

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1999 SESSION

**FILED**

February 17, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

JAMES P. STOUT,

Appellant.

C.C.A. NO. 02001-9812-CR-00378

SHELBY COUNTY

HON. JOSEPH B. DAILEY,  
JUDGE

(Capital felony murder; especially  
aggravated robbery; especially  
aggravated kidnapping)

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**JOHN H. PEAY,**

Judge

## OPINION

Defendant was indicted jointly with Derrick Carmichael, Robert Terrell and Quentin Jordan for the first-degree felony murder (robbery), premeditated murder, especially aggravated kidnapping, and especially aggravated robbery of Amber Hunter. Defendant was tried separately. The jury convicted him of felony murder committed in the perpetration of a robbery, especially aggravated kidnapping, and especially aggravated robbery. The jury sentenced defendant to death for the murder, relying on three aggravators: prior violent felony; the murder was committed to prevent the defendant's arrest or prosecution for the crime; and he knowingly committed it while he had a substantial role in committing the robbery or kidnapping. The trial court sentenced defendant to forty years each on the robbery and kidnapping convictions, to run consecutively to each other and to the death sentence. In this appeal as of right, the defendant raises the following issues:

- I. Whether the trial court committed error under Batson v. Kentucky when it forced defendant to accept a juror by ruling that his peremptory strike was racially motivated;
- II. Whether the evidence is insufficient to support his convictions because the accomplice testimony is not sufficiently corroborated;
- III. Whether the trial court violated his constitutional rights to present a defense;
- IV. Whether the trial court erred in refusing to review a statement to determine if it was exculpatory;
- V. Whether the trial court erred in ruling that defendant's prior conviction for especially aggravated robbery would be admissible to impeach him if he testified;
- VI. Whether the trial court erred in ruling that evidence of defendant's prior conviction for especially aggravated robbery could be used as substantive evidence if he called certain witnesses to testify;
- VII. Whether the trial court erred by admitting certain hearsay statements;
- VIII. Whether the trial court erred by allowing a witness to testify about defendant's threats against her;
- IX. Whether the trial court erred during the penalty phase by allowing the State to cross-examine one of defendant's witnesses about his (defendant's) prior convictions; by failing

to instruct the jury that this evidence was for impeachment purposes only; and by allowing the State during closing argument to refer to the underlying bad acts as substantive evidence;

X. Whether the use of a conviction for a crime committed after the instant crime as an aggravator constitutes due process and ex post facto violations;

XI. Whether the trial court erroneously excluded relevant evidence during the penalty phase;

XII. Whether the trial court erred in allowing testimony about the facts underlying defendant's prior violent felony conviction during the penalty phase;

XIII. Whether Tennessee's death penalty statutes are unconstitutional;

XIV. Whether cumulative errors during the penalty phase require a reversal of the death sentence; and

XV. Whether the death sentence is supported by sufficient evidence and was not imposed arbitrarily or disproportionately.

Upon our review of the record, we affirm defendant's convictions and sentences.

## **FACTS**

### **GUILT PHASE**

On the night of November 8, 1995, defendant, Quentin Jordan, and two other men left Tonya Woodall's apartment together. According to defendant's statement to the police, the two other men were Vassy Gandy and Rico Bowers, members of the Gangster Disciples gang. When he initially spoke with the police, defendant admitted that he was also a member of the gang. According to defendant's statement, the four men drove around in a white Mustang, with Gandy driving and Bowers in the front passenger seat. Bowers was armed with a pistol. They saw the victim, Amber Hunter, in a red car and Bowers told Gandy to follow her. Gandy did so, and they pulled up beside her when she parked in front of her house. According to defendant's statement, Bowers and Jordan got out of the Mustang, and Bowers grabbed the victim by her hair and put her in the back seat of her car. Jordan took the gun from Bowers and got in the back seat with the victim. Bowers got in the driver's seat of the victim's car and drove off; the Mustang followed. Bowers drove to some railroad tracks and stopped. Jordan got out of the car and pulled the victim out. Bowers talked to her and hugged her. Bowers

then put the gun to Hunter's head, backed away about five feet, and fired one shot. Bowers and Jordan got back in the victim's car, drove it to a dead end street, searched it and wiped it down. Bowers and Jordan then returned to the Mustang and the four men left and went back to Woodall's apartment. There, according to defendant's statement, Bowers and Gandy bragged about what had happened. In his statement, defendant denied knowing that any robbery or carjacking or murder was going to take place.

The remaining proof at trial contrasted sharply with the defendant's statement. Jordan testified that the other two men with him and defendant were Derrick Carmichael and Robert Terrell, and that Bowers and Gandy had not been at the apartment when the four men left. Jordan described the car they left in as a blue Corsica. When they left, he testified, Terrell was driving, defendant was in the front passenger seat, he (Jordan) was behind the driver and Carmichael was next to him. After they pulled in behind the victim's car at a red light, he testified, defendant said he "was going to get this whore." They followed the victim as she drove for five or ten minutes. She parked in front of her house and they pulled in behind her. As she was getting something out of the back seat of her car, defendant got out, grabbed her by the hair, and put a gun to her stomach. Jordan got out of the blue car and asked defendant what he was doing. Defendant asked him to drive the victim's car, but he couldn't drive a stick shift. Jordan got in the back seat of the victim's car with her, and defendant got in the driver's seat. Defendant handed the gun back to Jordan and told him to keep it on the victim. Jordan testified that he couldn't keep the gun on her, and laid it on his leg. The victim whispered something about God to him, and he told her he didn't want anything to happen to her. Jordan testified that she did not scream or try to get out of the car, or otherwise resist. He testified that defendant had asked her if she believed in God, and she responded, "yes, sir." Defendant then told her that she was with the devil, now. At some point, Jordan addressed defendant by his name, and told him that he didn't have to kill the victim. Defendant responded that he had to because she knew his name and had seen his face. Jordan also testified that, while they were in the victim's car, defendant told her that he wanted to rape her. Jordan responded by telling the defendant he would kill him. Defendant then told the victim she was lucky Jordan was with them,

because he wasn't going to rape her in front of him. While they were driving in the victim's car, Terrell and Carmichael followed in the blue Corsica.

When they arrived at the railroad tracks, defendant took the gun from Jordan, got out of the car, and got the victim out of the car. Jordan then got out of the car, too. Defendant took the victim to the space between the two cars and asked her if she wanted to hug a real man before she died. The victim did not respond, Jordan closed his eyes, and when he opened them, he saw defendant ending an embrace of the victim. Defendant dropped his head and the gun was at his side. Defendant then shot the victim. He searched her car, got a suitcase out of the trunk, drove the car and parked it, wiped it out, and returned to the blue car. Jordan had already returned to the blue car, and the four then left. The next day, Jordan testified, he was still in shock and broke down and told Woodall what had happened. When Jordan next saw defendant, he asked him why he had shot the victim, and defendant "[j]ust smiled."

Jordan denied getting any deal for his testimony. He also denied seeing Bowers or Gandy on November 8. He admitted that defendant had mentioned a sting, or stealing a car, while they were riding around, and that he (Jordan) had been drinking and sniffing cocaine. He admitted that he had initially lied to the police about what had happened, in an effort to help himself. He maintained that he was telling the truth to the jury. Jordan denied ever having been a member of the Gangster Disciples. He testified that Carmichael, Terrell and defendant were members.

Carmichael testified that, on the night in question, he was at Tonya Woodall's apartment, where he saw the other defendants. All four of the men left in a blue four door Corsica, with Terrell driving. Carmichael had arrived in Memphis from Detroit four days earlier, and wanted to go to a strip club. Instead, they went riding around and, at a stop light, pulled up next to the victim in a small red car. Defendant motioned for Terrell to follow the victim, and they pulled behind her when the light changed. When defendant told Terrell to follow the victim, Carmichael asked him where they were going and defendant told him he was going to rob her. The victim parked her

car in front of her house and left her car. Terrell stopped their car and defendant and Jordan got out. Defendant grabbed the victim before she reached her house; he was armed with a small pistol. Defendant brought the victim back to her car, took her keys, gave the pistol to Jordan, and Jordan put her in the back seat of her car. Defendant then got in the driver's seat and drove off; Terrell followed in the blue car, with Carmichael. Defendant drove the victim's car to some railroad tracks and parked. Defendant got out, opened the back door, and Jordan and the victim got out. Defendant then hugged the victim and shot her. Defendant and Jordan got back in the victim's car and drove it to a clearing and got out; Terrell and Carmichael followed in the Corsica. Jordan wiped the car down with a rag, took the victim's briefcase, and then he and defendant got back in the Corsica and the four drove away. Terrell drove back to the apartment where defendant and Jordan got out; Terrell and Carmichael went to the strip club. The next night, Carmichael returned to Woodall's apartment and heard Jordan and defendant arguing, with Jordan asking defendant why he had to shoot the victim. Jordan got mad and left.

On cross, Carmichael admitted to having been a member of the Gangster Disciples gang at the time of the murder, and stated that Jordan and Terrell were also members. He stated that Vassy Gandy and Rico Bowers, who were also Gangster Disciples, had been at the apartment on that night. He denied having made any deal on his charges in exchange for his testimony against defendant.

