992) *overruled by State v. Doane*, 393 S.W.3d 721, 732 (Tenn. Crim. App. 2011) for the proposition that the issue should have been raised pretrial, the court nevertheless addressed the merits because the State did not raise a waiver argument.[4] *Id.* Following the decisions in *Smith*, *Farmer*, and *Rhoden*, this court has issued several opinions finding waiver when a defendant did not

[4] We note parenthetically that the opinion in *Smith* cites the dissent in *Seagraves*. The *Seagraves* majority concluded, on the contrary, that a constitutional question could be raised at any time during the proceedings. *Seagraves*, 837 S.W.2d at 618. *Seagraves* relied on a conclusion that a conviction for a time-barred crime lay outside the trial court's subject matter jurisdiction, but this conclusion has since been overruled. *See id.* at 621; *Doane*, 393 S.W.3d at 732 (concluding that a statute of limitations is subject to waiver and not jurisdictional); *see also State v. Nixon*, 977 S.W.2d 119, 120-21 (Tenn. Crim. App. 1997) (examining difference between defects which implicate subject matter jurisdiction and those which must be raised prior to trial and include matters that go to form rather than substance).

raise a constitutional challenge to a statute in a pretrial motion. *State v. Chanceller Chatman*, No. W2008-00568-CCA-R3-CD, 2009 WL 1819241, at *5 (Tenn. Crim. App. June 26, 2009); *State v. Brian Edward Eggleston*, No. M2006-00210-CCA-R3-CD, 2007 WL 1582657, at *5 (Tenn. Crim. App. May 30, 2007) (holding that constitutional challenge was waived for failure to raise it pretrial or in the motion for a new trial); *State v. Alfonso Martinez*, No. W2003-01497-CCA-R3-CD, 2004 WL 2050282, at *2 (Tenn. Crim. App. Sept. 13, 2004).

This court has nevertheless addressed a waived constitutional challenge in other opinions. *State v. Diallo Jamel Lauderdale*, No. W2001-01296-CCA-R3-CD, 2003 WL 22080777, at *12 (Tenn. Crim. App. Sept. 5, 2003) (holding that issue raised in motion for new trial was waived, but noting that the argument against the statute's constitutionality was founded on an incorrect premise); *State v. Terry Taylor*, No. 01C01-9411-CC-00374, 1996 WL 200736, at *3-4 (Tenn. Crim. App. Apr. 26, 1996) (holding that issue was waived but nevertheless addressing it on the merits); *State v. Ronnie L. Hollie*, No. C.C.A. 13, 1988 WL 23572, at *2-3 (Tenn. Crim. App. Mar. 16, 1988) (concluding constitutional challenge was waived but addressing on the merits nevertheless). The Tennessee Supreme Court, in a civil case, held that waiver "applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion." *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983).

We take note that this court recently refused to review a claim regarding the unconstitutionality of the gang enhancement statute based on waiver. *State v. Christopher Minor*, No. W2016-00348-CCA-R3-CD, 2017 WL 634781, at *9 (Tenn. Crim. App. Feb. 16, 2017). In *Christopher Minor*, this court concluded that the issue was waived because the defendant raised it for the first time on appeal and the State objected based on waiver. *Id.* at *8. The court concluded that the defendant was "not entitled to 'plain error' review." *Id.* at *8-9. The dissent argued that the defendant should be entitled to reversal of the gang enhancement convictions. *Id.* at *11.

On the other hand, in *State v. Gerald Lamont Byars*, this court refused to apply waiver to a challenge to the defendant's convictions under the gang enhancement statute. No. W2016-00005-CCA-R3-CD, 2017 WL 758517, at *15 (Tenn. Crim. App. Feb 27, 2017). In *Gerald Lamont Byars*, the defendant did not challenge the gang enhancement statute at all in the trial court. *Id.* This court concluded that even if the issue were waived, the defendant was entitled to plain error review. *Id.* at *15, 17 ("Moreover, if neither [*Bonds* nor *William Jermaine Stripling*] existed, we fail to see how we would be constrained to uphold a statute" that is unconstitutional); *see also Ronnie Lamont Harshaw v. State*, No. E2015-00900-CCA-R3-PC, 2017 WL 1103048, at *12 (Tenn.

