

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs April 25, 2006

**MICHAEL SALVATORE MORANI v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Cumberland County  
No. 6395 Leon C. Burns, Jr., Judge**

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**No. E2005-01897-CCA-R3-PC Filed June 30, 2006**

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The petitioner, Michael Salvatore Morani, was convicted by a jury of attempted first degree murder and theft of property over \$10,000 in 2002. Trial counsel filed an untimely motion for new trial that was denied by the trial court after a hearing. The petitioner appealed to this Court. On direct appeal, the petitioner raised challenges to his sentence and the fines imposed by the trial court. The timeliness of the motion for new trial and subsequent notice of appeal were not addressed on appeal. This Court affirmed the judgment of the trial court. State v. Michael Salvatore Morani, No. E2002-02394-CCA-R3-CD, 2003 WL 21946736 (Tenn. Crim. App., at Knoxville, Aug. 14, 2003), perm. app. denied (Tenn. Dec. 15, 2003). The petitioner subsequently filed a petition for post-conviction relief requesting a delayed appeal in which he alleged ineffective assistance of counsel for failing to file a timely motion for new trial. The post-conviction court granted the delayed appeal. The petitioner presents the following issues for our review: (1) whether the trial court improperly admitted statements made by the petitioner to the victim; (2) whether the trial court improperly allowed Investigator Potter to testify that the petitioner commented he had been “Mirandized before;” (3) whether the trial court improperly denied the petitioner’s request for a continuance; (4) whether the evidence was sufficient to support the verdict; and (5) whether the cumulative effect of the trial court’s errors entitles the petitioner to a new trial. After a review of the record and the issues, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed**

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

C. Douglas Field, Crossville, Tennessee for the appellant, Michael Salvatore Morani.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Bill Gibson, District Attorney General; and Thomas Tansil and Gary McKenzie, Assistant District Attorneys General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

The petitioner was indicted in September of 2001 on charges of attempted first degree murder and theft of property over \$10,000. The petitioner was found guilty on both counts by a jury in February of 2002. At a sentencing hearing held on April 15, 2002, the petitioner was sentenced to serve a twenty-three year sentence as a violent offender for the attempted murder conviction and a five-year sentence as a Range I standard offender for the theft conviction. The trial court ordered the sentences to be served concurrently. The trial court also imposed a \$50,000 fine for the attempted murder conviction and a \$10,000 fine for the theft conviction as recommended by the jury. The judgments were initially entered on April 15, 2002, but a corrected judgment for the attempted first degree murder conviction was entered on April 29, 2002, “to reflect release eligibility as ‘Standard 30%.’” Defense counsel did not file a motion for new trial until June 24, 2002.<sup>1</sup> The motion raised the following issues: (1) the victim was erroneously permitted to testify that the petitioner was in jail in April of 2000 and that the petitioner “killed a man;” (2) Investigator Potter was erroneously permitted to testify that the petitioner understood his Miranda rights because he had been “Mirandized before;” (3) the trial court erred in allowing the State to introduce a gun as evidence in the case without sufficient proof that the gun was the weapon used by the petitioner; (4) the trial court incorrectly denied the motion for change of venue; and (5) the evidence was insufficient to support the convictions. Although clearly filed beyond the thirty-day time limit, see Tenn. R. Crim. P. 33(b), a hearing on the petitioner’s motion for new trial took place on September 24, 2002, during which the trial court heard argument from counsel. The State did not raise an objection based on the timeliness of the motion. The trial court overruled the motion, finding the issues raised therein to be without merit. The petitioner subsequently appealed his judgment, raising the propriety of his sentence and fines as the only issues.<sup>2</sup> This Court affirmed the petitioner’s sentence and the fines as recommended by the jury and imposed by the trial court. See Michael Salvatore Morani, 2003 WL 21946736, at \*1. The supreme court denied permission to appeal on December 15, 2003. On direct appeal, this Court summarized the underlying facts as follows:

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<sup>1</sup>The motion was dated May 3, 2002 by defense counsel, but was not stamped filed by the Clerk until June 24, 2002.

<sup>2</sup>The petitioner’s appellate counsel acknowledged in the brief to this Court on direct appeal that “[the petitioner] reluctantly acknowledges that Tenn. R. Crim. P. 33 motions must be filed within thirty (30) days of sentencing or the only thing this Honorable court will consider on appeal is sufficiency and sentencing. . . . [T]his brief will focus solely on sentencing.” Appellate counsel went on to acknowledge that “the decision not to present a sufficiency argument is a tactical decision by appointed counsel after review of the facts of this case in detail.” We acknowledge that, counsel’s appellate recitations of fact and argument are not evidence. See, e.g., State v. Burton, 751 S.W.2d 440, 450 (Tenn. Crim. App. 1988). Although it appears that sufficiency of the evidence was technically waived as a tactical decision by counsel in the initial appeal in the interests of justice and because of our determination that counsel was ineffective in his appellate function, we elect to address the sufficiency of the evidence in this delayed appeal.

The defendant first met the victim, Alan Logan, in August of 1999 when he applied for benefits at the Department of Human Services in Roane County, where the victim worked. As the victim testified at the trial court, he allowed the defendant to share his Cumberland County residence for approximately two months, providing both “emotional and financial support.” Two years later, the defendant arrived unexpectedly at the residence of the victim, apparently “on foot” and attempting to rekindle their friendship. Approximately one hour into the conversation, Jennifer Reynolds, the defendant's girlfriend, arrived in a vehicle. The defendant spoke to her privately and she left. About twenty minutes later, she returned, talked with the defendant and left again. After returning to the residence, the defendant remarked, “I’ve killed a man . . . because he had something I wanted and he wouldn’t give it to me.” He then displayed a handgun. As the victim reached for his drink, the defendant ordered him to “freeze.” In response, the victim threw a table at the defendant and fled toward the door. The defendant shot the victim once in the arm before his gun jammed, allowing the victim to run to a nearby residence, where the neighbor telephoned 911. The victim hid in the woods as the defendant took the victim’s 1999 Buick Regal and drove away.

Id.

The petitioner filed a pro se “Post Conviction Relief For Delayed Appeal” on November 17, 2004, in which he alleged that “he was denied the rights under the Constitution . . . due to trial counsel’s failure to file timely the motion for new trial, as well as her failure to withdraw so as to allow the Petitioner to file [a] pro se motion for new trial.” The post-conviction court entered an agreed order granting a delayed appeal on July 25, 2005, in which the trial court determined that the petitioner’s motion for new trial was untimely and that the petitioner is “entitled to a delayed appeal and his other claims for post-conviction relief [should be] held in abeyance or dismissed without prejudice pending a ruling on appeal.” The trial court determined that any issue regarding the length of the petitioner’s sentence was “precluded” because it was raised on direct appeal. The petitioner filed a timely notice of appeal.

On appeal, the petitioner raises the following issues: (1) whether the trial court erred by admitting statements made by the petitioner to the victim; (2) whether the trial court erred by allowing Investigator Potter to testify that the petitioner commented he had been “Mirandized before;” (3) whether the trial court erred in denying the petitioner’s request for a continuance; (4) whether the evidence was sufficient to support the verdict; and (5) whether the cumulative effect of the trial court’s errors entitles the petitioner to a new trial.

Analysis

Initially, we must address this Court’s jurisdiction to hear the issues that the petitioner raises in the appeal herein. The Tennessee Rules of Appellate Procedure contemplate one direct appeal as of right from a judgment of conviction. See Tenn. R. App. P. 3; Tenn. R. Crim. P. 37. The Post-

Conviction Procedure Act provides for a delayed appeal where the petitioner has been “denied the right to an appeal from the original conviction.” Tenn. Code Ann. § 40-30-113(a).

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer, and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. “However, a trial court’s conclusions of law - - such as whether counsel’s performance was deficient or whether that deficiency was prejudicial - - are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id.

The Tennessee Supreme Court’s opinion in Wallace v. State, 121 S.W.3d 652 (Tenn. 2003) is instructive to the case at bar. In that case, the defendant had retained counsel to defend him against a charge of first degree murder. Their agreement included a provision that counsel would be responsible only for the defendant’s representation at trial and would not be responsible for

handling any potential appeals. See id. at 654. After a jury trial, the defendant was convicted as charged. Id. After the conviction, counsel sent the defendant a letter instructing him on how to file a motion for new trial and the issues he should include. However, counsel did not obtain court approval to withdraw. Id. at 654-55. The defendant timely filed his pro se motion for new trial. Id. at 655. Because the defendant still had counsel of record, the trial court refused to consider the defendant's pro se filing. Id. Counsel subsequently filed a late motion for new trial and sought to be relieved from his representation of the defendant. Id. The defendant also filed a second pro se motion for new trial, which motion was also not timely. The defendant's second motion included issues other than sufficiency of the evidence. Id. (The record before the supreme court did not include the defendant's first motion. Id. at n.3). The trial court granted counsel's request to be relieved from further representing the defendant but did not grant either of the late-filed motions for a new trial. Id. at 655. The defendant pursued his direct appeal, but this Court concluded that, because the motions for new trial had been untimely, all issues were waived except for sufficiency of the evidence. See id. This Court determined that the evidence was insufficient to support the defendant's first degree murder conviction and thus modified the conviction to second degree murder. This Court remanded the case to the trial court to resentence the defendant for second degree murder. See id.

