IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	*	#03C01-9502-CR-00026
APPELLEE,	*	SULLIVAN COUNTY
VS.	*	Hon. R. Jerry Beck
RICKY LYNN GOINS,	*	(First Degree Murder; Attempted First Degree Murder)
APPELLANT.	*	

For the Appellant:

Stephen M. Wallace
District Public Defender
P.O. Box 839
Blountville, TN 37617

Richard A. Tate
Asst. Public Defender
P.O. Box 839
Blountville, TN 37617

For the Appellee

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Hunt S. Brown
Asst. Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Carl K. Kirkpatrick
District Attorney General

Phyllis Miller
Asst. District Attorney General
P.O. Box 526
Blountville, TN 37617

David Glenn Overbay
Asst. District Attorney General
P.O. Box 526
Blountville, TN 37617

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Ricky Lynn Goins, was convicted of the first degree murder of Kenneth Ray Roberts and the attempted first degree murder of Savonna Sanders. He was sentenced to life imprisonment for the former conviction and to twenty years in the Department of Correction for the latter conviction. The sentences are to be served concurrently.

On appeal, the appellant argues that: (a) the evidence was insufficient to support the convictions; (b) the trial court erred in excluding evidence; (c) the trial court erred in denying a proposed instruction to the jury on the elements of premeditation, deliberation, and passion; (d) the trial court erred in instructing the jury as to the range of possible penalties pursuant to Tennessee Code Annotated section 40-35-201(b); and (e) the trial court erred in allowing the prosecution to engage in misconduct during summation. The State of Tennessee argues on appeal that the trial court erred in imposing concurrent sentences.

We conclude that the evidence is sufficient to support the jury's verdict and that there is no reversible error in the record. The judgments are affirmed.

In the early morning hours of August 18, 1993, the appellant, armed with a .22 caliber semi-automatic rifle, entered the United Oil convenience store in Kingsport, Tennessee. The appellant shot Savonna Sanders, his former wife, three times; she survived. He also shot Kenneth Ray Roberts three times; Roberts was killed. When officers from the Kingsport Police Department arrived at the scene at approximately 4:42 a.m., they found Roberts lying on the floor of the store in a pool of blood. They found Sanders in a rear office. She was covered with blood and disoriented. She said she had fallen down and she denied having been shot. She mentioned her "ex-husband."

Several officers described the crime scene. Display stands had been knocked over. A trail of blood in the dining area and behind the sales counter led to the office in which Sanders had been found. Shoe prints were evident in the blood. The stock of a .22 caliber rifle was found in the office; the barrel was found under the sales counter. Two unfired .22 caliber shell casings were found outside the entrance to the store. Several fired and unfired .22 caliber shell casings were found inside the store near the sales counter, the dining area, and the office. Bullet fragments were recovered from the floor and from the wall near Roberts. A bullet fragment was also found in a bench.

Detective J.W. Sampson testified that much of the evidence recovered from the crime scene was sent to the Tennessee Bureau of Investigation for further analysis. After the victims were identified, Sampson obtained a search warrant for the appellant's apartment. He executed the warrant at approximately 4:00 p.m. The appellant was not present, nor was any evidence found in his apartment that tied him to the crime scene. Sampson testified that the appellant surrendered to authorities later in the day and that he was advised of his Miranda rights. The appellant's clothes and shoes were sent to the Tennessee Bureau of Investigation. At one point, the appellant told Sampson: "I don't know why I done that, it was stupid. Girls sure can mess you up, can't they?"

Deane Johnson, a serologist with the Tennessee Bureau of Investigation, analyzed the blood found at the crime scene and on the appellant's clothes. Tests revealed HP type 2-1 blood on the appellant's blue jeans. This blood type matched Savonna Sanders and Kenneth Roberts.[1] Human blood was also found on the appellant's T-shirt and shoes; however, the amount of blood was too small for testing. Linda Littlejohn, a forensic scientist with the Tennessee Bureau of Investigation, analyzed the shoe prints found in the blood behind the sales counter. Of eleven partial shoe prints, four were

[1] HP testing was one of five blood tests performed on the blue jeans. Type 2-1 is the most common result in HP testing, as it is shared by 49% of the population.

consistent with Savonna Sanders' left shoe in terms of size, shape, and tread design. One print was consistent with the appellant's right shoe in terms of size, shape, and tread design. Finally, one print matched the individual characteristics of the appellant's left shoe and the match excluded all other shoes.

