IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
FEBRUARY SESSION, 1995

FILED

February 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9403-CR-00094
Appellee	)	
	)	CUMBERLAND COUNTY
vs.	)	
	)	Hon. **LEON BURNS, JR**., Judge
MICHAEL DEAN BUSH,	)	
	)	(First Degree Murder and
Appellant	)	First Degree Burglary)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Michael Bush, appeals as of right from a judgment of conviction and sentence of death for first degree murder and a judgment of conviction for first degree burglary. The appellant raises the following issues for our review:[1]

> (1) whether the trial court erred in overruling the appellant's motion to suppress his pre-trial statements;
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> (2) whether the trial court erred in overruling the appellant's motion for a judgment of acquittal as to the charge of first degree murder;
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> (3) whether the trial court erred in overruling the appellant's motion to suppress his wife's testimony;
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> (4) whether the trial court erred in overruling the appellant's motion to suppress the testimony of jailhouse informants;
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> (5) whether the trial court erred in admitting, over the appellant's objection, photographs of the victim at the murder scene;
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> (6) whether prosecutorial misconduct deprived the appellant of a fair trial;
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> (7) whether the prosecutor's argument during the sentencing phase was unconstitutional, improper, and unethical;
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> (8) whether the trial court unconstitutionally infringed upon the jury's prerogative to assess the credibility of the State's witnesses;
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> (9) whether the appellant's burglary conviction violated the state and federal constitutions;
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> (10) whether the Tennessee death penalty statute is unconstitutional in that it allows for unfair implementation of the death penalty;
>
> (11) whether the appellant was unconstitutionally deprived notice of the factual basis for the application of the "witness murder" aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(6);
>
> (12) whether the trial court improperly instructed the jury as to the "heinous, atrocious and cruel" aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(1)(4);
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> (13) whether, during the sentencing phase, the trial court admitted

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[1] The appellant raises nineteen issues in his brief of 302 pages. We note that the transcript of the proceedings contains in excess of 4,175 pages, not including a technical record of 989 pages.

evidence that violated the appellant's rights to counsel and to remain silent;

(14) whether the trial court, at both phases of the trial, improperly instructed the jury as to the meaning of "reasonable doubt;"

(15) whether the trial court's instructions at the sentencing phase unconstitutionally prohibited the jury from considering and giving full effect to the appellant's mitigating evidence;

(16) whether the trial court failed to provide to the jury the proposed instructions necessary for the proper determination of the sentence;

(17) whether the death sentence unconstitutionally infringes upon the appellant's fundamental right to life;

(18) whether the Tennessee death penalty statute is unconstitutional in that it allows cruel and unusual punishment and denies defendants their due process rights; and

(19) whether the cumulative effect of all errors violates the appellant's constitutional rights.

After a review of the record, we affirm both convictions and the sentence of death.

I. FACTS - GUILT/ INNOCENCE STAGE:

On August 19, 1988, Bobby Lane, a criminal investigator for the Putnam County Sheriff's Department, was dispatched to the home of Jodie Lefever to investigate her apparent homicide. Ms. Lefever was a seventy-nine-year-old widow who lived in the Silver Point community of Putnam County.[2] A neighbor had reported seeing Ms. Lefever's body through a window in her home when he had checked on her earlier in the day.

When Deputy Lane opened the side door of Ms. Lefever's house, he observed Ms. Lefever's body lying face down beside the door. Deputy Lane

[2] Although the crime occurred in Putnam County, the appellant's trial was held in Cumberland County pursuant to his motion for change of venue.

further observed a gashing wound to the left side of the center of Ms. Lefever's head that extended to the base of her head. Numerous wounds were on her back. A large amount of blood was on her back, around her head, and on the floor. When he looked around the room, Deputy Lane noticed drops of blood on a chair and on the floor leading to the kitchen. A large amount of blood was splattered on the door and wall. He also noticed a piece of pressure-treated wood lying on the floor at the edge of the sofa. Another investigator found another piece of pressure-treated wood behind the television set.

At trial, Deputy Lane testified that the front door and windows of Ms. Lefever's house were locked, and that there was no sign of forced entry. The house was not in disarray, but two holes were found in the wall near the victim's body. Ms. Lefever was still wearing pearl earrings and a wedding ring. Fifty dollars were found in her purse in the bedroom. No bloody fingerprints were found anywhere, but one drawer in the victim's bedroom dresser was open. According to family members, the only item missing from the house was a butcher knife that the victim kept in a drawer near the kitchen sink.

Dr. Gretel Harlan, an assistant medical examiner with the State Medical Examiner's office, testified at trial that Ms. Lefever died as a result of multiple stab wounds. She was stabbed forty-three times. The wounds were in a pattern of distribution from the left side of the face, down the back of the neck and shoulders, and down the back. The wounds injured the left eye and multiple vital organs within the chest. Dr. Harlan testified that Ms. Lefever's heart was pumping when each of the stab wounds was inflicted, and that, since no damage was done to the central nervous system, Ms. Lefever possibly felt each of the stab wounds. Although Dr. Harlan could not tell the jury exactly how long the victim was conscious after she was first stabbed, the examiner stated that Ms. Lefever could have been alive for as long as twenty to thirty minutes, or for as

short a period of time as three to five minutes. Blood samples were drawn from the victim and sent to the T.B.I. lab for sampling.

On September 25, 1988, Sheriff Jerry Abston was notified by his office that Larry Bush, the father of the appellant, and Michael Bush, the appellant, were at the Putnam County Sheriff's Office, and that the appellant had information regarding the Lefever murder. Sheriff Abston proceeded to his office and spoke with the appellant, who indicated that he had been present when the victim was killed. At this point, the interview was moved to the Cookeville Police Department. While at the Cookeville Police Station, Sheriff Abston recorded the appellant's statement.

The appellant stated that he had received a telephone call at approximately 3:00 p.m. on the afternoon of August 16, 1988, and that a voice had told him that, if he ever wanted to see his family alive again, he would come to the "Japanese - like looking house in Silver Point" after dark. After he hung up, the appellant called his house. When nobody answered, he concluded that something was wrong.

Later in the evening, according to the appellant's statement, he asked his wife to drive him to the house in Silver Point. He told his wife that he needed some money, and that he was going to rob an old woman who lived there. When his wife dropped him off, the appellant saw four men wearing black ski masks getting out of their vehicles nearby. As the appellant approached the men, one of them pulled out a gun and told the appellant that they needed someone that the victim trusted.[3]

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[3] The appellant knew Ms. Lefever and was familiar with her home, because Ms. Lefever was a good friend of his grandmother, Rose Mae Bush.

The appellant told Sheriff Abston that Ms. Lefever was on the phone when he arrived at her house. He knocked on the door and identified himself. When Ms. Lefever unlocked the door, the men shoved the appellant into the house, and one of the men hit the victim. Another man pulled out a stick and began hitting her. The stick broke, and, for a few minutes, the men were intent upon finding pieces of the stick. They handed the pieces to the appellant and told him to go outside. In about three or four minutes, the men also came out. One of them gave the appellant a knife, cutting the appellant's hand in the process. The men told the appellant to "get rid of the stuff" and to wash himself off. They then told him that "loose lips sink ships."

The appellant stated that his wife picked him up shortly thereafter, and that he was crying, and that he was covered in blood. His wife asked him what was wrong, and he told her that he had killed Jodie Lefever. He directed her to drive him to the lake, into which he threw the pieces of stick and the knife. He then told his wife that he wasn't the person who had killed Ms. Lefever.

At trial, the tape was played for the jury. Sheriff Abston testified that, shortly after the appellant made this statement, as a result of additional interviews and also conversations with his staff, he arrested the appellant for the murder of Jodie Lefever. The appellant was advised of his rights, which he waived. Later in the afternoon of the same day, the appellant gave another statement, which was also recorded and played for the jury at trial. The second statement was essentially the same as the first.

On the day of the appellant's arrest, Doug Burgess, an investigator for the Putnam County Sheriff's Office, received a call from his brother, the chief of police in Baxter, Tennessee. His brother told Deputy Burgess that Sheila Bush, the appellant's wife, had information concerning Jodie Lefever's murder.

Burgess drove to the trailer, where Ms. Bush then resided with her mother, and spoke with her. He then took Ms. Bush to the Putnam County Sheriff's office, where Ms. Bush made several statements.

Ms. Bush told the officers that she and the appellant had married on August 13, 1988, approximately three days before the murder of Ms. Lefever. For a brief period following their marriage, the appellant and Ms. Bush resided with her mother. On the evening of August 16, 1988, the appellant told his wife that he knew a woman whom he could knock in the head and from whom he could steal money. He pried a stick out of the bedroom door of the trailer and told his wife to drive him to Silver Point. As they approached the victim's neighborhood, the appellant told his wife to stop beside a mailbox. He got out of the vehicle and told his wife to come back and pick him up in twenty minutes.

When she returned, the appellant was standing in the middle of the road. He had taken his shirt off and was covered in blood. As he got into the car, the appellant told his wife that he had killed Ms. Lefever by stabbing her with a knife. He instructed her to drive to the dam by the boat ramp. He threw his shirt, the knife, the sticks, and a pair of sunglasses into the lake. He then washed himself off.

According to Ms. Bush, the following day the appellant related the incident in more detail. The appellant told his wife that he had hit the victim with a stick. He had then removed his shirt, wrapped the shirt around his hand, and obtained a butcher knife from a kitchen drawer. He stabbed Ms. Lefever thirty or forty times and practiced karate on her.[4] Having recounted these details, the appellant made his wife lie on the floor, where he demonstrated how he had

[4] At the time of the murder, the appellant was 18 years old, 6 feet tall, and 230 pounds.

stabbed Ms. Lefever in the back and in the head.

When asked why she had not reported this information earlier, Ms. Bush stated that the appellant had told her that the Mafia was watching her and that something would happen to her if she mentioned anything. However, on September 24, 1988, the day before Ms. Bush spoke with the police about the Lefever murder, she and the appellant were involved in an altercation at her mother's home, during which the appellant struck his wife several times. The altercation arose when Ms. Bush refused to leave her mother's home with the appellant. Ms. Bush's brother intervened and threatened the appellant with a shotgun, forcing the appellant to flee. Ms. Bush and her mother proceeded to the police station and filed criminal charges against the appellant. The following day, Ms. Bush told her family that the appellant had murdered Jodie Lefever. Ms. Bush's brother-in-law contacted the police.

At trial, Howard Morris, an agent with the T.B.I. dive team, testified that he had recovered a knife next to the Center Hill Dam. Roger Lefever, the grandson of the victim, identified the knife as one that his grandmother had kept in a drawer next to the kitchen sink.

Sandy Evans, a forensic scientist in the micro-analysis section of the Tennessee Bureau of Investigation crime lab, testified that the two sticks of wood found at the home of the victim came from the top of a bedroom door in the trailer belonging to Sheila Bush's mother. Constance Howard, another T.B.I. forensic expert and a specialist in serology, typed the blood of the appellant and the victim. She concluded, and testified at trial, that the blood taken from the rug and the floor of Ms. Lefever's home was consistent with the blood of the appellant and not that of the victim. She further testified that the blood samples could only have come from two percent of the state's population.

James Mullins, a friend of the appellant, testified that, the day after Ms. Lefever's body was found, the appellant came to his house with a newspaper story about the murder. According to Mullins, the appellant was excited and grinning as he told him that the victim didn't live far from the appellant's house.

Jimmy Myers, a cell mate of the appellant in the Putnam County jail, testified that the appellant spoke to him about the murder. The first time the appellant talked about the murder, he told Myers that his wife had taken him to the victim's house to get money. When he couldn't find any money, he killed Ms. Lefever. Later, the appellant told Myers that his attorneys had warned him to be careful about what he said in jail, because somebody might be trying to obtain information. The appellant then told Myers several different accounts of the murder. The appellant also told Myers that he was going to "play crazy."

William Roger Moore, another fellow inmate of the appellant, testified that the appellant had told him that he had gone to get some money from the victim and that they had gotten into an argument. The appellant lost his temper and stabbed the victim repeatedly. The appellant also told Moore that his only defense was to "make the ploy of craziness."

The State rested and the defense moved for judgments of acquittal as to both charges. The defense relied upon the evidence already presented and offered no further proof. The jury was instructed and, following deliberation, found the appellant guilty of both first degree burglary and first degree murder.

II. FACTS - SENTENCING PHASE:

At the sentencing phase of the trial, the State relied upon the evidence presented during the guilt phase and presented no further proof. The appellant

first introduced a video deposition of Rose Mae Bush, the eighty-five-year-old grandmother of the appellant. Ms. Bush briefly described the family's history. She stated that the appellant was the middle child of three children, and that he had been a sweet child. His father, however, "was rough on Michael" and disciplined him more than the other children. The appellant's mother died of cancer in 1989.

