

IN THE TENNESSEE COURT OF CRIMINAL APPEALS

AT JACKSON

AUGUST 1999 SESSION

FILED
January 24, 2000

STATE OF TENNESSEE,)

Appellee,)

VS.)

JOHN MICHAEL BANE,)

Appellant.)

C.C.A. NO. W1997-02158-CCA-DD)

SHELBY COUNTY Cecil Crowson, Jr.)
Appellate Court Clerk

HONORABLE JOHN P. COLTON, JR.,)
JUDGE

(Sentencing - Death Penalty)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED: _____

DEATH PENALTY AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal from a new sentencing hearing ordered by the Tennessee Supreme Court. The appellant was originally convicted of murder during the perpetration of a robbery. The jury sentenced the appellant to death, finding that the murder was especially heinous, atrocious or cruel and that the murder was committed during the perpetration of a felony. On direct appeal, the Supreme Court affirmed the appellant's murder conviction, but, in light of State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), set aside the death penalty and remanded the case for a new sentencing hearing. State v. Bane, 853 S.W.2d 483 (Tenn. 1993).¹ After the new sentencing hearing in July 1997, the jury again sentenced the appellant to death, finding that the murder was especially heinous, atrocious or cruel and that the murder was committed to avoid arrest or prosecution.

In this appeal, the appellant raises numerous issues attacking the validity of the death sentence imposed. Having reviewed the various claims, we find no reversible error and thus affirm the judgment of the trial court.

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We note that this case was remanded for a new sentencing hearing after Middlebrooks was released, but before our Supreme Court adopted the harmless error review in State v. Howell, 868 S.W.2d 238 (Tenn. 1993).

FACTS

Because this appeal pertains to the new sentencing hearing that was ordered by the Supreme Court, the evidence introduced primarily addresses the applicability of the aggravating and mitigating circumstances. For a more detailed discussion of the facts, see State v. Bane, 853 S.W.2d 483 (Tenn. 1993). In short, the appellant and his girlfriend, Donna Lovett, robbed and strangled one of his girlfriend's acquaintances. Because Lovett knew the victim, the two decided she would enter the victim's home first and place Visine eye drops into the victim's beer in an attempt to render him unconscious. Once this was accomplished, Lovett was to signal the appellant to come inside for the robbery by flicking the porch light on and off. Lovett's attempt to render the victim unconscious apparently did not work, but she signaled for the appellant to come inside nevertheless. Lovett's minor son waited in their car which was parked outside in the driveway. Evidence at trial suggested that the victim did not surrender his money right away, so he was beaten into submission and subsequently strangled. The appellant and his girlfriend stole several items from the house, as well as over \$700 in cash from the victim's wallet. The appellant was apprehended after Lovett telephoned the police upon learning the appellant had checked into a motel room with another woman the day after the murder. Both of Lovett's minor sons testified at trial.

The victim, Royce D. Frazier, was murdered in his home on November 17, 1988. The victim was found lying in a bathtub full of water. He was gagged and a clear plastic bag was tied around his neck and secured with an electrical cord. In addition, a plunger had been placed over the victim's face in order to keep his head submerged under the water. When the police arrived, they found the victim's house in disarray. Items were scattered about, lamps and ashtrays overturned. There were several charred beer cans in the fire place. The victim's false teeth were found on the fireplace hearth.

Dr. Jerry Thomas Francisco, Shelby County Medical Examiner, performed the autopsy on the 60 year old male victim in this case. The victim died as a result of ligature strangulation with asphyxia, i.e., the combination of the strangulation with the gag and plastic bag. The gag forced the victim's tongue back into his throat. He also suffered extensive bruising to his head, neck, arms, hip and around his eyes. Dr. Francisco testified it was hard to determine how long the victim remained conscious after application of the cord, bag and gag, but stated it could have been anywhere from a few seconds to several minutes. Based upon the autopsy report, Dr. Francisco also testified it was possible the victim was still alive when he was placed in the tub of water.

