IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 21, 2008 Session

STATE OF TENNESSEE v. WARNER CONRAD BIAS

Direct Appeal from the Criminal Court for Sullivan County
No. S44,980 Phyllis H. Miller, Judge

No. E2007-01452-CCA-R3-CD - Filed November 16, 2009

Following a jury trial, Defendant, Warner Conrad Bias, was convicted of first degree premeditated murder and sentenced to life imprisonment with the possibility of parole. On appeal, Defendant argues that (1) the trial court erred in refusing to allow testimony of Defendant's severe mental disease or defect, and his ability to form the requisite intent to commit first degree murder; (2) the trial court erred in allowing the State to introduce evidence of a 1997 order of protection filed by the victim against Defendant; (3) the trial court erred in refusing to allow Defendant to cross-examine the investigator about Defendant's videotaped statement and by refusing to admit the videotape into evidence; and (4) the evidence was insufficient to support Defendant's conviction for first degree premeditated murder. Following our review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Stacy L. Street and Donald Spurrell, Elizabethton, Tennessee, for the appellant, Warner Conrad Bias.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; H. Greeley Welles, Jr., District Attorney General; Barry Staubus, Assistant District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Background

State's Proof

Michael Kegley testified that his mother, the victim, Ella Faye Kegley, operated an upholstery business out of her home on Southside Avenue in Bristol, Tennessee. She had operated the business since her husband's death in 1978. Defendant worked for the victim on a commission

basis, and he had also lived with the victim for a number of years, but they were never legally married. Mr. Kegley testified that Defendant sometimes talked about his days as a boxer in the navy and that he won several tournaments. Defendant also said that he could kill someone with his "bare hands."

On Monday, March 5, 2001, Mr. Kegley stopped by the victim's house around 12:30 to 1:00 p.m. to have lunch with her as he did each day. She prepared lunch and then said that she needed to finish some furniture in the basement. While Mr. Kegley was at the residence, Defendant walked upstairs to get a drink of water. They talked, but Defendant did not mention that he thought the victim was dating Darrel Swartz or that she was seeing anyone else. Mr. Kegley testified that the victim had previously indicated that she and Defendant had not been getting along very well and that she wanted to close the upholstery shop. Mr. Kegley left the victim's house around 2:00 p.m., and everything seemed fine. When he walked out of the front door and beside the house, both the victim and Defendant waived to him from the basement window.

The following day, March 6, 2001, Mr. Kegley called the victim to tell her that he would not be able to stop by for lunch because he had to be in court on behalf of his employer, CVS Pharmacy, for a shoplifting case. The victim did not answer, so he assumed that she was out giving someone an estimate for upholstery work. Mr. Kegley testified that he stopped by the victim's residence around 2:30 and discovered that it was locked. He noticed that the truck was there, but Defendant's van was gone. Mr. Kegley had a key to the residence, so he unlocked the door and walked inside. He yelled out, but no one answered. He then left the residence and drove by his grandmother's house located nearby. When he arrived, Mr. Kegley noticed a "detectives car" sitting in the driveway. He walked inside his grandmother's house to check on her and saw two detectives from Bristol, Virginia.

Mr. Kegley testified that at some point, an officer from the Bristol, Tennessee Police Department arrived to assist the Virginia officers. Mr. Kegley returned to the victim's house with all of the officers for a "walk through" of the residence to determine if the victim was inside. Mr. Kegley did not notice anything unusual or out of place. He testified that he did not have any contact with the victim on March 6, 2001, and there were no signs of a struggle or any type of violence in the house. Mr. Kegley testified that officers from the Bristol Tennessee Police Department returned to the victim's residence the following day, and he later received confirmation that the victim was dead. Mr. Kegley testified that at the time of her death, the victim had a full set of teeth with none missing. He also said that she and Defendant used blue tarp fabric in the upholstery business in order to cover boats.

A few days after the victim's funeral, Mr. Kegley, his wife, and his sister, Julie Maxfield, were at the victim's residence sorting through her belongings. As Ms. Maxfield was cleaning the spare bedroom where the victim stored her clothes, she found a pair of khaki pants with blood on them in between the wall and the bed. Ms. Maxfield threw the pants down and called Mr. Kegley into the room. He then called police. The pants were untouched until Detective Charlie Thomas arrived and took them. Ms. Maxfield testified that the pants appeared as though someone had wiped their hands on them. She also said that the pants were too large to be the victim's.

Charles Fields testified that he knew Defendant for about four years prior to March 5, 2001, and he met Defendant through Darrell Swartz, Fields' best friend. He also met the victim a few times through Defendant at the couple's business on State Street in Bristol, Tennessee. Mr. Fields testified that on March 5, 2001, he was living at 300 Lindsay Street, Apartment 2, located in Bristol, Virginia, on the lower level of a house owned by Mr. Swartz that was broken up into several units. Mr. Swartz lived beside him on the lower level. Around 11:30 p.m., Defendant showed up at Mr. Fields' apartment and said that he was going to jail because he had slapped the victim. Defendant also said that he wanted to apologize to Darrel Swartz for accusing him of having an affair with the victim.

Mr. Fields testified that although Defendant and the victim were not married, Defendant referred to her as his "wife." Defendant told him that he slapped the victim because "they were in bed and he could not get an erection and that she made a statement that Darrell was a handsome guy and maybe he could." Mr. Fields testified that Defendant wanted to give Mr. Swartz a key to his business so that Swartz could "run things" while Defendant was in jail. Mr. Fields also testified that Defendant had a case of beer, and he asked Fields to drink with him, but Fields declined. He said that Defendant acted normal, but Defendant had been drinking. Defendant also had a couple of cuts on his knuckles. Mr. Fields testified that he did not see Defendant or Swartz later that night. He left home around 5:50 a.m. the next morning and noticed Defendant's van sitting on the right side of the apartment building. Mr. Fields testified that Mr. Swartz usually left his apartment door unlocked.

Connie Gudger testified that in March of 2001, she was living upstairs in an apartment building owned by Darrel Swartz. On March 5, 2001, she worked second shift for the Robinette Bag Company and arrived home around 2:30 a.m. Mr. Swartz's truck was there when she got home, and there was a van parked on the side of the street that she walked by in order to get to her apartment. Ms. Gudger testified that she walked by Mr. Swartz's apartment and saw Defendant and Swartz inside. While upstairs in her apartment, she heard laughter and "cutting up" coming from Mr. Swartz's apartment. The next morning, she was awakened by a noise. Ms. Gudger looked out the window and noticed that Mr. Swartz's and Mr. Fields' vehicles were both gone. However, the van that she had seen earlier was pulled up to the back door of Mr. Swartz's apartment. She saw Defendant remove something from the van and carry it into the apartment. Ms. Gudger assumed that Defendant was doing work at Mr. Swartz's apartment. She heard the van drive away as she walked back to her bedroom. Ms. Gudger testified that she laid back down for a few minutes and then smelled smoke. She then called 911 and left the apartment for safety. The fire department responded to the building within minutes.