Ms. Bush further testified that, at the age of ten, the appellant was involved in a serious bicycle accident, which resulted in a skull fracture. After the accident, the appellant often told his grandmother that he wished he had died in the accident and that he wanted to die. In 1988, the appellant was hospitalized following two apparent suicide attempts.[5] Ms. Bush also stated that the appellant sniffed gas. She knew that he sniffed gas, because she had "smelt it on him." Nevertheless, Ms. Bush maintained that the appellant was intelligent and "just [a] typical teenager."

Finally, Ms. Bush testified that she and Ms. Lefever had been friends since childhood, and that, when they went to the store, the appellant would often carry Ms. Lefever's groceries. She testified that the victim had loved the appellant. She also stated that she did not believe that the appellant had committed the crime, but believed that he had been framed.

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[5] During the guilt phase, Sheila Bush Hammock asserted, "Michael wasn't going to take his life. Michael is too smart ... He just wanted attention." Hospital records indicate that on May 30, 1988, the appellant ingested approximately 20 or 30 Tylenol tablets, in conjunction with alcohol. At the time of his suicide attempt, he was with friends. Approximately 5 days later, on June 3, 1988, the appellant ingested a bottle of midol and a bottle of Advil, again in conjunction with alcohol. He was with a friend, and asked this friend to take him to the hospital. Dr. James Gillespie, Jr., the admitting psychiatrist, observed, "[The appellant] is somewhat vague about his reasons for taking the overdose, but says in his defense that he had no intentions of dying and could have had access to a gun or sleeping pills if he were serious about suicide. ... He implies that he may have taken the overdoses to upset his girlfriend ... ." Another doctor noted that the appellant "claimed that everything was all a joke. The patient was considered manipulative and quite babyish with the nursing staff."

Clarence Davenport, formerly the pastor of Wolf Creek Baptist Church, where the Bush family attended church, also testified on behalf of the appellant. He stated that the appellant had interacted well with other children and had behaved during church services.

Larry Bush, the appellant's father, testified that, during the appellant's childhood, there was much discord in the home. Mr. Bush admitted that he had assaulted his wife on several occasions. He also recounted numerous instances in which he had "whipped" his son.

Mr. Bush also testified that, when the appellant was eighteen months old, he would hold his breath until he passed out. Additionally, the appellant required medication for hyperactivity. When he was three or four years old, the appellant began sniffing gas. At age ten, he was involved in a bicycle accident and incurred a severe head injury. He was hospitalized for a week in intensive care. Following the accident, the appellant became more nocturnal. According to Mr. Bush, the appellant also became more distant and quick-tempered. He was often involved in fights at school because of his temper. Ultimately, in the fall of 1987, during his senior year, the appellant dropped out of high school.[6]

Mr. Bush stated that, as a child, the appellant was fascinated with twins and death. He wanted to attend all of the family funerals, and he would often touch the bodies of the deceased. The appellant also had nightmares and drew pictures of monsters and demons.

Sherry Bush Agee, the appellant's sister, testified that her father often

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[6] The admission records from the Plateau Mental Health Center indicate that the appellant blamed his voluntary departure from high school on difficulties with his teachers. However, his grades had been satisfactory until that point.

beat the appellant when he was younger. She acknowledged that the appellant began sniffing gas at an early age. Through Ms. Agee, the defense also introduced numerous poems written by the appellant. She testified that the appellant had received awards for his poetry.

Donald Bush, the appellant's uncle, testified that the appellant had worked for him renovating houses, and that he had always been an excellent worker. Mr. Bush also described two incidents in which he witnessed the appellant being beaten by his father.

Rebecca Jane Smith, a social worker employed with the Middle Tennessee Mental Health Institute (M.T.M. H. I.), Forensic Services Division, testified that she was on the appellant's initial evaluation team. She provided the court with a copy of the appellant's mental health record from M.T. M. H. I.

Ms. Smith testified that the appellant was admitted to M.T.M.H.I. on January 30, 1989, for evaluation and was discharged on April 10, 1989. He was admitted a second time for treatment on May 1, 1991, and was discharged on August 5, 1991. Ms. Smith testified that, during his first visit, the appellant initiated several altercations with other patients. At times, the appellant required restraints and was placed in solitary confinement. However, during his second hospitalization, the appellant was calmer and less disruptive. Ms. Smith confirmed that the appellant was diagnosed as paranoid schizophrenic.

Dr. Gillian Blair, a licensed clinical psychologist at M.T.M.H.I., Forensic Services Division, was also a part of the appellant's evaluation team in 1989. Her function was to conduct clinical interviews with the appellant and administer psychological tests.

Dr. Blair testified that, on the basis of the information gathered and reviewed, the evaluation team diagnosed the appellant as suffering from schizophrenia paranoid subtype sub chronic, an adjustment disorder, and substance abuse. She defined schizophrenia paranoid as a disorder in which the patient experiences systematized delusions and frequent auditory hallucinations. The patient often exhibits unfocused anxiety and anger and extreme intensity in interpersonal interaction. She defined an adjustment disorder as a response to situational stresses. Finally, she stated that a substance abuse disorder was diagnosed because of the appellant's history of inhalation of solvents.

Dr. Blair reviewed the appellant's history, including the administration of Ritalin before the appellant was two years of age, his exposure to extreme physical abuse, his substance abuse since the age of three or four, his head injury at the age of ten, his grossly dysfunctional family situation, and the absence of prior criminal behavior. On cross-examination, Dr. Blair stated that she believed the appellant's schizophrenia had begun prior to his January, 1989, admission to M.T.M.H.I. She stated that, when she administered the Minnesota Multiphasic Personality Inventory to the appellant, the results were either invalid or suggestive of gross psychopathology. Because of these results, Dr. Blair administered the "M" test, which is a test to determine malingering. The results indicated that the appellant was schizophrenic and not malingering.

Dr. Blair also administered the Wexler Adult Intelligence Test. She determined from the test results that the appellant has a full scale I.Q. of 96. Blair stated that any score between 85 and 115 is within the average range. Blair further observed, "[Talking to the appellant] was like talking to a very, very young child ... [A]t times he would sort of respond almost like a five year old, but overall I would say the maturity level was more like maybe twelve."

Dr. John Cain, a psychiatrist employed by M.T.M.H. I., Forensic Services Division, was yet another member of the appellant's evaluation team. Dr. Cain testified that, on one occasion, in an attempt to determine whether the appellant was malingering, he administered sodium amitol, popularly known as truth serum. Under the influence of the drug, the appellant's psychotic symptoms became even more pronounced. Therefore, Dr. Cain determined that the appellant was not malingering and was truly suffering from paranoid schizophrenia. Dr. Cain also opined that the appellant began to develop symptoms of this disorder sometime during high school.

The State called five rebuttal witnesses. First, Dr. Zillur Athar, a psychiatrist formerly with M.T.M.H.I., Forensic Services Division, testified that, during the appellant's first hospitalization, Athar was called in as a second psychiatrist to determine whether the appellant was committable. Dr. Athar determined that the appellant was not actively psychotic at that time.

During the appellant's second hospitalization, from May, 1991, to August, 1991, Dr. Athar was the appellant's treating psychiatrist. Dr. Athar felt that the appellant suffered from borderline personality disorder, which would account for his impulsiveness and lack of control over anger. He also felt that the appellant was malingering about his psychotic symptoms, and that he was inventing stories of hallucinations, vampires, and communications with a dead twin.

Edean Gerdes, the treatment coordinator for the treatment ward of M.T.M.H.I., Forensic Services Division, testified that, during his hospitalization in 1991, she also worked with the appellant. She opined that, when the appellant talked about vampires, he seemed to have an underlying motive.

Neil Blythe, a deputy with the Putnam County Sheriff's Department, testified that he transferred the appellant to different mental institutions on several occasions. On one occasion, the appellant told him that the doctors were easy to fool. Later, the appellant told him that there were many foreign doctors, and that they asked silly questions.

Georgia Cravens, the mother of the appellant's ex-wife, testified that, after her daughter married the appellant, he became very cruel and abusive. Ms. Cravens stated that the appellant was normal but quick-tempered. She testified that he had never mentioned twins, talked to outer space, or exhibited bizarre or weird behavior while in her presence.

The State's final rebuttal witness was Richard Henley, a high school friend of the appellant. He described the appellant as being a great guy and always happy. He further stated that the appellant had never mentioned vampires or twins. Moreover, Henley had never seen the appellant engage in any bizarre behavior. However, on cross-examination, he admitted that on March 16, 1989, when interviewed by the assistant district attorney, he had stated that in 1988 the appellant began to act strange and talked about dreams of killing.

Closing arguments were heard. The jury was instructed on the following two statutory aggravating circumstances:

> (1) The murder was extremely heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and
>
> (2) The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another.

The jury was also instructed that it should consider the following mitigating circumstances:

(1) The defendant has no significant history or prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Extreme mental or emotional disturbance is a temporary state of mind so enraged, inflamed or disturbed as to overcome one's judgment and to cause one to act from the compelling force of the disturbance rather than for evil or malicious purposes. It is not a mental disturbance in itself and an enraged, inflamed or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse for it;

(3) The youth of the defendant at the time of the crime;

(4) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental illness or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment;

(5) The defendant was subjected to physical and/or psychological abuse or cruelty during his formative years;

(6) That the defendant has considerable poetic abilities;

(7) That the defendant can be treated in a prison setting;

(8) That at a very early age the defendant exhibited signs of mental or emotional disturbance that went untreated;

(9) That the defendant was immature for his age and lacked the normal emotional development at the time of the commission of the offense; and

(10) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing. That is, you shall consider any aspect of the defendant's character or record or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The jury deliberated and returned a verdict, finding that the State had proven the two aggravating circumstances beyond a reasonable doubt and that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The jury sentenced the appellant to death.

III. ANALYSIS:

1. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS OF SEPTEMBER 25, 1988.

The appellant contends that the trial court erred in overruling his motion to suppress his September 25, 1988 statements, because such statements were obtained in violation of his *Miranda* rights.

A suppression hearing was held on December 10, 1992. At the hearing, Sheriff Jerry Abston testified that on Sunday, September 25, 1988, he was contacted by his office and informed that Larry Bush wanted to bring his son, the appellant, to the jail in order to discuss the Jodie Lefever homicide. The appellant and his father met Sheriff Abston at the Putnam County Jail between 1:00 and 1:30 p.m. Larry Bush informed the Sheriff that the appellant wanted to make a statement that, at the time of the murder, he was with the people who murdered Jodie Lefever.

At this point, Sheriff Abston transported the appellant and his father to the Cookeville Police Station. The appellant's father rode in the front passenger seat of a deputy sheriff's patrol car, and the appellant rode, unrestrained, in the back. The Sheriff moved the interview to the Cookeville Police Department for two reasons. First, it was visitor's day at the Putnam County Sheriff's Office, and the jail was crowded. Second, the appellant indicated that he also had information about an unrelated murder that had occurred in the city of Cookeville. The Cookeville Police Department was investigating this murder, and Sheriff Abston wanted their investigators to be present when the appellant made his statement.[7]

At approximately 2:47 p.m., Officer Bob Terry, Sheriff Abston, and the

[7] With respect to this other murder, the appellant was eventually charged with the first degree murder of Richard Dow.

appellant entered an investigator's room, where the appellant gave a taped statement concerning the two murders. Essentially, the appellant stated that he received a phone call, in which the caller threatened to harm his family if he did not follow the caller's instructions. In accordance with these instructions, the appellant went to the Lefever residence, where he met four people wearing hoods over their heads. The remainder of the appellant's statement described the beating and, ultimately, the killing of Jodie Lefever by the hooded intruders. The appellant was not given Miranda warnings before or during his first statement, because, according to Sheriff Abston, the appellant was neither a suspect nor in custody at that time.

When the interview ended, Sheriff Abston and Officer Terry left the room. In the hallway, Deputy Doug Burgess and T.B.I. agent Larry O'Rear approached the Sheriff and told him that the appellant's wife had also made a statement. She had indicated that the appellant had admitted to her that he had killed Ms. Lefever. Sheriff Abston testified that only when he became aware of this information did the appellant become a suspect. The appellant was Mirandized at approximately 4:17 p.m. At that time, the appellant signed a waiver of his rights.

A second interview was conducted, during which the appellant essentially repeated his first statement. He also described the manner in which the victim was lying as he left her residence, and he directed the officers to Center Hill Lake where he had thrown the murder weapon. The appellant and Officer Terry engaged in a heated exchange over the appellant's involvement in the murder, and the interview was concluded.

A third interview began at approximately 6:04 p.m. Bush discussed his role in the homicide of Richard Dow. During this session, Bush requested an

attorney, and all questioning ceased.

At no time prior to or during the interviews did Larry Bush indicate that there was anything wrong with his son's mental condition. Moreover, there was nothing in the appellant's behavior to indicate that he was suffering any mental problems. The appellant was nervous and became excited at various points during the interviews, but his behavior was otherwise completely normal.