At the sentencing hearing, Brian Wayne Lovett, the son of the appellant's girlfriend who waited outside the victim's house in the car, testified that the appellant stayed inside the victim's house for approximately half an hour. After the murder, on their way home, the appellant stated that he did "such a good job he deserved a beer." The appellant told Lovett that he "he kept hitting [the victim] and every time he hit him he'd get back up." The appellant also told Lovett he "cut the nuts off" the victim. The medical examiner testified, however, that there was no injury to the victim's testicles. Lovett stated that his mother was crying and nervous on the ride home. Lovett gave conflicting statements to the police concerning the events in this case. In one statement, he said he peered through a window and saw the appellant hold a knife to the victim's groin region while his mother placed a plastic bag over his head. In a subsequent statement, however, Lovett stated that he remained in the car the entire time and did not actually witness any of the events.

Through this witness, the appellant introduced two letters written to him from his girlfriend. In one letter, Donna Lovett accused her son of lying in his testimony. She also wrote that she and the appellant were the only two in the victim's house and, therefore, the only persons who knew what happened.

Lovett's younger son also testified at the hearing and stated that the appellant and his older brother dropped him off at home before the murder and then returned to the victim's house to pick up his mother.

The appellant's aunt, Wilma McNeill, testified on the appellant's behalf. McNeill informed the jury that the appellant was very close to his mother, who died of cancer in April 1988. The appellant's father was a farmer and the family moved around quite a bit when the appellant was younger. McNeill testified that the appellant was helpful around the house and farm and would do what he was asked without complaining. McNeill stated that she loved her nephew and asked the jury to spare his life. At the time of the sentencing hearing, the appellant was married and had two children from a previous marriage.

Teresa Goforth worked with the appellant just before he was arrested. She testified that the appellant was a good, hard worker. Donna Lovett also worked with them. Goforth testified that Lovett was extremely jealous of the appellant. According to Goforth, Lovett thought Goforth was romantically involved with the appellant and Lovett told Goforth about a week before the appellant was arrested that "if she couldn't have Michael no one would and that she would see him locked away so far he would never get out." The appellant was about 23 years old at the time and Lovett was in her 40s.²

Alicia Shadell Gray, the appellant's cousin, testified that Lovett was very possessive and jealous of the appellant. About three weeks before their arrest she heard Lovett say "if I can't have Michael no woman would have Michael, and I'll see us both behind bars." Later that day, Lovett attempted to commit suicide by overdosing on some pills because, according to Gray, she was upset about the appellant seeing another woman. The appellant took Lovett to the

² The trial judge failed to include a Rule 12 report in the record and there is nothing that states the specific ages of the perpetrators.

emergency room. According to Gray, the appellant was involved with another woman at the time, the same woman with whom the appellant shared a motel room the day after the murder. Gray further testified that Brian Lovett visited her sometime after the appellant was originally convicted. Brian Lovett told Gray that he did not want to see an innocent man go to prison and he would submit an affidavit stating that the appellant was not involved in the murder.

The appellant formerly worked for Marvin Ramey on his farm. Ramey testified that the appellant was a good worker and never gave him any trouble. Ramey's wife looked after the appellant when he was younger. Through Maybelle Cunningham, the appellant's aunt, the jury learned that the appellant had two sons, one fourteen years old and the other ten years old. Both of the appellant's parents are deceased.

Diane Bane and the appellant were married in March 1995. Diane Bane had previously been married for twenty-eight years until her husband died of a heart attack in August 1994. She has three children from that marriage. Diane Bane met the appellant while he was in prison through the appellant's brother. She drives approximately 200 miles round trip each Saturday to visit the appellant in prison. Diane Bane testified that she fell in love with the appellant after talking regularly to him on the telephone and eventually asked him to marry her. She stated that she did not care whether he was in prison. She testified on cross-examination that she and the appellant had sex once while in a visiting room in the prison. She lost visitation rights for three months as a result.

ANALYSIS

Especially Heinous, Atrocious or Cruel Aggravating Circumstance:

In his first issue, the appellant challenges the use of the heinous, atrocious

or cruel aggravating circumstance. The murder in this case occurred in 1988. At that time, the death penalty could be imposed if the jury found that “the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.” T.C.A. § 39-2-203(i)(5) (1982). In 1989, the language of this aggravator was amended by deleting “depravity of mind” and replacing it with “serious physical abuse beyond that necessary to produce death.” T.C.A. § 39-13-204(l)(5) (1997). The appellant claims, contrary to the well-established law of this state, that the 1982 version of (i)(5) is unconstitutionally vague.³ The appellant asks this Court to revisit the issue, which has just recently been decided to the appellant’s detriment by the supreme court. See State v. Middlebrooks, 995 S.W.2d 550, 556-57 (Tenn. 1999). This Court is bound by the decisions of the Tennessee Supreme Court, and this issue, therefore, is without merit.⁴ Moreover, because the crime in this case was committed in 1988, the trial court properly instructed the jury under the 1982 statute. See Id. at n.6.

