IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9404-CR-00154
APPELLEE,	*	DAVIDSON COUNTY
VS.	*	Honorable Seth Norman, Judge
JAMES PHILLIP HUNTER,	*	(First Degree Murder)
APPELLANT.	*	

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, James Phillip Hunter, appeals from his conviction for first degree murder. The trial court imposed a life sentence. In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues for review:

> (1) whether the trial court erred by denying the defendant's motion for judgment of acquittal;
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> (2) whether the trial court erred by failing to strike a police officer's testimony concerning shotgun blast test results;
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> (3) whether the trial court erred by admitting into evidence photographs of the victim taken at the morgue;
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> (4) whether the trial court erred by denying the defendant's motion in limine concerning pictures of the victim's apartment;
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> (5) whether the trial court erred by allowing the victim's father to sit at counsel table;
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> (6) whether the state erroneously failed to disclose to the defense all of the defendant's prior bad acts;
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> (7) whether the state committed prosecutorial misconduct in closing argument;
>
> (8) whether the trial court erred by failing to charge the jury on protection of property;
>
> (9) whether the trial court erred by failing to instruct the jury on criminally negligent homicide; and
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> (10) whether the trial court erred by failing to grant the defendant a new trial when an assistant district attorney, after the verdict, stated that she did not believe the defendant was guilty of first degree murder.

We find no reversible error and, therefore, affirm the judgment.

On January 8, 1993, Teresa Smoot was celebrating the birthday of her husband, Michael Smoot, at their residence. Ms. Smoot's brother, Ronald Fann, and the victim, Dewey Slanton, were present. Michael Smoot and the victim were drinking beer. The four watched television for a time before deciding to go to the Odyssey Club, where Ms. Smoot worked as a dancer. On their way, they stopped at a liquor store, where Ms. Smoot's husband and brother bought a "little bottle of something." The victim had also gone inside the store but did not purchase anything. The group continued their celebration at the club for a time, then took the victim home because he had to work the next day.

The other three decided to visit another club, the Brass Stables, but changed their minds on the way and drove towards the Smoot home. As they entered the alley leading to their driveway, Ms. Smoot saw the victim, who lived in the neighboring apartments, looking over his shoulder and motioning for her to stop. Ms. Smoot yelled, "Wait a minute," and was pulling into her driveway to park the car when she heard a gunshot. She then saw the defendant, who appeared to have something like the butt of a gun on his "back side," standing toward the front of her house. As she backed the car into the alley, she saw the victim clutch his stomach and chest and fall to the ground. Ms. Smoot ran to the victim, placed a pillow under his head and covered him with her coat and a blanket. Michael Smoot called 911; Ms. Smoot joined in

the conversation, telling the dispatcher that the defendant had shot the victim. The defendant, who lived in the same apartment complex as the victim, went to his sister's house right after the shooting; he returned to his apartment a few minutes later.

Ms. Smoot, who conceded that the victim was a close friend, testified that he was not drunk. She stated that the victim had previously told her that he "had words" with the defendant over Debra Ryman, the victim's ex-girlfriend and a niece to the defendant.

Michael Smoot's testimony closely tracked that of his wife. Smoot, who claimed that he had received death threats since the shooting, added that the victim had acted normally during the course of the evening, although he may have been a little depressed about his break-up with Ms. Ryman. Smoot saw the defendant with a gun in his hand and heard a shot fired. When he saw that the victim had been injured, he went to a neighbor's house to call 911. Smoot went back outside to stay with the victim when Ms. Smoot came inside to talk to the dispatcher.

Susan Franks, of the Metropolitan Nashville-Davidson County Police Department, was the first officer to arrive at the scene of the shooting. The victim, wrapped in a blanket, appeared to be unconscious. Officer Franks learned that Smoot and Fann suspected the defendant as the assailant. When the ambulance arrived, she looked for evidence in the nearby

apartment complex. A door to one of the apartments, that belonging to the victim, was open. The apartment was in disarray and there were two gunshot holes in the living room wall. As Officer Franks knocked on the door to the adjacent apartment, she saw that the door to a third apartment was open, investigated, and found the defendant sitting calmly inside. The defendant told Officer Franks that he had been asleep when the victim kicked in the door to his apartment and hit him in the jaw. He stated that he then took a shotgun from underneath his bed and shot the victim. Officer Franks found no cuts, bruises, or abrasions on the defendant and determined that the door had been kicked from the inside out, rather than the outside in.

