

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1994 SESSION

**FILED**

November 10, 1997

**Cecil W. Crowson**  
Appellate Court Clerk

DAVID CARL DUNCAN )  
 )  
 APPELLANT )  
 )  
 VS. )  
 )  
 STATE OF TENNESSEE )  
 )  
 APPELLEE )

NO. 01C01-9510-CR-00347  
NO. 01C01-9311-CR-00412  
SUMNER CRIMINAL  
HON. FRED KELLY, III  
HON. JANE WHEATCRAFT  
(Post-Conviction Relief)

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

AFFIRMED

JERRY SCOTT, SPECIAL JUDGE

**OPINION**

The appellant, David Carl Duncan, was convicted of murder in the first degree for which he received a sentence of death by electrocution. On appeal to the Tennessee Supreme Court his conviction was affirmed. State v. Duncan, 698 S.W.2d 63 (Tenn. 1995). His petition for certiorari was denied by the United States Supreme Court. Duncan v. Tennessee, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986).

On December 23, 1986, the appellant filed his first petition for post-conviction relief. Following an evidentiary hearing, relief was denied. The denial was affirmed by this Court. David Carl Duncan v. State of Tennessee, Tennessee Criminal Appeals, opinion filed at Nashville, February 9, 1988. The Tennessee Supreme Court denied permission to appeal on May 2, 1988.

On December 7, 1988, the appellant filed his second petition for post-conviction relief. Following an evidentiary hearing, that petition was also dismissed. While the dismissal of that petition was on appeal, the appellant filed a motion for consideration of post-judgment facts and for remand for further proof. The motion to consider post-judgment facts was denied, but the motion to remand was granted, pending resolution of a third petition for post-conviction relief, which had been filed twelve days before the motion to consider post judgment facts was filed. (Also, while the second petition for post- conviction relief was on appeal to this Court, the appellant filed a petition for the writ of habeas corpus, which was summarily dismissed by the trial court. On appeal to this Court, the dismissal was affirmed. David Carl Duncan v. State of Tennessee, Tennessee Criminal Appeals, opinion filed at Nashville, August 26, 1993. Permission to appeal was denied by the Tennessee Supreme Court on December 28, 1993.)

The third petition for post-conviction relief was denied after an evidentiary hearing and it is that denial and the denial of the second petition for post-conviction

relief which are the subject of this opinion, the appeals having been consolidated by order of this panel of this Court.

In one issue the appellant contends that the opinion of the Tennessee Supreme Court in State v. Trusty, 919 S.W.2d 305, 312 (Tenn. 1996) should be applied retroactively and that his conviction should be reversed and the cause remanded to the trial court “for further proceedings.”

In Trusty, the Supreme Court held that one who was indicted for attempted first degree murder cannot be convicted of aggravated assault, because a conviction for an unindicted offense that is not a lesser degree of the charged offense cannot stand because such a conviction offends the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution which require that the accused in a criminal prosecution be informed of the “nature and cause of the accusation.” Trusty, 919 S.W.2d at 309.

In this case, the indictment charges that the appellant “did unlawfully, feloniously, wilfully, with premeditation and malice aforethought kill and murder Ruby Evelyn Burgess in the perpetration of the act of aggravated rape on Ruby Evelyn Burgess and, therefore, David Carl Duncan did commit murder in the first degree.” This was the standard language used in indictments for felony murder, having been approved by the Tennessee Supreme Court in Sullivan v. State, 173 Tenn. 475, 121 S.W.2d 535, 537-38 (1938).

The appellant argues that because the trial judge charged the jury concerning both common law murder in the first degree and felony murder that it is impossible to determine of which offense they found the appellant guilty. Thus, he reasons that Trusty applies and that his conviction must be reversed.