The appellant also argues that the evidence is insufficient to support the application of this aggravating circumstance. The appellant does not explain why he believes the murder was not especially heinous, atrocious or cruel. He simply cites a couple of cases in an attempt, it seems, to preserve the issue. Given the evidence in this case, a rational trier of fact was certainly permitted to find beyond a reasonable doubt that the murder fell under this definition. Even though the medical examiner could not state how long the victim remained conscious after the gag, bag and cord were applied, other evidence about the beatings and circumstances surrounding the death support the finding that there was mental and physical torture and depravity of mind. The victim suffered bruising about his face and eyes and he was discovered with his pants pulled down below his

³ Interestingly, the trial court in this case instructed the jury that it must find both torture and depravity of mind.

⁴ Furthermore, this Court is not bound by the decisions of the lower federal courts. See Middlebrooks, 995 S.W.2d at n.7.

knees. This evidence confirms the testimony of Brian Lovett who related that the appellant repeatedly beat the victim and threatened to cut his testicles unless he revealed where he kept his money. This claim is without merit.

Avoiding Arrest Aggravating Circumstance:

Next, the appellant argues that application of the (i)(6) aggravating circumstance, that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another, failed to sufficiently narrow the class of death eligible defendants in this case. According to the appellant, this aggravating circumstance is present in every murder case where the perpetrator knows the victim. The appellant urges the Court to hold that this aggravator can only be applied when someone other than the intended victim is killed.

The supreme court has recently addressed this issue. In State v. Bush, 942 S.W.2d 489 (1997), the appellant was convicted of premeditated murder and first degree burglary and received the death penalty for the murder conviction. The jury found the same two aggravators found in this case. On appeal, the appellant argued that the imposition of the avoiding arrest aggravator did not narrow the class of death eligible offenders when the murder was committed only to prevent the arrest of the defendant for the commission of the murder. The Supreme Court agreed with this narrow argument, however, the Court held that the aggravator could be applied when the state advanced a different theory, such as the victim was killed to prevent the defendant's arrest for the burglary. The evidence in this case, like the evidence in Bush, showed that the victim was killed by someone he knew. Furthermore, the state's proof showed that one reason the victim was killed was to prevent arrest for the robbery. Accordingly, the evidence in this case is sufficient to warrant the jury's finding of this aggravating circumstance. Moreover, as the Supreme Court has held, the application of this circumstance in this case does not create the same type of narrowing concerns present in Middlebrooks. Bush, 942 S.W.2d at 504-05. This issue is without merit.

Additionally, the appellant argues that the state should be prevented from relying upon this aggravator when it chose not to do so during the original sentencing hearing. The appellant asserts there was no new evidence advanced by the state to support the imposition of this circumstance. Again, the supreme court has previously addressed this issue. In State v. Harris, 919 S.W.2d 323 (Tenn. 1996), the Court held that neither the United States or Tennessee Constitutions nor the Rules of Criminal Procedure preclude the state from relying upon different aggravating circumstances during a new sentencing hearing. The appellant, however, relying on the Court's statement in Harris that the state "is free to strengthen its case in any way it can by the introduction of new evidence," Id. at 331, argues that the state should only be permitted to rely upon a different aggravator when it seeks to introduce evidence previously unavailable. We disagree with the appellant's interpretation of Harris. Elsewhere in its opinion, the supreme court holds that "the State is free, at resentencing to introduce proof of any aggravating circumstance which is otherwise legally valid." Id. at 330. By rejecting the dissent's theory that the only different aggravating circumstance the state should be allowed to use in resentencing would be in the rare case where the defendant is convicted of a violent felony after the original sentencing hearing, we believe the majority in Harris implicitly rejected the appellant's present argument as well. The court did not specifically hold that the state can only introduce evidence otherwise unavailable. The court simply stated that the

state is not limited to the evidence introduced at the first trial. Id. at 331. This issue is without merit.

Impeachment of Witness:

Next, the appellant asserts that the trial court erred when it refused to allow into evidence Brian Lovett's psychological/medical records. Lovett admitted during direct examination that he abused drugs and alcohol and attempted suicide. He also admitted that he received psychiatric treatment approximately one month before the murder in this case. Citing Rule 617, Tenn.R.Evid., the appellant argues that the records reflect upon Lovett's credibility and should have been shown to the jury. Rule 617 provides that a "party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony." The Advisory Commission Comments state that "[o]nly impaired capacity at 'occurrence or testimony' will impeach." In this case, the appellant suggests that Lovett's memory of the events from the night of the crime may have been suspect because of his psychological and abuse problems. The appellant seems to focus on a report that says Lovett was discharged from the hospital against medical advice.

The appellant is challenging, in essence, Lovett's description of the appellant's degree of involvement in the crime. In denying the motion for new trial, the trial court concluded that "defense counsel asked Bryan [sic] Lovett about the information in the records and the witness admitted everything. Thus, the jury heard the evidence from the witness himself, there was nothing to impeach, and the defense was free to argue Bryan [sic] Lovett's credibility to the jury in closing argument." We agree. The admission of the records would have been cumulative. Counsel highlighted Lovett's problems to the jury during arguments. Moreover, the alleged "impaired capacity" of Brian Lovett was not at the "occurrence or testimony."

Nevertheless, this was a resentencing hearing; the appellant had already been found guilty of murder. Given the appellant's conviction, the jury was aware of the appellant's involvement in the murder. Furthermore, Lovett's testimony was not necessarily critical in proving the existence of either aggravating circumstance. Again, the appellant had been convicted of felony murder and robbery. At the hearing below, the medical examiner testified about the extent of injuries the victim suffered. The state did not have to prove that the appellant intended to torture the victim. The (i)(5) aggravator only requires the state to prove that the murder involved torture or depravity of mind. The victim in this case was obviously tortured. Lovett's testimony did not add anything relevant to this fact. As far as the (i)(6) aggravator, the other Lovett boy also testified that the victim was someone his mother and/or the appellant knew. Accordingly, even without Brian Lovett's testimony, the state would have been able to establish that the murder was committed to avoid arrest for the robbery since the perpetrators knew their victim. This issue is without merit.

Accomplice Instruction:

Similarly, the appellant contends that the trial court should have instructed the jury that Brian Lovett was an accomplice to the offense. The appellant also claims that this should have been included as a specific instruction on mitigating circumstances. We address the latter claim below. The appellant argues that since Lovett participated in the murder the jury should have specifically been informed that he was an accomplice. Brian Lovett was classified as an accomplice by the trial judge during the original trial. State v. Bane, 853 S.W.2d 483, 485 (Tenn. 1993). According to the appellant's argument, Lovett's status as an accomplice was probative on the issue of appellant's punishment. The appellant asserts that he is entitled to introduce evidence relating to the circumstances of the crime, including evidence which mitigates his culpability. More specifically, the appellant suggests that proof of the aggravating

circumstances cannot be found upon the uncorroborated testimony of this alleged accomplice.

As the appellant acknowledges, a jury had already found him guilty of first degree murder. It is well-settled law that a “conviction” cannot be based solely upon the uncorroborated testimony of an accomplice. See State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). While the finding of aggravating circumstances by a jury in the sentencing phase of a capital trial may be similar to a finding of guilt, the state did not rely solely upon the testimony of Brian Lovett to prove the aggravating circumstances in this case.

The state was relying on two aggravating circumstances: the heinousness, atrociousness or cruelty of the murder and whether the murder was committed to avoid arrest. Again, the fact that the appellant committed the murder had been established. The next step for this jury was to determine whether the aggravating circumstances had been proven beyond a reasonable doubt. Following the appellant’s argument, the state should not have been allowed to rely solely upon Lovett’s uncorroborated testimony concerning the circumstances of the crime since he was an accomplice.

Contrary to the appellant’s suggestion, however, there was other evidence presented that helped establish the aggravating circumstances. Cf. id. (“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 is slight and entitled, when standing alone, to but little consideration”). The medical examiner testified about the extent of the victim’s injuries and the younger Lovett boy also testified that his mother and the appellant were going to borrow money from someone they knew. Regarding the appellant’s assertion that mitigating evidence was excluded by the trial court’s failure to provide an accomplice instruction, Brian Lovett fully testified before the jury about his

involvement in this matter. Furthermore, the trial court did instruct the jury that it could consider as mitigation any aspect or circumstances of the crime favorable to the defendant. We can find no error in this instance, and, accordingly, this issue is without merit.