Mike Jordan testified that he was working as a Fire Marshall for the Bristol, Virginia Fire Department on March 6, 2001, and was called to the fire at 300 Lindsey Street. He arrived on the scene around 10:17 a.m. The fire was extinguished when he arrived, and a perimeter had been set up. He saw tire tracks leading from the side entrance of Apartment 2 onto Lindsey Street. Mr. Jordan could smell a strong odor of kerosene when he entered the apartment. When he walked in the bedroom, he saw a kerosene heater lying on the bed, and a partially melted plastic container had been tossed in the closet. Mr. Jordan found the victim's body laying "partially on and off the bed" in the corner. Underneath the victim's legs was a shotgun with a round in the magazine but not chambered. He also saw residue from a blue plastic tarp.

The victim's body had already set into rigor mortis. There was no smoke in her nostrils or mouth, which indicated that she died before the fire started. The victim's teeth were missing, and there was blood coming out of one side of her mouth. Mr. Jordan testified that he could smell the odor of kerosene in the bedroom. It was also on the floor, the chest of drawers, the victim's clothing, and on the bedding where the kerosene heater was tipped over. It was his opinion that the fire was intentionally set and that kerosene was used as an accelerant. He also said that the fire originated "around the bed area in those two set areas of the chest of drawers, . . .at the foot of the bed and around where we found the victim laying."

Sergeant Mark Nash of the Bristol, Virginia fire Department is an arson investigator and was partnered in March of 2001 with an accelerant detection canine named Buffy. Buffy was trained to alert on petroleum hydrocarbon-based products. On March 6, 2001, Sergeant Nash was called to the scene of the fire on Lindsey Street to assist Fire Marshall Jordan in the investigation and in drawing a diagram of the scene. Sergeant Nash testified that the fire started in a back bedroom, and he noticed the odor of kerosene or diesel fuel when he entered the room. He and Buffy later did a walkthrough of the apartment, and the dog alerted on the odor of an accelerant in several locations. The victim's body was still in the bedroom, and the dog also alerted to the presence of an accelerant on the victim's clothing.

Sergeant Nash testified that he and Buffy were then called to the Bristol, Virginia Fire Department to assist the Virginia State Police and the Bristol Police Department in going over Defendant's van. He said that a piece of carpet was removed from the van and placed on the concrete. Buffy alerted on the carpet taken from the driver's side floorboard of the van. It was Sergeant Nash's opinion that both the apartment on Lindsey Street and the carpet from the van had the odor of a petroleum-based product.

Special Agent Walter Parker of the Virginia State Police, Bureau of Criminal Investigation, testified that on March 6, 2001, he received a request to assist the Bristol, Virginia Police Department. He arrived at the address on Lindsey Street between 1:00 and 1:30 p.m. Special Agent Parker observed some recent tire tracks "leaving the pavement, going across the curb, a small grass area, across the sidewalk and toward the entrance of apartment number two, the Swartz apartment." He saw the victim's body and evidence of a fire. Blood was coming from the victim's right side, and her upper and lower front teeth were either broken or missing. There were remnants of a blue tarp on the floor underneath where the body was laying. Special Agent Parker also saw evidence that alcohol had been consumed at the residence.

Special Agent Parker was then called to the Virginia Health Department on Piedmont, located a short distance from the fire on Lindsey Street, to assist the Bristol, Virginia Police with a vehicle that "may or may not have been" the same vehicle seen at the Lindsey Street location. He found a full size Dodge van parked behind the health department with no one around. Special Agent Parker inspected the tires and fender wells of the vehicle and determined that the tires looked similar to the tracks left at the apartment on Lindsey Street. The van was then towed to the Bristol Fire Department and searched. Special Agent Parker testified that a blue tarp was found folded up behind the driver's seat in the van. It was similar to the color and texture of the tarp found at the apartment

on Lindsey Street. Two knives were also found in the van that did not match a sheath that was found. The van was registered to the Defendant.

Brad Fee testified that in March of 2001, he was employed as a station manager at the National Car Rental on State Street in Bristol, Tennessee. The rental location was part of Bill Gatton Chevrolet. He said that on the morning of March 6, 2001, he received a call that someone was waiting for him in the rental trailer. When Mr. Fee entered the trailer, he saw Defendant drinking a cup of coffee, and he smelled a strong odor of kerosene about the Defendant. Mr. Fee testified that Defendant, whom he had met on a previous occasion, appeared normal, and they had a conversation. Defendant told Mr. Fee that he was taking a weekend trip to Gatlinburg with either his wife or girlfriend, and he wanted to rent a vehicle. Defendant signed a rental agreement and paid for the vehicle with a credit card. Mr. Fee testified that Defendant was alone, and he did not see any type of luggage.

Trooper Michael Hilton of the North Carolina Highway Patrol testified that around 6:00 p.m. on March 6, 2001, he was traveling North on Interstate 77 (I-77) when he saw a white Buick around mile marker forty-one traveling in the same direction at fifty miles per hour, well below the posted speed of sixty-five miles per hour. Trooper Hilton testified that the vehicle was weaving in and out of its lane. He followed the vehicle for one mile until it exited I-77 at exit forty-two. He then followed the vehicle onto the exit ramp. Defendant traveled to the stop sign at the bottom of the ramp, turned his left signal on, and turned left onto US 21 N. Trooper Hilton testified that Defendant made the turn too wide and went into the emergency lane of the four-lane road. Trooper Hilton then activated his blue lights and siren to stop the vehicle, but Defendant fled at a high rate of speed. Defendant passed cars on a double yellow line, and he sped through the city of Troutman on a two-lane road at a speed Trooper Hilton estimated to be sixty miles per hour, well above the posted speed limit of thirty-five miles per hour. When he reached Murdock Road, Defendant failed to stop at the stop sign. At that point, other agencies became involved in the chase. The Troutman Police Department and the Iredell County Sheriff's Department placed stop sticks on Murdock Road that Defendant eventually ran over which punctured the tires on his vehicle. Defendant fled back onto I-77 traveling southbound from exit forty-five. After traveling for approximately one mile, Defendant's car became disabled.

