IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9501-CR-00029
Appellee	)	
	)	SHELBY COUNTY
vs.	)	
	)	Hon. JOSEPH B. DAILEY, Judge
SAMMIE LEE TAYLOR,	)	
	)	(Esp. Agg. Kidnapping, Esp. Agg.
Appellant	)	Robbery, Agg. Sexual Battery, and
	)	Felony Murder)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Sammie Lee Taylor, Jr., appeals his jury convictions for the crimes of especially aggravated kidnapping, especially aggravated robbery, aggravated sexual battery, and felony murder. At the conclusion of the penalty phase of the trial, the jury imposed a sentence of life imprisonment without the possibility of parole for the felony murder conviction. The Criminal Court of Shelby County sentenced the appellant to an effective sentence of sixty-two years for the remaining three convictions, ordering that this sixty-two year sentence run consecutively to the appellant's life sentence. On appeal, the appellant raises the following issues:

> I. Whether the evidence is sufficient to sustain the appellant's convictions and sentences.
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> II. Whether the trial court properly overruled the appellant's objection to the State's request for notice of alibi.
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> III. Whether the trial court properly denied the appellant's request to make an offer of proof relative to the issues raised in the supplemental motion to remand proceedings back to juvenile court.
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> IV. Whether the trial court properly denied the appellant's supplemental motion to remand proceedings back to juvenile court.
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> V. Whether the trial court properly denied the appellant's motion to suppress the appellant's statements to police and the results of the consensual search conducted in appellant's home.
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> VI. Whether the trial court properly denied the appellant's appointed co-counsel compensation.
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> VII. Whether the trial court properly denied the appellant's motion to strike the State's motion to seek enhanced punishment.
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> VIII. Whether the trial court properly denied the appellant's request for individual voir dire.
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> IX. Whether the trial court properly denied the appellant's motion for mistrial when an individual juror was removed prior to the selection of an alternate.
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> X. Whether the trial court properly allowed the jury to be selected from the then existing jury pool.
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> XI. Whether the trial court properly admitted color photographs of the deceased victim into evidence.

XII. Whether the trial court properly admitted State's Exhibit #25.

XIII. Whether the trial court properly denied the appellant's motion for mistrial due to prosecutorial misconduct during the penalty phase.

XIV. Whether the appellant's sentence constitutes "cruel and unusual punishment" under the Eighth Amendment of the United States Constitution.

After reviewing the record, we affirm the judgment of the trial court.

I. BACKGROUND

On February 17, 1994, a Shelby County Grand Jury returned four indictments charging the appellant with two counts of especially aggravated kidnapping, three counts of first degree/felony murder, one count of especially aggravated robbery, and two counts of aggravated rape.[1] At the time of the offense, the appellant was a juvenile.[2] However, prior to indictment, the Shelby County Criminal Court accepted jurisdiction of the appellant. On September 12, 1994, the appellant's case proceeded to trial, during which the following facts were developed.

On July 7, 1993, Kimberly Wilburn, a twenty-three year old student at Baptist Nursing School, was employed as a medical assistant at the Hickory Hill Family Medical Clinic. That evening, Ms. Wilburn worked late at the clinic. At approximately 7:45 p.m., her mother, who was visiting from Missouri, stopped by the clinic to deliver some groceries along with a new blouse and skirt she had purchased for Kimberly at Stein Mart. Shortly thereafter, Kimberly Wilburn left the clinic and drove to her residence at the Arbors of Harbor Town, a downtown

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[1]Willie Davidson, Tracey Davidson, Barry Smith, and Antonio Byrd were also named in the indictments. The record indicates that each co-defendant was to be tried separately. After the appellant was found guilty of all four counts and was sentenced to life without possibility of parole, his four co-defendants entered guilty pleas and received sentences of life without possibility of parole.

[2]The appellant was sixteen years old at the time of this crime.

Memphis apartment community located on Mud Island. Ms. Wilburn was wearing nursing slacks, a white lab coat, white nursing shoes, and a yellow and white bold-striped shirt. She was driving a 1992 teal green Ford Taurus with Missouri license plate number LRY 195.

Earlier that same day, at the appellant's house, the appellant, Willie Davidson, Tracey Davidson, Antonio Byrd, and Barry Smith were plotting to steal a car and commit robberies.[3] Jimmy Jones, a first cousin of the appellant, was also present. He testified that Willie Davidson stated that he wanted to "make a sting;"[4] "he wanted to walk up to someone, put them in the trunk, take their car." Jones added that the five co-defendants left the house "when it was getting dark."

The group's first stop was the residence of Stevin Cash, a relative of Willie and Tracey Davidson. Willie Davidson asked for Cash's assistance in obtaining a pistol to use in the planned robberies. Cash and Willie Davidson left Cash's home. They later returned with a .25 caliber automatic pistol which they had bought for thirty dollars. Cash testified that "the plan was to get someone with a car. . . if you steal a car without the owner, the owner can report it stolen. So the plan was to steal it, kidnap the person, put them in the trunk, pull robberies with the car, and then let the person go." The appellant and Cash then went to a Dollar Store to purchase an item unrelated to the planned crimes. The appellant informed Cash that "all he wanted to do was drive the car." The two youths rejoined the other four at Cash's residence.

The group then went to various locations in search of a car to steal. They

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[3]On July 7, 1993, Willie Davidson, the boyfriend of the appellant's sister, was twenty years old; Tracey Davidson, Willie's brother, was nineteen years old; Barry Smith was nineteen years old; and Antonio Byrd was seventeen years old.

[4]Jones' testimony indicates that "sting" is another term for robbery.

first tried the Kroger parking lot, but that area proved to be crowded. The appellant and his companions then ventured to St. Joseph's Hospital, but the presence of security cameras discouraged any attempt at this location. Finally, the group decided to split up. The appellant and Tracey Davidson took the gun and "went off toward the bridge." The rest of the group walked over to Auction Street.

Around 9:00 p.m., the appellant and Tracey Davidson were walking near the Arbors of Harbor Town apartment complex. When Ms. Wilburn drove up, the appellant, displaying the gun, confronted her and forced her into the trunk of her car despite her pleas of "[l]et me go, I won't tell." After locking Ms. Wilburn in the trunk, the appellant and Davidson went through Ms. Wilburn's purse and then drove off to meet their friends. The appellant was driving the Ford Taurus at this time.[5]

The appellant drove to Auction Street where he and Tracey Davidson rejoined the others. Willie Davidson, Smith, and Byrd climbed into the back seat of the Taurus. Cash asked where the owner of the car was. Tracey Davidson replied, "The bitch is in the trunk." At this time, Cash decided not to join the others in their planned criminal activities and walked back to his residence.

Cash testified that the appellant was the only member of the group who had a driver's license.

The appellant drove the Ford Taurus to a gas station. A gasoline purchase of two dollars was made.[6] The appellant then proceeded to the

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[5]Kevin Gill, a resident of the Arbors, testified that on July 7,1993, at approximately 9:15 p.m., he noticed two people sitting in a "dark green Ford." He stated that the interior light of the car was on enabling him to get a good look at the driver of the vehicle. On July 13, 1993, Gill identified the appellant as the driver of the Ford.

[6]Two dollars were found in Ms. Wilburn's purse.

Tennessee Valley Authority steam plant on Plant Road, an isolated area in southeast Memphis. The drive took approximately thirty minutes. During this time, Ms. Wilburn remained in the trunk of her car without ventilation, her situation aggravated by the extremely hot July weather.

The appellant stopped the Ford Taurus on a bridge near the plant.[7] He opened the trunk of the car, and Byrd "snatched [Ms. Wilburn] out and hit her." When the victim fell to the ground from Byrd's assault, Smith "started kicking her" and did not stop kicking her "[u]ntil she stopped moving." At some point, Ms. Wilburn's clothes were partially torn off and an object was forcefully inserted into her vagina.[8] After the victim had been severely beaten, especially about the head and neck, Willie Davidson announced: "I am fixing to run over her head." Wilburn was then run over by her own car. Afterwards, her body was dragged to the side of the bridge and thrown over.[9]

All five of the perpetrators then returned to the appellant's home. Once at the house, they proceeded to clean out the car. Many items belonging to Ms. Wilburn were taken into the house, including her driver's license, her checkbook, pictures of her family, and other papers. Willie Davidson and Byrd removed the Missouri license plates on the Ford Taurus and replaced them with a Tennessee license plate with the last number "7."[10] Jimmy Jones was at the house and testified that Byrd stated that he "hurt his hand hitting the girl." Jones also remembered Byrd and Smith joking about the incident. After the group had

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[7]This account of events occurring at the steam plant corresponds with the appellant's statement to the police. The State offered no other proof as to what transpired at the bridge. However, each co-defendant recounted different stories as to what actually transpired that evening.

[8]All five co-defendants deny any rape of Ms. Wilburn. Medical testimony, however, indicates forceful penetration of the victim's vaginal area.

[9]The appellant later confessed that Ms. Wilburn was killed "because she saw our face."

[10]The proof revealed that the Tennessee license plate was removed from the appellant's Chevrolet Nova.

rummaged through Ms. Wilburn's belongings, they left the appellant's house and went riding around Memphis in the Ford Taurus. Eventually, the group ended up at the appellant's sister's apartment on Airways, where they spent the night.