Other officers arrived shortly thereafter and, upon receiving permission, searched the defendant's apartment. The defendant informed certain of the officers that his weapon was in the bedroom. Three slugs which fit the defendant's shotgun were in the floor.

Lieutenant Roger Therber went to the scene briefly. His recollection of events was very similar to that of Officer Franks; he added that the defendant admitted firing his gun three times that night.

Officer J.R. Malone was also involved in the investigation. He testified that there was a heavy odor of gunpowder in the victim's apartment just after the murder. He found two shotgun blasts in the wall. One shot appeared to

have been fired through the front door from the outside whereas the second shot appeared to have been fired from inside the apartment. Officer Malone testified that several household items had been destroyed by the gunshots. He saw no bloodstains or shotgun shells inside the victim's apartment, but did recover a shotgun shell outside, somewhere between the apartment occupied by the victim and that of the defendant.

Officer Malone also found several unfired rounds of six shot for a twelve gauge shotgun in the defendant's apartment and determined that the front door had been kicked from the inside out. The living room area was also in disarray, but it appeared "contrived." While Officer Malone collected evidence, he overheard the defendant tell other officers that he was standing in the doorway of his apartment unit when he fired his shotgun at the victim.

Officer Brad Corcoran worked with Officer Malone in collecting physical evidence at the scene. He found bloodstains in an alleyway near the apartment building.

Homicide Detective Mike Roland took a statement from the defendant. The defendant, who described himself as nervous and upset, contended that after he had been attacked by the victim, he got his gun and went to the doorway of his apartment. While there, he fired two or three times at the victim who, by then, had fled some distance away but was coming back toward him. The defendant claimed that when he saw the victim fall, he put his gun away and went to his

sister's house to call authorities. The defendant maintained that he had no idea why the victim initiated the attack. He asserted that he generally tried to stay away from the victim because, in part, the victim drank heavily and became violent when he did so.

Detective Roland also described the condition of the defendant's apartment as "contrived." He explained that there was no damage to the glass portion of the front door which the defendant claimed had been kicked out. The furniture was in disarray but otherwise undamaged.

Officer Reed Majors, a firearms instructor with the Metropolitan Nashville-Davidson County Police Department, conducted tests on the defendant's weapon. He testified that the weapon was a Remington shotgun, which held three rounds of ammunition and which always ejected to the right when fired. Officer Majors showed the jury the pattern that was left on the target when he test-fired the weapon at both an open and closed choke position from several distances.

Dr. Mona Harlan, a forensic pathologist with the Davidson County Medical Examiner's Office, conducted the autopsy. She stated that the victim suffered multiple pellet wounds which extended from slightly above his knees to the top of his head. There was no stippling of the skin near the wound. That led Dr. Harlan to conclude that the victim had not sustained the gunshot wound from close range. She estimated that at least fifteen feet would have separated the

victim and the defendant when the victim was shot. The victim had abrasions on his hand, knee, and forehead, which Dr. Harlan believed could have been the product of a physical altercation, the victim's fall to the ground, or from pellets which had not penetrated the skin. Dr. Harlan also found that the victim's blood alcohol level was .14.

The defense offered several witnesses. The defendant's sister, Sandra Ryman, testified that the defendant had come to her home and asked her to call 911 on the night of the shooting. She then woke her husband and asked him to accompany her to the defendant's apartment to investigate. As they entered the alleyway in front of the apartment, Ms. Ryman saw the victim lying on the ground surrounded by emergency personnel, the Smoots, Fann, and the defendant's brother. Ms. Ryman testified that the victim had been her daughter's ex-boyfriend and had resided at her home a short time after his arrest for trespassing at another apartment building where he once lived. She stated that the victim often bragged about fighting, drank heavily, and was very "rowdy and redneck" when he was drunk. Ms. Ryman also testified that the victim had pushed and shoved her and did not get along well with her husband; she said her daughter had moved out of the apartment three days before the shooting. Ms. Ryman went to the victim's apartment on the day following the shooting. She claimed that she found an Odyssey Club coin and a lighter in the yard directly in front of the defendant's apartment.

Paul Ryman, the defendant's brother-in-law,

corroborated much of his wife's testimony. He claimed that the victim had shoved his wife and had been required to move out of their home.