Tommy Heflin, a special agent with the Tennessee Bureau of Investigation, testified that the weapon found at the scene was a .22 caliber semi-automatic rifle. Seven unfired Remington .22 caliber long rifle cartridges and six spent Remington .22 caliber long rifle cartridges were found at the scene. Based on firing pin impressions, Heflin concluded that all six spent cartridges had been fired from the .22 caliber rifle found at the scene. Based on other tests, Heflin concluded that one of the bullets recovered from Kenneth Roberts had definitely been fired from the weapon found at the scene. The other two bullets recovered from Roberts and the one bullet recovered from Savonna Sanders had the same class characteristics as the remaining bullets found at the scene. Similarly, bullet fragments recovered from the wall, floor, and bench had the same class characteristics as the other .22 caliber bullets found at the scene.

Savonna Sanders testified that she met the appellant in June of 1990, and that she married him two weeks later. Sanders was twenty-three or twenty-four years of age at the time and the appellant was twenty-one. It was Sanders' second marriage and the appellant's first. In February or March of 1992, the couple divorced. In April of 1992, Ms. Sanders married Steve Sanders yet continued to have a relationship with the appellant, who wanted to reconcile.[2] In November of 1992, Ms. Sanders stopped seeing the appellant and she also filed for divorce from Steve Sanders. In December of 1992, she began to date Kenneth Ray Roberts. The appellant continued to call her and to drive by

---

[2] Sanders acknowledged that her relationship with the appellant had been somewhat tumultuous and that, at one point, they continued to see one another despite the existence of a mutual restraining order.

her apartment. He frequently asked Sanders to remarry him. She told the appellant she would think about it, but she never accepted his proposals.

In August of 1993, a few days before the shooting occurred, Savonna Sanders started dating the appellant again. She declined to remarry him, but she moved into his apartment. They rented furniture together, and Ms. Sanders used the name "Savonna Goins." After less than a week, she decided the relationship would not work so she left the appellant and moved back in with Roberts. On August 17, 1993, the day before the shooting, she and Roberts removed the rented furniture from the appellant's apartment. Sanders testified that she knew the appellant would be "really mad" when he learned that she had left him for Roberts.

On the morning of the shooting, August 18, 1993, Savonna Sanders and Roberts drove to the United Oil convenience store, where Sanders was employed. They arrived shortly after 4:30 a.m., and Sanders turned off the alarm. As she walked back toward the door, she saw the appellant in the entranceway. Not realizing that the appellant had a weapon, Sanders went behind the sales counter. She heard a "click-click" and was shot in her right side by the appellant. The appellant then shot Roberts. Sanders pushed the alarm button and then ran into a rear office. She tried to lock the door but the appellant had followed her. She was unable to recall what happened next.

Sanders was taken to the hospital and treated for gunshots wounds, multiple bruises, and lacerations to her face and head. She had superficial gunshot wounds to her chest and forearm and a gunshot wound to her abdomen. Surgery was performed to remove the bullet from her abdomen. After being discharged from the hospital, Sanders experienced headaches and unsteadiness. She was readmitted to the hospital and treated for a subacute right subdural hematoma and a frontal skull fracture.

Dr. William McCormick performed an autopsy on Kenneth Roberts. He testified that Roberts had been shot once in the abdomen, once in the head, and once in the upper jaw. McCormick described the paths of the bullets and the damage inflicted. He testified that the gunshots to the abdomen and to the head were "lethal" wounds.

Ruth Mullenix testified that she saw the appellant and Savonna Sanders a few days before the shooting. She was aware the couple had reunited. On the day before the shooting, she talked to the appellant around 4:00 p.m. She learned that Sanders had left the appellant. The appellant said, "She really broke my heart this time." He also said that he was "not going to have anything else to do with her." Mullenix described the appellant as "real upset" and "crying." Similarly, Ruby McGrady testified that she saw Savonna Sanders at Roberts' apartment on the day before the shooting. At approximately 3:30 or 3:45 p.m., the appellant came by looking for Sanders and Roberts. Sanders hid in McGrady's apartment until the appellant left. McGrady testified that she saw the appellant drive by the apartment several times that evening.

