IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 24, 2021 Session

STATE OF TENNESSEE v. JAMES DAVID DUNCAN

Appeal from the Criminal Court for Morgan County
No. 2018-CR-68 Jeffery Hill Wicks, Judge

No. E2020-01532-CCA-R3-CD

The Defendant, James David Duncan, was convicted by a Morgan County Criminal Court jury of attempted second degree murder, a Class B felony, and aggravated assault, a Class C felony. *See* T.C.A. §§ 39-13-210 (Supp. 2017) (subsequently amended) (second degree murder), 39-12-101 (2018) (criminal attempt), 39-13-102(a)(1)(A)(i) (Supp. 2017) (subsequently amended). The trial court sentenced the Defendant to sixteen years for attempted second degree murder and to eight years for aggravated assault, with the sentences to be served concurrently to each other and consecutively to an Anderson County conviction. On appeal, the Defendant contends that (1) prosecutorial misconduct occurred during voir dire, opening statement, and closing argument, (2) he is entitled to plain error relief because the trial court failed to conduct a hearing pursuant to Tennessee Rule of Evidence 404(b) regarding prior bad act evidence, (3) the court erroneously instructed the jury, and (4) cumulative trial errors require relief. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and JILL BARTEE AYERS, JJ., joined.

Emily E. Wright (on appeal and at motion for new trial) and John Galloway (at trial), Jamestown, Tennessee, for the Appellant, James David Duncan.

Herbert H. Slatery III, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Russell Johnson, District Attorney General; Robert Edwards and Jonathan Edwards, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant's convictions relate to a May 1, 2018 altercation between the Defendant and the victim, Ryan Massengale, in which the Defendant stabbed the victim with a knife. The Defendant claimed at the trial that he did not intend to kill the victim and that he had acted in self-defense.

At the trial, Morgan County Sheriff's Deputy Tony Bunch testified that around 4:30 p.m. on May 1, 2018, he responded to an incident at C.J.'s Bar. Deputy Bunch said that when he arrived, the victim was sitting on the ground in front of the building with several people attending his injuries. Deputy Bunch said the victim was bleeding from his sternum area, had difficulty talking, struggled for air, and was in "[p]retty bad shape."

Deputy Bunch testified that no one at the bar appeared to be intoxicated. Deputy Bunch said he did not see any guns at the scene. He said he did not look inside the victim's car.

Michael Blaylock testified that he and the victim were close friends. Mr. Blaylock said that he talked to the victim at C.J.'s Bar on May 1, 2018, and that the victim stated he needed "to go talk to somebody about . . . some stolen stuff" that had been taken from the victim's porch. Mr. Blaylock said he knew that the victim did not have any weapons in the victim's truck because the victim never carried a weapon.

Mr. Blaylock testified that an apartment building sat to the right of C.J.'s Bar. A photograph of C.J.'s Bar was received as an exhibit. Referring to the exhibit, Mr. Blaylock identified the locations where the victim's truck had been parked, where Mr. Blaylock had parked, and where Mr. Blaylock spoke to the victim. Mr. Blaylock said Tiny Harness had been present and that the Defendant had been helping Mr. Harness move from the apartment building.

Mr. Blaylock testified that the Defendant talked to the victim for a minute and "lured" the victim to the right side of the apartment in between the victim's and Mr. Blaylock's trucks, away from the other people who were present. Mr. Blaylock acknowledged that he could not hear the Defendant and the victim's conversation. Mr. Blaylock said the victim was larger than the Defendant, and Mr. Blaylock thought the Defendant might have been afraid of the victim and might have lured the victim away from others "to do what he done." Mr. Blaylock said he did not hear yelling or screaming when the victim and the Defendant were talking but that there had been a "little bit of conflict" after the victim and the Defendant were between the trucks. Mr. Blaylock said the

Defendant stabbed the victim twice, ran behind a sign toward the road, and drove away in the Defendant's car. Mr. Blaylock stated that he had been able to see the victim and the Defendant "up so far" when they were between the trucks. Mr. Blaylock said he had seen the victim turn away and turn back before the Defendant stabbed the victim. Mr. Blaylock said that when the Defendant came from between the trucks, the Defendant held a five- to six-inch knife in his hand. Mr. Blaylock said the victim had not hit the Defendant during the scuffle, which he said lasted "[j]ust long enough for [the Defendant] to stab [the victim]."

Mr. Blaylock testified that he thought the victim would die from his injuries because the victim could not breathe. Mr. Blaylock said the victim was barely able to speak, was in and out of consciousness, and was bleeding from below the left breast to below the belly button. Mr. Blaylock identified the Defendant in the courtroom as the person who stabbed the victim.

When asked if it was possible that the victim had given the Defendant a photograph of missing tools and a telephone number for the Defendant to call if the Defendant had information about the tools' location, Mr. Blaylock responded, "They was on his porch and they disappeared and he was the last person seen (indiscernible) [sic]."

Mr. Blaylock agreed that some of the people present started to walk toward the victim and the Defendant as "they started getting in a squabble," but Mr. Blaylock denied that he held up his arms to keep others from going toward the victim and the Defendant.

Steve Pride testified that he worked for the owner of C.J.'s Bar doing general labor. Mr. Pride said he knew the victim and the Defendant but was not friends with either. Mr. Pride said the Defendant had lived in the apartment building near the bar for about two or three months. Mr. Pride did not recognize Michael Blaylock's name but stated he might know Mr. Blaylock if he saw him.

Mr. Pride testified that he was working in the parking lot of C.J.'s Bar on May 1, 2018. He said that the Defendant and the Defendant's wife were moving out of the apartment building that day and that others whose names he did not recall were helping with the move.

Mr. Pride testified that while he was working in the parking lot, he noticed a loud, aggressive argument about "half of [a] football field . . . away from the bar" near the apartment building. Mr. Pride said that both the Defendant and the victim were loud. Mr. Pride said he overheard in the argument that "something had been stolen" but did not know

which person made the statement. Mr. Pride said he watched the argument, returned to his work, and looked up to see the Defendant and the victim "knotted up" but that he did not see anyone "throw a punch." Mr. Pride said that the Defendant ran quickly across the parking lot and left in his car. Mr. Pride said the victim fell on the sidewalk near the bar.