Bernard Tefteller, another brother-in-law to the defendant, claimed to have seen the victim at a liquor store at approximately 10:00 p.m. on the night of the shooting. He stated that the victim was wobbly, had glassy eyes, and appeared to be drunk. Tefteller testified that the victim had been refused service and got angry when Tefteller would not purchase a bottle of liquor for him. When Tefteller told the victim not to be "putting his hands" on him, the victim replied, "[T]he hell with you and Jimmy [the defendant], too." Tefteller claimed that he saw a small pistol in the victim's back pocket.

Bradley Burton, whose apartment was located between those of the defendant and the victim, stated that he was at home watching television with his girlfriend on the night of the murder. He related that the victim, who had been yelling and screaming, banged on their door about 10:00 p.m.; when Burton answered, the victim, who appeared drunk, wanted to fight. Burton testified that the victim leaned back "like he was fixing to hit [him] or pull a weapon" and so he pushed the victim away and shut the door. When the victim started beating and kicking his door again, Burton refused to answer. Burton said that shortly thereafter he heard two loud noises that sounded like gunshots from a small caliber weapon and then heard the victim beat on the defendant's door. He stated

that there were thumping sounds from next door, some screaming and yelling, and then two more shots fired from what sounded like a large caliber gun. Burton claimed that about forty-five minutes later, he told an investigating officer that the victim had been "going off" and provided him with the details of his encounter. Burton, who had several state warrants pending against him at the time of the shooting, admitted that the defendant had asked him to tell defense counsel what he saw and heard on the night of the murder.

Brenda Arnold, who was living with Burton, stated that she also heard the victim screaming and yelling profanity on the night of the murder. Although she stayed in the back bedroom, Ms. Arnold overheard a heated exchange between the victim and Burton and claimed that Burton told the victim to go home and "sober up." According to Ms. Arnold, there was a great deal of noise coming from the defendant's apartment a few minutes later, which sounded like two people "wrestling around." She claimed that she heard the defendant order the victim to get out of his apartment. Ms. Arnold stated that she thought she had heard gunfire that night. She acknowledged, however, that she had not given this information to police on the night of the shooting.

Debra Ryman, who lived with the victim for three years, testified that he and the defendant got along well. She said that the defendant would often visit their apartment to eat dinner and watch television. She testified that the victim drank alcohol on the weekends, occasionally to excess.

The defendant, a sheet metal worker, testified that he had lived in his apartment at 128 Rains Road for approximately six months when the shooting occurred. He stated the victim lived in a nearby apartment with his niece and that they would occasionally invite him to eat dinner there. The defendant claimed that he and the victim had never had problems until the day of the shooting.

He testified that the victim had several guests at his apartment drinking that day. One of the guests had made a "smart" remark to the defendant, but the defendant claimed that he had ignored the comment. When he returned to his apartment, he turned on the television and fell asleep on the couch. The defendant claimed that the next thing he remembered was a loud banging at his door. When he answered, the victim, who smelled strongly of alcohol, struck him in the side of the face. The defendant contended that the victim, who had previously bragged about his fighting prowess, hit him about fifteen times. He testified that he retrieved his shotgun from underneath his bed only after he was hit in the back of the head; when he did so, the victim stood in the bedroom doorway and cursed at him. He maintained that the victim was only about fifteen or twenty feet outside the apartment by the time the shotgun had been loaded. The defendant claimed that the shotgun started "going off" only after the victim reached for something in his back pocket. He stated that he had not aimed his weapon before firing.

The defendant denied having been in the victim's

apartment on the day of the murder. He claimed that his only prior "trouble" had been a conviction for aggravated assault with intent to commit robbery. On cross examination, however, the defendant admitted that he had a prior misdemeanor, but could not remember the nature of the offense; he also conceded that he had prior charges for malicious destruction of property, assault with an automobile, and simple assault.

The defendant attempted to discredit the accuracy of the results of ballistics tests conducted by Officer Majors through the expert testimony of Herschel Watson, Jr., an examiner in the Nashville-Davidson County Medical Examiner's Office. Watson explained that the propellant used in shotgun shells determined the distance that the shell would travel when fired. He acknowledged that tests performed using a shell with a propellant different from that in the shell which killed the victim, would produce less than entirely accurate results. He testified that manufacturers frequently changed the propellant, but could not say whether the Remington Company, who manufactured the shotgun shell which killed the victim, had made any changes in their product between the victim's death and the point at which the state conducted tests on the murder weapon.

Michael Smoot testified in rebuttal for the state. He stated that he saw Tefteller at the liquor store on the night of the shooting and helped him select a bottle of wine. He said Tefteller made no mention of any altercation with the victim. Smoot reaffirmed that the victim did not have a

weapon, noting that the victim had passed through a metal detector at the Odyssey Club without incident.