Terrell testified that he had been planning on taking Carmichael to the club when Jordan asked him to take defendant somewhere. Terrell told Carmichael that they'd drop defendant and Jordan off, and then go to the club. The four men left in a blue Corsica which Terrell had borrowed from someone. As they were driving away, Terrell saw defendant with a small pistol, checking it for bullets. Defendant told him they were "going to make a sting." Terrell initially objected, then subsided. Defendant told him where to go, and tried to get him to follow some cars. Terrell refused to follow the cars. Eventually, defendant asked him to park on a street, because he was going to his aunt's house. Defendant and Jordan got out of the car and left. The next time Terrell saw

them, they were reversing toward him in a red car. Defendant asked Terrell to follow them; at this point, Terrell saw only defendant and Jordan in the car. They drove a short distance, and defendant stopped, he and Jordan got out of the red car, and pulled the victim out of the back seat. Terrell testified this was the first time he saw the victim. He stated that he saw defendant hug the victim, then take a step back and shoot her in the head. Defendant wiped the victim's car down. Jordan and defendant then ran to Terrell's car, Jordan with "tears in his eyes" and defendant with an "odd grin on his face." He testified defendant had some of the victim's belongings and was waving the gun around. Defendant got in the car and told Terrell to drop him off back at the apartment, which Terrell did. Jordan also got out, and Terrell and Carmichael went to the club. The next night at the apartment, Terrell overheard defendant saying "well, she heard my name, so I had to kill her." He testified that Jordan was mad, in tears, and cursing defendant out for what he had done. Later, he said, defendant told him, "can't nobody find out about what happened the other night."

On cross, Terrell denied having been a gang member. He also denied having seen Gandy or Bowers at the apartment on November 8. He admitted knowing that Bowers was with the Gangster Disciples gang.

Tonya Woodall testified that neither Gandy nor Bowers had been at her apartment on November 8, but that the defendant, Terrell, Carmichael and Jordan had been. The next day when she saw Jordan, he looked depressed and would not tell her what had happened. Eventually, she said, he told her that defendant had killed a woman. Jordan's demeanor was upset, depressed, and he said defendant should not have done it. Woodall testified about what Jordan had told her, which was largely consistent with Jordan's testimony. He had not, however, told her about Terrell's and Carmichael's involvement. She testified that he cried while telling her the story. She also stated that she overheard Jordan confronting defendant about what had happened, criticizing him for it, but that she did not hear defendant make any response.

On direct, Woodall testified that she had never been convicted of a crime.

On cross, she admitted to having been convicted of misdemeanors. She also stated that Jordan had said he was a Gangster Disciple. She admitted that she had been threatened by the police with prosecution as an accessory if she did not make a statement. She denied that she had been so threatened if she did not testify. On redirect, she testified that defendant had threatened her and her family if she testified.

Wendy Gunther, who performed the autopsy on the victim's body, testified that Hunter died from a gunshot wound to the head.

The victim was twenty-six years old when she was killed. Her mother, Dorothy Hunter, testified that she had been in good health, was a college graduate, and worked at a bank. She was very active in her church, and was returning home from a service when she was accosted. Hunter did not die immediately from the gunshot, but remained unconscious until the early morning of November 10, 1995, when she passed away.

## **SENTENCING PHASE**

The State put on one witness during the sentencing phase of defendant's trial: Walter Bush. Bush testified that, during the early morning hours of November 11, 1995, he was driving alone when he was carjacked and shot in the back of his head. Bush identified defendant as the man who shot him. Bush testified that, before shooting him, defendant asked him if he knew him or would remember his face. When Bush responded in the negative, defendant told him to turn around and walk away. Bush got three or four feet away when defendant shot him.

On cross-examination, Bush admitted that defendant had been accompanied by Vassy Gandy and Verico Bowers, and that two of the three men had guns. He reiterated on redirect that defendant was the person who had shot him.

Defendant called several family members to testify in the sentencing phase. Annette Bailey, defendant's mother, testified that she was working as an exotic dancer



and prostitute when she had defendant. During her pregnancy, she used cocaine. She gave defendant to her mother, Francis Beasley, when defendant was three weeks old; Beasley subsequently obtained custody of him. Bailey continued her work for the next ten years, seeing her son only occasionally. She testified that she felt her son's situation was her fault because she had never been there for him. She testified that defendant's father would not appear on defendant's behalf at trial even though he was aware of it.

Francis Beasley testified that she had five children besides Annette. She took defendant and raised him as her own. She testified that defendant had been very close to her husband, his grandfather. Defendant took it very hard when his grandfather passed away in 1991.

All of Beasley's children other than Annette were involved in raising defendant and engaging in family activities with him. She explained that defendant was the first grandchild and nephew, and that she and her other children "showered" him with love and were very close to him. Beasley took defendant to church every Sunday, and he became very active there. He continued to be active in church through his teenage years, and was attending regularly at the time he was arrested. Defendant always treated her with love and respect. She remembered defendant's mother telling defendant when he was sixteen or seventeen years old that he wasn't her son, and that she wished he'd never been born. Beasley testified that defendant had been "devastated." She asked the jury to spare his life, explaining that he had given his life to Christ, and that he could make something of his life.

Teresa Stout, one of defendant's aunts, testified that she had been very close to defendant all his life. She testified that he was "devastated" by his grandfather's death, and hit a wall with his fist. Thereafter, he stopped communicating with his family, but remained very active in church. She asked the jury to spare defendant's life.

Randall Stout, one of defendant's uncles, testified that he was like a big brother to defendant. He taught him to drive and to play musical instruments. He took

defendant to church with him, and defendant played music with the church choir. He testified that defendant had been a nice child, and that he was “not this villain that people try to make him out to be.” He further testified that defendant was easily persuaded. However, he explained, defendant had begun to grow in the church, and had “c[o]me to the Lord.” Stout testified that he still spent a lot of time talking with defendant, and that he was “a changed person.” He asked the jury to spare defendant's life.

On cross-examination, Stout admitted knowing that defendant had been a Gangster Disciple. Stout had talked to him about that. He was aware of defendant's gang tattoos. He knew about defendant's prior convictions for aggravated burglary, theft of property, and reckless endangerment. He was familiar with the State's version of how those crimes had occurred. He was aware of the defendant's conviction for the Bush carjacking, and of the State's version of the facts in that case. Stout described the charges against defendant as “trumped up.”

Thomas Stout, Francis Beasley's brother and defendant's great uncle, testified that he was the pastor in defendant's church. He was very close to defendant, loved him, and visited him often in prison. They talked about the Bible during their visits, and he provided defendant with scripture literature to read. He testified that defendant could experience spiritual growth while in prison.

Sheronda Bond, defendant's fiancée, testified that she began seeing defendant in the spring of 1993, and that they had a child together. Defendant also had an older child. Both of the children visited defendant in jail, and he showed love and concern for them. Bond asked the jury to spare her fiancée's life.

Donald Justus, one of defendant's jailers during June 1993, testified that defendant's floor had had a population of Gangster Disciple members. Justus' experience was that non-members were in danger from members. He recalled seeing defendant on June 22, 1993, with “a bruised eye and stuff,” consistent with being hit. Defendant was taken to the medical department.

Makimba Fowler testified that he had been in jail with defendant in June, 1993. He admitted that he was a Gangster Disciple member then and currently. According to Fowler, the fourth floor of the jail where he and defendant had been housed had a large population of Gangster Disciple members, and it was dangerous to be on that floor if you were not a member. He testified that he saw defendant being beaten, “[t]o release him of his functions of a Gangster Disciple.” According to Fowler, “Some brothers threw a sheet over his head and jumped on him and stabbed him with an ink pen.” The beating expelled defendant from the gang. Fowler also testified that he knew defendant was not currently a member of the Gangster Disciples.

### **I. ALLEGED BATSON ERROR**

On his ninth peremptory challenge, defendant struck juror Moore from the venire. The State objected to defendant's challenge, alleging a violation of Batson v. Kentucky, 476 U.S. 79 (1986). Following a lengthy hearing outside the presence of the venire, the trial court sustained the State's objection and reseated Moore on the panel. Defendant now challenges the trial court's ruling that he struck a juror for unconstitutional reasons.

In Batson, the United States Supreme Court held that, “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.” 476 U.S. at 89. In Georgia v. McCollum, 505 U.S. 42 (1992), Batson was extended to prohibit defendants from striking jurors on the basis of their race. To trigger an analysis of a defendant's peremptory strike, the State must first establish a prima facie case that the juror is being challenged on the basis of his or her race. Georgia v. McCollum, 505 U.S. at 59. Once the State has done so, the defendant must then articulate a race-neutral reason for challenging the juror. Id. Once the defendant does so, the trial court must then determine whether the State has established purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995).

In this case, defendant had exercised nine peremptory challenges in seven rounds. The first juror challenged was black; the remaining eight were white (defendant

is black). The State objected upon the defendant striking his eighth consecutive white juror. In finding that the State had established a prima facie case of racial discrimination, the trial court noted that the only black juror challenged by defendant was an employee of the Shelby County Correctional Center; that the remaining eight challenges had been against white jurors; and that in seven rounds of challenges, defendant had not once passed the jury. The court then directed defendant to articulate his race-neutral reason for excusing juror Moore.

Defense counsel responded that he challenged Moore because she was “not responsive;” was not making eye contact with him; that she appeared “very stern;” and that she was a teacher. Defense counsel stated that the predominant reason for the challenge was Moore's demeanor toward him. The court pointed out that a black teacher had not been challenged, and expressed doubt that Moore's demeanor was the type of race-neutral reason contemplated by Batson. Defense counsel denied knowing that the black juror he had not challenged was a teacher, and added that his challenge of Moore “had to do with [her] lack of responsiveness.” The court replied that Moore had responded to every question that she had been asked by the court, by the State, and by defense counsel. Finally, defense counsel stated his concern that Moore taught at the school which defendant had attended, and that the facts of the case might reflect badly on her school. He also noted, however, his reliance on his “experience and instinct” as trial counsel.