David Brady, a Cookeville attorney, testified that he was contacted at approximately 10:00 p.m. by Circuit Court Judge Leon Burns, who asked him to consult with the appellant. Brady further testified that, when he questioned the appellant, the appellant exhibited no emotion. Brady concluded that the appellant was in urgent need of an extensive psychiatric evaluation.

Dr. Gillian Blair, a licensed clinical psychologist at M.T.M.H.I., Forensic Services Division, reviewed the tapes of the appellant's statements. She testified that, in her opinion, the appellant was not competent on September 25, 1988, to waive his rights.

The trial court, in its findings, concluded that the appellant voluntarily went to the county jail, and that the appellant was not in the "custody" of the sheriff at the time of the initial interview at the police department. The court further found that the sheriff only considered the appellant to be a suspect after he spoke with the officers who had interviewed the appellant's wife. When the appellant became a suspect, he was immediately given Miranda warnings. Finally, the court found that, on September 25, 1988, the appellant was capable of understanding his rights and voluntarily waived his rights.

A. Custodial Interrogation

The appellant first contends that the trial court erred by admitting the statement made during the first interview at the Cookeville Police Department. According to the appellant, the trial court erroneously found that he was not in custody at the time of the first interview, and that, therefore, Miranda warnings were not required.

Miranda warnings are a set of procedural safeguards, designed to protect the constitutional rights of persons subjected to "custodial interrogation." The safeguards require that law enforcement officers provide certain specific warnings before questioning a person in custody.[8] If these warnings are not given, statements elicited from the individual may not be admitted for certain purposes in a criminal trial. Stansbury v. California, 511 U.S. ---, 114 S.Ct. 1526, 1528 (1994). However, an officer's obligation to administer Miranda warnings only attaches "where there has been such a restriction on a person's freedom as to render him 'in custody.'" Id. (citing Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1970) [citations omitted]).

Thus, in determining whether an accused should have been advised of his Miranda rights, the initial inquiry is whether the suspect was "in custody." A person is said to be "in custody" within the meaning of Miranda if there has been a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1966); Mathiason, 429 U.S. at 495, 97 S.Ct. at 714. In order to ascertain whether the accused was in custody at a particular time, an objective standard must be employed. Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988); United States v. Mendenhall, 446 U.S. 544, 554, 100

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[8]These warnings include the witness' right to remain silent and his right to counsel. See Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1637-38 (1966).

S.Ct. 1870, 1877 (1980); State v. Folds, No. 01C01-9308-CC-00278 (Tenn. Crim. App. at Nashville, March 3, 1995): State v. Loveday, C.C.A. No. 100 (Tenn. Crim. App. at Knoxville, July 5, 1990). Specifically, the inquiry is "how a reasonable person in the suspect's position would have understood his position," i.e., would he have felt that he was not free to leave and, thus, in custody.[9] Berkemer v. McCarty, 468 U.S. 420, 442 , 104 S.Ct. 3138,3151 (1984); see also Michigan v. Chesternut, 486 U.S. at 573, 108 S.Ct. at 1975; State v. Furlough, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990); State v. Mosier, 888 S.W.2d 781, 784 (Tenn. Crim. App. 1994); Folds, No. 01C01-9308-CC-00278; Anderson, C.C.A. #3; Loveday, C.C.A. No. 100. When such a question is presented to the court for determination, each case must be controlled by its own facts, and all of the circumstances must be taken into consideration by the judge making his decision. Loveday, C.C.A. No. 100 (citing State v. Nakdimen, 735 S.W.2d 799 (Tenn. Crim. App. 1987)).

The trial court concluded that the appellant was not in custody at the time of the first statement. This court will not set aside the judgment of the trial court unless the evidence in the record preponderates against its findings. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994).

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[9]We note that, in Beckwith v. United States, 425 U.S. 341, 346, 96 S.Ct. 1612, 1616 (1976), the United States Supreme Court expressly rejected the contention that the "in custody" requirement which triggers Miranda warnings was satisfied merely because the police interviewed a suspect who was the "focus" of a criminal investigation. The Court held: "It was the compulsive aspect of custodial interrogation and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose Miranda requirements with regard to custodial questioning." Id. Nor are warnings required simply because the questioning takes place at the station house. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). Finally, an officer's views concerning the nature of an interrogation or beliefs concerning the potential culpability of the individual being questioned may bear upon whether or not that person was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would have understood his ability to leave. Stansbury v. California, 511 U.S. at ---, 114 S.Ct. at 1529-30; State v. Godfrey, No. 03C01-9402-CR-00076 (Tenn. Crim. App. at Knoxville, March 20, 1995).

The record reflects that the appellant was not in custody at the time he made the initial statement to Sheriff Abston, and, moreover, that all of the appellant's statements were voluntary. Voluntary statements to police officers are not barred by the Fifth Amendment. Miranda v. Arizona, 384 U.S. at 436, 86 S.Ct. at 1602; see also California v. Beheler, 463 U.S. at 1121, 103 S.Ct. at 3517; Oregon v. Mathiason, 429 U.S. at 492, 97 S.Ct. at 711; Beckwith v. United States, 425 U.S. at 341, 96 S.Ct. 1612. "There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime . . . or [offers] any other statement he desires to make . . . ." Miranda, 384 U.S. at 478, 86 S.Ct. at 1630. It is undisputed that the appellant went voluntarily to the Sheriff's Department, and, later, to the Cookeville Police Department. Indeed, the appellant volunteered his statement on a Sunday, and Sheriff Abston had to be called at home to meet the appellant at the Sheriff's Department. The appellant was never told that he could not leave, and he never attempted to leave. Clearly, the statement meets the requirements of voluntariness imposed by the Due Process Clause. Accordingly, the trial court correctly admitted the first statement of the appellant.

The appellant also argues that the statements made by the appellant after he was given Miranda warnings should have been suppressed under the "cat out of the bag theory." This theory stands for the proposition that, if the police obtain a statement from a suspect in contravention of Miranda, the State cannot rely upon a subsequent waiver of rights to gain admissibility of a later statement derived from the earlier statement. See State v. Smith, 834 S.W.2d 915, 919 (Tenn. 1992).[10] As we have concluded that the appellant's first statement was not in contravention of Miranda, this argument is without merit.

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[10] In other words, the "cat out of the bag theory" provides that "an illegally obtained initial confession is presumed, subject to rebuttal, to taint a later confession." Smith, 834 S.W.2d at 921. See also United States v. Bayer, 331 U.S. 532, 540, 67 S.Ct. 1394, 1398 (1947).

B. Waiver of Miranda Warnings

The appellant additionally argues that his waiver was not valid, and that, therefore, his second and third statements, made on September 25, 1988, should likewise be suppressed. Specifically, the appellant contends that his mental illness (schizophrenia), combined with his immaturity, prevented him from appreciating that he was a suspect and from understanding the implications of waiving his Miranda rights. Furthermore, the appellant argues that the record is "devoid of evidence that Bush 'intelligently and understandably' waived his Miranda rights, and, therefore, the statements Bush made during his second and third sessions should have been suppressed." The State contends that the appellant was able to comprehend and voluntarily waive his Miranda rights. The trial court found that the appellant was capable of understanding the Miranda warnings, and that he voluntarily waived his rights.

The appellant also suggests that, because he requested counsel during his third interview, his statements during this interview were obtained in violation of his Sixth Amendment right to counsel. The appellant's contention is misplaced. A defendant's right to counsel attaches after formal proceedings have begun by way of formal charge, preliminary hearing, indictment, information, or arraignment. Brewer v. Williams, 430 U.S. 387,398, 97 S.Ct. 1232, 1239 (1977). Clearly, no formal proceedings had begun at the time of his request. However, we recognize the "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment" right to counsel as required by Miranda. See Edwards v. Arizona, 451 U.S. 482, 485, 101 S.Ct. 1880, 1885 (1981). Thus, when the accused requests counsel, all interrogation must cease. Id. The record before us reflects that, once the defendant asked to speak with an attorney, questioning did in fact cease, and an attorney was

called. Thus, we conclude that no violation of the appellant's Fifth Amendment right to counsel occurred.

On appeal, the trial court's ruling in a suppression hearing is presumed correct unless the evidence in the record preponderates against it. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The defendant has the burden of showing that the evidence preponderates against a finding that a confession was, in fact, freely and voluntarily given. State v. Buck, 670 S.W.2d 600, 610 (1984); see also Nakdimen, 735 S.W.2d at 800.

Although the right to counsel and the right against self-incrimination are constitutional rights, they may be waived, provided the waiver is made "voluntarily, knowingly, and intelligently." State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992) (citing Miranda, 384 U.S. at 444, 86 S.Ct. at 1612). In determining whether the statement has been made knowingly and voluntarily, the court must look to the totality of the circumstances. Id. (citations omitted).

At the suppression hearing, the appellant presented expert testimony from Dr. Gillian Blair. Dr. Blair testified that it was her opinion that, based upon her diagnosis that the appellant was a paranoid schizophrenic on September 25, 1988, he was incompetent to waive his Miranda rights. However, the State presented lay testimony that the appellant comprehended and voluntarily waived these rights. The appellant signed a written waiver of his constitutional rights. Sheriff Abston testified that the appellant's father never indicated that there was anything wrong with the appellant's mental condition at the time he made the statements. He also testified that the appellant never indicated that he was experiencing any difficulty with his mental processes, and that the appellant was responsive to his questions and gave a "good rehearsed type statement." Officer Robert Terry testified that, during the interviews, the appellant was

coherent and responsive to the officers' questions, and that he did not seem unduly nervous or anxious. At no time did the appellant speak of demons, vampires, or any other delusions, which appear to be the basis of Dr. Blair's diagnosis of the appellant.

Even if, as Dr. Blair suggests and the appellant argues, the appellant could not appreciate the effect of his waiver due to his existing mental illness, that alone is insufficient to invalidate a waiver. In State v. Green, 613 S.W.2d 229, 233 (Tenn. Crim. App. 1980), this court held that the general rule admitting a confession even if the accused was under the influence of drugs or alcohol, provided that the accused was capable of making a narrative of past events or of stating his own participation in a crime, is equally applicable to the issue of insanity. This court reasoned that if the mental incapacity did not render the accused incompetent as a witness, then, likewise, his confession is not incompetent. Id. (citing 23 C.J.S., Criminal Law, sec. 828). If the accused has sufficient understanding to comprehend the obligation of an oath and is capable of giving a correct account of the matters of which he has knowledge, he is competent to be a witness. Id. Therefore, if the accused comprehends that he need not talk, that he could have a lawyer, and that the statements can be used against him, and if his confession did not involve official coercion, he can make a valid waiver of his rights. See State v. Van Tran, 864 S.W.2d 465, 471-473 (Tenn. 1993). As the appellant later asked to speak to an attorney, it is presumed that the appellant did, in fact, understand his constitutional rights. Furthermore, the appellant's second statement is essentially a repetition of his first statement and was not a "confession," but rather a statement expressing the appellant's knowledge as to the facts of a crime.

Additionally, we address the voluntariness of the appellant's statement.

In determining the voluntariness of a confession, the sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion. Colorado v. Connelly, 479 U.S. 157, 170, 107 S.Ct. 515, 523 (1986) (statement found to be voluntary notwithstanding the longstanding disorder of chronic paranoid schizophrenia suffered by the accused). The voluntariness test under the Tennessee Constitution is more protective of individual rights than the test under the Fifth Amendment. Stephenson, 878 S.W.2d at 544. Accordingly, for Tennessee Constitutional purposes, a waiver is valid if the suspect is aware of the nature of the right being abandoned and the consequences of the decision to abandon the right. Id. at 547. Our examination of the totality of the circumstances surrounding this interview not only indicates that the appellant's relinquishment of his rights was not the product of intimidation, coercion, or deception, but also was the result of the appellant's free and deliberate choice. Again, the evidence in the record does not preponderate against the trial court's findings. Accordingly, we uphold the admission of all of the appellant's statements.

2. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGE OF PREMEDITATED MURDER.

The appellant contends that the evidence was insufficient to establish the necessary elements of premeditation and deliberation as required under Tennessee law to obtain a conviction of first degree murder. The appellant argues that, although the evidence sufficiently shows that the appellant used a deadly weapon without adequate provocation so as to constitute a willful, malicious killing, there is insufficient evidence to show that he had formed the intent to kill with cool purpose, free from the passion of the moment. See State v. West, 844 S.W.2d 144, 147 (Tenn. 1991).

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, 99 S.Ct. 2781, 2789 (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 at 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).