Ms. Smoot also testified on rebuttal. She stated that Tefteller was at the liquor store on the evening in question, but had no physical contact with the victim.

Detective Lawrence also provided additional testimony. He testified that Burton had been interviewed on the night of the murder, but said nothing about any disturbance at either the apartment of the victim or that of the defendant. The detective did acknowledge that Burton stated that he had seen the victim in an intoxicated state and had heard yelling in the defendant's apartment.

I

Initially, the defendant claims that the evidence was insufficient to support his conviction for first degree murder and that the trial court should have granted his motion for a judgment of acquittal on that charge. The state argues that there was ample evidence to allow a jury to find the defendant guilty of the offense.

The trial court may only enter a judgment of acquittal when the evidence submitted by the state, taken in its most favorable light, does not establish the elements of the offense. See State v. Hall, 656 S.W.2d 60 (Tenn. Crim. App. 1983). Clearly, the state met its burden of proof in that regard. Our analysis of the next issue buttresses that

conclusion. Thus the trial judge had no duty to enter a judgment of acquittal.

When there is a challenge to the verdict based upon the allegation that the evidence was insufficient, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). The relevant question on appeal is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

We now turn to the applicable statutory law. At the time of the offense, first degree murder was defined as follows:

> **First degree murder.--**(a) First degree murder is:
> (1) An intentional, premeditated and deliberate killing of another; or
> (2) A reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy; or
> (3) A reckless killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.
> (4) A killing of a child less than thirteen (13) years of age, if the child's death results from a protracted pattern or

> multiple incidents of bodily injury committed by the defendant against such child and the death is caused either by the last injury or the cumulative effect of such injuries.
>
> (b) A person convicted of first degree murder shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-13-202 (emphasis added). Tenn. Code Ann. § 39-13-201 provides as follows:

> **Criminal homicide.--**(a) Criminal homicide is the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide.
>
> (b) The following definitions apply in this part:
>
> (1) "Deliberate act" means one performed with a cool purpose; and
>
> (2) "Premeditated act" means one done after the exercise of reflection and judgment. Premeditation may include instances of homicide committed by poison or by lying in wait.

In consequence, the sufficiency of the convicting evidence, for purposes of this appeal, depends entirely upon whether the state was able to prove each and every one of the essential elements: intent, premeditation, and deliberation.

We begin our analysis with a review of each of the three elements required by the law to support a first degree murder conviction. An "intentional" act is statutorily defined:

> "Intentional" refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

Tenn. Code Ann. § 39-11-302(a). Sentencing Commission Comments describe conduct as intentional "when the defendant

wants to do the act or achieve the criminal objective." So, from all of this, it would appear that the burden of the state at trial (to show first degree murder) was to prove that the defendant had consciously engaged in conduct which resulted in the death of the victim (intentionally) and that he perpetrated the killing with a cool, calculated purpose (deliberately) and after reflective judgment (premeditatedly).

At common law, a homicide, a death caused by the intentional act of another, was presumed to be second degree murder. Witt v. State, 46 Tenn. 5, 8 (1868). Under current statutory law, the state must still prove both premeditation and deliberation beyond a reasonable doubt in order to raise the offense to first degree murder. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992).

In Brown, our supreme court held that the element of deliberation contemplates a lapse of time between the decision to kill and the killing. "[T]he deliberation and premeditation must be akin to the deliberation and premeditation manifested where the murder is by poison or lying in wait -- the cool purpose must be formed and the deliberate intention conceived in the mind, in the absence of passion, to take the life of the person slain." Id. at 539 (quoting Rader v. State, 73 Tenn. 610, 619-20 (1880)). In order to convict a defendant for first degree murder, a jury must find that the defendant killed with coolness and after reflective thought. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992); see also State v. Brooks, 880 S.W.2d 390, 392-93 (Tenn.

Crim. App. 1993).

No specific time is required to form the requisite deliberation. State v. Gentry, 881 S.W.2d 1, 3-4 (Tenn. Crim. App. 1993). Deliberation is present when the circumstances suggest that the murderer contemplated the manner and consequences of his act. West, 844 S.W.2d at 147. Though similar, deliberation and premeditation are defined separately and are distinct elements. See Tenn. Code Ann. § 39-13-201(b); see also Brooks, 880 S.W.2d at 392-93. They may be inferred from the circumstances where those circumstances affirmatively establish that the defendant premeditated his assault and then deliberately performed the act. State v. Richard Nelson, No. 02C01-9211-CR-00251 (Tenn. Crim. App., at Jackson, Oct. 14, 1993). This court has previously held that the holding in Brown requires "proof that the offense was committed upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement" before a second degree, intentional murder can be elevated to murder in the first degree. State v. David L. Hassell, No. 02C01-9202-CR-00038, slip op. at 3 (Tenn. Crim. App., at Jackson, Dec. 30, 1992).