Scott Lee Patterson testified that he and the appellant shared a ride home from work on the day before the shooting. Patterson knew the appellant and Savonna Sanders had reunited but he was unaware whether they had plans to remarry. The appellant left Patterson's home around 4:00 p.m., but he returned thirty to forty-five minutes later. The appellant told Patterson that Sanders had moved out and had taken his furniture and $250. The appellant told Patterson that he had a friend who wanted to buy Patterson's .22 caliber pistol. Patterson did not want to sell the pistol. He told the appellant that the "best thing" would be to leave Savonna Sanders alone.[3] The appellant left. Patterson saw the appellant later that evening. The appellant did not mention

[3] Patterson did not recall telling police officers that the appellant asked him to drive the appellant by Sanders' and Roberts' apartment.

Sanders. The following morning, the appellant did not arrive at the usual time to share a ride to work with Patterson.

Joe Crabtree testified that the appellant stopped by his home at 10:00 p.m. on the night before the shooting. The appellant asked Crabtree to take him to Wal-Mart to buy .22 caliber rifle shells because he planned to go "target shooting" the next morning. Crabtree agreed to take the appellant to Wal-Mart where the appellant bought a small box of shells. Crabtree told the appellant that he needed more shells if he wanted to go target shooting, but the appellant said someone else was bringing more shells. When they returned from Wal-Mart, the appellant showed Crabtree a .22 caliber semi-automatic rifle. He agreed to sell the rifle to Crabtree for $35.00 after he used it for target shooting the next morning. Crabtree identified the rifle found in the United Oil convenience store as the one the appellant had shown him.

Brenda Sue Bowen was present when the appellant visited Crabtree's house on the night before the shooting. The following morning, around 8:00 a.m., Bowen again saw the appellant at Crabtree's house. The appellant told her he had just gone to the United Oil convenience store, shot his ex-wife, and beat her in her head with a rifle.[4] The appellant also said he shot Kenneth Roberts several times, rolled him over, and shot him once more. The appellant told Bowen that he "did one thing wrong," which was to leave the rifle at the scene.

After the State rested its case in chief, the appellant recalled Detective Sampson to testify. Sampson said that he took a statement from Savonna Sanders two days after the shooting. Sanders was still in the hospital but appeared coherent. She told Sampson that she moved in with the appellant on August 12, 1993, and moved out on

---

[4] The appellant also told Bowen that he had awoke the previous evening to find Savonna Sanders holding a gun to his head. Sanders said she "ought to kill him," and she fired one shot that missed.

August 17, 1993. She said that the appellant told her several times that he would kill her and Roberts if she moved back in with Roberts. She also told Sampson about the events leading up to the shooting. The appellant arrived at the store and then returned to his truck to retrieve the rifle. He shot Sanders and then stood over Roberts, shooting him "over and over."[5]

Dr. Thomas Schacht, a licensed clinical psychologist, testified that he interviewed the appellant on February 15, 1994, and administered several intelligence tests. On a Wechsler Adult Intelligence Scale (WAIS), the appellant had a verbal score of 67, which was in the mild mental retardation range, a performance score of 76, which was in the borderline mental retardation range, and a full scale score of 71, which was also in the borderline mental retardation range. Although the IQ scores alone were insufficient to base a diagnosis of mental retardation, Schacht described the appellant's poor ability to make judgments and to evaluate situations. For instance, the appellant was gullible and prone to exploitation and manipulation. He had difficulty controlling strong emotions and evaluating dangerous situations. Schacht conceded that the impairments did not prevent the appellant from being able to premeditate or deliberate.

David Waye testified that he knew the appellant had reunited with the Savonna Sanders. He saw the couple four days before the shooting; both seemed happy. The appellant asked Waye to be the best man at the couple's marriage.