The court responded that,

viewing the jurors that have been excused by the defense, the answers they've given, the employment they have, the lack of red flags, if you will, that exist in this case with regard to the answers they've given with regard to being married to a police officer or being the recent victim of a violent crime or anything of that sort, leads one to conclude, I think a person would have to be blind if they didn't start looking real skeptically at why exactly these eight people have been challenged.

It sure starts to look like they're being challenged because they're Caucasian. . . . There've been eight in a row without any real articulable reason other than some vague general statements and conclusions.

. . . .

And at this point, unless there can be some further reason articulated to convince me otherwise, I am not satisfied that the reasons given sufficiently articulate a race neutral explanation for [Moore] being challenged.

Defendant contends that the trial court erred by not accepting his proffered race-neutral reasons at face value and then requiring the State to prove purposeful discrimination. He argues that the trial court completed only the first two steps of the Batson analysis, and that he is therefore entitled to a new trial. We respectfully disagree.

Defendant relies heavily on Purkett v. Elem, 514 U.S. 765 (1995). In that case, the defendant objected to the prosecutor's use of peremptory challenges to strike two prospective black jurors. In response, the prosecutor explained that he didn't like their haircuts or their facial hair. The trial court overruled the defendant's objection without explanation. On eventual appeal in federal court, the Court of Appeals for the Eighth Circuit concluded that the trial court had erred.<sup>1</sup> The Court of Appeals held that the prosecutor had not articulated a legitimate race-neutral reason for the strikes.

The U.S. Supreme Court reversed the Court of Appeals, finding that it (not the trial court) had erred by requiring that the race-neutral reason articulated by the proponent of the strike be at least plausible. It found that the trial court had properly proceeded to the third part of the inquiry, in which it ruled that the prosecutor was not motivated by discriminatory intent. The Supreme Court found that the Court of Appeals had erred in its review of the trial court's decision because it "did not conclude or even attempt to conclude that the [trial] court's finding of no racial motive was not fairly supported by the record. . . . It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility." Id. at 769. In effect, the Court of Appeals was impermissibly substituting its judgment for that of the trial court, and improperly adding a requirement to the second step of the Batson analysis.

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<sup>1</sup>The case was being appealed on defendant's petition for writ of habeas corpus.

This case is distinguishable from Purkett. We are not reviewing an appellate court's decision to substitute its findings of fact for those of the trial court. Rather, we are reviewing the trial court's lengthy findings after it heard substantial argument on this issue from both the State and the defendant. Cf. U.S. v. Tucker, 90 F.3d 1135, 1142 (6<sup>th</sup> cir. 1996) (where proponent of strike provided an inherently believable explanation and the opponent offered no rebuttal, the trial court did not commit clear error in overruling the opponent's objection). The issue is whether the State established by a preponderance of the evidence that defendant's strike of Moore was intentionally discriminatory. Id. We acknowledge that some of the trial court's language in this case appears to indicate that it simply rejected a facially race-neutral explanation offered by the defendant. Cf. Purkett v. Elem, 514 U.S. at 768 (The race-neutral explanation need not be persuasive, or even plausible. Unless a racially discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race neutral.) However, despite the imprecise phraseology used by the trial court, the record makes clear that the court engaged in the required in-depth analysis of all the circumstances before reseating Moore on the jury, and did not impermissibly shift the burden of persuasion to the defendant. The court took pains to articulate its findings on the record, and it had the opportunity – which we do not – to assess the demeanor of the prospective juror and defense counsel, and to evaluate their credibility. On appeal, this Court accords great deference to the trial court's findings, and will not set them aside unless clearly erroneous. State v. James E. Hathaway, No. 02C01-9702-CR-00082, Shelby County (Tenn. Crim. App. filed Dec. 30, 1997, at Jackson), perm. appeal denied (Tenn. 1998). See also State v. Butler, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990) (where a trial court's findings upon a Batson challenge are based on the credibility of witnesses, the standard of review is whether the trial court's decision was clearly erroneous).

We find this Court's analysis in State v. James E. Hathaway to be instructive:

Although a trial court must accept a facially race-neutral explanation for purposes of determining whether the proponent has satisfied his burden of production, this does

not mean that the court is bound to believe the explanation in making its [final] determination. In other words, while the court may find that a proffered explanation is race-neutral, the court is not required, in the final analysis, to find that the proffered explanation was the actual reason for striking the juror. If the court determines that a race or gender based motive was behind the challenge, the juror may not be excluded.

In making its determination, the trial court must look to the totality of the circumstances for rarely will a party admit that its purpose in striking a juror was discriminatory. Accordingly, the trial court may infer discriminatory intent from circumstantial evidence. <The factfinder's disbelief of the reasons put forth by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination, and . . . no additional proof of discrimination is required.> Additionally, the court may consider whether similarly situated members of another race were seated on the jury or whether the race-neutral explanation proffered by the strikes' proponent is so implausible or fantastic that it renders the explanation pretextual. The trial court may also consider the demeanor of the attorney who exercises the challenge which is often the best evidence of the credibility of his proffered explanations.

(emphasis added) (citations omitted). See also U.S. v. Ledford, 127 F.3d 1103, 1997 WL 659673 (6th Cir. 1997) (trial court "has the power to disbelieve even a race-neutral explanation offered by the prosecution").

The record supports the trial court's ruling in this case. Defendant struck eight white jurors consecutively. See Batson, 476 U.S. at 97 ("a pattern' of strikes against . . . jurors [of a particular race] . . . might give rise to an inference of discrimination.") The only black juror defendant struck worked for the Division of Corrections. The defendant's explanation for striking Moore rested primarily on Moore's demeanor, and the trial judge was in a much better position to evaluate both Moore's demeanor and defense counsel's credibility than is this Court. The trial judge's findings are not clearly erroneous, and this issue is therefore without merit.

## **II. CORROBORATION OF ACCOMPLICE TESTIMONY**

Defendant next alleges that his conviction must be reversed because there is insufficient corroboration of his accomplices' testimony. When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most

favorable to the prosecution in determining whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Defendant is correct that a felony conviction may not be based only on the uncorroborated testimony of an accomplice. State v. Green, 915 S.W.2d 827, 830 (Tenn. Crim. App. 1995). Moreover, where there is more than one accomplice, there must be additional corroboration because accomplices cannot corroborate each other. Id. at 831.

Corroborative evidence must be independent of the accomplice's testimony, and must tend to connect the defendant with the commission of the crime. Sherrill v. State, 204 Tenn. 427, 435, 321 S.W.2d 811, 815 (Tenn. 1959). Corroborative evidence may be either direct or circumstantial. Id.

The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence be slight and entitled, when standing alone, to little consideration.

<The entire conduct of the accused may be looked to for the corroborating circumstances, and if, from those circumstances, the crime may fairly be inferred, the corroboration is sufficient.'

Hawkins v. State, 4 Tenn. Crim. App. 121, 469 S.W.2d 515, 520 (1971) (citations omitted). “In short, the evidence must confirm in some manner that (a) a crime has been



committed and (b) the accused committed the crime.” State v. Griffis, 964 S.W.2d 577, 589 (Tenn. Crim. App. 1997). Corroborative evidence establishing only that the defendant was present at the scene of the crime and had the opportunity to commit the offense is not sufficient. Id. The sufficiency of the corroborating evidence is a question for the jury. State v. Bigbee, 885 S.W.2d 797, 804 (Tenn. 1994).

Defendant denied any knowledge about the crimes against Hunter when initially questioned by the police. Defendant later told the police that he had, in fact, been present at the scene of the crimes. Even slight proof connecting a defendant to a crime is strongly corroborative of guilt where it follows the defendant's denial of involvement. Gable v. State, 519 S.W.2d 83, 84 (Tenn. Crim. App. 1974). Moreover, while defendant denied knowing that a robbery or carjacking was going to take place, he acknowledged knowing that one of his companions was armed and intended to steal a car before they left Woodall's apartment. The jury was therefore entitled to draw the inference that, by going along, defendant intended to participate in criminal activity. Defendant's own statements to the police therefore provide sufficient corroboration of his accomplices' testimony.

Additional corroboration exists, moreover. Woodall testified that defendant threatened her and her family if she testified. “Any attempt by an accused to conceal or destroy evidence, including an attempt to suppress the testimony of a witness, is relevant as a circumstance from which guilt of the accused may be inferred.” Tillery v. State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978). Defendant's accomplices' testimony was sufficiently corroborated by independent proof, and this issue is therefore without merit.

### **III. TRIAL COURT'S RULINGS ON PROFFERED DEFENSE PROOF**

Defendant complains that the trial court repeatedly stymied his attempts to present his theory of defense, thereby violating his constitutional rights.<sup>2</sup> Defendant's theory was that he had once been a member of the Gangster Disciples gang, but had

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<sup>2</sup>Defendant cites to the Sixth and Fourteenth Amendments to the United States Constitution, and to Article I, Sections Eight and Nine of the Tennessee Constitution.

been “beaten out” of it in 1993 while he was in jail. As a result, he became an outsider and scapegoat for gang activity. Defendant wanted to prove that gang members Bowers, Gandy and Jordan actually committed the kidnapping, robbery and murder of Hunter; that lower ranking gang members Carmichael and Terrell agreed to “take the rap” for Bowers and Gandy; and that they all agreed to point the finger at him, the outsider, as the actual perpetrator of the crimes. In support of his theory, defendant wanted to introduce the initial statements that Bowers and Gandy made to the police, in which they claimed to have been present at the scene; the testimony of Makimba Fowler, a Gangster Disciple member who had been in jail with defendant and was familiar with the “beating out” ritual practiced by the gang; an incident report prepared by jailer Donald Justus after defendant got a black eye in 1993; and the testimony of Carl Nelson, an expert on gangs and gang-related activities, who would have testified about the gang practices of blaming crimes committed by gang members on non-members, and of lower-ranking gang members stepping forward to accept the consequences of higher-ranking members' activities.

Defendant initially ran into trouble presenting his theory of defense during opening statement. When his lawyer referred to his mother giving him to his grandmother at two weeks of age, the State objected. There followed a long discussion outside the jury's presence, during which defense counsel described in some detail both the theory of defense and the supporting proof. While reserving its evidentiary rulings, the court expressed concern over the admissibility of much of the proffered proof. Eventually, the court ruled that events occurring in June 1993 were too remote in time to be relevant to defendant's actions in November 1995:

Even if [defendant had been beaten out of the gang in 1993], he could have been in and out of the gang ten more times between June of '93 and November of '95. He could have had a dozen different meetings with gang members of ten different gangs. And who knows what he could have done during those two and a half years that -- what intervening circumstances might have made the '93 incident totally irrelevant to the '95 activity.

Accordingly, the court ordered defendant to confine his opening statement to the events that related to Amber Hunter's killing on November 8, 1995.

The trial court also ruled that defense counsel should not refer during opening statement to Gandy and Bowers' initial statements to the police, in which they admitted participating in the events leading to Hunter's death. Defense counsel wanted to introduce these statements via the police reports containing them. The State pointed out the hearsay problem with this proof,<sup>3</sup> and the trial court inquired whether counsel intended to call Bowers and Gandy to the stand. Defense counsel refused to commit to calling these witnesses. The trial court ruled that no mention should be made of these statements during opening statement unless counsel planned to call Bowers and Gandy to testify.

Our Supreme Court has held that 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 intends to prove.” Harris v. Baptist Memorial Hospital, 574 S.W.2d 730, 732 (Tenn. 1978) (emphasis added). In a trial, facts can be proven only by admissible evidence. Opening statements should not be used by either side as opportunities to present speculation and conjecture which is unsupported by admissible proof. And while a trial court should not make evidentiary rulings during opening statement, it may use its discretion to exclude from opening statements assertions which it deems unlikely to be supported by admissible evidence. Absent an abuse of that discretion, this Court will not overturn a trial court's ruling in that regard. See State v. Kimberly Wolfe, C.C.A. No. 122, Sevier County (Tenn. Crim. App. filed Mar. 13, 1991, at Knoxville), perm. appeal denied (Tenn. 1991) (standard governing trial court's control of both opening statement and closing argument is abuse of discretion). We find no such abuse of discretion here. This issue is without merit.

Defendant also complains that the trial court improperly limited his cross-examination of Officer Hightower. On November 20, 1995, Hightower took statements from Bowers and Gandy. After taking these statements, Hightower noted in his report that “both statements from Bowers and Gandy provided numerous details that only

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<sup>3</sup>Police reports are hearsay and not admissible under the public records exception to the hearsay rule. Tenn.R.Evid. 801; 803(8).

parties responsible could have known.” When defense counsel asked Hightower about this notation, the State objected. The court sustained the objection on the grounds that defense counsel was attempting to ask about the content of Bowers and Gandys' statements, which was hearsay. See Tenn. R. Evid. 801.

The trial court should have allowed defense counsel to ask Hightower about his own conclusions regarding his investigation of the case. Such questions, properly asked, would not have called for hearsay. However, the trial court's error in this regard was harmless. While Hightower may have initially concluded that Bowers and Gandy had been involved in the crimes against Hunter, subsequent events led the State to conclude that they were not. Hence, they were not charged in the indictments. Had Hightower been allowed to testify about his initial conclusions, the State would have been entitled to question him about whether and why he later changed those conclusions. Viewing the record as a whole, we do not find that the trial court's error in this regard more probably than not affected the judgment or resulted in prejudice to the judicial process. See Tenn. R. App. P. 36(b). Accordingly, this issue is without merit.

Defendant also complains that the trial court erred in ruling that the proffered testimony of Makimba Fowler, Carl Nelson and Lieutenant Justus was inadmissible. He claims that the court's ruling prevented him from proving that he had been beaten out of the Gangster Disciples in 1993, thereby becoming an outsider to be used as a “throwaway” and framed for the crimes committed by other gang members against Amber Hunter. We respectfully disagree.

According to defense counsel's statements to the court during the guilt phase of the trial, Fowler was with defendant in jail in June 1993, but did not remember seeing defendant being beaten. All Fowler could testify to, according to defense counsel, was that Gangster Disciple members would expel other members by throwing a sheet

over their head and beating them.<sup>4</sup> Lieutenant Justus was one of defendant's jailers in June 1993, and prepared a report when defendant appeared with a bruised eye and was sent to the medical department. Justus did not see how defendant got the bruised eye. Nelson was proffered as an expert in Gangster Disciple activities, familiar with the gang practice of blaming non-members for crimes committed by members.

The trial court correctly ruled that this proof was irrelevant absent some proof that defendant had been beaten out of the gang, and remained an outsider at the time Amber Hunter was kidnapped, robbed and murdered. According to defense counsel, Fowler could not testify to this; nor could Justus; nor could Nelson. All they could testify to was that defendant got a black eye while he was in jail; that members of the Gangster Disciples expelled other members through beatings; and that gang members blamed non-members for their own criminal activity. There was simply no proof proffered or admitted during the guilt phase of the trial that defendant had been subjected to this treatment. Indeed, the only evidence admitted during the guilt phase of the trial regarding defendant's gang affiliation was to the contrary. Officer Hightower testified that when he initially questioned defendant on November 21, 1995, defendant admitted to being a member of the Gangster Disciples. Jordan also testified that defendant was a member of the gang. If the uncontroverted proof established that defendant was a member of the gang in November 1995, any proof regarding what happened to non-members was utterly irrelevant. Irrelevant evidence is inadmissible. Tenn. R. Evid. 402. Thus, the trial court did not err in its ruling on the proffered proof, and this issue is without merit.

Defendant next alleges that, after the trial court prevented him from proving his theory of defense, the State was permitted to point out his lack of evidence during closing argument, thereby impermissibly shifting the burden of proof to him. The State disagrees.

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<sup>4</sup>At the sentencing hearing, Fowler testified that he did remember seeing defendant being beaten out of the Gangster Disciples gang. Fowler also testified that he had never before spoken with defense counsel, and defense counsel expressed surprise at Fowler's testimony.

Defense counsel maintained during closing argument that defendant was being blamed as the “new kid on the block,” and that the witnesses’ stories were inconsistent because two of them hadn’t actually been at the crime scene. He argued that the witnesses testified in order to get favorable plea bargains; that the State elicited testimony “needed to point the finger at [defendant] . . . like all the Gangster Disciples want . . . [b]ecause it solves the case;” and that “[t]he State’s case is built on the shifting sands of these people’s lies.”

On rebuttal, the State responded that, “the problem with [defense counsel’s] whole theory, his whole argument, is that he hasn’t given you any proof of anything. . . . Not one scintilla of proof that indicates that what he just told you is true.” On defendant’s objection that the State was arguing that defendant had a burden of proof to meet, the court ruled that the State’s argument was proper rebuttal.

The trial court has wide discretion in controlling the argument of counsel. Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). This Court will not interfere with the exercise of that discretion absent an abuse thereof. Id. We see no such abuse here. The State’s rebuttal argument did not impermissibly shift the burden of proof to defendant. Rather, it was merely comment on the evidence in the record (or not). The jury was instructed that the argument of counsel was not evidence, and that the State bore the burden of proving its case beyond a reasonable doubt. The jury is presumed to follow its instructions. State v. Blackmon, 701 S.W.2d 228, 233 (Tenn. Crim. App. 1985). This issue is without merit.

#### **IV. TRIAL COURT’S REFUSAL TO REVIEW STATEMENT**

Defendant contends that the trial court erred by refusing to conduct an in camera review of Harold Gray’s statement. Gray made his statement to the police on November 25, 1995, after Bowers’ and Gandy’s first statements. Defendant theorized that the police had “collaborated with each other,” taking information from Bowers’ and Gandy’s initial statements and “roll[ing] over a lot of what they said into everybody else’s statements.” Defendant argued that his theory would be supported if “that same verbiage

appears in subsequent statements.” Thus, defendant requested the court under Brady v. Maryland, 373 U.S. 83 (1963), to examine Gray’s statement for evidence of the alleged police subterfuge. The trial court refused after the State represented that the statement did not include anything “that would be even arguably exculpatory.”

The defendant cites us to no Tennessee authority for the proposition that the trial court abused its discretion by refusing to review the statement, and we decline to hold that it did so. Moreover, out of an abundance of caution in this capital case, this Court has reviewed Gray’s statement. It contains no information which would have required its disclosure to defendant under Brady (or which supports defendant's theory). This issue is without merit.

## V. & VI. ADMISSIBILITY OF DEFENDANT'S PRIOR CONVICTION

### A. As impeachment evidence

In 1993, defendant was convicted of theft of property, reckless endangerment, and two aggravated burglaries. He was also convicted in January 1997 of especially aggravated robbery. This conviction arose out of an armed carjacking that defendant committed with Bowers and Gandy<sup>5</sup> against Walter Bush on November 11, 1995, in Memphis. Prior to trial, the court conducted a hearing to determine whether the State could use any of these convictions to impeach the defendant's credibility if he testified. See Tenn. R. Evid. 609(a)(3). The court ruled that the State could not refer to the reckless endangerment conviction, but would be allowed to refer to the other four convictions. Defendant now argues that the trial court erred in its ruling on the especially aggravated robbery conviction.

A prior conviction may not be used for impeachment purposes if the unfair prejudicial effect of the conviction on the substantive issues outweighs its probative value on the accused's credibility. Tenn. R. Evid. 609(a)(3). Defense counsel argued that the prior conviction was so similar in nature to the instant offense that the prejudicial effect outweighed the probative value. The trial court disagreed, finding that “the probative value is substantial in light of the nature of the offense and how recent in time it is.”

When conducting the balancing test required by 609(a)(3), the trial court should first analyze the relevance of the prior conviction to the accused's credibility. State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999). If the conviction is probative of the accused's credibility, then the trial court should assess the similarity between the crime underlying the prior conviction and the crime which is being tried. Id. Where the two are substantially similar, the court “should carefully balance the probative value of the impeaching conviction on credibility against its unfairly prejudicial effect on substantive issues.” Id.

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<sup>5</sup>Bowers and Gandy each pled guilty to aggravated robbery in connection with this offense.



Contrary to defendant's assertions, the trial court in this case did “carefully balance” the necessary criteria. It correctly determined that especially aggravated robbery is a crime of dishonesty, and is therefore probative of the defendant's credibility. See, e.g., State v. Goad, 692 S.W.2d 32, 37 (Tenn. Crim. App. 1985). We further agree with the trial court that, because the crime underlying this prior conviction was more recent in time to the trial than the 1993 offenses, the probative value of this prior conviction was enhanced. The trial court correctly acknowledged that the similarity between the two crimes had to be considered in the balancing process, but further correctly noted that similarity does not automatically preclude using the prior conviction. See State v. Blevins, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997).

We review the court's decision on this issue for abuse of discretion. Id. at 892. No abuse of discretion having been shown, this issue is without merit.

#### **B. As substantive evidence**

After the State concluded its case in chief, defendant indicated that he intended to call Bowers and Gandy to testify. Defendant wanted to question Bowers and Gandy about their initial statements in which they admitted being present during the attack on Hunter. By calling these witnesses, defendant wanted to advance his theory of being taken along by Gangster Disciples in order to be blamed for their own criminal activities. Defense counsel renewed a motion in limine to prevent the State from questioning these witnesses about the Bush carjacking. The State opposed defendant's motion, arguing it should be allowed to rebut defendant's proof with evidence of his continued participation in activities with these alleged gang members. Defendant now contends that the trial court erred in denying his motion in limine.

Prior to ruling, the trial court held a jury-out hearing pursuant to Tennessee Rule of Evidence 404(b), which provides

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order 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; and

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

The court heard lengthy argument from counsel; the testimony of Bowers; an offer of proof of the victim Bush's testimony; and reviewed the statement defendant made in the Bush carjacking. The court then found that the two crimes were sufficiently identical to support the inference that the defendant had been involved in both of them. It further found the existence of material issues other than conduct conforming to a character trait, to wit: identification of who shot Amber Hunter; intent; and guilty knowledge. Finally, the court found that the probative value of this proof "clearly outweigh[ed] any prejudicial effect."

The trial court complied substantially with the procedural requirements of 404(b). Accordingly, this Court reviews its ruling for abuse of discretion. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). We find no such abuse.

We agree with the trial court that the Bush carjacking was substantially identical to the attack on Hunter. Bowers testified that he, Gandy and defendant drove up beside Bush as he sat in his parked car. Defendant got out of the car they were in and made Bush get out of his car. Bowers then got in the victim's car while Gandy stayed in the original vehicle. While Bowers sat in the victim's car, he heard a gunshot. Defendant then returned to the car Gandy was driving, and with Bowers following in the victim's car, they all returned to the Springcreek apartments. Bowers abandoned Bush's car there. The offer of proof of Bush's testimony established that Bush had parked his car at about five o'clock in the morning. Defendant and either Gandy or Bowers approached him, both of them armed. Defendant shot him in the neck as he tried to run, and the men then took his car.

According to defendant's statement, he was riding with Bowers and Gandy when they pulled up beside Bush's car. He and Bowers approached Bush as he was leaving his vehicle, and Bowers told him to drop the keys. Bowers stated to Bush that he had seen his face, and Bush tried to run. According to defendant, Bowers then shot Bush. Defendant returned to the original car, and Bowers got into Bush's car. Bowers followed them back to the Springcreek apartments. Defendant admitted in his statement that he was an "inactive member" of the Gangster Disciples.

The identity of Hunter's shooter was the key issue in this case. Given the similarity of the Bush carjacking with Hunter's attack, proof of this other crime was relevant to prove that the same person pulled the trigger both times. "An inference of identity arises when the elements of the [other] offense and the charged offense are sufficiently distinctive that one can conclude that the person who committed the [one] also committed the [other]." State v. Electroplating, Inc., 990 S.W.2d 211, 224 (Tenn. Crim. App. 1998). "[I]t is not required that the other crime be identical in every detail to the offense on trial. The evidence must support the inference that the defendant, who committed the [other] acts, is the same person who committed the offense on trial." Id. (citations omitted). Thus, proof of the Bush carjacking was properly admitted to prove identity.

It was also properly admitted to show defendant's guilty knowledge and intent. Defendant maintained that he was present when Hunter was kidnapped, robbed and killed, but that he did not have any knowledge that these crimes were going to be committed, and that he did not intend for these crimes to occur. That he was out riding around with the very same people he claimed committed the Hunter crimes just a few hours later, during which a strikingly similar crime was committed, serves to undercut his protestations of innocent presence.

This issue is without merit.

## **VII. ADMISSION OF HEARSAY STATEMENTS**

Defendant next contends that the trial court erred when it permitted Tonya Woodall to testify about what Jordan had told her about the attack on Amber Hunter. Woodall testified that Jordan described the crimes in some detail to her, and told her that defendant had killed the victim. Defendant objected at trial on the basis of hearsay. The trial judge overruled defendant's objection, finding that the statements were admissible under four exceptions to the hearsay rule: prior statement of identification; statement by a co-conspirator; excited utterance; and statement against penal interest. See Tenn. R. Evid. 803(1.1), (1.2)(E), (2) & 804(b)(3).

We agree, and the State concedes, that the trial court erred in ruling the statements admissible as declarations against penal interest. This exception to the hearsay rule applies only when the declarant is unavailable. See Tenn. R. Evid. 804(b). In this case, Jordan was available; indeed, he testified at trial. We further agree with defendant that Jordan's statements to Woodall were not made "during the course of and in furtherance of [a] conspiracy." Tenn. R. Evid. 803(1.2)(E). To the extent there was an arguable conspiracy to kidnap, rob and murder Hunter, Jordan's statements to Woodall were not designed to further it, but to voice his own anguish after the crimes had been committed.

We find that Jordan's statement to Woodall that defendant killed Hunter was, however, properly admitted as a prior identification. Where a declarant perceives a perpetrator, and subsequently identifies the perpetrator to a witness in an out of court statement, the witness may testify about the identifying statement so long as the declarant testifies at trial. Tenn. R. Evid. 803(1.1); Advisory Commission Comment ("witnesses other than the declarant may testify about the identifying declaration"). Thus, the rule is designed to admit precisely this type of statement. Jordan, the declarant, told Woodall, the witness, that defendant shot the victim. Since Jordan was present at the crime scene, he made the statement after perceiving the defendant do so. Jordan testified at defendant's trial, and was subject to cross-examination about his statements to Woodall. Woodall's testimony on this point was therefore properly admitted under this exception to the hearsay rule. See also State v. David Tanksley, No. 1, Henderson

County (Tenn. Crim. App. filed June 5, 1991, at Jackson) (under Tenn. R. Evid. 803(1.1), officer was permitted to testify about witness identifying defendant to him during photographic lineup, where witness testified at trial).

Woodall's testimony about what Jordan told her about the crimes was not limited, however, to his identification of defendant as the shooter. The State argues that the trial court properly admitted all of Jordan's statements to Woodall as excited utterances. Defendant disagrees.

An "excited utterance" is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," and is admissible as an exception to the hearsay rule. Tenn. R. Evid. 803(2). Excited utterances are deemed sufficiently reliable to be admitted notwithstanding their hearsay character for two reasons. First, where the statement is made spontaneously, in response to an exciting event, there is little opportunity for reflection and potential fabrication. Second, the statement is made while the event is still fresh in the declarant's memory, and therefore may be much more accurate than a later in-court description. State v. Gordon, 952 S.W.2d 817, 819-20 (Tenn. 1997). We must review the requirements of the rule with these reasons in mind. Id.

Clearly, the crimes committed against Amber Hunter constituted a startling event or condition. And, the statements Jordan made to Woodall related to the crimes. The key issue here, then, is whether Jordan made the statements while under the stress or excitement caused by the crimes. It is this requirement which "relates most directly to the underlying rationale for the exception." Gordon, 952 S.W.2d at 820. "The ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." State v. Smith, 857 S.W.2d 1, 9 (Tenn. 1993). However,

[t]he time interval is but one consideration in determining

whether a statement was made under stress or excitement: <Other relevant circumstances include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental condition; and the contents of the statement itself, which may indicate the presence or absence of stress.'

Gordon, 952 S.W.2d at 820, quoting Cohen, Paine & Sheppard, Tennessee Law of Evidence, § 803(2).2 at 534 (3rd ed. 1995).

The time interval between Hunter's murder and Jordan's statements to Woodall was significant: the crimes were committed at approximately 10:00 p.m., and Jordan did not talk to Woodall until the middle of the next day. However, we deem the nature of the startling event to be very upsetting, and its seriousness extreme. Jordan testified that he was crying as he talked to Woodall; that "stuff [was] happening in [his] head;" that he pictured his life gone and everyone dead; and that he was in a state of shock during their conversation. Woodall testified that, as Jordan spoke with her, he was crying, shaking his head, upset and depressed. Jordan was seventeen years old at the time.

The trial court ruled that, at the time he talked to Woodall, Jordan was still under the stress or excitement of "the traumatic events of the night before." We agree. While the time interval alone might indicate the opportunity for deliberation and fabrication, the other relevant circumstances indicate that Jordan was "still laboring under the excitement and strain of the circumstances." State v. Smith, 857 S.W.2d at 9. The trial court did not abuse its discretion in finding that Jordan's statements to Woodall were excited utterances, and we therefore find no error.

Moreover, even if the trial court erred in finding Woodall's testimony admissible as an excited utterance, we hold the error to have been harmless. Woodall's testimony about what Jordan told her added nothing new or different to the other witnesses' descriptions of what occurred at the crime scene. In substantive effect, it was merely redundant. And while it did serve to corroborate Jordan's testimony, this proof would have been admissible for this purpose anyway, as a prior consistent statement.

While prior consistent statements are not generally admissible to bolster a witness' credibility, State v. Braggs, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980), there are exceptions. For instance, where a witness is impeached by use of a prior inconsistent statement, an earlier consistent statement is admissible. See State v. Tizard, 897 S.W.2d 732, 746 (Tenn. Crim. App. 1994). This exception applies here. Defense counsel repeatedly questioned Jordan during cross-examination about discrepancies between his trial testimony and his statement to the police. The statements he made to Woodall were both earlier in time to his statement to the police, and consistent with his trial testimony. Thus, those prior consistent statements were proper rehabilitation. See also State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993) (where witness was impeached with a prior inconsistent statement, an earlier statement consistent with trial testimony was relevant and admissible to counter the impeachment). We recognize, of course, that prior consistent statements may only be used as corroborative proof, and not as substantive evidence. See State v. Braggs, 604 S.W.2d at 885. As such, their admission should be accompanied by a limiting instruction. Id. No such instruction was given in this case. However, as noted above, the primary effect of Woodall's testimony was to corroborate Jordan's credibility: not to shed light on what actually occurred at the crime scene. Thus, the limiting instruction was less important than if the testimony had also included substantive evidence not otherwise available.

In summary, Jordan's statement to Woodall that defendant was the shooter was properly admitted. Even if, however, the remainder of Jordan's conversation was erroneously admitted, we hold that the error does not require a reversal. Considering the record as a whole, we cannot find that the admission of the questionable testimony more probably than not affected the judgment or resulted in prejudice to the judicial process. Tenn. R. App. P. 36(b). Nor can we find that the error affirmatively affected the result of the trial on the merits. Tenn. R. Crim. P. 52(a). Accordingly, this issue is without merit.

### **VIII. DEFENDANT'S THREAT AGAINST WITNESS**

On cross-examination, defense counsel asked Woodall if she had been "forced to testify;" if she had been threatened with criminal charges if she didn't make a

statement to the police about the Hunter crimes; and whether she had been threatened “to make [her] testify” at the trial. Woodall responded that only God had forced her to testify; that she had been threatened with criminal prosecution if she did not make a statement to the police; but that no one had threatened her to make her testify. On redirect, the State inquired as to whether anyone from the prosecution had threatened her in order to make her testify, and Woodall responded in the negative. The State then asked her if she was scared. She responded, “Yes, I am,” and the State asked of whom she was afraid. Woodall replied that she was afraid of defendant because of threats he had made against her and her family if she testified.

Defense counsel objected on the grounds that this aspect of redirect exceeded the scope of his cross-examination. He argued that he had only explored threats made by the State in order to intimidate Woodall into testifying against the defendant; that he had not broached the subject of threats by anyone else. The court found that defense counsel's line of questioning implied that someone from “the system” had forced her to testify, and ruled that the State was entitled to rebut defense counsel's implication, “to the extent that they have proof.” Defendant now contends that the trial court's ruling was in error.

We respectfully disagree. As candidly noted by defendant in his brief, defense counsel was implying through his cross-examination of Woodall that she “was testifying falsely against the defendant because she had been threatened by the prosecutors or the police.” In other words, defense counsel was attacking the witness' credibility. The State was therefore entitled to rehabilitate Woodall's credibility. We think it bolstered Woodall's credibility when she admitted to testifying against defendant in spite of his alleged threats against her and her family. Accordingly, the question was appropriate and, contrary to defendant's contentions in his brief, relevant. “[T]he scope of redirect examination is within the sound discretion of the trial court, which will not be reversed absent an abuse of that discretion.” State v. Barnard, 899 S.W.2d 617, 624 (Tenn. Crim. App. 1994). No such abuse is apparent here, and this issue is therefore without merit.



## **IX. USE OF DEFENDANT'S PRIOR CONVICTIONS DURING PENALTY PHASE**

Defendant contends that the trial court erred in allowing the State to cross-examine Randall Stout about his knowledge of the defendant's prior convictions. Defendant argues that the trial court compounded its error by failing to instruct the jury that this evidence was to be used for testing Stout's credibility, and not as substantive evidence of defendant's good or bad character. He also complains that the State improperly used this proof as substantive evidence during its closing argument. These errors, he asserts, were not harmless.

By cross-examining Stout about his knowledge of the defendant's prior convictions, the State wanted to accomplish two things. First, if Stout admitted to knowing about the prior crimes, the credibility of his glowing opinion of defendant would suffer. Second, it wanted to rebut the picture Stout (and other family members) had painted of defendant as a devout church and family member, with evidence that he had engaged in very anti-social behavior. That is, the State wanted to use the defendant's prior convictions as both impeachment evidence, and as rebuttal proof.

In a capital sentencing hearing, a defendant is entitled to put on proof of his character. T.C.A. §39-13-204(c). Here, defendant put on abundant proof that he had taken an active role in his church; that he had “come to the Lord;” that he was growing spiritually and was a “changed person;” that he was a loving family member and father; and that he was “not the villain” he had been made out to be. As defendant did in this case through Stout and other family members, this proof may be offered in the form of opinion testimony. Tenn. R. Evid. 405(a). The witness's opinion may then be impeached by inquiry on cross-examination into relevant specific instances of the defendant's conduct. Id. Before such inquiry may be made, however, the trial court must hold a hearing outside the jury's presence; must determine that a reasonable factual basis exists for the inquiry; and must determine that the probative value of the specific instances of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues. Id.

The trial court did hold a hearing outside the jury's presence. The factual basis of defendant's prior convictions was established. The trial court did not, however, make a specific determination that the probative value of the defendant's convictions on Stout's credibility outweighed its prejudicial effect on the issue of defendant's punishment. We hold, however, that it did. The State questioned Stout about the defendant's prior convictions for two counts of aggravated burglary; one count of theft of property; one count of reckless endangerment; and the Bush carjacking. Stout's responses clearly indicated his bias in favor of the defendant; indeed, Stout's responses made clear that he would have testified in favor of the defendant no matter how many prior convictions the State proved. Thus, the probative value of these prior convictions on Stout's credibility was very high. Since the cross-examination on these matters was relatively brief, and since the jury had already heard proof of the Bush carjacking, we find that the prejudicial effect of this evidence on the issue of defendant's punishment did not outweigh its probative value. The trial court's failure to make this specific finding under Rule 405(a) is, therefore, harmless.

The State also wanted to cross-examine Stout about the prior convictions in order to rebut the defendant's evidence of his good character. As set forth above, evidence of a defendant's other crimes is not admissible to prove the defendant's character in order to show actions in conformity with a character trait. Tenn. R. Evid. 404(b). That is, the State cannot prove that the defendant committed other violent felonies in order to prove that he committed the one(s) for which he is being tried. Evidence of other crimes can be introduced, however, for other purposes. Tenn. R. Evid. 404(b). For instance, it can be admitted to rebut a defendant's claim of having led a peaceful, normal life, or that he is a docile person. See State v. Nichols, 877 S.W.2d 722, 732 (Tenn. 1994). Here, after holding a hearing outside the jury's presence as required by 404(b), the trial court determined that the evidence was admissible "to rebut this picture that's been painted of the defendant" as "a fine, active, Christian, young man." The court further stated that "the integrity of the system [required] that a fair and complete picture be painted for this jury and their consideration of what the appropriate punishment is in this case." While the court did not make a specific finding that the

probative value of the evidence outweighed the danger of unfair prejudice, its ruling clearly implies this finding, and the record supports it.

In conjunction with permitting the State to cross-examine Stout about the defendant's prior convictions, the trial court should have issued limiting instructions to the jury to prohibit it from using the proof as propensity evidence. However, we find the trial court's failure in this regard to be harmless error. The manner in which the State cross-examined Stout about the defendant's prior convictions served merely to establish his bias, and to rebut the defendant's proof of his good character. The State's use of this proof during closing argument was consistent with its proper effort to rebut the defendant's implied claim that he obeyed the Ten Commandments. Viewing the record as a whole, we cannot find that the admission of this evidence without a limiting instruction more probably than not affected the judgment, or resulted in prejudice to the judicial process. Tenn. R. App. P. 36(b). This issue is therefore without merit.

#### **X. USE OF SUBSEQUENT CRIME AS AGGRAVATOR**

Defendant next contends that the use of his prior conviction for the Bush carjacking as an aggravating circumstance is unconstitutional. He argues that, because the offense occurred after the instant crimes, its use as an aggravator constitutes due process and ex post facto violations. We respectfully disagree.

Our Supreme Court has recently reiterated its oft-repeated holding that, “so long as a defendant is convicted of a violent felony prior to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable.” State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997) (emphasis in original). In State v. Nichols, 877 S.W.2d at 736, the Court specifically rejected the defendant's contention of a due process violation, even where the prosecutor admitted that the defendant's multiple trials had been ordered in such a way as to create an additional aggravating circumstance. And in State v. Caldwell, 671 S.W.2d 459, 465 (Tenn. 1984), the Court specifically rejected the argument that a prior conviction based on a subsequent crime

permitted an ex post facto law. This issue is therefore without merit.<sup>6</sup>

## XI. EXCLUSION OF EVIDENCE

Defendant contends that the trial court erroneously excluded mitigating evidence during the sentencing phase. One of the mitigating factors available to a defendant facing the death penalty is that he “was an accomplice in the murder committed by another person and the defendant's participation was relatively minor.” T.C.A. § 39-13-204(j)(5). Defendant wanted to prove that he was a minor participant in Hunter's murder by establishing that Bowers and Gandy had been at the crime scene with him, and that Bowers had pulled the trigger. In support of this version of events, he also wanted to put on expert testimony that it was common for Gangster Disciples to let lower-ranking gang members “take the rap” for higher-ranking ones, and that members of the gang would frame non-members for their own criminal activity. The trial court ruled that, by trying to prove that Bowers had shot Hunter, defendant was “attempt[ing] to relitigate the case [and] [t]o impugn the verdict that the jury has already returned.” Accordingly, the trial court ruled that defendant could not call Bowers or Gandy to the stand in an attempt to prove that Bowers had shot Hunter. It further ruled that the proffered expert witness could not testify as to the described gang practices. Defendant contends that the court's rulings were in error.

We agree. “In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, . . . any evidence tending to establish or rebut any mitigating factors.” T.C.A. § 39-13-204(c). One mitigating factor is that the defendant “was an accomplice in the murder committed by another person and the defendant's participation was relatively minor.” T.C.A. § 39-13-204(j)(5). The jury found defendant guilty of felony murder, which did not depend on a finding that he pulled the trigger. An accused may

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<sup>6</sup>We are puzzled by defendant's assertion in his brief that, “[a]t the time of [Hunter's] murder, the notice that [he] had was clear: he only faced life imprisonment.” Besides finding that defendant had been convicted of a prior violent felony, the jury found two additional aggravating circumstances: that defendant committed the murder to prevent his arrest and/or prosecution, and that he committed or aided the murder while he had a substantial role in committing the robbery or kidnapping. Both of these aggravators arose simultaneously with the murder, and defendant therefore “had notice” when he pulled the trigger that he faced the death penalty.

be properly convicted of felony murder even if his or her participation in the murder was “relatively minor.” Thus, any attempt on defendant's part to prove that his level of participation in Hunter's murder was minor was not an attempt to relitigate his guilt or innocence or to impugn the jury's verdict. Therefore, defendant should have been allowed to put on the excluded proof.

“[T]he exclusion of mitigating evidence potentially undermines the reliability of the sentencing determination, and is an error of constitutional magnitude.” State v. Cauthern, 967 S.W.2d 726, 739 (Tenn. 1998). For the sentencing verdict to stand, then, we must determine that the error did not affect the verdict, and was harmless beyond a reasonable doubt. Id.

We have no trouble concluding that the trial court's error in this regard does not require a reversal of defendant's death sentence. Had defendant called Bowers and Gandy to the stand, he anticipated that they would each deny having been present at the crime scene, and would deny knowing who shot Hunter. To overcome the lack of favorable testimony, defendant wanted to impeach Bowers and Gandy through their prior inconsistent statements: their initial reports to the police, in which they had admitted being present at the scene. In so using their initial statements, defendant wanted to establish two things: first, that Bowers and Gandy had been on the scene,<sup>7</sup> and second, that they were liars. By establishing that they had been present when Hunter was shot, defendant could corroborate his own statement, in which he claimed that Bowers had shot Hunter. By establishing that Bowers and Gandy were liars, defendant could avoid the damning fact that, in their initial statements, Bowers and Gandy both claimed that defendant had pulled the trigger.

The problem with defendant's theory is that it required the jury to ignore all

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<sup>7</sup>Using Bowers' and Gandy's initial statements to the police to establish their presence at the crime scene required that the statements be used as substantive evidence. The use of prior inconsistent statements is generally limited to impeachment purposes. See State v. Mayo, 735 S.W.2d 811, 814 (Tenn. Crim. App. 1987). However, in capital sentencing hearings, evidence of mitigating factors deemed by the trial court to have probative value on the issue of punishment “may be received regardless of its admissibility under the rules of evidence.” T.C.A. § 39-13-204(c) (emphasis added).

of the eyewitness testimony on which it based its conviction of defendant, and it further required the jury to believe parts of Bowers' and Gandy's statements while disbelieving other parts. To further strain the credibility of defendant's theory, defendant had also claimed that Bowers shot Bush, while Bush testified that defendant had been the shooter. Finally, while defendant was attempting to disassociate himself from the Gangster Disciples at trial, he had earlier admitted to the police that he was a gang member at the time of Hunter's murder. Thus, the expert witness's proffered testimony about the framing of non-members would have required the jury to ignore part of defendant's own statement, even while he was asking it to believe other parts of it. In sum, the "proof" that defendant wanted to put on in support of his theory that he had been framed for a murder Bowers committed was so weak and lacking in credibility as to render its exclusion completely harmless. This issue is without merit.

## **XII. ADMISSION OF FACTS UNDERLYING PRIOR CONVICTION**

The prior conviction used as an aggravating circumstance against defendant stemmed from his attack on Walter Bush. Bush was allowed to testify at the sentencing hearing about the facts of the offense. Defendant contends that this was error, relying on State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994).

In State v. Bigbee, the State proved two aggravating circumstances: that the defendant had been previously convicted of one or more violent felonies, and that the murder had been committed while the defendant was attempting to commit a robbery. In proving the first of these aggravators, the State introduced a certified copy of the defendant's previous convictions of first-degree felony murder and robbery by use of a deadly weapon. Additionally, the State put on proof about the facts underlying the felony murder conviction. Our Supreme Court found error in the admission of this proof, holding that "it is not appropriate to admit evidence regarding specific facts of the crime resulting in the previous conviction, when the conviction on its face shows that it involved violence or the threat of violence to the person." 885 S.W.2d at 811. The Court reasoned that, since the proof of the prior conviction showed on its face that it involved violence to the

person, proof of the underlying facts was irrelevant and inadmissible. Id. at 811-12.

This case is distinguishable from Bigbee. In Bigbee, the State used proof of the underlying facts of the prior felony to enhance the seriousness of that aggravating circumstance. That is, the State was going beyond merely establishing the aggravator. In this case, however, the facts of the Bush carjacking were used for a different purpose: to prove a separate and distinct aggravator. The State was attempting to prove that defendant killed Amber Hunter in order to avoid, interfere with, or prevent his arrest or prosecution. T.C.A. § 39-13-204(i)(6). That is, it was attempting to prove defendant's motive in shooting her. As set forth above, evidence of prior bad acts can be used to establish motive. See Tenn. R. Evid. 404(b). Bush's testimony was offered to establish that defendant shot him to avoid arrest or prosecution, implying that defendant shot Hunter for the same purpose. Unlike the proof in Bigbee, then, the facts underlying the Bush conviction were relevant in this case. The trial court's admission of this evidence was not error.

The defendant also complains about the use to which the prosecutor put this evidence during closing argument:

Think of Walter Bush.

....

Another young person shot fifty something hours later. You can toss out the concept of remorse. It's not there. He don't care. He don't care one bit. Weigh these circumstances.<sup>8</sup>

This was improper argument. “[T]he State may not rely upon nonstatutory aggravating circumstances to support imposition of the death penalty, but is limited to those aggravating circumstances listed in the statute.” State v. Nesbit, 978 S.W.2d 872, 890 (Tenn. 1998). A defendant cannot be sentenced to death because of his lack of remorse. See T.C.A. § 39-13-204(i). Since defendant did not raise his remorse as a mitigating factor, any reference to his lack thereof in closing argument was improper.

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<sup>8</sup>The defendant also complains about other portions of the prosecutor's closing argument. We find these other portions proper either because they refer to the Bush carjacking in terms of proving defendant's motive, or because they could have been made simply on the basis of proof of the prior conviction, without any additional underlying facts.

See Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979) (“evidence is relevant to the punishment, and thus admissible, only if it is relevant to an aggravating circumstance, or to a mitigating factor raised by the defendant”). The facts underlying the Bush carjacking were admitted to prove motive: not to prove lack of remorse.

Where a defendant complains of a prosecutor's closing argument he is required to show that the argument was so inflammatory or the conduct so improper that it affected the verdict to his detriment. Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (Tenn. 1965). In reviewing an allegation of improper conduct, this Court should consider several factors including the intent of the prosecutor, the curative measures which were undertaken by the court, the improper conduct viewed in context and in light of the facts and circumstances of the case, the cumulative effect of the remarks with any other errors in the record, and the relative strength or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). Under the facts and circumstances of this case, and with these factors in mind, we cannot find that this portion of the State's closing argument during the sentencing hearing affected the jury's verdict to defendant's detriment. This issue is, therefore, without merit.

### **XIII. CONSTITUTIONALITY OF TENNESSEE'S DEATH PENALTY STATUTES**

Defendant argues that the Tennessee death penalty statutes are unconstitutional under both the United States and Tennessee constitutions.<sup>9</sup> Specifically, he argues that our statutes fail to meaningfully narrow the class of death eligible defendants; that the death sentence is imposed capriciously and arbitrarily; that electrocution is cruel and unusual punishment; and that the appellate review process in death penalty cases is constitutionally inadequate. Our Supreme Court has previously rejected these arguments, and so, therefore, must we. See, e.g., State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998), cert. denied, 119 S.Ct. 1359 (1999), affirming State v.

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<sup>9</sup>Defendant refers to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and to Article I, Sections Eight, Nine, Sixteen and Seventeen, and Article II, Section Two of the Tennessee Constitution.



Clarence C. Nesbit, C.C.A. No. 02C01-9510-CR-00293, reported at 978 S.W.2d 897; and State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998), cert. denied, 119 S.Ct. 343 (1998), affirming State v. Perry A. Cribbs, C.C.A. No. 02C01-9508-CR-00211, reported at 967 S.W.2d 792. This issue is without merit.

#### **XIV. CUMULATIVE ERROR AND WAIVER OF ERROR**

Defendant contends that the cumulative effect of errors committed during the penalty phase of his trial require a reversal of his death sentence and a new sentencing hearing. We respectfully disagree. We have carefully reviewed the record and considered the errors assigned by defendant, and have determined that none of them, either individually or cumulatively, constitute prejudicial error requiring reversal. This issue is without merit.<sup>10</sup>

#### **XV. STATUTORY REVIEW OF SENTENCE**

This Court is required to determine whether defendant's death sentence was imposed in any arbitrary fashion; that the evidence supports the three aggravating circumstances found by the jury; whether the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. T.C.A. § 39-13-206(c)(1). Our close review of the entire record convinces us that the death penalty was not imposed in any arbitrary fashion in this case. The evidence adduced at both phases of the trial is more than sufficient to support the jury's findings that the defendant had been previously convicted of a felony involving the use of violence to the person; that he committed the felony murder of Amber Hunter for the purpose of avoiding, interfering with, or preventing his arrest or prosecution; and that he knowingly committed, solicited, directed, or aided her murder while he had a substantial role in committing her robbery or kidnapping. See T.C.A. § 39-13-204(i)(2), (6) & (7). And the evidence adduced in

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<sup>10</sup>Defendant also contends that, while the State argues that he has waived certain issues, the usual waiver rules should not apply to issues which relate to the reliability of the death sentence. Since we have addressed all of defendant's assignments of error on the merits, we deem it unnecessary to address this contention.

support of the aggravating factors clearly outweighed the proof of mitigating circumstances.

In undertaking our comparative proportionality review, we “begin with the presumption that the sentence of death is proportional to the crime of first-degree murder.” State v. Cribbs, 967 S.W.2d at 789. We then compare the instant case with other cases in which the defendants were convicted of the same or similar crimes. This analysis enables us to determine whether the death penalty in this case is “disproportionate to the punishment imposed on others convicted of the same crime.” State v. Burns, 979 S.W.2d 276, 283 (Tenn. 1998) (citations omitted). In conducting the comparison, we consider numerous factors about the offense:

- (1) the means of death;
- (2) the manner of death;
- (3) the motivation for the killing;
- (4) the place of death;
- (5) the victim's age, physical and psychological condition;
- (6) the absence or presence of premeditation;
- (7) the absence or presence of provocation;
- (8) the absence or presence of justification; and
- (9) the injury to and effects on nondecendent victims.

Id. We also consider several factors regarding the defendant:

- (1) age, race and gender;
- (2) prior criminal record;
- (3) mental, emotional, or physical condition;
- (4) role in the murder;
- (5) remorse;
- (6) cooperation with authorities;
- (7) the defendant's knowledge of the victim's helplessness; and
- (8) the defendant's potential for rehabilitation.

Id.

Here, the defendant executed the victim by a single gunshot wound to the head. He killed her while she was fully conscious, with no one nearby to help, while he stood a few feet away. Defendant killed Amber Hunter to eliminate her as a witness. Hunter was shot a short distance from her home; she was twenty-six years old, in good physical and psychological condition. There was no provocation or justification for the murder. Hunter left behind at least two family members. Apparently, the jury found no premeditation.

With respect to defendant, he was twenty years old when he murdered Hunter. His prior criminal record includes a violent felony conviction. His mental, emotional and physical condition are, apparently, normal. He played a pivotal role in the murder, yet showed no remorse. He initially denied any involvement in the crimes, and then tried to blame someone else. That defendant hugged the victim before he shot her indicates that he knew she was helpless. Finally, other than evidence that defendant was active in his church, there is no proof of his potential for rehabilitation.

Our review reveals cases similar to this one in which the death penalty was imposed and upheld. See, e.g., State v. Bates, 804 S.W.2d 868 (Tenn. 1991) (defendant kidnapped jogging woman, took her to a remote area and tied and gagged her, shot her once in the head without warning, and then stole her car); and State v. Coleman, 619 S.W.2d 112 (Tenn. 1981) (with accomplice, defendant shot and killed victim in victim's automobile, then ransacked vehicle before driving it from scene). We conclude, therefore, that the death sentence was not applied disproportionately in this case.

### **APPLICABILITY OF FELONY MURDER AGGRAVATOR**

Under prior law, a defendant convicted of felony murder could not have the felony murder aggravating circumstance<sup>11</sup> applied against him for death penalty

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<sup>11</sup>Prior to May 30, 1995, the felony murder aggravator was applicable when "[t]he murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb." T.C.A. § 39-13-204(i)(7) (1991).

purposes. State v. Bigbee, 885 S.W.2d at 816; State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992). Effective May 30, 1995, our legislature modified the felony murder aggravator such that it is now applicable where the murder “was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.” T.C.A. § 39-13-204(i)(7) (1997) (emphasis added). It is this revised felony murder aggravator which was applied against the defendant.

Defendant does not challenge the use of this aggravating circumstance. However, because this is a capital case, and because it is an issue of first impression, we deem it appropriate to examine the constitutionality of applying the revised aggravator against a defendant convicted of felony murder.

In Middlebrooks, our Supreme Court held unconstitutional the application of the felony murder aggravator to a defendant convicted of felony murder because the aggravating circumstance did not sufficiently narrow the class of death-eligible murderers. Because the language of the felony murder aggravator duplicated the language of the statute defining felony murder,<sup>12</sup> every defendant convicted of felony murder was eligible for the death penalty.

Under the law in effect on November 8, 1995 (and currently), an accused can be convicted of felony murder when a person is killed in the perpetration or attempted perpetration of any first-degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, or aircraft piracy. T.C.A. § 39-13-202(a)(2) (Supp. 1996). A substantial role in committing the underlying felony is not required. Nor is there any culpable mental state required in the killing. Thus, an accused could participate in

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<sup>12</sup>Prior to July 1, 1995, felony murder was defined as “[a] reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy.” T.C.A. § 39-13-202(a)(2) (1991).

a burglary with no intention of harming anyone, and with no knowledge that his partner is armed, and be convicted of felony murder when his partner shoots and kills a neighbor on the spur of the moment, and with no encouragement or aid from the accused. Under the old felony murder aggravator, the accused would be eligible for the death penalty. Under the current felony murder aggravator, however, he would not: the accused did not knowingly commit, solicit, direct or aid the murder, even if he had a “substantial role” in committing the burglary.

Likewise, an accused may be merely “along for the ride” when his cohorts suddenly decide to burglarize a retail establishment. The accused's participation is limited to alerting his cohorts upon seeing blue lights. However, when the police arrive on the scene, the accused deliberately shoots and kills an officer. While the accused may be convicted of felony murder, the felony murder aggravator will not be applicable to him because he did not have a substantial role in committing the burglary.

Given these scenarios, we think it is apparent that the revised felony murder aggravator does not automatically apply to every defendant convicted of felony murder, and sufficiently narrows the class of death eligible felony murderers to pass constitutional muster. Moreover, even if it does not, we find that its use in this case was harmless error beyond a reasonable doubt. See State v. Howell, 868 S.W.2d 238, 260 (Tenn. 1993) (use of invalid aggravating factor is subject to review for harmless error beyond a reasonable doubt). In arriving at this conclusion, we have considered the strength of the two remaining valid aggravating circumstances; the prosecutor's argument at sentencing; the evidence admitted to establish the felony murder aggravator; and the nature, quality and strength of the mitigating evidence. Id. at 260-61.

The other valid aggravating factors in this case were that the defendant had a prior conviction for a violent felony, and that he committed the murder to avoid his lawful arrest or prosecution. T.C.A. § 39-13-204(i)(2) & (6). The evidence supporting the first of these two aggravators was uncontroverted; the evidence in support of the second was also very strong. The prosecutor's closing argument touched briefly on the felony

murder aggravator, but did not emphasize it as much as the other two aggravators. The evidence establishing the felony murder aggravator had been admitted during the guilt phase to establish the defendant's guilt of the crimes charged. Because the defendant was also charged with premeditated murder, especially aggravated kidnapping, and especially aggravated robbery in this case, the State was attempting to prove that defendant intentionally and with premeditation killed Amber Hunter, and that he also committed the other two felonies. Therefore, the proof at trial (rather than at sentencing) established defendant's role in the murder and underlying felonies, as well as his mental state. Accordingly, the jury was not exposed to prejudicial evidence in support of the felony murder aggravator which it would not otherwise have heard. Finally, the evidence in support of mitigating circumstances was effectively impeached by the State, and was clearly outweighed by the proof in support of the two remaining aggravators.

In sum, we conclude that the use of the felony murder aggravating circumstance in this case was constitutional under Bigbee and Middlebrooks. Furthermore, we conclude beyond a reasonable doubt that the defendant's sentence would have been the same had the jury given no weight to the felony murder aggravator. Accordingly, we affirm the defendant's sentence of death.

Defendant's convictions and sentences are affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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NORMA McGEE OGLE, Judge

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ALAN E. GLENN, Judge