In his petition for the writ of habeas corpus which he previously filed the appellant made the same contention, i. e., that the indictment failed to charge all of the elements of common law first degree murder, that the trial judge improperly instructed the jury regarding common law first degree murder and that was the offense of which he was convicted. On appeal to this Court, a panel of this Court, speaking through Judge Joseph M. Tipton held “(c)learly, the indictment charges first degree murder in terms of felony murder, the guilty verdict returned by the jury for ‘murder in the first degree’ under the indictment is ‘valid on its face’ and the conviction is not invalid because the jury failed to return a verdict of guilty of ‘murder in the perpetration of a felony.’” David Carl Duncan v. State of Tennessee, Tennessee Criminal Appeals, opinion filed at Nashville, August 26, 1993. As previously noted the appellant sought review of this Court’s opinion dismissing that habeas corpus petition by the Tennessee Supreme Court and the Court refused to grant his application for permission to appeal on December 28, 1993.<sup>1</sup> Thus, it is clear that this issue has already been addressed and rejected by a panel of this Court and by the Tennessee Supreme Court. This issue clearly has no merit.

In two other issues the appellant contends that the prosecution’s failure to provide defense counsel with investigative reports regarding a former boyfriend of the victim rendered his conviction and sentence void or voidable. He asserts that this evidence was “exculpatory or favorable” and that the fact that it was not revealed “put the whole case in such a different light as to undermine confidence” in the conviction and sentence.

The victim had previously had a tumultuous and violent relationship with David Key prior to 1977. However, they had not had any relationship for approximately four years before Ms. Burgess’ murder. Nevertheless, Mr. Key was interviewed

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<sup>1</sup>It is interesting to note that Justice Penny White who wrote the opinion on Trusty was not a member of the Supreme Court when the appellant’s application for permission to appeal was considered, but she was a member of the panel of this Court which affirmed the dismissal.

immediately after the murder investigation began. He had an alibi that was checked and verified by a Gallatin Police Department detective. In addition to giving his sworn statement, Mr. Key agreed to submit to a polygraph examination, which was administered with no indication of deception being found. Four fingerprints found on a sweating bottle of Tropicana fruit punch at the scene of the murder were found not to be Mr. Key's fingerprints. They were clearly identified as the appellant's fingerprints.

The appellant insists that Mr. Key had a motive to kill the victim because Ms. Burgess had reported Mr. Key to the Internal Revenue Service for claiming his dog as a dependent. However, the proof revealed that Mr. Key was not even aware of her report to the IRS prior to the demise of Ms. Burgess.<sup>2</sup>

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963) requires the prosecution, upon request, to provide defense counsel with any "evidence favorable to an accused." The failure to do so amounts to suppression of evidence and violates due process "irrespective of the good faith or bad faith" of the prosecution.

This Court has held that such non-disclosure offends the due process guaranties of the United States Constitution and the Tennessee Constitution. State v. Marshall, 845 S.W.2d 228, 234 (Tenn. Crim. App. 1992).

The Seventh Circuit has delineated three criteria for making out a successful claim of a Brady violation. First, it must be established that the prosecutor suppressed the evidence; then it must be shown that the evidence was favorable to the defense; and finally it must be shown that the evidence was material. United States v. Driver,

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<sup>2</sup>Although Mr. Key was the central figure in the testimony regarding this issue, he was not asked to testify at the post-conviction hearing.

798 F.2d 248, 250 (7th Cir. 1986). This Court has delineated the same three requirements with a fourth added that the accused made a proper request for the evidence. State v. Spurlock, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993).

There can be no doubt that the defense made a proper request for any Brady material. The State concedes that the prosecutor suppressed the evidence in that it was not revealed to the defense and that it was favorable to the defense “by virtue of the nature of the information presented.” However, the State contends that the information was not “material” in the context of Brady.

In Kyles v. Whitley, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1555, 1566-67, 131 L.Ed.2d 490 (1995), the United States Supreme Court provided additional guidance as to the definition of “material” in the context of Brady material. First, there is no requirement that it be demonstrated by a preponderance of the evidence that the defendant would be acquitted if the evidence was available. Second, materiality is not judged by a sufficiency of the evidence test. Next, materiality precludes a harmless error analysis. Finally, suppressed evidence must be considered collectively, not item-by-item. However, as the Sixth Circuit Court of Appeals has held, there is no constitutional remedy unless the defendant can show that the nondisclosure deprived him of a fair trial. United States v. Presser, 844 F.2d 1275, 1281-82 (6th Cir. 1988).