One respected authority provides some insight into the nature of proof required before a jury might properly infer either premeditation or deliberation:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, planning activity;
>
> (2) facts about the defendant's prior

> relationship and conduct with the victim from which motive may be inferred; and
>
> (3) facts about the nature of the killing from which it may be inferred that the manner of the killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7 (1986)(emphasis in original)(footnote omitted). Our court has held that the elements of deliberation and premeditation are questions for the jury and may be inferred from the manner and circumstances of the killing. Gentry, 881 S.W.2d at 3. Still, a jury may not engage in speculation.

Viewed in the light most favorable to the state, the evidence here showed that the victim went to the defendant's apartment; a verbal altercation ensued; and the defendant retrieved his shotgun. After taking the time to load the weapon, the defendant began a search for his fleeing victim. At some point, the defendant fired two shots into the victim's apartment, one through the door before entering and another from the inside. The victim was a considerable distance away when the defendant fired the fatal shot. In the meantime, the victim had sought protection from his friends. The evidence suggested that the defendant then made it appear that the victim had initiated a physical altercation and that the killing was in self defense.

There was some evidence of planning. Officers found three unused "slugs" lying on the floor of the defendant's bedroom. There was testimony that the "slugs" require

precision shooting and the circumstances suggested that the defendant had unloaded the "slugs." The defendant's shotgun would hold exactly three shells. The shells used to kill the victim were six shot, a type which requires much less precision in order to hit the intended target. A reasonable inference is that the defendant coolly and purposefully took the time to load his weapon with that type of ammunition which would allow him the best chance at striking the victim. As the finder of fact, the jury was entitled to reject the defendant's claim that he had not unloaded his weapon, but had simply knocked the "slugs" into the floor as he reached for his six shot. In either scenario, the defendant required some time to retrieve ammunition from his closet and load his weapon. By the time the defendant had loaded his weapon, the victim had fled. That the defendant pursued the victim for at least some distance was not at issue.

The defendant insists there was no motive for the killing and that he had never before had any type of disagreement with the victim. Ms. Smoot, however, testified that the victim had told her that he and the defendant had previously "had words" and that he did not think the defendant liked him. Further, the defendant's niece, Debra Ryman, had moved out of the apartment she shared with the victim only three days before the shooting. The testimony of the defendant's sister and two of his brothers-in-law also suggested that his family disliked the victim. The defendant and the victim had apparently engaged in some sort of altercation just prior to the shooting. While motive is not a

necessary element of first degree murder, it may, if proved, reflect upon the elements of premeditation and deliberation. See State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1993).

The defendant argues that the nature of the killing is such that the jury could not have found that he had time to act deliberately or with premeditation. He bases this claim in large part upon the testimony of Brad Burton and Brenda Arnold, whose apartment was situated between those of the victim and the defendant. The testimony of both supported the defendant's claim that the victim was drunk and "looking for a fight." Burton testified that after his confrontation with the victim, the victim returned to his apartment, from where Burton heard shouts and possibly two shots. Burton and Ms. Arnold claimed to have later heard a commotion from the defendant's apartment, followed by gunshots from what Burton believed to be a larger caliber weapon. Yet Ms. Arnold did not offer to make a statement to the police when they came to investigate. Burton made no mention of many of the critical facts he supplied later at the trial. Police were unable to find any small caliber weapon, which Burton claimed to have heard fired, in either the defendant's or the victim's apartment.

The defendant also claims that even if he was not justified in shooting the victim, there was insufficient time between the altercation and the time of the shooting for him to have regained a reflective, dispassionate mental state. We disagree. Some evidence indicated that the defendant, after

loading his shotgun, went to the victim's apartment, fired one gunshot through his door, and then entered to fire a second shot. When he did not find the victim, he walked back outside, saw the victim some distance away, aimed, and fired the fatal shot. From all of that, the jury was entitled to infer that the shooting was intentional, deliberate, and premeditated. Moreover, there was evidence that the defendant took great pains to make it appear that the victim had broken into his apartment and that a physical altercation had taken place.

