IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1997 SESSION

FILED

March 18, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. NO. 03C01-9704-CR-00131
APPELLEE,	*	KNOX COUNTY
VS.	*	Hon. Ray L. Jenkins, Judge
HARVEY D'HATI MOORE,	*	(Criminally Negligent Homicide)
APPELLANT.	*	
	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Harvey D'Hati Moore, was indicted for the first-degree child abuse murder of Kadijah Hopewell. See Tenn. Code Ann. § 39-13-202(a)(4) (Supp. 1993). The jury returned a verdict of guilt of the lesser grade offense of criminally negligent homicide. See Tenn.Code Ann. § 39-13-212. The trial court imposed a sentence of 452 days, which the defendant had already served by the time of trial.

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

> (I) whether the evidence is sufficient;
>
> (II) whether the trial court erred by instructing the jury on criminally negligent homicide; and
>
> (III) whether the trial court erred by refusing to allow the defense line of questioning which would show that someone else committed the homicide.

We affirm the judgment of the trial court.

State's Proof

On April 28, 1994, four-month-old Kadijah Hopewell suffered "hemorrhages in her eye grounds, ... multiple bruises over the forehead, over the ... area of the bone beneath the eye on the left side and over the back and ... a crescent-shaped bruise on the ... thigh." According to her treating physician, Dr. Christopher Miller, she was "comatose and had a significant brain problem." There was a large amount of blood throughout much of the space that surrounds the brain. The victim survived until May 2, 1994, when taken off the ventilator.

Dr. Miller testified that the victim's injuries were the result of shaken

baby syndrome, which he described as a "violent to and fro shaking of the body." Dr. Miller related that the injuries must have occurred very near the time emergency medical technicians (EMT's) first saw the child because she would have survived only a short period of time given the nature of the injuries, unless she received medical care. He estimated that the shaking "could have" occurred as early as twelve minutes before the EMT's first arrived but definitely within hours. It was his opinion that falling out of bed would not cause the type of injuries the victim suffered. He conceded that it would not be unusual for a person who discovered a child not breathing to shake the child to try to get her to respond. Dr. Miller testified that a bruise on the victim's leg appeared to be a bite wound, but he had no opinion, however, as to when the injury occurred.

The defendant informed Dr. Miller that he was with the child prior to her admission to the hospital. He told the doctor that he had placed the child in bed and that he had heard a thump, and then discovered she had fallen to the floor. The defendant reported that the child was not breathing, and so he called 911 and received instructions for administering CPR until the paramedics arrived. Dr. Miller recalled the defendant saying the child had been "sleeping all day recently and that she had been crying for no apparent reason."

Dr. Joel Sanner, who also treated the victim, testified that he could not determine when the injuries were inflicted but was certain they could not have been caused by the victim's falling out of bed. It was his opinion that the degree of neurological suffering could only be caused by a far more severe trauma. Dr. Sanner described the injuries as shaken baby syndrome.

Dr. Joseph Childs testified that he detected no brain wave activity in

the victim and determined she was brain dead. His CAT scan report showed "absolute evidence of shaken baby syndrome." Dr. Childs estimated that the victim was injured some four to six hours prior to her admission to the hospital. It was his belief that if the baby had been shaken before she was placed in the bed, she would not have been able to roll over. Dr. Childs conceded that shaken baby syndrome can be caused by repeated shaking over a period of time. He testified that while a single blunt trauma could cause some of the symptoms the victim suffered, retinal hemorrhaging is not typically caused by a single blunt trauma. Dr. Childs conceded that lethargy could be cause by a minor episode of shaking. He did not believe that chronic shaking had occurred in this instance because there was no bleeding in the subdural space.

Dr. James Hayes, who examined the victim the day after her hospitalization, observed that her clitoris was heavily bruised and greatly enlarged, probably due to abusive pinching. He described an elliptical-shaped bum outside her rectum, which appeared to be two to three days old. Dr. Hayes observed old healing tears of the rectum consistent with chronic forceful entry into the rectum and a bruise several days old on the victim's left thigh, apparently caused by a bite.

Arthur Bohanan, police specialist with the Knoxville Police Department, testified that he photographed the victim within a few hours of her admission to the hospital. He observed at least four bite marks on the victim's legs. Officer Bohanan acknowledged that Marsha Hopewell, the victim's mother, did not "[s]how any signs of a grieving mother" after the incident.

Marsha Hopewell, who was called as a state witness, testified that she had resided with the defendant and the victim in Austin Homes. She remembered

that the victim, four-and-one-half months old at the time of her hospitalization, was able to roll over and scoot backwards on the floor. Ms. Hopewell recalled that at 9:00 on the morning of the hospitalization, the victim seemed like "her normal self." She described the location of the bed as in the corner of the room so that the left side and the head of the bed were against walls. Ms. Hopewell recalled that at 8:30 that evening, she placed the victim in the top left corner of the bed, placed a pillow at the victim's feet and on her right side, and then laid a blanket around the perimeter of the bed to keep the baby from falling. She testified that she ordinarily used pillows to keep the child in the bed, but because of a fall from the bed the day before, she used the blanket to further secure her.

Elwana Shorts, a friend who had been staying at the apartment for about a week, was present the evening the victim required hospitalization. Ms. Hopewell remembered spending the earlier part of the day at the apartment with the defendant and recalled that he drank two or three beers and smoked marijuana. Ms. Hopewell testified that she and Ms. Shorts left for about thirty minutes right after the victim was put to bed. As they were walking back to the apartment, the defendant hurriedly approached and informed them that the victim had fallen off the bed and was not breathing. The defendant informed Ms. Hopewell that when he called 911, he was instructed to shake the baby. Emergency personnel transported the victim to the hospital.

About two weeks before the shaking incident, Adrian Watson had kept the victim for three nights while Ms. Hopewell served a jail term. Ms. Hopewell recalled that, while at the Watson residence, the victim "got ... a bruise on the side of her face and a little cut on her behind." She remembered that on the date of the victim's hospitalization, prior to leaving the victim with the defendant, the only

injuries were those that had occurred while in Ms. Watson's care. Ms. Hopewell recalled that the victim had no bite marks but admitted that she would occasionally "gnaw" playfully on the baby using only her lips. She insisted she never left teeth marks.

Ms. Hopewell testified that the defendant told her that he was in the living room lying on the couch when he heard the baby fall from the bed. When he went in the bedroom to check, the victim was not breathing. On a different occasion, the defendant told Ms. Hopewell that he was in the bathroom and that another unidentified female caused the injuries.

Ms. Hopewell testified that she had known the defendant for about a month-and-a-half before he moved in with her. During that time, she never saw him harm the child in any way. She claimed that the defendant had never been violent towards her and treated the victim like "she was his own." In addition to the baby's rolling out of bed on April 27th, she had fallen off of the couch while in Watson's care.

Ms. Hopewell recalled that about two weeks before the shaking incident, the victim contracted bronchitis and a physician prescribed a breathing machine for her. While acknowledging that she had reported the week before the incident that the victim "slept a lot more than she was supposed to," Ms. Hopewell denied stating the child had rolled off the bed numerous times.

Ms. Hopewell remembered an interview by Detective Randy York, who asked if "anything sounded suspicious to you about [the defendant] after he had described all these injuries to you, that he was the only one with [the baby]." At that

time, Ms. Hopewell told York that she did not see anything suspicious about it. At trial, Ms. Hopewell, who denied ever shaking the baby, speculated the defendant was the only person who could have inflicted the injuries. She then testified, "I'm not going to say that. I don't know if anybody came in the house while I was gone or not, so I can't point the finger at him at all."

Elwana Shorts, who "used" to be a close friend to Ms. Hopewell, arrived on the day of the victim's hospitalization around 4:00 P.M. She described the victim as alert, gave her a bath, and observed no bruises on the victim's neck, face, chest, or legs. Afterwards, the victim was fed and then fell asleep. She recalled leaving the apartment around 6:30 or 7:00 P.M. and being gone thirty to forty-five minutes. Ms. Shorts denied mentioning to Detective York a bruise caused by Ms. Hopewell's playfully "gnawing on [the victim's] leg" but did inform him that the victim had rash near the rectum. Ultimately, Ms. Short conceded on cross-examination that the child had a bruise on her right leg caused by her mother's "gnawing."

Detective Randy York testified that he conducted two separate interviews with the defendant, seventeen years old at the time, concerning the death of the victim. The defendant had claimed that he was in the living room on the couch when he heard the victim fall from the bed and hit the floor; he went into the bedroom and discovered she was not breathing. The defendant explained that he shook the child gently to revive her, sprinkled water on her face, and slapped her a few times. The defendant informed the detective that two or three days before the shaking incident, he noticed the victim had a black eye and a bruise on her face. When Detective York advised the defendant that the victim's injuries could not have been caused by falling from a bed, the defendant acknowledged that he shook the

victim three times in an attempt to get a response. When asked if he "los[t] it," the defendant responded negatively.

The defendant admitted that he was a "little intoxicated" when he heard the victim fall, conceding that he drinks and smokes marijuana every day. While denying any knowledge of who injured the victim, the defendant did point out that the child had suffered a black eye while in Ms. Watson's care. He claimed that he never saw Ms. Hopewell strike the victim. The defendant informed the detective that the victim was alert and awake when put to bed. The defendant insisted that he meant no harm to the child. The defendant contended that the burn appeared during Ms. Watson's care and the vaginal trauma occurred when Ms. Shorts cared for the victim a few hours before her hospitalization.

Defendant's Proof

Elwana Shorts testified that Ms. Watson had kept the baby during the day on April 25th, 26th, and 27th. She also identified an individual by the name of Clarencet who kept her. Ms. Shorts recalled the defendant and the victim's mother arguing about who would put the baby to bed on the evening prior to the hospitalization. She recalled that the defendant carried the baby to the bedroom and Ms. Hopewell followed; about five or ten minutes later, the defendant returned and lay on the couch while Ms. Hopewell remained with the baby for another five or ten minutes. When she returned to the living room area, the two women left. She recalled that the baby, who appeared normal and alert during the day, was asleep when taken to the bedroom.

Dr. Stuart Van Meter, a pathologist at UT Hospital, testified that the victim died of shaken baby syndrome. He described the bruises on the

victim's legs and pubis "in a pattern typical of a human bite mark." It was his opinion that the bites occurred at the same time a few days to a week before the autopsy. He testified that the bruises could have been inflicted at about the time the child was admitted to the hospital. There were superficial abrasions on the pubis where the skin was scraped apparently by teeth. While Dr. Van Meter observed bruises on the front and back of the victim, he did not find any evidence of tearing of the rectum and could not determine what had caused the crescent-shaped injury near the rectum.

Private Investigator Barry Rice, who interviewed Ms. Hopewell in August of 1995, recalled her claim that the victim had fallen off the bed two to three times before and had stayed with Ms. Watson on a regular basis. He remembered her claim that about two weeks before her hospitalization, the victim had bruising, "acted funny," and slept a lot after a visit with Ms. Watson.

The defendant, who moved in with Ms. Hopewell in late February or early March of 1994, testified that he treated the victim like his own and loved her. He claimed that he often had to remind Ms. Hopewell to take care of the child and not leave her alone. The defendant recalled that the victim had a black eye, a bruise on her jaw, and some kind of cut near her rectum after one particular weekend in Ms. Watson's care but that Ms. Hopewell refused his suggestion of medical care. He insisted that the child was never the same after that visit.

The defendant testified that he awoke around 9:00 A.M. on the day of the victim's hospitalization and spent much of the day playing basketball, drinking beer, and smoking marijuana. He claimed that he fed the baby and tried to play with her at about 6:00 P.M. and that, later, an argument ensued over who would put the

baby to bed. The defendant recalled placing a pillow between the child and the wall so she would not fall from that side of the bed and placing a pillow at the foot of the bed so she would not "scoot" down. The defendant claimed that he used the pillows because the victim had fallen out of bed several times previously. He testified that he left the bedroom about five or ten minutes before Ms. Hopewell did and was on the couch when the two women left the apartment. The defendant contended that he was in the bathroom when he heard the child fall and, after rushing into the bedroom, found her limp. He explained that he shook her to get a response, tapped her on the face and sprinkled water on her face before calling 911.

Adrian Watson testified in rebuttal that she provided child care for the victim approximately five times, the last time being about two weeks before the victim died. She claimed that she kept the child, who had a bruise on her head, for three nights while Ms. Hopewell was in jail. When she asked the defendant what caused the bruise, the defendant said that she fell off the bed. Ms. Watson acknowledged that the victim rolled off the couch on one occasion while in her care but sustained no injuries. Ms. Watson also contended that she went to Ms. Hopewell's residence on occasion and found the victim alone in the apartment.

I

The defendant's first issue is that the evidence is insufficient to sustain a conviction for criminally negligent homicide. The defendant argues that "whoever harmed this baby did it deliberately and intentionally" and that there is no proof that the injuries were caused by an accident or negligence.

When the defendant challenges the sufficiency of the evidence on appeal, the state is entitled to the strongest legitimate view of the trial testimony 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 to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). The relevant question is whether, after reviewing the evidence in the light most favorable to the state, 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); Tenn. R. App. P. 13(e). A crime may also be established by the use of circumstantial evidence only. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958).

"Criminally negligent conduct which results in death constitutes criminally negligent homicide." Tenn. Code Ann. § 39-13-212(a). Criminal negligence is defined as follows:

> [A] person ... 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. § 39-11-302(d).

Viewing the evidence in the light most favorable to the state, the proof shows that Ms. Shorts and Ms. Hopewell left the apartment between 8:30 and 8:40 P.M., on April 28, 1994, at which point the victim appeared to be acting normally. From then until the 911 call, the victim was in the exclusive care of the defendant. Expert testimony established the cause of death as shaken infant syndrome. A reasonable inference is that after the two women left the apartment, the defendant

inflicted the fatal injuries. Yet the defendant adamantly denied any intent to harm or kill the infant. These facts support the conclusion that the defendant handled the victim in a violent manner, which qualified as a "substantial and unjustifiable risk," and that his failure to perceive that risk was a deviation from the standard of care an ordinary person would exercise under all the circumstances. See also State v. Adams, 916 S.W.2d 471 (Tenn. Crim. App. 1995) (where the proof showed the child victim suffered severe brain injuries while under the sole care and supervision of the defendant, there was sufficient evidence to support the verdict for criminally negligent homicide). In our view, the jury acted within its prerogative in determining that the defendant was guilty of criminally negligent homicide.

II

The defendant also argues that the trial court erred by instructing the jury on criminally negligent homicide. He complains that the instruction allowed the jury to reach a compromise verdict wherein the jury could "punish him as minimally as possible without letting him go outright." The defendant also claims that he was denied adequate notice that he would have to defend against an accidental killing. The trial court instructed on first degree aggravated child abuse murder, reckless homicide, and criminally negligent homicide. The defendant objected only to the instruction on reckless homicide.

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). 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." State v. Wright, 618

S.W.2d 310, 315 (Tenn. Crim. App. 1981) (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 530, 549-50 (Tenn. 1994).

In Wright v. State, 549 S.W.2d 682 (Tenn. 1977), our supreme court confirmed 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, the 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.

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

In State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996), our supreme court observed there are "two types of lesser offenses that may ... form the basis for

a conviction: a lesser grade or class of the charged offense and a lesser included offense." A lesser grade is determined "by statute." Id. Criminal homicide is divided into the grades of "first-degree murder, second-degree murder, voluntary manslaughter, [and] criminally negligent homicide." Id. Under the analysis set forth in Trusty, we must conclude that criminally negligent homicide is a lesser grade offense of first-degree child abuse murder; because there was evidence to support the conviction for that lesser offense, we cannot conclude the trial court erred by charging it.

Trial judges should charge the jury on lesser included offenses charged in the indictment whether requested to do so or not. Tenn. Code Ann. § 40-18-110(a). Failure to instruct on a lesser included offense denies a defendant his constitutional right to trial by jury. State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981).

In 1995, Judge Welles spoke for this court in its determination that an omission of a lesser included offense from the charge to the jury always requires a new trial. State v. Boyce, 920 S.W.2d 224 (Tenn. Crim. App. 1995). The opinion included a quote from Poole v. State, 61 Tenn. 288, 294 (1872):

> However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so he invades the province of the jury, whose peculiar duty it is to ascertain the grade of the offense. However clear it may be, the Court should never decide the facts, but must leave them unembarrassed to the jury.

Boyce, 920 S.W.2d at 927.

The thrust of the defendant's argument is that if criminally negligent homicide had not been charged, he would have been acquitted and that the

conviction on the lesser offense represents a compromise verdict. In our view, the defendant is still not entitled to relief. In State v. Davis, 751 S.W.2d 167 (Tenn. Crim. App. 1988), the defendant was indicted for first degree murder. The jury found him guilty of voluntary manslaughter. On appeal he argued the record was devoid of any evidence showing provocation. Our court rejected his claim:

> On appeal, a conviction of a lesser degree of the crime charged, or of a lesser included offense, will be upheld, even if there is no evidence in the record to establish the technical elements of that crime, if the evidence demands a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal of the greater crime, or if there is, the verdict of the jury clearly indicates that the evidence in support of acquittal was disbelieved, on the theory that the defendant was not prejudiced by the charge and the resulting verdict.
>
> We therefore hold that the judgment is valid, though there was no evidence that the homicide was committed "on a sudden heat."

Davis, 751 S.W.2d at 170 (citations omitted).

Also, "[w]hen the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly." Tenn. Code Ann. § 39-11-301(a)(2).

The defendant's complaint that he was not given proper notice that he would have to defend against negligent homicide is meritless. "An indictment charging a greater offense impliedly charges all lesser included offenses for which the proof would support a conviction." State v. Banes, 874 S.W.2d 73, 80 (Tenn. Crim. App. 1993). The indictment charging first degree murder was sufficient to put the defendant on notice for criminally negligent homicide.

III

The defendant's final argument is that the trial court erred by refusing

to admit evidence suggesting that the victim's mother killed the child. The state argues that the proposed evidence was irrelevant. We find no reversible error.

An offer of proof was made by the defense. See Tenn. R. Evid. 103. Shannon Bean, an employee of the hospital where the victim was treated, saw the victim's mother while at the hospital and made the following observation:

> [Ms. Hopewell] had a flat affect or there were times where she was angry and distant from things that were going on ... There were different times where she was screaming at different people or laughing with her friends. There were times when it seemed like she was crying ... but it didn't look like she was really crying.

Beverly Schneider and Jeane Short would have testified in a similar fashion.

The defendant also sought to admit a letter, wherein, after the incident, Ms. Hopewell declared her love for the defendant, wrote that she missed having sex with him, and indicated that she did not believe he committed the crime.[1]

It is always appropriate for a defendant, charged with a criminal offense to prove that another person had a motive to commit the offense for which he is charged. Sawyers v. State, 83 Tenn. 694, 695 (1885). In State v. Kilburn, 782 S.W.2d 199 (Tenn. Crim. App. 1989), this court noted as follows:

> Where ... a defendant attempts to raise a third party defense, he is allowed to present proof tending to show that another had the motive and opportunity to have committed the offense. Where the proof is consistent with this hypothesis, it is to be considered by the jury.

782 S.W.2d at 204.

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[1]In his brief the defendant also complains that the trial court would not let Detective Bohanan testify that the victim's mother told him she did not care about the baby. There was not an offer of proof so we may not consider the merits of the claim. See Tenn. R. Evid. 103; Alley v. State, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994).

The evidence by which the guilt of a third party is to be established must conform to all the rules regulating the admission of evidence. Thus, the third person's guilt cannot be established by hearsay. State v. McAlister, 751 S.W.2d 436, 439 (Tenn. Crim. App. 1987). Where there is evidence tending to connect another person with the criminal act, evidence of that person's motive or intent and opportunity to commit the crime is admissible as long as it is not too remote in time nor too weak in probative value. 22A C.J.S. Criminal Law § 729 (1989).

The evidence to establish that someone other than the defendant is the guilty party must qualify as relevant if presented in the trial of the third party; and the evidence offered as to the commission of the crime by a third party must be limited to such facts as are inconsistent with the defendant's guilt, and to such facts as raise a reasonable inference of innocence. Hensley v. State, 28 Tenn. 243 (1848). To be admissible, the evidence must directly connect the third party with the substance of the crime and suggest that someone besides the accused is the guilty person. "Evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." 22A C.J.S. Criminal Law § 729 (1989) (footnote omitted).

In our view, the proffered evidence was not relevant proof that Ms. Hopewell killed the victim. "Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Tenn. R. Evid. 401. In State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995), our court discussed the standard of review of a trial court's determination of relevancy:

> Because an assessment of whether a piece of evidence is relevant requires an understanding of the case's theory and other evidence as well as a familiarity with the evidence in question, appellate courts give great deference to a trial judge's decision on relevance issues. Often it is stated that a trial court's decision on relevance will be reversed only for an abuse of discretion.

(quoting Neil P. Cohen, Tennessee Law of Evidence, § 401.5 at 70 (2d ed. 1990)).

Thus, we conclude the trial court did not abuse its discretion by refusing to admit the proffered evidence. That an observer thought Ms. Hopewell "was crying ... but it didn't look like she was really crying" lacks probative value. That a casual observer thought she did not grieve appropriately does not, in our view, make it more or less likely that Ms. Hopewell committed the offense. See Tenn. R. Evid. 401. Furthermore, Detective York testified that Ms. Hopewell did not appear to grieve over the victim's injuries. Thus, the jury was made aware of the mother's demeanor after the victim's death.

The letter was also irrelevant. We disagree with the defendant's argument that the letter is relevant because it tends to show that Ms. Hopewell killed the victim. That Ms. Hopewell continued to have feelings for the defendant after the victim's death hardly suggests that she committed the crime. See Tenn. R. Evid. 401. The jury was aware of Ms. Hopewell's doubts about the defendant's having committed the crime. She testified that she was hesitant to point the finger of guilt at the defendant and speculated that someone else could have entered the apartment and inflicted the injuries. Ms. Hopewell also testified that the defendant was kind to the victim, treated her like she was his own child, and never harmed her.

Even if the proffered evidence should have been admitted, its content would have been cumulative. Thus, any error would have had no effect on the

results of the trial. In State v. Richardson, 875 S.W.2d 671, 675 (Tenn. Crim. App. 1993), an attempted murder case where the defendant complained that he was denied the right to establish the victim's bias, our court found the error to be harmless. The defendant wanted to prove "certain court documents" that demonstrated he had "obtained a peace warrant against the victim." Id. at 674-75. Other witnesses, however, "testified to the threats the victim had made ...." Id. at 675. This court found the error to be harmless:

> Based on these facts, we find that any error in the limitation on the defendant's cross-examination of the victim was harmless. The victim's bias against the defendant is apparent from this record. ... The jury was not, in our view, denied the opportunity to weigh that bias, in context, against the victim's credibility in describing his account of the crimes.

Id. at 675.

Accordingly, the judgment of the trial court is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Jerry L. Smith, Judge