We cannot say from the evidence adduced that the appellant was in any way deprived of a fair trial in this case by the nondisclosure of the information about Mr. Key. There was absolutely no evidence that Mr. Key killed Ms. Burgess or that he was anywhere near the market at the time of the murder. Without more than the fact that Mr. Key once had a stormy relationship with the victim, all of the evidence about him was irrelevant. These issues have no merit.

Following the second post-conviction hearing, the appellant filed his brief in which he raised twenty-three issues with several sub-issues.

First, he alleges that he was put to trial upon homicide offenses not charged, i.e., that it is not clear whether the jury found him guilty of common law first degree murder or felony murder. As the appellant concedes in his brief, this is the same issue addressed and rejected by this Court in David Carl Duncan v. State of Tennessee, Tennessee Criminal Appeals, opinion filed at Nashville August 26, 1993. Thus, this is a matter already decided adversely to the appellant by Judge Tipton's opinion in that habeas corpus case and cannot be relitigated in a subsequent post-conviction proceeding.

In the next issue, the appellant contends that his sentence of death is void or voidable based upon State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992). However, in Middlebrooks, the Tennessee Supreme Court overruled State v. Smith, 755 S.W.2d 757, 768 (Tenn. 1988) and its progeny, but did not intimate that the opinion would be applied retroactively. However, in Barber v. State, 889 S.W.2d 185, 187 (Tenn. 1994), the Supreme Court held that Middlebrooks will be applied retroactively.

In Middlebrooks, the Supreme Court found that when a defendant is convicted of felony murder the aggravating circumstance that the murder was committed while committing an enumerated felony cannot alone be the basis for the imposition of the death penalty. Middlebrooks, 840 S.W.2d at 306. However, as noted by our Supreme Court in the opinion in this case on direct appeal, the jury found two aggravating factors were present. In addition to the commission of the offense while engaged in a rape and robbery, the jury also found the murder especially heinous, atrocious and cruel. Duncan, 698 S.W.2d at 67. Having conducted the same analysis the Supreme Court conducted in Barber, 889 S.W.2d at 189, we conclude, as the

Supreme Court did in Barber, beyond a reasonable doubt that “the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor.” This issue has no merit.

Next, the appellant contends that the failure of the trial judge to define the terms “heinous,” “atrocious,” “cruel,” “torture,” and “depravity of mind” constitutes prejudicial error of constitutional dimension. The appellant admits that the Tennessee Supreme Court addressed and rejected this issue in its opinion on his direct appeal, Duncan, 898 S.W.2d at 70-71, but contends that the Supreme Court “committed such fundamental error, which is so egregiously prejudicial to the judicial process, as now requires post-conviction relief.” Be that as it may, this Court, as an intermediate appellate court, is powerless to set aside a judgment of the Tennessee Supreme Court, which is the final authority on all matters of Tennessee law in which is vested “[t]he supreme judicial power of this State.” In Re: Burson, 909 S.W.2d 768, 772 (Tenn. 1995). This issue has no merit.

Next, the appellant contends that “much exculpatory evidence” was withheld from defense counsel in violation of Brady and its progeny.

First, the appellant points to a report by Danny White, a Deputy Sheriff, that he saw the victim standing behind the counter at 5:10 A.M. and that at 5:34 A.M. he saw a black Cordova automobile bearing Nashville tags with two black men inside at a location about .7 mile from the scene of the murder. He did not stop the car and the murder of Ms. Burgess was reported four minutes later. The appellant’s counsel suggested that Glen David Randolph resembled the composite drawing of the alleged murderer and that Mr. Randolph had a similar car.