Because there was proof of each and every element required to sustain a conviction for first degree murder, the trial judge properly refused to enter a judgment of acquittal. The evidence was sufficient, in our view, to support the jury's verdict.

II

The defendant also contends that Officer Majors' testimony concerning shotgun blast test results was irrelevant and should have been stricken. The tests were conducted to show the spread pattern which occurs at the fully open and the fully closed setting of the choke on the defendant's shotgun from varying distances. Because there was no evidence to show which position the choke was in at the time he shot the victim, the defendant claims the testimony had no probative value.

The distance between the victim and the defendant at

the time of the shooting was a hotly contested issue at trial. The defendant claimed that he did not intend to kill the victim and only shot him in self defense. Under these circumstances, the expert testimony, although inconclusive, was highly relevant. The further the victim was away, the less threat he presented to the defendant.

Officer Majors offered no opinion as to which setting the choke was on or how far the victim was from the defendant when he was shot. He merely explained the tests he had conducted and showed the jury the spread pattern which resulted from a shot fired from a particular distance at a given choke setting. Thus, the jury was able to use this information insofar as it aided in the explanation of the testimony of Dr. Harlan. More specifically, it could compare the spread pattern on the body with those provided by Officer Majors to help estimate how close the defendant may have been when the shot was fired.

III and IV

The defendant next asserts that photographs of the victim taken at the morgue were overly prejudicial. He also contends that photographs of the victim's apartment were inadmissible because the state did not prove that the defendant was ever in the apartment.

The admissibility of photographs from the scene of the crime is governed by Tennessee Rule of Evidence 403 and State v. Banks, 564 S.W.2d 947 (Tenn. 1978). The evidence

must be relevant and its probative value must outweigh any prejudicial effect. Tenn. R. Evid. 403; State v. Banks, 564 S.W.2d at 950-951. Whether to admit the photographs is within the discretionary authority of the trial court and will not be reversed absent a clear showing of an abuse. State v. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985).

We first address the admissibility of the morgue photographs, which depict the nature of the injuries the victim suffered as a result of the gunshot wound. While unpleasant, the photographs of the victim were not overly graphic. Because the distance between the defendant and the victim related to critical elements of the offense, the probative value of the photographs clearly outweighed any unfair prejudice.

The defendant argues that the photographs of the victim's apartment were irrelevant. While there was no direct proof that the defendant had been inside the victim's apartment, there was circumstantial evidence which suggested that fact. There was a heavy odor of gunpowder in the apartment when police officers arrived at the scene. Two shots appeared in the walls. There was no gun there. No weapon was found near the victim's body. On the other hand, the defendant acknowledged that he used a shotgun to kill the victim. A reasonable inference is that the same weapon was used to "shoot up" the victim's apartment.

Evidence is relevant if it has any tendency to make

the existence of any fact that is of consequence more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. In our view, whether the defendant entered the victim's apartment and fired shots was relevant to one or more of the elements of the offense. Photographs showing the location and type of damage done to the victim's apartment were admissible to assist the jury in resolving the disputed facts.

V

Next, the defendant contends that the trial court erred by allowing the victim's father to sit with the prosecution because his presence served only to elicit sympathy from the jury. The state argues that there is no evidence in the record that the jury knew he was the victim's father and, thus, the defendant was not prejudiced.

While the record does, in fact, establish that the jury was aware that the victim's father sat with the prosecution, we nevertheless find that there has been no showing of prejudice. The question of whether a person "should be permitted to sit at the state's counsel table is a matter which addresses itself to the sound discretion of the trial court." State v. Henry Eugene Hodges, No. 01C01-9212-CR-00382 (Tenn. Crim. App., at Nashville, May 18, 1995)(holding that the defendant was not prejudiced by the trial court's ruling that the victim's mother could sit at counsel table, although the jury was aware of her identity). In this instance, defense counsel did not lodge an objection

until the trial was well underway. No issue was made, until defense counsel asked Paul Ryman to identify the victim's father. In these circumstances, there is always the risk that the issue has been waived. Moreover, a defendant cannot invite error and then complain of its commission. Tenn. R. App. Proc. 36(a). While it is the duty of the trial judge to avoid the possibility of sympathy as a factor in the outcome of a trial, it has not been established that the trial court abused its discretion in this instance.

VI

Next, the defendant insists that the trial court erred by allowing evidence of the defendant's prior bad acts despite the state's failure to provide notice in accordance with Rule 16 of the Tenn. R. Crim. Proc. The record fails, however, to support this assertion.

