IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1995

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9413-CR-00448
APPELLEE,	*	KNOX COUNTY
V.	*	Hon. Richard Baumgartner, Judge
DAVID PAUL MARTIN,	*	(Voluntary Manslaughter)
APPELLANT.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, David Paul Martin, indicted for first degree murder, was convicted of voluntary manslaughter in the death of his wife, Connie Lynn Martin. The trial court imposed a Range I sentence of five years imprisonment.

In this appeal, the defendant presents the following issues for our review:

> (1) whether the trial court failed to exercise proper control over the compelled mental examination and whether the court-ordered mental examination of the defendant violated the defendant's right against self-incrimination and right to counsel;
>
> (2) whether the testimony by Drs. Tennison and Burrell was based upon an incorrect standard for mental responsibility;
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> (3) whether the state engaged in prosecutorial misconduct during closing argument;
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> (4) whether the state elicited inadmissible evidence under Tenn. R. Evid. 404(b) during cross-examination of the defendant's mental health expert;
>
> (5) whether the trial court erred by refusing to grant the defendant permission to depose the state's mental health experts;
>
> (6) whether the trial court erred in instructing the jury as to the burden of proof on the issue of sanity; and,
>
> (7) whether the trial court erred in assessing the sentence and refusing to grant either judicial diversion or probation.

We find no reversible error and affirm the judgment.

It was undisputed that the relationship between the

defendant and the victim was "stormy" throughout their marriage, characterized by many arguments, fights, separations, and reconciliations. Each side had initiated and then dismissed divorce proceedings.

In 1991, the defendant and victim were separated, a divorce was pending, and each had a protective order against the other. The defendant resided at the marital residence on Lemonwood Lane in Knoxville. On May 28 of that year, the defendant was arrested after a complaint by the victim that the defendant had broken the windshield of her car and had attempted to choke her. The defendant denied her claims and his children corroborated the denials.

Almost two weeks later, on the afternoon of June 9, the victim entered the defendant's residence, "stomping" and "screaming," according to witnesses. The defendant, the defendant's two children, Brandy and Clint, and James Watson, a friend of Clint's, were present. Brandy was in the kitchen area. The victim sat down to eat as the defendant entered the house from the backyard, where he had been sunbathing. When the defendant complained about Brandy having to do all the housework, the victim began to curse at Brandy and argue with the defendant. Brandy, crying, then left to go downstairs to join her brother, Clint, and his friend James. Meanwhile, Clint came upstairs and sat by his father on the couch in the living room.

When the victim implied that she wanted the

defendant back in jail, Watson overheard the defendant say, "Well, here I go." Brandy, however, denied that the defendant made that statement. In any event, the defendant then knocked the victim out of her chair and began to choke her. Although Clint attempted to intervene, the defendant was able to strangle the victim to death. Afterward, the defendant took a shower, gave some keys and money to his children, turned on the television, and waited for the police to arrive. He was taken into custody shortly thereafter.

I

As his first issue, the defendant contends that the trial court failed to exercise adequate control over the compelled mental evaluation ordered pursuant to Tenn. R. Crim. P. 12.2(c). He also argues that his right against self-incrimination and his right to counsel were violated.

The defense filed a notice of intent to rely on the mental responsibility defense and the district attorney subsequently moved for a mental examination of the defendant. Tenn. R. Crim. P. 12.2(c) provides as follows:

> **(c) Mental Examination of Defendant.** In an appropriate case the court may, upon motion of the district attorney, order the defendant to submit to a mental examination by a psychiatrist or the other expert designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except for impeachment purposes or on an issue

> respecting mental condition on which the defendant has introduced testimony.

At the conclusion of the pretrial hearings on the motion, the trial court ordered the defendant to be examined by Dr. Clifton Tennison and his staff at the Helen Ross McNabb Center. The order gave Dr. Tennison discretion over who to allow at the examination and whether the examination could be recorded. Because he believed it would impede the examination process, Dr. Tennison would not allow the presence of counsel or others during the interview, but did permit the examination to be audiotaped.

Upon completing his examination of the defendant, Dr. Tennison sought permission to authorize Dr. James Burrell to conduct an additional interview and join in the evaluation as a consultant. Although the defense objected, the trial court permitted the additional examination. Dr. Burrell would not allow others to be present and did not audiotape the interview.

The defense first claims that the trial court erred by allowing more than one mental health professional to examine the defendant. The defendant argues that because Rule 12.2(c) authorizes his submission "to a mental examination by a psychiatrist or other expert" (in the singular), a second opinion is not permissible under the rule. (Emphasis added). The defendant maintains that he was prejudiced because the state had two experts rather than one and had a choice as to which to call as a witness.