The next morning, July 8, Jerry Locke, a TVA employee, was "bushhogging" by an overpass near the steam plant. At 8:00 a.m., Locke testified that he "hit and [sic] old tire rim that was in the grass. ...I got off to get it and move it over to a scrap pile that was under the bridge. ...[W]hen I did that, I looked over . . .on the south side of the bridge, and I saw . . .a body." Locke immediately notified law enforcement officers.

Officer Tyrone Currie of the Memphis Police Department was the first to arrive at the scene. In addition to Ms. Wilburn's partially clothed body, other belongings, including credit cards and a nursing magazine, were located nearby. Ms. Wilburn's white nursing pants were unzipped and pulled down around her knees. Her panties were torn in two and wadded under her left leg. Her yellow and white striped shirt and her bra were both pulled up. Additionally, there was a great deal of blood on the bridge in patterns suggesting that Ms. Wilburn's head had been crushed and her body dragged to the side of the bridge and thrown over.[11]

Dr. O.C. Smith, assistant medical examiner for Shelby County and deputy chief medical examiner for Western Tennessee, was called to the scene to examine the body of Ms. Wilburn. At trial, he recounted his observations of the body and the results of the autopsy.

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[11]The distance from the bridge to the ground below was measured to be twenty-six feet and eight inches.

The facial region showed abrasions... about both eyes and about the forehead, both cheek areas, the nose. The left side of the head showed a laceration...going down to the skull ...a little bit less than 4 ½ inches long... . That L-shaped tear had an area of abrasion...around it that was oval and was about 2 ½ inches in length and about...an inch in height... .

The right side of [her] head had a pattern area of abrasion and contusion... . There was a pattern that had every appearance of a tread mark going across...the right side of her head... .[T]he tire pattern on [the Taurus's tire] would be consistent with producing the type of mark that we found on [her] head.

...[T]here was a crack going literally from ear to ear causing the skull to be mobile... .

The brain showed some rather diffuse bleeding over the top... .[I]t was fairly widespread bleeding over the top of the brain. But the most significant finding was that the brain was torn nearly in two by the crushing effect of the top of the head... . This...was Miss Wilburn's most immediate cause of death... .

There were some injuries that were present on the left and right side of the neck. They were deep. They gave the impression of some compressive force being applied to the neck region. The hyoid bone. . . was fractured on both sides. ...[T]here was bleeding in there indicating that this bone was broken during life.

...[T]he chest showed evidence of injuries. The left collar bone was fractured. The first three ribs on the left side were fractured....

The breastbone...has a top portion known as the manubrium. That was buckled and fractured. The first six ribs on the right-hand side were fractured....

...[T]he left lung showed bruising in five distinct spots.... [T]here was one bruise of the right lung indicating that whatever crushing force or impacting force that fractured the ribs was conducted into the lungs with enough force to cause them to actually be bruised.

...[T]hese fractures would cause an unstable chest. ...[F]lail chest could occur, which means that the normal bellows action of pumping in and out air would not be effective; and the person would have difficulty breathing, and that can result in death.

The pubic bone...was crushed inward against itself and buckled up.

There were crushing injuries of her liver... . [A] total of seven large lacerations...in the liver from a crushing effect.

...[T]he pancreas...showed bruising along its left-most portion.... And the spleen was ruptured.

Now, these injuries occurred during life, and they were

> accompanied by bleeding.... [S]hortly after these injuries were sustained, she died....
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> In her genital region, ...there were abrasions...of the labia minora and the entrance of the vagina, indicating that on both sides of the vagina the delicate skin surface had been torn and abraded or scraped away. There was also a bruise at the entrance of the vagina. ...That type of injury is going to be a friction-type injury in which some object has been pushing or sliding against the skin surface causing it to peel or crack away... .

(Emphasis added).

On July 8, Barry Smith attempted to cash a check drawn on Ms. Wilburn's account. Smith entered the First Tennessee Bank at 157 Madison in downtown Memphis in order to cash a check in the amount of $150.00 for "yard work." The check bore Kimberly Wilburn's apartment address and purported to carry her signature. Carolyn McCroy, a First Tennessee teller, "went through the normal procedures of trying to verify the signature on the check," during which time she obtained Smith's photo identification. She noticed that the "address on the check was an apartment," and the check was for "yard work." Becoming suspicious, McCroy obtained a signature card to verify Wilburn's signature. The signatures did not match. McCroy took the check to her supervisor, Glenda Martin. Martin instructed McCroy to "tell the guy that it would be just a minute because she had to go through some channels of approving a check." Martin tried to verify Wilburn's signature, she even tried to contact her at work, but was unsuccessful. During this time, Barry Smith asked McCroy where he could find a water fountain. McCroy gave him directions and Smith proceeded to calmly walk out the front door of the bank. Martin "followed him...trying to get...a license number off of a car that he was driving... . He went around the left side of the building down the ally... . There was someone else there waiting for him. They both ran around to the side and got in a car." Martin described the car as a "newer model, teal green Ford Taurus." She also provided the police with Barry Smith's photo identification, which he had inadvertently left with the teller. She

testified that the license plate was a "Shelby County tag with the number 7 at the end." The appellant told the police that "Barry, Tracey, and Willie" had gone to the bank to cash one of Ms. Wilburn's checks. He also admitted that earlier that day he had tried to find someone to use Ms. Wilburn's J.C. Penney credit card.

The next day, July 9, Memphis police recovered Ms. Wilburn's car behind Carnes Elementary School.[12] The right front seat had been set on fire and there was other damage to the interior. A plastic container of "MEGA" charcoal lighter fluid was found underneath the right rear passenger door. Apparently, the attempt to burn the car had failed because the car doors had been closed and the windows rolled up. The fingerprints of both Barry Smith and Tracey Davidson were found on the car.[13]

At this point, Barry Smith and Tracey Davidson became suspects in the gruesome murder of Kimberly Wilburn. In order to locate Smith and Tracey Davidson, Sergeant Michael Houston, accompanied by several other officers, went to 735 Robeson, the appellant's residence, on the morning of July 10, 1993. Houston made repeated efforts to gain entry into the residence. Ten minutes later, the appellant opened the door and Houston identified himself as a police officer. Immediately, Willie Davidson remarked, "I know why you're here, you're looking for my brother Tracey." Houston acknowledged that this was true and told the appellant that he would like to speak with his mother or father. The appellant replied that his mother was out of town, that he was left in charge, and

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[12]The police used the vehicle identification number on the Ford Taurus to determine that the vehicle belonged to Ms. Wilburn.

[13]The proof at trial revealed that no other fingerprints were found on the car, not even the fingerprints of Kimberly Wilburn. Further testimony revealed that the smoke and fire in the interior of the car would have destroyed any fingerprints in the interior.

that "there is no one else here."[14] The police officers were then allowed into the house to look for Tracey Davidson and Smith.

The police located Tracey Davidson underneath a couch in a rear bedroom. Houston testified that "[i]t appeared that the couch had been set over the top of him." Barry Smith was found in the front bedroom. Also present at the house were Antonio Byrd and Terrell Jefferson, a thirteen year old. Smith and Tracey Davidson, the only suspects at that time, were arrested and transported to the police station. The other four, including the appellant, were taken to the police station in a squad car as possible witnesses.

The appellant and his three companions arrived at the jail around 9:15 a.m. No information was obtained by the police concerning Ms. Wilburn's murder from any of the four witnesses. Three of the witnesses were then informed that they were free to leave. However, because they were juveniles, they were advised that they could not be released unless in the custody of a parent or guardian. While waiting for his older sister, who was his guardian while his mother was away, the appellant talked with the others, used the telephone, and went to the bathroom.

Around 11:45 that morning, Tracey Davidson implicated the appellant, Barry Smith, Willie Davidson, and Antonio Byrd in the murder. Provided with probable cause from Tracey Davidson's statement, the police placed the appellant under arrest. The appellant's sister arrived at noon. Later that afternoon, with his sister present and after waiving his rights, the appellant

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[14]It was later revealed that the appellant's father also resides in Memphis. However, his father did not live with the appellant and his mother. The appellant's father and mother had been separated for fourteen years. His father also did not have any supervisory responsibility over the appellant.

confessed to the police.[15] At 6:12 p.m., the appellant gave a second statement concerning the use of the gun in the commission of the crimes. Finally, the appellant agreed to consent to a search of his residence. Seized as a result of the search were numerous items belonging to Ms. Wilburn. These items, in addition to the appellant's two statements, were introduced as evidence at the trial. Several days after the search, the appellant's mother informed the police that she had discovered a blouse and skirt with Stein Mart tags attached.

After finding the appellant guilty of felony murder, especially aggravated kidnapping, especially aggravated robbery, and aggravated sexual battery, the jury returned a verdict sentencing the appellant to imprisonment for life without the possibility of parole for the felony murder conviction. At a sentencing hearing on a later date, the court sentenced the appellant to twenty-five years imprisonment for especially aggravated kidnapping, twenty-five years imprisonment for especially aggravated robbery, and twelve years imprisonment for aggravated sexual battery. These sentences were ordered to be served consecutively to each other and consecutively to the sentence of life without the possibility of parole.

II. SUFFICIENCY OF THE EVIDENCE

In his first issue, the appellant argues that the evidence adduced at trial is insufficient to support the jury verdicts rendered in both the guilt and penalty phases of his prosecution. The appellant concedes, "At first blush this record seems to contain evidence sufficient to sustain the convictions...." However, he continues that "should the Court agree that certain evidence should have been

[15]This statement was given to the police at approximately 3:25 p.m. The Advice of Rights was administered around 2:32 p.m.

excluded such as the fruits of the search of the appellant's home and his subsequent confessions, then there is a real issue of sufficiency of the evidence." Subsequently we conclude that the trial court properly admitted evidence of the appellant's statements and the fruits of the search of the appellant's home. See, *infra*, Section V, Motion to Suppress. Moreover, the appellant fails to support his issue with argument, citation to authority, and reference to the record. Accordingly, this issue is found to be both without merit and waived. Tenn. R. App. P. 27(a)(7), (h); Tenn. Ct. Crim. R. App. 10(b).

In any event, we conclude that the evidence in this case is overwhelming as to all charges. The evidence presented at trial clearly demonstrates that the appellant actively participated in the planning of the kidnapping and robbery, that the appellant initiated contact with the victim and physically placed her in the trunk of her car, that the appellant was present at the scene of the crimes, that the appellant participated in the division of the victim's property, and that the appellant concealed two known suspects at his residence. When the sufficiency of the evidence is challenged on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). If the evidence was sufficient for any rational trier of fact to find the essential elements of the crimes beyond a reasonable doubt, this court must affirm the convictions. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). Guilt may be predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Using this standard, we conclude that the evidence clearly establishes the appellant's guilt of the especially aggravated kidnapping, especially aggravated robbery, aggravated sexual battery, and felony murder of Ms. Wilburn.

The appellant, through his own statements, admits his guilt as to the kidnapping and robbery charges. However, he denies responsibility for Ms. Wilburn's death, and, along with his co-defendants, denies rape, or, in effect, sexual contact, with Ms. Wilburn. Regarding his accountability for felony murder and aggravated sexual battery, Tenn. Code Ann. §39-11-402 (1991) provides:

> A person is criminally responsible for an offense committed by another if:
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> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense.

Accordingly, it is necessary that the defendant "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting Hembree v. State, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). In other words, the "defendant must 'knowingly, voluntarily and with common intent unite with the principal offenders in the commission of the crime.'" Id. (quoting State v. Foster, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988)). "When one enters into a scheme with another to commit one of the felonies enumerated in Tenn. Code Ann. § 39-2-202 (1994 Supp.), in this case kidnapping, and death ensues, both defendants are responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the other." State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App. 1988). The evidence clearly shows that the appellant actively participated in the kidnapping and, as such, he became accountable for all consequences flowing from the kidnapping. See Brown, 756 S.W.2d at 703.

Concerning his conviction for aggravated battery, the testimony of the medical examiner, the photographs of the victim's vaginal area, and the arrangement of her clothing establish the occurrence of sexual contact.

Obviously, there is no dispute that serious bodily injury occurred. After viewing the evidence in the light most favorable to the State, we conclude that, based on the appellant's participation in the events leading up to and following the sexual battery of Ms. Wilburn, especially in view of the fact that it was the appellant who transported the victim to Plant Road, any rational trier of fact could have found that the appellant "acted with the intent to promote or assist in the commission" of aggravated sexual battery. See Tenn. Code Ann. § 39-11-402(2). Additionally, the requisite mental state may be proved by the acts and circumstances surrounding the appellant's conduct. Thus, even though he may not have had sexual contact with Ms. Wilburn, based upon his conduct and culpability, he is criminally responsible. Accordingly, we conclude that his convictions for felony murder and aggravated sexual battery are amply supported by the evidence.

The appellant also challenges the evidence supporting his sentence of life without the possibility of parole. Specifically, he argues that testimony evidencing "a lack of active participation in the crimes," coupled with testimony from friends and family that "this kind of conduct was out of character," demonstrate that a sentence of life without parole should not have been rendered. Questions regarding the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court. State v. Hill, 885 S.W.2d 357, 360 (Tenn. Crim. App.),perm. to appeal denied, (Tenn. 1994). This court does not reweigh or reevaluate the evidence. Id. at 359.

The jury, in this case, unanimously found three aggravating factors pursuant to Tenn. Code Ann. § 39-13-204(I) and 207 (1994 Supp.):

> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to

produce death;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another; and

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any ... kidnapping.

The evidence clearly supports these aggravating factors. The jury heard all of the testimony in this case and concluded that the appellant should be sentenced to life without the possibility of parole.[16] It was the jury's prerogative to weigh the evidence and their conclusion is amply supported by the record. The appellant's claim here is meritless.

III. STATE'S REQUEST FOR NOTICE OF ALIBI

The appellant contends that the trial court erred in denying his Motion to Strike the State's Demand for Notice of Alibi Defense. Specifically, the appellant asserts that the State's demand, pursuant to Tenn. R. Crim. P. 12.1, violated his right against self-incrimination under both the United States and Tennessee Constitutions. See U.S. CONST. amend. V & XIV; TENN. CONST. Art. I, §9. The appellant submits that Rule 12.1 requires a defendant to speak or to give evidence against himself. He explains, "This is true not only in the sense of supplying information concerning the alibi but also in another sense, that is, if he does not give notice of alibi it could be inferred that no such defense exists." The State asserts that this issue has been waived for failure to cite to authority and for failure to make any argument regarding this issue. See Tenn. R. App. P. 27 (a)(7), (h); Tenn. Ct. Crim. R. App. 10(b). Moreover, the State argues that

[16] We note that the appellant's age at the time he committed the murder, in addition to various other factors, is a statutorily prescribed mitigating factor that the jury was able to consider in determining whether to fix punishment of life or life without the possibility of parole. See Tenn. Code Ann. § 39-13-204(j) (1994 Supp.).

the right against self-incrimination is not implicated by a criminal defendant's "notice of alibi" response. We agree.

> Tenn. R. Crim. P. 12.1 provides, in pertinent part:
>
> (a) Notice by Defendant. Upon written demand of the district attorney general stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the district attorney general a written notice of an intention to offer a defense of alibi. Such notice...shall state the specific place or places...and the names and addresses of the witnesses upon whom the defendant intends to rely... .

The notice of alibi rule is a form of pre-trial discovery intended to prevent unfair surprise to the State. Considering the ease with which an alibi can be fabricated, the State has both an "obvious and legitimate interest in protecting itself against an eleventh hour defense." Williams v. Florida, 399 U.S. 78, 81, 90 S.Ct. 1893, 1896 (1970); see also United States v. White, 750 F.2d 726, 728 (8th Cir. 1984) (citing H.R.Rep. No. 247, 94th Cong., 1st Sess. 8, *reprinted in*, 1975 U.S.Code Cong. & Ad.News 674, 681). This interest is protected, procedurally, by the notice of alibi rule. Sanctions exist for failure to comply with the rule, including possible exclusion at trial of the defendant's alibi evidence, or, alternatively, the State's rebuttal evidence. Tenn. R. Crim. P. 12.1(d). However, nothing in the rule requires the defendant to rely on an alibi, nor is there any provision preventing him from abandoning an alibi defense. Therefore, the decision of whether to provide an alibi is left entirely to the discretion of the defendant.

The United States Supreme Court, in Williams v. Florida, 399 U.S. at 78, 90 S.Ct. at 1893, upheld the constitutionality of Florida's notice of alibi rule, Fla.

Rule Crim. Proc. 1.200.[17] Cf. White, 750 F.2d at 728 (holding that the federal notice of alibi rule, F.R.Cr.P. 12.1, is not violative of the Fifth and Fourteenth Amendments). The Court held that, consistent with other courts' decisions on this same issue,[18] the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses prior to trial. Id. at 83, 90 S.Ct. at 1897.

Although a defendant must choose between presenting an alibi defense and remaining silent, this dilemma is not an invasion of the privilege against self-incrimination. Williams, 399 U.S. at 85, 90 S.Ct. at 1897. Even if the alibi defense is "incriminating" or "testimonial," it cannot be considered compelled within the meaning of the Fifth and Fourteenth Amendments.[19] Id. (emphasis added). The rule only compels the defendant to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the defendant planned to divulge at trial. Id. at 85, 90 S.Ct. at 1898. "Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." Id.

In the case presently before this court, the appellant did not present an alibi defense. Consequently, he argues that his "silence" can give rise to the

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[17]Fla. Rule Crim. Proc. 1.200 is essentially verbatim to F.R.Cr.P 12.1. Tenn. R. Crim. P. 12.1 "conforms to the federal rule" and, accordingly, is given the same interpretation. See Tenn. R. Crim. P. 12.1, Committee Comment.

[18]Citations to decisions of other courts prior to Williams are omitted in this opinion, but, see Williams, 399 U.S. at 84, 90 S.Ct. at 1897, note 13, for citations to these authorities.

[19]The declarant's response or statement must be compelled to invoke protection by the Fifth Amendment. See United States v. Doe, 465 U.S. 605, 610-11, 104 S.Ct. 1237, 1241 (1984); United States v. Washington, 431 U.S. 181, 186-87, 97 S.Ct. 1814, 1818 (1977); Fisher v. United States, 425 U.S. 391, 400, 96 S.Ct. 1569, 1575-76 (1976); Schmerber v. California, 384 U.S. 757, 763, 86 S.Ct. 1826, 1831 (1966).

inference that "no such [alibi] defense exists." Thus, he contends that his silence makes him incriminate himself, violating his Fifth Amendment right. This argument is without merit. If a defendant refuses to testify at trial, the Fifth Amendment prohibits the State from commenting that the silence of the accused is evidence of guilt. Griffin v. California, 380 U.S. 609, 615, 87 S.Ct. 1229, 1233 (1965). Likewise, the Fifth Amendment prohibits the State from commenting on the defendant's failure to provide an alibi defense. For these reasons, we conclude that Tenn. R. Crim. P. 12.1 is not violative of the Fifth and Fourteenth Amendments of the United States Constitution and Art. I, §9 of the Tennessee Constitution.

IV. REMAND TO JUVENILE COURT AND OFFER OF PROOF

In his third and fourth issues, the appellant argues that the trial court erred by denying his motion to remand the proceedings to the juvenile court and by refusing to allow an offer of proof with regard to issues raised in that motion. Specifically, the appellant argues that his case was transferred by a non-elected judicial officer and any such ruling of that officer is void.[20] Moreover, he argues that he received the ineffective assistance of counsel at both the transfer hearing

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[20]To support his argument that his transfer is void, the appellant asserts that A.V. McDowell, an appointed referee of the Shelby County Juvenile Court, who conducted the transfer hearing, was without the authority to do so, according to Town of South Carthage v. Barrett, 840 S.W.2d 895, 899 (Tenn. 1992) (holding that "judges charged with interpreting the laws of this state should be elected"). The appellant concludes that McDowell's ruling is void because he was not elected. Additionally, the appellant contends that because Shelby County Juvenile Court Judge Kenneth Turner is a non-lawyer judge, he is prohibited from making any disposition of a juvenile that operates to confine that juvenile or deprive him of his liberty. Anglin v. Mitchell, 596 S.W.2d 779, 791 (Tenn. 1980).

First, the record does not support the appellant's argument that the juvenile judge was a non-lawyer who appointed a referee to conduct the transfer hearing. However, even if the record supported the appellant's contention, this practice is perfectly permissible under the current law. In State v. Briley, 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981), the court held that Anglin does not require a juvenile transfer hearing to be conducted by a lawyer judge. See also State v. Davis, 637 S.W.2d 471, 474 (Tenn. Crim. App. 1982). Cf. State v. York, 615 S.W.2d 154, 156 (Tenn. 1981) (holding that, if the referee is a lawyer, the judge who reviews the action in juvenile court need not be a lawyer). Furthermore, Tenn. Code Ann. § 37-1-107(1991) permits juvenile court judges to appoint a referee and authorizes the judge to direct the referee to hear any case in the first instance over which the juvenile court has jurisdiction. The referee must be a member of the bar, but, there is no requirement that he be elected. Tenn. Code Ann. § 37-1-107(a). Accordingly, the referee had the authority and jurisdiction to consider the transfer.

and the acceptance hearing.[21] The trial court prohibited the appellant from raising these issues at the hearing on the motion. The trial court also denied the appellant the opportunity to make an offer of proof relative to the status of the juvenile court referee who transferred the appellant's case to the criminal court.

In order for a juvenile to be transferred to criminal court to be tried as an adult, the juvenile court must conduct a transfer hearing in accordance with Tenn. Code Ann. § 37-1-134 (1994 Supp.). A transfer pursuant to this section terminates the jurisdiction of the juvenile court with respect to the delinquent acts originally alleged. Tenn. Code Ann. § 37-1-134(c). If a non-lawyer judge presides at the transfer hearing, then, upon the motion of the child filed within ten days of the juvenile court's order, the criminal court shall hold a hearing to determine whether it will accept jurisdiction over the child. Tenn. Code Ann. § 37-1-159(d) (1994 Supp.). This hearing is conducted *de novo* and functions essentially as a review of the transfer hearing. Id. Following the hearing, the criminal court may remand the child back to the juvenile court or enter an order certifying that it has taken jurisdiction over the child. Tenn. Code Ann. § 37-1-159(e). Once jurisdiction is vested in the criminal court, there is no further process to review the transfer of a juvenile until a conviction has been returned. Tenn. Code Ann. §37-1-159(f). An order of the criminal court pursuant to Tenn. Code Ann. §37-1-159(e) is reviewable only by the Court of Criminal Appeals following a conviction on the merits of the charge. Tenn. Code Ann. § 37-1-159 (f) (emphasis added). Thus, the trial court did not have the authority to review the appellant's allegations of errors in the prior proceedings. That authority is

[21] Regarding the claim of ineffective assistance of counsel, the appellant contends that his first appointed trial counsel failed to object to the admissibility of the illegally obtained statement of the appellant; that counsel failed to object to the opinion testimony of Perry Adams concerning the results of his examination of the appellant; that counsel failed to offer proof as to the mental status of the appellant; and that trial counsel failed to object to the violation of the appellant's rights as a juvenile.

vested only in this court following a conviction. Therefore, the trial court did not err in denying the appellant's motion to remand.

Consequently, the trial court did not err by denying the appellant the opportunity to offer proof relevant to these issues. Without jurisdiction to entertain the motion, the trial court also lacked jurisdiction to consider proof with regard to issues raised in the motion. Where there is no issue before the court, there is no error in refusing to take proof on it. Alley v. State, 882 S.W.2d 810, 816 (Tenn. Crim. App. 1994). Moreover, the purpose of an offer of proof is to preserve evidence in order for an appellate court to review the effect of its exclusion on the merits of the case. Id. at 815. In the present case, the purpose does not exist because the trial court lacked jurisdiction to consider the motion. Accordingly, no evidence was presented and no evidence was excluded. Moreover, even if the trial court could have entertained the appellant's motion, it would have been acting as a reviewing court. It could not have supplemented the record on review by taking additional proof. A reviewing court is limited to the record of the lower proceedings.

For the reasons stated above, the appellant's issues III and IV concerning the motion to remand the proceedings back to juvenile court are without merit.

V. MOTION TO SUPPRESS

The appellant contends that on the morning of July, 10, 1993, "there was no probable cause to arrest him," yet for Fourth Amendment purposes, he was "seized" when police officers "invited" him into the backseat of a patrol car and transported him downtown to the police station for questioning as a possible witness in the case. He argues that his subsequent confessions and the

evidence found during the search of his house were "fruits" of this illegal arrest and should have been suppressed. For reasons discussed herein, we conclude that the statements obtained and the items found during the search of the appellant's residence need not be suppressed.

At the suppression hearing, the following facts were established. On July 10, 1993, Memphis police officers had developed Tracey Davidson and Barry Smith as possible suspects in Kimberly Wilburn's murder. Around 9:00 that morning, several officers went to 735 Robeson, the appellant's residence, in order to locate Tracey Davidson and Smith. Sergeant Houston knocked on the door and two windows without receiving any response. In one window, he saw a head "stick up." Houston identified himself and requested that someone come to the door. About ten minutes later, the appellant opened the door. The appellant permitted the officers to look through the house for Tracey Davidson and Smith. The two suspects were discovered hiding in separate bedrooms in the house. Tracey Davidson and Smith were arrested at the scene and transported in separate cars to the police station.

After discovering that no adults were present, the officers transported the remaining four individuals, including the appellant, to the police station in a squad car. The squad car lacked door handles, which prohibited any exit absent outside assistance. The police officers testified that it was common practice to have "possible witnesses" ride to the station in cars without door handles. The appellant did not refuse to go, nor did he make any attempt to leave.

They arrived at the police station at approximately 9:15 a.m. The appellant and the other witnesses were asked general questions about themselves and about the crime. However, no information was gained

concerning the death of Ms. Wilburn. After the appellant's interview was completed, the appellant was very talkative, was joking around with the others, and did not appear to be frightened or nervous. He was offered food, used the telephone, and went to the bathroom. The officers indicated and the appellant's sister, LaTanya, verified that the appellant was free to leave the police station at any time.[22]

Around 11:45 that morning, Tracey Davidson implicated the appellant, Barry Smith, Willie Davidson, and Antonio Byrd in the murder. It was only at this time that the police employed any type of restraint to detain the appellant. The appellant was then read his Miranda rights, however, prior to interviewing him, the police sought to have a parent or guardian present, because of the appellant's age. Police officers contacted LaTanya Taylor, the appellant's twenty year old sister, who was the temporary guardian of the appellant while their mother was out of town. LaTanya Taylor was present when the appellant confessed to the police. The appellant was advised of his rights prior to making his statement. Both he and LaTanya read, signed, and initialed both his statement and the Advice of Rights form.[23]

After learning that a gun had been involved in the crimes, the police asked the appellant to give a second statement describing the use of the weapon in Ms. Wilburn's abduction. The appellant agreed and was again advised of his

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[22]LaTanya Taylor testified that Willie Davidson called her sister, Tammie, from the police station. Willie told Tammie that "the police was fixin' to let three of them go and Sammie was one of them." LaTanya Taylor verified this information with the police and went to the police station to pick up her brother.

[23]This statement was given to the police on July 10, 1993, at approximately 3:25 p.m. The Advice of Rights was administered around 2:32 p.m.

rights. At 6:12 p.m., the appellant gave a second statement. He then read, signed, and initialed this second statement. His sister, however, was not present during this second statement.

Finally, the appellant was asked and agreed to sign a Consent to Search form in order to allow the police to search his house at 735 Robeson. Before signing the form, the appellant was advised of his rights with respect to this search. LaTanya Taylor signed the form the next morning when she met the police at the house prior to the search.

The next day, July 11, 1993, the police conducted a search of the appellant's home. The search revealed a white lab coat, two Missouri license plates (tag # LRY 195), a deposit slip with Kimberly Wilburn's name, check stubs, an address book, a key ring with twelve keys, a sunglasses case, a tube of lipstick, a radiology name tag inscribed with "Kimberly Wilburn," and a plastic picture wallet. The police also recovered a Tennessee license plate with the last digit "7."

The appellant contends that his initial contact with the police was an illegal seizure because it was without probable cause. Consequently, he argues, this illegal seizure "tainted" his subsequent confessions and consent to search, making them and any evidence flowing therefrom inadmissible. This argument is misplaced. We agree that the exclusionary rule, in order to deter unlawful police activity and maintain judicial integrity, prohibits the introduction of all evidence flowing from an unlawful arrest. See Brown v. Illinois, 422 U.S. 590, 601-03, 95 S.Ct. 2254, 2260-61 (1975); Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S.Ct. 407, 416 (1963). This prohibition extends to the indirect as well as the direct and the tangible as well as the testimonial products of such invasions. Murray v. United States, 487 U.S. 533, 536-36, 108 S.Ct. 2529, 2533 (1988).

However, in the present case, the appellant's statements and consent did not result from an unlawful seizure.

The record clearly indicates that the appellant's statements and consent to search were obtained after his arrest at the police station.[24] This arrest was supported by probable cause (Tracey Davidson's statement) and, therefore, was valid. At the suppression hearing, the trial court found that the appellant was not arrested when "he was brought down to be questioned as a witness in the on going investigation... ." A determination of whether he was unlawfully seized at this juncture is unnecessary. However, even if the initial contact was an unlawful seizure, evidence discovered through a subsequent legal arrest based on independent probable cause is admissible. See New York v. Harris, 495 U.S. 14, 19, 110 S.Ct. 1640, 1643-33 (1990); Murray, 487 U.S. at 537, 108 S.Ct. at 2533; Segura v. United States, 468 U.S. 796, 799, 104 S.Ct. 3380, 3382 (1984). The "independent source doctrine" permits the introduction of such evidence because the evidence does not result from the exploitation of the appellant's Fourth Amendment rights and because the State should not be put in a worse position simply because of unrelated police error or misconduct. See Murray, 487 U.S. at 537-38, 109 S.Ct. at 2533; Nix v. Williams, 467 U.S. 431, 433, (1984); United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1251 (1980). See also United States v. Calhoun, 49 F.3d 231, 234 (6th Cir. 1995) (defendant's voluntary consent to search, subsequent to illegal sweep of apartment, provided independent source for seizure of evidence). Accordingly, the trial court properly admitted the appellant's statements and evidence resulting from the search of his residence at 735 Robeson.

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[24]As previously indicated, the proof presented reveals that, during his initial session with the police, the appellant gave no statement, or otherwise provided police with any evidence.

Next, the appellant argues that his statutory rights as a juvenile, specifically Tenn. Code Ann. § 37-1-113, -114, -115 (1991), were violated when the police obtained his statements and the consent to search. It is established law in this state that once a juvenile has been transferred from juvenile court to criminal court to be tried as an adult, he is afforded only those protections that are available to similarly situated adults. Colyer v. State, 577 S.W.2d 460, 462-63 (Tenn. 1979) ([T]he per se exclusion of extra-judicial statements, obtained in violation of this chapter dealing exclusively with juvenile courts, is limited in scope to proceedings in that court. (emphasis in original)). The extra protections outlined in the juvenile code no longer apply. Id. at 463; State v. Turnmire, 762 S.W.2d 893, 896 (Tenn. Crim. App. 1988). Therefore, the protections of the juvenile code were not applicable at the suppression hearing in the appellant's adult trial. Id. at 897. Accordingly, the trial court did not err in denying the appellant's motion to suppress.

Further, the appellant argues that his consent to search was not a "knowing, intelligent, and voluntary waiver of his Fourth Amendment rights." We conclude that the trial court did not err in admitting the fruits of the search of the appellant's house. The trial court found that:

> The consent to search, again, I think that in light of the number of times that he had been advised of his rights and the circumstances that it was freely and voluntarily given, I think that he certainly had standing to give consent to search that house, and then, out of an abundance of caution the police had the sister to sign the consent form the following day, before they went into the house. And she arguably had standing as well, because she had been called specifically by the mother, prior to the mother leaving home, and she had been asked, and told to supervise/take care of/ check up on the house and Mr. Taylor.
>
> So I think in every regard that the consent to search was proper.

The validity of a search depends upon whether, based on the totality of the circumstances, the consent was "voluntarily given, and not the result of duress or coercion." Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S.Ct.

2041, 2059 (1973). Moreover, the trial court's finding that a search is consensual will not be overturned on appeal unless the evidence preponderates against the ruling. State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990), perm. to appeal denied, (Tenn. 1991), cert. denied, 502 U.S. 1079, 112 S.Ct. 986 (1992); Brady v. State, 584 S.W.2d 245, 251-52 (Tenn. Crim. App. 1979). In the present case, the record indicates that the appellant signed a consent to search form on July 10, 1993. The consent form clearly advised the appellant of his right to refuse the search. The appellant admitted that his permission was given voluntarily and without threats or promises of any kind. His sister also signed the form the next morning when the police arrived at the house to conduct the search. The proof clearly supports the trial court's finding that the appellant's waiver was valid. Accordingly, we find no merit to this contention.

VI. COMPENSATION OF CO-COUNSEL

In his next issue, the appellant contends that co-counsel in this case should have been provided compensation.[25] Specifically, he asserts that Rule 13, Section 1 of the Tennessee Rules of the Supreme Court[26] is violative of his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States

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[25]The appellant, in his brief, captions this issue as "Whether the trial court erred in denying defendant's motion for appointment of co-counsel." We note that, while the trial court did deny the appellant's first request for appointment of co-counsel, the court did appoint co-counsel at a latter date.

[26]Rule 13, Section 1 provides, in pertinent part:

> In a capital case two attorneys may be appointed for one defendant and each is eligible for compensation. For purposes of this Rule, a capital case is defined as:
>
> A case in which an individual is indicted for an offense that is punishable by death and wherein the district attorney general announces to the Court at any time, prior to the presentation of proof, that the state will insist upon the death penalty. ...
>
> Co-counsel or associate attorneys appointed in non-capital cases may not be compensated.
>
> (Emphasis added).

Constitution and Article I, Section 9 of the Tennessee Constitution.

In his brief, the appellant argues that the court's denial of compensation for co-counsel denied him effective assistance of counsel. To the extent that his co-counsel was not compensated by the court, we cannot discern how this affected the representation that the appellant received at trial. As such, we conclude that the appellant has not been injured, constitutionally or otherwise, by failure to compensate co-counsel at trial.[27]

In the alternative, the appellant notes that this was a five defendant case in which the death penalty was sought for the three adult defendants. Because the appellant was a juvenile, he is protected from a sentence of death. See Tenn. Code Ann. § 37-1-134 (1991). He essentially argues that, but for his ineligibility for the death penalty, his case remained a capital case and he was entitled to compensation for two attorneys. We disagree. Rule 13 limits the definition of a "capital case" with regard to compensation of counsel. See, *supra* note 26. Under this definition, the appellant's case is not a capital case because he was never eligible to receive the death penalty. This issue is without merit.

VII. STATE'S MOTION TO SEEK ENHANCED PUNISHMENT

The appellant argues that Tenn. Code Ann. § 39-13-202(b) (1994 Supp.) and § 39-13-207 (1994 Supp.), which allow a person convicted of first degree murder to be sentenced to life without the possibility of parole, does not apply to juveniles. He contends that the maximum sentence available for a juvenile convicted of first degree murder is a life sentence. The trial court found, by interpreting the applicable statutes and case law, that the appellant "shall be

[27]We agree with the State that "[i]t is only [the appellant's] co-counsel at trial that has a complaint...about the operation of Rule 13...denying compensation to co-counsel in non-capital cases."

handled as an adult in all regards except for the availability of the death penalty." Therefore, the trial court concluded that life without parole is a viable punishment for a juvenile convicted of first degree murder. We agree with the finding of the trial court.

Effective July 1, 1993, Tenn. Code Ann. § 39-13-202 (b)(2) added life without the possibility of parole as a punishment for first degree murder, in addition to (1) death and (3) imprisonment for life.[28] These statutes apply to juveniles transferred to criminal court, as well as to adults. See Colyer, 577 S.W.2d at 463. When a juvenile is properly transferred to criminal court, he or she may no longer receive the benefit of statutes expressly applicable to children. Id.; Tenn. Code Ann. § 37-1-134(a). The only exception to this rule is found within the juvenile transfer statute. The statute prohibits the imposition of the death penalty upon a juvenile who has been properly transferred from juvenile court to criminal court. Tenn. Code Ann. § 37-1-134(a)(1)(A) & (B). Clearly, by the plain language of the statute, the legislature intended to treat an individual, once transferred to an adult court, as an adult in all regards except for the availability of the death penalty. Accordingly, we find no merit to this argument.

VIII. REQUEST FOR INDIVIDUAL VOIR DIRE

The appellant contends that he was denied a fair and impartial jury based upon the trial court's refusal to allow individual voir dire. Because of the media attention given to this case, the appellant argues that the jury could have been tainted and that due process required that he individually question the

[28]While the procedure imposed for capital sentencing is found at Tenn. Code Ann. § 39-13-204(1994 Supp.), Tenn. Code Ann. § 39-13-207 sets forth the procedure employed where the death penalty is not sought.

prospective jurors in order to properly exercise his peremptory challenges. The State contends that the appellant has waived this issue for failure to cite to authority and for failure to make arguments concerning this alleged deprivation. Tenn. R. App. P. 27(a)(7), (h); Tenn. Ct. Crim. R. App. 10(b). Alternatively, the State argues that the conduct of voir dire rests within the sound discretion of the trial judge and that the trial court did not abuse its discretion. Although we agree that waiver applies to this issue, we elect to address this issue on its merits.

In the present case, the appellant requested individual voir dire because of the excessive media attention this case received. In Tennessee, the prevailing practice is to voir dire prospective jurors collectively, rather than individually. State v. Oody, 823 S.W.2d 554, 563 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991) (citation omitted). Within the context of the ultimate goal of voir dire, which is to insure that jurors are competent, unbiased, and impartial, the trial court retains sole discretion to control the conduct of voir dire. State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994) (citing State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993); State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992)); see also State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994), cert. denied, --U.S.--, 115 S.Ct. 743 (1995); Tenn. R. Crim. P. 24. The trial court's exercise of its discretion will not be disturbed unless there is an abuse of that discretion. State v. Irick, 762 S.W.2d 121, 125 (Tenn. 1988), cert. denied, 489 U.S. 1072, 109 S.Ct. 1357 (1989) (citation omitted).

Where the crime is highly publicized, the better procedure is to grant individual, sequestered voir dire. Cazes, 875 S.W.2d at 262 (citing Harris, 839 S.W.2d at 65; State v. Porterfield, 746 S.W.2d 441, 447 (Tenn. 1988)). However, it is only where there is a "significant possibility" that a juror has been exposed to potentially prejudicial material that individual voir dire is mandated. Id. Additionally, questions regarding the content of any publicity to which jurors

have been exposed may be helpful in assessing whether a juror is impartial. Cazes, 875 S.W.2d at 262. However, such questions are not constitutionally required, and a trial court's failure to ask such questions is not reversible error unless the defendant's trial is thereby rendered fundamentally unfair.[29] Id. (citing Mu'Min v. Virginia, 500 U.S. 415, 425-26, 111 S.Ct. 1899, 1905 (1991)). Moreover, a juror is not automatically disqualified because he has read or heard some publicity about a case, or heard some person mention it, if the prospective juror is otherwise qualified and he states, under oath, that he believes he can give the defendant a fair and impartial trial on the law and the evidence. Blakely, 677 S.W.2d at 17 (citing Dukes v. State, 578 S.W.2d 659, 664 (Tenn. Crim. App. 1978)).

As the State points out, the prospective jurors in this case were questioned about the media coverage, and, for the most part, they indicated to the court that, despite the publicity surrounding the trial, they could put aside what they had heard and make a decision based on proof adduced from the witness stand.[30] Three jurors indicated that, because of media exposure, they could not be impartial. The court excused these three jurors. Finally, despite the trial court's decision to deny individual voir dire, defense counsel was permitted to question prospective jurors individually about the publicity surrounding the crimes. We conclude that the trial court did not abuse its discretion by denying individual questioning of prospective jurors. This issue is without merit.

IX. REMOVAL OF JUROR PRIOR TO SELECTION OF ALTERNATE

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[29]The mere exposure to publicity is not constitutional error. State v. Blakely, 677 S.W.2d 12, 17 (Tenn. Crim. App. 1983) (citing Lackey v. State, 578 S.W.2d 101, 103 (Tenn. Crim. App. 1978)).

[30]The trial court estimated that approximately two-thirds of the prospective jurors admitted having contact with some type of media publicity concerning this case.

A jury comprised of twelve citizens was impaneled and found acceptable by both the State and the appellant. Prior to the selection of the alternate jurors, one of the impaneled twelve jurors questioned his ability to properly sit on the jury.[31] The trial judge elected to wait until after three alternates were chosen and sworn to excuse this juror for cause. The first alternate selected would replace the excused juror and the remaining two alternates would be designated alternate No. 1 and No. 2 in the order in which they were selected. The appellant immediately objected to this arrangement, asking that the juror be dismissed immediately. He then moved for a mistrial arguing that the removal of this juror would leave a panel of eleven jurors with no alternates. Alternatively, he argued that the prospective alternates had a right to know that one of them would be immediately seated on the jury.[32] The trial court found these arguments to be without merit and proceeded with the voir dire of the potential alternates. On appeal, the appellant argues that the trial court's method of replacing the excused juror effectively denied him his right to an impartial jury and that the trial court erred by refusing to grant a mistrial on this basis.[33] We disagree.

The trial court has wide discretion in examining prospective jurors and ruling on their qualifications. State v. King, 718 S.W.2d 241, 246 (Tenn. 1986). It is also within the trial court's discretion to seat an alternate who has been selected by the parties when a regular juror must be removed. State v. Millbrooks, 819 S.W.2d 441, 445 (Tenn. Crim. App. 1991). However, the discharge of one juror does not effectuate the break up of the entire panel. State

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[31]This juror expressed his belief that his religious convictions would prevent him from "judging" another person.

[32]Defense counsel suggested that the answers of the potential alternates might differ depending on whether they were to sit as alternates or jurors.

[33]Although we elect to address this issue on its merits, we note that the State correctly argues that the appellant, again, has waived this issue for appellate consideration for failure to cite to authority and for failure to make any argument in support of his position. Tenn. R. App. P. 27(a)(7), (h); Tenn. R. Crim. P. 10(b).

v. Max, 714 S.W.2d 289, 293 (Tenn. Crim. App. 1986). Rule 24(e) of the Tennessee Rules of Criminal Procedure permits the trial court to "replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties."[34] The judge, in this case, replaced the juror immediately following the selection of three alternates. The rule clearly permits such practice.

Moreover, in Dorsey v. State, 568 S.W.2d 639, 645 (Tenn. Crim. App.), perm. to appeal denied,(Tenn. 1978), this court rejected a claim almost identical to that asserted by the appellant. The trial court in Dorsey excused a regular juror, who was discovered to have a disabling physical condition after he was selected, but before the alternate juror was selected. Id. The court then replaced this juror with an alternate juror. Id. This court held that the trial judge did not abuse his discretion in the seating of an alternate juror as a regular member of the panel. Id. Moreover, the burden is on the defendant to demonstrate how he was prejudiced by the seating of the alternate juror. Max, 714 S.W.2d at 294 (citing Dorsey, 568 S.W.2d at 645). The defendants, in Dorsey, failed to show how they were prejudiced by the seating of an alternate juror. Dorsey, 568 S.W.2d at 645. The same rationale applies to the appellant's argument. Accordingly, we conclude that the trial judge acted properly within his discretion in impaneling an alternate juror as a member of the regular jury panel. Additionally, we note that the appellant has failed to demonstrate how the procedure employed by the trial court prejudiced him.

The appellant also argues double jeopardy. The record indicates that the twelve jurors were sworn before the alternates were selected. This argument, also, is meritless. "The discharge of a juror in a criminal case during the progress

[34]The trial court is to seat the alternate jurors in the order in which they are selected. Tenn. R. Crim. P. 24(e)(1).

of a trial, after which another juror...is impaneled will not authorize a plea of double jeopardy." Max, 714 S.W.2d at 294 (citations omitted). Consequently, double jeopardy had not attached.

X. SYSTEMATIC EXCLUSION

In his next issue, the appellant contests the racial composition of the jury venire. The appellant argues that "the venire was hastily chosen after the original jury pool members were dismissed because of prior taint by a criminal court judge."[35] He contends that, because the new jury pool does not constitute a group of his peers, he was not afforded a fair and impartial jury as required by the United States and Tennessee Constitutions.[36] Again, the appellant fails to cite to authority and fails to make any argument in support of his position. Tenn. R. App. P. 27(a)(7), (h); Tenn. R. Crim. P. 10(b). For all purposes, this issue is waived. However, once again, due to the sentence imposed in this case, we elect to address the appellant's issue.

The Sixth and Fourteenth Amendments of the United States Constitution require that "juries be drawn from a source fairly representative of the community." Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975). In order to establish a *prima facie* case of purposeful discrimination, the defendant must show that:

> (1) the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) this under representation is due to the systematic exclusion of the

[35]The alleged taint involved improper comments by the criminal court judge to the entire jury pool during juror orientation.

[36]The appellant asserts that the majority of the jury pool was Caucasian, and thus, not representative of the population of the appellant's community in terms of racial makeup.

group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979); see also State v. Evans, 838 S.W.2d 185, 193 (Tenn. 1992), cert. denied, 510 U.S. 1064, 114 S.Ct. 740 (1994).

The appellant has failed to establish a *prima facie* case of exclusion. The appellant does not support his argument with any statistics or facts which would be useful to this court. In fact, the appellant, in his brief, does not even identify what "group" is excluded. However, the record indicates that the appellant's trial counsel objected to the jury pool on the basis that "the overwhelming majority of them are white." In response to this objection, the trial court concluded:

> ...[A]s far as I'm concerned, the process that's used in Shelby County is a fair one and has been a fair one for many, many years; and, on its face, has been handled in a fair manner in this instance. ... I'll note your concern that you've lodged; but there's been no proof shown to me, at this point, of any impropriety in the selection process of the venire that currently exists. And while we haven't stated for the record, person-by-person, race and sex, that's been called to the jury box, there have been -- while it has been a majority of white, there have been, certainly, several black members of the 18 at any given time, and many women-- and some black women and some white women. And so I think there has been a representation -- a cross-section of the community here.

The record contains no other proof to support the appellant's contention. In the absence of a proper record, we must presume that the trial judge ruled correctly. State v. Bibbs, 806 S.W.2d 786, 789 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991); Tenn. R. App. P. 36(a).

From the trial court's remarks, we can determine that there were African-Americans in the jury pool. However, we cannot discern whether the African-American population of Shelby County was represented on the jury panel. In any event, the fact that a defendant is tried by a jury which has no African-American on it is not proof of the violation of any right. State v. Smith, No. 01C01-9201-CC-00021 (Tenn. Crim. App. at Nashville, Sept. 11, 1992), perm. to

appeal denied, (Tenn. Nov. 30, 1992) (citation omitted). Moreover, there is no requirement that each and every jury mirror the various distinctive groups which make up a community. Id. (citing Taylor v. Louisiana, 419 U.S. at 538, 95 S.Ct. at 702). The appellant has not shown that there is a pattern of underrepresentation of African-Americans in groups from which juries are selected and that such underrepresentation, if it existed, results from a systematic exclusion in the jury selection process. This issue is without merit.

XI. PHOTOGRAPHS OF VICTIM

The appellant argues that it was reversible error for the trial court to admit into evidence color photographs of the victim as she appeared at the crime scene and photographs taken during the autopsy.[37] He insists that "any probative value of [these four] photos was outweighed by the prejudicial effect." We disagree.

Tennessee courts have followed a policy of liberality in the admission of photographs in both civil and criminal cases. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). This policy translates into the rule that "the admissibility of photographs lies within the discretion of the trial court." Id. The trial court's "ruling, in this respect, will not be overturned on appeal except upon a clear showing of an abuse of discretion." Id. (citations omitted); see also Stephenson, 878 S.W.2d at 542; State v. Bordis, 905 S.W.2d 214, 226 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). However, before a

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[37]The challenged photographs include:

(1) State's Exhibit #8, victim's body as it appeared when first discovered on July 8;

(2) State's Exhibit #14, victim's body depicting arrangement of clothing;

(3) State's Collective Exhibits #30 and #31, victim's vaginal region during examination and body at crime scene; and

(4) State's Exhibit #2 at penalty phase, victim's body at morgue.

photograph may be admitted into evidence, it must be relevant to an issue that the jury must decide and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); see also Tenn. R. Evid 401 and 403.

The appellant first argues that the trial court should have excluded State's Exhibits #8 and #14, depicting the deceased at the crime scene. Exhibit #8 establishes the location of the victim's body when she was first discovered at the scene.[38] The trial court found this photograph to be "sufficiently probative, the amount of blood and other matters are minimized so that I'll allow it in." Exhibit #14 depicts the partially nude body of the victim and the arrangement of her clothes when her body was discovered.[39] The appellant's counsel argued that this photograph was cumulative to Exhibit #8. The State contends that this photograph offers circumstantial evidence that Ms. Wilburn was sexually assaulted. The court pointed out that "there are sufficient differences between the two pictures to warrant admission of both of them." The trial court did not abuse its discretion in admitting these photographs. See State v. Bigbee, 885 S.W.2d 797, 807 (Tenn. 1994) (video of victim's body at crime scene admissible); State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), cert. denied, --U.S.--, 114 S.Ct. 1577 (1994) (photographs of victims' bodies taken at scene of incident admissible); State v. Duncan, 698 S.W.2d 63, 69 (Tenn. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240 (1985) (photograph of crime scene admissible, even though it showed the blood of the victim, because photograph showed arrangement of victim's clothing, relevant to prove sexual attack).

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[38] At trial, defense counsel objected to the introduction of this photograph, however, he conceded that, although blood could be seen on Ms. Wilburn's face and head, this photograph was one of the least offensive.

[39] Ms. Wilburn's pants were on her body, however, her panties were removed.

The appellant also argues that Collective Exhibits #30 and #31, photographs taken during Dr. Smith's autopsy, should have been excluded, because Dr. Smith's testimony was sufficiently descriptive by itself and because the photographs were cumulative to a detailed slide presentation by Dr. Smith. Although the appellant asserts that these photographs are cumulative to the subsequent slide presentation by Dr. Smith, the record reveals that the slide presentation depicted the blood splatters found on the bridge at the TVA plant.[40] In any event, a relevant photograph is not rendered inadmissible merely because it is cumulative. See Bigbee, 885 S.W.2d at 807 (photograph admissible despite numerous photographs of body); Van Tran, 864 S.W.2d at 477 (color photographs of deceased victims, introduced after videotape of victims' bodies at crime scene, were not unnecessarily cumulative or prejudicial). State's Exhibit # 30 was introduced to show that the injuries to Ms. Wilburn's vaginal area were "penetrating type" injuries and not the result of a general beating. Again, as in the case of Exhibit #14, the State sought to introduce these photographs as evidence of a sexual assault. The trial court found these photographs to be relevant for this purpose. Exhibit #31 was introduced to aid the jury during Dr. Smith's testimony regarding the examination of the body at the scene. Dr. Smith testified that, at the time these photographs were taken, Ms. Wilburn's body had been rolled so that the front side of her body could be examined. The trial court did not abuse its discretion in admitting these photographs. See Stephenson, 878 S.W.2d at 542 (photographs used to illustrate witness' testimony admissible for this purpose); Duncan, 698 S.W.2d at 69 (photographs used to supplement and clarify oral testimony describing the crime scene held to be admissible).

Finally, the appellant contests the reintroduction of the State's Exhibit #2 during the penalty phase of the trial because "in light of everything that the jury

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[40]The slides were not included in the record.

had seen...the photograph... [was] cumulative and unfairly prejudicial."[41] During its case-in-chief, the State remarked that Exhibit #2, marked for identification only during the guilt phase, would be the only picture submitted during the penalty phase to establish the "heinous, atrocious, and cruel" aggravating factor in this case. Trial counsel objected on the grounds that the photograph is "inflammatory" and that its "prejudicial value outweighs its probative value." The trial court remarked:

> ...given the fact that Mr. Taylor has now been convicted; and we're no longer in the guilt/innocence phase but, in fact, are in the penalty phase. Proving that an offense was heinous, atrocious, or cruel, by its very definition, may involve some -- would necessarily involve either testimony or proof that would demonstrate to the jury that something was heinous, atrocious, or cruel took place. ...

The trial court did not abuse its discretion in admitting these photographs. See State v. Smith, 893 S.W.2d 908, 924 (Tenn. 1994), cert. denied, --U.S.--, 116 S.Ct. 99 (1995) (photographs of victim appropriately admitted for establishing "heinous, atrocious, cruel" aggravating factor); Accord State v. Smith, 868 S.W.2d 561, 579 (Tenn. 1993), cert. denied, --U.S.--, 115 S.Ct. 417 (1994); State v. Porterfield, 746 S.W.2d 441, 449 (Tenn.), cert. denied, 486 U.S. 1017, 108 S.Ct. 1756 (1988). For the preceding reasons, we find this issue to be without merit.

XII. INTRODUCTION OF STATE'S EXHIBIT # 25

The appellant submits that "if [his] arrest was illegal then it was plain error for the trial court to allow into evidence collective exhibit #25." Exhibit #25 consists of three photographs of the appellant's garbage can and items belonging to Kimberly Wilburn as they were found in the garbage can the

[41]The appellant erroneously describes this photograph as being that of the body at the crime scene. Exhibit #2 depicts the body of Ms. Wilburn at the morgue on July 8, 1993.

morning of July 11, 1993. As discussed earlier, the search of the appellant's residence was proper. See, *supra*, Section V, Motion to Suppress. Accordingly, there was no error in the introduction of this evidence. This issue is without merit.

XIII. PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE

The State, in closing argument during the penalty phase of the trial, stated to the jury, "You have heard no mitigating factors that will outweigh those aggravating... ."[42] Trial counsel immediately objected on the grounds that the use of the word "outweigh" was "highly improper" and simultaneously moved for a mistrial. The trial court denied trial counsel's request, but agreed to give the jury a curative instruction, asking the jury to disregard this statement by the prosecution.[43] The appellant now alleges that this instruction was insufficient and that the court should have granted a mistrial.

A mistrial will only be granted when there is a "manifest necessity" requiring such action by the trial judge. Millbrooks, 819 S.W.2d at 443. The decision whether to grant a mistrial is within the trial court's discretion. McPherson, 882 S.W.2d at 370. This decision will not be disturbed on appeal absent a clear abuse of discretion. Id. In the present case, we do not find that a "manifest necessity" existed requiring a mistrial.

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[42]Tenn. Code Ann. §39-13-207(c),-207(d) does not require that mitigating factors outweigh the aggravating factors in order to avoid imposition of a sentence of life without possibility of parole. The statute instructs jurors to "weigh and consider the statutory aggravating circumstance[s]...and any mitigating circumstance[s]."

[43]The trial court instructed the jury that "the last statement by Mr. Challen was a misstatement, and I will ask you to disregard that." The prosecution rephrased its argument, informing the jury that "Your job is to weigh aggravating circumstances and weigh mitigating circumstances."

Additionally, trial judges traditionally have been afforded wide discretion in controlling the argument of counsel and this discretion will not be reversed absent abuse. State v. Payton, 782 S.W.2d 490, 496 (Tenn. Crim. App. 1989) (citing Smith v. State, 527 S.W.2d 737 (Tenn. 1975)). However, the courts must ascertain "whether the improper statement is so prejudicial to the defendant as to invalidate his conviction." Judge v. State, 539 S.W.2d 340, 343 (Tenn. Crim. App. 1976). Five factors should be considered in making this determination:

> 1. The conduct complained of viewed in the context of the light of the facts and circumstances of the case.
>
> 2. The curative measures taken by the court and the prosecution.
>
> 3. The intent of the prosecutor making the improper statement.
>
> 4. The cumulative effect of the improper conduct and any other errors in the record.
>
> 5. The relative strength or weakness of the case.

Judge, 539 S.W.2d at 344.[44] The court should also consider whether the remarks were lengthy and repeated or whether they were single and isolated. Id. Moreover, courts must remain cognizant of the fact that remarks require reversal only when the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Norris, 874 S.W.2d 590, 599 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (emphasis added). In addition to these factors, consideration should be given to the principle that a prompt instruction by the trial judge generally cures any error, State v. Philpott, 882 S.W.2d 394, 408 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994) (citing State v. Tyler, 598 S.W.2d 798, 802 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1985)), since the jury is presumed to have followed the trial judge's instructions. State v. Richardson, 697 S.W.2d 594, 596 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1985)

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[44]The factors set forth in Judge were approved by the Tennessee Supreme Court in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

In the present case, we conclude that the remark was harmless beyond a reasonable doubt. Immediately upon objection, the court offered a curative instruction. The prosecutor corrected his previous misstatement. No objections were made to any other statements. The misstatement was inadvertent and was not the result of bad faith on part of the State. Finally, the proof presented at both the guilt and the penalty phase was overwhelming. Accordingly, we are of the opinion that the remark by the prosecutor during closing argument does not give rise to such prejudice as to undermine our confidence in the sentence returned by the jury. This issue is without merit.

XIV. CONSTITUTIONALITY OF SENTENCES

In his final issue, the appellant submits that "there is no rational basis for sentencing an individual to sixty-two years imprisonment after his death." To do so, he argues, constitutes cruel and unusual punishment.

The Eighth Amendment prohibits not only barbaric punishment, but also sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 284, 103 S.Ct. 3001, 3006 (1983). In determining whether a sentence violates constitutional prohibitions against cruel and unusual punishment, courts must consider whether the sentence conforms to contemporary standards of decency, is proportionate to the offense, and is no more than necessary to accomplish a legitimate penalogical objective. Becker v. State, No. 01C01-9312-CR-00443 (Tenn. Crim. App. at Nashville, July 21,1994) (citing State v. Black, 815 S.W.2d 166, 189-90 (Tenn. 1991)). We hold that the appellant's sentences conform to the current standards of society, are proportional to the gravity of the crimes committed, and meet the aims of our penal system.

First, the appellant offers no evidence to establish that a sentence of life without parole plus sixty-two years for a juvenile violates contemporary standards of decency. However, as the majority of Americans favor the death penalty as a punishment for first degree murder, we find it difficult to believe that Tennesseans would find a sentence exceeding the appellant's life expectancy cruel and unusual punishment.[45] Therefore, we conclude that the appellant's sentence conforms with contemporary standards of decency.

Next, we must determine whether the punishment is proportionate to the crime. The proper means to evaluate a defendant's proportionality challenge is set forth in State v. Harris, 844 S.W.2d 601, 603 (Tenn. 1992). In Harris, our supreme court adopted the methodology espoused in Harmelin v. Michigan, 501 U.S. 957, 994-1009, 111 S.Ct. 2680, 2701-09 (1991). Under Harmelin, the sentence imposed is initially compared with the crime committed. Harris, 844 S.W.2d at 603. Unless this threshold comparison leads to an inference of gross disproportionality, the inquiry ends and the sentence is constitutional. Id. The appellant, in this case, received a sentence of sixty-two years for the crimes of especially aggravated kidnapping, especially aggravated robbery, and aggravated sexual battery. He contends that this sentence, running consecutive to his sentence of life without parole for felony murder, is grossly disproportionate to the crimes. We disagree. His crimes are among the most violent crimes that may be committed in an ordered society. The appellant was an active participant in the planning and execution of the crimes committed

[45]See, e.g., Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK.L.REV. 759(1991)(Public support for the death penalty has increased to about 3 or 4 to 1 with barely ten percent undecided.); William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment. What Citizens and Legislators Prefer*, 22 AM. J.CRIM.L. 77, 78 (1994) (Three out of four Americans now say they favor the death penalty in response to public opinion polls.); Alex Kozinski and Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W.RES.L.REV. 1, note 11 (1995) (In 1993, seventy-two percent of Americans favored the death penalty for murders, while only twenty-one percent were opposed.); Yale Kamisar, *This Judge was not for Hanging*, N.Y. TIMES, July 7, 1994, at 12. ("more than 4 out of 5 Americans are in favor of the death penalty").

against the victim. It was he who initiated the contact with Ms. Wilburn, using a gun to force her into the trunk of her car despite her pleas to "let [her] go." Even following Ms. Wilburn's death, he continues his exploitation of the victim by joyriding through Memphis in her car and attempting to fraudulently use her credit card. The record establishes that the appellant and his companions in crime exhibited a callous indifference to the value of human life. Considering the manner in which these crimes were committed, the appellant's total disregard for the law, the perpetrators' brutal treatment of Ms. Wilburn, and their actions following her murder, we conclude that no inference of gross disproportionality arises.[46]

Third, the punishment accomplishes legitimate penalogical objectives, including deterrence and retribution. Although a less severe punishment than the death penalty, a sentence of life without parole, consecutive to another lengthy sentence, is "an expression of society's moral outrage at particularly offensive conduct." Black, 815 S.W.2d at 190 (citing Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2930 (1976)).

Furthermore, a punishment imposed within the statutory limits for that offense and according to this state's sentencing principles does not violate constitutional proscriptions against cruel and unusual punishment. State v. Flynn, 675 S.W.2d 494, 499 (Tenn. Crim. App. 1984); State v. French, 489 S.W.2d 57, 60 (Tenn. Crim. App. 1972). Therefore, any sentence within the statutory guidelines cannot be considered excessive. Additionally, the fact that the sentence imposed by the trial court exceeds the life expectancy of the appellant does not, *per se*, make the sentence oppressive or constitute an abuse of discretion. See State v. Tyler, 840 P.2d 413, 435 (Kan. 1992) (finding

[46]If gross disproportionality is found, the analysis proceeds by comparing "(1) the sentences imposed on other criminals in the same jurisdiction, and (2) the sentences imposed for commission of the same crime in other jurisdictions." Harris, 844 S.W.2d at 603.

sentence of 111 to 330 years is not cruel and unusual punishment). Accord. People v. Walker, 663 N.E.2d 148 (Ill. App. Ct. 1996) (sentence of 100 to 300 years for rape, armed robbery, and attempted murder imposed upon sixty-four year old defendant not excessive); Hurt v. State, 657 N.E.2d 112 (Ind. 1995) (ninety year sentence for murder and rape not unreasonable); Fields v. State, 501 P.2d 1390 (Okla. Crim. App. 1972) (1,000 year sentence not excessive). Cf. State v. Wallace, 604 S.W.2d 890, 892 (Tenn. Crim. App. 1980) (sentence of 150 years not cruel and unusual punishment); Moore v. State, 563 S.W.2d 215 (Tenn. Crim. App. 1977) (two consecutive life sentences upheld); Hall v. State, No. 01C01-911-CC-00338 (Tenn. Crim. App. at Nashville, Aug. 13, 1992) (110 year effective sentence does not violate 8th amendment).

A sixty-two year sentence consecutive to a sentence of life without parole, under the facts of this case, is not an unconstitutional or excessive punishment for these crimes. Accordingly, we conclude that the appellant's sentence does not constitute "cruel and unusual punishment." This issue is without merit.

XV. CONCLUSION

After a thorough review of the record and the applicable law, we find no error in the judgment of the trial court. Furthermore, in accordance with Tenn. Code Ann. § 39-13-207(g), we conclude that the jury appropriately found three statutory aggravating factors and did not arbitrarily impose a sentence of life without the possibility of parole. Accordingly, the judgments of conviction and sentences imposed are affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY L. SMITH, Judge

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LYNN W. BROWN, Special Judge