While the defendant did object to the prosecutor's cross-examination of the defendant concerning certain prior misdemeanor offenses, he did not assert lack of notice as the basis for the objection. On appeal, a defendant may not assert a different theory for the exclusion of evidence than the one relied upon at trial. Thus, the issue has been waived. See Stephen C. Parker v. State, No. 01C01-9008-CR-00188 (Tenn. Crim. App., at Nashville, Feb. 26, 1991), perm. to appeal denied, (Tenn. 1991). Moreover, even if there was error, it appears to have been invited by the defendant. Tenn. R. App. P. 36(a); State v. Garland, 617 S.W.2d 176, 186 (Tenn. Crim. App. 1981). The trial court ruled that the

defendant threw "the door wide open" in direct examination when he falsely claimed that this was only "the second time" he had ever been in trouble. The state has the right to challenge untruthful assertions by the defendant which place him in a more favorable light than deserved. See State v. Johnson, 670 S.W.2d 634 (Tenn. Crim App. 1984). While lack of notice might prohibit the use of these convictions as general impeachment, it would not prohibit their use to rebut false testimony given by the defendant.

VII

The defendant also claims that the prosecutor was guilty of misconduct during closing argument by referring to the defendant as a "lunatic," by characterizing his testimony as "ludicrous," and by describing the killing as a "slaughter." The defendant asserts that the language used was meant only to inflame the jury and that the proof did not support these characterizations.

Our courts have traditionally provided counsel with a wide latitude of discretion in the content of their final argument. Argument is a privilege that should not be unduly restricted. Trial judges are accorded wide discretion in control of the argument. See Russell v. State, 532 S.W.2d 268 (Tenn. 1976). However, every person charged with a crime has the right to a fair and impartial jury, one protected from inflammatory argument. Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758 (1965). It is preferable for counsel in criminal cases to limit their commentary to the facts and

circumstances of each case rather than rendering personal opinions.

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

Here, the defendant did not object to the argument made by counsel. The failure to object results in the waiver of an issue on appeal. Tenn. R. App. P. 36(a). Even if he had not waived the issue, we believe that counsel's argument, even if inappropriate, did not affect the results of the trial.

VIII and IX

The defendant also contends that the trial court erred by failing to charge the jury on the defense of protection of property and the lesser included offense of criminally negligent homicide. The state argues that, based

upon the proof presented at trial neither instruction was warranted.

The trial judge has the duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.), cert. denied, 476 U.S. 1153 (1986). This would include a charge on the defense of protection of property, if the facts would support it.

The defendant argues that this instruction was warranted because the proof showed that the victim had a reputation for violence and assaulted him, leaving him to fear for his life. He claims that it is only out of this fear that he attacked the victim. Even if these facts are taken as true, the trial court instructed the jury on self defense; that was adequate.

T.P.I.--Crim. 40.08, in pertinent part, provides as follows:

> A person in lawful possession of real or personal property is justified in threatening or using force against another when and to the degree it is reasonably believed the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.
>
> A person who has been unlawfully dispossessed of real or personal property is justified in threatening or using force against the other when and to the degree it is reasonably believed the force is immediately necessary to re-enter the land or recover the property if the person threatens or uses the force immediately or in fresh pursuit after the dispossession;
> ...

> A person is not justified in using deadly force to prevent or terminate the other's trespass on real estate or unlawful interference with personal property.

(Emphasis added.) As the state points out, this instruction may have actually been more helpful to the prosecution. It clearly provides that if the defendant was merely protecting his property, he was not justified in using deadly force. If, on the other hand, the defendant contention is that he was acting to protect his life rather than his property, this instruction has no applicability. In our view, the instruction was not warranted by the evidence.

We now turn to the propriety of an instruction on criminally negligent homicide. The trial court charged all lesser grades of the offense except criminally negligent homicide. The least possible offense under the instruction given was voluntary manslaughter. Voluntary manslaughter is clearly a lesser included offense of first degree murder. See Wright v. State, 549 S.W.2d 682 (Tenn. 1977). Tenn. Code Ann. § 39-13-211(a) provides as follows:

> Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a

> reasonable person to act in an irrational manner.

Criminally negligent homicide, which under the 1989 Act replaced involuntary manslaughter as a crime, is also a lesser included offense, see State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994), and is defined as "[c]riminally negligent conduct which results in death." Tenn. Code Ann. § 39-13-212(a). The degree of negligence required to prove the offense is as follows:

> Criminal negligence refers to a person who acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint[.]