_____An appellant challenging the sufficiency of the proof has the burden of illustrating to this court why the evidence is insufficient to support the verdict returned by the trier of fact in his case. This court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the appellant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

At the time the offense was committed, premeditated first degree murder required proof of the "willful, malicious, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-2-202 (replaced by § 39-12-202 (a)(1) (1989)). The terms "premeditated" and "deliberate" are not synonymous. State v. Brown,

836 S.W.2d 530, 538 (Tenn. 1992). Premeditation requires a previous intent to kill. Id. at 539. Deliberation, on the other hand, may be defined as a "cool purpose... formed in the absence of passion." Id. (citations omitted); see also Tenn. Code Ann. § 39-13-201(b)(1) (1989). Deliberation also requires "some period of reflection, during which the mind is free from the influence of excitement." Id. (citations and internal quotations omitted); see also Tenn. Code Ann. § 39-13-201(b)(2) (1989).

Premeditation and deliberation are questions for the jury and may be inferred from the manner and circumstances of the killing. State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994). Both elements may be proved by circumstantial evidence alone. Brown, 836 S.W.2d at 541. Although there are no strict standards as to what constitutes proof of premeditation and deliberation, this court has held that the following considerations are helpful in the inquiry:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, planning activity;
>
> (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and
>
> (3) facts about the nature of the killing from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

Gentry, 881 S.W.2d at 4-5 (emphasis in original)(quoting 2 W. LaFave and A. Scott, Substantive Criminal Law § 7.7 (1986)).

There is sufficient evidence concerning planning activity and the nature of the killing to support the jury's finding of both premeditation and deliberation. The evidence reveals that the appellant had stated his intention to "knock the victim in the head." Furthermore, the board which the appellant took to the victim's home was clearly capable of carrying out his stated intention. The

procurement of a weapon has long been held to establish premeditation. See Brown, 836 S.W.2d at 541. Moreover, the fact that the killing was particularly cruel serves to establish premeditation. Id. It is apparent from the evidence before us that the appellant intended to kill the victim. If the appellant's purpose was only to disable or subdue his elderly victim, the beating with the board would have been sufficient. However, as the evidence shows, after beating the victim with the board, the appellant obtained a second weapon, a butcher knife. He then proceeded to stab the victim a total of forty-three times, the wounds extending from the left side of her head down to her back, thereby ensuring her death.

Moreover, the circumstances of the killing clearly reflect that it was committed with deliberation. The proof at trial established that the appellant told his wife that he struck the victim in the head with the board. Once she was down, he took his shirt off, wrapped it around his hand, opened the kitchen drawer, and took out a butcher knife. It can be inferred that the appellant covered his hands in order not to leave any fingerprints or to prevent injury to his own hands. He then stabbed the victim forty-three times. Before leaving the scene, the appellant took the time to collect broken pieces of the board used to beat the victim. The appellant then fled the scene and told his wife to drive to a nearby dam, where he disposed of the weapons and washed himself. Although the concealment of evidence after the fact is not probative of the appellant's state of mind before the shooting, State v. West, 844 S.W.2d 144, 148 (Tenn. 1992), the fact that the concealment occurred immediately after the killing supports the theory that the appellant committed the killing "in the absence of passion." Id. Moreover, we agree with the finding of the jury that the appellant's motive was the removal of the victim as a witness. These facts support the jury's finding that the appellant committed the murder with cool purpose formed in the absence of passion.

Based upon the foregoing facts, we conclude that the evidence is sufficient to establish, beyond a reasonable doubt, that the killing was committed with premeditation and deliberation. Therefore, this issue is without merit.

3. THE MARITAL PRIVILEGE

A. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE TESTIMONY OF SHEILA BUSH HAMMOCK

The appellant contends that the marital privilege should have barred, at trial, the testimony of Sheila Bush Hammock concerning statements made by the appellant to Ms. Hammock during their marriage. Specifically, the appellant argues that, because the trial court restricted examination of Ms. Hammock at the suppression hearing to "the circumstances under which any statements were made that might be attributable or not attributable to some marital privilege," the court was unable to properly determine whether the appellant could invoke the privilege. In other words, according to the appellant, testimony concerning "the details and contents of the statements" was essential to the resolution of the appellant's motion.

The suppression hearing was held on June 9, 1992. At the hearing, Ms. Hammock testified that she had married the appellant on August 13, 1988, three days prior to the murder of Jodie Lefever. She further testified that she and the appellant had been dating "off and on two years" before their marriage. Both before and after their marriage, the appellant "threatened" and "beat" Ms. Hammock. Ms. Hammock also stated, "He would always call me names and make fun of me. I couldn't say anything right." Moreover, following their marriage, while the appellant and Ms. Hammock were living with her mother, the appellant would not allow Ms. Hammock to visit friends. After they moved to his parents' house, the appellant would not allow her to visit her mother.

Ms. Hammock concluded that she "was just scared of Michael," and that her relationship with the appellant was a relationship built upon fear and threats. For example, after the appellant admitted to her that he had killed Ms. Lefever, he told Ms. Hammock that the Mafia was watching her, and that, if she ever told anyone what he had done, she would be killed. On the day that Ms. Hammock decided to leave the appellant, he again physically abused her. The State introduced into evidence a picture of bruises that Ms. Hammock suffered as a result of the appellant's abuse. At the time of the suppression hearing, Ms. Hammock and the appellant had been divorced for approximately two years.

The rule of marital privilege applicable in the appellant's case was announced by our supreme court in McCormick v. State, 186 S.W. 95 (Tenn. 1916).[11] In McCormick, 186 S.W. at 97, the supreme court held that "[s]ound

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[11] The appellant in his brief suggests that the trial court's decision to deny the appellant the marital privilege implicates the *ex post facto* provisions of the United States and Tennessee Constitutions. We disagree. Between the time of the offense and the time of trial, there were no significant changes in the law of marital privilege in criminal cases. Although the Tennessee Rules of Evidence were adopted in 1990, Tenn. R. Evid. 501 simply states,

> Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

The Advisory Commission Comments to Rule 501 refer one to McCormick for the rule governing spousal communications in criminal cases. Clearly, Rule 501 also encompasses the exceptions to the marital privilege implicit in this court's opinion in Adams v. State, 563 S.W.2d 804 (Tenn. Crim. App. 1978).

In State v. Hurley, 876 S.W.2d 57, 64 (Tenn. 1993), cert. denied, __ U.S. _ , 115 S.Ct. 328 (1994), our supreme court modified the marital privilege in criminal cases so that the testifying spouse alone had the right to invoke the privilege. However, the opinion was filed on April 5, 1993, approximately two months after the appellant's trial. Thus, obviously, the trial court did not apply the Hurley rule in this case. In any event, even had the trial court applied the new rule, we have held that the Hurley rule is a procedural rule that does not affect any substantial rights of a defendant in a criminal case and, therefore, does not implicate *ex post facto* constitutional provisions. State v. Bragan, No. 03C01-9403-CR-00121 (Tenn. Crim. App. at Knoxville, July 5, 1995).

Finally, we note that the Hurley modification of the common law rule was superseded by statute when the legislature, in 1995, amended Tenn. Code Ann. § 24-1-201, which had previously only applied in civil cases. Section 24-1-201

public policy requires that neither the husband nor the wife shall be permitted to testify, in criminal cases, as to any matter coming to his or her knowledge by reason of the marital relation." See also Burton v. State, 501 S.W.2d 814, 817-819 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1973); Bragan, No. 03C01-9403-CR-00121. Under this rule, either the testifying or non-testifying spouse can invoke the privilege. Bragan, No. 03C01-9403-CR-00121. However, the privilege is not absolute. In Adams, 563 S.W.2d at 808, this court observed that the following conditions must exist before a communication between husband and wife can be considered privileged:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The court in Adams noted that exceptions to the marital privilege generally arise from the failure of the communication to meet these conditions. Id. "All four of these conditions must exist to protect the evidence by the marital privilege." State v. Garland, 617 S.W.2d 176, 183 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1981). Thus, testimony at the suppression hearing relevant to the first two conditions was unnecessary if sufficient evidence was presented to negate the last two conditions.

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now provides,

> (a) In either a civil or criminal proceeding, no married person has privilege to refuse to take the witness stand solely because that person's spouse is a party to the proceeding.
> (b) In either a civil or criminal proceeding, confidential communications between married persons are privileged and inadmissible if either spouse objects.

In Garland, 617 S.W.2d at 182-183, this court observed that the application of the marital privilege was inappropriate where the marriage between the parties was "extremely tumultuous." Similarly, in this case, the trial court denied the appellant's motion to suppress on the basis of the following findings of fact:

> Sheila (Bush) Hammock and the defendant were married on August 13, 1988. The Court further finds that the parties separated on or about September 25, 1988. From the testimony, the Court further finds that a divorce was granted to the parties approximately two (2) years prior to the date of this hearing. The Court further finds that the marriage was extremely turbulent and disturbing from its beginning. The defendant regularly beat and physically abused the prospective witness. He subjected her to various forms of mental and verbal abuse on a regular basis. He threatened her with physical harm and death if she ever disclosed any of the crimes which he allegedly committed. The threats were made before and after the threats [sic] were allegedly committed.

The findings of fact made by the trial court after an evidentiary hearing are afforded the weight of a jury verdict; this court will not set aside the judgment of the trial court unless the evidence in the record preponderates against its findings. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994); State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993); State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988). We conclude that the record supports the trial court's findings. Thus, as in Garland, 617 S.W.2d at 183, "we do not believe that the conditions 3 and 4 enumerated in Adams are met." Therefore, contrary to the appellant's argument in his brief, further testimony regarding the contents of the appellant's statements to Ms. Hammock was unnecessary to the proper resolution of the appellant's motion.

B. WHETHER THE TRIAL COURT'S LIMITATION AT THE SUPPRESSION HEARING OF CROSS-EXAMINATION OF SHEILA BUSH HAMMOCK VIOLATED THE APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE TENNESSEE CONSTITUTION.

The appellant contends that, at the suppression hearing, he "was limited and restricted from confronting [his] accuser, Sheila Bush (Hammock), and thereby denied his rights under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution." The right to confrontation set forth in the Sixth Amendment includes the right to conduct cross-examination.[12] However, we have previously observed, "[I]t is elementary that the exclusion of immaterial or irrelevant evidence does not abridge an accused's right to confrontation." State v. Marquadis, 649 S.W.2d 15, 17 (Tenn. Crim. App. 1982). See also Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986)("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"); Tenn. R. Evid. 611(a) ("[t]he court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel"). In other words, "the Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense counsel might wish.'" Pennsylvania v. Ritchie, 480 U.S. 39, 53, 107 S.Ct. 989, 999 (1987)(citation omitted). We have already concluded that the testimony at the suppression hearing concerning the contents of the appellant's statements to Ms. Hammock would have been superfluous.

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[12] The Sixth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068 (1965). Moreover, our supreme court has largely adopted the standards of the United States Supreme Court under the Sixth Amendment in determining whether there has been a violation of the Tennessee Constitution. State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992)(however, with respect to the right to physically confront one's accusers, our supreme court has observed that "[t]he 'face-to-face' language found in the Tennessee Constitution has been held to impose a higher right than that found in the federal constitution," State v. Deuter, 839 S.W.2d 391, 395 (Tenn. 1992)).

Moreover, this court has held that "the 'confrontation' guaranteed by the United States Constitution is confrontation at trial." Haggard v. State, 475 S.W.2d 186, 187 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1971). Similarly, in Ritchie, 480 U.S. at 52, 107 S.Ct. at 999, a plurality of the United States Supreme Court observed that "the right to confrontation is a trial right." See also United States v. Sasson, 62 F.3d 874, 881 n. 5 (7th Cir. 1995); United States v. De Los Santos, 819 F.2d 94, 97 (5th Cir. 1987); United States v. Boyce, 797 F.2d 691, 693 (8th Cir. 1986).[13] Defense counsel was able to fully and extensively cross-examine Ms. Hammock at trial. This claim is without merit.

4. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS THE TESTIMONY OF OTHER INMATES.

The appellant contends that the trial court erred in allowing jailhouse informants to testify against the appellant concerning statements made by the appellant during his incarceration. The appellant filed a motion on October 16, 1992, to exclude the testimony of William Moore, Jimmy Myers, Billy Goney, and other inmates, based on the allegation that law enforcement officers asked the inmates to elicit statements from the appellant in violation of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964). On November 13, 1992, an evidentiary hearing was held to resolve the appellant's motion.

Billy Goney and Jimmy Myers testified at the hearing. Billy Goney stated that he was incarcerated with Michael Bush at the Putnam County Jail between

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[13] In Kentucky v. Stincer, 482 U.S. 730, 738, 107 S.Ct. 2658, 2663 n.9 (1987), Justice Blackmun stated that, in his opinion, denying a defendant access to information before trial may hinder that defendant's opportunity for effective cross-examination, thereby implicating the Confrontation Clause. However, our supreme court in Middlebrooks, 840 S.W.2d at 832, noted that "[t]he right to cross-examine witnesses ... does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." In any event, the State in this case followed a policy of open file discovery and, prior to trial, informed the appellant's counsel of the statements made by the appellant to Sheila Bush Hammock.