When the vehicle eventually came to a stop, Defendant exited the vehicle with his hands up, and Trooper Hilton placed him under arrest. He asked Defendant why he was running from police, and Defendant would not reply. He also patted Defendant down to check for weapons or illegal contraband and found a pocket knife. Trooper Hilton searched Defendant's vehicle, but did not find any illegal contraband. Defendant was driving a rental vehicle. Trooper Hilton placed Defendant in his patrol car in order to transport him to the Iredell County Jail, and he advised Defendant of his *Miranda* rights. As he was transporting Defendant to the jail, Defendant told Trooper Hilton that he had done a terrible thing and could not live with himself. He also said that he had been trying to kill himself for three days. Trooper Hilton testified:

> Well he went on to ask me if I would kill him and at that point I asked him, I said, "What did you do that was so bad." And he said "I want a camera and everything set up," he said "I want to tell it just one time." He said "I want a camera set up so I can

> give a confession." And I told him at that point that I didn't have any reason to set up cameras for a confession on the charges that I had him for. And I said, "Well what am I dealing with here?" And he said "You're dealing with murder." He said, "I murdered my wife." He said, "She was being unfaithful to me, I've been married to her for 19 years and she was being unfaithful to me with my best friend." And I - - - - he said that - - - - well, I asked him at that point, I said, "Well what about your friend," I said, "Did you do anything to your friend," and he said, no, he did not.

He said that Defendant cried while he was talking and seemed to be remorseful. Defendant also said that the murder occurred in Bristol, Tennessee.

Shelby Hopkins testified that she owned a bar on State Street in Bristol, Tennessee. She and the victim were good friends, and she met Defendant through the victim. She said that Defendant rented space from her at 708 State Street where he ran a flea market. She also knew Darrell Swartz, and he and Defendant shot pool together. Ms. Hopkins testified that she saw Defendant in front of his business on the afternoon of March 4, 2001, around 4:30 or 5:00 p.m. He was loading his van with chairs and other furniture. Defendant indicated that the victim was cheating on him with Swartz, and he said that he was going to kill Swartz, the victim, and himself. As she and Defendant were talking, Mr. Swartz drove by, but Swartz did not waive as he usually did. Defendant then told Ms. Hawkins that he saw the victim in the truck with Swartz. Ms. Hopkins told Defendant, "that's not Ella Faye, [t]hat looks like his little boy."

Ms. Hopkins left and returned approximately forty-five minutes later from running errands. Defendant approached and thanked her for talking to him. He also said that he was not going to hurt anyone. Ms. Hopkins testified that Defendant seemed calm after that and continued loading furniture into his van to take back to the victim. Defendant also mentioned having an auction and keeping the business open in the building until he could sell everything. Ms. Hopkins testified that Defendant came into her business on March 6, 2001, and asked to borrow $200. He said that he would repay her the following Friday. Ms. Hopkins did not have the money so she asked an employee, Doug Slagle, to loan her the money so she could give it to Defendant. Ms. Hopkins did not notice anything unusual about Defendant. She said that police arrived fifteen minutes after Defendant left, and they were looking for him.

Pamela Alamany testified that in 2001 she was working at Uncle Sam's Loan office on State Road in Bristol, Tennessee. Shortly after 5:00 p.m. on March 5, 2001, Defendant came into the store because he was attempting to purchase a Rossi .38 caliber revolver from Sam's Gun Shop in Virginia, and he needed to complete the transaction in Tennessee because he was a resident of Tennessee. Ms. Alamany testified that Defendant was nice and polite. He told her that he owned a business on State Street, and he needed the gun for protection because he had previously been robbed. Ms. Alamany ran the transaction through the computer, but she was denied permission to sell the gun to Defendant. She told Defendant that he could appeal the denial; however, he chose to leave. He told her that he would go back to Sam's gun shop and ask for a refund.

Jack Necessary testified that in March of 2001, he was employed by the Bristol, Tennessee Police Department as a Lieutenant in the Criminal Investigation Division, and he was the supervising

detective in the investigation of the victim's death. As part of the investigation, Lieutenant Necessary traveled to Statesville, North Carolina to the Iredale County jail and met with Defendant. He noticed that Defendant's right hand was injured, and it appeared Defendant was in pain or had some anxiety when they shook hands. Lieutenant Necessary collected Defendant's personal belongings and noticed a "petroleum based odor."

Rainer Drolshagen of the Federal Bureau of Investigation was called to assist the Bristol, Tennessee Police Department in processing the crime scene at the victim's residence on Southside Avenue. He traveled to the residence on March 7, 2001, and found what appeared to the blood. He went back to the house on March 8, 2001, for a more thorough investigation and found several items with blood on them. Mr. Drolshagen agreed that he missed the khaki pair of pants found by the victim's family member. He found a pool of blood under a trash can and a wet mop. There were also spots on a table next to the sewing machine that looked as though they had been cleaned.

Sandra McCoy testified that on March 5, 2007, she was living at 1900 Southside Avenue, Apartment 8. She had been living there for about a week and did not know any of her neighbors. Ms. McCoy testified that she looked out her back door window sometime between 7:00 and 9:00 p.m. and saw Defendant pushing and pulling a large wheelbarrow in the direction of a small building on the property. She also saw a vehicle parked down the driveway. Although it was dark outside, the area was well lit by a flood light. Ms. McCoy testified that the wheelbarrow had a large mound of plastic and some cans or buckets on the bottom.

Special Agent Laura Hodge is a forensic scientist with the Tennessee Bureau of Investigation (TBI) Crime Lab in Nashville, Tennessee, and she is an expert in the area of microanalysis. Agent Hodge analyzed evidence in the present case and found the presence of a "heavy petroleum distillate," such oil or diesel fuel, on Defendant's socks, underwear, and pants. She testified that kerosene is now classified as a heavy petroleum distillate. Special Agent Charles Hardy of the TBI is an expert in the areas of serology and DNA analysis. He received several pieces of evidence in this case and found the victim's blood present on Defendant's right shoe and pants.