Crim. App. Mar. 24, 2017) (concluding on post-conviction review that the challenge to the constitutionality of the statute was not waived for failure to present it to the post-conviction court because the statute is so obviously unconstitutional as to obviate the need for discussion). The Defendant in this case was charged with and convicted of additional offenses at the time of his arrest, and he recently raised a challenge to the enhancement of those offenses based on the gang enhancement statute. *See State v. Ronald Turner*, No. E2016-00790-CCA-R3-CD, slip op. at *7 (Tenn. Crim. App. Apr. 13, 2017). A panel of this court concluded that the challenge, raised first at the motion for a new trial, was not waived and concluded that the Defendant was entitled to relief under either plenary or plain error review. *Id.* at *10-12.

In the present case, the challenged statute, as pointed out in *Bonds*, is tantamount to a proscriptive statute, meaning that any constitutional flaw may be more critical to the triumph of justice than it might be if it were found in a more tangential statute. In that vein, the statute has been declared unconstitutional via a published case that held the statute to be unconstitutional on its face. In our view, a *facially unconstitutional proscriptive* statute is void on its face. As such, it does not fall within the ambit of Rule 12; because it renders the indicted charge void, a pretrial motion is not required. Furthermore, we discern that such a central error need not be raised in the motion for a new trial as a condition of litigating the issue on appeal. This discernment is controlled by the understanding that, under Tennessee law, an error that renders a criminal judgment void – whether it be one of constitutional magnitude – is subject to collateral attack via the writ of habeas corpus. It makes no sense to empower a habeas corpus court to strike down a void conviction while disabling an appellate court from doing likewise during direct appellate review of that very conviction. Seen in this light, the appellate court's adjudication of the issue is not really a function of plain error – unless the aggrieved party simply failed to raise the issue on appeal.

Thus, we hold that our adjudication of the constitutional issue is not blocked by any issue of waiver.

B. Constitutionality of the 2014 Gang Enhancement Statute

The Defendant asserts that the statute authorizing the enhancement of his sentences based on his gang affiliation is unconstitutional. This court has issued three opinions concluding that the statute is unconstitutional. *See Gerald Lamont Byars*, 2017 WL 758517, at *17; *William Jermaine Stripling*, 2016 WL 3462134, at *8; *Bonds*, 502 S.W.3d at 157-58. *Bonds*, *William Jermaine Stripling*, and *Gerald Lamont Byars* currently constitute only persuasive authority for this court to conclude that the statute at issue is unconstitutional. We note here that the Defendant's legal argument consists entirely of a citation to *Bonds*. We conclude that the Defendant urges us to adopt the

reasoning in *Bonds*, which held that the statute was unconstitutional based on the lack of a requirement that there be a nexus between the charged offense and the gang activity. *Bonds*, 502 S.W.3d at 157-58. *Bonds* was decided based on a violation of due process, and accordingly, we analyze the version of the statute in effect at the time of the Defendant's offenses to determine whether the statute violates due process. Initially, we note that the gang enhancement charges that applied to the dismissed offenses should in any event be dismissed.

The Defendant's sentences were enhanced pursuant to Tennessee Code Annotated section 40-35-121 (2014). At the time of the Defendant's offenses, the statute defined a "criminal gang offense" as, among other things, the attempt to commit second degree murder or the unlawful possession of a weapon contrary to Tennessee Code Annotated section 39-17-1307. T.C.A. § 40-35-121(a)(3)(B)(ii), (xxvi). The statute mandated that "[a] criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed." T.C.A. § 40-35-121(b).

The statute provided definitions for "criminal gang" and "criminal gang member." T.C.A. § 40-35-121(a)(1), (2). A criminal gang is a "formal or informal ongoing organization, association or group consisting of three or more persons" when the group has as at least one of its activities the commission of criminal acts and at least two members who engage in or have engaged in a pattern of criminal gang activity. T.C.A. § 40-35-121(a)(1). A pattern of criminal gang activity includes a certain number of convictions for various "criminal gang offenses" committed on separate occasions within a five-year period. T.C.A. § 40-35-121(a)(4)(A). A "criminal gang member" must meet two out of seven statutory criteria. T.C.A. § 40-35-121(a)(2). The Defendant does not contest that the State established that the Unknown Vice Lords was a gang within the statutory definition, nor does he raise any challenge to the State's proof that he was a gang member. Instead, he relies on *Bonds* for the proposition that the statute itself is facially unconstitutional because it lacks any nexus requirement between the criminal activity and gang membership.