Virginia Overbay testified that she saw the appellant at her home on the day of the shooting at approximately 5:00 a.m. The appellant was "pacing and couldn't stand still." He told Overbay he had just shot Savonna Sanders and "her boyfriend." He told her that he and Sanders had tried to work things out but that he had caught Sanders and

---

[5] The trial judge instructed the jury that Sanders' statements could be considered for impeachment purposes only.

Roberts "making love." Virginia Sue Goins, the appellant's sister-in-law, talked to the appellant between 10:00 and 11:00 a.m. on the day of the shooting. The appellant said he "messed up." He was crying and "torn to pieces." Virginia Goins drove the appellant to his family's home in Surgoinsville. Jeanna Marie Kiersay, the appellant's sister, was present. She testified that the appellant was crying and upset. She took the appellant to meet with Paul Taylor, the Chief of Police in Surgoinsville. According to Kiersay, Taylor took the appellant to the Kingsport Police Department.[6]

I

The appellant contends that the evidence did not support a finding that the killing of Roberts and the attempted killing of Sanders were premeditated or deliberate. He argues that the offenses occurred while he was in a state of passion over his latest break up with Sanders. The State maintains that the evidence was sufficient to support the convictions.

When the sufficiency of the evidence is challenged, the standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence, and to all reasonable inferences that may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). In determining the sufficiency of the evidence, this court should not reweigh the evidence, id., and this court should not substitute its inferences for those drawn by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956).

---

[6] Taylor testified in the State's rebuttal case. He described the appellant as quiet and subdued but not crying.

At the time of these offenses, first degree murder was defined as the "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a).[7] A deliberate act is one "performed with a cool purpose," and a premeditated act is one "done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(1) & (2). An attempted crime is statutorily defined as follows:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101.

In State v. Brown, 836 S.W.2d 530, 539 (Tenn. 1992), our supreme court discussed the elements of first degree murder and emphasized the distinction between the elements of premeditation and deliberation. A treatise cited in Brown provided some guidance:

> 'Premeditation' is the process simply of thinking about a proposed killing before engaging in the homicidal conduct; and 'deliberation' is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended. 'Deliberation' is present if the thinking, i.e., the 'premeditation,' is being done ... in a cool mental state ... and for such a period of time as to permit a 'careful weighing of the proposed decision.'

---

[7] Effective July 1, 1995, first degree murder was amended to delete the deliberation requirement. Tenn. Code Ann. § 39-13-202(a)(1995 supp.).

2 C. Torcia, Wharton's Criminal Law, §140 (14th ed. 1979)(footnotes omitted); see also State v. Gentry, 881 S.W.2d 1, 3-4 (Tenn. Crim. App. 1993). Deliberation, therefore, requires some time interval between the decision to kill and the act itself, during which the mind is free from the influence of excitement or passion. State v. Brown, 836 S.W.2d at 539-40. It is present when the circumstances indicate that the murderer reflected upon the manner and the consequences of his act. See State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). The elements of deliberation and premeditation may be inferred from the manner and circumstances of the killing. State v. Gentry, 881 S.W.2d at 3.

We conclude that the evidence was sufficient for the jury to find the elements of first degree murder and attempted first degree murder beyond a reasonable doubt. The on again, off again, relationship between the appellant and Savonna Sanders was apparent from the record. On the day before the shooting, Sanders moved out of the appellant's apartment and returned to live with Kenneth Roberts. The appellant was upset by Sanders' departure, and he told several friends that she had left him and had taken his furniture. After trying to purchase a pistol from Scott Patterson, the appellant acquired a .22 caliber rifle and went to Wal-Mart to buy ammunition. On the morning of the shootings, the appellant drove to the United Oil convenience store and confronted Sanders and Roberts in the early morning hours before the store opened for business. He was in possession of the semi-automatic rifle and he shot each victim several times. Moreover, he later told a witness that he had beat Sanders in the head with the rifle after shooting her, and that he had shot Roberts, rolled him over, and then shot him again. In sum, we conclude that the evidence was legally sufficient for the jury to have found the elements of the offenses. Tenn. R. App. P. 13(e).