Mr. Pride testified that before May 1, 2018, the Defendant had tried to sell "articles." Mr. Pride said that on May 1, he saw the Defendant had a "pretty unique looking knife" with a button that caused the blade to pop out. Mr. Pride said he saw the Defendant with the knife at least twenty to thirty minutes before the Defendant's altercation with the victim.

The victim testified that he had "been in quite a bit of trouble in [his] past" but that he was working and doing well. The victim acknowledged a prior conviction related to stealing a four-wheeler. He said he had received tools from his father and aunt after he completed drug court, probation, and rehabilitation. He said that about two or three months before May 1, 2018, the tools were stolen by "two boys," who sold or traded them to the Defendant. The victim said the tools "meant something to" him. The victim said that his information about what had happened to the tools was based upon "people talking" and people having seen the tools at the apartment building and that he received the information when he was at C.J.'s Bar on May 1. The victim acknowledged that he never reported the theft to the police.

The victim testified that on May 1, 2018, he stopped at C.J.'s Bar and saw the Defendant and three or four others moving the Defendant's belongings into a car. The victim said he went inside the bar, had a beer, went outside, saw his "buddy Michael," and saw the Defendant on the other side of the parking lot. The victim said he went to talk to the Defendant about the tools. The victim said he told the Defendant that he would pay the Defendant what the Defendant had paid for the tools because the victim wanted them returned. The victim said that he and the Defendant talked for a few minutes, that they walked toward the front of the bar near the victim's truck, and that the Defendant kept denying that he had the tools and changing the subject. The victim stated that in his opinion, the Defendant "lured [him] away." The victim denied that he and the Defendant yelled and screamed. The victim said he became aggravated and turned to walk toward the bar. The victim said that the Defendant said something that the victim could not recall, that the victim turned around, and that the victim thought the Defendant hit him "in the bottom of the gut." The victim said he grabbed the Defendant and scuffled with him. The victim said that they fell against the victim's truck, that the victim thought the Defendant hit the victim's chest, and that blood spurted from the victim's chest. The victim said the Defendant ran to the Defendant's car. The victim said that he collapsed, that he "black[ed]

out," and that he thought he would die. He said he was transported by helicopter for medical care.

The victim testified that he did not threaten the Defendant. The victim said he did not have a weapon with him on May 1, 2018, and that he had never owned a gun. The victim said he "never touched" the Defendant before the Defendant stabbed him. He denied that he walked toward his truck to show the Defendant a photograph of the tools and to give the Defendant the victim's telephone number.

The victim testified that his surgeon stated the victim had been stabbed with an eight-inch blade. The victim stated that he talked to the police in the ambulance but that they did not question him again. The victim said he had two or three beers on the day of the incident and that he had not used any drugs.

The victim denied that he had gone to the Defendant's house in Anderson County. He stated that he had not testified at the preliminary hearing that he "went [to the Defendant's house in Anderson County] at least once." The victim denied that he had gone to the apartment building near C.J.'s Bar before May 1, 2018, and spoken to the Defendant's wife about the tools.

The victim testified that he was hospitalized for three days, that he had surgery, that he was in the intensive care unit during his hospitalization, and that the hospital "kicked [him] out because of no insurance." The victim identified a photograph, which was received as an exhibit. He said the exhibit showed his injuries, which he described as a two-inch gash "on the edge of" his heart and another cut under his navel. He said he had a scar down his chest from the emergency surgery he underwent as a result of the stabbing. The victim said he was limited in his abilities at work due to the injuries from the stabbing.

The victim testified that before May 1, 2018, he had not known the Defendant or had any prior conversations or disagreements with him. The victim said that he was age twenty-eight at the time of the stabbing, that he was 6′2″ or 6′3″, and that he had weighed about 285 pounds at the time.

The Defendant testified that he was fifty-one years old and that he weighed 165 pounds. He said his work history included masonry and construction but that he was less able to do them than he had been in the past. He said he had been a subcontractor who employed laborers. He acknowledged that he had two prior theft convictions and that he had completed a drug court program related to an unspecified offense. The Defendant said

he had a congenital chest deformity involving "a large chest muscle and [a] loose lung," which sometimes caused breathing difficulty.

The Defendant testified that he and his wife moved to the apartment building near C.J.'s Bar around Christmas 2017 and that they lived there briefly while they sought other housing. The Defendant said he and his wife were moving out of the apartment on May 1, 2018, with the help of Tad Wilson, Tiny Harness, Michelle Richardson, and Steve Pride. He said that he had a utility knife to cut the rope he used to tie down the belongings they were moving. He said that the knife was in a sheath on his right side and that its blade did not pop out when a button was pressed.

The Defendant testified that he had never talked to the victim before May 1, 2018. The Defendant said that he had seen the victim at the Defendant's cousin's house and that "they" came to the Defendant's previous residence, but that the Defendant had not been home.

The Defendant testified that on May 1, 2018, he was tying down a couch onto a truck and using the utility knife to cut the rope when he saw a truck pull to his left. The Defendant stated that his wife "said that was them." The Defendant stated that the victim and others were talking and that as he continued with what he was doing, he noticed the victim and Mr. Blaylock walking across the parking lot toward him. The Defendant stated that his wife told him that the victim "came by there earlier when she had a flea market . . . [and] had asked about some tools." The Defendant did not know the date on which the victim spoke to his wife. The Defendant said he told his wife to stay by the porch because he did not know what was about to happen.

The Defendant testified that the victim approached him and asked about some tools, which the victim stated he had been told the Defendant had. The Defendant told the victim that he did not have the tools. The Defendant said he told the victim, "[Y]ou've been down [to] the house a couple of times threatening me to my wife and stuff and . . . you've scared her up and everything else, I said I done already told you I don't have my tools, I don't have your tools." The Defendant said that the victim continued to insist others had said the Defendant had the victim's tools and that the Defendant continued to deny he had the tools. The Defendant said that he offered for the victim to take the Defendant's tools, which the Defendant said were the tools the victim was "saying he's seen," but that the victim "wouldn't have it." The Defendant said he told the victim that he would let the victim know if the Defendant saw the victim's tools. The Defendant said he walked toward the victim's truck with the victim because the victim wanted to show the Defendant a photograph of the tool box in which the tools had been stored and to give the Defendant

the victim's telephone number. The Defendant said that the victim asked if the Defendant wanted a beer and that the Defendant declined.