September or October of 1988 and April of 1989. He further alleged that, approximately one week after the appellant was placed in the jail, Bobby Lane and Doug Burgess, investigators with the Putnam County Sheriff's Department, asked Goney and fellow inmates, Guy Ramsey and Jimmy Myers, to tape conversations with Michael Bush. The inmates were told that, if they cooperated with the police, the police "would help [them] out." The inmates already had access to tape recorders and tapes, and the inmates used the equipment to tape conversations with the appellant. However, Goney added,

> [W]hat we'd do was like Jimmy would ask Michael a question, say, did you kill that old woman, and we'd have the recorder playing and we'd ease up off the play button. Then they would ask him another question like, do you like karate, and he would say, yeah, and we'd push yeah when he was saying yes.

Goney stated that he and his fellow informants made approximately three tapes, and that Jimmy Myers, his half-brother, delivered the tapes to Deputy Lane. Goney insisted that he never heard the appellant admit to killing Jodie Lefever.

Jimmy Myers also testified at the hearing. He was also incarcerated at the Putnam County Jail in September of 1988. Indeed, he shared a cell with the appellant. However, Myers testified that neither Deputy Burgess nor Deputy Lane asked the inmates to record conversations with Michael Bush. Rather, Myers asserted that Goney and Ramsey first suggested taping the appellant and first contacted Deputies Lane and Burgess. His testimony is somewhat unclear as to whether the tapes were made before or after the inmates contacted the deputies. Myers conceded that the officers may have been aware that the tapes were being made.

In any event, before the tapes were made, Myers heard the appellant admit to killing Ms. Lefever.

> Well, one time he was telling me and Billy and Ramsey all, I mean, he told us he tied Ms. Lefever up and stuff and stabbed her and waited on his wife. His wife dropped him

> off and came back to pick him up, and he went down to the dam and washed blood off of him and stuff. And, I mean, that's about all he said. And then some other times he would tell a different story.

Again, Myers could not remember whether he and the other inmates spoke to the deputies before or after they overheard this statement. Finally, Myers conceded on cross-examination that it was common knowledge at the jail that inmates could get help from the police if they provided information. However, he testified that he was not promised any assistance in return for his testimony.

Deputy Burgess testified at the hearing that he never asked any of the inmates to tape conversations with Michael Bush, nor, to his knowledge, had any other deputy made such a request. Moreover, he never received any tapes, nor was he aware that tapes had been turned over to the Sheriff's Department until he found a tape in Bobby Lane's office the day before the hearing. He was not aware of any agreement between jailhouse informants and the police. He testified that Billy Goney and, possibly, Jimmy Myers had asked to speak with him several times. He spoke with Goney privately "maybe one or two" times. He told Goney "to keep his ears open and if he heard anything, let us know." Goney was unable to provide any useful information. At a subsequent hearing, on December 10, 1992, Burgess stated that he would not have turned to inmates to obtain incriminating statements from Michael Bush because "[t]hat's no good in court. We can't use it."

At the December 10 hearing, Deputy Bobby Lane testified that, during the course of his investigation of the Lefever murder, he never asked inmates to secretly record conversations with the appellant. Goney approached him with two tapes, but "[t]he tapes was garbage. There wasn't any use in keeping the tapes." Lane did not have any subsequent conversations with Goney about the tapes, nor did Lane talk to any other inmate. On December 22, 1992, the trial court denied the appellant's motion, observing, "I think it's a question of credibility

for the jury to decide."

At trial, no tapes were introduced into evidence. However, Jimmy Myers and William Roger Moore testified. Jimmy Myers again stated that he had heard the appellant admit to killing Jodie Lefever. Bush also told Myers that "he was going to try to make people think he was crazy." Myers testified that these statements were not recorded, as the informants began taping the appellant only after the appellant's lawyers advised him against talking to fellow inmates about the murder. After the appellant was so advised, he changed his story several times. Finally, Myers insisted that he was never offered any form of compensation in return for his testimony. On cross-examination, he conceded that he had written a letter to an assistant district attorney, in which he stated, "If you can help me out in any way, I promise you that you will not be sorry."

Finally, William Roger Moore, another fellow inmate of Michael Bush following the appellant's incarceration at the Putnam County Jail, also testified at trial. Moore stated that, as there was very little to do at the jail, Bush approached him and initiated several conversations. The appellant admitted to Moore that he had killed Jodie Lefever. The appellant also stated that he was going to "make a ploy for craziness." Moore imparted this information to Special Agent O'Rear, an agent with the Tennessee Bureau of Investigation. Moore testified that he was not offered any compensation in return for his cooperation, nor did he ask for any compensation.

Again, the appellant argues that any incriminating statements made by the appellant to fellow inmates were elicited in violation of Massiah. We note, initially, that, because only Jimmy Myers and William Moore testified at trial, the denial of the motion to suppress with respect to Goney and other inmates, even if erroneous, was harmless. See Hartman v. State, 896 S.W.2d 94, 100 (Tenn.

1995); State v. Sparks, 727 S.W.2d 480, 482 (Tenn. 1987), post-conviction relief granted, No. 03S01-9212-CR-00105 (Tenn. May 10, 1993). With respect to Myers and Moore, "the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 1240 (1977). Thus, in order to find a Massiah violation, a court must first determine (1) whether adversary proceedings had commenced; (2) whether the informant was a government agent; and (3) whether the agent "interrogated" the appellant within the meaning of Massiah.

The initiation of adversary proceedings is "marked by formal charge, which [has been] construe[d] to be an arrest warrant, or at the time of the preliminary hearing in those rare cases where a preliminary hearing is not preceded by an arrest warrant, or by indictment or presentment." State v. Mitchell, 593 S.W.2d 280, 286 (Tenn. 1980), cert. denied, 449 U.S. 845, 101 S.Ct. 128 (1980). Clearly, at the time the appellant allegedly made the incriminating statements to fellow inmates, he had been formally charged and, probably, indicted.[14]

It is arguably unclear whether Myers was acting as a government agent. This court in State v. Dunn, No. 85-356-III (Tenn. Crim. App. at Nashville, June 6, 1986) observed, "Although Massiah and it progeny do not explicitly define the term 'state agent,' the conduit in each of these cases was clearly a state agent, operating as such, when the conversations occurred." Thus, any admissions made by the appellant before law enforcement officers became involved would, of course, be admissible. Hartman, 896 S.W.2d at 100. "[T]he Sixth

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[14]The appellant was arrested on September 25, 1988, and indicted the next day. The record does not reflect precisely when the appellant made the incriminating statements. However, the statements were made after the appellant's arrest and consequent incarceration in the Putnam County Jail.

Amendment is not violated whenever - by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached." Maine v. Moulton, 474 U.S. 159, 176, 106 S.Ct. 477, 487 (1985).

Again, at the suppression hearing, Goney testified that Deputies Burgess and Lane asked inmates, including Myers, to record conversations with the appellant. However, Goney's testimony was largely contradicted by the testimony of both deputies and by the testimony of Myers.[15] At trial, Myers recounted statements by the appellant, overheard prior to the recording of any conversations. At the suppression hearing, Myers could not remember whether he heard these statements before or after first talking to Burgess and Lane. Both deputies, for the most part, denied enlisting inmates to obtain statements from the appellant, although Deputy Burgess admitted that he might have asked Goney "to keep his ears open."

Even assuming that Myers was a state agent, the appellant at the suppression hearing also carried the burden of demonstrating "that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." Kuhlmann v. Wilson, 477 U.S. 436, 456, 459, 106 S.Ct. 2616, 2628, 2630 (1986). At the suppression hearing, Goney testified that he and Guy Ramsey recorded conversations with the appellant, during which they attempted, with Myers' assistance, to elicit and, indeed, fabricate a confession.[16] However, Myers testified that he did not participate in the recording of any statements. Rather, he testified both at the suppression hearing and at trial that he merely overheard the appellant confess to the murder of Ms. Lefever. There is no evidence in the record that this

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[15] In any event, no tapes were ever introduced either at the suppression hearing or at trial.

[16] Deputy Lane testified at the suppression hearing that the resultant tapes contained no incriminating evidence.

statement was made in response to efforts by the other inmates to stimulate conversation about the crime charged.

Given the conflicting testimony adduced at the suppression hearing, the record supports the trial court's denial of the appellant's motion with respect to Jimmy Myers. The findings made by the trial court after an evidentiary hearing are afforded the weight of a jury verdict; this court will not set aside the judgment of the trial court unless the evidence in the record preponderates against its findings. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994); State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993); State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988).

In any event, assuming for the sake of argument that Myers was a state agent and assuming that he "interrogated" the appellant within the meaning of Massiah, the admission at trial of Myers' testimony was harmless error. See Hartman, 896 S.W.2d at 100; Sparks, 727 S.W.2d at 482. William Moore testified at trial concerning almost identical statements made by the appellant to him in the Putnam County Jail. The record is devoid of evidence that Moore was a state agent at the time of his conversations with Michael Bush, nor is there evidence that he made any effort to elicit statements from the accused about the crime charged. This issue is without merit.

5. WHETHER THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTION TO THE INTRODUCTION OF CERTAIN PHOTOGRAPHS OF THE VICTIM.

The appellant contends that the trial court erred in overruling his motion to suppress certain photographs of the victim. Specifically, he insists that the pictures were admitted only for the purpose of inflaming the jury, thus, their

prejudicial effect outweighed their probative value. Additionally, the appellant argues that the photographs had no probative value in light of the vivid description of the victim's body given in Officer Lane's testimony.

During a jury-out hearing, the State attempted to present four photographs of the victim. Exhibit 25 was a photograph of the victim as she was discovered by Officer Lane. Exhibit 26 was a photograph which showed wounds to the victim's head. Exhibit 27 was a photograph which showed the lower dental plate of the victim on the floor next to her body. Exhibit 28 showed a wound to the victim's left knee. The State argued that the photographs were relevant to corroborate medical testimony, to aid the jury in determining the extent of the wounds, and to establish the element of malice. The appellant responded that the pictures did not add to testimonial value as Officer Lane had already described the wounds in great detail. The appellant concluded that, moreover, the pictures were more prejudicial than probative.

The trial court accepted the State's argument that Exhibit 25 was probative to show the placement of the wounds on the body, Exhibit 27 was probative as to the amount of force that was used to dislodge the dental plate from the victim's mouth, and Exhibit 28 was probative to show additional wounds on the body. Furthermore, the trial court found that the probative value of these three photographs was not outweighed by their prejudicial effect. However, the trial court sustained the appellant's objection to Exhibit 26, finding it to be the most gruesome of the pictures, and finding it to not accurately depict the victim's wounds.

To be admissible, a photograph must be relevant to some issue at trial, and its prejudicial effect must not outweigh its probative value. State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978); see also Tenn. R. Evid. 403. The discretion

of a trial judge in allowing the admission of a photograph into evidence will not be overturned except upon a clear showing of an abuse of discretion. State v. Bordis, 905 S.W.2d 214, 226 (Tenn. Crim. App. 1995) (citations omitted); see also State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994).

We conclude that it was not error to admit the photographs in this case. The photographs were relevant to supplement the testimony of the medical examiner and the officer who initially investigated the crime scene in establishing the cause of death, see Stephenson, 878 S.W.2d at 542, and to show the brutality of the attack and extent of force used against the victim, from which the jury could infer malice. See State v. Brown, 836 S.W.2d 530, 551 (Tenn. 1992). This issue is without merit.

6. WHETHER THE APPELLANT IS ENTITLED TO RELIEF BASED ON ALLEGATIONS OF PROSECUTORIAL MISCONDUCT.

A. LACK OF REMORSE

The appellant first argues that the prosecutor erroneously elicited testimony concerning the appellant's lack of remorse from three witnesses. When questioned by the prosecutor as to whether the appellant had expressed any remorse for what he had done, William Roger Moore, an inmate who had been incarcerated with the appellant, answered that the appellant had expressed remorse only in that he had gotten caught. When asked whether he had observed any sadness on the part of the appellant when the appellant had shown him a newspaper account of the murder, James Mullins, a friend of the appellant, testified that he had observed no sadness. When asked whether the appellant had expressed any remorse or sadness for what he had done, Shelia Bush (Hammock) testified that he had expressed no remorse.

The failure of defense counsel to make a contemporaneous objection waives consideration of the issue on appeal. See Teague v. State, 772 S.W.2d 915,926 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1989); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); Tenn. R. App. P. 36(a). A review of the record reveals that of the three statements to which the appellant now objects, the appellant only objected to the prosecutor's question to James Mullins, and the objection was based on the fact that it was a leading question. We conclude that the appellant has waived this issue.

B. IRRELEVANT OPINION EVIDENCE

The appellant next contends that the prosecutor erred in eliciting irrelevant opinion evidence from Jimmy Myers, another inmate who had been incarcerated with the appellant. On redirect examination, the prosecutor asked Myers why he was in court testifying. Myers responded that it "could be my mother or my grandmother, someone that's you know, laying there dead you know. I don't think someone should kill someone like that and just walk the streets. Get out scot free."

The appellant contends that the prosecutor deliberately brought before the jury evidence which was wholly irrelevant to the appellant's guilt or innocence. However, the record reveals that on cross-examination, appellant's counsel questioned Myers extensively concerning his true motivation for testifying. We conclude that the question asked by the prosecutor was appropriate, notwithstanding the witness' nonresponsive statement. This issue is without merit.

C. CLOSING ARGUMENT

(1) MASSIVE INVESTIGATION

The appellant also argues that he is entitled to a reversal of his conviction due to prosecutorial misconduct during closing argument. He objects to the prosecutor's remark that the investigation was "the most extensive investigation ... that I've ever heard of" and to the prosecutor's statement that the appellant was the only suspect resulting from the investigation. The appellant contends that evidence of such an investigation was not before the jury, and that the prosecutor's comments exceeded the scope of proper argument.

Our supreme court has observed that "argument of counsel is a valuable privilege that should not be unduly restricted. Our courts seek to give great latitude to counsel in expressing their views of the case to the jury." Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). See also State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994). The trial judge has wide discretion in controlling the argument of counsel. Smith, 527 S.W.2d at 739. Generally, on appeal, this court will not interfere with the exercise of that discretion in the absence of abuse thereof. Id. However, if the prosecutor's remarks, in fact, "stray[ed] beyond the wide latitude afforded," this court should consider, among other factors, the intent of the prosecutor, any curative measures 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. Bigbee, 885 S.W.2d at 809; Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). We note that "curative instructions will not render all improper comments harmless; the test is whether the conduct ... affected the results to the prejudice of the appellant." State v. Byerley, 658 S.W.2d 134, 139 (Tenn. Crim. App. 1983). See also Bigbee, 885 S.W.2d at 809.

In arguing that the investigation was extensive, the prosecutor specifically referred to Deputy Richard Smith's testimony that the Sheriff's Department had interviewed between 200 and 250 people regarding this case. The prosecutor's observation, that the appellant was the only suspect, was similarly supported by the evidence introduced at trial. We conclude that the trial court did not abuse its discretion in allowing the argument.

(2) PROSECUTOR'S PERSONAL VIEWS

The appellant next contends that the prosecutor erred in referring to this murder as being "a murder of the worst kind," "one of the worst kind of murders imaginable," and "a most heinous and brutal act." The appellant contends that the prosecutor expressed his personal views of the offense in an effort to inflame the passions of the jury.

However, evaluating the prosecutor's comments in light of his entire argument, we conclude that the comments referred to the fact that the appellant took advantage of a lady who was a close friend of his grandmother. Even if improper, we do not view this argument as being so prejudicial as to require a new trial. This issue is without merit.

D. BOLSTERING

Finally, the appellant contends that the prosecutor erred by improperly bolstering the testimony of William Roger Moore and Shelia Bush (Hammock) by asking them if they were telling the truth. He also asked Ms. Bush if she was having dreams about the case.

In State v. Carpenter, 773 S.W.2d. 1, 11 (Tenn. Crim. App.), perm. to

appeal denied, (Tenn. 1989), this court held that bolstering was permitted to rehabilitate an impeached witness to rebut the inference that the witness's testimony was a recent fabrication. Bolstering has also been permitted to allow seemingly inconsistent statements to be placed into context. State v. Boyd, 797 S.W.2d 589, 594 (Tenn. 1990). We conclude that the prosecutor's questions were not inappropriate.

The question asked of Ms. Bush concerning whether she had dreams about the offense were posed in the context of remembering things that she had not thought of and explaining why there had been inconsistencies in previous statements. Again, we conclude that the prosecutor could use this question to rehabilitate his witness. This issue is without merit.

7. WHETHER THE PROSECUTOR'S STATEMENTS DURING THE CLOSING ARGUMENT OF THE PENALTY PHASE OF THE TRIAL DENIED THE APPELLANT A FAIR TRIAL.[17]

A. CALDWELL VIOLATION

The appellant first contends that the prosecutor, in violation of the Supreme Court's holding in Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639 (1985), "led the jury to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The appellant cites the following portion of the prosecutor's argument to the jury:

> I submit to you that the most important day in the defendant's life was the day that he chose -- not you; not I; -- the day that he chose to go to the home of Jodie Lefever and murder her horribly, heinously, atrociously, in cold blood. They'll tell you that you have a choice to make here today, that is his life is literally in your hands. And I submit to you, ladies and gentlemen of the jury, that's not true. When he went to the home of Jodie Lefever and had her open the door as a friend, he took his life in his own hands. He

[17] See supra Section III, Issue #6 "Whether the Appellant is Entitled to Relief Based on Allegations of Prosecutorial Misconduct," (C)(1) Closing Argument, Massive Investigation, for a general discussion of the standard to be applied in reviewing counsel's argument.

took his life in his own hands.

When reviewing an alleged Caldwell error, this court must first determine whether the prosecutor's comments minimized the jury's role in determining the appropriateness of death. State v. West, 767 S.W.2d 387, 399 (Tenn. 1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3254 (1990). If the prosecutor's comments were improper, we must then decide whether the trial judge's instructions to the jury sufficiently corrected the error. Id. "If the Court cannot say the comments had no effect on the sentencing, then the jury's decision does not meet the standard of reliability required by the Eighth Amendment." State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988), cert. denied, 489 U.S. 1072, 109 S.Ct. 1357 (1989).

We have previously observed that the State may properly argue that a defendant is the "author of his own fate." Wright v. State, No. 01C01-9105-CR-00149 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1129 (1995). In any case, the prosecutor's comments must be evaluated in the context of the total argument by the parties and, of course, the trial court's instructions to the jury about its obligations under the law. See State v. Nichols, 877 S.W.2d 722, 733 (Tenn. 1994), cert. denied, _ U.S. __, 115 S.Ct. 909 (1995).

Immediately following the quoted portion of the prosecutor's argument, the prosecutor reminded the jurors that they had been asked during voir dire whether they would be able to impose the death penalty if the State were able to prove that aggravating factors outweighed any mitigating factors. The prosecutor then reviewed the aggravating circumstances presented by the State. During rebuttal argument, the prosecutor again explained the weighing process, remarking, "You have a job to do and it's a serious job. It's probably one of the most tough things that you've ever been called upon to do in your life." Defense counsel, during

closing argument, emphasized the importance of the jury's role in determining the appropriate punishment. Defense counsel observed, "The verdict you render on the question you have today is whether a young man lives or dies. You are the supreme decision makers in this case." Finally, immediately before the jury began deliberations, the trial court correctly instructed the jury as to their responsibility for determining the appropriate punishment. We conclude, therefore, that even if the prosecutor's comments, by themselves, violated Caldwell, the error was harmless beyond a reasonable doubt.

B. PROSECUTORIAL EXPERTISE

The appellant next contends that the prosecutor alluded to prosecutorial expertise when she asked that the jury impose the death penalty. That is, the prosecutor, according to the appellant, argued that the jury should impose the death penalty because the State, in its expertise, chose to seek the death penalty. However, the record reveals that, in the portion of the argument to which the appellant refers, the prosecutor merely reviewed the facts of the case and concluded that "[i]f that's not a set of circumstances that deserves the death penalty, one would wonder what it takes." We conclude that the prosecutor's argument did not rely upon prosecutorial expertise, and that this issue is without merit.

C. DENIGRATION OF MITIGATING EVIDENCE

The appellant also contends that the prosecutor misled and inflamed the jury by denigrating the appellant's mitigating evidence, characterizing the evidence as an "excuse" which should be disregarded. First, our supreme court found "nothing wrong with counsel's argument" in State v. Smith, 893 S.W.2d 908, 922 (Tenn. 1994), cert. denied, __ U.S. __, 116 S.Ct. 99 (1995), a case in which the prosecutor similarly referred to the defendant's mitigating evidence as an excuse. See also State v. Keen, No. 02S01-9112-CR-00064 (Tenn. May 23,

1994), rehearing granted, (Tenn. May 16, 1995). Second, the record reveals that, although the State generally downplayed the mitigating evidence presented by the appellant, the prosecutor, during rebuttal, conceded that two mitigating factors, the appellant's youth and his lack of a significant criminal history, had been proven. During the course of argument, the prosecutor also explained that the appellant could "present proof on anything [he] want[s] to and call it a mitigator. Whether it's a mitigator or not is up to you." We conclude that the challenged comments do not rise to the level of reversible error.

D. MERCY

The appellant next contends that the prosecutor attempted to discourage the jury's consideration of mercy. Specifically, in rebuttal, the prosecutor argued, "We want you to use the same mercy that this defendant used on Jodie Lefever as she lay helpless in her floor." Our supreme court has observed that this argument "encourage[s] the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence," and is therefore improper. Bigbee, 885 S.W.2d at 812. However, the record reveals that the trial court sustained the appellant's objection to the prosecutor's remark. Moreover, at the conclusion of argument, the trial court instructed the jury that they could "decide to sentence the appellant to life imprisonment simply because based on the evidence introduced at either the guilt/innocence or sentencing phase at this trial you find it appropriate to exercise mercy." We conclude that the appellant was not unduly prejudiced by the prosecutor's statement.

E. MISCELLANEOUS

The appellant complains that the prosecutor waived the murder weapon before the jury. He also asserts that the prosecutor improperly argued that the death penalty would protect all the "other Jodie Lefevers of the world." Finally,

the appellant argues that the prosecutor, during argument, impermissibly remarked that the appellant's expert witnesses received a fee for their services.

First, the murder weapon was properly introduced into evidence at trial and, therefore, could be displayed to the jury and otherwise referred to during the State's closing argument. Moreover, the prosecutor is an advocate and is entitled to pursue his role with thoroughness and vigor. Post v. State, 580 S.W.2d 801, 808 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1979). Second, although argument based on general deterrence and, perhaps, deterrence of the defendant, is in fact improper, see Irick, 762 S.W.2d at 131, the trial court sustained the appellant's objection to the prosecutor's remark. Finally, with respect to any remarks addressing fees paid to expert witnesses, Tenn. R. Evid. 616 provides, "A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Thus, in cross-examining the appellant's expert witnesses during trial, the prosecutor properly inquired about fees. Therefore, the prosecutor's statements during closing argument were grounded in the proof presented at trial.

"Closing argument must be temperate, must be predicated on evidence introduced during the trial of a case, and must be pertinent to the issues being tried." State v. Odom, No. 02C01-9305-CR-00080 (Tenn. Crim. App. at Jackson, October 19, 1994), perm. to appeal granted, (Tenn. 1995). See also State v. Tyson, 603 S.W.2d 748, 754 (Tenn. Crim. App. 1980). We conclude that the State's argument largely complied with this standard, and that the trial court did not abuse its discretion in controlling closing argument during the penalty phase of the trial. This issue is without merit.

8. WHETHER THE TRIAL COURT PROPERLY CHARGED THE JURY REGARDING THE CREDIBILITY OF WITNESSES.

The appellant contends that the jury instructions given by the trial judge regarding the credibility of witnesses, the impeachment of witnesses, and the method of resolving conflicts in the testimony of witnesses unconstitutionally restrained the jury in their determination of credibility.

The instructions about which the appellant complains are the pattern jury instructions for the credibility of witnesses and the impeachment of witnesses. T.P.I. -- Crim. § § 37.01, 37.02. Both of these instructions have been held by this court to be a proper statement of the law. See State v. Glebock, 616 S.W.2d 897, 906 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1981). We conclude that this issue is without merit.

9. WHETHER THE APPELLANT WAS PROPERLY CONVICTED OF FIRST DEGREE BURGLARY.

A. INSUFFICIENT EVIDENCE

The appellant contends that there was insufficient evidence to convict him of first degree burglary. He specifically claims that the State failed to prove that there had been a "breaking and entering" of the victim's house. The standard of review regarding the sufficiency of the evidence outlined in the appellant's second issue will be used to evaluate this contention also. See, *supra*, Section III, Issue #2 "Whether the trial court erred in overruling the appellant's motion for judgment of acquittal as to the charge of premeditated murder.".

Tenn. Code Ann. § 39-3-401 (1988) defined first degree burglary as "the

breaking and entering into a dwelling house . . . by night, with intent to commit a felony." The trial court properly instructed the jury that "[a]ny person who after having entered the premises mentioned in §39-3-401, with intent to commit a felony, shall break any premises, or any safe or receptacle therein, shall receive the same punishment as if he had broken into the premises in the first instance." See Tenn. Code Ann. § 39-3-402 (1988).

The appellant contends that the evidence demonstrated that the appellant had been granted entry by the victim. However, the breaking element can be either actual or constructive, and if entry was gained by either fraud or threat, the breaking will be considered constructive. State v. Holland, 860 S.W.2d 53, 58 fn. 11 (Tenn. Crim. App. 1993). Since the appellant was armed with a piece of wood, there was at least circumstantial evidence that the appellant gained entry by threat. Likewise, because the victim knew the appellant, entry could have been gained by fraud if the appellant told her that he was there for legitimate business.

Moreover, in consideration of Tenn. Code Ann. § 39-3-402, the State proved that the top right-hand dresser drawer had been opened and that the appellant had opened the kitchen drawer to remove the butcher knife. Based upon these facts, we conclude that a rational trier of fact could have found the appellant guilty of first degree burglary.

B. VARIANCE

The appellant next argues that he was denied notice of the charges being brought against him because the indictment charged the breaking and entering into the home while the proof demonstrated only the breaking into the drawers of the home. He further contends that he was denied due process and a fair trial

because he was convicted on a charge never made in the indictment.

In order to satisfy constitutional requirements, an indictment must provide the defendant with notice of the offense charged, provide the court with an adequate ground upon which a judgment may be entered, and provide the defendant with protection against double jeopardy. State v. Byrd, 820 S.W. 2d 739, 741 (Tenn. 1991). Moreover, in State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984), the Tennessee Supreme Court held that a variance between the proof and the indictment did not prejudice the defendant's rights if the indictment sufficiently informed the defendant of the charges against him so that he could properly prepare his defense and not be misled or surprised at trial and if the variance was not such that it would present a danger that the defendant could be prosecuted a second time for the same offense.

In this case, the appellant was aware of the facts surrounding the entry into Ms. Lefever's home and the entry into the two drawers of her home. Although the appellant contends that he was surprised at trial, he has not demonstrated how he could have better defended had he been given prior notice that the breaking involved breaking into the drawers. All of the activity was involved in one criminal episode. For these reasons we conclude that, even if a variance existed, it was harmless under these circumstances. This issue is without merit.

10. WHETHER THE DEATH PENALTY IS CONSTITUTIONAL AS APPLIED IN THIS CASE.

A. JURY QUESTION CONCERNING PAROLE ELIGIBILITY

The appellant first contends that the trial court's ruling on the jury's question regarding parole eligibility demonstrate's the unconstitutionality of the death penalty statute in Tennessee. After the jury began its deliberations in the penalty phase of the trial, the jury passed a question to the court asking about parole eligibility when a life sentence is imposed. The trial court responded as follows:

> I would in response to those questions remind you that parole eligibility is not an issue in a capital case, and I would refer you back to the instructions that I read to you in regards to your other question. That's the only answers I can give you at this point.

The Tennessee Supreme Court, in Houston v. State, 593 S.W.2d 267, 278 (Tenn. 1980), held that "[t]he after-effect of a jury's deliberation is not a proper consideration for the jury." See also State v. Payne, 791 S.W.2d 10, 21 (Tenn. 1990).

The appellant relies on the United States Supreme Court's holding in Simmons v. South Carolina, --U.S.--, 114 S.Ct. 2187 (1994), to support his argument that the trial court's answer to the jury was in error. In Simmons, the Court held that the sentencing jury in a death penalty case must be informed that the defendant is parole ineligible where state law would absolutely deny parole eligibility to a person sentenced to life imprisonment. However, three of the justices voting with the majority in Simmons expressed the view that a jury must be informed of the defendant's parole status only when "the only available alternative sentence to death is life imprisonment without possibility of parole." Simmons, -- U.S. at --, 114 S.Ct. at 2201. In all other cases, information concerning the defendant's parole eligibility need not be conveyed to the jury. Since Tennessee is a state in which defendants sentenced to life imprisonment are eligible for parole,[18] we conclude that the trial court did not err in its answer to

[18]Effective July 1, 1993, Tenn. Code Ann. § 39-13-202 (b) (1994 Supp.) set forth the punishment for first degree murder. The available punishments are

the jury's question.

B. AGGRAVATING CIRCUMSTANCE (i)(6)

The appellant also argues that Tenn. Code Ann. § 39-2-203(i)(6) (1988) does not apply in this case, but even if it does apply, its application would be unconstitutional based on a Middlebrooks analysis.

Tenn. Code Ann. § 39-2-203(i)(6) (1988) states that if "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another," this may be considered an aggravating circumstance in a death penalty prosecution. In State v. Smith, 868 S.W.2d 561, 580-81 (Tenn. 1993), the Tennessee Supreme Court held that for purposes of applying this circumstance, the State need only prove that at least one motive for the killing was the prevention of prosecution.

In this case, the jury convicted the appellant of first degree burglary. In order to do so, the jury had to find that the appellant entered the victim's home with the intent to commit larceny.[19] The evidence supports this finding. Also, the evidence was uncontested that the victim knew the appellant. Under these facts, a reasonable juror could have found that the appellant killed the victim, in part,

because he did not want her to identify him as the perpetrator of a burglary. Therefore, aggravating circumstance (i)(6) was applicable and properly found by the jury.

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(1) death; (2) imprisonment for life without possibility of parole; or (3) imprisonment for life. Tenn. Code Ann. § 39-13-202 (b). Prior to this enactment, the only available punishments were death and life with possibility of parole.

[19]The burglary count of the indictment charged the appellant with breaking and entering the victim's home with the intent to commit "[l]arceny of the goods and property located therein."

C. NARROWING OF DEATH PENALTY ELIGIBLE POPULATION

The appellant also contends that the application of aggravating circumstance (i)(6) (that the murder was committed for the purpose of avoiding arrest or prosecution) is unconstitutional in that it would be present in every premeditated murder case, and thus it would not sufficiently narrow the death penalty eligible population. The appellant's argument is misplaced. In State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992), the Tennessee Supreme Court determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurred under the statute in that defendant's case. Thus, when a defendant is convicted of felony murder, that aggravating circumstance cannot apply because it duplicates the elements of the offense.

In the case at bar, however, the prosecution was not statutorily required to prove that the appellant killed the victim because he knew that she could identify him to sustain his conviction for first degree murder. We conclude that, as applied to the facts of this case, aggravating circumstance (i)(6) sufficiently narrows the persons eligible for the death penalty and reasonably justifies the imposition of a more severe sentence upon the appellant compared to others found guilty of murder. This issue is without merit.

11. WHETHER THE APPELLANT WAS GIVEN PROPER NOTICE OF THE AGGRAVATING CIRCUMSTANCES UPON WHICH THE STATE INTENDED TO RELY.

The appellant contends that he was not provided sufficient notice of the facts supporting the aggravating circumstance that "[t]he murder was committed

for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." Although the appellant requested a bill of particulars for information concerning this circumstance, the State did not reply.

Tenn. R. Crim. P. 7(c) allows the court to direct the filing of a bill of particulars "so as to adequately identify the offense charged." "This provision is to be construed to serve that singular purpose, and is not meant to be used for purposes of broad discovery." (emphasis added) Advisory Commission Comments, Tenn. R. Crim. P. 7. See also State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994); State v. Wiseman, 643 S.W.2d 354 (Tenn. Crim. App. 1982). Therefore, Rule 7(c) is not applicable to the sentencing phase of the proceedings.

Tenn. R. Crim. P. 12.3(b) requires the State to provide notice of its intent to seek the death penalty no less than thirty days prior to trial. The rule also requires the State to specify the aggravating circumstances upon which it tends to rely at the sentencing hearing. Specification may be satisfied by a citation to the aggravating circumstance. Tenn. R. Crim. P. 12.3(b).

In the present case, the State amended its notice to seek the death penalty to include the subsection (i)(6) aggravating factor on November 5, 1992, well within the statutorily mandated time period.[20] This issue is without merit.

12. WHETHER THE JURY INSTRUCTION AS TO THE "HEINOUS, ATROCIOUS, OR CRUEL" NATURE OF THE CRIME WAS IMPROPERLY GIVEN.

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[20]The appellant's trial was set for February of 1993.

A. PROPER INSTRUCTION WHEN OFFENSE WAS COMMITTED

The appellant first contends that the jury was not properly instructed on the aggravating circumstance concerning the "heinous, atrocious, or cruel" nature of the crime. Before 1989, a statutory aggravating circumstance was that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." See Tenn. Code Ann. § 39-2-203(i)(5) (repealed 1989). In 1989, the statute was amended to provide as an aggravating factor that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." See Tenn. Code Ann. § 39-13-204(i)(5) (1991). The trial court erroneously instructed the jury under the 1989 definition.

The appellant cites State v. Stephenson, 878 S.W.2d 530, 534 (Tenn. 1994) and State v. Keen, No. 02S01-9112-CR-00064 (Tenn. May 23, 1994), reh'g granted, (May 16, 1995), for the proposition that a reversal is required if a jury is not instructed with the law as it existed at the time of the offense. In both of these cases, however, the jury was instructed on old law, which held the State to a lesser standard of proof. In the case at bar, the jury was given the definition of "heinous, atrocious, or cruel" under the new statute, which required a higher burden on the State to prove that the act involved torture or serious physical abuse. In reviewing the entire record in this cause, we are satisfied that this error was harmless beyond a reasonable doubt. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

B. UNCONSTITUTIONALLY VAGUE

The appellant also contends that the jury instructions were unconstitutionally vague. The Tennessee Supreme Court, however, has held

that under either definition of "heinous, atrocious, or cruel," the statutory aggravating circumstance is not unconstitutionally vague. See State v. Cazes, 875 S.W.2d 253, 267 (Tenn. 1994); State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991). We conclude that this issue is without merit.

13. WHETHER THE STATE INTRODUCED EVIDENCE IN VIOLATION OF THE APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS AT SENTENCING.

The appellant contends that the testimony of Dr. Zillur Athar, a practicing psychiatrist who had treated the appellant while he was a patient at M.T.M.H.I., and Edean Gerdes, the treatment coordinator at M.T.M.H.I., was improperly introduced into evidence. The appellant cites the United States Supreme Court decision in Estelle v. Smith, 451 U.S. 454, 470, 101 S.Ct. 1866, 1876 (1981), for the proposition that once a capital defendant has been formally charged, his Sixth Amendment right to counsel and his Fifth Amendment right against compelled self-incrimination precludes the State from subjecting the defendant to any psychiatric examination concerning future dangerousness without first informing the defendant that he had the right to remain silent and without notifying counsel as to what the psychiatric examination would encompass.

In Buchanan v. Kentucky, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917, 2918 (1987), the United States Supreme Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense. The Court also held that there was no Sixth Amendment violation where counsel had requested the psychiatric evaluation and counsel was on notice that if he intended to put on a "mental status defense," he would have to anticipate the use of psychological evidence by the prosecution in rebuttal. Buchanan, 483

U.S. at 424, 107 S.Ct. at 2918. In the case at bar, the appellant put his mental status at issue by claiming it as a mitigating factor in the penalty phase of the trial. Moreover, in this case, defense counsel was made aware of each psychiatric evaluation that was conducted as each examination was court ordered at the request of the appellant or the State. We conclude that the testimony of Dr. Athar and Ms. Gerdes was appropriate rebuttal testimony after the appellant put his mental status into issue in the penalty phase of the trial. This issue is without merit.

14. WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY "REGARDING REASONABLE DOUBT."

The appellant contends that he was denied his rights under Article I, Sections 6, 7, 8, 16, 17, and 18 of the Tennessee Constitution, and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the jury was unconstitutionally instructed concerning the meaning of "reasonable doubt" at the guilt and sentencing phase of the trial. At the guilt phase of the trial, the jury received the following instruction concerning the meaning of "reasonable doubt."

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every element of proof necessary to constitute the offense.

(charge of the court, transcript of the evidence, vol. five, § III, p. 681).[21]

[21]We also note that, at the sentencing phase of the trial, the jury was likewise instructed as to "a moral certainty" regarding the finding of aggravating circumstances "beyond a reasonable doubt." (charge of the court, transcript of the evidence, vol. eight, § III, pp. 1153-1154).

The appellant argues that this instruction equating "beyond a reasonable doubt" with "a moral certainty" violated his due process rights under the new standard set forth in Victor v. Nebraska, --- U.S. ---, 114 S.Ct. 1239 (1994). In Victor, the United States Supreme Court ruled that the phrase "moral certainty" may have lost its historical meaning, and that a jury might "understand it to allow conviction on proof that does not meet the beyond a reasonable doubt standard." Victor, --- U.S. at ---, 114 S.Ct. at 1247. It reasoned that "'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt,' " but "something less than the very high level of probability required by the Constitution in criminal cases." Id. While the Court stated that it did not condone the use of the "moral certainty" phrase, the Court held that the phrase could pass constitutional muster if used in conjunction with a modifying instruction that lent meaning to the phrase. Victor, --- U.S. at ---, 114 S.Ct. at 1248.[22] In order to meet the requirements of due process, the jury instructions must be examined as a whole, without considering particular phrases out of context. Victor, --- U.S. ---, 114 S.Ct. at 1243.

The instruction provided to the jury in the present case used the term "moral certainty" in conjunction with "let the mind rest easily" and "arise from possibility." Though neither of these phrases have been before the United States Supreme Court,[23] the courts of this state have consistently upheld the constitutionality of this instruction. See State v. Nichols, 877 S.W. 2d 722 (Tenn. 1994), cert. denied, --- U.S. ---, 115 S.Ct. 909 (1995); Pettyjohn v. State,

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[22]The United States Supreme Court, in Cage v. Louisiana, 298 U.S. 39, 41, 111 S.Ct. 328, 329 (1990), held that "moral certainty" modified by the phrases "grave uncertainty" and "actual substantial doubt" did not meaningfully convey the definition of reasonable doubt, and, thus, violated the due process clause.

[23]We note, however, that a federal district court has recently held that the phrase "let the mind rest easily," when used to qualify "moral certainty," does not sufficiently convey to the jury the requisite burden of proof required by the Constitution. See Rickman v. Dutton, 864 F.Supp. 686 (M.D. Tenn. 1994). We are not, however, bound by that court's decision.

885 S.W.2d 364 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); State v. Beckham, No. 02C01-9405-CR-00107 (Tenn. Crim. App. at Jackson, Sept. 27, 1995); Caldwell v. State, No. 02C01-9405-CR-00107 (Tenn. Crim. App. at Jackson, Dec. 28, 1994), perm. to appeal granted in part, denied in part, (Tenn. May 30, 1995); State v. Voaden, No. 01C01-9305-CC-00151 (Tenn. Crim. App. at Nashville, Dec. 22, 1994), perm. to appeal denied, (Tenn. May 1, 1995); Smith v. State, No. 03C01-9312-CR-00393 (Tenn. Crim. App. at Knoxville, July 1, 1994). Specifically, the Tennessee Supreme Court noted in State v. Nichols, 877 S.W.2d at 734, that "the use of the phrase 'moral certainty' by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt." The court distinguished the Tennessee instruction from the one invalidated in Cage v. Louisiana because the Tennessee instruction does not require "grave uncertainty" to support acquittal. Moreover, the court concluded that:

> [w]hen considered in conjunction with an instruction that "[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict," we find that the instruction properly reflects the evidentiary certainty required by the "due process" clause of the federal constitution and the "law of the land" provision in our state constitution.

Nichols, 877 S.W.2d at 734. We, therefore, conclude that the charge given by the trial court, although containing the phrase "moral certainty," did not violate the appellant's rights under the United States or the Tennessee Constitutions.

15. WHETHER THE TRIAL COURT'S INSTRUCTIONS IN THE PENALTY PHASE PROHIBITED THE JURY FROM CONSIDERING AND GIVING FULL EFFECT TO THE APPELLANT'S MITIGATING EVIDENCE.

A. MODIFIER "EXTREME"

The appellant first contends that the jury instructions precluded the jury from considering mitigating evidence of mental or emotional disturbance which

did not rise to the level of extreme mental or emotional disturbance. In its jury instructions, the trial court recited the language of Tenn. Code Ann. § 39-2-203(j)(2) in instructing the jury that in arriving at the punishment the jury shall consider the mitigating factors including, but not limited to that "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." The appellant contends that use of the modifier "extreme" misled the jury in its consideration of the evidence.

The Tennessee Supreme Court rejected this same argument in State v. Smith, 857 S.W.2d 1, 16-17 (Tenn.), cert. denied, --U.S.--, 114 S. Ct. 561 (1993). Moreover, in the case at bar, the jury was also instructed that it could consider any mitigating factor raised by the evidence at either the guilt or penalty phase of the trial. This issue is without merit.

B. MODIFIER "SUBSTANTIALLY"

The appellant also contends that the jury instructions precluded the jury from considering mitigating evidence of mental illness and intoxication which did not rise to the level of "substantially" affecting the appellant's ability to conform his conduct to the law. Again, this argument was rejected in Smith, 857 S.W.2d at 16-17, and we find the issue to be without merit.

C. UNANIMOUS AGREEMENT ON MITIGATING CIRCUMSTANCES

Lastly, the appellant contends that the trial court unconstitutionally limited the consideration of mitigating evidence by requiring the jury to unanimously agree on a verdict of life or death. This argument was rejected in Smith, 857 S.W.2d at 18, and we agree that "nothing in the Tennessee statutes, and the instructions given the jury, or in the verdict form submitted to the jury, was likely to lead any juror to believe that he or she was precluded from considering mitigating circumstances unless all jurors agreed that the circumstances

existed." This issue is without merit.

16. WHETHER THE TRIAL COURT FAILED TO PROVIDE THE JURY WITH PROPOSED INSTRUCTIONS NECESSARY FOR THE PROPER DETERMINATION OF SENTENCE.

The appellant contends that the trial court erred in refusing to give certain requested jury instructions during the penalty phase of the trial. The trial court rejected the following special instructions:

1.(2) Burden of proof -generally;
2.(4) Life means life -death means death -sentence will be carried out
3.(5) Definition of life and death - sentencing;
4.(6) Jury has responsibility for final decision - sentencing;
5.(7) Decision to be made by individual jurors - sentencing;
6.(9) Aggravating circumstance - definition - sentencing;

7.(10) Weighing aggravation and mitigation - defining mitigation - sentencing;
8.(13) Aggravating circumstance - standards for consideration - sentencing;
9.(14) Presumption regarding aggravating circumstances - sentencing;
10.(15)Aggravating circumstances - unanimity - sentencing:
11.(16)Aggravating circumstance - individual consideration but requirement of unanimity - sentencing;
12.(18)Sentence - crime in society;
13.(19)Deterrence - cost sentencing;
14.(20)Definition - weight and unanimity - sentencing;
15.(21)Definition - mitigating circumstances - sentencing;
16.(22)Mitigating circumstance - definition -sentencing;
17.(23)Mitigating circumstance - definition -sentencing;
18.(24)Standard of proof - sentencing;
19.(26)Weighing aggravating and mitigating circumstances - sentencing;
20.(27)Doubt inures to the benefit of the defendant - sentencing;
21.(28)Mercy - sentencing;
22.(29)Consideration for sentence less than death - sentencing;
23.(30)Mitigation - reason for sentence less than death - sentencing;
24.(31)Sympathy - sentencing;
25.(32)Compassion - mercy - sentencing;
26.(33)Mitigation - reason for sentence less than death - sentencing;
27.(34)Mitigating circumstances - basis for sentence less than death - sentencing;
28.(35)Imposing a sentence less than death;
29.(36)May vote life - sentencing;
30.(37)Finding beyond a reasonable doubt that death is appropriate - sentencing;
31.(38)Lingering doubt -sentencing;
32.(39)Jury verdict - inability to agree - sentencing;
33.(40)No evidence except that introduced at trial - sentencing;

34.(42)Mitigating circumstance - age - sentencing;
35.(44)Mitigating circumstance - mental illness - sentencing;
36.(46)Mitigating circumstance - capacity to appreciate criminality - sentencing;
37.(47)Mitigating circumstance - emotional development - sentencing;
38.(50)Mitigating circumstance - adolescent - sentencing;
39.(51)Mitigating circumstance - parental expectations - sentencing;
40.(53)Mitigating circumstance - health of another - sentencing;
41.(54)Mitigating circumstance - domination - sentencing;
42.(55)Mitigating circumstance - planning of crime - sentencing;
43.(56)Mitigating circumstance - death of victim - sentencing;
44.(57)Mitigating circumstance - lingering doubt - sentencing.

When a trial court's instructions correctly charge the applicable law, the court does not err by refusing special requests. Tillet v. State, 565 S.W.2d 509, 511(Tenn. Crim. App. 1978). Nor is it error to refuse to give an inaccurate special request. State v. Moore, 751 S.W.2d 464, 467 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988). After reviewing the instructions given by the trial court, we conclude that the instructions adequately charge the applicable law. This issue is without merit.

17. WHETHER THE DEATH PENALTY UNCONSTITUTIONALLY INFRINGES UPON THE APPELLANT'S FUNDAMENTAL RIGHT TO LIFE.

The appellant contends that the Tennessee death penalty statute is unconstitutional in that the right to life is fundamental and the punishment of death is not necessary to promote any compelling state interest. The appellant argues that less severe penalties are available to serve the state's interest in punishing the appellant. Moreover, the appellant asserts that "compelling state interests are those which secure our democratic institutions and/or insure national security." While this argument is somewhat novel in its approach, we note that one of the state's most basic functions is to enforce the penal laws as established by the legislature. We quote from the United States Supreme Court decision, Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2930 (1976):

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

The Tennessee Supreme Court has held that the state's death penalty statute, per se, meets due process requirements. See State v. Black, 815 S.W. 2d 166, 190 (Tenn. 1991); see also State v. Groseclose, 615 S.W.2d 142 (Tenn.), cert. denied, 454 U.S. 882, 102 S.Ct. 366 (1981). This issue is therefore without merit.

18. WHETHER THE STATE'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The appellant raises several constitutional objections to the Tennessee death penalty statute. Specifically, the appellant contends that the death penalty statute is unconstitutional in that:

(a) it provides insufficient guidance to the jury concerning who has the burden of proving whether mitigation outweighs aggravation and what standard the jury should use in making that determination;

(b) it fails to sufficiently narrow the class of death penalty eligible defendants;

(c) it insufficiently limits the jury's discretion in that once it finds an aggravating circumstance beyond a reasonable doubt, it can impose death, regardless of what mitigation is shown;

(d) it requires that if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, it must impose death;

(e) it allows the jury to afford too little weight to non-statutory mitigating factors. The statute requires that the jury consider "any mitigating circumstances";

(f) it does not require the jury to make the ultimate determination that death is appropriate in that it is "merely filling in the blanks" in determining and comparing mitigating and aggravating circumstances.;

(g) it does not inform the jury of its ability to impose mercy;

(h) it provides no requirement that the jury make findings of fact as to the presence or absence of mitigating circumstances, thereby preventing effective

appellate review;

(i) it prohibits the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase of the trial;

(j) it allows the imposition of a cruel and unusual punishment and in that it allows death to be imposed by electrocution;

(k) it has been imposed discriminately on the basis of race, sex, geographic region, and economic and political status of the defendant;

(l) the proportionality of arbitrariness review conducted by the Tennessee Supreme Court pursuant to Tenn. Code Ann. § 39-13-205 is inadequate and deficient;

(m) it permits the introduction of relatively unreliable evidence in the State's proof of aggravating circumstances and in its rebuttal of mitigating circumstances;

(n) it allows the State to make final closing arguments to the jury in the penalty phase of the trial;

All of the appellant's arguments except (g) have been rejected by the Tennessee Supreme Court. See State v. Cazes, 875 S.W.2d 253, 268-269 (Tenn. 1994);.State v. Smith, 857 S.W.2d 1, 16-17, 23 (Tenn. 1993); State v. Howell, 868 S.W.2d 238, 258 (Tenn. 1993); State v. Black, 815 S.W.2d 166, 185, 187 (Tenn. 1991); State v. Boyd, 797 S.W.2d 589, 596 (Tenn. 1990); State v. Melson, 638 S.W.2d 342, 366, 368 (Tenn. 1982); State v. Groseclose, 615 S.W.2d 142, 150 (Tenn. 1981). With respect to the argument in (g), in consideration of the jury instructions given in a capital case, we find this issue to be without merit.

19. WHETHER THE CUMULATIVE EFFECT OF ALL ERRORS VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHTS.

As his final argument, the appellant contends that the cumulative effect of all errors alleged both at trial and at sentencing violates his constitutional rights. As this court has not found any error with respect to the appellant's previous eighteen issues, we find this final issue to be without merit.

IV. CONCLUSION

The appellant has offered no grounds that warrant relief from his convictions of premeditated first degree murder and first degree burglary. Moreover, we conclude that the appellant has failed to establish any ground warranting relief from his sentence of death. The judgment of the trial court is affirmed.

Moreover, in accordance with the mandates of Tenn. Code Ann. § 39-13-206(c)(1) (1994 Supp.) and after a thorough review of the record and the trial court's Rule 12 form, we conclude that: (1) the sentence of death was not imposed in any arbitrary fashion, Tenn. Code Ann. §39-13-206(c)(1)(A); (2) the evidence supports the jury's finding of two statutory aggravating circumstances, Tenn. Code Ann. § 39-13-206(c)(1)(B); and (3) the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances, Tenn. Code Ann. § 39-13-206(c)(1)(C).

In the case *sub judice*, the proof establishes that the appellant went to the home of the victim to "get money." The victim, a seventy-nine year old widow, living alone, was the best friend of the appellant's grandmother. Apparently, the appellant used this relationship to gain access to her home. Once inside, the appellant savagely beat the victim with a stick, stabbed her forty-three times, and "practiced karate on her." Medical evidence further establishes that the victim was alive through most, if not all, of the stabbings. The appellant confessed the crime to his wife. A comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Tenn. Code Ann. § 39-13-206(c)(1)(D). Accordingly, we affirm the sentence of death.

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David G. Hayes, Judge

CONCUR:

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Paul G. Summers, Judge

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William M. Barker, Judge