He contends that the failure to disclose the sighting of that automobile (which, as previously noted, was not stopped by Mr. White, nor were the occupants ever



identified) was exculpatory evidence which should have been disclosed to defense counsel. The mere presence of a vehicle with black male occupants at a location nearly a mile from the scene at about the time of the crime was not, without more, “exculpatory” evidence.

The test for materiality of undisclosed exculpatory evidence is whether there is “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). In this case, there is no such probability. Given the evidence against the appellant, the evidence about the car and its occupants could not have affected the verdict.

As to the nondisclosure of Brady material, the appellant argues that the State failed to disclose that police had been given a description of a green Army jacket worn by the killer after a witness testified that the appellant was wearing a dark colored windbreaker.

William Rogan, a Gallatin police officer, testified that he was attempting to locate some suspects in this case and that he encountered one person who matched the description of the killer who was wearing a green Army-type jacket. The person was quickly ruled out as a suspect and the appellant concedes in his brief that that determination was correct. Thus, what that suspect was wearing at the time the officer spoke with him is not exculpatory evidence and the failure to reveal what that person was wearing was not a Brady violation.

As to the Brady issue, the appellant finally contends that the circumstances of this case “strongly suggest” that a prosecution witness was afforded “lenient treatment” with regard to her pending felony drug charge only after she testified against the appellant. However, no evidence was presented that the witness, Linda

Kelly, was afforded any preferential treatment because she testified at the appellant's trial. Indeed, both Ms. Kelly and the District Attorney General testified to the contrary.<sup>3</sup> This sub-issue and the entire Brady issue lack merit.

Next, the appellant contends that the limitation on Ms. Kelly's cross-examination at trial unconstitutionally abridged his right to confrontation and cross-examination. In this issue, he again attacks Ms. Kelly, contending that trial defense counsel's attempt to cross-examine her concerning a pending charge of selling marijuana should have been allowed by the trial judge and that to limit his cross-examination on that issue denied him his right to confrontation and cross-examination.

As previously set forth, both Ms. Kelly and the District Attorney General denied any relationship between the plea bargain and her earlier testimony and the appellant presented no proof to rebut their testimony. Thus, the post-conviction judge did not err by finding no constitutional violation from the refusal to allow cross-examination regarding the pending marijuana charge and her impending guilty plea. This issue has no merit.

Next, the appellant contends that the trial judge's decision to allow the jury to deliberate until 11:40 P.M. on the issue of the penalty to be imposed was plain and prejudicial error of constitutional dimension, even though there was no objection by trial defense counsel.

Although this Court has opined that late night court sessions should be held only when required by unusual circumstances, State v. Parton, 817 S.W.2d 28, 33-34 (Tenn. Crim. App. 1991), the Tennessee Supreme Court has held that the determination of how long into the evening a trial should continue is a matter within

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<sup>3</sup>The District Attorney General testified the favorable plea bargain with Ms. Kelly was related to the poor quality of his proof against her, not her trial testimony.

the discretion of the trial court. State v. Poe, 755 S.W.2d 41, 47 (Tenn. 1988). The Supreme Court has never intimated that late night court sessions abridge any constitutional right and only errors of constitutional dimension -- under either the United States Constitution or the Tennessee Constitution -- are grounds for the granting of post-conviction relief. Tenn. Code Ann. § 40-30-203.

Next, the appellant contends that the failure of defense counsel to offer any proof at the penalty phase of a capital case falls below the standard of competence expected of defense counsel in capital cases.

As to this issue the trial court found:

[m]uch of the Petitioner's thrust concerns the lack of preparation or the fact that no testimony was presented on behalf of the Petitioner at the sentencing phase of the trial. Upon hearing all of the background, the Court finds no reason for requesting a psychological examination of the Petitioner and that there was no defense at the sentencing hearing that had not been previously presented at the guilt phase. Contrary to the allegations, testimony regarding the Petitioner's character was filled with pitfalls and could have been of little benefit to the Petitioner and may well have resulted in exacerbating his plight. The nature of the crime committed was especially heinous in that the victim was dragged to the back of the market, raped, and murdered by having her throat cut with evidence of struggle and all the horrible aspects of fear, pain and death by the nature of the wound which would accompany such a crime.