In the pretrial hearings, both Dr. Tennison and Dr. Burrell testified that it was standard procedure at the Helen Ross McNabb Center to employ two mental health professionals in the evaluation of a criminal defendant. After making his own observations of the defendant's mental capabilities, Dr. Tennison decided it would be prudent to solicit Dr. Burrell's opinion.

We do not read the rule so narrowly as to preclude an examination by a team of experts working jointly towards a single diagnosis. Thus, we find no fault with the procedure implemented here. Both experts were employed by Helen Ross McNabb. The second interview was part and parcel of a single evaluation process. Using that rationale, it would appear that the trial court's order is in compliance with the intent of the rule. Moreover, we cannot agree that this method of evaluation permitted the state to "expert shop." The state had little choice but to accept the findings made at the center. The pretrial order of the trial court did not give the state the ability to choose the opinion which better supported its case. Cf. Ake v. Oklahoma, 470 U.S. 68, 83 (1985). The opinions were not in conflict and were available to the defense. Had the opinions of the individuals involved differed, the defendant could have called either Dr. Tennison or Dr. Burrell to testify on his behalf.

The defense also complains that despite the fact that the trial court had ordered only a mental responsibility determination, a competency evaluation was also performed.

Although neither party raised the issue of the defendant's competency to stand trial, Dr. Tennison testified at a pretrial hearing that the process of determining mental responsibility begins with an evaluation of competency. This court fails to see how the defendant could have been harmed by the inclusion of a competency evaluation. Certainly, the defendant has offered no proof of any prejudice.

The defendant also complains that the trial court's order was defective: first, because it omitted the legal definition of "mental disease or defect" and, second, it directed the experts to determine only whether any type of insanity defense could be supported due to the defendant's mental condition at the time of the offense. The defendant also asserts that by asking the experts to determine whether any type of insanity defense "could be supported," the trial court erroneously placed the burden of proof on the defendant.

We disagree. It is not always necessary to define "mental disease or defect" in the pretrial order requiring a mental evaluation. The determining factor is whether the right test was applied. Here, the record clearly demonstrates that Dr. Tennison and Dr. Burrell were fully aware of the appropriate legal definition. The record also demonstrates that both of the examiners knew the definition of "insanity" that is codified in Tenn. Code Ann. § 39-11-501. That statute describes the mental responsibility defense as the defense of "insanity." Thus, it is not improper for a trial court to order the court-appointed expert to determine whether an

insanity defense can be supported by the defendant, rather than to state the question in the exact terms embodied in that rule.

Moreover, we do not believe that the order inappropriately shifted the burden of proof to the defense. The expert was to determine whether at the time of the offense the defendant was insane. The statutory definition is as follows: "as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of law." Tenn. Code Ann. § 39-11-501(a). The opinions of the experts were provided in those terms. Their conclusion was merely evidence for the jury to consider. And, because the trial court properly allocated the burden of proof in the instruction provided at the conclusion of the trial, there was no error.

The defense also claims that the compelled mental examination violated both the defendant's right against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution and the defendant's right to counsel under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. He cites Estelle v. Smith, 451 U.S. 454 (1981), as authority for this claim.

In Estelle, the United States Supreme Court held that where the defendant did not voluntarily consent to the

examination and was not forewarned that statements he made could be used against him, the state may not use the statements made during the pretrial examination to "make its case on future dangerousness" in a capital sentencing proceeding. 451 U.S. at 468-69; see also State v. Thompson, 768 S.W.2d 239, 248-49 (Tenn. 1989), cert. denied, 497 U.S. 1031 (1990)(no right against self-incrimination or right to counsel violation during a sentencing hearing when state introduced a deposition of a psychiatrist who had interviewed defendant on defendant's own motion). The Estelle court further ruled as follows:

> If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

451 U.S. at 468-69.

In Buchanan v. Kentucky, 483 U.S. 402 (1987), the United States Supreme Court held that a defendant waived his Fifth Amendment privilege when he raised a defense based on mental status. See also Powell v. Texas, 492 U.S. 680, 685 (1989)(restating the Fifth Amendment holding in Buchanan but reversing on Sixth Amendment grounds). In addition, many other courts, including the United States Court of Appeals for the Sixth Circuit, have held that a compelled mental evaluation of a defendant who pleads insanity does not violate the defendant's right against self-incrimination. E.g.,

Noggle v. Marshall, 706 F.2d 1408 (6th Cir.), cert. denied, 464 U.S. 1010 (1983); United States v. Cohen, 530 F.2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976); Braswell v. State, 371 So. 2d 992 (Ala. Crim. App. 1979); State v. Fair, 197 Conn. 106, 496 A.2d 461 (1985), cert. denied, 475 U.S. 1096 (1986); Parkin v. State, 238 So. 2d 817 (Fla. 1970), cert. denied, 401 U.S. 974 (1971); Rogers v. State, 222 Miss. 690, 76 So. 2d 831 (1955).

In Noggle, supra, the court noted as follows:

> We also do not see any violation of the Fifth Amendment by providing a witness to the State on the issue of sanity. The adversarial nature of criminal proceedings reflected in the Fifth Amendment requires that the State obtain evidence independently from the defendant. It does not however preclude court ordered psychiatric examination. We discern no significant difference between the compulsion in a court-ordered examination and the subpoena of a psychiatrist who has made an evaluation for the purpose of serving as a possible defense witness. Unlike evidence relating to commission of the alleged acts, evidence of sanity or insanity can only be obtained from the defendant.

706 F.2d at 1415 n.6 (citations omitted).

As indicated, the defendant was subjected to a psychiatric examination by mental health professionals appointed by the court pursuant to Rule 12.2(c). This rule provides that no statement made by defendant in the course of an examination by an expert appointed under the rule, nor any "fruits" of any such statements, may be used as substantive evidence of guilt against the defendant. In our assessment, the provision adequately safeguards the defendant's right

against self-incrimination under the interpretations of the applicable constitutional safeguards, because nothing the defendant says nor any "fruits" of what the defendant reveals can be used as substantive evidence of his guilt. The evidence may, however, be used in the state's case in chief when the defendant "raises an issue concerning his mental or emotional condition." State v. Vilvarajah, 735 S.W.2d 837, 839-40 (Tenn. Crim. App. 1987). Moreover, if a defendant were allowed to invoke the privilege, "his silence may deprive the State of the only effective means it has of controverting his proof on an issue [sanity] that he interjected into the case." Buchanan, 483 U.S. at 422.

In addition to the self-incrimination claim, the defendant also contends his Sixth Amendment right to counsel was violated. He cites two reasons: first, neither his counsel nor his psychiatrist were allowed to attend the court-ordered mental examination; and, second, Dr. Burrell would not allow his interview to be taped.

A defendant has the right to counsel at all "'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)); State v. Mitchell, 593 S.W.2d 280, 286 (Tenn. 1980), cert. denied, 449 U.S. 845 (1980). In Brewer v. Williams, 430 U.S. 387, 398 (1977), the Supreme Court held as follows:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him[.]

The right to counsel had clearly attached by the time of the court-ordered mental evaluation. Estelle v. Smith, 451 U.S. at 470; Mitchell, 593 S.W.2d at 286. In our opinion, the court-ordered mental evaluation was not a "critical stage" in the proceedings; therefore, the defendant did not have a right to have his counsel or psychiatrist present at the examination.

When a mental evaluation is requested by defense counsel, there is no denial of the defendant's right against self-incrimination, his right to counsel, or his statutory privilege protecting communications with a psychiatrist. State v. Thompson, 768 S.W.2d 239, 248 (Tenn. 1989), cert. denied, 497 U.S. 1031 (1990) (admission of psychiatric/ psychological report at sentencing hearing). There are, however, no published Tennessee decisions which have determined the extent of the right to counsel at a mental examination sought by the state.

Other jurisdictions have considered the issue. For example, the Sixth Circuit has held that there is no constitutional right to counsel at a court-appointed mental evaluation. E.g., Noggle v. Marshall, 706 F.2d 1408, 1415 (6th Cir.), cert. denied, 464 U.S. 1010 (1983); Weaver v.

Gill, 633 F.2d 737, 738 (6th Cir. 1980). Some of the other United States Courts of Appeal have held similarly. E.g., United States v. Cohen, 530 F.2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976); United States v. Mattson, 469 F.2d 1234 (9th Cir. 1972), cert. denied, 410 U.S. 986 (1973); United States v. Smith, 436 F.2d 787 (5th Cir.), cert. denied, 402 U.S. 976 (1971); United States v. Baird, 414 F.2d 700 (2d Cir. 1969), cert. denied, 396 U.S. 1005 (1970). Many state courts have also held that there is no right to counsel in court-ordered mental evaluations of criminal defendants. Blocker v. State, 92 Fla. 878, 110 So. 547 (1926); People v. Larsen, 74 Ill. 2d 348, 385 N.E.2d 679, cert. denied, 444 U.S. 908 (1979); Commonwealth v. Stukes, 435 Pa. 535, 257 A.2d 828 (1969); Stultz v. State, 500 S.W.2d 853 (Tex. Crim. App. 1973). The Larsen opinion contains an extensive list of other jurisdictions refusing to extend the right to counsel at court-ordered mental evaluations. 385 N.E.2d at 682-83.

There are several reasons why the right to counsel has not been readily applied to compelled mental evaluations. Initially, there is typically little reason to believe that court-appointed mental experts would be biased in favor of the state; thus, courts have not found the same level of distrust that might accompany other proceedings where the right to counsel has been extended. Baird, 414 F.2d at 711. Secondly, the purpose of the evaluation is to determine the "sanity" of the accused, and not to further investigate the crime or otherwise help determine the guilt of the defendant. Id.; Stultz, 500 S.W.2d at 855. Third, courts have generally held

that there are sufficient other safeguards to protect the defendant without extending the right to counsel to a mental evaluation setting. Defense counsel can, for example, utilize their own experts to counter any unfavorable findings of the state's experts; the defense may cross-examine the state expert to uncover the methodologies, data, or facts underlying the opinion; and, as mentioned, the defense may successfully challenge any attempt to introduce statements made as evidence of guilt. Larsen, 385 N.E.2d at 683; Tenn. R. Crim. Pro. 12.2(c).

If all of these assumptions do in fact apply, it is difficult to see how defense counsel's presence at the examination could effectively assist the accused on the sanity issue. See Larsen, 385 N.E.2d at 683. Finally, the interests of having a professional examination of the defendant, unimpeded by the presence of adversary interests, would outweigh, in our view, any potential advantage gained by the presence of defense counsel. See Cohen, 530 F.2d at 43.

Here, it is also apparent that the defendant has not proved prejudice by his counsel's absence during the interviews. Moreover, there is no indication in the record that the process used hampered defense counsel in trial preparations. The trial court provided defense counsel open access to both of the state's experts and their findings. The record clearly demonstrates that defense counsel conducted a comprehensive investigation of all possible defenses, was fully prepared on the sanity issue, and otherwise rendered

superior professional services. Under these circumstances, we find no prejudicial error by defense counsel being excluded during the mental evaluation of the defendant.

II

As his second issue, the defendant contends that the court-appointed experts erroneously applied the M'Naghten test for mental responsibility rather than the Graham test embodied in Tenn. Code Ann. § 39-11-501. As a result, he asserts that their testimony should have been stricken. The defendant also argues that the trial court improperly allowed those experts to testify to an ultimate issue, namely, whether the defendant was insane at the time he killed the victim.

In a pretrial hearing on the mental evaluation of the defendant, Dr. Tennison testified that, in his opinion, the defendant suffered from a mental disease or defect at the time of the offense. When asked about his further findings, Dr. Tennison replied, "The next thing is to determine whether or not that mental disease or defect caused him to not know the difference between right or wrong at the time of the alleged event or to not be able to conform his behavior to the constraints of the law." Later, during the trial, in a hearing outside the presence of the jury, Dr. Tennison, was asked to explain the Graham standard. He answered as follows:

> The first step is to determine whether or not, in our best opinion, ... there was a mental illness. I believe the legal term is mental disease or defect at the time of the alleged crime.
>
> The second prong is itself divided into two parts. The second prong is, if there was a mental illness, did indeed the

> mental illness cause the person to not have the ability to know or understand cognitively that what they were doing was wrong, to not know the difference between right or wrong.
>
> That is differentiated from the second prong of the second half, which is, if there was mental illness, did that mental illness cause the person to be unable to control his or her behavior, in order to stay within the restraints of the law....

Dr. Burrell provided very similar testimony.

In Graham v. State, 547 S.W.2d 531 (Tenn. 1977), the supreme court rejected the M'Naghten test in favor of that suggested by the Model Penal Code. The M'Naghten standard was as follows:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Graham, 547 S.W.2d at 539 (quoting M'Naghten's Case, 8 Eng.Rep. 718, 722 (1843)). This standard was followed in Tennessee until 1977. E.g., Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299 (1963). In Graham, our supreme court observed, however, that the "nature and quality of the act" portion of the M'Naghten test had been consistently disregarded by the Tennessee courts in favor of the right versus wrong portion. 547 S.W.2d at 539. The court, noting that the new test was "[i]n actuality ... a refinement and restatement of the full M'Naghten rules," rejected the M'Naghten standard and adopted

the test eventually enacted by the legislature. Id. at 541. The statutory definition for insanity is as follows:

> **Insanity. -** (a) Insanity is a defense to prosecution if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of law.
>
> (b) As used in this section, "mental disease or defect" does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Tenn. Code Ann. § 39-11-501.

As noted in Graham, the new standard and that applied in M'Naghten's Case are markedly similar. 547 S.W.2d at 541. While acknowledging the differences, however, the record demonstrates that both Dr. Tennison and Dr. Burrell understood the proper standards for mental responsibility. Even if the observations of Dr. Tennison were not articulated in the exact language of the modern rule, we are satisfied that his findings were in substantial compliance with the statute. There is nothing wrong with paraphrasing the statutory standard. And that, we think, was the case here. In consequence, we hold that both Drs. Tennison and Burrell adequately incorporated the language of the statute in their testimony at trial.