Tenn. Code Ann. § 39-11-106(4).

The sum of the testimony upon which the defendant relies as warranting the instruction is as follows:

> DEFENDANT: The gun come straight up like this right here and started going off. I don't know if it went off two times. I don't know if it went off three times. The gun was starting to just discharge. I mean, I didn't pull the gun up and aim it. When I was coming up with the gun, I had my foot against the bottom edge of that door, where it was tore up. And the door was on this arm. And the gun started going off.
>
> ***
>
> DEFENDANT: I don't know exactly what time it was that night. I know it was dark. And I know it was late in the morning when this happened. And this man, he is the one that come and provoked me. I was in

> bed asleep. I was asleep. And he come for some ungodly reason. I don't know. I don't know what happened. I couldn't tell you what happened. He could have got into it with somebody else somewhere else, and come over there. But all I know the man provoked me, brung that stuff out of me, something that I'm very sorry of what happened. And I didn't really want to do what I done. But I was nervous, and feared for my life. And I was scared.
>
> And I know what had happened, that this man was probably hurt. I want to -- I wanted to help him. But I didn't know if I would have went over there and done something to him, they might have said -- the police might have said, "Well, he was trying to do something else to him." You don't never know what they'd say. I don't know what they can say, or what they will say, but I know what I tried to do. I thought I was doing right.
>
> MR. DUZANE: Did you intend to kill him?
>
> DEFENDANT: No. I didn't.

It is settled law that when "there are any facts that are susceptible of inferring guilt on any lesser included offense or offenses, then there is a mandatory duty upon the trial judge to charge on such offense or offenses. Failure to do so denies a defendant his constitutional right of trial by a jury." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981)(citations omitted); Tenn. Code Ann. § 40-18-110. When there is a trial on a single charge of felony, there is also a trial on all lesser included offenses, "as the facts may be." Strader v. State, 362 S.W.2d 224, 227 (Tenn. 1962).

Here, the defendant was charged with first degree murder. The lesser included offenses included second degree murder, voluntary manslaughter, and criminally negligent

homicide. See Howard v. State, 506 S.W.2d 951 (Tenn. Crim. App. 1973); see also State v. Stephenson, 878 S.W.2d at 550. The defendant argues that portions of his testimony suggested that the shooting was unintentional, the result of a "gross deviation from the standard of care that an ordinary person would exercise..." Tenn. Code Ann. § 39-11-106(4). Thus, he claims an entitlement to the instruction of criminally negligent homicide.

It is only when the record contains no evidence which might support an inference of guilt of a lesser included offense that the trial court has no duty to instruct. See State v. King, 718 S.W.2d 241, 245 (Tenn. 1986). Even where the evidence is slight that the defendant lacked the intent required to warrant a conviction for a greater offense, trial courts must instruct on the lesser offense.

Upon careful examination of the context of the defendant's testimony, we have concluded that this is one of those rare instances in which the omission of the instruction was not erroneous. As we view his testimony, the defendant claimed self-defense or, in the alternative, "adequate provocation" and lack of a preconceived notion to kill the victim. In other words, according to his testimony, it was the killing, not the shooting, of the victim which was unintentional. If a shooting was intentional, any resultant death would not qualify as mere, criminally negligent homicide.

X

As his last issue, the defendant asserts that the trial court, acting as the thirteenth juror, should have granted the defendant a new trial after an assistant district attorney general expressed surprise at the verdict of murder in the first degree. We disagree.

The "thirteenth juror" rule provides in part as follows:

> The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence...

Tenn. R. Crim. P. 33(f). The rule provides trial courts with the authority to set aside a guilty verdict and to grant a new trial if, in the view of the judge, the jury verdict is against the greater weight of the evidence. See State v. Enochs, 823 S.W.2d 539, 540 (Tenn. 1991).

The defendant argues that the trial judge should have considered the prosecutor's personal view concerning the sufficiency of the evidence in exercising his role as the thirteenth juror. That is not relevant to the determination. When acting as thirteenth juror, a trial judge must ascertain whether the evidence was sufficient to support the verdict. That conclusion must be based solely upon the evidence adduced at trial. To do otherwise would undermine the plain language of the rule. Here, the trial court expressed satisfaction with the verdict. That, when coupled with proof of each and every element of the offense, is sufficient.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
David H. Welles, Judge

_____
William S. Russell, Special Judge