



## OPINION

The appellant, Kenneth L. Weems, was convicted of one count of murder in the first degree by a jury of his peers. He was sentenced to confinement for life in the Department of Correction. The appellant was also convicted of second degree murder. The trial court, finding that the appellant was a standard offender, imposed a sentence consisting of confinement for fifteen (15) years in the Department of Correction. The appellant challenges the sufficiency of the evidence on the elements of premeditation and deliberation; he claims that the instruction on premeditation and deliberation was erroneous; he claims the trial court committed prejudicial error in allowing the jury to hear an audio tape that was recording when the murder was committed; and he argues the trial court also committed error in permitting the hearsay testimony regarding who requested the meeting between the victim and the appellant. After a thorough review of the record, the briefs of the parties, and the law governing these issues, this Court is of the opinion that the judgment of the trial court should be affirmed.

The victim, Alice Hurt, and the appellant had a relationship. The appellant contended in his statement to the police that he told the victim the relationship was over. However, the victim was pregnant. The victim advised the appellant that she was pregnant with his child. She also told the appellant that she wanted him to pay child support when the child was born through the Juvenile Court of Memphis and Shelby County. The victim had started the process of filing a paternity suit to have the appellant declared the father of the child, legitimate the child, and require the appellant to pay child support.

The appellant and the victim agreed to meet on the evening of February 8, 1993. There is a factual dispute as to who initiated the meeting. In his statement, the appellant stated that the victim initiated the meeting. However, the victim told her cousin that the appellant wanted to meet with her.

The victim and the appellant met at McDonald's restaurant across the street from Libertyland Amusement Park in Memphis. The information as to when the meeting was to take place is sketchy. It appears that they met in the parking lot of the fast food establishment between 8:00 p.m. and 9:00 p.m. on the evening of February 8, 1993. The

victim had a tape recorder in her pocket. They walked through the area for a while before returning to the victim's motor vehicle. The victim was seated on the driver's side and the appellant was seated on the passenger side of the vehicle. Shortly before the appellant attacked the victim, the parties were quiet. The radio was playing. The audio tape found in the victim's pocket revealed the following:

FEMALE: Oh, Oh, (Screams), No, No, No, Oh, No, Kenny, No. Why you want to do this? No, No.

MALE: Let me go.

FEMALE: No, No, No, Kenny, No, No, Oh, No, Kenny, Kenny, Kenny.

MALE: Stop.

FEMALE: Ok, I won't.

MALE: You won't do what?

FEMALE: I won't [unintelligible] my money.

MALE: You won't?

FEMALE: No.

MALE: Promise, Promise, Promise.

The conversation ended. Only the radio could be heard in the background. The appellant locked the victim's car doors and left the parking lot.

The following morning at approximately 7:45 a.m. a Shelby County deputy sheriff went to McDonald's restaurant for breakfast. An employee of the restaurant told the deputy that she believed a woman was sleeping in a motor vehicle at the rear of the building. The deputy sheriff went to the vehicle, attempted to wake the victim, but she did not respond. He discovered that the doors were locked. The deputy called for assistance. Later, the officers broke the rear window to gain entry to the vehicle. Once inside the vehicle the officers discovered that the victim had expired. The Memphis Police Department commenced an investigation immediately.

The investigation almost immediately led to the appellant. A few hours after the victim's body was discovered the officers found the appellant. He was asked to accompany the officers to police headquarters. The appellant agreed to do so. He

subsequently gave a statement to the police.

The appellant admitted that he killed the victim with a knife in the parking lot of the fast food establishment. He told the police that he only stabbed the victim one time when she made an “advance” toward him. He claimed to have found the knife in the victim’s vehicle, and he threw the knife out of his car window after leaving the parking lot. Later, he told the officers that he did not remember what occurred -- he just remembered seeing blood on the knife.

According to the appellant, he knew that the victim was pregnant. The victim told him it was his child. Supposedly, during the Thanksgiving holidays of 1992, the victim told the appellant that she wanted him to pay child support through the Juvenile Court of Memphis and Shelby County. He claimed that she was constantly asking him for money. On the date in question, the victim wanted the appellant to pay \$300 a month in support, the cost of day care and diapers, and provide insurance for the child.