In a related issue, the defendant claims that by allowing the state's experts to testify as to whether they felt there was enough evidence to support an insanity defense, the trial court improperly allowed the experts to reach a legal conclusion. We disagree.

Under Rule 704 of the Tennessee Rules of Evidence, an expert may testify to an ultimate issue, including that of the defendant's mental responsibility.[1] Tennessee specifically rejected the federal counterpart which does not allow an expert to testify to the sanity or insanity of the accused. See Tenn. R. Evid. 704, Advisory Commission Comments; Fed. R. Evid. 704(b). In any event, Dr. Tennison testified that it was merely his professional opinion that the insanity defense could not be supported. The jury, after being properly instructed as to the burden of proof, had the ultimate responsibility to determine whether to accept that opinion.

III

As his third issue, the defendant contends that he was prejudiced by improper conduct on the part of the prosecutor during the closing arguments to the jury. He asserts the prosecutorial misconduct deprived him of a fair trial.

The test to be applied in reviewing claims of prosecutorial misconduct is whether "the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965). The factors are set out in Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), as adopted

[1]But see 1995 Tenn. Pub. Acts ch. 494 (amending the defense of insanity and providing that "[n]o expert witness may testify as to whether the defendant was or was not insane [at the time of the offense]. Such ultimate issue is a matter for the trier of fact alone.")(Effective July 1, 1995).

by the Tennessee Supreme Court in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984):

> (1) the conduct complained of, viewed in light of the facts and circumstances of the case;
>
> (2) the curative measures undertaken by the court and the prosecutor;
>
> (3) the intent of the prosecutor in making the improper statement;
>
> (4) the cumulative effect of the improper conduct and any other errors in the record; and
>
> (5) the relative strength or weakness of the case.

The defendant argues that the prosecutor committed misconduct on three different occasions. The first comment was as follows:

> Ladies and gentlemen, [defense counsel] has said to find [the defendant not] guilty because he's going to go through the doors and receive treatment by the same individuals who say that -- that he is not insane -- that there is no evidence to support an insanity defense.

In State v. Estes, 655 S.W.2d 179 (Tenn. Crim. App. 1983), this court addressed a similar question. The prosecutor in that case made the following argument:

> Now, Miss Speed says he's insane, and that if you find him insane, what's going to happen to him.
>
> Well, I'm sure -- I guess the Judge will explain that to you, but if you find him insane, they take him and put him in a hospital till a psychiatrist says he's ready to come home, and he goes home.

655 S.W.2d at 184. In Estes, this court found the statement

to be improper because it misstated the law[2], but held the error was "entirely harmless." Id. at 185.

The same reasoning applies here. The statement by the prosecutor should not have been made; it implied that Drs. Tennison and Burrell would be treating the defendant if he were acquitted by reason of insanity. The argument, however, which was not entirely clear as transcribed, was minor "in light of the facts and circumstances of the case." Judge, 539 S.W.2d at 344. And, in our view, the comment had no effect on the jury's determination as to the sanity of the defendant. It appears that the intent of the prosecutor was to convince the jury to convict the defendant. During its general charge at the conclusion of the trial, the trial court instructed the jury as to the consequences of a not guilty by reason of insanity verdict. In this context, the improper comment did not cause prejudice. See Harrington, 215 Tenn. at 340, 385 S.W.2d at 759.

The second comment challenged by the defendant was as follows:

> And sure, we talk about the defense of insanity, a mental disease or defect. But listen to what the qualifications of these people are. Dr. [John] Kandilakis is a therapist. He's not licensed by the State of Tennessee to do forensic examinations. The people who are licensed by the State of Tennessee, who the State of Tennessee has found qualified to do forensic, insane examinations, having to do with a court of law, say that that man doesn't meet the test. It just doesn't happen. He doesn't

[2]This statement misstated the law with regard to what actually happens to a criminal defendant who is acquitted by reason of insanity. Estes, 655 S.W.2d at 184-85.

meet the test.

The defendant contends this amounted to a request for the jury to disregard Dr. Kandilakis' testimony because he was not a state licensed examiner. The defendant complains that the argument was misleading because the licensure as forensic examiners is available only to state employees. The state contends this issue was waived because there was no contemporaneous objection. The defendant concedes his failure to object but asserts that he did not discover until after trial that only state employees could be licensed as forensic examiners.

Whether waived or not, this issue must be resolved favorably to the state. Technically, Dr. Kandilakis is a therapist and is not a licensed forensic examiner. The fact that he would not be able to qualify as a forensic examiner even though he otherwise met all the criteria for licensure may mean that the statement was misleading. And, although both the state and the defense may argue the relative merits of expert witnesses, this comment probably went too far, especially if licensure depends upon an issue unrelated to substantive qualifications. Even so, in the context of this trial, the comment could not have affected the verdict. The jury saw and observed the expert witnesses, listened to the conflicting opinions, and received accurate instructions at the conclusion of the trial as to how to assess the testimony. The proof of sanity offered by the state, while not overwhelming, was fairly strong. By the application of all of

the factors set out in Judge, we cannot find this argument to have been overly prejudicial.

The defendant also contends a two-minute period of silence, devised to illustrate the length of time the victim was choked, qualified as a third improper argument:

> [Prosecutor]: Is it rage, or is it saying I'm sure of what I am doing and what I'm [sic] do. Think about what Tom Pressley said about the description. This is a person who was right there on top of it, right there on top of the person, seeing froth come out of their mouth.
>
> And how long was he there holding her? At least how long? You can see. Look at your watch, and the remainder of my argument, starting now, is two minutes.
>
> (Silence.)
>
> [Defense Counsel]: May I object, Your Honor?
>
> THE COURT: No.
>
> (Continued silence for two minutes.)

The defendant asserts this two-minute silence was intended to invoke an inappropriate emotional response from the jury, unwarranted by the evidence.

It is unprofessional conduct for a prosecutor to intentionally misstate the evidence or mislead the jury as to the inferences it may draw. State v. Hicks, 618 S.W.2d 510, 518 (Tenn. Crim. App. 1981). Nonetheless, a prosecutor may argue reasonable inferences from the record. State v. Sutton, 562 S.W.2d 820, 826 (Tenn. 1978). Strong advocacy for the state is not prohibited. And here, there was medical testimony to support the argument. While the medical examiner testified there was no way to know exactly how long the defendant choked the victim, a jury could have properly inferred a two-minute interval by the evidence in the record.

Thus, we conclude that the argument was not improper.

IV

As his fourth issue, the defendant contends that the state elicited inadmissible and prejudicial 404(b) evidence during its cross-examination of defendant's expert psychologist, Dr. Kandilakis. The state asked Dr. Kandilakis whether the defendant said anything about either forcing the victim out of a Laundromat and into his car or striking the victim's daughter, Tiffany. Defense counsel timely objected to the testimony and a bench conference was held outside the hearing of the jury. The trial judge sustained the objection, but defense counsel did not ask for curative instructions. Apparently, the exchange between counsel was heated and the bench conference terminated abruptly; thus, the defendant claims he should not be penalized for his failure to request a curative instruction.

Counsel must have taken "whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). Because defense counsel failed to request a curative instruction, this issue was technically waived. State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987); Laird v. State, 565 S.W.2d 38, 40 (Tenn. Crim. App. 1978).

By considering this issue as waived, we do not excuse the inappropriate behavior of the prosecutor. The trial court had ordered the state not to refer to "other

crimes, wrongs, or acts" in the presence of the jury without prior clearance. Although we will not try to determine whether the action was intentional, the state clearly violated that order. And, while waiver bars any finding of error here, we would have also held that the inappropriate reference, in context, did not appear to have affected the results of the trial. The defendant was convicted of the lesser charge of voluntary manslaughter instead of first or second degree murder. Under all of the circumstances shown at trial, the defendant could have hardly expected a better result.

V

As his fifth issue, the defendant contends the trial court erred by failing to grant the defendant permission to depose Drs. Tennison and Burrell. The defendant's complaint is based upon Tenn. R. Evid. 706(a), which allows any expert appointed under that rule to be deposed by either party:

> Appointment. -- The court may not appoint expert witnesses of its own selection on issues to be tried by a jury except as provided otherwise by law. As to bench-tried issues, the court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, the witness's

> deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

Here, however, the expert was appointed under Tenn. R. Crim. Pro. 12.2(c), not Rule 706(a). These two rules provide separate and distinct mechanisms for the appointment of experts. If it were the intent of the drafters of 12.2(c) to allow depositions of the experts appointed under that provision, the rule should so state. It does not. Instead, Tenn. R. Crim. Pro. 15 controls the depositions of the state witnesses. Unless there are "exceptional circumstances," depositions are not authorized. Tenn. R. Crim. P. 15(a); State v. Singleton, 853 S.W.2d 490, 493 (Tenn. 1993); State v. Reeder Junior Robbins, No. 02C01-9309-CC-00202, slip. op. at 2 (Tenn. Crim. App., at Jackson, Sep. 21, 1994), perm. to appeal denied, (Tenn. 1995).

The defendant has failed to establish any such exceptional circumstances here. Moreover, the trial court gave the defendant open access to the findings of both Drs. Tennison and Burrell. Defense counsel was allowed to cross-examine these experts extensively about their findings and the data underlying those findings. And, counsel performed that task capably. Under these circumstances, we could not have found that any prejudice had resulted by the defendant's inability to depose these witnesses.

VI

Next, the defendant contends the trial court erred by refusing to approve special instructions requested by the defense. Instead, the trial court charged the pattern jury instructions. See Tennessee Pattern Jury Instructions, Criminal § 36.06 (2d ed. 1988).[3]

The defendant first contends that the instruction was erroneous because it presented for the jury questions on the sanity issue without first charging the required burden of proof. We disagree. The record indicates that the trial court properly instructed the jury on the burden of proof at least four times during the general charge.

The trial court posed the following questions for the jury:

> (1) was the defendant suffering from a mental illness at the time of the commission of the crime;
>
> (2) was the illness such as to prevent his knowing the wrongfulness of his act; and
>
> (3) was the mental illness such as to render him substantially incapable of conforming his conduct to the requirements of the law.

The defendant claims that Tenn. Code Ann. § 39-11-501 uses the word "substantial capacity" to modify questions (2) and (3), not just question (3). This is true. On the other hand, it does not necessarily follow that the failure to use the term "substantially incapable" in question (2) constituted prejudicial error. In the context of the overall charge, we

[3]The third edition of the pattern instructions does not include a charge on mental responsibility or insanity.

find that the omission was not so significant as to qualify as harmful error.

The defendant also contends that the trial court should have instructed the jury that the state's proof must not only be consistent with sanity, but inconsistent with insanity. This portion of defendant's requested instruction is an accurate statement. State v. Overbay, 874 S.W.2d 645 (Tenn. Crim. App. 1993). Thus, there was no basis for the trial court to refuse to give at least that portion of defendant's instruction. Again, however, we do not believe the omission affected the verdict. The phrase "consistent with sanity and inconsistent with insanity" may be critical in cases in which the state has no expert testimony and merely offers evidence of the defendant's actions immediately before or immediately after the offense to prove his sanity. See id. at 650; State v. Green, 643 S.W.2d 902, 916 (Tenn. Crim. App. 1982). Here, however, the state submitted both lay and expert testimony that the defendant met the legal test of sanity. Thus, there was more than the bare assertion that the defendant acted "normally," that is, merely consistent with being sane. The jury had ample, although conflicting, testimony about the mental status of the defendant. It was their duty to resolve that conflict. The omission, under these circumstances, clearly did not prejudice the defense.

VII & VIII

The defendant's seventh and eighth issues question the propriety of the sentence levied against the defendant.

The defendant contends the trial court erred by denying him probation and/or judicial diversion; by improperly enhancing the sentence based on domestic violence; and by failing to properly consider the mitigating factors offered by the defendant. Again, we disagree.

The sentence is controlled by the Tennessee Criminal Sentencing Reform Act of 1989. When a challenge is made to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a "de novo review ... with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). There are, however, exceptions to the presumption of correctness. First, the record must demonstrate that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing. State v. Keel, 882 S.W.2d 410, 418 (Tenn. Crim. App. 1994)(citing State v. Bonestil, 871 S.W.2d 163 (Tenn. Crim. App. 1993). And third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts. Id.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any

mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, and -210. Among the factors determinative on the issue of probation are the circumstances of the offense, the defendant's criminal record, social history, present condition, his potential for rehabilitation or treatment, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn. 1978), cert. denied, 439 U.S. 1077 (1977); Stiller v. State, 516 S.W.2d 617, 619-20 (Tenn. 1974).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a) & (b). The ultimate burden of establishing suitability for probation, however, is still upon the defendant. Tenn. Code Ann. § 40-35-303(b).

The defendant asserts that as a Range I, Class C felon, he was presumed to be a favorable candidate for sentencing options under Tenn. Code Ann. § 40-35-102(6):

> A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the

absence of evidence to the contrary.

The defendant more specifically claims that the trial judge had a history of automatically confining persons who committed crimes involving the death of another.

This offense was truly an act of violence. The defendant took the life of the victim by strangulation. There was a history of serious marital discord. The defendant had reacted violently on prior occasions. In these circumstances, the grant of probation would tend to depreciate the seriousness of the offense. State v. Kyte, 874 S.W.2d 631 (Tenn. Crim. App. 1993)(affirming trial court's denial of probation to a defendant convicted of vehicular assault). In our view, the record fully supports the denial of probation.

The defendant also argues that the trial court should have granted him judicial diversion as an alternative to incarceration. See Tenn. Code Ann. § 40-35-313. This court, however, has previously held that judicial diversion is not an alternative sentence under Tenn. Code Ann. § 40-35-104. Thus, "the presumption of being a favorable candidate for alternative sentencing does not apply in a judicial diversion analysis." State v. Teri Melissa Bingham, No. 03CO1-9404-CR-00127 (Tenn. Crim. App., at Knoxville, Feb. 14, 1995)(citing State v. Anderson, 857 S.W.2d 571, 573 (Tenn. Crim. App. 1992)). The question of whether or not to grant judicial diversion is within the trial court's discretion; this court will not interfere with the trial court's denial if there is "'any substantial evidence to support the refusal' contained

in the record." State v. Bonestil, 871 S.W.2d at 168 (quoting, State v. Anderson, supra). The guidelines applicable in probation cases are applicable in diversion cases. They are, however, more stringently applied in diversion cases. State v. Holland, 661 S.W.2d 91, 93 (Tenn. Crim. App. 1983). Under these guidelines, we can readily conclude that the trial court did not abuse its discretion by denying the defendant's request for judicial diversion.

Next, the defendant contends the trial court should have ordered the minimum sentence and should have given more weight to certain mitigating factors. More specifically, the defense requested the trial court to consider the following mitigating factors:

> (1) The defendant acted under strong provocation, Tenn. Code Ann. § 40-35-113(2);
>
> (2) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense, Tenn. Code Ann. § 40-35-113(3);
>
> (3) The defendant was suffering from a mental or physical defect that significantly reduced his culpability for the offense, Tenn. Code Ann. § 40-35-113(8);
>
> (4) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct, Tenn. Code Ann. § 40-35-113(11);
>
> (5) The defendant is truly remorseful for his actions which resulted in the death of his wife, Tenn. Code Ann. § 40-35-113(13);
>
> (6) The defendant enjoys a good reputation in the community in which he lives, Tenn. Code Ann. § 40-35-113(13);

> (7) Members of the community believe that the defendant possesses full potential for rehabilitation, Tenn. Code Ann. § 40-35-113(13); and
>
> (8) The defendant voluntarily sought treatment for his mental condition and has devoted significant effort and expense to correct that condition, Tenn. Code Ann. § 40-35-113(13).

The record demonstrates that the trial court considered all the mitigating factors proposed by the defendant. Each was specifically addressed. The trial court, however, chose not to apply the first three of the preceding mitigating factors, for the reason that they had been taken into account by the jury in reaching the verdict. The defendant has cited this court's unpublished opinion in State v. Cindy Lynn Smith as support for his claim that the trial court improperly rejected the three mitigating factors:

> While "essential elements of the offense" cannot be enhancement factors, Tenn. Code Ann. § 40-35-114, there is no such limitation of mitigating factors. Tenn. Code Ann. § 40-35-113. Thus, "double mitigation" is not prohibited by the statute. However, whether to "double mitigate" is an act of discretion, reviewable under the same standard as all other sentencing issues.

No. 03C01-9206-CR-00219, slip op. at 6-7 (Tenn. Crim. App., at Knoxville, March 25, 1993).

Thus, the question appears to be whether, under all the circumstances, the trial court abused its discretionary authority by failing to consider the first three cited factors as mitigating. We find no such abuse. This court has previously ruled that "double credit" need not be automatically applied in voluntary manslaughter cases. See

State v. McKinzie Monroe Black, No. 01C01-9401-CC-00006 (Tenn. Crim. App., at Nashville, July 14, 1995). And, while the proof of provocation may have been adequate to convince the jury to reduce the degree of culpability, the nature and circumstances of the killing does not necessarily demonstrate the kind of "strong provocation" required to mitigate a sentence.

The trial court rejected the fourth cited factor, that there was no "sustained intent to violate the law," on the ground that the defendant had a violent relationship with the victim. We think this finding is adequately supported by the record.

The remaining claims in mitigation, remorse, good reputation, potential for rehabilitation, and voluntary submission to treatment, warranted favorable consideration by the trial judge but appear to have been given little weight in the sentence determination. We cannot disagree on the matter of weight.

The nature and circumstances of the crime, particularly the past history of marital discord and the brutality of the attack, may very well negate the value of these specific claims of mitigation. Moreover, although the trial court found only one enhancement factor applicable, namely, that defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, that finding

appeared to have warranted great weight under these particular facts. See Tenn. Code Ann. § 40-35-114(1). In delivering the sentence, the trial judge observed as follows:

> [T]here had been a history of violent conduct, as I've said about three times now, between these parties that there was a--a history of criminal behavior and that criminal behavior to which I refer is the domestic violence that had occurred between these parties. Both of them were guilty of it, but only one of them is on trial here today and that is Mr. Martin. And I find that his engaging in domestic violence is a history of criminal behavior which justifies the imposition of enhancement factor number one under 114.

Clearly, domestic violence qualifies as criminal conduct and, thus, falls within the terms of Tenn. Code Ann. § 40-35-114(1). The weight to be given to each factor, whether enhancing or mitigating, is discretionary with the trial judge. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; see also State v. Moss, 727 S.W.2d 229 (Tenn. 1986). In summary, we hold that the nature and degree of the single enhancement factor warranted a sentence of two years more than the minimum.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

William M. Barker, Judge

Cornelia A. Clark, Special Judge