A video deposition of Dr. William Massello, the Assistant Chief Medical Examiner for the Commonwealth of Virginia, was played for the jury. During the deposition, Dr. Massello testified that he performed an autopsy on the sixty-three-year-old victim. She was five feet six inches tall and weighed one-hundred and four pounds. Dr. Massello testified that the cause of death was stab wounds to the victim's chest, strangulation, and impact wounds to her face. Any one of the injuries would have been fatal. Seventy percent of her body had been burned, and her blood analysis revealed no drugs, alcohol, or carbon monoxide in her system. The burns occurred postmortem. Dr. Massello testified that the victim had three stab wounds to the chest that penetrated her heart and lung. The stab wounds were approximately four inches deep and injured the victim's internal organs, which caused massive internal and external bleeding. The wounds were caused by some type of sharp knife, and the victim was alive when she was stabbed. She also had other cuts and a contusion to her chest, and her breastbone was fractured.

Dr. Massello testified that the victim had injuries to her head, and there was a bruise to the back of her head that indicated some impact to the area. He felt that the injury may have been

caused by a moving object striking the victim's head. Dr. Massello said that the injuries to the victim's head could have occurred while the victim was on her back with her head on the floor, and a heavy blow was struck to her face or if someone had pushed her head into the floor. The injuries also could have occurred if the victim had fallen or was pushed down hitting the back of her head. Dr. Massello testified that there was a major injury deep in the victim's neck, which could have been caused by squeezing the neck or from receiving a heavy blow to the side of the head and neck. He said that strangulation to cause death would have taken one to two minutes or longer.

There was also a bruise on the left side of the victim's head, her face, and forehead. Her front teeth had been knocked out, and her jawbones were fractured. Dr. Massello testified that the injuries to the victim's face could have been caused by a heavy impact such as being punched with a fist or other heavy object, a fall, slam, or hitting the head on the floor. He also said that a large athletic man, such as a boxer, could have caused the injuries with a single blow. However, he was unable to determine how many times the victim's face was struck. Dr. Masello testified that the victim had no defensive wounds to her arms or hands, and there were no signs of a struggle. He said that the perpetrator was either in front of the victim or to her side when she was first struck, and the victim could have been on the floor when the other injuries occurred.

Defendant's Proof

The sixty-six-year-old Defendant testified that he began boxing at the age of fourteen and continued until he was twenty. He stopped boxing competitively in 1963. Defendant said that he moved to Bristol, Tennessee in 1980 and met the victim when he answered an ad for an upholsterer. He and the victim began a relationship after he started working for her, and he eventually moved in with her. Defendant testified that he and the victim were never formally married, but they had a private ceremony at Steele's Creek where they exchanged vows and agreed to be faithful to one another. They continued living together for eighteen years. Defendant also ran an antique store.

Defendant testified that the victim began acting strangely toward him a few weeks before the murder. He said that he became jealous when she made remarks about his good friend Darryl Swartz being handsome. He and the victim then began arguing sporadically because Defendant believed that the victim was having an affair with Swartz.

Defendant testified that on Monday, March 5, 2001, he walked downstairs to work and to unload the victim's dining room chairs from his van. He said that the victim was cooking breakfast, and everything seemed normal. She later walked downstairs and was upset because he had broken an antique cabinet. Defendant testified that an argument ensued and escalated until Swartz's name was mentioned. Defendant thought that he accused the victim of having an affair with Swartz, and he said that he was leaving her. He said that the victim became angry and told him that he was crazy. She also denied committing adultery. Defendant testified that he then told the victim that he found a semen spot on the bed. He said that the two began cursing and calling each other names. He claimed that the victim then admitted to the affair, but said that she "broke it off."

Defendant testified that he again told the victim that he was leaving her, and she became angry. He said that while she was sitting on the cutting table, she removed a knife and attempted

to stab him in the face. He claimed that the knife barely missed his head, and "as a natural response I threw a left hook and a right cross and hit her, broke her jaw." Defendant testified that the punch did not "faze" the victim because she was so angry. He said that he then had a "mini stroke" due to his blood pressure, became dizzy, and fell over. The victim jumped on top of him with a butcher knife as he was lying on the floor. Defendant testified that he also had a knife that he had been using to work on upholstery, and he stabbed the victim five times. He claimed that he was in fear for his life because the victim was trying to kill him. Defendant testified that he dropped his knife and used his remaining strength to get the butcher knife away from the victim. He said that the two began wrestling, and the victim then died in his arms beside the sewing machine after apologizing to him.

Defendant testified that he remained there with the victim for ten or fifteen minutes and then wrapped her body in a blue tarp, which he placed in the back of his van. He also put the knives in the van. Defendant said that he mopped the floor near the sewing machine, went upstairs, and took a shower. He left the house and drove to Steel's Creek Park with the victim's body in his van. He said that he planned to put the victim under a tree and use the butcher knife to kill himself beside her. However, he saw several dogs in the area that he thought would disturb his and the victim's bodies. Defendant testified that he remained in the park for an hour or more and then drove around confused and disoriented. He drove to Uncle Sam's Gun Shop and attempted to purchase a gun to use to commit suicide.

Defendant testified that he drove to Darrel Swartz's house around 6:00 p.m. with a plan to kill him; however, Defendant later changed his mind because he could not kill someone in "cold blood." He eventually drove back to Swartz's house around 11:00 p.m. with a twelve-pack of beer in his van, but Swartz was not home. Defendant testified that he went to Charles Fields' apartment looking for Swartz. He told Fields that he and the victim had a fight and that he hit the victim. He also said that he might need Swartz to get him out of jail. Defendant admitted that he lied to Fields so that Fields would not ask him any questions.

Defendant testified that he went back to Mr. Swartz's apartment around 11:30 p.m. and told him that the victim tried to kill him with a butcher knife. He told Swartz that he killed the victim and that her body was in the van. He also told Swartz that the victim admitted to an affair. Defendant said that he and Mr. Swartz then sat in the livingroom and drank beer. He testified that Swartz offered to help him get rid of the victim's body, but Defendant said that he refused. Defendant testified that Swartz mentioned tying a chain around the victim's waist and sinking her body in the deepest part of the lake. He said that Swartz also suggested cutting the victim's body up in pieces with his new chain saw and burying it. Defendant claimed that he was enraged by Swartz's suggestions, but he did not do anything. He then spent the remainder of the night at Swartz's apartment in a recliner beside a kerosene heater, and he said that kerosene was on the chair. Mr. Swartz left the next morning for work, and Defendant brought the victim's body inside the apartment and placed it on Swartz's bed. Defendant testified that he planned to use the shotgun to commit suicide, but Swartz came back home and talked him out of killing himself. Mr. Swartz then said that he would call police and take care of everything.