The Defendant testified that the victim went into the bar and that the Defendant saw the butt of a handgun under an armrest inside the victim's truck, which the Defendant said "spooked" him. The Defendant said that he turned toward the sound of a truck without a muffler and that the victim came out of the bar and threw something that hit the Defendant's face and neck. The Defendant thought the object had been a beer. The Defendant said the victim wrapped his arms around the Defendant and stated that he was going to kill the Defendant. The Defendant said the victim "drove [him] into the bed of the truck . . . and knocked the air out of" him. The Defendant said the victim "jerked on" him two or three times, causing a cut on the Defendant's hand, and that the Defendant thought he was going to die. The Defendant said that when the victim "slung [him] around, strung [him] off [his] feet," the Defendant stabbed the victim with his knife because he thought the victim would kill him. The Defendant stated that he stabbed the victim once and that he did not know if the victim might have fallen on the knife. The Defendant denied that he stabbed the victim twice. The Defendant said that he "hit the ground," that the victim fell on top of him, and that the Defendant got up and ran. The Defendant said a man ran toward him and stated, "[W]e going to get you." The Defendant said that he was afraid people would start shooting at him and that he left. The Defendant said that the area where the incident occurred, which was in Roane County, did not have cellular service but that later the same night he reported the incident to Anderson County Sheriff's Deputy Matt Wilson, whom the Defendant knew through the Defendant's having worked as a confidential informant.

The Defendant testified that he did not intend to kill or seriously hurt the victim and that he did not think his actions were reasonably certain to cause the victim's death. The Defendant said he did not have an opportunity to run when the Defendant held him against the truck but that he would have run if he could have. The Defendant said he had just tried to get the victim "off of" him. The Defendant said he had not seen the victim holding a weapon.

The Defendant testified that Deputy Wilson told him to photograph his injuries from the incident, which the Defendant said included a bruise on his face from the thrown object, a cut on his hand, and unspecified injuries on his neck and shoulder from the victim's hitting his neck. The Defendant said his wife photographed the injuries and that the photographs were stored on the cell phone which was taken by the police when he was arrested.

Melissa Duncan, the Defendant's wife, testified that she and the Defendant had moved to an apartment near C.J.'s Bar less than thirty days before the incident in this case and that they were moving out on May 1, 2018. She explained that although the rent had been paid, the landlord stated they had to leave because Ms. Duncan "had to[o] much stuff." She said that she had seen the victim in her former neighborhood and in the C.J.'s Bar parking lot but that she did not otherwise know the victim. She said that, previously, the victim had come to the home where she and the Defendant lived before they moved into the apartment. She said the victim told her that the Defendant "had gotten some tools that had belonged to [the victim] and that [the victim] wanted them back." She said that she had told the victim she did not know anything about the situation but that the victim was adamant about wanting the tools. Ms. Duncan said the victim came to the apartment "just a couple of times." She later said it was "[a]bout three times" and that the Defendant had not been home "most of the time." She said that on one occasion, the victim "said he was going to kill him." She said the victim had "wanted to know where he was at" and had been "adamant about getting those tools back." She said that the victim never explained why the Defendant might have the tools and that she did not understand "why it was such a big deal." She said the victim drove through C.J.'s parking lot a couple of times and yelled at her, stating that he was going to kill the Defendant and asking where the Defendant was.

Ms. Duncan testified that she saw the victim in the bar's parking lot about 4:00 p.m. on May 1, 2018, as she, the Defendant, and their friends were loading items they were moving. She said that the victim walked over to talk to her and Michelle Richardson and that she asked, "[Y]ou ain't here about them tools again are you?" She said he responded that he was and asked where the Defendant was. She said Ms. Richardson pointed to the Defendant's location inside a car. She said that the victim walked over to talk to the Defendant and that she continued talking to others present. Ms. Duncan said the Defendant told her that the victim asked the Defendant to go to C.J.'s Bar for a beer and that the Defendant said he had declined. However, she said the Defendant and the victim walked toward the bar.

Ms. Duncan testified that she kept glancing over to the area outside the bar, where the victim and the Defendant stood arguing. She saw the men "shuffling together," the Defendant fall backwards, and the Defendant stand up again. She said the victim remained standing. She said she saw the victim grab the Defendant, the Defendant try unsuccessfully to free himself, and the men scuffling in a "bear hug." She said the Defendant "ran off." She said the Defendant stated, "I stabbed him," and "I don't know what to do." She said she had not seen the stabbing but assumed it occurred when the men were in the bear hug. She said that after the men were no longer in the bear hug, the victim leaned against a wall

then fell down. She said the victim said, "[H]e stuck me like a pig." She said the Defendant drove away. She said she knew the Defendant "didn't mean [the victim] any harm." She said she heard Mr. Harness, Ms. Richardson, and Mr. Blaylock "talking about them having a gun in the truck" before the fight. She thought that as the Defendant left the scene, he said that Mr. Wilson had stated that the Defendant had a gun.

Ms. Duncan testified that she did not see the victim go inside the bar or inside any vehicles. She said that she did not see the victim throw anything at the Defendant and that the Defendant did not tell her the victim had thrown anything at the Defendant or that the Defendant had been hit with a beer. She said she had not seen either man "throwing any punches."

Ms. Duncan testified that the Defendant had a knife "on his side," which he used to cut the rope they used to tie down the furniture they were moving. She did not think he had a utility knife. She said the knife he had that day was "his knife" that he had "all the time" and was not a folding knife. She said he kept it in a "black thing." She said that she had never seen him with a switchblade knife and that he had not tried to sell a switchblade knife in the parking lot on the day of the incident.

Ms. Duncan testified that after the incident, the Defendant had bruises on his sides under his arms near his ribcage and on his neck. She was unaware of the Defendant's ever showing the bruises to the police and said he had been scared. She said that she wanted to photograph the bruises but that after a long discussion, the Defendant would not let her because he said it would not matter. She said the Defendant might have photographed the bruises and sent the photographs to her.