II

In his second issue, the appellant argues that the trial court erred in excluding statements he made to Virginia Sue Goins and Jeana Marie Kiersay regarding his plans

to remarry Savonna Sanders. In a jury out hearing, Virginia Sue Goins testified that the appellant told her that he and Sanders were "going to get remarried." The statement was made on August 14, 1993, four days before the shooting. Jeana Marie Kiersay testified in the jury out hearing that the appellant told her "me and [Sanders] is getting remarried again." The statement was made on August 4, 1993. The trial court ruled that the statements did not qualify for admission pursuant to the state of mind hearsay exception in Rule 803(3), Tennessee Rules of Evidence. The court also commented on the amount of time that passed between the appellant's statements and the offenses.

The appellant maintains that the statements were admissible to show his state of mind pursuant to Rule 803(3). He contends that his statements reflected not only his feelings toward the victim in the days prior to the shooting, but also the state of passion caused by the victim's termination of the relationship. The State contends that the trial court correctly ruled that the statements were inadmissible hearsay and that the appellant's statements prior to the offenses were not relevant to his criminal conduct.

Rule 803(3) provides that the following statements are admissible as exceptions to the general rule excluding hearsay: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." A treatise on Tennessee evidence provides the following interpretation of the rule:

> Although Rule 803(3) is commonly referred to as the state of mind hearsay rule, it extends to a number of mental processes that stretch the concept of state of mind. Thus, by its own terms Rule 803(3) reaches emotions, sensations, and physical condition. As illustrations of the processes, the rule cites seven examples: 'intent, plan, motive, design, mental feeling, pain, and bodily health.' It should be obvious that these examples reflect an intent that this hearsay exception be read broadly to embrace virtually all mental processes that the declarant can describe.

N. Cohen, D. Paine, & S. Sheppeard, Tennessee Law of Evidence, (3rd ed. 1995), §803(3).1 at 539 (emphasis added). In addition to showing a declarant's then existing mental state, a statement may also show a future or past mental state. "Logically a person's feeling toward a person on one day are at least some evidence of the person's feelings toward that person the next day. At some point, however, mental state on one day may become irrelevant in assessing mental state far in the future or past." Id., §803(3).3 at 542.

Notwithstanding the breadth of Rule 803(3), the appellant's statements were not necessarily express declarations of his mental state, but rather, were circumstantial indications of his feelings toward the victim. As discussed in Tennessee law of Evidence:

> In order for Rule 803(3) to apply, the declarations of mental condition should expressly assert the declarant's mental state. Common examples include statements of love ('I love Karen'), fear ('I'm afraid Adolph will kill me'), and hate ('I hate him'). Many times a statement does not literally assert the declarant's mental state when offered to prove that mental state. If so, the statement should be admitted as nonhearsay....In any event, both circumstantial declarations of mental state and express declarations of mental state are admissible.

See id., §803(3).2 at 540. In effect, the appellant's statements were not offered to prove the truth of the matter asserted, i.e., that he and the victim were, in fact, going to remarry. Rather, the appellant's statements circumstantially showed his mental state toward Sanders at the time the statements were made. Thus, the statements were admissible as nonhearsay. See id., §801.7 at 498-99 (circumstantial declarations to show declarant's mental state are nonhearsay).

We conclude, however, that the exclusion of this evidence did not constitute reversible error. There was extensive direct evidence and circumstantial evidence of the appellant's mental state admitted at trial. Savonna Sanders testified that the appellant repeatedly expressed his desire to remarry her. Numerous witnesses testified that the appellant was elated to have reunited with Sanders in the week before the shooting and

that he was extremely upset when Sanders again terminated the relationship. Moreover, a defense witness, David Waye, testified without objection that the appellant asked him to be the best man when he and Sanders remarried. According to Waye, the conversation occurred on August 16, 1993, two days before the shooting. As a result, we conclude that the trial court's ruling did not constitute reversible error and that the appellant is not entitled to relief on this ground. Tenn. R. App. P. 36(b).

III

The appellant contends that the trial court erred in refusing to charge the jury with the following instruction:

> You have heard evidence that the defendant was suffering from a mental defect, to wit that he has a low intelligence quotient. You may consider this evidence in determining whether the defendant possessed the mental state required for the offense of first degree murder, that is whether the alleged killing was premeditated and deliberate. You may also consider this evidence in deciding whether the defendant was in a state of passion during the alleged killing.

The State maintains that the trial court properly denied the request.

The trial judge has a 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. 1986). Where the charge fully, fairly, and correctly conveys the applicable law to the jury, there is no requirement that the trial court give a specially requested instruction. State v. Edwards, 540 S.W.2d 641, 649 (Tenn. 1976). In reviewing the charge as a whole, we note that the trial court correctly charged the elements of the offense, the mental state required to commit the crimes, and the State's burden to prove these elements beyond a reasonable doubt. With regard to mental state the instruction stated:

> The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a state of passion when the design was carried into effect.

> Furthermore, premeditation can be found if the decision to kill was first formed during the heat of passion, but the accused commits the act after the passion has subsided.

The charge also stated:

> You may consider all the facts and circumstances in evidence including evidence of the defendant's mental state at the time of the alleged acts to determine if the State has proved beyond a reasonable doubt all of the elements required to be proved in each of the alleged offenses....

These instructions fully, fairly, and correctly charged the jury on law applicable to this case. We conclude, therefore, that the trial court did not commit reversible error in refusing to include the appellant's requested instruction in the charge to the jury.[8]

IV

The appellant contends that the trial court erred in granting the State's motion to instruct the jury on the range on possible penalties for the charged offenses and all the lesser included offenses. The appellant claims that the State's motion was untimely and that the governing statute, Tennessee Code Annotated section 40-35-201(b) is unconstitutional. The State maintains on appeal that the trial court properly granted the motion and that, in any event, the appellant has not shown that he was prejudiced by the ruling.

At the time of this trial, the applicable statute provided that "[i]n all contested criminal cases ... upon the motion of either party, filed with the court prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses." Tenn. Code Ann. § 40-35-201(b)(emphasis added).[9] The record indicates that the State made its motion pursuant to this statute on the morning of

---

[8] Moreover, we note that the first sentence in the requested instruction would appear to be an improper comment on the evidence by the court. Tenn. Const. Art. VI, §9; see State v. Suttles, 767 S.W.2d 403, 405 (Tenn. 1989).

[9] The statute was amended effective July 1, 1994. See Tenn. Code Ann. § 40-35-201(b)(1995 supp.).

the first day of trial. The appellant objected on the ground it was untimely. The trial court noted for the record that although voir dire had begun, no jurors had yet been selected or removed from the panel. In short, no peremptory challenges had been made and voir dire had not been completed. Thus, the court granted the State's motion.

Although a motion may be made by either party, it is often made by the defense. In State v. Cook, 816 S.W.2d 322, 326 (Tenn. 1991), the supreme court noted that Tennessee Code Annotated section 40-35-201(b) gave the defendant a statutory right to have the jury instructed on the range of penalties. Obviously the statute affords the State the same right. With regard to the timing of such a motion, a panel of our court has noted that "the state [or defense] must be given notice of this request prior to jury selection so that prospective jurors may be questioned about the effect that knowing the possible punishment might have upon their verdict." State v. Donald E. McIntosh, No. 85-27-III (Tenn. Crim. App., Nashville, May 23, 1986), slip op. at 5. Accordingly, in State v. Royce Wayne Bowie & Richard Steve Bowie, No. 86-212-III (Tenn. Crim. App., Nashville, Mar. 12, 1987), our court affirmed the denial of a defense motion made during, and not before, jury selection. See also State v. Linda Marie Van Tol, No. 47 (Tenn. Crim. App., Jackson, July 23, 1986)(request made after jury impaneled too late).

Although the ideal practice would be to file a motion pursuant to this statute in advance of trial, the State offered no reasons for filing its motion after voir dire had commenced. Nonetheless, the trial court observed that no juror had yet been selected and that no peremptory challenges had yet been made. Additionally, the appellant did not show that he was prejudiced by the trial court's grant of the State's motion at that stage of the proceedings.[10] We conclude that it was within the trial court's discretion as to whether

[10] We note that the transcript of the voir dire proceedings is not included in the record on appeal.

to grant or deny the State's request. In light of the foregoing considerations, the trial court's ruling was not an abuse of its discretion.