As noted above, we approach a challenge to the constitutionality of legislation with the presumption that the statute is valid. *State v. Robinson*, 29 S.W.3d 476, 479-80 (Tenn. 2000). The Fourteenth Amendment of the United States Constitution and article I, section 8 of the Tennessee Constitution guarantee the accused the due process of law. *Bonds* concluded in part that the statute did not comport with due process as described in *Scales v. United States*, 367 U.S. 203, 226-27 (1961). *Bonds*, 502 S.W.3d at 158. In *Scales*, the defendant challenged a conviction under a statute that prohibited holding knowing membership in an organization which was advocating for the overthrow of the

federal government by force or violence. *Scales*, 367 U.S. at 205. The defendant argued that the statute violated the Fifth Amendment by "impermissibly imput[ing] guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct." *Scales*, 367 U.S. at 220. The Court noted that "guilt is personal" under the Fifth Amendment. *Id.* at 224. "[W]hen the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." *Id.* at 224-25. Membership in an organization engaged in illegal advocacy is not in itself sufficient to establish a criminal offense. *Id.* at 225. Nevertheless, the Court concluded that the statute did not violate due process because it required the offender to "actively and knowing" work in the ranks of the organization, intending to contribute the success of its illegal activities. *Id.* at 227. Because the statute reached only "'active' members having also a guilty knowledge and intent" the Court upheld the conviction. *Id.* at 228. Accordingly, "[a] heightened showing of scienter was required in *Scales* because the statute at issue in that case could otherwise be read as criminalizing mere association with an organization that engaged in illegal activities." *United States v. Warsame*, 537 F. Supp. 2d 1005, 1020-21 (D. Minn. 2008) (upholding statute criminalizing providing material support to an organization the donor knows to be engaging in terrorism). "[A] criminal statute that provides for guilt by association is unconstitutional no matter how clear the notice or how fair the hearing it provides." *State v. Bennett*, 782 N.E.2d 101, 107 (Ohio Ct. App. 2002).

We note here that *Bonds* concluded that the gang enhancement statute, despite its name, is actually a separate offense which constitutes "an extension of the actual guilt phase of the trial." *Bonds*, 502 S.W.3d at 150-51. *Bonds* also concluded that the bifurcated section of trial dealing with the gang enhancement statute is "not … merely a sentencing hearing," and that the accused is entitled to the protections of the Confrontation Clause during the bifurcated portion of the hearing. *Id.*

Bonds relied in part on a Florida decision invalidating a similar statute. *Id.* at 155. In *State v. O.C.*, the Supreme Court of Florida concluded that the defendant's due process rights were violated because the statute required no nexus between the criminal act and gang membership. 748 So. 2d 945, 949 (Fla. 1999). In *O.C.*, the court reasoned that the defendant could be punished for merely associating with others and that the legislation therefore lacked any rational relationship to the goal of reducing gang violence. *Id.* at 950.

Likewise, a California court, in construing a gang-related offense, noted that its legislature had drafted the statute in an attempt to avoid due process concerns in

punishing mere membership in a gang. *People v. Rodriguez*, 290 P.3d 1143, 1149 (Cal. 2012). The court rejected the argument that a gang member committing a crime alone could satisfy the elements of the statute because "[t]he Attorney General's interpretation that a gang member may satisfy the statute simply by committing a felony alone reads out of the statute the nexus between defendant's conduct and gang activity that the Legislature put in the statute by requiring one act with another gang member." *Id.* at 1150. An Ohio court likewise found that a criminal statute regarding gang membership did not violate due process because it required active participation, required knowledge that the gang's members were engaging in criminal activity, and required the offender to willfully promote, further, or assist gang members in committing certain enumerated offenses. *Bennett*, 782 N.E.2d at 110.

Bonds concluded that the statute did not comport with due process because it omitted any sort of nexus requirement:

> Without a nexus requirement that the underlying offense be gang-related, Section 40-35-121(b) is untethered to any personal criminal intent or conduct by the defendant…. Section 40-35-121(b) imposes mandatory punishment on an eligible defendant by imputing to him responsibility for the criminal activity of the gang as a collective without requiring the defendant's knowledge of and intent to promote such activity. We simply cannot believe that the concept of personal guilt articulated in *Scales* tolerates such an attenuated basis for criminal punishment. Indeed, a literal reading of the statute reveals that the scope of its potential application is startling, also posing an increased risk of arbitrary application.

Bonds, 502 S.W.3d at 158 (footnote omitted). *Bonds* went on to note that the statute imposes a "mandatory criminal punishment wholly aside from any consideration of the nature of the underlying offense" and concluded that this procedure "enhances punishment solely on the mere fact of one's affiliation with a gang which makes it easily distinguishable from other discretionary sentencing enhancement factors that are relevant for reaching a personalized sentencing decision." *Id.*

Bonds likewise found that the statute also violated the principles of substantive due process because, although the legislative goal of curtailing harmful gang activity is a legitimate governmental purpose, the statute lacks a reasonable relationship to achieving the purpose because it is "completely devoid of language requiring that the underlying offense be somehow gang-related before the sentencing enhancement is applied." *Id.* at 156-57. In *William Jermaine Stripling*, the court analyzed *Bonds* and independently concluded that the statute violated the principles of substantive due process. 2016 WL 3462134, at *7-8. "Without a requirement that the offense be related to the Defendant's

criminal gang membership, we fail to comprehend how Tennessee Code Annotated section 40-35-121(b) is reasonably related to the goal of deterring criminal gang activity." *Id.* at *8.

Bonds ultimately noted that the statute "lacks a textual basis conditioning enhanced punishment on gang-related criminal conduct by the defendant," distinguishing it from permissible statutes which "contain specific language limiting the reach of those statutes only to offenses that possess a nexus to a defendant's gang affiliation, and therefore, a defendant's own criminal conduct." *Bonds*, 502 S.W.3d at 159. *Bonds* concluded that the statute was facially unconstitutional, despite noting that "it is amply apparent that the underlying offenses in this case were gang-related." *Id.* at 161.

Bonds and *William Jermaine Stripling* both analyzed the statutory provision applied to conduct committed prior to July 1, 2013.[5] *See Bonds*, 502 S.W.3d at 147; *William Jermaine Stripling*, 2016 WL 3462134, at *5. While the statute as it applied in *Bonds* defined a criminal gang offense as a criminal offense, "[d]uring the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person or persons and specifically includes rape of a child, aggravated rape and rape," T.C.A. § 40-35-121(a)(3)(A), the statute as applied to this case defined a criminal gang offense as "[t]he commission or attempted commission, facilitation of, solicitation of, or conspiracy to commit" a lengthy list of enumerated offenses, including second degree murder and unlawful possession of a weapon, T.C.A. § 40-35-121(a)(3)(B)(ii), (xxvi) (2014). Accordingly, while the statutory requirements are not identical, both provisions lack any sort of nexus requirement. Like the statute invalidated in *O.C.*, it "subjects the defendant to conviction for a higher degree crime than originally charged, resulting in an increased penalty range, based only upon a defendant's 'simple association' with others, who may or may not be criminals." *O.C.*, 748 So. 2d 945, 949 (Fla. 1999) (quotation omitted). We conclude that the statute runs afoul of the due process protections articulated in *Scales*. The offense, which requires "an extension of the actual guilt phase of the trial," imposes a separate punishment for mere membership in a gang without any requirement of a nexus between the membership and the criminal activity. *Bonds*, 502 S.W.3d at 150-51.

The facts of this case are an illustration of this defect. While the record establishes that the Defendant was a gang member and that he committed the crimes at issue, there is no evidence tying his assault on his child, his child's mother, and Ms. Walden to any sort

[5] The statute was amended effective April 28, 2016, in an attempt to impose a nexus requirement and now requires that "[t]he criminal gang offense was committed at the direction of, in association with, or for the benefit of the defendant's criminal gang or a member of the defendant's criminal gang." T.C.A. § 40-35-121(b)(2)(2016).

of gang activity. Instead, the Defendant grew angry when he discovered that some marijuana was missing, attempted to shoot Ms. Cody in the closet, left the home, caught Ms. Walden's eye as he passed the balcony, and fired through the glass door. Accordingly, the Defendant's sentences were enhanced based solely on his membership in the gang. We join *Bonds* and *William Jermaine Stripling* in concluding that the statutory provision offends the principle of due process because it fails to tie membership in a gang to the offense at issue.

CONCLUSION

We conclude that the evidence was insufficient to support two of the Defendant's convictions for attempted second-degree murder, and we reverse these convictions and the convictions for employment of a firearm in the commission of a dangerous felony and the gang enhancements predicated on them. Those charges are dismissed. Finally, having concluded that the version of the gang enhancement statute in effect at the time of the Defendant's convictions was unconstitutional, we vacate these enhancements and remand for resentencing on the remaining convictions without the gang enhancement.

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JOHN EVERETT WILLIAMS, JUDGE