Sentencing Instructions:

Because the murder in this case occurred before the 1989 amendments to the death penalty statute, the trial court instructed the jury under the law in existence at the time of the crime. The appellant insists, however, that the trial court should have instructed the jury pursuant to the 1989 changes. Specifically, the appellant asserts the judge should have instructed the jury that it must find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Prior to 1989, the statute called for the death penalty upon a finding that the aggravating circumstances are not outweighed by the mitigating circumstances. T.C.A. § 39-2-203 (1982). The supreme court has consistently held that a trial court does not err by instructing the jury under the statute as it existed at the time of the offense. See, e.g., State v. Walker, 910 S.W.2d 381, 397 (Tenn. 1995); State v. Brimmer, 876 S.W.2d 75, 82 (Tenn. 1994). This issue is without merit.

Similarly, the appellant contends the trial court should have provided the jury instructions on the nonstatutory mitigating circumstances he submitted to the court. In State v. Cauthern, 967 S.W.2d 726, 746-47, (Tenn. 1998), a capital case in which a resentencing hearing was ordered for a pre-1989 murder, the supreme court adopted the portion of this Court's opinion that addressed this very issue. Citing State v. Odom, 928 S.W.2d 18 (Tenn. 1996), the court held that the trial court was not compelled to provide nonstatutory instructions on mitigating evidence and should have instructed the jury under the law as it existed. The trial court in this case did precisely that. Accordingly, there is no merit to the

appellant's contention.

Prosecutorial Misconduct:

The appellant also claims that the prosecutor improperly attacked the appellant's character during cross-examination and closing arguments. Specifically, the appellant asserts that the prosecutor should not have been allowed to question mitigation witnesses about the appellant's alleged promiscuity or refer to the appellant as Lovett's "sweetheart" during closing argument. According to the appellant's argument, these actions by the state erroneously represented to the jury evidence of a nonstatutory aggravating circumstance, mainly the appellant's immoral character.

During the state's case in chief, the jury learned that the appellant rented a motel room with another woman the day after the murder. As mitigation, the appellant solicited information about his marriages, his children, and his home life. In fact, during the appellant's direct examination of his cousin, his cousin stated that the appellant was dating another woman (the one who spent the night with him in the motel) while he was allegedly seeing Lovett. During cross-examination, the prosecutor asked appellant's cousin about his relationship with this woman, as well as his relationships with other women. Interestingly, however, the appellant is not complaining about the questioning of this witness. He is complaining about the prosecutor's cross examination of the appellant's aunt regarding the appellant's ex-wife and previous girlfriends.

The capital sentencing provision governing this trial provides that "evidence may be presented as to any matter the court deems relevant to the punishment and may include . . . the defendant's character, background history, and physical condition . . . and any evidence tending to establish or rebut any mitigating factors." T.C.A. § 39-2-203(c) (1982). The jury was instructed that it could

consider as mitigation any factors raised by the evidence produced by either the defense or prosecution, including any aspect of the appellant's character. The appellant characterizes the prosecutor's actions in terms of aggravation. We believe this is a mischaracterization. The prosecution was simply soliciting evidence to rebut, as the state was permitted to do, the appellant's mitigation and description of his character. Even if the questioning was improper, the error is harmless in light of the cousin's answers on direct examination. The evidence the appellant himself presented to the jury explained that he had been married twice and was dating two women at the same time. Furthermore, although the prosecutor asked the aunt about the appellant's previous girlfriends, the aunt clearly responded that she did not try to "keep track" of the appellant's life and did not know any of his previous girlfriends or with whom he had lived. Accordingly, this witness' answers tended to dispel any rumors or suspicions created by the questions.

The appellant also complains that the prosecutor belabored this notion of the appellant's promiscuity by referring to him during closing arguments as Lovett's "sweetheart." As is commonly recognized, closing arguments are an important tool for the parties during the trial process. Consequently, the attorneys are usually given wide latitude in the scope of their arguments, see State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994), and trial judges in turn are accorded wide discretion in their control of those arguments, see State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App.), perm. app. denied, (Tenn. 1995). Such scope and discretion, however, are not completely unfettered. The test for determining whether the prosecuting attorney committed reversible misconduct in the argument is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). The following factors have been recognized to aid the Court in this determination: 1) the conduct complained of, viewed in light of the facts and circumstances of the case; 2) the curative measures undertaken by the court and

the prosecutor; 3) the intent of the prosecutor in making the improper statement; 4) the cumulative effect of the improper conduct and any other errors in the record; and 5) the relative strength or weakness of the case. State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984); Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

While derogatory remarks or improper name-calling on the prosecutor's part are irrelevant and patently improper, see, e.g., State v. Bates, 804 S.W.2d 868, 881 (Tenn. 1991) (referring to defendant as a rabid dog); State v. Green, 947 S.W.2d 186 (Tenn. Crim. App. 1997) (repeatedly calling defendant by his first name), the ultimate question is whether these remarks affected the verdict to the appellant's prejudice. The evidence introduced during the sentencing hearing established that the appellant was involved in a romantic relationship with Lovett. The appellant also introduced a letter written by Lovett wherein she addressed him as "sweetheart." Although the term sweetheart is synonymous with the term girlfriend or boyfriend, the prosecutor may have over-embellished somewhat in this case. Regardless, the appellant brought this term to the attention of the jury. We do not find this reference prejudiced the verdict.

Also regarding closing argument, appellant claims the prosecutor improperly told the jury there is "no greater torture" than when someone threatens to cut off a man's testicles. Closing arguments must be temperate, must be based upon evidence introduced at trial, and must be pertinent to the issues being tried. Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). While a prosecutor may not express his personal opinion or belief, id., he or she may state conclusions based upon inferences supported by evidence in the record, State v. Brown, 836 S.W.2d 530, 552-53 (Tenn. 1992). As soon as the prosecutor made the above-mentioned comment, defense counsel voiced an objection. The trial court thereafter instructed the jury

that the statements, arguments, and remarks of counsel are

intended to help you in understanding the evidence and applying the law. But if they are not evidence or if any statements were made that you believe are not supported by the evidence, you should disregard them. And this would include what has just been stated by the State's attorney.

Although this statement may have been improper, given that it was one isolated remark in this respect and the trial court gave a curative instruction, we do not find cause for reversal.

The appellant also complains about the following argument by the prosecutor:

Obviously, they didn't gag him to keep him from talking when they wanted to find out where the wallet was. It'd be kind of hard to make him tell you that if he was already gagged. There's not much need to gag him once you've got a plastic bag or an electrical cord around his neck and are choking him to death. There's no need to gag him then.

So if you've already gotten the location of the money and gotten the wallet, why do you then gag a man? Because you don't want to hear his screams. It's not to stop him from talking. It's to stop him from screaming.

Appellant's counsel immediately objected to this and the trial court gave the same curative instruction. Regardless, this argument was not improper. As noted earlier, the prosecutor may argue reasonable inferences based upon the evidence before the jury. See also State v. Cone, 665 S.W.2d 87, 94 (Tenn. 1984). We believe this argument was just that, a reasonable inference from the proof, and not error. This issue, therefore, is without merit.

Exclusion of Witness:

The appellant next argues the trial court erred to his prejudice by ordering the removal from the courtroom of his expert witness during the testimony of the state's expert. Prior to any testimony, the trial court stated that all witnesses would be excluded from the courtroom until after they testified. See Rule 615,

Tenn.R.Evid. The appellant requested that his expert pathologist be allowed to remain in the courtroom during the testimony of the medical examiner. Counsel argued that the assistance of their expert was essential in understanding the state's expert testimony for purposes of cross-examination. The trial court denied the request.

Dr. Richard Harruff and Dr. Jerry Thomas Francisco performed the autopsy on the victim in this case. Dr. Harruff testified for the state during the original trial. Dr. Francisco testified during this resentencing hearing. Prior to trial, the appellant was provided a copy of the transcript of Dr. Harruff's testimony from the original trial. He also had a copy of the autopsy report.

Rule 615 permits the court to allow defense expert witnesses to remain in the courtroom during the testimony of a state expert if the defense is able to show that the presence of the expert is essential to the presentation of the defense. The Advisory Commission Comment to this rule notes that this practice is within the trial court's discretion. The Comment also suggests that this exception to the sequestration rule may be allowed if the attorney would have trouble understanding the testifying expert's testimony. We believe the appellant has failed to show how the trial judge abused his discretion in this case.

Because the appellant possessed the prior transcript and autopsy report, he and his expert had advance knowledge of the general nature of Dr. Francisco's testimony. The appellant argues that the state's witness was essential in establishing the heinous, atrocious or cruel aggravator and to exclude the defense witness was prejudicial to his case. The appellant's argument must fail. As the state notes, Dr. Francisco's testimony was rather straightforward and uncomplicated. Nothing about Dr. Francisco's comments should have confused the appellant, especially given the fact that he possessed the prior medical testimony and autopsy report. Accordingly, we do not believe the trial judge

abused his discretion in this instance. See State v. Lane, No. 52, Shelby County (Tenn. Crim. App., Jackson, June 14, 1989) (case decided prior to enactment of Rule 615, but Court held under common law that trial court discretion in excluding witnesses from courtroom would not be disturbed on appeal unless appellant prejudiced by action); Brown v. Brown, No. 02A01-9108-CV-00168 (Tenn. App., Jackson, Jan. 16, 1992); cf. Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625 (4th Cir. 1996) (interpreting similar federal rule on exclusion of witnesses). This issue, therefore, is without merit.

Removal of Juror for Cause:

The appellant contends the trial court erroneously excused a prospective juror during voir dire. He argues that, although the juror initially stated he could not vote for imposing the death penalty, upon further questioning by defense counsel the juror acknowledged that he could follow the mandates of the law as instructed by the trial judge. The appellant further argues the trial judge

improperly and excessively questioned the juror even after he had allegedly been rehabilitated by defense, thereby forcing his removal from the panel.

Upon questioning by the prosecutor, prospective juror Yual Carpenter stated that no matter what the case he could not personally agree to sentence someone to death. The prosecutor asked for excusal. The following exchange then occurred:

Prospective Juror Carpenter: The question he asked, well, if I did find like that, I couldn't -- because of my heart I couldn't live with myself by doing that, by putting my name on that I just --

Defense Counsel: You don't think under -- if His Honor instructed you that it was the law and all that --

Juror: Yes.

Counsel: -- and you went through that instruction that even if you found that that enhancement factor exists you're saying you wouldn't be able to do it?

Juror: I don't believe so because, you know . . .

Counsel: You don't think you'd be able to follow the law?

Juror: I could follow the law, but, you know, it would probably be --

Counsel: Well, I mean, you regard death as a very serious thing?

Juror: Yes.

Counsel: And having the power to take someone's life is a very --

Juror: Yes. I don't think -- my signature shouldn't have that pull.

. . .

Juror: What I'm trying to get you to understand is that like I couldn't put my name on it.

Counsel: You don't think you could do it even if His Honor instructed you to follow the law?

Juror: See, then it would be forcing me to do something against my will.

Counsel: Let me ask you this. If His Honor were to instruct you to follow the law would you follow the law?

Juror: Yeah, I'll follow the law.

The trial court then asked Carpenter several questions regarding his position:

Court: All right. Mr. Carpenter, let me ask you, sir, you say you couldn't write your name down. Now, the -- you understand what the law is in this?

Juror: Yes, sir.

Court: -- that you have the choice of life imprisonment or death by electrocution; is that correct?

Juror: Yes, sir.

Court: Now, that's the law in the state of Tennessee.

Juror: Yes, sir.

Court: You understand that? Now, are you saying that you could not follow that law if it were presented to you beyond a reasonable doubt and to a moral certainty by the aggravating circumstances overcoming the mitigating circumstances you could not follow the law as far as death is concerned?

Juror: No, sir.

Court: You could not?

Juror: (No audible response.)

Court: All right. You'll be excused. The Court finds that this juror irrevocably is committed prior to trial in this case that he will not follow the law of the state of Tennessee.

The applicable standard for determining whether a juror was properly excused for cause because of his or her beliefs on the death penalty was delineated in Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), and is as follows: "whether the juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" See State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989) (Tennessee Supreme Court adopts Wainwright standard). Furthermore, the United States Supreme Court held that "this standard does not require that a juror's bias be proved with 'unmistakable clarity.'" Wainwright, 469 U.S. at 424, 105 S.Ct. at 852. The Court also noted that "deference must be paid to the trial judge who sees and hears the jurors." Id. at 426, 105 S.Ct. at 853.

It appears to us that Carpenter's answers "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424, 105 S.Ct. at 852. See also, State v. Smith, 893 S.W.2d 908, 915-16 (Tenn. 1994). Although this determination might not be "unmistakably clear," it need not be. Moreover, as the United States Supreme Court has held, great deference should be given to the trial judge, who is "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Wainwright, 469 U.S. at 426, 105 S.Ct. at 853. The trial judge's findings "shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that [those findings were] erroneous." State v. Alley, 776 S.W.2d 518 (Tenn. 1989). Although the appellant claims that Carpenter was rehabilitated by defense counsel's questions, the record simply does not support this argument. This issue is without merit.

Statutory Review:

Pursuant to T.C.A. § 39-13-206, this Court must also consider whether the sentence of death was imposed in an arbitrary fashion, whether the aggravating circumstances outweigh the mitigating circumstances, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. In State v. Bland, 958 S.W.2d 651 (Tenn. 1997), the Supreme Court outlined the process appellate courts should employ when conducting a comparative proportionality review. The review required is not a rigid, objective test, id. at 668, nor are the courts bound to consider only those cases in which exactly the same aggravating circumstances have been found, State v. Brimmer, 876 S.W.2d 75, 84 (Tenn. 1994). It is the duty of the appellate court, not to “assure that a sentence less than death was never imposed in a case with similar characteristics,” but to “assure that no aberrant death sentence is affirmed.” Bland, 958 S.W.2d at 665.

With respect to the circumstances of the offense, we consider: 1) the means of death; 2) the manner of death; 3) the motivation for the killing; 4) the place of death; 5) the similarity of the victims’ circumstances including age, physical and mental conditions, and the victims’ treatment during the killing; 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. With respect to comparing the character of the defendants, the following factors are relevant: 1) the defendant’s prior criminal record or prior criminal activity; 2) the defendant’s age, race, and gender; 3) the defendant’s mental, emotional or physical condition; 4) the defendant’s involvement or role in the murder; 5) the defendant’s cooperation with authorities; 6) the defendant’s

remorse; 7) the defendant's knowledge of helplessness of victim(s); and 8) the defendant's capacity for rehabilitation.

The facts and circumstances of the offenses in this case have been detailed above. While no two cases are identical, considering the factors outlined above, we believe the following cases where the death penalty was imposed contain characteristics similar to the present one: State v. Hall, – S.W.2d – (Tenn. 1999) (defendant repeatedly beat and drowned his estranged wife in her home - jury found one aggravator, that the murder was especially heinous, atrocious or cruel); State v. Mann, 959 S.W.2d 503 (Tenn. 1997) (young defendant broke into home of elderly victim whom he knew and beat, raped and killed her - jury found two aggravating circumstances, that the murder was especially heinous, atrocious or cruel and that the murder was committed during burglary); State v. Bush, 942 S.W.2d 489 (Tenn. 1997) (young defendant broke into home of elderly victim whom he knew and beat and stabbed her to death - the jury found the same two aggravators that were found in the present case); State v. Barber, 753 S.W.2d 659 (Tenn. 1988) (defendant and his accomplice broke into house of elderly victim they knew intending to commit robbery - victim was brutally beat about the head upon discovering the plot - jury found that the murder was especially heinous, atrocious or cruel); State v. McNish, 727 S.W.2d 490 (Tenn. 1987) (young defendant beat and killed elderly victim, with whom he was acquainted, in her home during robbery attempt - jury found one aggravating circumstance, that the murder was especially heinous, atrocious or cruel).

We are convinced that the result in this case was neither disproportionate nor arbitrary. Moreover, having thoroughly reviewed the record in this case, we believe the evidence supports the jury's finding that the aggravating factors outweigh the mitigating evidence that was introduced on appellant's behalf.

CONCLUSION

Accordingly, for the reasons stated above, we affirm the appellant's sentence of death. Because this case must automatically be reviewed by the Tennessee Supreme Court, we will not set an execution date. See T.C.A. § 39-13-206.

DAVID H. WELLES, JUDGE

CONCUR:

JERRY L. SMITH, JUDGE

JAMES CURWOOD WITT, JR., JUDGE