At the conclusion of the evidence, one count of the indictment charging the Defendant with aggravated assault with a deadly weapon was dismissed with the consent of the State. The jury found the Defendant guilty of attempted second degree murder and aggravated assault causing serious bodily injury.

After a sentencing hearing, the trial court sentenced the Defendant to sixteen years for attempted second degree murder and to eight years for aggravated assault, with the sentences to be served concurrently with each other and consecutively to an Anderson County conviction. This appeal followed.

I

Prosecutorial Misconduct

The Defendant contends that he was deprived of due process due to prosecutorial misconduct during voir dire, opening statement, and closing argument. The State counters that the Defendant waived any objection to the State's comments by failing to object contemporaneously and that, in any event, the Defendant has not shown that he is entitled to relief as a matter of plain error.

As the State correctly notes, the defense did not make a contemporaneous objection to the instances of alleged prosecutorial misconduct about which it now complains. Generally, failure to make a contemporaneous objection to alleged prosecutorial misconduct results in waiver of the issue. *See* Tenn. R. Crim. P. 36(a) ("[R]elief may not be granted in contravention of the trier of fact."); *e.g.*, *State v. Banks*, 271 S.W.3d 90, 132 (Tenn. 2008) (stating that, ordinarily, the complaining party must object contemporaneously to an allegedly improper closing argument, although a court may grant relief as a matter of plain error in the case of an "exceptionally flagrant" argument); *State v. Fusco*, 404 S.W.3d 504, 519 (Tenn. Crim. App. 2012) (stating that a prosecutorial misconduct issue was waived due to the absence of a contemporaneous objection and that the appellate court was limited to consideration of plain error); *State v. Green*, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997) (stating that an issue of prosecutorial misconduct was waived by the defendant's failure to make a contemporaneous objection). The requirement that an objection to closing argument be contemporaneous is "to provide the trial court with an opportunity to assess the State's argument and to caution the prosecution and issue a curative instruction to the jury if necessary." *State v. Jordan*, 325 S.W.3d 1, 57-58 (Tenn. 2010). The record reflects that despite the failure to object at the time the remarks were made, the Defendant belatedly raised the issues in the motion for a new trial.

In limited circumstances, this court has said that an issue related to alleged prosecutorial misconduct is not waived if the defendant, though not objecting contemporaneously, objected shortly after the remark was made and raised the issue in the motion for a new trial. *See State v. Brandon Lee Clymer*, No. M2016-01124-CCA-R3-CD, 2017 WL 5197292, at *13 (Tenn. Crim. App. Nov. 9, 2017), *perm. app. denied* (Tenn. Mar. 14, 2018); *State v. Deandre Rucker*, No. M2014-00742-CCA-R3-CD, 2015 WL 4126756, at *5 (Tenn. Crim. App. July 9, 2015) (holding that the defendant did not waive appellate consideration of a prosecutorial misconduct issue, although his objection was made shortly after the specific argument, at the close of the State's rebuttal argument, and he had raised the issue in the motion for a new trial); *see also* Tennessee Rule of Appellate

Procedure 3(e) (issues related to "misconduct of . . . counsel" must be "specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."). In the present case, however, the issue was not raised until the motion for a new trial, thereby depriving the trial court of the opportunity to admonish the prosecution to correct its course and to give the jury an appropriate curative instruction. *See Jordan*, 325 S.W.3d at 57-58.

Admittedly, the appellate decisions of our supreme court and this court do not definitively answer the question of whether an objection to alleged prosecutorial misconduct is waived if it not the subject of a contemporaneous objection. In *State v. Hawkins*, 519 S.W.3d 1, 48 (Tenn. 2017), the supreme court conducted plenary review of allegations of prosecutorial misconduct in closing argument, despite the defendant's having first raised the issues in the motion for a new trial. The court conducted plain error review of additional allegations of prosecutorial misconduct which were raised for the first time on appeal. *See id.* at 49. Although the court stated its differing standards, based upon whether the issues had been raised in the motion for a new trial, it did so without discussing previous cases in which it had stressed the importance of a contemporaneous objection. *See id.* at 48-49. For example, in *State v. Thomas*, 158 S.W.3d 361, 413 (Tenn. 2005), the supreme court said, "[W]here a prosecuting attorney makes allegedly objectionable remarks during closing argument, but no contemporaneous objection is made, the complaining defendant is not entitled to relief on appeal unless the remarks constitute 'plain error.'" *See also Jordan*, 325 S.W.3d at 57 ("[W]e stress that it is incumbent upon defense counsel to object contemporaneously whenever it deems the prosecution to be making improper argument."); *Banks*, 271 S.W.3d at 132. *Compare State v. Zackary James Earl Ponder*, No. M2018-00998-CCA-R3-CD, 2019 WL 3944008, at *11-12 (Tenn. Crim. App. Aug. 21, 2019) (relying upon *Hawkins* in conducting plenary, rather than plain error, review to claims of prosecutorial misconduct, notwithstanding the defendant's failure to object contemporaneously during closing argument), *perm. app. denied* (Tenn. Dec. 5, 2019) *with State v. Tyshon Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *29 (Tenn. Crim. App. Apr. 8, 2020) (acknowledging but distinguishing *Hawkins* and *Zackary James Earl Ponder* and applying plain error review standards to prosecutorial misconduct allegations which were not the subject of contemporaneous objections but were raised in the motion for a new trial), *perm. app. granted* (Tenn. Sept. 16, 2020).

We anticipate that the law regarding when an objection must be made or will be conclusively treated as waived will be more precisely defined in the future, as the issue is presently before the Tennessee Supreme Court. *See State v. Tyler Ward Enix*, No. E2020-00231-CCA-R3-CD, 2021 WL 2138928, at *14-15 (Tenn. Crim. App. May 26, 2021) (declining to follow *Hawkins* and *Zackary James Earl Ponder* on the basis that "they generally involved the prosecutor's use of information in closing argument that was

objected to pretrial, which was determined to have sufficiently preserved the issue for appellate review"), *perm. app. granted* (Tenn. Oct. 13, 2021) (order) ("[T]he application is granted as to whether plenary or plain error review should apply to a claim of prosecutorial misconduct during closing argument when a contemporaneous objection is not lodged at the time the misconduct allegedly occurred but the claim is raised in the motion for a new trial."). In the interim, we are unprepared to conclude that *Hawkins*, with its absence of any discussion of an intent to do so, stands for a wholesale departure from the well-established principles of prior supreme court decisions such as *Thomas*, *Jordan*, and *Banks* emphasizing the importance of a contemporaneous objection and imposing waiver of plenary review in the absence of such an objection.

We conclude that the Defendant in the present case waived consideration on the merits of the prosecutorial misconduct issues. *See* T.R.A.P. 36(a); *Fusco*, 404 S.W.3d at 519; *Green*, 947 S.W.2d at 188. Thus, we will consider whether plain error exists.

Five factors are relevant

> when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'"

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); *see also State v. Minor*, 546 S.W.3d 59, 70 (Tenn. 2018). All five factors must exist in order for plain error to be recognized. *Smith*, 24 S.W.3d at 283. "[C]omplete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id*. In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the trial." *Id.*; *Adkisson*, 899 S.W.2d at 642.

Because the claims to be reviewed for plain error involve alleged prosecutorial misconduct, consideration of the standard for the analysis of prosecutorial misconduct claims is relevant. Although an exhaustive list of the bounds of prosecutorial impropriety cannot be defined, five general areas of prosecutorial misconduct have been recognized:

(1) intentionally misstating the evidence or misleading the jury as to the inferences it may draw;

(2) expressing personal beliefs or opinions as to the truth or falsity of any testimony or as to the defendant's guilt;

(3) inflaming or attempting to inflame the passions or prejudices of the jury;

(4) injecting broader issues other than guilt or innocence of the defendant; and

(5) arguing or referring to facts outside the record unless such facts are matter of common public knowledge.

State v. Jennifer Lopez, No. M2014-01701-CCA-R3-CD, 2015 WL 6083216, at *16 (Tenn. Crim. App. Oct. 16, 2015), *perm. app. denied* (Tenn. Mar. 24, 2016) (citing *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003)).

If improper argument occurs, a new trial is required only if the argument affected the outcome of the trial to a defendant's prejudice. *State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001). In determining whether prosecutorial misconduct affected the jury verdict to prejudice a defendant, this court has stated a court should consider the conduct in light and in context of the facts and circumstances of the case, any curative measures taken by the trial court and the prosecutor, the prosecutor's intent in making the comment, the cumulative effect of the improper comment and any additional errors, the strength or weakness of the case, whether the prosecutor's comments were lengthy and repeated or isolated, and whether the comments were in response to defense counsel's closing argument. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); *see Goltz*, 111 S.W.3d at 5-6.

A. Voir Dire

The Defendant argues, first, that he was denied due process by the prosecutor's misstatement of the burden of proof during voir dire. He complains that the following statement unfairly characterized the burden of proof as being less than beyond a reasonable doubt:

> When you sit here as a juror, you're ultimately just doing – we can drum it up and try to make it sound kind of far-fetched and everything else, you're deciding what's right and what's wrong. That's all. That's all you got to do at the end of the day, decide what's right and what's wrong.

The record reflects that before the prosecutor's voir dire began, the trial court advised the prospective jurors that the State's burden of proof was beyond a reasonable doubt, which the court defined in accord with the pattern jury instruction. *See* T.P.I.—Crim. 2.03 (Reasonable doubt). Before the prosecutor made the statement quoted above, he told the jury that the Defendant was presumed innocent throughout the trial. After the statement, he asked if the jurors agreed with the saying, "[T]here's no such thing as a fair fight," and asked questions related to facts which might affect whether a self-defense claim was reasonable. After the close of proof, the court instructed the jury in accord with the pattern jury instructions regarding the statements and arguments of counsel not being evidence, the presumption of innocence, the burden of proof, and the definition of reasonable doubt.

The Defendant argues that, because the prosecutor was "a quasi-judicial officer," his words carried great weight with the jury and that the prosecutor urged the jury to utilize a lower burden of proof than required by deciding the case based upon what was right and wrong, rather than proof beyond a reasonable doubt. The jury was properly instructed by the trial court in accord with the relevant pattern jury instructions related to the presumption of innocence, the burden of proof, and the definition of reasonable doubt. Likewise, the jury was instructed that the statements and arguments of counsel were not evidence. The jury is presumed to have followed the court's instructions. *See State v. Larkin*, 443 S.W.3d 751, 806 (Tenn. Crim. App. 2013). Viewing the comments in the overall context of voir dire and in connection with the prefatory and final instructions the trial court gave the jury, we conclude that the Defendant has not shown that a clear and unequivocal rule of law was breached, that a substantial right was adversely affected, and that consideration of the alleged error is required to do substantial justice. *See Smith*, 24 S.W.3d at 282. Plain error relief is not appropriate. *See id.*

B. Opening Statement

The Defendant argues that he was prejudiced by the prosecutor's references to "bad act" evidence suggesting that the Defendant had stolen tools from the victim or had bought the stolen tools and that the Defendant was being evicted from his apartment. The Defendant also complains of the prosecutor's having elicited evidence regarding these matters. The Defendant characterizes these actions as violating Tennessee Rule of

Evidence 404(b). To the extent that the Defendant's complaint relates to the alleged erroneous admission of evidence, we will consider it separately as a Rule 404(b) issue in Section II below. However, to the extent that the Defendant complains of the prosecutor's references to these matters during opening statement, we will consider them as allegations of prosecutorial misconduct and review them for plain error.

Opening statements "are intended merely to inform the trial judge and jury, in a general way, of the nature of the case and to outline, generally, the facts each party intended to prove." *State v. Reid*, 164 S.W.3d 286, 343 (Tenn. 2005). Opening statements are not evidence. *State v. Thompson*, 43 S.W.3d 516, 523 (Tenn. Crim. App. 2000). Trial courts should allow the parties to present "a summary of the facts supportive of the respective theories of the case, only so long as those 'facts are deemed likely to be supported by admissible evidence.'" *State v. Sexton*, 368 S.W.3d 371, 415 (Tenn. 2012) (quoting *Stanfield v. Neblett*, 339 S.W.3d 22, 41-42 (Tenn. Ct. App. 2010)). Therefore, opening statements should "be predicated on evidence introduced during the trial" and should never refer "to facts and circumstances which are not admissible in evidence." *Sexton*, 368 S.W.3d at 415.

The Defendant has identified four allegedly improper statements made by the prosecutor during the State's opening statement:

1. The victim "came to believe that the defendant had something to do with the theft of a tool box that belonged to" the victim.

2. The victim is "a working man, he's like many people in Morgan County he works check to check and he had had about $250.00 worth of tools gone and it hurt, and he was unhappy."

3. "Now, as it turns out [the Defendant] had moved in there only about 30 some days prior to [the date of the incident], and was having to move out," suggesting that the Defendant was being evicted from the apartment from which he was moving on the date of the incident.

4. Referring to the possible self-defense theory that the Defendant might raise during the proof, "It looked like it was going to be another argument between [the Defendant] and [the victim] who thought [the Defendant] had something to do with stealing [the victim's] tools."

Viewed through the lens of alleged prosecutorial misconduct, the prosecutor's assertions during the opening statement are consistent with the evidence later introduced during the trial. The Defendant argues that the evidence suggested that he had stolen the victim's tools or had bought stolen tools and that the Defendant had been evicted after a short tenancy, all of which was impermissible prejudicial propensity evidence pointing to his guilt of the charged crimes, suggested a lack of credibility, and were barred by Rule 404(b). We note, first, that the victim testified he had received information that the Defendant bought the tools from the thieves and that the victim offered to pay the Defendant for the tools, not that the Defendant stole the tools. In any event, the import of the evidence about the victim's belief that the Defendant possessed the victim's tools was to explain the context within which the incident arose. Further, the evidence regarding the circumstances of the Defendant and Ms. Duncan's vacating the apartment after about one month was of limited significance, although it provided background evidence about why the Defendant was moving his personal belongings when he was approached by the victim. The circumstances of the Defendant and Ms. Duncan's vacating the apartment were explained by the Defendant's testimony that they had moved there temporarily while looking for other housing and by Ms. Duncan's testimony that the landlord did not want them to continue their tenancy due to the amount of personal property she had. No Rule 404(b) objection was raised to this evidence when it was introduced at the trial, despite Rule 404(b)'s provision for a hearing "upon request" regarding the admissibility of contested evidence. *See* Tenn. R. Evid. 404(b). In the absence of an objection, evidence is admissible and is properly considered by the jury and given the appropriate weight the jury considers appropriate. *See Smith*, 24 S.W.3d at 280. The prosecutor was permitted in the opening statement to present the State's theory of the case, to the extent that it was supported by admissible evidence. *See Sexton*, 368 S.W.3d at 415. As we have stated, the trial court properly advised the jury that the statements of counsel were not evidence, and the jury is presumed to have followed the court's instructions. *See Larkin*, 443 S.W.3d at 806; *Thompson*, 43 S.W.3d at 523. The Defendant has not shown that a clear and unequivocal rule of law was breached, that a substantial right was adversely affected, and that consideration of the alleged error is required to do substantial justice relative to the State's opening statement. *See Smith*, 24 S.W.3d at 282. Plain error relief is not appropriate. *See id*.

C. Closing Argument

The Defendant argues that the State's closing argument was improper for two reasons. First, he argues that the prosecutor improperly referred to the victim's having gone "to confront [the Defendant] about the tools that [the victim] heard were taken and

sold to [the Defendant]." The Defendant characterizes this argument as improper because it referenced "extremely prejudicial prior bad acts." Second, he complains that the prosecutor "inflamed the jurors' emotions" by arguing that although the police investigation had not done justice for the victim, the jury could "do . . . justice" for him by finding the Defendant guilty of the charged offenses.

Closing argument is "a valuable privilege that should not be unduly restricted." *Terry v. State*, 46 S.W.3d 147, 156 (Tenn. 2001); *see State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001); *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998). However, closing argument "must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *Goltz*, 111 S.W.3d at 5; *Jordan*, 325 S.W.3d at 64. A trial court has significant discretion in controlling closing argument, and its decisions relative to the contents of argument may only be reversed upon an abuse of discretion. *Terry*, 46 S.W.3d at 156; *Cauthern*, 967 S.W.2d at 737; *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975).

1. <u>Reference to the Defendant's Possession of the Victim's Tools</u>

Evidence of the victim's belief that the Defendant had purchased the victim's stolen tools was admitted at the trial and was relevant to show the context in which the incident arose and to the Defendant's claim that he acted in self-defense when the victim confronted him about the victim's belief that the Defendant had the victim's tools. A prosecutor is permitted to argue based upon the evidence introduced at the trial. *See Goltz*, 111 S.W.3d at 6. The Defendant has not shown that a clear and unequivocal rule of law was breached, that a substantial right was adversely affected, and that consideration of the alleged error is required to do substantial justice relative to this portion of the State's closing argument. *See Smith*, 24 S.W.3d at 282. Plain error relief is not appropriate. *See id*.

2. <u>Asking the Jury to Do Justice by Returning Guilty Verdicts</u>

The Defendant's remaining prosecutorial misconduct complaint relates to the State's rebuttal closing argument, in which the prosecutor said:

> [Defense counsel] has talked about the investigation. The investigation in this case did not do [the victim] justice but you all can do [the victim] justice. You all can go back there, make your decision and find the defendant guilty of Attempted Second Degree Murder, guilty of Aggravated Assault and do justice for [the victim] with that verdict.

The record reflects that during the Defendant's closing, defense counsel had suggested that reasonable doubt existed based upon the lack of police investigation of whether the victim had a gun in his truck and the victim's failure to report the alleged tool theft to the police in order for the police to investigate the theft.

In the past, this court and our supreme court have admonished prosecutors to refrain from arguments which appeal to the emotions and sympathies of a jury, such as a call to "do justice." *See State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994) (holding that although the argument was improper, it "was not so inflammatory that it more probably than not prejudiced the jury's verdict"); *State v. Bruce Marvin Vann*, No. W2014-02119-CCA-R3-CD, 2015 WL 5096355, at *8 (Tenn. Crim. App. Aug. 28, 2015) (disapproving of a prosecutor's arguments that the jury should give justice to the victim and to consider the burden the victim would carry for the rest of her life but concluding that the defendant was not prejudiced); *State v. Ladonte Montez Smith*, No. M1997-00087-CCA-R3-CD, 1999 WL 1210813, at *13 (Tenn. Crim. App. Dec. 17, 1999) (characterizing the State's argument that the jury should not decide the case based upon sympathy for the victim's parents but that it could do justice by returning a guilty verdict as "ill-advised" but declining to conclude it was improper), *perm. app. denied* (Tenn. Oct. 9, 2000); *State v. Larry Trent*, No. 137, 1991 WL 96597, at *4 (Tenn. Crim. App. June 7, 1991) (holding that prosecutor's argument for the jury to do justice and end a feud between families was improper but concluding that no showing had been made that the argument more probably than not prejudiced the verdict). In the present case, the prosecutor's comment was brief and was responsive to the Defendant's argument. *See Judge*, 539 S.W.2d at 344.

Upon review, we conclude that the Defendant has not shown the breach of a clear and unequivocal rule of law, that a substantial right was adversely affected, and that consideration of the alleged error is required to do substantial justice relative to this portion of the State's closing argument. *See Smith*, 24 S.W.3d at 282. Plain error relief is not appropriate. *See id*.

II

Failure to Conduct a Hearing Pursuant to Tennessee Rule of Evidence 404(b)

The Defendant contends that he is entitled to a new trial based upon the State's repeated violations of Tennessee Rule of Evidence 404(b). He acknowledges that he failed to object at the trial to these alleged violations of Rule 404(b), and he asks this court to grant him a new trial as a matter of plain error. As we have stated, we considered the aspects of this issue which pertain to statements or arguments of the prosecutor as

allegations of prosecutorial misconduct in Section I. We now address the remaining claims arising from evidence admitted during the trial.

Tennessee Rule of Evidence 404(b) prohibits the admission of evidence related to other crimes, wrongs, or acts offered to show a character trait in order to establish that a defendant acted in conformity with the trait. Tenn. R. Evid. 404(b). Such evidence, though, "may . . . be admissible for other purposes," including, but not limited to, establishing identity, motive, common scheme or plan, intent, or absence of mistake. *Id*.; *see State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Before a trial court determines the admissibility of such evidence,

> (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.

Tenn. R. Evid. 404(b)(1)-(4). The standard of review is for an abuse of discretion, provided a trial court substantially complied with the procedural requirements. *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *see State v. Electroplating, Inc.*, 990 S.W.2d 211 (Tenn. Crim. App. 1998).

The Defendant argues that the jury was "poisoned" by the evidence that the Defendant stole or bought stolen tools and that the Defendant had been evicted from his apartment. He argues that this was prior bad act evidence which suggested his propensity to commit the charged crimes and which undermined his credibility. While acknowledging his failure to object at the trial, he argues that he is entitled to plain error relief based upon the trial court's failure to, sua sponte, conduct a hearing pursuant to Rule 404(b) regarding the admissibility of the evidence. Rule 404(b) provides for a hearing "upon request." Tenn. R. Evid. 404(b)(1).

> A trial court . . . generally has no duty to exclude evidence or to provide a limiting instruction to the jury in the absence of a timely objection. A party

> may consent to the admissibility of evidence which is otherwise prohibited by the Rules, so long as the proceedings are not rendered so fundamentally unfair as to violate due process of law.

Smith, 24 S.W.3d at 279, 283-83.

Given the unequivocal language of Rule 404(b) providing for a hearing "upon request," the fact that the trial court did not, on its own accord, conduct a hearing pursuant to Rule 404(b) and exclude the evidence was not a breach of a clear and unequivocal rule of law, no substantial right was adversely affected, and consideration of the alleged error is not required to do substantial justice. *See Smith*, 24 S.W.3d at 282. Plain error relief is not appropriate. *See id*.

III

Jury Instructions

Next, the Defendant contends that the trial court erred in its jury instructions (1) regarding the mens rea for attempted second degree murder, (2) by giving the Defendant's requested special instruction regarding attempted voluntary manslaughter, and (3) regarding the sequential consideration of lesser-included offenses. The first issue was neither raised contemporaneously nor in the motion for a new trial. Our review is limited to consideration of whether plain error exists. *See* T.R.A.P. 3(e) (stating that "[N]o issue presented for review shall be predicated upon error in . . . jury instructions granted or refused . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."). The second issue results from a special instruction given at the Defendant's request, but it was raised as error in the motion for a new trial. We will consider it on its merits. *See id.* The third issue was raised in the motion for a new trial, and we will consider it on its merits. *See id.*; *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005) ("An erroneous or inaccurate jury charge, as opposed to an incomplete jury charge, may be raised for the first time in a motion for a new trial and is not waived by the failure to make a contemporaneous objection.").

A criminal defendant has "a right to a correct and complete charge of the law." *Hanson*, 279 S.W.3d at 280 (citing *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000)). As a result, a trial court has a duty "to give proper jury instructions as to the law governing the issues raised by the nature of the proceeding and the evidence introduced at trial." *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013) (citing *Dorantes*, 331 S.W.3d at 390); *see State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975). A jury instruction related to general defenses is not required to be submitted to the jury "unless it is fairly raised by the proof." T.C.A. § 39-11-203(c) (2018). An erroneous jury instruction, though, may deprive the defendant of the constitutional right to a jury trial. *See Garrison*, 40 S.W.3d at 433-34.

A. Mens Rea for Attempted Second Degree Murder

The Defendant argues that the trial court erred in its attempted second degree murder instruction because it used an incorrect definition of the requisite "knowing" mens rea. The court's instruction provided, in pertinent part:

> Knowingly means that a person acts with an awareness that his conduct is reasonably certain to cause the death of the alleged victim. If you find beyond a reasonable doubt that the defendant knowingly engaged in multiple incidents of domestic abuse, assault, or the infliction of bodily injury against the alleged victim, *you may infer that the defendant was aware that the cumulative effect of the conduct was reasonable* [sic] *certain to result in the death of the victim*, regardless of whether any single incident would have resulted in the victim[']s death. However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits you, the jury, to draw. Also, the inference may be rebutted by other evidence and circumstances. It is for the jury to determine, after a consideration of all the evidence, whether to make the inference which the law permits, the correctness of such inference, and what weight is to be given to such inference – evidence.
>
> The requirement of knowingly is also established if it is shown that the defendant acted intentionally.
>
> Intentionally means that the person acts intentionally when it is the person's conscious objective to cause the death of the alleged victim.

(Emphasis added to the challenged portion of the instruction.)

The trial court instructed the jury in accord with the pattern instruction for second degree murder, which includes the language we have quoted. *See* T.P.I. – Crim. 7.05(a); *see also State v. Page*, 81 S.W.3d 781, 791 (Tenn. 2002) (appendix). Nevertheless, the Defendant argues that the instruction given erroneously permitted the jury to convict the Defendant based upon the nature, rather than the result, of his conduct. He argues that because second degree murder, and thereby attempted second degree murder, is a result-of-conduct crime, the instruction given lowered the State's burden of proof. *See Page*, 81 S.W.3d at 788 (holding that second degree murder is a result-of-conduct offense and that "a jury instruction that allows a jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the state's burden of proof"); *State v. Henry Mitchell Dixon*, No. E2002-

00731-CCA-R3-CD, 2003 WL 22432415, at *13-14 (Tenn. Crim. App. Oct. 22, 2003).

The fault with the Defendant's argument is that the instruction given, including the challenged portion which we have italicized above, was not a nature-of-conduct instruction as to the knowing mens rea. Rather, it was a result-of-conduct instruction. The jury was correctly charged that a person who acted with awareness that the person's conduct was reasonably certain to cause death of an alleged victim was guilty of second degree murder. The jury was also correctly charged that if it found beyond a reasonable doubt that the Defendant in multiple incidents of various forms of enumerated conduct, it could infer that he was aware that the cumulative effect of his conduct was reasonably certain to cause the death of the alleged victim. Both of these portions of the instruction focus on the result, not the nature, of the Defendant's conduct. The Defendant argues that the jury instruction in the present case mirrors the erroneous instructions in *Page* and *Henry Mitchell Dixon*, which included both the result-of-conduct and nature-of-conduct language regarding the knowing mens rea and which did not include the inference language in the instruction given in the present case. We believe *Page* and *Henry Mitchell Dixon* are distinguishable on these bases.

The Defendant has not shown that a clear and unequivocal rule of law has been breached, that a substantial right was adversely affected, and that consideration of the alleged error is required to do substantial justice. *See Smith*, 24 S.W.3d at 282. Plain error relief is not appropriate. *See id*.

B. Special Instruction Given at the Defendant's Request

The Defendant argues that plain error exists because the trial court gave the special instruction the Defendant requested. The instruction reads as follows:

> The distinction between attempted voluntary manslaughter and attempted second degree murder is that voluntary manslaughter requires that the attempted killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. Therefore, should you unanimously find beyond a reasonable doubt that the killing, attempted killing, was intentional or knowing you must then consider whether the attempted killing resulted from a state of passion produced by adequate provocation sufficient to lead to [sic] a reasonable person to act in an irrational manner.
>
> If you unanimously find or have a reasonable doubt whether the attempted killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner, then your verdict should be guilty of attempted voluntary

> manslaughter. If you unanimously have a reasonable doubt that the attempted killing was intentional, or knowing, then your verdict should be not guilty as to both attempted second degree murder and attempted voluntary manslaughter and you should proceed to deliberate to the lesser included offenses.

The jury instruction advised the jurors that if they had a reasonable doubt about the Defendant's guilt of attempted second degree murder and attempted voluntary manslaughter, it should consider the lesser included offenses. The jury convicted the Defendant of the greater, charged offense – attempted second degree murder. Thus, the jury never reached the point in its deliberations at which this instruction would have become operative. As a result, the instruction had no bearing on the jury's verdict, and the Defendant is not entitled to relief on this basis. *See State v. McKinney*, 605 S.W.2d 842, 847 (Tenn. Crim. App. 1980) (holding that the failure to instruct on a lesser included offense was not error because "the evidence clearly made out the greater offense" of which the defendant was convicted); *see also State v. Williams*, 977 S.W.2d 101, 105-06 (Tenn. 1998) (holding that a defendant convicted of first degree murder was not entitled to relief for the trial court's failure to instruct on voluntary manslaughter as a lesser-included offense).

C. Instruction on Sequential Consideration of Lesser-Included Offenses

The Defendant argues that the trial court erred in instructing the jury that it must acquit him of attempted second degree murder before considering the lesser-included offense of attempted voluntary manslaughter. He argues, "Because provocation and passion are exculpatory components that decrease a conviction from murder to voluntary manslaughter, the jury should have been instructed to consider the exculpatory components in tandem with their consideration of second-degree murder." As noted previously, the trial court utilized the pattern jury instruction for second degree murder. The pattern instruction for second degree murder states, in pertinent part, and the jury in the present case was advised, "The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation from the alleged victim sufficient to lead a reasonable person to act in an irrational manner." T.P.I. – Crim. 7.05(a). The pattern instruction resolves the Defendant's concern by advising the jury that in the second degree murder charge, a killing which resulted from a state of passion produced by adequate provocation from the victim would be voluntary manslaughter. *See State v. William Langston*, No. W2015-02359-CCA-R3-CD, 2017 WL 1968827, at *13-16 (Tenn. Crim. App. May 12, 2017), *perm. app. denied* (Tenn. Sept. 22, 2017); *State v. Chris Jones*, No. W2009-01698-CCA-R3-CD, 2011 WL 856375, at *16 (Tenn. Crim. App. Mar. 9, 2011), *perm. app. denied* (Tenn. Aug. 25, 2011). The Defendant is not entitled to relief on this basis.

IV

Cumulative Trial Error

The Defendant contends that he is entitled to a new trial due to the cumulative effect of trial errors. The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (internal citations omitted); *see Jordan*, 325 S.W.3d at 79 ("'[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.'") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)). The Defendant has not demonstrated that multiple errors occurred during the trial. Without multiple instances of trial error to accumulate, the cumulative error doctrine does not apply. Thus, cumulative error relief is not appropriate.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE