IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1999 SESSION

FILED
July 26, 1999
Cecil Crowson, Jr.
Appellate Court
Clerk

STATE OF TENNESSEE,	*	No. 03C01-9802-CR-00063
Appellee	*	WASHINGTON COUNTY
V.	*	Hon. Lynn W. Brown, Judge
VERLIN RALPH DURHAM	*	(First Degree Murder)
Appellant.	*	

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OPINION FILED:

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

The appellant, Verlin Ralph Durham, appeals as of right his conviction by a jury in the Criminal Court for Washington County of premeditated first degree murder. The trial court imposed a sentence of life imprisonment in the Tennessee Department of Correction. On appeal, the appellant presents the following issues for our review:

1. Whether the jury's verdict is supported by sufficient evidence.

2. Whether the trial court erroneously admitted testimony concerning a prior threatening statement made by the appellant to the victim, thereby violating the Tennessee Rules of Evidence and denying the appellant due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution.

3. Whether the trial court erroneously prohibited the appellant's daughter from testifying concerning the victim's prior statements contrary to the rules of evidence and principles of due process.

4. Whether the prosecutor engaged in misconduct during closing argument.

5. Whether the trial court impermissibly advised the jury that a "good closing argument" should not exceed twenty minutes.

6. Whether the cumulative effect of the errors denied the appellant due process of law.

Following a thorough review of the record and the parties' briefs, we affirm the judgment of the trial court.

I. Factual Background

The appellant's murder conviction arose from the fatal shooting of his wife, Joyce Durham, at a United gas station and convenience store on West Market Street in Johnson City, Tennessee. Testimony at trial revealed that the appellant and Mrs. Durham had separated in August 1996, following thirty-four years of

marriage. Mrs. Durham moved to her mother's home following the separation and, in September 1996, petitioned the General Sessions Court of Washington County for an order of protection against her husband. In her petition, Mrs. Durham alleged that the appellant was engaging in "constant drinking, cussing, verbal and mental abuse, also destruction of personal property. And physical in past . . . . Coming on job drunk, calling work, employees names." Judge John Kiener, the general sessions court judge who heard Mrs. Durham's petition, testified that he issued an order of protection, particularly instructing the appellant to stay away from Mrs. Durham's workplace.[1]

Mrs. Durham worked at the United gas station and convenience store where she died on October 1, 1996. At trial, Lorrie Gloria Ann "Tiny" Coffey, a co-worker of Mrs. Durham, testified on behalf of the State, recounting events leading to Mrs. Durham's murder. She testified that, several weeks prior to Mrs. Durham's death, the appellant telephoned his wife at work. Ms. Coffey answered the telephone in the rear of the store. She recognized the appellant's voice, although his speech was slurred, and asked Mrs. Durham to pick up a telephone receiver where she was working in the front of the store. When Mrs. Durham picked up the receiver, Ms. Coffey continued to listen to the conversation. She testified at trial:

> Well, he was yelling, you know, screaming and cussing. He was wanting her to come home and she wouldn't go home. She told him no. . . .
>
> He said, "You'll know what -- you know what will happen to you."

On the night of the murder, the appellant entered the store a little after

[1]Judge Kiener testified during both the State's and the appellant's presentation of proof. On behalf of the State, he merely testified that he issued an order of protection against the appellant. During the appellant's case, defense counsel elicited testimony concerning the contents of Mrs. Durham's petition for an order of protection and the substance of testimony adduced at the order of protection hearing.

9:00 p.m., at the conclusion of Mrs. Durham's shift. Ms. Coffey testified that Mrs. Durham had just served a customer at the drive-up window, and Ms. Coffey was standing beside her. The appellant laid a rifle on the cash register and stated, "Bitch, this is what you've been waiting on." The appellant shot Mrs. Durham once before Mrs. Durham and Ms. Coffey could turn and begin running down the hallway toward the rear of the store. Ms. Coffey testified that she was sure that the first shot hit Mrs. Durham, because "her blood went in my mouth." The appellant continued firing the rifle. Mrs. Durham was behind Ms. Coffey, "hanging on the back of my neck." Ms. Coffey heard Mrs. Durham say, "Oh, God, Tiny, help me." Mrs. Durham then fell to the floor. As Mrs. Durham fell, Ms. Coffey could feel Mrs. Durham's knees hit the back of her legs. Ms. Coffey crawled into the bathroom and waited for a few minutes. When she emerged, she was able to observe on a security monitor the appellant leaving the store. The appellant appeared to be calm. Ms. Coffey then telephoned the police. She stated that, by that time, Mrs. Durham was already dead.

John Whitaker also testified on behalf of the State. He was at the United gas station shortly after 9:00 p.m. on October 1, 1996. He was pumping gas into his car when he heard "a bunch of noise" that sounded like gunshots. Immediately thereafter, Mr. Whitaker observed the appellant emerge from the convenience store. The appellant was carrying a long weapon and was walking "slow and casual." He proceeded to his car and placed the rifle in the back seat. Before entering the vehicle, the appellant turned and looked at Mr. Whitaker "like he was calm as can be." Another vehicle passed in front of the appellant's car from the direction of the drive-up window. The appellant waited for the car to pass and then drove away.

Angela Lynette Coppage testified that she was with her ex-husband and her six year old daughter at the United gas station on the night of the murder. She and her husband were purchasing beer at the drive-up window, and Mrs. Durham was serving them. After concluding the transaction, her husband began to drive the car away from the window. At that time, they heard gunshots inside the store. Her husband drove to the front of the store and paused in front of a parked car. Mrs. Coppage observed the appellant emerge from the store carrying a gun. He was walking at a normal pace and appeared to be calm. He placed the gun in the parked car, entered the car, and drove away.

The State additionally introduced the testimony of James Brown, an investigator with the Johnson City Police Department. Investigator Brown testified that he was on duty on the evening of October 1, 1996. He was dispatched at approximately 9:11 p.m. to the United gas station and convenience store. When he arrived at the gas station, another patrol unit and an ambulance were already present, and paramedics were attempting to revive Mrs. Durham inside the store. Investigator Brown began securing the crime scene. He spoke with several witnesses, including Ms. Coffee, Mr. Whitaker, and the Coppages. Additionally, a search of the crime scene yielded seven spent .22 caliber long rifle casings from the counter area of the convenience store and one long rifle casing from outside the drive-up window of the store. Investigator Brown also obtained a video tape from the store's automated surveillance system.

The video tape, and still photographs developed from the video tape by the Federal Bureau of Investigation, show the appellant entering the convenience store at approximately 9:11 p.m. Mrs. Durham was working at the drive-up window, and Ms. Coffey was in the back of the store. According to the video tape and the

photographs, the appellant stood and looked in the direction of the drive-up window for approximately fourteen (14) seconds. At that time, the appellant was carrying nothing in his hands other than, perhaps, money or cigarettes. The appellant then left the store and reentered moments later carrying a long object, later identified as a rifle. By this time, Mrs. Durham and Ms. Coffey had returned to the front counter. The appellant pointed the rifle toward the two women. Mrs. Durham and Ms. Coffey then fled toward the back of the store.

Investigator Brown testified that the police quickly determined that the appellant was a suspect and issued a "BOLO" or "be on the lookout" for the appellant. When the police apprehended the appellant, the officers recovered the following items: a Marlin .22 caliber semi-automatic rifle with eight live rounds in the magazine and a single shot twelve gauge shotgun with a spent shell casing in the chamber. Investigator Brown testified that the Marlin rifle has a tube magazine that runs along the base of the barrel. The gun is "spring loaded," i.e., once a bullet is fired from the gun, a mechanism forces another bullet from the magazine into the chamber of the rifle. Investigator Brown observed that, in order to fire eight rounds from the rifle, a person would need to pull the trigger eight times.

Bob Odom, an officer with the Johnson City Police Department, also testified that, on October 1, 1996, a little after 9:00 p.m., he was dispatched to the United gas station and convenience store. Soon thereafter, he began to search the surrounding area for the appellant, who had been identified as a suspect. As he was driving past the tobacco warehouses lining Main Street in Johnson City, he observed a parked car matching the description of the appellant's blue Ford Mustang. A man was sitting inside the vehicle. After communicating with the dispatcher, Officer Odom activated a spot light and directed it toward the appellant's

car. By this time, the appellant was standing outside his car, with his back to the officer. The officer got out of his vehicle and drew his weapon. However, when he asked the appellant to raise his hands and turn around, the appellant fell to the ground, landing on his stomach. Upon the arrival of additional officers, they attempted to handcuff the appellant. They then discovered a bullet wound in the appellant's chest and called for medical assistance. An ambulance transported the appellant to Johnson City Medical Center. Meanwhile, the officers located the .22 caliber Marlin rifle in the back seat of the appellant's car. The shotgun was lying on the ground in front of the appellant's car.

Robert Royce, a forensic scientist with the Tennessee Bureau of Investigation specializing in firearms identification, testified that the .22 caliber long rifle casings recovered from the scene of the murder had been fired from the Marlin rifle recovered from the appellant's blue Ford Mustang. Additionally, eight bullets recovered from Mrs. Durham's body possessed the same class characteristics and similar individual characteristics as test bullets fired from the rifle. Finally, Agent Royce demonstrated to the jury the steps required in loading the Marlin rifle:

> Starting with it empty, you pull up the magazine tube and expose the loading port right here. You then drop the live cartridges in one at a time, [and] replace the [magazine tube]. At that point, you'd have to . . . just cycle [the slide] one time in order to chamber the first live cartridge.

Mona Gretel Harlan, a forensic pathologist, performed an autopsy on the victim, Joyce Durham. She determined that the victim died as a result of multiple gunshot wounds. Mrs. Durham suffered eight gunshot wounds. Six of the eight bullets damaged major organs, including Mrs. Durham's heart, lungs, kidneys, liver, stomach, spleen, and large intestine. Each of these six gunshot wounds was

potentially fatal. Dr. Harlan testified that an unusually high percentage of the gunshot wounds were potentially fatal wounds.

The appellant also presented proof at trial, including the testimony of several family members. Kara Higgins, the appellant's and the victim's daughter, testified that, on September 30, 1996, the day before the murder, the appellant telephoned her home. Mrs. Higgins testified that the appellant sounded intoxicated. She further testified that, although her father drank regularly, he usually did not become intoxicated. However, she conceded that, at the time of the murder, her father was receiving Social Security disability benefits due to his alcoholism.

Dallas Higgins, the appellant's son-in-law, also testified on behalf of the appellant. He testified that, on the day prior to the shooting, he visited the appellant's residence at his wife's request. When Mr. Higgins arrived, the appellant appeared intoxicated. Mr. Higgins testified:

> He was sitting there drinking beer and he told me that he had eat valiums and he said he had plenty of beer, that his wife had brought him beer, that the refrigerator was full of beer, and Mr. Durham opened the refrigerator door and showed me the beer. . . . He seemed sad. He seemed depressed. . . .
>
> He never -- to me never mentioned his wife or nothing like that. . . . He really wasn't upset. He was just lonely, wanting somebody to talk to . . . .

Mr. Higgins identified the rifle and the shotgun recovered by the police from the appellant's blue Ford Mustang. Mr. Higgins stated that the guns had hung on the wall in the appellant's house for many years and had been covered with dust. He believed that the guns belonged to the appellant's son, Kevin. He had never seen the appellant with any guns and, to his knowledge, the appellant did not hunt.

The appellant next called his sister, Kathy Gail Bouton, to testify on his behalf. She testified that she visited her brother in the early evening on the day of the murder. When she arrived at the appellant's home, the appellant was seated at the kitchen table, and a bottle of pills was on the table beside him. The label on the bottle indicated that it contained "Diazepam" and that a prescription for ninety pills had been filled the previous day. Ms. Bouton testified that there were twenty-three pills remaining in the bottle. She stated that the appellant denied ingesting the missing sixty-seven pills but admitted that he had been drinking beer and whiskey. Ms. Bouton testified that the appellant appeared intoxicated to her, because she knows him. She admitted that the appellant might have appeared sober to a stranger.

The appellant conversed with his sister, confiding that he missed his wife and wanted her to return home. Ms. Bouton and another sister, Norma Jean Freeman, testified that the appellant believed his wife was having an affair. However, Ms. Bouton conceded that, although the appellant was depressed, he was calm and did not appear angry on the night of the murder. Ms. Bouton left her brother's home at approximately 8:15 p.m.

Jim Hamilton, a pharmacist, testified that his pharmacy dispensed medications to the appellant on September 30, 1996, including Indomethacin, an anti-inflammatory drug, Metoprolol, an anti-hypertensive drug, and Diazepam, an anti-anxiety drug. Mr. Hamilton stated that Diazepam is commonly referred to as Valium. He confirmed that his pharmacy dispensed ninety 5 milligram tablets of Valium to the appellant on the day prior to the murder.

Additionally, Mr. Hamilton testified that Valium can cause mental

confusion, and ingesting Valium together with alcohol will increase the effects of both the Valium and the alcohol. However, the pharmacist further testified that the appellant had been regularly taking Valium and also opined that a person who regularly ingests Valium and alcohol can develop a tolerance for both substances and be able to function fairly well, including operating an automobile, exercising judgment, and making decisions. In other words, he confirmed that, if the proof showed that the appellant "drank on a regular basis or drank from time to time on a weekly basis or -- or drank beer or whiskey occasionally and took some Valium pills, it is . . . entirely possible that [the appellant] could function and make conscious deliberate decisions." The pharmacist also stated that one could measure the effect of alcohol and Valium upon an individual by considering the following factors: the person's ability to operate an automobile; the person's ability to walk or physically move about; a person's ability to speak; and a person's ability to perform mechanical tasks that require physical dexterity.

Finally, Mr. Hamilton testified that a normal person would be comatose if he took sixty-seven five milligram Valium tablets within a twenty-four hour period. He again noted that an individual's tolerance will vary depending upon the person's history of taking the drug. However, the pharmacist testified that sixty-seven five milligram tablets would exceed a lethal dose of Valium.

Dr. Mark Harrell also testified on behalf of the appellant. He testified that he is a physician with the Emergency Department at Johnson City Medical Center. He testified that he treated the appellant on October 1, 1996, for a self-inflicted gunshot wound in his left lower chest and upper abdominal area. Dr. Harrell testified that, when the appellant was admitted to the hospital, he was intoxicated, registering a blood alcohol level of .131. Additionally, the appellant's urine tested

positive for Benzodiazepine, a derivative of Valium. However, Dr. Harrell testified that he could not determine the quantity of Valium that the appellant had ingested or whether the appellant had ingested Valium on that day or five days ago.

Dr. Harrell also opined that a combination of alcohol and Valium would increase the intoxicating effects of both drugs and would make "it easier for you to do things you normally wouldn't do." He noted that, obviously, a higher dosage of Valium would more significantly decrease an individual's inhibitions. However, he also testified that a person under the influence of alcohol and Valium could make conscious deliberate decisions, plan, and carry out a plan. With respect to alcohol, the doctor testified that many people who regularly drink alcohol over a long period of time can function fairly well at .131 blood alcohol level. Moreover, Dr. Harrell stated that the mere presence of Valium in a person's urine does not necessarily indicate any impairment of the person's ability to function.

The appellant called Dr. Gary Wishart, a licensed clinical psychologist, to testify on his behalf. Dr. Wishart testified that he had been hired by the appellant's family following the murder to evaluate the appellant. He had met with the appellant on two occasions and had interviewed the appellant a total amount of nine hours. On the basis of these interviews, Dr. Wishart concluded that the appellant was suffering from a mental defect at the time of the murder. Dr. Wishart testified that the appellant had suffered from a severe anxiety disorder since childhood. The anxiety disorder had resulted in a dependent personality disorder and severe alcoholism. The psychologist particularly noted the appellant's complete dependence upon his wife. Dr. Wishart stated, "[He] was utterly and totally dependent on his wife for his psychological well-being. She was more important for his psychological survival than his own self was really."

In light of the appellant's complete dependence upon his wife and his realization of his permanent separation from his wife, Dr. Wishart opined that the appellant would not have been sufficiently rational to coolly and calmly premeditate and deliberate the killing of his wife. He explained:

> [T]his is an extremely insecure anxious man who cannot think clearly and cannot do things on his own, and he developed an extreme anxiety and dependency disorder over time to the point that he was excessively reliant on his wife for his psychological welfare, and given how much that he depended on her to get by on a daily basis, my -- my opinion is that he would not be able to fathom her not being on this earth, say nothing about taking her life himself, in any kind of rational state.

Dr. Wishart additionally concluded that the appellant's ingestion of alcohol and Valium would have impaired his ability to control his emotions on the night of the murder. He asserted that, at the time of the murder, the appellant was overwhelmed with emotions and "out of control of his thinking."

The appellant testified on his own behalf. He recounted that he and his wife separated in August 1996 after he began accusing his wife of having an affair. The appellant stated that he began to suspect his wife's infidelity following a telephone conversation with his daughter, Sherry Whaley. Ms. Whaley was angry with her mother, because Mrs. Durham had struck her during an argument about Ms. Whaley's current boyfriend. Ms. Whaley suggested to her father that her mother was "no angel herself" and further suggested that he should follow Mrs. Durham and observe her activities. The appellant testified that he later spied upon his wife at her workplace and observed her talking with a man through the window where customers pay for gas. His wife's subsequent departure and petition for an order of protection further strengthened the appellant's suspicions. He also stated that, after the separation, an acquaintance told him that his wife was "partying" with co-workers.

The appellant testified that he ultimately became convinced that his wife was in fact having an affair with a man she had dated in high school. He asserted that his wife had been promiscuous prior to their marriage and that, at the time of the murder, he believed that she was again engaging in promiscuous behavior. Following the separation, he attempted to discuss his wife's alleged infidelity with his daughter, Ms. Whaley, but she refused to talk about her prior accusation. On the morning of the murder, Ms. Whaley told her father, "Daddy, just forget about that. I didn't mean nothing by it."

The appellant conceded that, on the basis of these facts, a reasonable person would not have believed that his wife was having an affair. Nevertheless, the night before the shooting, the appellant called his wife and again inquired if she was having an affair. Mrs. Durham hung up the telephone. The appellant testified that his wife's reaction confirmed his suspicions. He also stated that he realized at that time that Mrs. Durham was not returning home.

The appellant admitted at trial that he drank "a lot and pretty periodically," and that, following his separation from his wife, he began drinking more. However, he denied Mrs. Durham's other allegations in the petition for an order of protection. The appellant stated that he could not understand why his wife had left and admitted that, after the issuance of the order of protection, he called his wife several times and asked her to return home.

The appellant began the day of the murder at home, listening to the radio in the kitchen and drinking beer. He then called his brother, who agreed to change the oil in the appellant's car and perform some additional repairs on the car. At his brother's home, the appellant drank a few beers and talked while his brother

worked on the car. Afterwards, the appellant and his brother adjourned to a picnic table behind his brother's home, drank more beer, and talked. Finally, the appellant thanked his brother for fixing his car and returned home, purchasing a pint of bourbon along the way.

The appellant returned home at approximately 5:30 p.m. or 6:00 p.m. He stayed in the house and drank some more, including the entire pint of bourbon. The appellant noted that he had a considerable tolerance for alcohol. The appellant also testified that he probably took some Valium on the day of the murder but could not recall how much Valium he ingested. He denied taking sixty-seven Valium tablets. He suggested that some tablets may have been missing from the bottle because he had dropped some. According to the appellant, he had been taking Valium for six months prior to the shooting.

Sometime after the appellant's return from his brother's home, his sister visited him. When she departed, he went to his bedroom to retire for the night. The appellant explained that, at that time, he was angry because he believed his wife was having an affair and he thought about killing his wife and himself. He stated, "My passion was high. I had a lot of grief and anger and hurt." He further recounted:

> I was there and the guns was right there on the wall. . . . But I retch up and got the guns there when all that entered my mind in a just instant it seemed like to me. And that's when it happened there. I took and the service station that my wife was working at, I could see it from my bedroom window . . . .
>
> . . .
>
> Just there when I started to go to bed, I felt like I was alone and I thought, you know, well, my wife's gone and -- and I'm tired of this being by myself so there all I had -- all them thoughts entered my mind, you know, and I remember having those thoughts to run through my mind

> real fast. . . . That's the choice I took. I don't know why.
>
> . . .
>
> I thought about it and when I was thinking about it, I was reaching for the guns and it was all spontaneous.

The appellant asserted that he could not remember anything after thinking about killing his wife and himself and after reaching for the guns until he awakened in the Johnson City Medical Center.

The appellant confirmed that both the rifle and the shotgun were unloaded and the safety device on the rifle was probably in place. The appellant stated that he kept the ammunition for the guns in his top dresser drawer. He recalled that his son had previously told him that the ammunition for the rifle was "long rifle hollow points" and "how deadly those things were."

At the conclusion of the evidence, the trial court charged the jury with first degree murder, second degree murder, and voluntary manslaughter. Additionally, the trial court instructed the jury concerning the appellant's claim of intoxication. As previously noted, the jury found the appellant guilty of first degree murder.

II. Analysis

a. Sufficiency of the Evidence

The appellant first challenges the sufficiency of the evidence to support his conviction of the intentional, premeditated, and deliberate murder of Joyce Durham. In Tennessee, appellate courts accord considerable weight to the verdict of a jury in a criminal trial. In essence, a jury conviction removes the presumption of the defendant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will

not support the jury's findings. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no "reasonable trier of fact" could have found the essential elements of first degree murder beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

At the time of the offense in this case, the relevant statute defined first degree murder as "[a] premeditated and intentional killing of another." Tenn. Code. Ann. § 39-13-202(a)(1) (1996). However, in the indictment, the State charged the appellant with first degree murder as defined prior to July 1, 1995. Prior to that date, first degree murder required deliberation in addition to intent and premeditation. Tenn. Code. Ann. § 39-13-202(a)(1) (1994). Before trial, the trial court noted the State's error and also noted that the error benefitted the appellant by placing a greater burden of proof upon the State. Because the State had failed to submit a motion to amend the indictment, the court concluded that it would instruct the jury according to the old statute. Defense counsel proffered no objection and does not challenge the indictment on appeal.

Thus, at trial, the State was required to prove beyond a reasonable doubt that the appellant killed Joyce Durham with intent, premeditation, *and*

deliberation. A person acts intentionally "with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code. Ann. § 39-11-106(a)(18) (1994). Additionally, premeditation necessitates "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992), and "the exercise of reflection and judgment," Tenn. Code. Ann. § 39-13-201(b)(2) (1994). Deliberation requires a "cool purpose" and the absence of "passion or provocation." Tenn. Code. Ann. § 39-13-201(b)(1); Tenn. Code. Ann. § 39-13-201, Sentencing Commission Comments. However, "the [mere] presence of agitation or even anger . . . does not necessarily mean that the murder could not have occurred with the requisite degree of deliberation." State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993).

In State v. Brown, 836 S.W.2d 530, 540-541 (Tenn. 1992) (citation omitted)(emphasis in original), our supreme court further defined premeditation and deliberation and explained the distinction between the two terms:

> "'Premeditation' is the process of simply 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 such a cool mental state, under such circumstances, and for such a period of time as to permit a 'careful weighing' of the proposed decision*."

In this case, the jury considered both direct and circumstantial evidence in reaching a verdict. The State may prove the necessary elements of first degree murder with either or both categories of evidence, Brown, 836 S.W.2d at 541, and the standard of appellate review is the same. State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998), cert. denied, __ U.S. __, 119 S.Ct. 1359 (1999); State v.

Vann, 976 S.W.2d 93, 111-112 (Tenn. 1998), cert. denied, __ U.S. __, 119 S.Ct. 1467 (1999). As in the case of direct evidence, the weight to be given circumstantial evidence and "'[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)(citation omitted). However, this court has also observed that circumstantial evidence of a defendant's state of mind will not support a jury verdict of premeditated and deliberate murder unless the proof of premeditation and deliberation is so strong and cogent as to exclude beyond a reasonable doubt every other reasonable hypothesis. State v. Schafer, 973 S.W.2d 269, 273 (Tenn. Crim. App. 1997).

Accordingly, while the jury may not engage in speculation, State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995), the jury may infer premeditation and deliberation from circumstances surrounding the killing. Gentry, 881 S.W.2d at 3. These circumstances include planning activity by a defendant prior to the killing; the defendant's prior relationship with the victim; and the manner of the killing. Bordis, 905 S.W.2d at 222. See also Schafer, 973 S.W.2d at 273. More specifically, our supreme court has observed that the requisite premeditation and deliberation may be inferred from the defendant's use of a deadly weapon upon an unarmed victim; the cruelty of the killing; declarations by the defendant of an intent to kill; the defendant's procurement of a weapon; a defendant's preparations prior to a killing for concealment of the crime; and calmness immediately after the killing. State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998), cert. denied, __ U.S. __, __ S.Ct. __ (1999).

In this case, the appellant did not deny that he killed his wife on

October 1, 1996. The sole issue at trial was the appellant's mental state at the time of the killing. We conclude that the record amply supports the jury's finding of an intentional, premeditated, and deliberate killing. As noted earlier, the record reflects that the appellant and the victim had a troubled marital relationship and were in the midst of a separation at the time of Mrs. Durham's death. The appellant believed that his wife was having an affair and, several weeks prior to the killing, had threatened his wife.[2] The appellant himself testified that he decided to kill his wife and himself at least forty-five minutes before fatally shooting his wife eight times. In preparation for the killing, he removed a rifle and a single shot shotgun from the wall of his home and loaded both guns. He placed both guns in his car and drove to his wife's workplace, where he quietly watched his wife for fourteen seconds. He then selected from his car the rifle with its high capacity magazine and what he believed to be hollow point bullets. Returning to the store, the appellant announced his intention before he began firing the rifle at Mrs. Durham. Afterwards, he departed calmly. Compare State v. Kendricks, 947 S.W.2d 875, 880 (Tenn. Crim. App. 1996)(this court upheld the jury's finding of premeditation and deliberation when the defendant drove to the gas station where his wife worked, calmly asked her to come outside, shot his wife, and left without rendering assistance).

Despite this overwhelming evidence, the appellant argued at trial that, at the time of the killing, his intoxication with alcohol and Valium and his anxiety and dependent personality disorders precluded any premeditation or deliberation. First, under Tenn. Code. Ann. § 39-11-503(a) (1997), intoxication, whether voluntary or involuntary, is admissible in evidence if it is relevant to negate a culpable mental state. However, whether a defendant is too far intoxicated to premeditate and deliberate prior to a killing is a question for the jury to determine. See, e.g., State v.

[2]We subsequently conclude that this testimony was admissible at trial. See infra Part II(b).

Arnold, No. 81, 1988 WL 87671, at *2 (Tenn. Crim. App. at Knoxville, August 25, 1988)(upholding the appellant's convictions for premeditated first degree murder when the evidence demonstrated that, soon after the killings, the appellant's blood alcohol level was 0.16 and he had a Diazepam level of 0.1). In this case, the jury was entirely justified in concluding that, despite his intoxication, the appellant was capable of forming the requisite culpable mental state.

Second, under Tennessee law, evidence of a mental disease or defect that does not rise to the level of an insanity defense is nevertheless admissible to negate elements of specific intent, including premeditation and deliberation in a first degree murder case. State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994). See also State v. Hall, 958 S.W.2d 679, 688-690 (Tenn. 1997), cert. denied, __ U.S. __, 118 S.Ct. 2348 (1998); State v. Abrams, 935 S.W.2d 399, 402 (Tenn. 1996). Again, however, this court may not reweigh or reevaluate the evidence. Pruett, 788 S.W.2d at 561. Accordingly, we must defer to a jury's determination that the appellant was capable of forming the requisite intent if supported by evidence adduced at trial. State v. Perry, No. 01C01-9710-CC-00467, 1999 WL 233522, at *8 (Tenn. Crim. App. at Nashville, April 22, 1999).

The State offered no medical testimony to refute Dr. Wishart's contention that the appellant was incapable of premeditating and deliberating his wife's murder. However, in the context of the defense of insanity and the State's burden to prove a defendant's sanity beyond a reasonable doubt, our supreme court has observed that a jury is not required to accept the testimony of a psychiatrist to the exclusion of lay testimony or to the exclusion of evidence of actions of a defendant inconsistent with the expert's testimony. Edwards v. State, 540 S.W.2d 641, 646 (Tenn. 1976). Similarly, in the context of an allegation of "diminished

capacity" and the State's burden to prove premeditation and deliberation, the jury was not required to accept the testimony of Dr. Wishart to the exclusion of all other evidence. In fact, the record overwhelmingly contradicts Dr. Wishart's conclusion that the appellant was so "overwhelmed with emotions" or "out of control of his thinking" as to preclude premeditation and deliberation.[3] This issue is without merit.

b. Prior Threatening Statement by the Appellant Toward the Victim

The appellant next argues that the trial court erroneously admitted Ms. Coffey's testimony that the appellant had threatened Joyce Durham several weeks prior to the murder. Citing Tenn. R. Evid. 401 and 403, the appellant argues that the testimony was irrelevant and unfairly prejudicial, and that its admission thereby violated the appellant's right to due process of law under the Tennessee and federal constitutions. The State argues in turn that Ms. Coffey's testimony was relevant to the appellant's motive and intent, and that any danger of unfair prejudice to the appellant was outweighed by the probative value of the evidence. Tenn. R. Evid. 404(b).

As noted earlier, Ms. Coffee testified that, several weeks prior to Mrs. Durham's murder, the appellant called his wife at work and stated that, if she did not return home, she knew what would happen to her. The trial court admitted the testimony following a jury-out hearing. The court agreed with the State that Ms. Coffey's testimony was relevant to the appellant's motive and intent and that there was no danger of unfair prejudice to the appellant.

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[3]We acknowledge that the appellant attempted to commit suicide shortly after murdering his wife. However, the United States Supreme Court has noted that

> 'the empirical relationship between mental illness and suicide' or suicide attempts is uncertain and . . . a suicide attempt need not always signal 'an inability to perceive reality accurately, to reason logically and to make plans and carry them out in an organized fashion.'

Drope v. Missouri, 420 U.S. 162, 181, 95 S.Ct. 896, 908 n. 16 (1975)(citation omitted).

In determining the admissibility of evidence, a trial court must make a threshold determination of relevance. Tenn. R. Evid. 401 defines relevant evidence as "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 be without the evidence." This court has further explained,

> "'Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'"

State v. Davis, No. 03C01-9511-CC-00360, 1997 WL 184771, at *3 (Tenn. Crim. App. 1997)(citation omitted). Relevant evidence is generally admissible, Tenn. R. Evid. 402, but even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Tenn. R. Evid. 403.

Tenn. R. Evid. 404(b) specifically provides that evidence of prior bad acts by a defendant is not relevant to prove the character of the defendant and to show action in conformity with a character trait. However, such evidence is relevant to issues including a defendant's motive and intent. State v. Hall, 958 S.W.2d 679, 707 (Tenn. 1997), cert. denied, __ U.S. __, 118 S.Ct. 2348 (1998). As under Tenn. R. Evid. 403, the trial court must determine under Tenn. R. Evid. 404(b)(3) whether the probative value of the evidence is outweighed by the danger of unfair prejudice. We note, however, that the test in Rule 404(b) for balancing probative value against prejudicial effect is more stringent that the test set forth in Rule 403. See State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997).

The admissibility of a defendant's prior threats to a victim in a murder prosecution is subject to Rule 404(b). See, e.g., State v. Nichols, No. 01C01-9704-CR-00158, 1998 WL 468638, at *12 (Tenn. Crim. App. at Nashville, August 12,

1998), perm. to appeal granted, (Tenn. 1999); State v. Gunter, No. 03C01-9605-CC-00183, 1997 WL 798779, at *4 (Tenn. Crim. App. at Knoxville, December 17, 1997), perm. to appeal denied, (Tenn. 1998); State v. Collier, No. 03C01-9602-CR-00072, 1997 WL 9722, at *8 (Tenn. Crim. App. at Knoxville, January 14, 1997). A trial court's determination pursuant to Rule 404(b) will not be overturned absent an abuse of discretion. Vann, 976 S.W.2d at 102.[4] We see no reason in this case to disturb the trial court's ruling.

It has long been accepted in Tennessee that prior threats by a defendant to a victim in a murder prosecution may be relevant to prove a defendant's motive or intent in a murder prosecution and, therefore, admissible in evidence. State v. Hunter, No. 01C01-9506-CR-00176, 1996 WL 473999, at *3 (Tenn. Crim. App. at Nashville, August 22, 1996). See also State v. Smith, 868 S.W.2d 561, 575 (Tenn. 1993); Nichols, No. 01C01-9704-CR-00158, 1998 WL 468638, at *12; Collier, No. 03C01-9602-CR-00072, 1997 WL 9722, at *8. The appellant argues that the statement at issue in this case was so vague that it reveals nothing about the appellant's intent. Essentially, the appellant argues that his statement to the victim, that she knew what would happen if she failed to return home, was susceptible to any number of interpretations. According to the appellant, any probative value of the statement was therefore outweighed by the danger of unfair prejudice.

We find our decision in State v. Hunter, No. 01C01-9506-CR-00176, 1996 WL 473999, at **3-4, to be analogous to the instant case. In Hunter, the State introduced testimony that the defendant informed his father-in-law four days prior to

[4]The record reflects the trial court's compliance with the procedural requirements of Tenn. R. Evid. 404(b). DuBose, 953 S.W.2d at 652.

shooting the victim that the victim would "pay." Id. at *1. We concluded that the defendant's statement was highly probative on the issue of intent and affirmed the trial court's admission of the testimony. Id. at **3-4. Similarly, the appellant's prior statement in this case was highly probative on the issue of his intent. We submit that, within the bounds of rationality, it is impossible to interpret the appellant's statement as anything other that a threat to harm Mrs. Durham. As to the prejudicial impact of the appellant's statement upon the jury, any evidence is prejudicial. Davis, No. 03C01-9511-CC-00360, 1997 WL 184771, at *3. The issue is one of simple fairness. Id. We conclude that the trial court's ruling was eminently fair and consistent with due process of law. This issue is without merit.

c. Victim's Prior Statements

The appellant additionally contends that the trial court erroneously prohibited him from introducing Kara Higgins' testimony, describing her telephone conversation with Mrs. Durham on the evening before the murder. During this conversation, Mrs. Durham recounted another telephone conversation between her and the appellant on the same evening. The appellant asserts that Mrs. Durham's statements to Ms. Higgins were relevant to his state of mind at the time of the murder. Additionally, while conceding that the victim's statements constitute hearsay, the appellant contends that the statements were admissible pursuant to Tenn. R. Evid. 803(3), the "state of mind" exception to the general prohibition against hearsay. The appellant concludes that the trial court's ruling denied him due process of law.

The State responds that, despite the trial court's invitation, the appellant did not pursue a jury-out hearing for the purpose of determining the admissibility of this testimony. Therefore, the State asserts that the appellant has

waived this issue pursuant to Tenn. R. App. P. 36(a). Additionally, the State argues that any error was harmless as the disputed evidence had already been presented to the jury during Ms. Coffey's testimony. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). See also State v. Cook, 816 S.W.2d 322, 326 (Tenn. 1991)(citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) (error of constitutional dimensions will require reversal of a criminal conviction unless a reviewing court determines that the constitutional error was harmless beyond a reasonable doubt).

Initially, the State has apparently confused in its brief Mrs. Durham's telephone conversation with the appellant on the night prior to the murder and the telephone conversation several weeks earlier during which the appellant threatened Mrs. Durham. Ms. Coffey only testified concerning the latter telephone conversation. Moreover, the record reveals that the State is incorrect in asserting that the appellant did not pursue a jury-out hearing concerning Kara Higgins' testimony.

Prior to trial, the State submitted a motion to the trial court, asking that the trial court instruct defense counsel to approach the bench prior to eliciting testimony concerning any statements by the victim. During a pre-trial hearing, the State specifically cited possible testimony by the appellant's and the victim's daughter describing a telephone conversation with her mother on the night before the murder.

During this pre-trial hearing, the defense attorney described the daughter's expected testimony:

> Joyce Durham, had after speaking with [the appellant] on the telephone in response to that, had called her daughter immediately thereafter and made statements in a very exaggeratedly upset state, and said to the

> daughter that, "Verlin just called me", used some rather graphic language and said in fact, the pertinent part, that she said, "Well, what did you do when he called?" and she said, "I hung up on him. I hung up."

The defense attorney argued to the trial court that the daughter's testimony was relevant to the appellant's state of mind at the time of the murder. According to counsel, the appellant intended to testify that his actions were precipitated by his telephone conversation with his wife. Additionally, defense counsel noted that the daughter's testimony was particularly critical, because the appellant could not recall when the conversation with his wife had occurred.

After hearing argument by counsel, the trial judge stated that he would need to hear the witness' testimony before ruling upon its admissibility. Accordingly, he granted the State's motion and ordered defense counsel to approach the bench prior to eliciting the aforementioned testimony. The court opined, however, that the testimony was "very likely hearsay within hearsay and [would] be excluded."

Prior to the presentation of the appellant's proof and in accordance with the trial court's order, defense counsel indicated that he wished to make an offer of proof to the court outside the jury's presence. He explained that he wanted to introduce the testimony of Kara Higgins, the appellant's and the victim's daughter. According to defense counsel, Ms. Higgins would testify that, at the appellant's request, she called her mother on the evening prior to the murder. Ms. Higgins conveyed to Mrs. Durham the appellant's request that the victim accompany the appellant and their grandchildren to a restaurant on the occasion of their wedding anniversary. Soon after concluding this telephone conversation,

> [t]he decedent called [Ms. Higgins] back in a fit of anger, anger directed toward the other daughter, Sherry, and that she says, I had to slap Sherry over her boyfriend and being mean to my granddaughter, and to get even with me, Sherry has told your daddy about me and another

> man because he called me at the store and asked me about it. And Kara would then testify, I asked Mother, well Mother, what did you say to Daddy? And she will -- she will testify that the mother said, I hung up on him.

Defense counsel again argued to the trial court that the testimony was relevant to the appellant's state of mind.

The record suggests that defense counsel was prepared to present Ms. Higgins' testimony to the trial court during this jury-out hearing. Nevertheless, on the basis of defense counsel's summation of the proposed testimony, the court concluded that the evidence was inadmissible. The court stated that "what the deceased told her daughter has no relevance to any issue in the case. . . . I see absolutely no relevance in that and -- and it will not be allowed. [The appellant] can testify to all those matters."

Thus, we conclude that the appellant has preserved this issue for appeal, and we address the merits of the appellant's argument. Again, the appellant concedes that the proposed testimony constituted 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(c). Hearsay is inadmissible in Tennessee unless it falls within an enumerated exception. Tenn. R. Evid. 802; State v. Bragan, 920 S.W.2d 227, 242 (Tenn. Crim. App. 1995). Moreover, hearsay within hearsay is inadmissible unless each part of the combined statements conforms with an exception to the hearsay rule. See, e.g., State v. Tolbert, No. 03C01-9707-CR-00325, 1998 WL 694931, at *13 (Tenn. Crim. App. at Knoxville, October 7, 1998), perm. to appeal denied, (Tenn. 1999).

To summarize, Kara Higgins' proposed testimony consisted of Mrs.

Durham's statements on the night before the murder that (1) Mrs. Durham had spoken with the appellant on the telephone on that evening; (2) the appellant had accused her of having an affair; and (3) she had hung up on the appellant. We first note that this is not a case of hearsay within hearsay. Had the victim been able to testify concerning the appellant's accusation that she was having an affair, the appellant's accusation would have been admissible. The accusation did not constitute hearsay, as it was not proffered as proof of the fact contained in the accusation, but rather as proof that the accusation had been made and as proof of the appellant's mental state. See, e.g., State v. Wesemann, No. 03C01-9404-CR-00144, 1997 WL 348869, at *8 (Tenn. Crim. App. at Knoxville, June 25, 1997), perm. to appeal denied, (Tenn. 1998). See also State v. Roe, No. 02C01-9702-CR-00054, 1998 WL 7107, at *11 (Tenn. Crim. App. at Jackson, January 12, 1998), perm. to appeal denied, (Tenn.), cert. denied, __ U.S. __, __ S.Ct. __ (1999)("[t]he key to determining whether a statement is hearsay is the purpose for which it is offered"). However, Mrs. Durham's statements as recounted by her daughter, including Mrs. Durham's account of the appellant's accusation, *did* constitute hearsay, and we conclude that the statements were not encompassed by the hearsay exception set forth in Tenn. R. Evid. 803(3).

> Rule 803(3) provides:
>
> 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 . . . .

Mrs. Durham's statements were clearly statements of a memory, i.e., her memory of the telephone conversation with her husband. Additionally, the appellant intended to introduce the statements to prove the fact remembered. Thus, the appellant's reliance upon Rule 803(3) is mistaken.

Moreover, the appellant has repeatedly argued that the telephone conversation between himself and Mrs. Durham on the night before the murder was relevant to prove *his* state of mind at the time of the murder. Our supreme court and this court have held that only the *declarant's* conduct or state of mind, and not that of some third person, is provable by this exception. State v. Hutchison, 898 S.W.2d 161, 171 (Tenn. 1994); State v. Farmer, 927 S.W.2d 582, 595 (Tenn. Crim. App. 1996); State v. Leming, No. 01C01-9704-CR-00151, 1998 WL 707801, at *10 (Tenn. Crim. App. at Nashville, October 9, 1998); State v. Hall, No. 02C01-9703-CC-00095, 1998 WL 208051, at *13 (Tenn. Crim. App. at Jackson, April 29, 1998); Roe, No. 02C01-9702-CR-00054, 1998 WL 7107, at *11; State v. Sherrod, No. 01C01-9505-CR-00157, 1997 WL 34429, at *7, (Tenn. Crim. App. at Nashville, January 30, 1997). Accordingly, the appellant's attempt to prove his state of mind by introducing Mrs. Durham's statements was an improper use of the state of mind exception to the hearsay rule.

The trial court did note that Mrs. Durham's statements might qualify as an excited utterance under Tenn. R. Evid. 803(2). Rule 803(2) provides that an excited utterance is excluded from the hearsay rule and defines an exited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." One noted authority has described the rationales underlying this exception:

> First, since this exception applies to statements where it is likely there was a lack of reflection - and potential fabrication - by a declarant who spontaneously exclaims a statement in response to an exciting event, there is little likelihood, in theory at least, of insincerity. Rule 803(2) requires that the declarant must labor under the stress of excitement while speaking. . . . Second, ordinarily the statement is made while the memory of the event is still fresh in the declarant's mind. This means that the out-of-court statement about an event may be more accurate than a much later in-court description of it.

Cohen, Sheppeard, and Paine, Tennessee Law of Evidence § 803(2).1, at 532 (3d ed. 1995).

Thus, in order to justify reliance upon the excited utterance exception to the hearsay rule, a defendant must establish three elements. First, he must demonstrate that there was a startling event. State v. Gordon, 952 S.W.2d 817, 820 (Tenn. 1997). "[T]he 'event must be sufficiently startling to suspend the normal, reflective thought processes of the declarant.'" Id. (citation omitted). Second, the declarant's statement must relate to the startling event. Id. Third, the statement must be made while the declarant is under the stress or excitement from the event or condition. Id.

In this case, Mrs. Durham's telephone conversation with her husband was arguably a startling event. Moreover, Mrs. Durham's statements to Ms. Higgins described this telephone conversation. Finally, Ms. Higgins apparently intended to testify that Mrs. Durham recounted the telephone conversation to her immediately following the conversation, and Mrs. Durham was in "a very exaggeratedly upset state" and in "a fit of anger." Accordingly, Mrs. Durham's statements were admissible pursuant to the excited utterance exception to the hearsay rule.

Nevertheless, defense counsel did not rely upon the excited utterance exception before the trial court and does not rely upon it now. Under these circumstances, the appellant has waived any right to relief. Tenn. R. App. P. 36(a). In any case, any error was harmless beyond a reasonable doubt. As noted by the trial court, the appellant himself testified concerning the conversation at issue. Contrary to defense counsel's argument to the court prior to trial, the appellant was able to testify that the conversation occurred the night before the murder. Moreover,

the appellant's sisters testified that the appellant believed his wife was having an affair. Finally, the evidence of premeditation and deliberation in this case was overwhelming. This issue is without merit.

d. Closing Argument

i. Scope of Rebuttal Argument

The appellant next argues that the State committed prosecutorial misconduct during closing argument by exceeding the scope of rebuttal argument. In reviewing allegations of prosecutorial misconduct, this court must first determine whether misconduct has in fact occurred, keeping in mind the trial court's wide discretion in controlling the argument of counsel. State v. Bush, 942 S.W.2d 489, 515 (Tenn. 1997). This discretion is rooted in the principle that closing argument is a valuable privilege for both the State and the defense and courts should afford wide latitude to counsel in presenting final argument to the jury. State v. Cribbs, 967 S.W.2d 773, 783 (Tenn.), cert. denied, __ U.S. __, 119 S.Ct. 343 (1998).

Generally, the bounds of proper argument are established by the facts in evidence, the character of the trial, and the conduct of opposing counsel. State v. Pulliam, 950 S.W.2d 360, 368 (Tenn. Crim. App. 1996). Moreover, Tenn. R. Crim. P. 29.1 provides that the State's rebuttal argument is "limited to the subject matter covered in the State's opening argument and the defendant's intervening argument." This court has explained:

> "Ordinarily, the prosecutor is entitled to make the opening argument and, after the defendant presents his argument, the prosecutor is entitled to make the closing argument in rebuttal. The prosecutor's closing argument is limited in scope; he is allowed only to reply to arguments made by the defendant. To allow the prosecutor to introduce new matter during his closing argument would deprive defendant of the opportunity to respond thereto."

Wallis v. State, 546 S.W.2d 244, 247 (Tenn. Crim. App. 1976)(citation omitted).

If the appellant establishes prosecutorial misconduct, he must still demonstrate that the improper conduct prejudicially affected the verdict in his case. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965); Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). In measuring the prejudicial impact of any misconduct, this court should consider the facts and circumstances of the case; any curative measures undertaken by the court or prosecutor; the intent of the prosecutor; the cumulative effect of the improper conduct and any other errors; and the relative strength or weakness of the case. Id.

The appellant asserts that the State discussed during rebuttal argument Ms. Coffey's testimony concerning the appellant's prior threat to the victim. The appellant notes that the State did not discuss this testimony in its "opening" argument and the appellant did not address Ms. Coffey's testimony in his closing argument. The record reflects that defense counsel objected to the State's rebuttal argument. However, the trial court overruled the objection, opining that the State's argument was proper rebuttal. On appeal, the State notes that most of the closing arguments in this case, including the appellant's closing argument, are not included in the record. Accordingly, the State asserts that the appellant has waived this issue.

The State's position is well taken. The appellant carries the burden of ensuring that the record on appeal conveys a fair, accurate, and *complete* account of what has transpired with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b). See also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997); State v. Utley, 928 S.W.2d 448, 453 (Tenn. Crim. App. 1995).

This court is precluded from considering an issue when the record does not contain the necessary transcript. Utley, 928 S.W.2d at 453. Accordingly, this issue is waived.

ii. Missing Witness Rule

The appellant also argues that the prosecutor improperly commented during its rebuttal argument upon the appellant's failure to call his daughter, Ms. Sherry Whaley, as a witness. The appellant contends that the prosecutor thereby attempted to shift the burden of proof to the appellant in violation of his right to due process. In response, the State again notes that the record is incomplete. Additionally, the State argues that the prosecutor's reference to the missing witness was appropriate pursuant to Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979).

Absent the entire transcript of closing arguments, we are hesitant to address this issue. Generally, appellate review of prosecutorial misconduct during closing arguments should occur in the context of the *entire* argument. See, e.g., State v. Cribbs, 967 S.W.2d 773, 784 (Tenn. 1998). In any event, we conclude that the appellant is not entitled to relief.

In Tennessee, it is well established that a party may comment upon an opposing party's failure to call an available and material witness whose testimony would ordinarily be expected to favor that party. State v. Philpott, 882 S.W.2d 394, 407 (Tenn. Crim. App. 1994). However, before the missing witness rule can be invoked, the record must show that (1) the witness had knowledge of material facts; (2) a relationship existed between the witness and the party that would naturally incline the witness to favor the party; and (3) the missing witness was available to the process of the court for trial. Delk, 590 S.W.2d at 440. See also State v.

Bigbee, 885 S.W.2d 797, 804 (Tenn. 1994). Moreover, when a party intends to argue the missing witness inference, the party should inform the court at the earliest opportunity so that an evidentiary hearing, if necessary, can be held to establish whether the prerequisites set forth in Delk have been met. State v. Francis, 669 S.W.2d 85, 90 (Tenn. 1984); Philpott, 882 S.W.2d at 407 n. 27.

Initially, there is no evidence in the record that the State informed the trial court of its intention to argue the missing witness inference. Rather, the record reflects that the prosecutor made the following statements in rebutting the appellant's closing argument:

> Sherry has been -- who set this thing perhaps in motion, at least in Mrs. Durham's mind, after she became angry when she and her mother quarreled and her mother slapped her. She said, Well, you better watch mother, she's no angel. Was she called by the defense to say, Mother was having an affair because I knew about it?

The appellant immediately objected to the prosecutor's argument. However, the trial court observed that defense counsel had argued to the jury that the appellant reasonably believed his wife was having an affair. The trial court then concluded that Ms. Whaley's testimony would have been relevant to this issue and overruled the objection. The trial court made no other findings concerning the Delk criteria.

First, we agree with the trial court that a primary issue at trial was whether the appellant was "in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner" at the time of the shooting. Tenn. Code. Ann. § 39-13-211 (1997). Additionally, the record supports a conclusion that Ms. Whaley possessed knowledge of facts material to this issue. Certainly, the record suggests that she could have testified concerning any inflammatory statements she had made to the appellant prior to the murder and also concerning the appellant's agitation over his wife's alleged infidelity during the

days immediately preceding the murder.

However, we also note that the State suggested to the jury in its closing argument that the appellant should have called his daughter to testify concerning *her knowledge of any affair*. We agree with the appellant that, to the extent Ms. Whaley declined to share her knowledge with the appellant, her knowledge of an affair was irrelevant. The appellant testified that, following her vague accusation that Mrs. Durham was "no angel," Ms. Whaley refused to share with the appellant any knowledge she possessed concerning her mother's activities.

In any event, the record does not reflect the remaining Delk criteria. Although Ms. Whaley is the appellant's daughter, a relationship that would perhaps naturally incline her to favor the appellant, the appellant testified at trial that Ms. Whaley was particularly close to her mother. Indeed, while she did not testify for the State, the record reflects that the State subpoenaed Ms. Whaley as a witness. We have previously observed that, under Delk, "it must not be likely that the witness will be as favorable to one party as to the other." See State v. Murray, No. 01C01-9702-CR-00066, 1998 WL 934578, at *25 (Tenn. Crim. App. at Nashville, December 30, 1998). Finally, although the State apparently issued a subpoena for Ms. Whaley to testify as a witness, nothing in the record reflects whether, in fact, the subpoena was served or whether Ms. Whaley was available to the process of the court for trial.

Thus, the prosecutor improperly commented upon Ms. Whaley's failure to testify on behalf of the appellant. Nevertheless, we conclude that the remarks did not affect the verdict to the prejudice of the appellant. Harrington, 385 S.W.2d at 759; Judge, 539 S.W.2d at 344. This issue is without merit.

e. Trial Court's Comment to the Jury

The appellant next complains that the trial court commented to the jury that a "good closing argument" should not exceed twenty minutes. He correctly notes that a trial judge should not express any thought that would lead the jury to infer that his opinion is favorable or unfavorable to a defendant in a criminal trial. State v. Harris, 839 S.W.2d 54, 66 (Tenn. 1992). However, we do not agree that the trial court's remark in this case rose to the level of judicial misconduct.

The trial court immediately followed the challenged comment with the remark, "Some people have different opinions about that and that's fine. That's their job. They'll do it." As in Pickle v. State, No. 02C01-9412-CR-00271, 1996 WL 275049, at *3 (Tenn. Crim. App. at Jackson, May 24, 1996), we believe that the trial court's remarks were more demonstrative of personality and style rather than misconduct. In any case, as noted by the State, the evidence does not indicate whether or not either the State's or the appellant's closing argument or both exceeded twenty minutes. Finally, we conclude that any error was harmless beyond a reasonable doubt.

f. Cumulative Error

We also reject the appellant's contention that the trial was so fundamentally tainted with error as to deny the appellant due process of law. Our supreme court has previously observed, "The line between harmless and prejudicial error is in direct proportion to the degree of the margin by which the proof exceeds the standard required to convict, beyond a reasonable doubt." Delk, 590 S.W.2d at 442. See also State v. Carter, 714 S.W.2d 241 (Tenn. 1986). The evidence of guilt in this case was conclusive. This issue is meritless.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

Norma McGee Ogle, Judge

CONCUR:

Gary R. Wade, Presiding Judge

James Curwood Witt, Jr., Judge