Defendant testified that he parked his van in a parking lot and walked to Bill Gatton Chevrolet. He admitted that he lied to Brad Fee. He then drove to Shelby's Bar to borrow some

money. Defendant claimed that he planned to drive to Myrtle Beach to kill himself. He said that he was driving fifty miles per hour in a fifty-five mile per hour zone because he was trying to be cautious. He did not feel that he was driving erratically. Defendant testified that he speeded up during the police pursuit because he planned to run into an overpass to kill himself. He said that he was disoriented when the officer told him to get out of the car, and he told the officer that he would confess if the officer got him out of the cold. Defendant testified that he told the officer that he was dealing with murder because he "didn't understand there's a distinction between homicide, kill and murder." He explained that he meant to say "kill" rather than murder.

On cross-examination, Defendant testified that he killed the victim in self-defense because she was trying to kill him with a butcher knife. He denied telling Mike Kegley that he could kill a man with his bare hands. Defendant testified that he was wearing gray pants when he killed the victim, and he claimed that police planted the bloody pants found in the bedroom. He said that he cleaned up the blood in the shop because he did not want the victim's family to see it, and he admitted to moving furniture around to mop the floor. Defendant also admitted that when he was pulled over, he was traveling north toward Virginia rather than going south toward Myrtle Beach. He said that he got "turned around." Defendant did not remember telling Trooper Hilton that he killed the victim because she was having an affair.

Defendant testified that Ms. McCoy was mistaken when she testified that she saw Defendant pushing a large wheelbarrow after dark. He denied any involvement in the fire at Mr. Swartz's apartment, and he claimed that the police put kerosene on his underwear. Defendant testified that he never heard the victim tell Mike Kegley that Defendant had threatened to kill her and her mother or burn the house down with them inside. He also denied telling Kegley that he made the statement, but did not mean it.

Rebuttal Proof

Mike Kegley testified that sometime in early May of 1997, the victim told him that Defendant had threatened to kill her and her mother and burn the house down with them inside. Defendant was present when the victim told Mr. Kegley about the threat, and he told Kegley that he "just didn't mean it." On cross-examination, Mr. Kegley testified that he was not surprised by the comment because Defendant had a violent temper. He did not believe that Defendant had mental problems, but that Defendant was mean. Mr. Kegley testified that he wanted to "throw" Defendant out of the victim's house, but she would not allow it.

Darrell Swartz testified that he thought he and Defendant were best of friends. He denied having an affair with the victim. On March 5, 2001, Mr. Swartz said that Defendant stopped by his house, but did not mention that he had killed the victim. Mr. Swartz said that he did not suggest cutting the victim's body into pieces or sinking her in the deepest part of the lake. He did not set his own apartment on fire, and he did not witness Defendant threaten to kill himself with a shotgun. Mr. Swartz testified he had only "structural" insurance on his house. He lost all of his mother's antiques, guns, knives, fishing rods, and clothing as a result of the fire.

Expert Testimony

Defendant argues that the trial court erred in excluding expert testimony on the issue of his severe mental disease or defect and his ability to form the requisite intent to commit first degree murder. Prior to trial, Defendant gave the trial court and the State timely written notice of his intent to present the testimony of Dr. Rokeya Farooque, a psychiatrist, and Dr. Sam Craddock, a psychologist, regarding his mental health status and ability to or capacity to form the mental state required to commit first degree murder. The trial court held a jury-out hearing to determine the admissibility of the expert testimony. At the hearing, Dr. Farooque testified that she is a psychiatrist employed by the Middle Tennessee Mental Health Institute in Nashville, Tennessee. She testified that she first saw Defendant three years after the murder. On the first three occasions that Defendant was with her, she saw him daily. At the time of trial, she was seeing him once a week unless there were any other complaints or for medication purposes.

Dr. Farooque testified that she diagnosed Defendant as an AXIS II paranoid personality disorder and AXIS I, delusional disorder, persecutory type. She explained that paranoid personality is an enduring pattern of behavior, and it is manifested by distrust or suspicion of others. Dr. Farooque testified that Defendant was probably suffering from the disorder at the time of the murder. Concerning the features of the personality disorder manifested by Defendant, Dr. Farooque said:

> Mr. Bias was like, when he was with us and we talked to with him, he always feels like that everything has some - - - some other meaning and that was like he was with that, he was thinking about others, that they have some other meaning so we (unintelligible) but when he came to us he became more concerned about that what the jail officer did to him, that the TPI did to him and all those kin of - - - - so when he came to us it was more like he became more delusional, talking about the food being poisoned and they are putting something in the food for him so he became more symptomatic when we gave him that delusional disorder diagnosis.

Dr. Farooque testified concerning the medications that she had given Defendant during the course of treatment, and at the time of trial, he was on Lexapro and a Prolixin Enanthate shot every two weeks. She testified that another doctor had him on some anti-hypertensive medicine and Valium. Dr. Farooque testified that despite the fact that defendant suffers from two mental disorders, his mental impairment at the time of the murder was not sufficient to deprive him of the ability to act with premeditation. This was based on a review of all the "information at the time of the incident and after that his statement, others statement [sic] and the autopsy result and everything we have in our, we have with us . . ." Defendant did not tell her anything that showed he was delusional at the time of the murder. Dr. Farooque testified that most of Defendant's delusions were after the murder and about jail incidents. She also said that he was capable of manipulation.

Defense counsel then informed the trial court that Dr. Craddock's testimony would be similar to that of Dr. Farooque. Concerning this issue, the trial court held:

> Now, as I read these cases, I've got three cases here. I've got Phipps, Hall and Marshallo and according to Dr. Ferooque [sic] if you suffer from the personality, paranoid personality disorder you don't even need to go to see a doctor. It's just sort of, you know, you can have that disorder, function out in society and form intent and

that's the one that - - - I mean you're the one that stated it. The first time I thought she said well it could have just, you know, it could have started up later, could have been back then, could have been a long time, it could have been sudden, but she could have been talking about the delusional disorder. You did ask her, it was your statement, "Since it begins in adolescence, early adulthood did he have the personality disorder in 2001." She did say yes that time. I'm trying to find out where she said - - - let's see - - - she said he got worse over the times that they saw him and she finally decided he suffered delusional disorder, persecutory type. She didn't say he suffered from delusional order jealous type. She said that was a classification. She didn't find that. Just a minute. "When he came to us he became more symptomatic." Here she said most probably he was suffering from the paranoid personality disorder in 2001, became more delusional. Now, she said that in 2001 no delusions at time of the incident. That was her testimony. "There's no mental impairment or mental disease that was sufficient to affect his capacity." It was part of her testimony. In State v. Hall the psychiatric testimony must demonstrate that the defendant's inability to form the requisite culpable mental state was the product of a mental disease or defect not just a particular emotional state or mental condition. Well, I don't find that there's anything. She didn't say he was unable to form the requisite culpable mental state. In the Marcello case the person that wanted to testify there did not indicate that if he were suffering from, in that case Gulf War Syndrome, that that syndrome would preclude his formation of the requisite mental state. She said that having the paranoid personality disorder would not, that's Dr. Ferooque [sic], prevent him from having the capacity to form the requisite mental state and then she said there was no delusion at the time of the incident. That was her testimony. So I'm not going to allow her testimony in.

* * *

No. No. First of all it would just - - - I have to weigh it. I think that it would just confuse the jury, would confuse them between what she testifies to about him being manipulative, what she testified to, would testify to about he's been in jail for three years by the time she sees him and, you know, and whether or not he's competent and what it took to get him competent. I think it would just confuse the jury and, you know, even her testimony that it took a while before they came up with delusional disorder even. So, no, there's no evidence that he could, didn't have the capacity to form the culpable mental state.

In Tennessee, the doctrine commonly referred to as diminished capacity was first recognized by this Court in 1994. See State v. Phipps, 883 S.W.2d 138, 14 (Tenn. Crim. App. 1994). After an exhaustive review of authority from sister states and the federal circuits, this Court held that evidence, including expert testimony, on an accused's mental state, is admissible in Tennessee to negate the elements of specific intent, including premeditation and deliberation in a first degree murder case." Id. The supreme court summarily agreed with the holding in Phipps in State v. Abrams, 935 S.W.2d 399, 402 (Tenn. 1996). However, the court did not specifically address the doctrine of diminished capacity until State v. Hall, 958 S.W.2d 679 (Tenn. 1997). In Hall, the court

reviewed the exclusion of expert testimony which the appellant alleged was relevant to negate the essential elements of premeditation and deliberation. Id. at 688-692. Similar to the discussion in Phipps, the Hall court held that evidence of diminished capacity is not admissible to justify or excuse a crime, but instead to prove that a defendant was incapable of forming the requisite mental state, thereby resulting in a conviction of a lesser offense. See id. at 692; See also State v. Perry, 13 S.W.3d 724, 734 (Tenn. Crim. App. 1999); State v. Faulkner, 154 S.W.3d 48 (Tenn. 2005). The court cautioned against referring to such testimony as proof of diminished capacity. Id. at 690. Instead such evidence should be presented to the trial court to negate the existence of the *mens rea* for the charged offense. Id.

The standard of admissibility of diminished capacity type evidence was succinctly coined in State v. Hall, 958 S.W.2d at 689:

> [T]o gain admissibility, expert testimony regarding a defendant's incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law.

The testimony "*must demonstrate*" that the claimed inability to form the culpable mental state was "*the product of a mental disease or defect,* not just a particular emotional state or mental condition. It is the showing of a lack of capacity to form the requisite culpable mental intent that is central to evaluating the admissibility of expert psychiatric testimony on the issue." Id. at 690 (emphasis added). "[A]s with most other evidentiary questions, the admissibility of expert opinion testimony is a matter which largely rests within the sound discretion of the trial court." Id. at 689.

Recently, in State v. Bradley Ferrell, 277 S.W.3d 372, 379 (Tenn. 2009), the Supreme Court clarified that "our decision in Hall established that the testimony is properly admissible if it satisfies the relevancy and expert testimony provisions in the Tennessee Rules of Evidence and its content indicates that a defendant lacked the capacity to for the required mental state for an offense. . ." The Court further stated that "although our holding in Hall referred specifically to psychiatric evidence under the circumstances of that case, it was based upon the broader legal principle that 'expert testimony relevant to negating intent is admissible in Tennessee even though diminished capacity is not a defense.'" Id. (quoting Hall, 958 S.W.2d at 691).

Pursuant to the Hall standard of admissibility, we are of the opinion that the trial court did not abuse its discretion in excluding the testimony of Dr. Farooque and Dr. Craddock, which Defendant sought to present. Dr. Farooque was unable to testify that Defendant's mental impairment at the time of the murder was sufficient to deprive him of the ability to act with premeditation. Defense counsel informed the trial court that Dr. Craddock's testimony would be similar to that of Dr. Farooque. The trial court correctly determined that the Defendant's evidence did not meet the relevancy standard set out in Hall. Defendant is not entitled to relief on this issue.

Admission of 1997 Order of Protection and Prior Threats

Defendant contends that the trial court erred in reversing its ruling on Defendant's motion in limine regarding a 1997 order of protection and allowing the order of protection and previous threats made by Defendant toward the victim and her family to be admitted into evidence.

As noted above, the admission of evidence is a matter within the trial court's discretion, and a decision to admit or exclude evidence will not be disturbed on appeal absent a clear abuse of that discretion. State v. Carroll, 36 S.W.3d 854, 867 (Tenn. Crim. App. 1999). Rule 404(b) of the Tennessee Rules of Evidence provides as follows:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

A fourth prerequisite to admission is that the court find by clear and convincing evidence that the defendant committed the other crime. State v. Thacker, 164 S.W.3d 208, 240 (Tenn. 2005) (citing Tenn. R. Evid. 404, Advisory Comm'n Comment; State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985)).

While evidence of a prior crime, wrong, or act is not admissible to prove that a defendant had the propensity or disposition to commit the crime, it may be relevant and admissible to prove issues such as identity, intent, motive, opportunity, or absence of mistake or accident. See State v. Shropshire, 45 S.W.3d 64, 75 (Tenn. Crim. App. 2000). Where the trial court has been called to pass upon the admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b), its determination is entitled to deference when it has substantially complied with the procedural requisites of Rule 404(b). Thacker, 164 S.W.3d at 240 (citing DuBose, 953 S.W.2d at 652).

Prior to trial in this case, Defendant filed a motion in limine to exclude evidence of the order of protection and testimony concerning previous threats made by Defendant toward the victim. The "Petition for Order of Protection" contains the following language: "Warner threw a tack hammer at me and missed. He came up to me and hit me with a can of spray glue. He threaten [sic] me. He said if you call the law I will come back and kill you and burn your house." In holding that the evidence would not be admissible at that time, the trial court stated:

> At this time, still, I'm going to rule that not knowing anymore than what I know right now and not having heard the - - - I assume, though, the defense here is going to be that he couldn't premeditate, couldn't - - - that that's going to be part of it based on your voir dire of the jury. It makes a lot more probative if he's actually, if that is actually the defense. So right now I'm going to find that I'm not going to admit it. There's no need in taking the chance right now, but as the trial goes along, if I see that there's evidence that this is sort of a continuing thing and it's not just an event four years before an event then, I'll reconsider it. Right now it's just not admissible. So, okay.

At trial, after Defendant's direct examination, the State asked the trial court to revisit its ruling concerning the order of protection and previous threats because Defendant had put forth the defense of self-defense and said that he did not kill the victim with premeditation. The State also argued that the order of protection was more relevant because Defendant threatened to kill the victim the day before he actually murdered her. The State asked to question Defendant about the statement and if he denied it, to call Mike Kegley as a rebuttal witness. Concerning this issue, the trial court held:

> And now that there has been testimony about their relationship and how it started and through the years and testimony that this event was precipitated by his believing that she was having an affair and an argument and all of that, I think it is more probative and I find that the probative value outweighs and prejudicial effect. I just need to make sure, and I'm going to allow them to ask him about it, and then, you know, we will see if he admits it then that's the end of it. If he denies it then I will allow them to recall their witness. I just have to make sure about an instruction to the jury.

On cross-examination, Defendant testified that he never heard the victim tell Mike Kegley that Defendant had threatened to kill her and her mother or burn the house down with them inside. In rebuttal testimony, Mike Kegley testified that sometime in early May of 1997, the victim told him that Defendant had threatened to kill her and her mother and burn the house down with them inside. Defendant was present when the victim told Mr. Kegley about the threat, and Defendant told Kegley that he "just didn't mean it."

The trial court properly admitted this evidence as it demonstrates Defendant's motive and intent, and it rebuts Defendant's testimony that he acted in self-defense and without premeditation. Under State v. Smith, 868 S.W.2d 561, 574 (Tenn.1993), when there are prior bad acts which indicate the relationship between the defendant and the victim of a violent crime, these prior violent acts are relevant to show the defendant's hostility toward the victim, the defendant's malice, the defendant's intent, and the defendant's "settled purpose" to harm the victim. See also State v. Turnbill, 640 S.W.2d 40, 46-47 (Tenn. Crim. App. 1982); State v. David Kyle Gilley, No. M2006-02600-CCA-R3-CD, 2008 WL 3451007 (Tenn. Crim. App. Aug. 13, 2008) (app. denied Feb. 17, 2009).

Based on the foregoing, we conclude that the evidence was probative of both Defendant's motive and intent and to rebut his theory of self-defense and lack of premeditation. Although the

evidence was prejudicial, based on our review of the facts presented in this case, we conclude that the probative value was not outweighed by the danger of unfair prejudice. Accordingly, this evidence was properly admitted.

Defendant's Statement

Defendant contends that the trial court erred in refusing to admit his videotaped statement to Lieutenant Jack Necessary and in refusing to allow him to cross-examine Necessary about the statement. Defendant argues the evidence was admissible to show his state of mind at the time of the offense.

Prior to Lieutenant Necessary's testimony, the State notified the trial court that it anticipated Defendant would attempt to introduce the statement during Necessary's cross-examination. The State objected to the introduction of the statement because it was hearsay and self-serving. Defendant argued that the statement was admissible because it was inculpatory and because it was evidence of Defendant's state of mind since he was relying in part on the defense of serious mental disease or defect. Concerning this issue, the trial court held:

> Okay, first of all it doesn't matter that the videotape interview, so to speak, I don't think it was much of an interview. I think it was a production put on by Mr. Bias, to tell you the truth, but it doesn't matter that he made inculpatory remarks. If the State doesn't want to use those inculpatory remarks they don't come in. And it's just as exculpatory if somebody says, that's charged with first degree murder, "I did it because she made me so mad I went nuts," to try to get a voluntary manslaughter conviction. That's just as much exculpatory as if they said it was an accident. You know, it could have been criminally negligent homicide. But the whole thing it would appear to me was just orchestrated by Mr. Bias. The first statement that is already in, that the jury has heard, was part of that but I think the more that he had to plan and to think about it and to manipulate people he did it. He got the detectives over there, they were over there the first night to do what he said, in essence he wanted to do, and he told them he'd give a statement with his attorney when he got back to Bristol. But then, you know, he still wants to keep them on a string and then he figures out the production he wanted to make. And then, as I recall, I've had one hearing on that videotaping, he got very, very upset. He didn't want the statement to show just what he said, he wanted the statement to show how emotional he was, the emotions that were cut off immediately upon ending the interview. So, you know, I sustain the State's objection. It's like it said in one of these cases, you know, if you let this in, if that becomes the law then every defendant could manufacture their defense and you'd have to let it in and let the jury hear it. So that's why exculpatory statements given by a defendant do not come in, that's hearsay.

As stated above, the admission of evidence is a matter within the trial court's discretion, and a decision to admit or exclude evidence will not be disturbed on appeal absent a clear abuse of that discretion. State v. Carroll, 36 S.W.3d 854, 867 (Tenn.Crim.App.1999). In Moon v. State, 146

Tenn. 319, 242 S.W. 39, 54 (1921), the Supreme Court held that the self-serving statements of a criminal defendant are not admissible. This Court, in Hall v. State, explained the reason for this rule:

> A declaration made by a defendant in his own favor, unless part of the res gestae or of a confession offered by the prosecution, is not admissible for the defense. A self-serving declaration is excluded because there is nothing to guarantee its testimonial trustworthiness. If such evidence were admissible, the door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence.

Hall, 552 S.W.2d 417, 418 (Tenn. Crim. App. 1977)(quoting Wharton's Criminal Evidence, 13th ed., § 303)); See also State v. King, 694 S.W.2d 941 (Tenn. 1985); State v. Turnmire, 762 S.W.2d 893 (Tenn. 1988).

On appeal, Defendant argues that his statement to Lieutenant Necessary was admissible pursuant to the "state of mind" hearsay exception found in Tennessee Rule of Evidence 803(3):

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The advisory commission comments add the following guidance: "Normally [state of mind] declarations are inadmissible to prove past conduct." Tenn. R. Evid. 803(3), Advisory Comm'n. Comments. To qualify for this exception, "the statement must be one made at the time of the event in question." State v. Mike Lafever, No. M2003-0506-CCA-R3-CD, 2004 WL 193060 (Tenn. Crim. App., at Nashville, Jan. 30, 2004) (app. denied May 10, 2004).

In the present case, Defendant killed the victim on March 5, 2001. During the offer of proof, Lieutenant Necessary testified that he first spoke with Defendant around 2:40 a.m. on March 7, 2001. Defendant did not sign a waiver, and he would not give a statement. Defendant then said that he would give a video interview and full confession with his attorney present when they returned to Bristol. Lieutenant Necessary left Defendant in the Iredale County Jail in North Carolina and traveled back to Bristol. Later that day, Defendant contacted Necessary and asked him to return to the jail. Defendant said that he murdered his wife and asked Necessary to bring a Bible and a pastor with him. Lieutenant Necessary testified that he traveled back to the Iredale County Jail on March 8, 2001, to conduct the interview with Defendant. They set up video equipment at Defendant's request. The video shows Defendant crying, and he asked Lieutenant Necessary to pray with him. However, the video equipment malfunctioned, and the remainder of the statement was not recorded.

Lieutenant Necessary testified that during the interview, Defendant went into great depths about the victim's history of sexual relationships with other men and that he believed she was having an affair with Darrell Swartz. Defendant also discussed statements that the victim had made about Darrell Swartz, the size of his penis, how Swartz performed sexual acts on the victim and how it

made her feel. Defendant told Necessary that he was impotent and that the victim had made some derogatory comments about his impotence and had made fun of him. He also said that she nudged him in the groin area immediately prior to his attacking her. However, Defendant told Lieutenant Necessary that he could not remember what took place during the attack, and the "next thing that he knew was that she was lying on the concrete floor with blood running from her head and that he picked her up in his arms."

When Lieutenant Necessary attempted to ask defendant specific questions about the methods that he used to kill the victim, Defendant said that his mind went blank. Additionally, when Necessary asked Defendant questions about the knife used to kill the victim, Defendant said that he did not want to talk about that. Lieutenant Necessary testified that Defendant cried during the interview, and he stopped crying as soon as the interview was over and when he thought the videotape was turned off.

In our view, the interview with Lieutenant Necessary was not admissible pursuant to the "state of mind" hearsay exception found in Tennessee Rule of Evidence 803(3) since it was made nearly three days after the murder. The trial court correctly excluded the statement as hearsay.

Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of first degree murder because the State failed to prove premeditation beyond a reasonable doubt.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Defendant was convicted of first degree premeditated murder, which is a premeditated and intentional killing of another. T.C.A. § 39-13-202(a)(1). An act is premeditated if the act is done after the exercise of reflection and judgment. Id. at (d). Furthermore,

> Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused

> for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id.

The element of premeditation is a question of fact for the jury to determine based upon consideration of all of the evidence. State v. Suttles, 30 S.W.3d 252, 261 (Tenn. 2000) (citing State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997). Because premeditation involves the defendant's state of mind, concerning which there is often no direct evidence, Tennessee cases have long recognized that premeditation may be proved by circumstantial evidence. State v. Davidson, 121 S.W.3d 600, 614-616 (Tenn. 2003) (citing State v. Brown, 836 S.W.2d 530, 541 (Tenn.1992)). Our supreme court has provided a list of non-exclusive circumstances that would justify a jury in finding or inferring premeditation: the use of a deadly weapon on an unarmed victim; the particular cruelty of a killing; the defendant's threats or declarations of intent to kill the victim; the defendant's procurement of a weapon; preparations taken to conceal the crime undertaken before the crime is committed; destruction or secretion of evidence of the killing; and the defendant's calm demeanor immediately after the killing. State v. Pike, 978 S.W.2d 904, 914-15 (Tenn. 1998); Bland, 958 S.W.2d at 660. A jury, however, is not limited to any specific evidence when determining whether a defendant intentionally killed the victim after the exercise of reflection and judgment. See T.C.A. § 39-13-202(d). All of the circumstances of the offense and the defendant's conduct may be considered in determining whether the act was premeditated. Davidson, 121 S.W.3d at 615 (citing State v. LaChance, 524 S.W.2d 933, 937 (Tenn. 1975)).

Viewing the evidence in a light most favorable to the State, the proof established that the day before the murder, Defendant threatened to kill the victim. He told Shelby Hopkins that he was going to kill the victim because he thought that she was having an affair with Darrell Swartz. There was testimony from the victim's son, Mike Kegley, that the victim had indicated that she and Defendant had not been getting along very well and that she wanted to close the upholstery shop. The proof shows that the unarmed sixty-three-year-old victim, who was five feet six inches tall and weighed one-hundred and four pounds, was stabbed three times in the chest penetrating her heart and lungs. She also had other cuts to her chest, and her breastbone was fractured. The victim's front teeth were knocked out, and her jawbones were fractured. She also had a bruise to the back of her head indicating some impact to the area, and there was a major injury deep in the victim's neck that could have been caused by squeezing the neck or from receiving a heavy blow to the side of the head and neck. Although Defendant testified that he and the victim struggled and that he hit and stabbed her in self-defense, the victim had no defensive wounds to her arms and hands, and there were no signs of a struggle consistent with Defendant's version of an altercation.

In a light most favorable to the State, the evidence clearly proved premeditation. Defendant acted with calmness immediately after the killing, and he attempted to secrete or dispose of evidence. He wrapped the victim's body in a tarp and placed it and the murder weapon in his van. He went back inside the house and mopped the blood from the basement floor, walked upstairs, and took a shower. He also hid a pair of bloody pants behind a bed in the spare bedroom. Defendant

then drove around for a while with the victim's body in his van, and he eventually drove to Darrel Swartz's house with a twelve-pack of beer. Mr. Swartz was not home, but Defendant spoke to Charles Fields and told him that he would be going to jail because he slapped the victim for saying that she was going to sleep with Mr. Swartz. Defendant admitted that he lied to Mr. Fields so that Mr. Fields would not ask him any questions. Defendant went back to Mr. Swartz's apartment a second time, but did not mention that he hit or killed the victim. After Mr. Swartz left for work the following morning, Defendant dragged the victim's body inside the apartment, placed it on Mr. Swartz's bed, poured kerosene over the body and set it on fire. Defendant left the apartment, parked his van in a parking lot, and walked to Bill Gatton Chevrolet and rented a car. He then drove to Shelby's Bar and borrowed money from Shelby Hopkins. Defendant was later pulled over by Trooper Michael Hilton in North Carolina after leading the officer on a high speed chase. Defendant told Trooper Hilton that he murdered his wife for being unfaithful to him with his best friend.

Based on a thorough review of the record, we conclude that the facts and circumstances as a whole were sufficient for a rational trier of fact to have found the elements of premeditated first degree murder beyond a reasonable doubt. Defendant is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

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THOMAS T. WOODALL, JUDGE