An autopsy revealed that the appellant inflicted numerous knife wounds to the victim’s body. He stabbed her in the left chest and the knife penetrated the victim’s heart. He also stabbed her in the left breast. In addition, there was one knife wound to the left side of the neck, and another knife wound to the right forearm. There was also a series of sharply incised knife wounds to the thumb and fingers of the palm side of her left hand. The latter wounds would appear to be defensive wounds -- wounds inflicted when she attempted to prevent the appellant from cutting her.

The autopsy revealed that the victim was eight and one-half months pregnant. The child, a boy, was a viable fetus. Although there was no direct trauma to the fetus, the child died in the uterus as a direct result of the victim’s death.

## I.

The appellant contends that the State of Tennessee failed to establish two elements of murder in the first degree: premeditation and deliberation. He relies on State v. West, 844 S.W.2d 144 (Tenn. 1992). The State of Tennessee contends that there is sufficient evidence contained in the record to establish these two elements beyond a

reasonable doubt.

When the appellant murdered the victim, first degree murder was defined in part as “[a]n intentional, premeditated and deliberate killing of another.” Tenn. Code Ann. § 39-13-202(a)(1) (Supp. 1993). A “premeditated act” was defined as “one done after the exercise of reflection and judgment.” Tenn. Code Ann. § 39-13-201(b)(2)(1993). A “deliberate act” was defined as “one performed with a cool purpose.” Tenn. Code Ann. § 39-13-201(b)(1)(1993).

The appellant predicates his argument upon the facts contained in the statement he gave to the police. He told the police that he stabbed the victim only one time. The jury was at liberty to reject these facts. The autopsy revealed multiple stab and cut wounds. Also, the facts contained in the statement conflicted with evidence introduced by the state.

The jury could have found that the appellant called the victim and arranged the meeting on the night in question. When the appellant arrived for the meeting, he was armed with a large knife. In other words, the appellant formed the intent to kill the victim, he made her available so that he could kill her, and he was armed when he arrived.

The jury could further find that the appellant remained calm as he systematically killed the victim. As evidenced by the audio recording, while the victim was screaming, the appellant’s voice was calm and natural. He did not raise his voice as he stabbed the victim once in the neck, once in the arm, and twice in the chest. The appellant showed no emotion. There was no inflection in his voice.

There is sufficient evidence contained in the record to support a finding by a rational trier of fact that the appellant was guilty of murder in the first degree beyond a reasonable doubt. Tenn. R. App. P. 13(e). The elements of premeditation and deliberation were established beyond a reasonable doubt.

This issue is without merit.

## II.

The appellant contends that the instruction on first degree murder was inadequate. The appellant did not object to the instruction or offer a special request setting for the

instruction that the appellant argues should have been given.

This Court has reviewed the instructions given by the trial court. The instructions conform to our Supreme Court's decision governing premeditation and deliberation. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). Thus, this issue is without merit.

### III.

The appellant contends that the trial court committed error of prejudicial dimensions by permitting the jury to listen to the enhanced version of what was contained on the audio tape removed from the victim's pocket. He argues that most of what is contained on the tape is unintelligible.

Questions concerning the introduction of evidence are addressed to the sound discretion of the trial court. An appellate court will not interfere with the exercise of this discretion unless the record clearly reflects that there has been an abuse of this discretion. In this case, the trial court did not abuse its discretion by permitting the state to introduce the tape into evidence.

The tape was highly probative of the victim's and appellant's actions before, during, and after the killing. The quality of the tape goes to the weight the jury may give it rather than its admissibility.

This issue is without merit.

### IV.

The appellant contends that the trial court committed error of prejudicial dimensions in permitting the witness, Etta Green, to testify that the victim told her that the appellant wanted to meet with her on the evening in question. He argues that this was rank hearsay and should have been excluded.

To the extent the testimony was for the purpose of proving the victim's later conduct through her expressed state of mind, it would be admissible pursuant to Rule 803(3), Tenn. R. Evid. However, the Advisory Commission Comment to this rule notes "that only the

declarant's conduct, not some third party's is provable by this hearsay exception." Thus, to the extent the testimony could be taken to prove the defendant's future conduct and plan relative to meeting and killing the victim, the testimony qualifies as hearsay. See e.g., State v. Hutchison, 898 S.W.2d 161, 171 (Tenn. 1994). However, we conclude that any error in admitting the testimony was harmless in light of the defendant's statement to the police and the tape recording contents.

This issue is without merit.

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JOE B. JONES, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JOHN K. BYERS, SENIOR JUDGE