IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9504-CR-00098
Appellee,	*	SHELBY COUNTY
VS.	*	Hon. Bernie Weinman, Judge
JANICE HANSBROUGH-EASON,	*	(Voluntary Manslaughter)
Appellant.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Janice Hansbrough-Eason,[1] was convicted of voluntary manslaughter. The trial court imposed a three-year, Range I sentence and ordered the sentence suspended after one year at the Shelby County Correctional Center. In this appeal of right, the defendant claims the trial court erred as follows:

> (1) by failing to grant a new trial because the jury foreman failed to reveal relevant, potentially prejudicial information;
>
> (2) by failing to charge the jury on criminally negligent homicide;
>
> (3) by failing to instruct the jury on the defense of another;
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> (4) by failing to allow the defendant to present testimony that the victim told others he did not want to prosecute the defendant for the shooting;
>
> (5) by failing to grant a mistrial, when the state asked a witness a question in violation of a prior ruling; and
>
> (6) by failing to suppress a statement made by the defendant to police officers.

We find no reversible error and affirm the judgment.

The defendant was indicted for second degree murder following the September 23, 1993, shooting death of her husband, Malcomb Eason. Only the defendant, the victim, and their infant child were present at the time of the homicide.

Felicia Ballard, the defendant's downstairs apartment neighbor, testified that just after the shooting, the defendant knocked on her door and, in a

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[1]It is the policy of this court to refer to the defendant by the name listed on the indictment. The defendant was referred to as Janice Eason in many of the court documents.

calm voice, asked that she come to the Eason apartment. The defendant explained that she had made a mistake and shot her husband. She added that he had come close to hitting her. Ms. Ballard described the victim as a "nice-going, easy type person" who was a good husband and father; she characterized the defendant as being the "dominating type" and "aggressive."

Wayne Weston, a college friend of both the victim and the defendant, described the victim as "laid-back" and the defendant as "outgoing" and "dominant." The victim, he said, was an ideal father. Weston claimed that he had never seen the victim with a gun but was aware that the defendant, who had invited him to go shooting at a firing range, carried one for protection.

Darron Clark, another friend of the victim, testified that he was a well-composed man, a loyal husband, and a good father. He described the defendant as verbally abusive toward her husband.

Rita May Smith, a convenience market clerk, had given the defendant a ride to the Eason apartment shortly before the shooting. Several months after the shooting, Ms. Smith received a phone call and a thank-you note from the defendant expressing her appreciation for the ride home.

Officer Tim Canady of the Memphis police department was the first officer to arrive at the scene of the shooting. He was met at the door by the defendant, who abruptly exclaimed that she had just shot her husband. Officer Canady arrested the defendant, took her to the police station, and upon questioning, learned that she had slapped the victim just before the shooting. An ambulance

took the victim to a hospital where, despite emergency surgery, he died several hours later.

Jacqueline Eason, the victim's sister, identified a photograph of the victim. Later, Dr. O. C. Smith identified the man in this photo as the person he examined during the autopsy. Dr. Smith, an assistant medical examiner for Shelby County, performed the autopsy and determined the cause of death was a gunshot wound to the abdomen. Because of the absence of powder burns, it was his opinion that the victim was shot at a distance of 24 inches or greater. There were no traces of alcohol or drugs, except those administered at the hospital, found in the victim's blood.

Sergeant George Olive of the Memphis Police Department was called as a witness for the defense. He testified that there were two doors leading into the apartment, one in the kitchen and a second door in the living room which had been blocked.

Memphis Police Officer Steven Opler, who had spoken to the defendant shortly after the shooting, testified that the defendant acknowledged that there had been an argument. He recalled her contention that she shot the victim as he "approached" her. The officer was unable to explain what the defendant meant by "approach."

Orelia Merchant, a college friend of the defendant, testified that on one occasion she had seen the victim drink so much that he became sick. She stated that on the next day, she saw the victim try to force the defendant into his car by pulling, grabbing, and shaking her.

The defense offered several character witnesses. Emma Tom Johnson, a member of the defendant's church, testified that the defendant was "a good Christian" and "respectful" and "obedient" to the elderly. Robert Hewitt, a friend of the defendant's family, testified that she was a compassionate person who cared for the sick and taught the young. Robert and Billie Hansbrough, the defendant's father and mother, attested to her honesty and her calm nature.

The defendant testified at trial. She claimed that she and the victim had enjoyed a pleasant family visit at her parents' house in the hours just before the shooting. The defendant recalled that the victim, while very sleepy on the way home, had declined her offers to drive even though he was swerving into the wrong lane of traffic. She claimed that when the victim stopped to get gas at a convenience market, she carried the child out of the car and called her parents, who suggested that she call the police for a ride. The police refused her request, but the store clerk offered to drive her home at the end of her shift two hours later.

The defendant testified that when she reached her apartment, the victim stood in front of the door and refused to let her and the child inside. The defendant admitted that she struck the victim and pushed her way in. She described the blow as accidental. The defendant claimed that the victim yelled, telling her she should not have come home. She contended that when she went into the bedroom, the victim followed her, grabbed their child, and threw the infant into the baby bed. She testified that the victim raised his arm and approached her as if to strike her; at that point, she opened the dresser drawer, pulled out the gun, removed the safety, and shot him. The victim stumbled backwards into the living room and fell to the floor.

I

During voir dire, defense counsel asked prospective jurors the following:

> COUNSEL: [C]ircumstances do require me to ask some fairly personal questions. What I want to say is that in the event as I go through these questions -- because it can get into your marital relationships, and I don't mind telling you that right now -- if there is a particular question that you would prefer to deal with not in the hearing of the others, raise your hand and let us know and we can ask the Court if we can step up there and deal with that.
>
> ***
>
> COUNSEL: [W]e are influenced by what happens to us in our lives, and we tend to see the world through our personal experiences, so I will get into those questions, as I said.
>
> ***
>
> COUNSEL: Have any of you ever been accused of any type of -- I'm going to use the term that's in vogue now -- spousal abuse?
>
> PROSPECTIVE JURORS: (No response.)
>
> COUNSEL: Have any of you ever felt that you were the victims of spousal abuse?
>
> PROSPECTIVE JURORS: (No response.)

(Emphasis added.)

During the questioning, several potential jurors described their experiences with and feelings about spousal violence. Delbert Danley, who did not respond to the questions, was impaneled as a juror, was later elected foreman, and was responsible for reporting the verdict.

Later, at the hearing on the motion for a new trial, Danley acknowledged that prior to this trial, his wife had filed for divorce, alleging he had abused her; in his formal answer to the complaint, he denied that he had ever been

guilty of abusive behavior and asserted that his wife had, in fact, abused him. Danley conceded that he had not forgotten about these events, which occurred some five years before trial, when defense counsel submitted the question. When the defense counsel asked why he did not respond to the voir dire question, Danley replied: "I felt like it was mostly a misunderstanding between my wife and I [sic], and we ended up working things out satisfactory [sic] to both of us, and it's--as far as I'm concerned, it's over ... I was thinking since everything was dropped, that didn't matter." The following dialogue then took place:

> DEFENSE: You made a conscious decision not to disclose it because you felt it was over and done with?
>
> A: Yes.
>
> DEFENSE: Did you ever consider that maybe it would be better to accept my invitation to step up to the judge and explain that and let the judge make the decision as to whether it had anything to do with your ability to serve as a fair and impartial juror?
>
> A: I thought about it at the time, but you asked would anything affect my decision, and I answered no.
>
> ***
>
> STATE: Did you place any significance on this event [allegation of abuse] that happened in your life during the jury selection?
>
> A: I didn't.
>
> STATE: Did you place any significance on it in any of your deliberations?
>
> A: No, ma'am.
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> ***
>
> STATE: Did in any way it affect your decision on the verdict?
>
> A: No, ma'am.

The defendant insists that she was denied a fair and impartial jury. She argues that Danley would not have been seated as a juror if he had answered truthfully.

The common law rules governing challenges to juror qualifications fall into two categories: (1) propter defectum or (2) propter affectum. Partin v. Henderson, 686 S.W.2d 587, 589 (Tenn. Ct. App.1984). Objections based upon general disqualifications, such as alienage, family relationship, or statutory mandate, are within the propter defectum class and, as such, must be made before the return of a jury verdict. Literally translated, propter defectum means "on account of defect." State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993).

In contrast, a propter affectum challenge, translated as "on account of prejudice," is based upon the existence of bias, prejudice, or partiality towards one party in the litigation "actually shown to exist or presumed to exist from circumstances." Durham v. State, 188 S.W.2d 555, 559 (Tenn. 1945); see also Toombs v. State, 270 S.W.2d 649 (Tenn. 1954). Propter affectum challenges may be made after the return of the jury verdict. State v. Furlough, 797 S.W.2d 631, 652 (Tenn. Crim. App. 1990). "Thus, when a juror conceals or misrepresents information tending to indicate a lack of impartiality, a challenge may be made ... in a motion for new trial." Akins, 867 S.W.2d at 355. The burden is on the defendant to show that the juror had actual bias or prejudice. State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993).

The defendant, of course, has the burden of providing a prima facie case of bias or partiality. See State v. Taylor, 669 S.W.2d 694, 700 (Tenn. Crim. App. 1983). If a juror intentionally fails to disclose information on voir dire which

might indicate partiality, the presumption of prejudice arises. Durham, 188 S.W.2d at 559. "Silence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." Akins, 867 S.W.2d at 354. "[T]he theory [is] that a prejudicial bias has been implanted in the mind which will probably influence the judgment." Durham, 188 S.W.2d at 558.

Juror Danley admitted that his wife had filed for divorce claiming that he had physically abused her. The complaint, an exhibit at the hearing on the motion for a new trial, alleged that Ms. Danley sought medical treatment at a local hospital for her injuries and had called the police to her home more than once for protection from further abuse. In his answer to the divorce complaint, Danley denied any abusive behavior, insisting that he, in fact, had been physically assaulted by Ms. Danley on numerous occasions.

At the hearing on the motion for new trial, Danley denied that this experience had prejudiced him as a juror. Because he and his wife had reconciled some five years before the voir dire, he insisted that the information was not significant enough to disclose.

In the ruling on the motion for new trial, the trial court correctly quoted the applicable law as follows:

> [F]ailure to disclose information in the face of material questions reasonably calculated to produce the answer or false disclosure gives [rise] to a presumption of bias and partiality. The theory being that a prejudicial bias has been implanted in the mind which will probably influence the judgment. The question must be material and one of which counsel could reasonably be expected to give substantial weight.

(Emphasis added.)

After hearing all of the evidence offered at the motion for new trial, the trial court specifically found that the defendant had failed to meet its burden to prove undue influence by Danley through bias or favor. That is, the defendant failed to show improper influence. While this language does not neatly fit with presumptive bias described by law, the record does demonstrate that the trial court considered the presumption and then accredited the testimony of the juror; implicit in the ruling is that the state successfully rebutted the presumption of bias. Under that circumstance, our scope of review is limited. Findings of fact made by the trial court are given the weight of a jury verdict. See State v. Burgin, 668 S.W.2d 668 (Tenn. Crim. App. 1984). We cannot reverse the holding unless the evidence clearly preponderates against the trial court's conclusion that the juror had been able to set aside his bias and perform his duties with impartiality.

The question is whether the defendant was denied her constitutional right to a fair and impartial jury. "Article 1, Section 9 of the Tennessee Constitution, like the Sixth Amendment to the United States Constitution, provides the accused with the right to trial by an impartial jury." Akins, 867 S.W.2d at 354. Trial courts must carefully guard the jury selection process to ensure that no defendant is denied his right to a fair trial and that his right to a verdict from an impartial jury is not violated. Our state constitution guarantees all citizens "a trial by a jury free of ... disqualification on account of some bias or partiality toward one side or the other of the litigation." Toombs, 270 S.W.2d at 650.

The recent case of State v. Akins is directly on point. In Akins, Supreme Court Justice Penny White, then writing for a panel of this court, cited a number of Tennessee cases dealing with juror disqualifications. Justice White described "bias in a juror [as] a 'leaning of the mind; propensity or prepossession

towards an object or view, not leaving the mind indifferent; [a] bent; [for] inclination.'" Akins, 867 S.W.2d at 354 (quoting Durham v. State, 188 S.W.2d 555, 559 (Tenn. 1945)). She wrote of a natural predisposition "'in response to those natural and human instincts common to mankind,' [which] interfere with the underpinnings of our justice system." Id. This court ruled that jurors are obligated to make "'full and truthful answers ... neither falsely stating any fact nor concealing any material matter.'" Id. (quoting 47 Am. Jur. 2d, Jury § 208 (1969)).

Here, the juror at issue failed to respond to straightforward questions asked on voir dire which dealt with matters relevant to the defense theory. Whether the charge of spousal violence in Ms. Danley's divorce complaint was true was not necessarily at issue. These events at least raised the possibility that juror Danley had some "leaning of the mind," a "bent" or "inclination." Counsel for the defense, in an effort to assure an impartial jury, was entitled to further inquiry.

The defendant based the core of her defense on the theory that she was a victim of spousal violence protecting herself when she shot her husband. The jury was charged with self-defense pattern jury instructions. Defense counsel should have received accurate information on voir dire. That juror Danley failed to disclose this information tends to trivialize the jury selection process. The presumption of bias certainly applied. It is only because the trial court specifically accredited the juror's assertion that he was able to remain fair and impartial that a new trial is not warranted. Certainly a trial judge who sees and hears a witness first hand and determines that he or she spoke truthfully is in a far better position to make that assessment than an appellate court with only the transcript of the proceedings. It is likely that a verdict of voluntary manslaughter in the face of a reasonably strong case of second degree murder lends credence to the juror's

claims that he could be fair. In short, we defer to the findings of fact made by the trial court.

II

As her second issue, the defendant claims the trial court erred by refusing to charge criminally negligent homicide as a lesser included offense. The defendant was indicted for second degree murder; the jury was so charged.[2] The trial court also instructed the jury on voluntary manslaughter.[3] The defendant's specific complaint is that the evidence also warranted an instruction on criminally negligent homicide.[4]

The defendant argues that the evidence suggested and the jury could have found that the shooting was accidental, a result of her ignorance of weapons and the poor quality of the gun itself. Thus, she claims an entitlement to the instruction of criminally negligent homicide. In response, the state submits that because the defendant admitted arming herself and intentionally firing a gun at the victim, there was simply no evidence of "negligent conduct" and thus anything less than voluntary manslaughter.

In State v. Trusty, our supreme court observed that "Tennessee law recognizes two types of lesser offenses ... : a lesser grade or class of the charged offense and a lesser included offense." 919 S.W.2d 305, 310 (Tenn. 1996). The

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[2]"Second degree murder is a knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1).

[3]"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." Tenn. Code Ann. § 39-13-211(a).

[4]"Criminally negligent conduct which results in death constitutes criminally negligent homicide." Tenn. Code Ann. § 39-13-212(a).

trial judge has a statutory duty to charge the jury "on lesser grades or classes of the charged offense supported by the evidence." Id.; Tenn. Code Ann. § 40-18-110. The trial judge also has a duty grounded in case law to instruct the jury on lesser included offenses. Trusty, 919 S.W.2d at 311. Failure to charge the jury with either a lesser grade offense or lesser included offense denies a defendant her constitutional right of trial by a jury. State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981); Tenn. Code Ann. § 40-18-110.

A lesser grade or class of the charged offense is determined by reference to the statutory scheme. Wright, 618 S.W.2d at 315. For example, the varying grades or classes of homicide are defined at Tenn. Code Ann. § 39-13-201 and codified at Tenn. Code Ann. § § 39-13-202 through -213.

The other type of lesser offense is one "necessarily included in the indictment." Trusty, 919 S.W.2d at 311. In Wright v. State, 549 S.W.2d 682 (Tenn. 1977), our supreme court outlined the test to determine whether an offense is lesser and included in the greater offense. Quoting the late Justice Weldon White in Johnson v. State, 397 S.W.2d 170, 174 (Tenn. 1965), the court ruled as follows:

> The true test of which is a lesser and which is a greater crime is whether the elements of the former are completely contained within the latter, so that to prove the greater the State must first prove the elements of the lesser.

Wright v. State, 549 S.W.2d at 685-86.

Two years later, our supreme court again addressed the subject:

> We believe that the better rule, and the one to be followed henceforth in this State, is the rule adopted implicitly by this court in Wright v. State, supra, that, in this context, an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not

> congruent with, all the elements of the lesser. If there is evidence to support a conviction for such a lesser offense, it must be charged by the trial judge. T.C.A. § 40-2519 [now Tenn. Code Ann. § 40-18-118(a)]; Whitwell v. State, 520 S.W.2d 338 (Tenn. 1975).

Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979).

The defendant was indicted for second degree murder. The trial court charged the lesser offense of voluntary manslaughter but not of criminally negligent homicide. Voluntary manslaughter is clearly a lesser included offense of second degree murder. See Wright v. State, 549 S.W.2d at 685-86. 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 is also a lesser included offense of second degree murder, 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 trial court 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). It is settled law that when "there are any facts that are susceptible of inferring guilt of 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." Wright, 618 S.W.2d at 315 (citations omitted); Tenn. Code Ann. § 40-18-110(a). When there is a trial on a single charge of a 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).

Trial courts, however, are not required to charge the jury on a lesser included offense when the record is devoid of evidence to support an inference of guilt of the lesser offense. State v. Stephenson, 878 S.W.2d at 549-50; State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990); State v. Dulsworth, 781 S.W.2d 277, 287 (Tenn. Crim. App. 1989). In determining whether evidence fairly raises an issue, trial courts must assess the defendant's position without ascertaining its truthfulness or the weight to which it might be entitled. State v. Dorie Miller Currin, No. 02C01-9201-CC-00018 (Tenn. Crim. App., at Jackson, August 26, 1992); see Potter v. State, 85 Tenn. 88, 1 S.W. 614 (1886). Even where the evidence is strong that the defendant had the intent required to warrant a conviction for a greater offense, trial courts must still instruct on the lesser offense. It is the jury's duty to resolve the factual dispute and ascertain the applicable law.

During the trial, defense counsel questioned several witnesses about the gun used in the shooting. It would appear that through these questions, counsel attempted to show that the gun was a cheap-quality model; that its safety could be easily released; and that the weapon jammed after the defendant fired. The

defendant also testified she had never shot this particular gun before the night of the killing.

This is a close issue. But these facts, in our view, are not enough to have warranted the negligent homicide instruction. The defendant, by her own testimony, had argued with the victim. She claimed that the victim threatened her. Having some experience with guns, the defendant opened a drawer, took possession of the pistol, removed the safety, and fired at the victim. All of that signifies an intentional act, not one of neglect. Moreover, the direct examination by defense counsel did not produce testimony that suggested an accidental rather than an intentional act.

III

Next, the defendant insists that the trial court should have given an instruction on the defense of third party, based on her claim that the victim grabbed the baby from her arms and tossed him into the crib, where he lay crying.

> Defense of a third party is set out in Tenn. Code Ann. § 39-11-612:
>
> A person is justified in threatening or using force against another to protect a third person if:
>
> (1) Under the circumstances as the person reasonably believes them to be, the person would be justified under [self-defense] in threatening or using force to protect against the use or attempted use of unlawful force reasonably believed to be threatening the third person sought to be protected; and
>
> (2) <u>The person reasonably believes that the intervention is immediately necessary to protect the third person</u>.

(Emphasis added.)

The law on defense of third person is paraphrased in State v. Barnes, 675 S.W.2d 195, 196 (Tenn. Crim. App. 1984):

> Where a person is about to be injured by an assailant, then another person may make resistance sufficient to prevent the offense . . . . Further, a person interfering in a dispute, affray, or fight on behalf of another simply steps into the latter's shoes. He may lawfully do in another's defense only what that person could have done, and no more. He stands on the same plane, is entitled to the same rights, and is subject to the same conditions, limitations, and responsibilities as the person defended. And his act must receive the same construction as the act of the person defended would receive if the killing had been committed by that person. Thus, a person is not entitled to the plea of defense of another unless a plea of self-defense would have been available to the person on whose behalf he intervened.

(Emphasis added.) The defendant did testify that the victim grabbed the child from her arms and tossed him into the crib. The defendant repeatedly testified that she thought the victim was going to hit her. She told how she screamed, "don't hit me." She testified that she had been hit and pushed by the victim before. The defendant, however, never testified that she believed that the victim was about to harm the baby when she shot him; instead, she spoke of how the victim was a devoted father, who loved his only son.

In order for the defendant to be justified in using force to protect the child, she must have believed that the child was in peril. The proof simply did not rise to that level; thus the issue was not fairly raised. The trial court correctly declined to charge the jury on defense of a third party.

IV

Next, the defendant contends that the trial court erred by not allowing statements made by the victim to medical personnel and police officers before his death. The police report was not included in the record.

At trial, defense counsel made the following statement out of the presence of the jury:

> I do have Sergeant Olive here. If Your Honor will accept my statements as a formal proffer, this is the officer who will testify that he went to the hospital and was told by Mr. Eason that he did not wish to prosecute. If Your Honor will accept that as a proffer, I need not even have him make the formal proffer.

The trial court accepted this proffer and made it part of the record; the state offered no resistance to the procedure. The court then determined that this evidence was not probative of any issue in the case.

By reading the side bar transcript, we deduce that while at the hospital, the victim said he did not wish to prosecute the defendant for shooting him. While the defendant's brief argues the relevancy of the evidence, counsel never addressed the hearsay issue raised by the state. We believe that even if the statement met the relevancy requirements of Tenn. R. Evid. 401, the evidence would not qualify as an exception to the hearsay rule.

The Tennessee Rules of Evidence provide as follows:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Tenn. R. Evid. 801. The victim's statement meets the definition of hearsay under this rule.

Hearsay is not admitted unless it qualifies as an exception under the Tennessee Rules of Evidence or otherwise by law. Tenn. R. Evid. 802. Under Tenn. R. Evid. 803 (3) "a statement of the declarant's then existing state of mind ... such as intent ...." is admissible unless the "statement is of memory or belief to prove the fact remembered or believed ..." Tenn. R. Evid. 803(3). In addition, the advisory commission comment adds further guidance: "Normally [state of mind] declarations are inadmissible to prove past conduct." Rule 803(3) "does not permit statements of mental condition amounting to memory or belief to prove the declarant's consistent past conduct." Neil P. Cohen et al., Tennessee Law of Evidence § 803(3).5 at 547 (3d ed. 1995).

From the transcripts and motion for a new trial, it would appear that the defense wanted to prove that the victim did not want to prosecute; this, the defendant argued, would create an inference that the victim was the initial aggressor. Because the defendant wanted to use the victim's statement of present intent to prove his conduct just prior to the shooting, the statement does not qualify under this exception to the hearsay rule. The trial court was correct in not allowing defense counsel to admit the statement into evidence.

At this point we would like to explain why this statement would not be considered a dying declaration. Tenn. R. Evid. 804 (b)(2) creates a hearsay exception for statements made under belief of impending death:

> In a prosecution for homicide, a statement made by the victim while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

The statement, in all probability, would meet four of the elements of a dying declaration: (1) the declarant was the victim; (2) the statement was offered in a homicide trial; (3) the declarant believed he was dying; (4) the declarant later died.

The fifth element requires that a dying declaration, a narrow exception to the hearsay rule, must relate to the cause or circumstances of the declarant's death. The cause or circumstances of the impending death "includes an identification or description of the killer and a recitation of the events that occurred during the homicide. ... [it may also be about] events or conditions that preceded the homicide but precipitated or caused it." Cohen, supra at § 804(b)(2).1. In our view, this statement does not relate to the circumstances of the death.

V

Next, the defendant claims that the trial court should have declared a mistrial when the state asked one of the witnesses about a statement the victim made. After the court had excluded the statements made by the victim at the hospital, the state, during cross-examination of one of the officers, asked if the victim had expressed his love for the defendant. Defense counsel immediately objected. The court instructed the witness not to answer the question and gave the jury a corrective instruction.

The trial court had already ruled the victim's statements to be irrelevant. The question was never answered. A mistrial is warranted only when an event has occurred which would preclude an impartial verdict; there must be a manifest necessity for the declaration of a mistrial. Arnold v. State, 563 S.W.2d 792 (Tenn. Crim. App. 1978). Here, the trial court provided a curative instruction. The jury is presumed to have followed that directive. Under these circumstances, there is clearly no error.

VI

As her final contention, the defendant argues that the trial court erred by not granting the motion to suppress her statements to police officers shortly after the shooting. There is no transcript of the suppression hearing in the record. There were no findings of fact in the trial court's order denying the motion to suppress.

The defendant has failed to include in the record on appeal the statements in question or a transcript from the suppression hearing. It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); State v. Rhoden, 739 S.W.2d 6 (Tenn. Crim. App. 1987); State v. Miller, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987). Generally, this court is precluded from addressing an issue on appeal when the record fails to include relevant documents. See State v. Bennett, 798 S.W.2d 783 (Tenn. Crim. App. 1990); Tenn. R. App. P. 24. Because the hearing on the motion to suppress is not in the record, the issue has been waived.

Had the record been complete, however, we would have affirmed the trial court's denial of the motion to suppress the defendant's statement. While it is true that the statement meets the definition of hearsay and although hearsay is generally inadmissible, statements by a party-opponent are an exception to the rule against hearsay. Tenn. R. Evid. 803(1.2)(A). Here, the defendant's statements appear to have been made spontaneously shortly after the shooting.

Moreover, the statements of the defendant were first introduced by defense counsel during the cross-examination of Officer Canady. The defendant repeated the statement during her direct examination. It was only after the defense twice questioned witnesses about the statements that the state used the statements

to impeach the defendant. Under these circumstances, we find no error in the trial court's decision to allow the state to question the defendant about statements she made shortly after the offense.

Accordingly, we affirm the judgment of the trial court.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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William M. Barker, Judge