Eventually, the defendant filed for post-conviction relief alleging that his trial counsel had been ineffective in failing to file a timely motion for new trial. Id. After a hearing, the trial court agreed and granted the defendant a delayed appeal. Id. This Court then dismissed the delayed appeal, concluding that the defendant had received a direct appeal, albeit only upon the sufficiency of the evidence. See id. at 655-56. Our supreme court subsequently reversed this Court and reinstated the defendant's delayed appeal. Id. at 660. In reviewing the defendant's case, our supreme court initially concluded that "counsel's failure to file a timely motion for new trial, as well as his failure to withdraw so as to allow the defendant to file a pro se motion for new trial, was deficient." Id. at 657. Accordingly, the defendant satisfied the first prong of the Strickland test. With respect to the second prong, our supreme court first determined that "the prejudice prong of the analysis can [not] be resolved simply by reasoning that [the defendant] had direct review on the issue of sufficiency of evidence alone." Id. at 658. Furthermore, under the circumstances of the defendant's case, he was not required to demonstrate actual prejudice from his lawyers's deficient performance. Id. Rather, "[c]ounsel's deficient performance was . . . presumptively prejudicial" because:

Counsel's abandonment of his client at such a critical stage of the proceedings resulted in the failure to preserve and pursue the available post-trial remedies and the complete failure to subject the State to the adversarial appellate process. Counsel's deficient performance was, therefore, presumptively prejudicial and supported the trial court's grant of a delayed appeal under Tennessee Code Annotated section 40-30-113.

Id. (citation omitted). Our high court recognized that "the key issue is the failure of trial counsel to file the specified pleading resulting in the defendant being deprived of complete appellate review on direct appeal." Id. at 659 (emphasis added). Thus, the court concluded, "[a]s a direct result of

counsel's ineffective assistance, the defendant was procedurally barred from pursuing issues on appeal, and the State's case was not subjected to adversarial scrutiny upon appeal." Id. at 660. Significantly, our supreme court rejected a per se rule regarding a trial lawyer's failure to file a motion for new trial. Rather, in order to be entitled to relief, "a petitioner in a post-conviction proceeding must establish that he or she intended to file a motion for new trial and that but for the deficient representation of counsel, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence." Id. at 659.

In the case herein, we have no hesitation in concluding that counsel's failure to file timely a motion for new trial on behalf of the petitioner was deficient performance. Thus, the petitioner has satisfied the first prong of the Strickland test. We further conclude that the petitioner has established the two prerequisites for a finding of presumed prejudice resulting from this deficient performance. An untimely motion for new trial was filed, indicating that counsel knew that the petitioner wanted to pursue his post-trial remedies. That motion included issues other than sentencing. The only issue presented on appeal was sentencing. It is not entirely clear from the record as to why these issues were abandoned on appeal after the trial court's denial of the motion for new trial. However, a review of the record indicates that appellate counsel chose to abandon the issues as a result of the untimeliness of the original motion for new trial despite the State's failure to argue that the untimeliness of the motion precluded appellate review of the issues. In the untimely motion for new trial, which the trial court erroneously considered on its merits, the petitioner raised all of the issues he has included herein. We conclude that the petitioner established trial counsel's deficient representation because of the late filing of the motion for new trial and that prejudice is presumed as a result. Accordingly, the petitioner is properly before this Court on his delayed appeal, and we will address the issues it raises.

#### Introduction of Evidence

The petitioner first argues that the trial court erred by allowing the victim, Allen Logan, to testify that the petitioner "was in jail in Roane County," and by allowing the victim to testify that the petitioner said to him, "I've killed a man." The petitioner further argues that the trial court erred by allowing Investigator Wiley Potter to testify that the petitioner stated, "I've had my rights read to me before." Specifically, the petitioner acknowledges that the first and third statements "do not set out a specific crime or bad act," but he asserts that the statements create a clear inference of bad character. The petitioner contends that the admission of the statements was prejudicial error under Tennessee Rule of Evidence 404(b). The State responds that the trial court properly ruled on any objections made by the petitioner and that any evidence admitted without objection is waived. Further, the State contends that any error made by the trial court was harmless.

#### A. Statement #1 - The petitioner was "in jail in Roane County."

At trial, Mr. Logan testified during direct examination that he met the petitioner when the petitioner applied for food stamps. A friendship began between the two and the victim often helped the petitioner by giving him money. Mr. Logan even allowed the petitioner to stay at his home for

thirty days until the petitioner found an apartment. At the end of the thirty days, the petitioner left. Mr. Logan testified that he did not hear from the petitioner until “April of 2000. He was in jail in Roane County.” At that point, counsel for the petitioner objected and the trial court gave the following curative instruction:

We’d ask the jury to disregard any reference to - - that doesn’t have anything to do with this case and should not be used in any way, held against the accused. We don’t know anything about that, we don’t need to know anything about that. It’s not anything you need to be concerned about. So I’d ask the witness not to make any reference to that in the future.

Despite the trial court’s admonition, counsel for the petitioner moved for a mistrial. The trial court overruled the motion, determining that he had instructed the jury “significantly” and that the State did not bring out the evidence “on purpose.”

The testimony regarding the petitioner’s previous incarceration was arguably evidence of other crimes, wrongs, or prior bad acts and was not admissible to prove the character of a person in order to show action in conformity with the character trait. See Tenn. R. Evid. 404(b). However, the decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). This Court will not disturb that decision unless there is an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). A manifest necessity exists when “no feasible alternative to halting the proceedings” exists. State v. Knight, 616 S.W.2d 593, 596 (Tenn. Crim. App. 1981). The defendant bears the burden of establishing a manifest necessity. State v. Seay, 945 S.W.2d 755, 764 (Tenn. Crim. App. 1996).

When determining whether a mistrial is necessary after a witness has interjected improper testimony, this Court has often considered the following factors: (1) whether the improper testimony resulted from questioning by the State or was a gratuitous declaration, (2) the relative strength or weakness of the State’s case, and (3) whether the trial court promptly gave a curative instruction. See State v. Paul Hayes, No. W2001-02637-CCA-R3-CD, 2002 WL 31746693, at \*4 (Tenn. Crim. App., at Jackson, Dec. 6, 2002), perm. app. denied, (Tenn. May 27, 2003).

In this case, the statement regarding prior bad acts was elicited during direct examination by the State. However, we cannot say that the record reflects that the State intentionally sought to elicit

the testimony.<sup>3</sup> In fact, the victim offered the testimony in response to a question by the State unrelated in any way to bad acts by the petitioner. In addition, the record shows the State presented relatively strong evidence of the petitioner's guilt. As for the last factor, we note that the trial court provided the jury with a thorough curative instruction, explaining that it was irrelevant whether the petitioner was ever incarcerated and that there was no information in the record to substantiate the victim's assertion. Furthermore, it did so in a timely fashion following the petitioner's objection to the testimony. We believe that the trial court's curative instruction was sufficient to admonish the jury not to consider the inappropriate statement, and this Court must assume that the jury followed the trial court's instructions. State v. Baker, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987).

We conclude that the petitioner has failed to establish that the trial court abused its discretion when it determined that there did not exist a manifest necessity so as to warrant a mistrial and that the improper testimony did not render his trial unfair. The petitioner is not entitled to relief on this issue.

B. Statement #2 - "I've killed a man."  
and  
Statement #3 - "I've had my rights read to me before."

Next, the victim testified that the petitioner showed up at his house on the day of the incident. During their lengthy conversation, the victim commented that the petitioner had been through a lot in his life and deserved to be happy. The petitioner responded that he was "going to be happy tonight no matter what it takes." According to the victim, the petitioner sat down, reached into his pockets and stated that he had "killed a man." The victim asked why and the petitioner responded, "Because he had something I wanted and he wouldn't give it to me." At that point, the petitioner pulled out a gun, held it across his chest and called it his "baby."

Additionally, Investigator Potter testified that prior to questioning the petitioner concerning the shooting, he advised the petitioner of his Miranda rights. Investigator Potter read the waiver form to the petitioner and then asked the petitioner to read it to himself. When Investigator Potter asked the petitioner if he understood the waiver and whether he had any questions, the petitioner replied, "I've had my rights read to me before." Then the petitioner signed the form.

Counsel for the petitioner did not object to the statement made by the victim or to the statement made by Investigator Potter. Accordingly, consideration of these issues on appeal has been

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<sup>3</sup>The petitioner contends that the facts are similar to State v. Fleece, 925 S.W.2d 558 (Tenn. Crim. App. 1995). In Fleece, an appeal of a DUI conviction, this Court reversed the conviction as a result of the prosecutor's incessant questioning of the appellant about his restricted license status based on a prior DUI without the introduction of the prior DUI conviction. Id. at 560. The prosecutor also introduced testimony by the criminal court clerk as to the appellant's restricted license status. Id. This Court concluded that the prosecutor's actions gave rise to the impermissible inference of a previous DUI conviction. Id. at 561. The case herein is clearly distinguishable from Fleece because the State did not elicit the testimony from the victim, and the reference to the petitioner's incarceration was isolated.



waived. The burden is on the defendant to take action to prevent or nullify any harm that might occur during trial. State v. Little, 854 S.W.2d 643-51 (Tenn. Crim. App. 1992). Tennessee Rule of Appellate Procedure 36(a) states that “[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” The failure to object, request a curative instruction or move for a mistrial is typically grounds for waiver of an issue on appeal in the absence of plain error. State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995).

Despite the obvious waiver of these issues, this Court may address the issues in the event there was plain error on the part of the trial court. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000). Thus, if this Court is to review the claim that the trial court erred in allowing the victim to testify that the petitioner stated he had “killed a man” or that the trial court erred in allowing Investigator Potter to testify that the petitioner commented he had been “read his rights before,” we must do so through the process of “plain error” review embodied in Tennessee Rule of Criminal Procedure 52(b) which provides:

An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.<sup>4</sup>

In order to review an issue under the plain error doctrine, five factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. See Smith, 24 S.W.3d at 282-83; State v. Adkisson, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994); see also Tenn. R. Crim. P. 52(b). For a “substantial right” of the accused to have been affected, the error must have prejudiced the appellant. In other words, it must have affected the outcome of the trial court proceedings. United States v. Olano, 507 U.S. 725, 732-37 (1993) (analyzing the substantially similar Federal Rule of Criminal Procedure 52(b)); Adkisson, 899 S.W.2d at 642. This is the same type of inquiry as the harmless error analysis under Tennessee Rule of Appellate Procedure 36(b), but the appellant bears the burden of persuasion with respect to plain error claims. Olano, 507 U.S. at 732-37.

In the case herein, we are not persuaded that the petitioner has successfully carried the burden of persuasion in establishing a plain error claim. Although, the record is fairly clear as to what happened in the trial court the remaining Smith factors are not present. This issue is waived.

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<sup>4</sup>This rule by its terms allows plain error review only where there is a failure to allege error in the new trial motion or where the error is not raised before the appellate court. Nevertheless the rule has been interpreted by the appellate courts to allow appellate review under some circumstances in the absence of a contemporaneous objection as well.

## Motion for Continuance

Next, the petitioner complains that the trial court erred by refusing to grant his motion for continuance made immediately preceding the start of the trial. Specifically, the petitioner contends that his choices were “simply overruled by his counsel and the court.” The State counters that the petitioner waived the issue by failing to raise it in the motion for new trial filed as a result of the granting of a delayed appeal.

Tennessee Rule of Appellate Procedure 3(e) provides that “in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.” This Court has repeatedly determined that the failure to include an issue in a motion for new trial results in a waiver of all issues, which, if found to be meritorious, would result in the granting of a new trial. See State v. Keel, 882 S.W.2d 410 (Tenn. Crim. App. 1994).

However, because of the procedural posture of this case and the presumptively prejudicial actions of counsel in failing to timely file a motion for new trial, we will address the issue despite the waiver. The granting of a continuance rests within the sound discretion of the trial court. State v. Odom, 137 S.W.3d 572, 589 (Tenn. 2004). We will reverse the denial of a continuance only if the trial court abused its discretion and the defendant was prejudiced by the denial. State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995). In order to show prejudice, the defendant must demonstrate that a different result might reasonably have been reached if the trial court had granted the continuance or that the denial of the continuance denied the defendant a fair trial. Id. Moreover, a defendant who asserts that the denial of a continuance constitutes a denial of due process or the right to counsel must establish actual prejudice. Odom, 137 S.W.3d at 589. This Court has recognized that a continuance might be appropriate in order to afford a defendant a “reasonable opportunity” to locate a witness. State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). However, the burden rests with the defendant to show that a continuance might have reasonably resulted in locating the witness. Id.; see also Brown v. State, 489 S.W.2d 855, 857 (Tenn. Crim. App. 1972).

At the beginning of trial, the petitioner himself addressed the trial court concerning witnesses that he desired to be present at trial. Trial counsel advised the court that she had discussed the potential witnesses with the petitioner and indicated that, at best, the witnesses he had proposed would not be useful, and, at worst, would be more harmful than beneficial. At one point, the petitioner was given an opportunity to further address the trial court and he commented that he did not have anything more to say. The trial court gave the petitioner a second chance to address any concerns, and the petitioner again declined. From the record, it does not appear that the petitioner ever even explicitly sought a continuance. The petitioner does not explain on appeal how the trial court’s refusal to grant a continuance operated to deny a fair trial or affected the outcome of the trial. The petitioner did not present evidence indicating that the outcome of trial would have been different

had a continuance been granted. Thus, the petitioner failed to show prejudice as a result of the denial of the continuance. This issue is without merit.

### Sufficiency of the Evidence

Next, the petitioner challenges the sufficiency of the evidence to support his conviction for attempted first degree murder. Specifically, the petitioner argues that the evidence is insufficient “due to a lack of reliable proof of premeditation and deliberation.” The petitioner does not appear to challenge the conviction for theft of property over \$10,000. The State argues that the petitioner waived the issue and, in the alternative, that the evidence is sufficient to support the conviction.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and “approved by the trial judge, accredits the testimony of the” State’s witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption “and replaces it with one of guilt.” State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” Matthews, 805 S.W.2d at 779. Moreover, questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are to be resolved by the trier of fact. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1991).

In the case herein, the appellant was convicted of attempted first degree murder. First degree murder is defined, in pertinent part, as: “(1) A premeditated and intentional killing of another; [or] (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; . . . .” Tenn. Code Ann. § 39-13-202. Criminal attempt is defined as:

- (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
  - (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

- (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
  - (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.
- (b) Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense.

Tenn. Code Ann. § 39-12-101(a) & (b). Premeditation is “an act done after the exercise of reflection and judgment.” Tenn. Code Ann. § 39-13-202(d).

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

Id. The jury determines whether a defendant acts with premeditation, State v. Holder, 15 S.W.3d 905, 914 (Tenn. Crim. App. 1999), and premeditation may be “established by proof of the circumstances surrounding the killing.” State v. Suttles, 30 S.W.3d 252, 261 (Tenn. 2000) (citing Bland, 958 S.W.2d at 660). The following factors have been determined to support a jury's finding of premeditation: (1) the use of a deadly weapon on an unarmed victim; (2) the particular cruelty of the killing; (3) declarations by the defendant of an intent to kill; (4) evidence of procurement of a weapon; (5) preparations before the killing for concealment of the crime; and (5) calmness immediately after the killing. Bland, 958 S.W.2d at 660.

Viewed in a light most favorable to the State, the evidence at trial showed that the petitioner showed up at the victim's home on July 4, 2001. During a lengthy conversation, the petitioner told the victim that he “killed a man” and would do anything necessary to be happy. The petitioner pulled a gun from his pocket and referred to it as his “baby.” The victim was afraid because the petitioner said that he had nothing to live for then told the victim, “Don't move or I'll . . . .” The victim responded, “I know you will.” At that time, the victim threw a table at the petitioner and ran for the door. The victim turned around as he reached the door and saw the flash of a bullet. The victim was shot but ran out of the house to get help and hid in the woods until he saw the petitioner drive away in his car. Further, Jennifer Reynolds testified that she dropped the petitioner off at the victim's home that day. When the petitioner was apprehended by the police driving the victim's car, there was a handgun under the driver's seat. The petitioner gave a statement to the police in which he admitted getting into an argument with the victim and threatening to “blow his brains out.” The petitioner also admitted to shooting the victim. We determine that there was sufficient evidence for the jury to find the petitioner guilty of attempted first degree murder.

Cumulative Error

Finally, the petitioner argues that the cumulative effect of the trial court's errors amount to prejudicial error requiring a reversal of his convictions. The State argues that the issue was not raised in a motion for new trial and that on appeal, the argument is not supported by citations to the record.

We have addressed all the petitioner's issues in the above opinion. We have concluded that there was no error in his complaints. Therefore, we find this issue to be without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE