STATE OF TENNESSEE v. PAUL DENNIS REID, JR.

APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 13, 2001 Session

STATE OF TENNESSEE v. PAUL DENNIS REID, JR.

Direct Appeal from the Criminal Court for Davidson County
No. 97-C-1834 Cheryl Blackburn, Judge

No. M1999-00803-CCA-R3-DD - Filed May 31, 2001

OPINION

[Deleted: Summary of Facts]

[Deleted: I. Motion to Suppress]

II. Voir Dire of the Venire

A. Use of Religious Tests

Prior to trial, the Appellant filed a motion requesting that the court prohibit the use of "religious tests" during jury selection. He argued that the removal for cause of prospective jurors who oppose the imposition of the death penalty because of "sincerely held" religious, moral or philosophical beliefs violates Article I, section 6 of the Tennessee Constitution. He further asserted that the question, "whether the juror's 'sincerely held' religious, moral, or philosophical beliefs would preclude them from following their oath as jurors," violates Article I, sections 3, 4, 6, 8, and 17 and Article XI, section 8 of the Tennessee Constitution. Indeed, the Appellant argued that the only inquiry which is constitutionally permissible when a prospective juror expresses an opposition to the death penalty upon religious, moral or philosophical grounds is that of determining whether the belief is sincerely held. The trial court denied the Appellant's motion. The Appellant now contends that this denial was error.

A person otherwise competent may not be disqualified as a juror because of his or her religious beliefs. In other words, no religious test shall be put forth to the person. Religious tests

probe religious beliefs. See Wolf v. Sundquist, 955 S.W.2d 626, 631 (Tenn. App.), perm. to appeal denied, (Tenn. 1997) (citing Torcaso v. Watkins, 367 U.S. 488, 494, 81 S. Ct. 1680, 1683 (1961); Patty v. McDaniel, 547 S.W.2d 897, 908 (Tenn. 1977), rev'd on other grounds, 435 U.S. 618, 98 S. Ct. 1322 (1978)). For example, a person may not be excluded from jury service because of their lack of belief in a Supreme Being nor may a judge coerce a prospective juror to take an oath which includes a reference to God where the prospective juror is an atheist. See generally 47AM. JUR. 2d, *Jury* § 177 (1995). However, the exclusion by a trial court of prospective jurors because of their moral or religious-based reluctance to impose the death penalty is not error. In this regard, potential jurors are removed for cause not because of their religious opinion or affiliation but because the jurors are unable to view the proceedings impartially and perform their duties in accordance with the juror's oath. See generally State v. Jones, 789 S.W.2d 545, 547 (Tenn.), cert. denied, 498 U.S. 908, 111 S. Ct. 280 (1990); State v. Bobo, 727 S.W.2d 945, 949 (Tenn.), cert. denied, 484 U.S. 872, 108 S. Ct. 204 (1987). The Court of Appeals, in Wolf v. Sundquist, reaffirmed this principle, stating:

> It is now settled that a criminal defendant's constitutional rights are not violated by excusing prospective jurors for cause when their personal beliefs concerning the death penalty would prevent or substantially impair their performance as a juror in accordance with their instructions and their oath.

Wolf v. Sundquist, 955 S.W.2d at 629 (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985); Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526 (1980); State v. Hutchinson, 898 S.W.2d 161, 167 (Tenn. 1994), cert. denied, 516 U.S. 846, 116 S. Ct. 137 (1995); State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989), cert. denied, 493 U.S. 1036, 110 S. Ct. 758 (1990)). The court further held that questioning jurors concerning their religious beliefs with regard to the death penalty does not amount to a religious test.[1] Wolf v. Sundquist, 955 S.W.2d at 631. In sum, the court held that the exclusion of jurors who because of their religious beliefs cannot apply the law to the facts of a particular case is not error.[2] Wolf v. Sundquist, 955 S.W.2d at 633. This issue is without merit.

B. Other Issues Concerning Voir Dire

The Appellant raises additional issues regarding the trial court's direction of voir dire within the jury selection process in his case. Specifically, the Appellant contends that the court improperly limited the Appellant's ability to learn about potential jurors' attitudes toward mental health evidence, improperly questioned jurors concerning opinions about the death penalty, and improperly commented that the court expected the Appellant to be found guilty. The State asserts that the Appellant has waived any challenge related to jury composition based upon his failure to exhaust

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[1] Like the State, we are strained to find logic behind the Appellant's assertion that the only appropriate inquiry is whether a religious belief is "sincerely held." Accordingly, we find it unnecessary to address this complaint.

[2] The Appellant recognizes the Court of Appeals' decision in Wolf v. Sundquist as dispositive of this issue. Notwithstanding, he asserts that "Wolf is incorrectly decided." As the State acknowledges, the Appellant fails to offer any argument for his position. We agree with the Court of Appeals' rationale in Wolf. Accordingly, we reject the Appellant's contention that the court's decision is flawed.

all peremptory challenges. With regard to challenges to specific jurors,[3] we agree that the Appellant has waived any challenge on appeal. See generally State v. Howell, 868 S.W.2d 238, 248 (Tenn. 1993), cert. denied, 510 U.S. 1215, 114 S. Ct. 1339 (1994); State v. Middlebrooks, 840 S.W.2d 317, 329 (Tenn. 1992); State v. Teel, 793 S.W.2d 236, 247 (Tenn.), cert. denied, 498 U.S. 1007, 111 S. Ct. 571 (1990). It is only where a defendant exhausts all of his peremptory challenges and is thereafter forced to accept an incompetent juror can a complaint about the jury selection process have merit. State v. Coury, 697 S.W.2d 373, 379 (Tenn. Crim. App. 1985) (citing Hale v. State, 198 Tenn. 461, 281 S.W.2d 51 (1955); McCook v. State, 555 S.W.2d 411, 413 (Tenn. Crim. App. 1977)). Further, the record shows that the jury that heard the case was fair and impartial. There is nothing in the record to show that any prejudice resulted to the Appellant by the manner of the selection process utilized. Accordingly, we find no error. However, because of the manner in which the remaining challenges are phrased, we choose to address the challenges on their merits.

1. Limitation of Inquiry into Mental Health Evidence as Mitigating Circumstance

Tennessee Rule of Criminal Procedure 24(a), in pertinent part, states that the trial court "shall permit questioning by the parties for the purpose of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges." It further states that "[t]he court . . . may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors." Although the rule provides no test for determining whether the scope of questioning is adequate to fulfill the rule's purpose, Tennessee courts have held that "the scope and extent of voir dire is entrusted to the discretion of the trial judge, and his actions will not be disturbed unless clear abuse of discretion is shown." State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S. Ct. 1368 (1993); see also State v. Smith, 993 S.W.2d 6, 28 (Tenn.), cert. denied, 528 U.S. 1023, 120 S. Ct. 536 (1999). Thus, the method of voir dire, *i.e.*, individual or group,[4] the questions that may be asked, and the scope of inquiry are all within the discretion of the trial court.[5]

In the present case, the trial court, prior to the commencement of jury selection, instructed counsel that individual voir dire would be limited to issues surrounding pretrial publicity and death

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[3]The Appellant's brief makes reference to Prospective Juror Gerald Hodges in his challenge to the limitation of questioning into mental health issues. Additionally, within his challenge to the trial court's questioning the jurors regarding their opinion of the death penalty, the Appellant makes specific reference to prospective jurors William Nelson, Gerald Hodges, Gary Hixson, Terry McNabb, Troy Calloway, Willie King, Patricia Anderson, Justin Law and Robert Brown. These challenges are waived for failure to exhaust all peremptory challenges.

[4]Howell, 868 S.W.2d at 247; State v. Van Tran, 864 S.W.2d 465, 473-474 (Tenn. 1993), cert. denied, 511 U.S. 1046, 114 S. Ct. 1577 (1994).

[5]State v. Smith, 857 S.W.2d 1, 19-20 (Tenn. 1993), cert. denied, 510 U.S. 996, 114 S. Ct. 561 (1993); State v. Irick, 762 S.W.2d 121, 125 (Tenn. 1988), cert. denied, 489 U.S. 1072, 109 S. Ct. 1357 (1989); State v. Poe, 755 S.W.2d 41, 45 (Tenn. 1988), cert. denied, 490 U.S. 1085, 109 S. Ct. 2111 (1989); Kennedy v. State, 186 Tenn. 310, 319, 210 S.W.2d 132, 136 (1947), cert. denied, 333 U.S. 846, 68 S. Ct. 659 (1948).

qualification, "unless there has been something on that questionnaire that we need to deal with individually." Defense counsel informed the court that, from the questionnaires,

> an amazingly large number of jurors recorded for us mental health issues related to themselves or to their family. As this obviously would be a subject of voir dire where they have indicated something which is innately a personal topic, I wonder if the Court would like to consider those questions. [6]

The court denied the Appellant's request to question jurors during individual voir dire regarding mental health issues, but stated, "that is something that you can deal [with] within the general voir dire." The trial court additionally informed defense counsel that during the individual voir dire they could ask the general question, "Will you consider all mitigation?" and also permitted the parties to question the potential jurors regarding any matters that the jurors had designated as "private" on their questionnaires. Regarding group voir dire, the trial court limited inquiry into mental health issues, requiring any question to be an attempt to clarify a position stated in the questionnaire or be a general inquiry regarding the juror's ability to consider mental health testimony.[7] The Appellant now contends that the limitations placed on voir dire prevented him from developing possible cause challenges against jurors who had already expressed negative attitudes about mental health evidence,[8] thereby rendering the limitations essentially meaningless.

We cannot conclude that the trial court abused its discretion. Defense counsel had access to the questionnaires of the prospective jurors. The questionnaires combined with the permissible inquiries as to mental health issues during individual and group voir dire provided the Appellant with

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[6] The venire completed an extensive questionnaire prior to voir dire. Pursuant to the Appellant's request, the questionnaire included multiple inquiries regarding mental health issues. Of relevance to this issue:

> Question Number 44 Do you believe that diagnosis or treatment provided by a psychiatrist or psychologist or other qualified professional might be helpful?
> Question Number 45 Have you, anyone in your family or close personal friend ever received any type of inpatient or out-patient mental health counseling or treatment?
> Question Number 46 Have you, any member of your family . . . or close personal friend ever taken any type of psychotropic drug or other medications for depression, anxiety or any other psychological or psychiatric problem or disorder?
> Question Number 47 Have you ever had an unpleasant experience or confrontation with someone who suffered from any type of mental illness or emotional disorder, or someone who has lost control of their behavior?
> Question Number 48 Do you hold an opinion about defendants who use mental health as an excuse for their actions?

[7] The court's restrictions during group voir dire arose from the court's concern over the recent case of State v. Reid, 981 S.W.2d 166 (Tenn. 1998)(notice requirements of intent to use mental health evidence as mitigation and ability to withdraw notice of intent at any time prior to presenting such evidence), and unfair disadvantage to the State.

[8] The Appellant specifically refers to prospective jurors Hodges and Fears. Again, based upon his failure to exercise all available peremptory challenges, the Appellant has waived any challenge to individual jurors.

ample background information from which to exercise peremptory challenges. Accordingly, we find that the limited restrictions placed upon the parties by the trial court were reasonable and were well within the trial court's discretion. This issue is without merit.

2. Court Implied to Venire that Appellant was Guilty

The Appellant cites to numerous statements by the trial court which he asserts "implicitly conveyed that the court expected the [Appellant] to be found guilty of first-degree murder, so that a penalty phase would necessarily occur thereafter." The Appellant contends that the inference from the trial court's directions to the venire implied that the court "viewed the [Appellant's] convictions as a foregone conclusion." Accordingly, he avers that the court's comments resulted in prejudice to the judicial process requiring reversal. See Tenn. R. App. P. 36(b).

Without reiterating verbatim the challenged language of the trial court to the venire, we acknowledge that the court, for example, used the term "**until** he is found guilty beyond a reasonable doubt of murder in the first-degree" rather than the term "**unless** he is found guilty beyond a reasonable doubt of murder in the first-degree." The Appellant argues prejudice without considering the context in which the court's statements were provided. Indeed, one challenged comment of the court, placed in full context of the court's instruction, provided:

> Mr. Reid hasn't been found guilty of anything. That is what the trial is about, so I want to make certain that you understand he is presumed innocent as he sits in front of you, and that presumption stays with him until he is found guilty after you hear the proof in the case, so just because we are asking you questions with regard to the possible punishments in this case, I want to make certain you keep in mind that he has not been found guilty of anything, but the reason we have to ask you these questions is that we must have jurors who can consider all three possible punishments.

We disagree with the Appellant's argument that this instruction compels the finding that the court implied to the jury the Appellant's guilt. Given the entire context of the voir dire, we conclude that no reasonable juror could have believed that the court was instructing him or her to return a guilty verdict. This issue is without merit.

[Deleted: III. Sufficiency of the Evidence]

IV. Evidentiary Issues: Guilt Phase

A. Admissibility of Testimony of Sergeant Hunter

The Appellant argues that the trial court erred by permitting Sgt. Johnny Hunter to testify as an expert witness in the field of blood spatter analysis. Specifically, the Appellant contends that this testimony violated his constitutional right to a fair trial because the defense was unfairly surprised. We disagree and find no error.

Sgt. Hunter was qualified by the court to testify as an expert on fingerprint analysis and comparison, as well as blood spatter analysis. The Appellant complains that he received no advance notice that the State was intending to introduce expert testimony in the field of blood spatter analysis and that he was denied the opportunity to effectively cross-examine the witness. Sgt. Hunter's report, which was provided to the defense prior to trial, mentioned that no visible blood spatter was found, with the exception of a small amount of blood on the floor around the victims. At trial, Sgt. Hunter testified about blood patterns found on the floor and surrounding area, specifically noting the absence of blood spattering. Sgt. Hunter further testified that the absence of blood spattering indicated that the victims were lying on the ground when they were shot. He further stated that the blood pattern on a shelf to the right of one of the victims, Sarah Jackson, indicated that she had attempted to lift herself up after being shot.

The Appellant is not contesting Sgt. Hunter's qualifications, but rather insists that he was surprised by his testimony in this respect. Although the Appellant argues that he had no notice that Sgt. Hunter would testify about blood spattering at trial, the Appellant fails to explain how he was prejudiced by this testimony. Over a year before trial, the Appellant was provided with a copy of Sgt. Hunter's report, which stated that a small amount of blood was found on the floor near the victims. The Appellant cannot complain about Sgt. Hunter's testimony simply because he failed to find any significance in the report which was properly and timely provided to him by the State. This issue is without merit.

B. Testimony of TBI Agent Linda Littlejohn Regarding Length of Shoes Seized

The Appellant argues that the trial court erred by allowing Tennessee Bureau of Investigation Agent, Linda Littlejohn, to testify that the length of the shoes seized from the Appellant's apartment were within the range of the unidentified shoe print left at the scene of the crime. Specifically, he contends that the technique used in "measuring" the enlarged photographic negative was not shown to meet the standards of admissibility for expert testimony set forth in McDaniel v. CSX Transp., 955 S.W.2d 257 (Tenn. 1997). Additionally, the Appellant asserts that the admission of Agent Littlejohn's testimony violated Tenn. R. Evid. 702 and 401.

Determinations of the admissibility of expert testimony are made within the sound discretion of the trial court. State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993). The standard of review on appeal is whether the trial court abused its discretion in excluding the expert testimony. The abuse of discretion standard contemplates that, before reversal, the record must show that a judge "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999); State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

In the present case, Agent Littlejohn testified that a ruler was placed near the shoe print found at the crime scene before the photograph was taken. The negatives were later developed and "one to one photographs were made, and that would be where the negative is enlarged to where the ruler in the photograph is actually the same size of the ruler next to the print at the scene, so the

photographs . . . would be exactly the same size as the print at the crime scene." Both tread and length were determined using this same technique. After comparing the photograph and the shoes, Agent Littlejohn testified that none of the treads on the shoes recovered from the Appellant's apartment matched the print left at the crime scene. Although Agent Littlejohn testified that she could not speculate as to the actual size of the shoe worn by the perpetrator because different styles and brands would vary slightly in length, she did testify, however, that the length of the shoe print found at the scene fell within the range of lengths of the nine pairs of shoes seized from the Appellant's apartment. Specifically, she testified that the shoe print found at the scene measured 12 and 3/8 inches in length. The shoes taken from the Appellant's apartment ranged from 11 13/16 inches to 12 ½ inches in length.

First, the Appellant contends that the trial court erred in admitting Agent Littlejohn's testimony regarding the length of the shoe print because it did not comport with standards for expert testimony set forth in McDaniel, 955 S.W.2d at 257. We note that the Appellant does not contest this measurement technique with respect to the tread identification testimony, which was favorable to him. Rather, he only attacks this technique with respect to the length of the shoe print. The Appellant further argues that the trial court erred by violating Tenn. R. Evid. 702, which reads, "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

In McDaniel, the Tennessee Supreme Court held that a trial court may consider the following factors when determining the reliability of scientific evidence: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. McDaniel, 955 S.W.2d at 265. In this instance, the following dialogue took place during a jury-out hearing:

THE COURT: Well, let me ask Ms. Littlejohn a couple of questions. Ms. Littlejohn, the training that you had in terms of the conclusions that you drew, were these standard procedures used in that field?

LITTLEJOHN: Yes, I mean - -

THE COURT: Okay, and it is the blowing up, the one-on-one comparison - -

LITTLEJOHN: Uh-huh.

THE COURT: - - and is that what your training indicates?

LITTLEJOHN: . . .yes, ma'am.

THE COURT: And is that the standard used in your field?

LITTLEJOHN: Yes, it is.
THE COURT: All right, and is there scientific literature with regard to this, I mean - -
LITTLEJOHN: Yes, there is.

THE COURT: - - and is this subject to being able to be proven or disproved?

LITTLEJOHN: Yes.

THE COURT: Okay, so there are scientific principles behind this?

LITTLEJOHN: Yes.

THE COURT: So you blow it up one-on-one, which is the exact size of the print, and then you just make a comparison of both in tread and otherwise, and apparently you did that in this case that [defense counsel] does not object to?

LITTLEJOHN: Yes, your honor.

DEFENSE: Correct.

THE COURT: Okay, so you used that same methodology to compare the prints, the tread, and that, that you used to make the size comparison?

LITTLEJOHN: Basically. . . .

We conclude that the above text, along with other testimony presented at the jury-out hearing, more than satisfies the factors set forth in McDaniel. The evidence presented at both the jury-out hearing and trial indicated that the technique used by Agent Littlejohn was standard procedure and widely accepted in the field of shoe and footprint comparison. Agent Littlejohn properly qualifies as an expert in shoe and footprint comparison and her testimony would have substantially assisted the trier of fact due to her education, experience, and training. See Tenn. R. Evid. 702. Moreover,

the Appellant was able to solicit testimony during cross-examination that the length of the print found would be fairly common among the general population. This issue is without merit.

The Appellant also argues that Agent Littlejohn's testimony concerning range of length was irrelevant. See Tenn. R. Evid. 401 and 402. Tennessee Rules of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Clearly, testimony concerning the shoe prints found at the crime scene as compared to the shoes seized from the Appellant's apartment is relevant evidence that was properly admitted. This issue is without merit.

C. Admissibility of Cash Register Receipts Seized from Appellant's Residence

The Appellant argues that the trial court erred in admitting into evidence cash register receipts seized from the Appellant's residence that were not properly authenticated pursuant to Tenn. R. Evid. 901. Specifically, he contests the authentication of the receipts because the prosecution failed to call as witnesses representatives of the respective businesses to testify as to the legitimacy and accuracy of the receipts. The prosecution, through the testimony of Detective Postiglione, introduced three cash register receipts seized from the Appellant's residence: (1) a Wal-Mart receipt in the amount of $78.34, dated February 17, 1997; (2) a Wal-Mart receipt dated the same day in the amount of $69.29; and (3) a receipt from Jumbo Sports dated February 18, 1997, for $97.41. The purpose for the introduction of these receipts was to show that the Appellant had spent a large amount of money in a short period of time after the murders despite the fact that he was in dire financial trouble at the time. At trial, defense counsel objected to the introduction of the receipts, arguing that the receipts had not been properly authenticated. The trial court overruled the objection and found the cash register receipts admissible. Upon reviewing this issue, we agree that the receipts were admissible.

Rule 901(a) of the Tennessee Rules of Evidence provides that "[t]he requirement of authentication . . . is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Notwithstanding, Rule 902(7) states that extrinsic evidence of authenticity is not required as a condition precedent to admissibility when the item or items sought to be admitted are "[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin." In the present case, two of the receipts were from Wal-Mart and one receipt was from Jumbo Sports. All three receipts were in printed form, bearing the retailer's name, address, and other relevant information. This printed material constitutes an "inscription" for purposes of satisfying Rule 902(7). See, e.g., United States v. Hing Shair Chan, 680 F. Supp. 521, 526 (E.D.N.Y. 1988)(a hotel record on hotel stationary was held to be self-authenticating); State v. Deleon, No. CA 17574, 2000 WL 646502 (Ohio App. 2d. May 19, 2000)(bill of sale for automobile bearing dealer's name and address held to be self-authenticating); Neil P. Cohen, et. al., *Tennessee Law of Evidence* §§ 9.02[9] (4th ed. 2000). Thus, the cash register receipts were self-authenticating and properly admitted at trial. This issue is without merit.

V. Closing Argument at Guilt Phase

A. Prosecutorial Comment on Appellant's Failure to Testify

The Appellant argues that the trial court erred by denying defense counsel's motion for a mistrial when, during closing arguments of the guilt/innocence phase, the prosecution commented on the Appellant's failure to testify. A prosecutor is strictly prohibited from commenting on the defendant's decision not to testify. State v. Coker, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). However, a prosecutor's statement that proof is unrefuted or uncontradicted is not an improper comment upon a defendant's failure to testify. State v. Thomas, 818 S.W.2d 350, 364 (Tenn. Crim. App.1991); Coury, 697 S.W.2d at 378.

In the present case, the Appellant did not testify at trial. However, a videotaped statement to the detectives following the Appellant's arrest was played before the jury. In this tape, the Appellant stated that he did not know how his fingerprint got on Hampton's Movie Gallery card. Nonetheless, he also told detectives "I'm not surprised that it is on there." During closing arguments of the guilt/innocence phase, defense counsel made the following statements:

> I believe the evidence showed that card was found the next day, over 24 hours after the robbery happened. You heard that it was found on Ellington Parkway, about a mile from [the Appellant's] house. You heard that [the Appellant] had a car that broke down all the time. If a person was near something and your car breaks down and you walk by something, you might pick that up and throw it back down. Four months after the fact, you may not even remember that.

Additionally, defense counsel questioned the prosecution's reasoning for playing the videotaped statement during trial. In its closing arguments, the prosecution responded to defense counsel's comments as follows:

> [Defense counsel] talked about why did the State put in the statement. Because he gave it, and you, as jurors, have a right to hear it. You did hear it, and we put in on for one reason; because he was given chance after chance to explain how his fingerprint could have gotten on that card. He said I'm not surprised it is on there. *Would he ever have an explanation*? [Defense counsel] grabbed one out of the air, and there is no basis in fact or evidence for anything else, and said, well maybe his car broke down.

(Emphasis added). The Appellant maintains that the prosecution's statement of "When would he ever have an explanation?" clearly commented upon the fact that the Appellant failed to explain during his statement to police the presence of his fingerprint on property that had been in the possession of one of the victims. Additionally, he contends that the prosecutor wrongfully commented on the Appellant's failure to take the witness stand and offer an explanation at trial. We disagree. This was clearly rebuttal argument directed toward defense counsel's earlier argument that the Appellant could have picked up the movie card while walking after his car broke down. We do

not find that the statement can be fairly characterized as a comment on the Appellant's failure to testify. At most, the comment was mere argument by the prosecution that its proof was unrefuted or uncontradicted. See Coury, 697 S.W.2d at 378. This issue is without merit.

B. Prosecutorial Comment During Closing Arguments

The Appellant argues that the trial court erred by overruling defense counsel's objection to the prosecution's statement during closing argument that the Appellant's foot was the "same size" as shoe prints left at the scene. Specifically, the Appellant contends that the comment was prejudicial "because the prosecutor's comments constituted a misstatement of the evidence on a crucial matter."

Closing arguments are an important tool for the parties during the trial process. Consequently, the attorneys are usually given wide latitude in the scope of their arguments, see State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994), and trial judges, in turn, are accorded wide discretion in their control of those arguments, see State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). Notwithstanding such, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law. Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). To justify a reversal on the ground of improper argument of counsel, it must affirmatively appear that the improper conduct affected the verdict to the prejudice of the defendant. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965); State v. McBee, 644 S.W.2d 425, 428 (Tenn. Crim. App. 1982). Furthermore, the following factors must be considered by this court in making such a determination: 1) the conduct complained of, viewed in light of the facts and circumstances of the case; 2) the curative measures undertaken by the court and the prosecutor; 3) the intent of the prosecutor in making the improper statement; 4) the cumulative effect of the improper conduct and any other errors in the record; and 5) the relative strength or weakness of the case. Bigbee, 885 S.W.2d at 809; State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

In the present case, Agent Littlejohn testified that the unidentified shoe print found at the crime scene was within the range of the length of shoes seized from the Appellant's residence. She also testified that it is common for the same "shoe sizes" to vary in length based upon the brand name and manufacturer of the shoe. Accordingly, Agent Littlejohn declined to specifically identify the shoe print as being a particular size. Because the shoes taken from the Appellant's apartment ranged in length from 11 and 13/16 inches to 12 and ½ inches, Agent Littlejohn testified that she had no doubt that the shoe print found at the scene, which measured 12 and 3/8 inches in length, fell within the range of length of shoes taken from the Appellant's apartment. Thus, the Appellant could not be excluded from having left the print.

During closing arguments of the guilt/innocence phase, the prosecution made the following three comments with respect to the Appellant's "shoe size":

> More than likely, it was the killer, and could that print have excluded [the Appellant] if it [sic] was the killer? Of course, if it was a size 7 or a size 8 or a size 9, but it fit in the *size of the shoe* [the Appellant] wears.
>
> ***
>
> The footprint could have excluded him. The *same size* of [the Appellant].
>
> ***
>
> Who has a footprint the *same size* as the one left at the crime scene? [The Appellant].

(Emphasis added). The Appellant argues the above comments made by the prosecution were prejudicial and misrepresented the proof. We disagree. The prosecutor never referred to the unidentified shoe print as being a particular size. While it might have been more preferable for the prosecution to use the terminology "within range of length of [the Appellant's] shoes" instead of "same size," it is clear from the record before us that the prosecution was simply referring to Agent Littlejohn's testimony where she explained that the crime scene shoe print fell within the range of shoes seized from the Appellant. As the trial court correctly noted, "the State did nothing more than argue its position that, because the length of the unknown print was not inconsistent with the length of the [Appellant's] shoes, the [Appellant] could not be excluded as the perpetrator." Moreover, we note that the trial court also cautioned the jury that "Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them." As such, we find no evidence of prosecutorial misconduct, nor do we find error which prejudiced the Appellant. Thus, this issue is without merit.

VI. Instructions on Lesser-Included Offenses

The Appellant argues that it was error for the trial court to deny his request for jury instructions as to the lesser-included offenses of facilitation of first-degree murder and facilitation of especially aggravated robbery. With respect to the premeditated first-degree murder charges, the court instructed the jury on the lesser-included offense of second-degree murder. With respect to the especially aggravated robbery charges, the court instructed the jury on the lesser-included offense of aggravated robbery. The trial court, however, declined to instruct the jury on the lesser-included offense of facilitation.

Initially, we note that, in Tennessee, irrespective of a party's request for a lesser-included jury instruction, "[I]t is the duty of all judges charging juries in cases of criminal prosecutions for any felony . . . to charge the jury as to all of the law of each offense included in the indictment." Tenn. Code Ann. § 40-18-110(a) (1997). Moreover, as the State concedes, facilitation is a lesser-included offense of both first-degree murder and especially aggravated robbery. See generally State v. Burns, 6 S.W.3d 453 (Tenn. 1999). This fact alone, however, is not dispositive of whether error occurred. See generally Burns, 6 S.W.3d at 463.

Determining whether a lesser-included offense must be charged in the jury instructions is a two-part inquiry. Burns, 6 S.W.3d at 469. First, the court must determine whether any evidence exists that reasonable minds could accept as to the application of a lesser-included offense. Id. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Id. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense. Id. at 467-469.

Criminal responsibility for facilitation of a felony is defined in Tenn. Code Ann. § 39-11-403 (1997) and reads as follows:

> (a) A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony.

We are unable to conclude under the test announced in Burns that reasonable minds could find that anyone other than the Appellant was involved in this crime. Neither the prosecution nor the defense advanced the theory that the Appellant was criminally responsible for facilitating the acts of another at trial. To the contrary, it was the prosecution's theory that the Appellant was solely responsible for both the murders and the robbery. At trial, the Appellant, in his defense, asserted the position that the prosecution failed to establish his identity as the perpetrator.

On appeal, the Appellant gives several reasons why he was entitled to the lesser-included instructions. First, the Appellant points to his statement to police where he says, "I am not the triggerman." This statement, however, in no way indicates the participation of another person. Second, the Appellant points to his statement where he says he did not know the victims but was "not surprised" his fingerprint was on the victim's Movie Gallery card. He also insists the bloodhounds' tracking of a scent from the location of the card to a nearby residence implicates the involvement of another person. Once again, we do not interpret this to mean another person was involved. Moreover, no evidence was presented at trial to support this contention. Third, the Appellant argues that another person could have been involved because there were many unidentified fingerprints left at the crime scene. The crime scene was a public restaurant and it is expected that many unidentifiable fingerprints would be found at such a location. Fourth, the Appellant points to the fact that one shoe print was never identified. Once again, it is expected in a public restaurant to have many prints, whether fingerprints or shoe prints, that belong to unidentified persons. Fifth, the Appellant maintains that cigarettes were found in an ashtray in the restaurant. The proof at trial, however, indicated that the cigarettes were found at the employees' break station and had not been removed the night before when the employees went home. Sixth, the Appellant argues that his friend, Danny Tackett, testified that he and the Appellant had previously discussed committing robberies against fast food restaurants. Seventh, the Appellant points to the testimony of Mark Farmer, who testified at trial that it was "possible" that someone else could have been in the driver's side of the car. However, he did not testify that there was, or that he thought there was another

person in the car. Instead, he only acknowledged that it would have been possible. Finally, the Appellant argues that the composite drawings do not resemble him. The evidence at trial, however, indicates that the drawings were similar and that many features between the composite drawings and the Appellant match.

We find that no reasonable juror could have accepted that the evidence presented in any manner established the commission of the lesser-included offense of facilitation. To the contrary, the entire case is centered around the Appellant as the sole perpetrator and the Appellant's defense of not being involved. Thus, the trial court properly declined to instruct the jury on the lesser-included offenses of facilitation of first-degree murder and facilitation of especially aggravated robbery. This issue is without merit.

VII. Late Night Court Sessions

The Appellant argues that the trial court committed reversible error by holding numerous "late night" court sessions. Specifically, the Appellant maintains that the late night sessions caused his attorneys to be tired and less effective than they normally would have been had they been given the opportunity for more rest. In State v. Parton, 817 S.W.2d 28, 33 (Tenn. Crim. App. 1991), this court addressed the issue of "late night" court sessions as follows:

> It is clear in this state that late night court sessions should be scheduled "only when unusual circumstances require it." McMullin, 801 S.W.2d at 832. Regardless of whether counsel or any juror objects, the late night sessions should be avoided; and they must be justified because of unusual circumstances. If the requisite unusual circumstances do exist and late night sessions are scheduled because of necessity, good practice would be to also let the record affirmatively reflect that all counsel and all jurors expressly agree. But the threshold question which must always be determined by the court is whether the circumstances justify the unusual session.

First, we note that this issue has been waived for failure of defense counsel to object to the late hours at trial and for defense counsel's failure to raise this issue in the motion for new trial. See Tenn. R. App. P. 36(a). Notwithstanding the waiver, however, we find that the record does not support the Appellant's argument that the court kept excessively late hours during trial. During the two and one-half weeks of trial, sessions ran "late" on five of the thirteen nights. On the five "late nights," two of which were jury selection, court concluded between 8:30 and 9:25 p.m. We also note that during this period, there were five "off days" where neither counsel nor the litigants had to report to court. Further, this was a sequestered jury from a distant county. The Tennessee Supreme Court has held that a determination of how long into the evening a trial should last is a matter within the discretion of the trial court. See Poe, 755 S.W.2d at 47. Although these five days may exceed the "normal eight hour day," we do not find the sessions to be unreasonable in this particular case. This issue is without merit.

VIII. Evidentiary Issues at Penalty Phase

A. Dr. Martell as Expert Witness

During the penalty phase of the Appellant's trial, the State called Dr. Daniel Martell as a rebuttal witness and sought to qualify Dr. Martell as an expert in "forensic neuropsychology."[9] During voir dire of Dr. Martell, the State elicited testimony that Dr. Martell obtained both his master's degree and his Ph.D. at the University of Virginia and completed a forensic internship at Bellevue Hospital in New York City. After his internship, he was awarded a postdoctoral fellowship to do advanced study and research in forensic neuropsychology. From this fellowship, Dr. Martell founded the Forensic Neuropsychology Laboratory at Kirby Forensic Hospital in New York City, where he remained as director for the next eight years. Dr. Martell then joined the clinical faculty at the Neuropsychiatric Institute at UCLA and also engaged in private consultation practice. Throughout his career, Dr. Martell has authored numerous papers outlining the relationship between neuropsychology and criminal law and has limited his professional practice to forensic neuropsychology.

Dr. Martell testified that board certification was currently unavailable in the field of "forensic neuropsychology" and there is no professional association for "forensic neuropsychologists." Dr. Martell admitted that, although there is Board Certification and Recognition in the field of neuropsychology, he has never applied for board certification in the field of neuropsychology. On this basis, the Appellant, while conceding Dr. Martell's qualifications as an expert witness in the field of psychology, objected to his qualification as an expert in the field of "forensic neuropsychology." The trial court overruled the objection, accepting Dr. Martell's qualifications as an expert in the field of forensic neuropsychology. The Appellant now challenges this ruling, alleging that "an expert is competent to testify 'only as to matters within the limited scope of his or her expertise and licensure.'" Appellant's Brief at 260 (citing Bolton v. CNA Ins. Co., 821 S.W.2d 932, 935 (Tenn. 1991)). He contends that the "State never sufficiently established that Dr. Martell was an expert in the field of 'forensic neuropsychology.'" Appellant's Brief at 261.

The determination of the qualifications of an expert witness and the relevancy and competency of expert testimony are matters generally entrusted to the sound discretion of the trial court. State v. Anderson, 880 S.W.2d 720, 728 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); see also Tenn. R. Evid. 104(a). This court will not overturn the trial court's decision absent a clear abuse of discretion. Anderson, 880 S.W.2d at 728 (citing State v. Williams, 657 S.W.2d 405, 411 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S. Ct. 1429 (1984)).

Rule 702 of the Tennessee Rules of Evidence provides "that in order to testify as an expert and thus be permitted to give conclusions and opinions on a matter involving scientific, technical or other specialized knowledge, a witness must possess sufficient 'knowledge, skill, experience, training, or education.'" Neil P. Cohen et al, *Tennessee Law of Evidence* § 7.02[4] at 7-21 (emphasis added). The witness may acquire the necessary expertise through formal education or life

[9] Dr. Martell explained that "forensic neuropsychology" is "the study of brain damage, and how it affects violent behavior."

experiences. Id. However, the witness must have such superior skill, experience, training, education, or knowledge within the particular area that his or her degree of expertise is beyond the scope of common knowledge and experience of the average person. Id. (citations omitted).

The record in the present case clearly establishes that forensic neuropsychology is a recognized sub-specialty of psychology regardless of the availability of board certification in this area. It is equally clear that Dr. Martell is more than qualified to testify in this area of practice. Moreover, the issue of whether the courts of this state recognize experts in the area of forensic neuropsychology is not an issue of first impression. The courts of this state have previously permitted experts to testify in this area. See, e.g., Coe v. State, 17 S.W.3d 193, 205 (Tenn.), cert. denied, 529 U.S. 1034, 120 S. Ct. 1460 (2000) (defense presented Dr. Walker as expert witness in field of forensic neuropsychology); Victor James Cazes v. State, No. 02C01-9801-CR-00002 (Tenn. Crim. App. at Jackson, Dec. 8, 1999) (Dr. Martell testified as expert in field of forensic neuropsychology). Accordingly, we cannot conclude that the trial court abused its discretion in qualifying Dr. Martell as an expert in forensic neuropsychology.[10]

B. Cross-Examination of Dr. Martell

Prior to Dr. Martell's testimony, the Appellant requested that he be permitted to question Dr. Martell regarding a letter written by Dr. Martell in 1997 to the United States Department of Justice. Relying upon Rule 405 of the Tennessee Rules of Evidence as grounds for the letter's admission, he argues that the letter was relevant to the witness' credibility and bias. The eight-page letter was Dr. Martell's request for a Department of Justice investigation into an incident that had led to rumors of unprofessional and possibly illegal conduct by Dr. Martell in a federal death penalty case.[11] In his letter, Dr. Martell repeatedly asserted his innocence of any wrongdoing and sought an investigation so that he could receive a letter of exoneration from the Department of Justice. Specifically, he emphasized that these allegations had damaged his professional reputation and threatened his "financial status." The allegations concerned an affidavit Dr. Martell had signed in a federal case. This affidavit was discussed by the attorneys and the judge in chambers.[12] Dr. Martell was denied the opportunity to hear the allegations or to defend himself if needed.

In denying admission of Dr. Martell's letter, the trial court found, in relevant part:

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[10] Within his argument, the Appellant additionally alleges that the court's acceptance of Dr. Martell as an expert in the field of forensic neuropsychology undoubtedly resulted in prejudice to his case. Specifically, he asserts that, although he called Dr. Auble, a psychologist with similar training to that of Dr. Martell, he did not seek to qualify her as an expert in forensic neuropsychology. Accordingly, he argues that the jury likely gave Dr. Martell's testimony greater weight than Dr. Auble's testimony. Nothing prevented the Appellant from seeking to qualify Dr. Auble as an expert in forensic neuropsychology. He cannot now complain about an action which he failed to pursue. Tenn. R. App. P. 36(a).

[11] Members of the National Network of Capital Defense Attorneys alleged that, in the case of United States v. Spivey, Dr. Martell signed a false affidavit.

[12] The Appellant acknowledges that the allegation against Dr. Martell was by defense counsel in that matter and that there is no evidence that the allegation by defense counsel did, in fact, occur.

> It says I must determine that the questions are proposed in good faith rather than an effort to place before the jury unfairly prejudicial information supported only by unreliable rumors. I'm going to determine that there is no reasonable factual basis for that inquiry.

The Appellant challenges the trial court's ruling, asserting that this information was admissible to show Dr. Martell's credibility and "goes to the prospect of bias." Like other evidentiary rulings, an appellate court reviews a trial court's ruling under Tenn. R. Evid. 608(b) using an abuse of discretion standard. See Ingram v. Earthman, 993 S.W.2d 611, 639 (Tenn. App. 1998), cert. denied, 528 U.S. 986, 120 S. Ct. 445 (1999); State v. Blanton, 926 S.W.2d 953, 959-60 (Tenn. Crim. App. 1996).

Character evidence may be used in limited circumstances to impeach a witness. See Tenn. R. Evid. 404(a)(3) (evidence of character of witness admissible as provided in Rules 607, 608 and 609). However, extrinsic evidence of conduct other than criminal conviction may not be used to attack the character of a witness. See Tenn. R. Evid. 608(b). Accordingly, Dr. Martell's letter was properly excluded as extrinsic evidence of Dr. Martell's character.

Moreover, certain conditions must be satisfied before allowing inquiry on cross-examination of the witness about specific instances of conduct probative solely of truthfulness or untruthfulness. See Tenn. R. Evid. 608(b). First, upon request, the court must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry. See Tenn. R. Evid. 608(b)(1). If these requirements are met, the court must then determine that the conduct, within limited exceptions, must have occurred no more than ten years before commencement of the action or prosecution. See Tenn. R. Evid. 608(b)(2).

In the present case, the court determined that no "reasonable factual basis" existed for the Appellant's inquiry. We agree. The Appellant offered no evidence of conduct by Dr. Martell evidencing untruthfulness. Rather, the only proof offered was a letter written by Dr. Martell requesting exoneration because of false rumors. The letter itself is not proof of Dr. Martell's untruthfulness. Where there is no factual basis for an inquiry into prior conduct of a witness, the court shall bar any such attempt to interrogate a witness based on mere speculation or rumor. See State v. Philpott, 882 S.W.2d 394, 404 (Tenn. Crim. App. 1994)("An attempt to communicate by innuendo through questions which are answered in the negative is impermissible when the questioner has no evidence to support the question."); see also State v. Bowling, 649 S.W.2d 281, 283 (Tenn. Crim. App. 1983); Neil P. Cohen et al., *Tennessee Law of Evidence* § 6.08[7][d]. Accordingly, we conclude that the trial court did not abuse its discretion in preventing inquiry into Dr. Martell's letter to the Department of Justice. Finally, we fail to see how the letter written by Dr. Martell establishes that Dr. Martell is biased in favor of the State or prejudiced against the Appellant. See Tenn. R. Evid. 616. This issue is without merit.

C. Court's Refusal to Admit Tape-Recording to Rebut Dr. Martell's Testimony

During his testimony, Dr. Martell opined that the Appellant suffered from "delusional disorder, mixed type with persecutory and grandiose themes, in substantial remission." He qualified

his diagnosis, however, noting that the Appellant has a lengthy history of malingering mental illness and that, in his opinion, the Appellant's delusional disorder was in remission. During cross-examination, defense counsel requested permission to introduce an audiotape of a June 1997 interview by Detective Postiglione of Ms. Dorothy Meadlin, the Appellant's former landlord. Dr. Martell, in forming his opinions of the Appellant, testified that he had reviewed and considered the contents of the audio taped interview. The trial court denied defense counsel's request, finding that the contents of the tape constituted hearsay and were "not appropriate." Specifically, the court stated:

> Mr. Engle, I'm not going to let you do this. It is just flat out not appropriate. I still don't understand why – why you don't call her as a witness? You could have called her as a witness, or you could call Detective Postiglione, if you had reason, in order to put that, in order to authenticate the tape, but to try to get the information of what she has to say in through [Dr. Martell], who is testifying as an expert about Mr. Reid's mental condition, I mean, just exactly what rule of evidence do you think this belongs to?

Defense counsel then sought to introduce a transcript of Ms. Meadlin's testimony provided by the State. The State objected, noting that the State had not provided defense counsel a transcript of the audio taped interview. At this point, defense counsel conceded that the transcript was supplied by the District Attorney's Office in another judicial district. In response to further inquiry by the court, defense counsel stated that he intended to ask Dr. Martell about the tape, whether he considered the tape in making his conclusions, and how he evaluated the tape. Defense counsel further added that he did not call Ms. Meadlin as a witness because she is sixty-eight years old and infirm. Although defense counsel conceded that he could have sought a deposition from Ms. Meadlin, he stated that he would rather seek admission of the interview through Dr. Martell. The court again refused admission of the tape.

The Appellant challenges the trial court's exclusion of the audiotape during the cross-examination of Dr. Martell. Specifically, the Appellant relies upon the premise that the rules of evidence do not preclude, at a capital sentencing hearing, evidence which establishes or rebuts an aggravating circumstance.

The Appellant is correct in his argument that evidence is not excluded at a capital sentencing hearing merely because the evidence is hearsay. See Tenn. Code Ann. § 39-13-204(c). Thus, as long as evidence or testimony is relevant to the circumstances of the murder, the aggravating circumstances of the murder, or the mitigating circumstances and has probative value in the determination of punishment, such evidence is admissible. See State v. Teague, 897 S.W.2d 248, 250 (Tenn. 1995); see also State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), cert. denied, – U.S. –, 121 S. Ct. 98 (2000). The admission of evidence, however, is not without constraints. Evidence may properly be excluded if it is so unduly prejudicial that it renders the trial fundamentally unfair. See State v. Vincent C. Sims, No. W1998-00634-CCA-R3-DD (Tenn. Crim. App. at Jackson, Mar. 14, 2000), aff'd by, No. W1998-00634-SC-DDT-DD (Tenn. at Jackson, Apr. 17, 2001) (citing State v.

Burns, 979 S.W.2d 276, 282 (Tenn. 1998), cert. denied, 527 U.S. 1039, 119 S. Ct. 2402 (1999); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998), cert. denied, 526 U.S. 1052, 119 S. Ct. 1359 (1999)). Additionally, the admissibility of evidence ultimately is entrusted to the sound discretion of the trial court. State v. Vincent C. Sims, No. W1998-00634-CCA-R3-DD (citing Hutchinson, 898 S.W.2d at 172). Absent an abuse of that discretion, such rulings will not be reversed on appeal. State v. Vincent C. Sims, No. W1998-00634-CCA-R3-DD (citing State v. Caughron, 855 S.W.2d 526, 541 (Tenn.), cert. denied, 510 U.S. 979, 114 S. Ct. 475(1993)).

Initially, we acknowledge that the record belies the Appellant's assertion that the audiotape's admission was sought to rebut the testimony of Dr. Martell. The record is abundantly clear that the Appellant had every opportunity to question Dr. Martell regarding his consideration of the audiotape interview of Ms. Meadlin in making his diagnosis of the Appellant, yet he failed to avail himself of such opportunity. See generally Tenn. R. App. P. 36(a). Additionally, the Appellant fails to offer any valid reason as to why a deposition of Ms. Meadlin was not requested or as to why Detective Postiglione was not called to testify regarding his interview of Ms. Meadlin. See generally Tenn. R. App. P. 36(a). Finally, we fail to comprehend the Appellant's assertion that Ms. Meadlin's statement would rebut Dr. Martell's conclusion that the Appellant's delusional disorder was in substantial remission in the late 1990's when the incidents discussed by Ms. Meadlin occurred in the early 1990's. For these reasons, we cannot conclude that the trial court abused its discretion in excluding introduction of the audiotape interview of Ms. Meadlin. This issue is without merit.

[Deleted: VIII D. Cross-Examination of Janet Kirkpatrick]

[Deleted: IX. Introduction of Victim Impact Evidence]

X. Use of Felony Murder Aggravating Circumstance

The jury returned verdicts finding the Appellant guilty of both premeditated murder and felony murder. The trial court properly merged the verdicts into one count of first-degree murder. At the subsequent sentencing hearing, the State proceeded to the penalty phase intending to prove the felony murder aggravating circumstance, Tenn. Code Ann. § 39-13-204(i)(7). The Appellant's objection was overruled and the State was permitted to use the (i)(7) aggravator. The jury subsequently found the aggravating circumstance applied beyond a reasonable doubt.

In State v. Carter, 958 S.W.2d 620, 624 (Tenn. 1997), our supreme court approved the use of the felony murder aggravating circumstance to a general verdict of first-degree murder. While acknowledging the decision in State v. Carter, 958 S.W.2d at 624, the Appellant contends that the court erred by permitting the State to rely on the felony murder aggravating circumstance to seek a sentence of death because the use of the (i)(7) factor "violates the principles of death-sentencing as

outlined by the Tennessee Supreme Court in Middlebrooks."[13] Essentially, the Appellant invites this court to overrule our supreme court's decision in State v. Carter and adopt the position that the use of the felony murder aggravating circumstance in any case where the defendant is convicted of felony murder is unconstitutional. We decline to do so.

XI. Failure to Instruct on Non-Statutory Mitigators

During the penalty phase of the trial and acting pursuant to statutory authority, the Appellant filed a request for non-statutory mitigating circumstances to be included in the jury charge. Specifically, the non-statutory mitigating circumstances asserted in the request were:

1. Mr. Reid suffers from brain damage.
2. Mr. Reid sustained several brain injuries as a child.
3. Mr. Reid never received adequate treatment for his brain injuries as a child.
4. Mr. Reid has not received adequate treatment for his brain injuries as an adult.
5. Mr. Reid was born with a deformed ear, along with a hearing impairment.
6. Mr. Reid never received adequate medical treatment for his deformed ear and resulting hearing impairment.
7. Mr. Reid suffers from the specific mental illness of schizophrenia.
8. Mr. Reid is unaware that he suffers from schizophrenia.
9. Mr. Reid has never received adequate medical treatment for his schizophrenia.
10. At the time of the offenses, Mr. Reid was not involved in any course of treatment for his schizophrenia.
11. At the time of the offenses, Mr. Reid was not taking any medication to control his schizophrenia.
12. When Mr. Reid was released from prison in Texas, he was not placed on any plan of follow-up medical care for his schizophrenia.
13. As a child, Mr. Reid lacked substantial guidance, discipline, and love from his parents.
14. Mr. Reid's parents were divorced when he was still very young.
15. Mr. Reid was taken from his mother's care at a very early age.
16. Mr. Reid's father was absent a great deal during his early childhood years.
17. Mr. Reid did not start school until he was almost seven years old.

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[13] We note that both the State and the Appellant acknowledge the legislature's response to Middlebrooks in its 1995 amendment to the (i)(7) aggravator. The amended aggravator is applicable where the murder "was *knowingly* committed, solicited, directed, or aided by the defendant, while the defendant had a *substantial* role in committing or attempting to commit [a specific enumerated felony]." Tenn. Code Ann. § 39-13-204(i)(7) (emphasis added). This court has concluded that the amended aggravator, even applied in cases where the sole verdict is that of felony murder, sufficiently narrows the class of death-eligible defendants, thereby creating no Middlebrooks problem. See State v. James P. Stout, No. 02C01-9812-CR-00376 (Tenn. Crim. App. at Jackson, Feb. 20, 2000), perm. to appeal granted, (Tenn.). The Appellant disputes this court's review of the amended statute, arguing that the Middlebrooks analysis is still applicable even with the current language. We find no sound reason to overrule this court's holding in State v. James P. Stout.

18. Mr. Reid was placed in a boys' home at age eight.
19. Mr. Reid was a social outcast as a child.
20. Throughout his childhood years, Mr. Reid had only sporadic school attendance.
21. As a child, Mr. Reid was aware of his sister's sexual abuse at the hands of one of his stepfathers.
22. Mr. Reid lacked any substantial family support as a child, and he continues to lack that support as an adult.
23. In spite of his brain damage, mental illness, and difficult childhood, Mr. Reid has tried to lead a normal lifestyle.
24. Mr. Reid has made efforts to better himself.
25. Mr. Reid obtained his GED, and he then attended college at age 39.
26. In his daily tasks, Mr. Reid is polite and courteous to others.
27. STRICKEN
28. Mr. Reid does well in a structured environment, such as prison.
29. Mr. Reid's convictions in this case were based upon circumstantial evidence.

The trial court denied the Appellant's request to instruct the jury verbatim to the proposed instruction. Instead, the trial court, relying upon State v. Odom and State v. Hodges, found that a verbatim reading of the Appellant's instruction would amount to an unconstitutional comment upon the evidence. The trial court, instead, instructed the jury on the requested mitigators in general categories, including:

3. History of childhood.
4. Mental illness or mental or emotional disturbance.
5. Brain injury or damage.
6. Educational history.
7. Performance in a structured environment.
8. Family history and relationships.

In addition to instructions on specific statutory mitigating circumstances and the above mentioned non-statutory mitigating circumstances, the court provided the jury the following:

9. Any aspect of the defendant's background or character which [you] believe reduces the defendant's blameworthiness.

10. Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The Appellant complains that the court committed reversible error in refusing to instruct the jury on the specific non-statutory mitigating circumstances set forth in his request. He additionally

contends that the manner in which the trial court instructed the jury regarding non-statutory mitigating circumstances did not adequately define for the jury the mitigating evidence presented.

> In State v. Odom, 928 S.W.2d at 31, the supreme court determined that:
> The jury instructions [on mitigating circumstances] are critical in enabling the jury to make a sentencing determination that is demonstrably reliable. To ensure this reliability, the jury must be given specific instructions on those circumstances offered by the capital defendant as justification for a sentence less than death.

The court then recognized the importance of instruction on non-statutory mitigating circumstances as well as on statutorily enumerated mitigating circumstances. See generally Odom, 928 S.W.2d at 31 (citing Tenn. Code Ann. § 39-13-204(e)(1) (no distinction shall be made between statutory mitigators and those raised by the evidence)). However, the supreme court explained that instructions on non-statutory mitigating circumstances must not be fact specific and imply to the jury that the judge had made a finding of fact in contravention of Article VI, section 9 of the Tennessee Constitution. See Odom, 928 S.W.2d at 32 (court recognized risk of instruction amounting to unconstitutional comment upon evidence); see also State v. Hodges, 944 S.W.2d 346, 356 (Tenn.), cert. denied, 522 U.S. 999, 118 S. Ct. 567 (1997). Instead, the instructions on non-statutory mitigating circumstances must be "drafted so that when they are considered by the jury, the statutory mitigating circumstances are indistinguishable from the non-statutory mitigating circumstances." Odom, 928 S.W.2d at 32. In essence, an instruction on a non-statutory mitigating circumstance must be phrased in general categories similar to the statutory mitigating circumstances. See, e.g., Hodges, 944 S.W.2d at 355-356; Odom, 928 S.W.2d at 33.

Again, the Appellant essentially complains that the trial court's lack of specificity and instruction in general categories defeated the purpose of the instructions and did not convey a fair picture of the mitigation proof. This identical argument was rejected by our supreme court in State v. Hodges, 944 S.W.2d at 356. In Hodges, the defendant argued that the trial court erred by denying his requested instructions on non-statutory mitigating circumstances. Hodges, 944 S.W.2d at 351. Instead, the trial court had instructed the jury on the following non-statutory mitigating circumstances: history of childhood; victim of child sex abuse; mental illness or mental or emotional disturbance; dominance by another person and/or immaturity; drug abuse; and any other aspect of the defendant's background or character or the circumstances of the offense, which would reduce the defendant's blameworthiness. Id. at 355. In reviewing the instructions on mitigating circumstances, the supreme court emphasized that a jury instruction on mitigating circumstances can be found "prejudicially erroneous" only if "it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." Hodges, 944 S.W.2d at 352. The court observed that " '[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.' " Id. at 352 (quoting Boyde v. California, 494 U.S. 370, 380-81, 110 S. Ct. 1190 (1990)). Our supreme court explained:

> Jurors interpret the instructions in a common sense manner and in light of the evidence presented at the trial. The defense assertion ignores the reality that these

> jurors had heard specific evidence during the sentencing hearing about the defendant's childhood, his immaturity, alleged sexual abuse, drug abuse, mental illness and emotional disturbance, as well as the dominance by Tina Brown. By their breadth, the instructions on non-statutory mitigating circumstances encompassed all the evidence presented by the defense at the sentencing hearing .... [T]he defendant's claim of error is without merit.

Hodges, 944 S.W.2d at 356 (citations omitted). While the instructions specifically requested by the defendant were not given, other instructions, as enumerated above, were provided to the jury, which "encompassed all the evidence" the defendant presented. Id.; see also Brimmer v. State, 29 S.W.3d 497, 520-521 (Tenn. Crim. App. 1998).

In the instant case, the trial court clearly followed the directives of Odom and the example provided in Hodges. We conclude that the instructions provided by the trial court were substantially the same as those requested by the Appellant and that the instructions fairly submitted to the jury the legal issues. See, e.g., Hodges, 944 S.W.2d at 356; State v. Rudolph Munn, No. 01C01-9801-CC-00007 (Tenn. Crim. App. Apr. 1, 1999), perm. to appeal granted, (Tenn. Nov. 9, 1999). Accordingly, the trial court's refusal to instruct the jury as to the proffered non-statutory mitigating circumstances was not error. This claim is without merit.

XII. Sentence for Especially Aggravated Robbery

Following a sentencing hearing, the trial court sentenced the Appellant, as a Range I standard offender, to twenty-five years for the especially aggravated robbery conviction. The trial court further ordered that the sentence be served consecutively to the death sentences imposed in this case and consecutively to a sentence in Texas for which the Appellant was on parole at the time the offense was committed. On appeal, the Appellant argues that the trial court erred by imposing the maximum sentence for the especially aggravated robbery conviction and erred in ordering the especially aggravated robbery conviction to run consecutively to his death sentences.

The Appellant bears the burden of establishing that the sentence imposed by the trial court was erroneous. State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Boggs, 932 S.W.2d 467, 473 (Tenn. Crim. App. 1996); State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991). Appellate review of a sentence is *de novo*, with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d) (1997); Ashby, 823 S.W.2d at 169. In determining whether the Appellant has carried the burden, this court must consider the evidence received at the trial and the sentencing hearing, the pre-sentence report, the principles of sentencing, the arguments of counsel, the nature and characteristics of the offenses, existing mitigating and enhancing factors, statements made by the offender, and the potential for rehabilitation. Tenn. Code Ann. § 40-35-210 (Supp. 1998); Ashby, 823 S.W.2d at 169.

A. Enhancement Factors

Especially aggravated robbery is a class A felony. Tenn. Code Ann. § 39-13-403(b). As a Range I standard offender, the sentencing range for especially aggravated robbery is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1) (1997). The trial court sentenced the Appellant to the maximum sentence of twenty-five years for the especially aggravated robbery conviction. During sentencing, the trial court applied the following seven enhancement factors:

> 1. The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.
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> 3. The offense involved more than one victim.
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> 5. The defendant treated or allowed a victim to be treated with exceptional cruelty.
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> 10. The defendant had no hesitation about committing a crime when the risk to human life was high.
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> 12. During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or person other than the intended victim.
>
> 13(B). The felony was committed while on any of the following forms of release if such release is from a prior felony conviction . . . parole.
>
> 16. The crime was committed under circumstances under which the potential for bodily injury to the victim was great.

Tenn. Code Ann. § 40-35-114(1), (3), (5), (10), (12), (13(b)), (16) (1997). Additionally, the trial court applied mitigating factor 8 based upon the Appellant's mental condition, and applied mitigating factor 13 based upon "the majority of the testimony" developed during the capital penalty phase, including the Appellant's childhood history and his family history. Tenn. Code Ann. § 40-35-113(8), (13) (1997). On appeal, the Appellant only challenges the trial court's application of enhancement factors (3), (5), (10), and (16).

First, the Appellant contests the application of enhancement factor (3), "that the offense involved more than one victim." Specifically, the Appellant contends that because only one victim, Steve Hampton, was named in the indictment upon which he was convicted of especially aggravated robbery that the other victim, Sarah Jackson, cannot also be considered a victim of especially aggravated robbery. The Appellant further argues that there was no evidence at trial to prove that the perpetrator ever robbed or attempted to rob Sarah Jackson. Thus, the Appellant asserts, the trial

court's application of enhancement factor 3 was erroneous. When applying this factor, however, the trial court reasoned that Sarah Jackson was also a victim of the robbery. We agree.

This court has defined "victim," as used in Tenn. Code Ann. § 40-35-114(3), as being limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime. State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994). This court has also held that factor (3) may not be applied to enhance a sentence when the Appellant is separately convicted of the offenses committed against each victim. State v. Williamson, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995); see State v. Lambert, 741 S.W.2d 127 (Tenn. Crim. App. 1987). Accordingly, statutory enhancement factor (3) does not apply when there are separate convictions for each victim. State v. Freeman, 943 S.W.2d 25, 31 (Tenn. Crim. App. 1996). Because the Appellant was not convicted of separate offenses against each victim, and because Sarah Jackson was clearly a victim as defined in Raines, the trial court properly applied enhancement factor (3) during sentencing. This issue is without merit.

Second, the Appellant challenges the trial court's application of enhancement factor (5), that "the defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense." Specifically, the Appellant contends that "there is no evidence in the record suggesting that either of the victims were subjected to the type of torture that would justify the application of § 40-35-114(5)." At sentencing, the trial court applied factor (5) because there was evidence in the record that Sarah Jackson had moved after she was shot.

Tennessee Code Annotated section 40-35-114 provides that enhancement factors must be "appropriate for the offense" and "not themselves essential elements of the offense." Accordingly, enhancement factors based on facts which are used to prove the offense or which establish the elements of the offense are excluded. State v. Poole, 945 S.W.2d 93, 98 (Tenn.1997). Moreover, because "exceptional cruelty" is inherent in some offenses such as aggravated assault, the facts must demonstrate a culpability distinct from and greater than that incident to the offense. Id. "Exceptional cruelty," when used as an enhancement factor, denotes the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged. Thus, cruelty requires more than the physical infliction of serious bodily injury upon a victim.

We first note that "exceptional cruelty" is not an element of especially aggravated robbery. Tenn. Code Ann. § 39-13-403(a)(2); Poole, 945 S.W.2d at 98. Moreover, proof of serious bodily injury, which is an element of especially aggravated robbery, does not necessarily establish the enhancement factor of "exceptional cruelty." Poole, S.W.2d at 98. Exceptional cruelty is usually found in cases of abuse or torture. State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

This court has recognized that "exceptional cruelty" is a matter of degree. State v. Moore, No. 02C01-9306-CC-00126 (Tenn .Crim. App. at Jackson, Jun. 8, 1994). In this regard, we first note that the taking of a life is not necessary to accomplish the offense of especially aggravated robbery. Additionally, the proof in this case established that the Appellant forced the victims onto

the floor in the walk-in cooler. The anguish experienced by the victims at this point while they awaited their execution is unfathomable. Based upon the manner in which this crime was committed, and its consequences, we find that the Appellant's conduct established not only the infliction of serious bodily injury but also a calculated indifference toward suffering. Thus, we find application of enhancement factor (5) appropriate.

Finally, the Appellant challenges the trial court's application of enhancement factor (10), that the defendant had no hesitation about committing a crime when the risk to human life was high, and enhancement factor (16), that the crime was committed under circumstances under which the potential for bodily injury to the victim was great. Specifically, the Appellant argues that neither enhancement factor can apply because both are factors inherent to the offense of especially aggravated robbery.

With respect to enhancement factor (10), risk to human life is an essential element of the crime of especially aggravated robbery and cannot be used to enhance sentencing when the person facing danger is the named victim. See Tenn. Code Ann. § 40-35-114; State v. Nox, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1998). However, this court has held that enhancement factor (10) may be applied where the defendant creates a high risk to the life of a person other than the named victim. State v. Bingham, 910 S.W.2d 448, 452-53 (Tenn. Crim. App. 1995). We conclude that the presence of Sarah Jackson, who was not named in the indictment, during the robbery of Steve Hampton created a high risk to her life, which ultimately and unfortunately resulted in her death. Accordingly, the trial court properly applied enhancement factor (10). Enhancement factor (16), however, is inapplicable to the offense of especially aggravated robbery as bodily injury is an element of the offense. Nix, 922 S.W.2d at 903. Thus, the trial court erroneously applied factor (16). Notwithstanding the erroneous application of enhancement factor (16), we believe that the remaining six enhancement factors balanced against the two mitigating factors, fully support the maximum twenty-five year sentence imposed by the trial court.

B. Consecutive Sentencing

The Appellant next argues that the trial court erred by ordering the especially aggravated robbery conviction to be served consecutively to the death sentences imposed in this case. Specifically, he asserts that "a sentence to be served consecutively to a sentence of death is not the least severe sentence necessary to achieve the purposes for which the sentence is imposed." Our supreme court has consistently upheld sentences consecutive to a death sentence. See generally Morris, 24 S.W.3d at 788; State v. Pike, 978 S.W.2d 904, 928 (Tenn. 1998); State v. Black, 815 S.W.2d 166, 170 (Tenn. 1991). Thus, this issue is without merit.

XIII. Constitutionality of Tennessee's Death Penalty Statutes

The Appellant raises a myriad of challenges to the constitutionality of Tennessee's death penalty provisions. The challenges raised by the Appellant have been previously examined and

rejected by case law decisions. The body of law upholding the constitutionality of Tennessee's death penalty provisions, specifically that rejecting the claims currently raised by the Appellant, are recited as follows:

> 1. Tennessee's death penalty statutes meaningfully narrow the class of death eligible defendants; specifically, the statutory aggravating circumstances set forth in Tenn. Code Ann. § 39-13-204(i)(2), (i)(6), and (i)(7), whether viewed singly or collectively, provide a "meaningful basis" for narrowing the population of those convicted of first-degree murder to those eligible for the sentence of death. See Vann, 976 S.W.2d at 117-118 (Appendix); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).
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> 2. The death sentence is not capriciously and arbitrarily imposed in that
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> > (a) The prosecutor is not vested with unlimited discretion as to whether or not to seek the death penalty. See State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995), cert. denied, 519 U.S. 847, 117 S. Ct. 133 (1996).
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> > (b) The death penalty is not imposed in a discriminatory manner based upon economics, race, geography, and gender. See Hines, 919 S.W.2d at 582; Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d at 23.
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> > (c) Standards or procedures for jury selection exist to insure open inquiry concerning potentially prejudicial subject matter. See Caughron, 855 S.W.2d at 542.
> >
> > (d) The death qualification process does not skew the make-up of the jury and does not result in a relatively prosecution prone guilty-prone jury. See Teel, 793 S.W.2d at 246; State v. Harbison, 704 S.W.2d 314, 318 (Tenn.), cert. denied, 470 U.S. 1153, 106 S. Ct. 2261 (1986).
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> > (e) Defendants are not unconstitutionally prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, *i.e.*, the cost of incarceration versus cost of execution, deterrence, method of execution. See Brimmer, 876 S.W.2d at 86-87; Cazes, 875 S.W.2d at 268; Black, 815 S.W.2d at 179.
> >
> > (f) The jury is not instructed that it must agree unanimously in order to impose a life sentence, and is not prohibited from being told the effect of a non-unanimous verdict. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d at 22-23.

(g) Requiring the jury to agree unanimously to a life verdict does not violate Mills v. Maryland and McKoy v. North Carolina. See Brimmer, 876 S.W.2d at 87; Thompson, 768 S.W.2d at 250; State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), superseded by statute as recognized by, Hutchinson, 898 S.W.2d at161.

(h) The jury is required to make the ultimate determination that death is the appropriate penalty. See Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22.

(i) The failure to instruct on "the meaning and function of" mitigating circumstances was considered in State v. Thompson, 768 S.W.2d 239, 251-52 (Tenn. 1989), and found not to constitute error.

(j) The defendant is not denied closing argument in the penalty phase of the trial. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542.

3. The appellate review process in death penalty cases is constitutionally adequate. See Cazes, 875 S.W.2d at 270-71; Harris, 839 S.W.2d at 77. Moreover, the supreme court has recently held that, "while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." See State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536 (1998).

4. Electrocution is a constitutionally permissible method of execution.[14] See Black, 815 S.W.2d at 179; see also Hines, 919 S.W.2d at 582.

[Deleted: XIV. Proportionality of Sentences of Death]

Conclusion

After a thorough review of the issues and the record before us, as mandated by Tenn. Code Ann. §§ 39-13-206(b), and (c), and for the reasons stated herein, we affirm the Appellant's convictions for two counts of first-degree murder and one count of especially aggravated robbery and accompanying sentences of death plus twenty-five years. In accordance with the mandate of Tenn.

[14] Recent legislation in this state has substituted death by lethal injection for death by electrocution. See Tenn. Code Ann. § 40-23-114 (1998 Supp.) (changes method of execution from electrocution to lethal injection for those persons sentenced to death after January 1, 1999). The new statute also provides that those persons sentenced to death prior to January 1, 1999, may choose to be executed by lethal injection by signing a written waiver. Hence, the Appellant's argument has not only been rejected by prior decisions but, now, also is irrelevant, as the capital defendant is no longer subjected to death by electrocution.

Code Ann. § 39-13-206(c)(1) and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find that the sentences of death were not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances, and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. See Tenn. Code Ann. § 39-13-206(c)(1)(A),(C). A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentences of death are neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, we affirm the Appellant's convictions for two counts of first-degree murder and one count of especially aggravated robbery and the resulting sentences of death plus twenty-five years imposed by the trial court.

DAVID G. HAYES, JUDGE

CONCUR:
JOHN EVERETT WILLIAMS, Judge
JAMES CURWOOD WITT, JR., Judge