In challenging the constitutionality of Tennessee Code Annotated section 40-35-201(b), the appellant argues that it is improper to allow the jury to speculate on the length of the sentence when determining guilt or innocence. The appellant cites Farris v. State, 535 S.W.2d 608 (Tenn. 1976) in support of his position. In Farris, a plurality of our supreme court said that a statute which required the trial court to charge the jury regarding "certain powers and duties of the Board of Pardons and Paroles, good behavior allowances, and the allowing of honor time," was unconstitutionally vague. Id. at 613-14. The statute challenged by the appellant does not contain the provisions discussed in Farris; rather, it allowed the court to inform the jury on the statutory range of possible penalties. Thus, the dicta in Farris does not stand for the proposition advanced by the appellant. Moreover, the appellant has failed to show any other grounds upon which to invalidate the statute on constitutional grounds. Thus, he is not entitled to relief on this issue.

V

The appellant's final contention is that the trial court erred in allowing the prosecutor to engage in misconduct during summation. The appellant takes issue with the following remarks made by the prosecutor:

> Maybe he just made one mistake, maybe that was it. And if you want to see premeditation, right there it is, 'Til Death Do Us Part,' the t-shirt that he put on, and that he wore over there, and he took that fully loaded gun. There it is.

The trial court overruled the appellant's contemporaneous objection at trial. On appeal, the appellant maintains that the argument was not based on evidence within the record and that the argument was improper and prejudicial. The State maintains that the argument was fairly based on evidence in the record and that, in any event, the argument did not affect the outcome of the trial.

Our supreme court has observed that "argument of counsel is a valuable privilege that should not be unduly restricted." Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975); State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994). The trial court has the discretion to control the argument of counsel, and this court will not disturb the trial court's rulings absent an abuse of that discretion. Smith v. State, 527 S.W.2d at 739. In evaluating a claim of prosecutorial misconduct, we must consider the context of the allegedly improper conduct, the prosecutor's intent, the curative measures, if any, taken by the trial court, the cumulative effect of the conduct together with any other errors in the record, and the relative strength or weakness of the evidence. State v. Bigbee, 885 S.W.2d at 809. In sum, we consider whether the prosecutor's conduct was so inflammatory that it affected the result of the trial to the prejudice of the appellant. Id. at 809.

We disagree with the appellant's contention that there was no evidence in the record to support the inference argued by the prosecutor. According to Detective Sampson, the appellant was arrested on the day the offenses were committed. When the appellant was arrested he was wearing a black t-shirt with the word "Til Death Do Us Part." The picture on the t-shirt depicted a man and women getting married next to a skeleton with a hood, or, as Sampson testified, the grim reaper. The State's expert witness testified that human blood was found on the t-shirt, lending an inference that the appellant was wearing the t-shirt when the crimes were committed. Significantly, the appellant did not object when the t-shirt was admitted into evidence.[11] Thus, while the inference of premeditation from the t-shirt may have been debatable, it appears to have been fairly drawn from the evidence in the record. Moreover, the argument was not so inflammatory or prejudicial as to have affected the result to the detriment of the appellant. The appellant is not entitled to relief on this issue.

---

[11] Moreover, we note that defense counsel's summation likewise referred to the fact that the appellant was wearing the same clothes when he was arrested.

VI

The State contends that the trial court erred in ordering the appellant's twenty year sentence for attempted first degree murder to run concurrently with the life sentence for first degree murder. Based on the facts and circumstances of the offenses, the State insists that the appellant is a dangerous offender as defined in Tennessee Code Annotated section 40-35-115(b)(4), and that consecutive sentences are reasonably related to the seriousness of the crimes and necessary to protect the public. The appellant maintains that the trial court correctly ordered the sentences to run concurrently.

When a party challenges the length, range or manner of service of a sentence, the reviewing court must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. § 40-35-401(d). The presumption of correctness is "conditioned upon the affirmative showing in the record 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). The burden of showing that a sentence is improper is on the appealing party. Tenn. Code Ann. § 40-35-401(d)(sentencing commission comments).

Consecutive sentencing may be appropriate if the court finds by a preponderance of the evidence one or more of the factors set forth in Tennessee Code Annotated section 40-35-115(b). See State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1978); Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). Our supreme court has recently commented on the rationale for consecutive sentencing:

> Section 40-35-115 requires proof of particular facts defining an offender subject to consecutive sentences. The rationale for consecutive sentences stated in Gray and Taylor is that they be reasonably related to the severity of the offenses committed and serve to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct. This statement of principle cannot be separtated into a discrete findings of fact which in every case would justify the

> imposition of consecutive sentencing. It does, however, recognize those limitations on consecutive sentencing established by the Court, that consecutive sentencing cannot be imposed unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant.

State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)(emphasis added).

The record indicates that the trial court considered the presentence report, the evidence at trial and sentencing, the arguments of counsel, and the principles of sentencing. Tenn. Code Ann. § 40-35-210(b). Moreover, the trial court entered meticulous written findings of fact and conclusions of law at the conclusion of sentencing. See State v. Jones, 883 S.W.2d 597, 599-600 (Tenn. 1994). Thus, the court's findings clearly warrant the presumption of correctness afforded in Tennessee Code Annotated section 40-35-401(d).

The trial court observed that the appellant was a dangerous offender because his behavior showed "little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high." Tenn. Code Ann. § 40-35-115(b)(4). However, in considering whether consecutive sentencing was appropriate pursuant to this section, the court also analyzed the factors set forth in State v. Woods, 814 S.W.2d 378 (Tenn. Crim. App. 1991):

> (a) whether the defendant's behavior indicated little or no regard for human life;
>
> (b) whether the circumstances surrounding the offense were aggravated;
>
> (c) whether confinement for an extended period of time is necessary to protect society from the defendant's unwillingness to lead a productive life and [his] resort to criminal activity in furtherance of his anti-social life style; and
>
> (d) whether the aggregate length of the sentences, if consecutive, reasonably relates to the offenses committed by the defendant.

Id. at 380. The trial court found that the facts and circumstances of the offenses supported the first two factors and weighed in favor of consecutive sentencing. However, the court then found that the appellant had no prior criminal convictions, exhibited a low level of intelligence, had voluntarily surrendered to authorities, had a good employment record, and had a peaceful reputation. Thus, after making these detailed findings, the court concluded that concurrent sentences were reasonably related to the severity of the offenses and that consecutive sentences were not necessary to protect the public from further criminal acts by the appellant.

On appeal, the State argues that the trial court erred in applying the criteria in Woods in light of the supreme court's decision in State v. Wilkerson, supra. In Wilkerson, the supreme court modified Wood's requirements for strict factual findings particularly with regard to a defendant's "anti-social" lifestyle. Moreover, the supreme court said that Woods was approved only to the extent that it was consistent with the principles espoused in Wilkerson. However, the supreme court adhered to the view that not every dangerous offender deserves consecutive sentences:

> Proof that an offender's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences. Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences; consequently, the provisions of Section 40-35-115 cannot be read in isolation from the other provisions of the Act. The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. In addition, the Sentencing Reform Act requires the application of the sentencing principles set forth in the Act applicable in all cases. The Act requires a principled justification for every sentence, including, of course, consecutive sentences.

State v. Wilkerson, 905 S.W.2d at 938 (emphasis added).

Accordingly, we disagree with the State's contention that Wilkerson requires consecutive sentencing in this case. The trial court's detailed findings, although citing

Woods, indicate that it considered all of the sentencing principles and factors mentioned in Wilkerson. In particular, the court found that the sentence imposed was reasonably related to the severity of the crimes and that consecutive sentences were not necessary to protect the public from the appellant. State v. Wilkerson, 905 S.W.2d at 938. Given the trial court's detailed findings, and the presumption of correctness attendant to those findings, we conclude that the State has failed to show the sentences were inappropriate. The State's issue is without merit.

_____
William M. Barker, Judge

_____
John H. Peay, Judge

_____
David G. Hayes, Judge