Considerable testimony was presented to the effect that the deprived background of the Petitioner should have been presented to the Jury at the sentencing phase. Simply put, the Court finds that the facts do not support the allegations of the Petitioner's childhood. He suffered no hunger, no deprivation of clothing or living conditions and the only abuse was verbal when his father would occasionally be under the influence of alcohol. While not an ideal family condition, the Petitioner's youth was ordinary and not unusual for the many persons in that time and place. The defendant's father was a well thought of black man who held janitorial positions in two banks in Gallatin and was fully trusted by both institutions. The Petitioner's mother can be described as kind, religious, wise, and well respected in her community. The Court finds that there was nothing in Petitioner's background that would disclose him to have psychological

defects that would have been considered exculpatory by the Jury.

The questions regarding the correctness of the sentences rendered by the Jury has been decided previously on appeals and the previous Post-Conviction Relief Petition. The Court finds that the testimony presented was not credible enough to raise a serious challenge to the previous decisions by the various Courts nor to warrant further proceedings. It was obvious to this Court that much of the testimony was calculated to be of what little assistance it might be to the Petitioner. The Petitioner's trial attorney was aware of all of these facts and weighed both the pro and con and there is no basis for second guessing his decisions at trial and no prejudice to the Petitioner has been shown.

The trial court's findings of fact at a post-conviction proceeding have the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against the findings. Turner v. State, 698 S.W.2d 90, 91 (Tenn. Crim. App. 1985). The evidence does not preponderate against the trial judge's findings. This issue has no merit.

Next, the appellant contends that his defense counsel's failure to require the State to elect between the felony murder count of the indictment and the count charging the underlying felony amounted to ineffective assistance of counsel. The State conceded that it was, at the time of the appellant's trial, a double jeopardy violation for a defendant to be convicted of both felony murder and the underlying felony. See Briggs v. State, 573 S.W.2d 157, 159 (Tenn. 1978).<sup>4</sup> Therefore, had counsel moved to dismiss the rape count of the indictment, the motion would undoubtedly have been granted. However, that is not to say that the evidence of the rape would have been excluded. Obviously, the same evidence would have been presented and it is clear that the evidence of the murder resulted in the punishment of death, not the rape. Thus, it is clear beyond a reasonable doubt that any error was harmless and did not affect the sentence of death in any way.

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<sup>4</sup>That holding has since been overruled. Blackburn v. State, 694 S.W.2d 934, 937 (Tenn. 1985).

Next, he contends that the prosecutor unconstitutionally injected a gratuitous appeal to racial prejudice into his rebuttal argument at the guilt phase when he said:

“I’m sure [Linda Kelly] was kind of nervous and upset to come in here and testify. She was put under subpoena to do it. And she might not have wanted to come in here and testify about a black man here in Gallatin, Tennessee who has committed first degree murder and rape and robbery.”

On direct appeal the appellant challenged fifteen different aspects of the prosecutor’s argument. While this issue was not raised, our Supreme Court reviewed the entire argument and found that the argument was proper except in one unrelated particular, finding that if that portion was error, it was harmless. Duncan, 698 S.W.2d at 70. This issue has no merit.

Next, the appellant contends that the evidence that he took property “from the person” of the victim was not proven beyond a reasonable doubt and that his conviction of armed robbery was therefore constitutionally infirm.

Again, this was a matter addressed by our Supreme Court on direct appeal and our highest court found that “[t]here is no question but that the crimes of murder, aggravated rape, and robbery were committed, and the evidence, though circumstantial, points unerringly to the defendant as the person guilty of the crimes.” Duncan, 693 S.W.2d at 67. That finding, like all other findings of the Supreme Court, is not subject to reexamination by this intermediate appellate court and this issue has no merit. Furthermore, sufficiency of the evidence is not a matter cognizable in post-conviction proceedings. Brotherton v. State, 477 S.W.2d 522, 524 (Tenn. Crim. App. 1971).

Next, the appellant says the trial judge, by his instructions to the jury, impermissibly relieved the State of its burden to prove the killing was malicious.

In State v. King, 694 S.W.2d 941, 946 (Tenn. 1985), our Supreme Court, speaking through the late Justice Harbison, reviewed its prior holdings, and specifically found that felony murder does not require proof of malice. This issue has no merit.

Next, the appellant contends that his trial defense counsel's failure to request the Court's approval of assistance from and/or funding for qualified forensic experts deprived him of the effective assistance of counsel.

As the appellant noted in his brief, his trial predated the express authority for the employment of defense experts at state expense, Tenn. Code Ann. § 40-14-207(b), Supreme Court Rule 13. He relies on this Court's opinion in State v. Goodman, 643 S.W.2d 375, 379 (Tenn. Crim. App. 1982)(which also antedates the same authorities) for the proposition that "employment of an expert at state expense is not authorized or required in the absence of a threshold showing a denial of due process by the failure to employ such an expert." He contends the threshold showing was made in this case.

At the post-conviction relief hearing, the appellant offered the affidavit of Dr. Kris Sperry, a forensic pathologist and Dr. Gilliam Blair, a clinical psychologist.

Through Dr. Sperry he sought to show that none of the evidence adduced at the trial showed that the victim was raped, since the evidence of sexual penetration of the victim was as consistent with consensual sex as with forcible rape because there was no evidence of trauma to her vaginal area and there was no evidence of when the semen found in her vagina was deposited there.

However, as our Supreme Court noted in its opinion, the presence of semen was not the only evidence that the victim was raped. Her "still-warm" partially nude

body was found with her pants and undergarments pulled down around her lower right leg. Her clothes were torn and there were bruises on her thighs. Duncan, 698 S.W.2d at 65-66, 69.

Thus, even if Dr. Sperry's opinion had been presented to the jury the outcome on the issue of whether the victim was raped would have been the same.

Dr. Sperry also questioned the Sumner County medical examiner's findings that the victim died from an air embolism, that she was in a prone position when her throat was cut, and that her throat was cut with a hawk bill knife. Be all that as it may, the proof showed that the victim's throat was cut and she died from that cutting and Dr. Sperry agrees that was the cause of her death. Thus, any such evidence from Dr. Sperry would not have changed the outcome of the trial in any way whatsoever.

Dr. Sperry, noting that the lack of a complete autopsy was nothing short of astounding, also found that the medical examiner could have performed several enzymatic tests to subidentify seminal fluid to a much smaller group than the population of Type O secretors. However, he has presented no proof that such testimony would have excluded him as the perpetrator.

Finally, he concluded that a defense forensic expert could have been of invaluable assistance to the defendant in cross-examining the State's experts and adducing defense evidence for their case in chief and the failure to seek such assistance seriously undermined confidence in the verdict of guilt and the death sentence.

While it can hardly be doubted that such an expert would have been helpful to the defense in those tasks, it does not follow that the failure to request such assistance -- at a time when under Goodman, 683 S.W.2d at 379, it was necessary

to show that it was a denial of due process not to have such assistance – undermined the verdict of guilt and the sentence of death.

As to the psychological evidence, Dr. Blair opined that the appellant did not suffer from a diagnosable mental illness. Thus, the appellant reasons that the jury could well have found a lack of future dangerousness as a mitigating factor.

There is no evidence that the lack of mental illness equates to lack of dangerousness. Indeed, given the horrible facts of this murder, evidence that the appellant was not mentally ill could just as well have convinced the jury that the appellant was a very dangerous individual who must be sentenced to death.

Next, the appellant contends that the trial judge's jury instructions at the penalty phase left the incorrect impression that mitigating circumstances had to be found unanimously in order to impose a life sentence.

The appellant quoted two paragraphs from the judge's charge which he claims has the "unfortunate effect" of equating the requirement that aggravating factors be unanimously found beyond a reasonable doubt with a similar requirement for mitigating factors. The jury instructions contain no such language. In the charge the requirement of unanimity is applicable only to aggravating circumstances, never to mitigating circumstances. This issue has no merit.

Finally, in this vein, the appellant includes the standard catch-all allegation that the cumulative effect of the errors at trial deprived him of his constitutional right to a fundamentally fair trial. Given the fact that we have found no errors requiring reversal, there was no "snowball effect" as alleged by the appellant. This issue has no merit.



In the next series of issues, the appellant contends that various alleged errors entitle him to a new post-conviction relief hearing.

First, the appellant contends that the failure of the trial judge to authorize funding for his forensic pathologist, Dr. Kris Sperry, was error.

As the State points out in its brief, this issue is moot. Dr. Sperry's affidavit was admitted as evidence and issues heretofore covered in this opinion relate to the doctor's findings.

Next, the appellant contends that the trial judge hearing the post-conviction relief petition erred by refusing to strike the State's procedural defenses because the State did not comply with Tenn. Code Ann. § 40-30-114(b) which requires the District Attorney General to include the material records and transcripts "with the responsive pleading or within a reasonable time thereafter."

The transcript was admitted as an exhibit at the post-conviction hearing and is part of the record on appeal. Thus, any failure of the District Attorney General to comply precisely with the statute was of no consequence and the appellant clearly was not prejudiced by his actions. This issue has no merit.

Next, he contends that the judge hearing the post-conviction proceeding wrongly interfered with counsel's efforts to make a record for appellate review by refusing to allow his counsel to make an offer of proof in flagrant disregard of the rules of evidence.

As to this issue, the appellant first contends the trial judge erred by not allowing an offer of proof as to how Judge Ernest Pellegrin (who presided at the appellant's trial) would probably have ruled if defense counsel had made a reasonable request

for the appointment of forensic experts. Judge Pellegrin testified at the post-conviction hearing that he had no independent recollection of the appellant's trial which occurred ten years before his testimony. Thus, as the State points out in its brief, Judge Pellegrin's testimony about how he would have ruled would have been nothing but speculation. Furthermore, it was a question for the court hearing the post-conviction petition to decide when presented with the issue and the opinion of Judge Pellegrin would be of no benefit to the trial judge who alone was required to determine at the hearing whether there was error of constitutional dimension.

Next, he contends that the trial judge hearing the post-conviction proceeding erred by failing to issue an instanter subpoena for a detective. The judge did not rule that the detective could not testify, only that no instanter subpoena would issue. During this lengthy post-conviction proceeding defense counsel could have obtained a subpoena and had the detective present later in the proceeding.

Finally, as to this issue, the appellant says the trial judge erred by making a "preemptive determination" that the testimony of Dr. Gilliam Blair was inadmissible. However, a lengthy offer of proof was made and the trial judge thus had ample opportunity to consider the doctor's testimony in determining the outcome of the appellant's petition for post-conviction relief. This issue has no merit.

In the next series of issues, the appellant launched a broadside attack on Tennessee's death penalty statute. First, he says the statute fails to "meaningfully narrow the class of death eligible defendants." In this regard, he says the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, Tenn. Code Ann. § 39-13-204(i)(5), is vague and overbroad. Our Supreme Court has repeatedly rejected this contention. State v. Black, 815 S.W.2d 166, 181-82 (Tenn. 1991). He also contends that "(i)n combination," subsections (l)(2), (5), (6) and (7) of Tenn. Code Ann. § 39-13-204 encompass the majority of homicides committed in Tennessee.

Again, our Supreme Court has addressed the constitutionality of the statute and, whether viewed singly or collectively, the aggravating circumstances are constitutional. This issue has no merit.

In the next issue the appellant contends the death penalty is imposed capriciously and arbitrarily. In this regard, he alleges that unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty, but this argument was rejected by our Supreme Court in State v. Brimmer, 876 S.W.2d 75, 86 (Tenn. 1994); the death penalty is imposed in a discriminatory manner, another contention rejected in Brimmer, 876 S.W.2d at 87 n.5; there are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter, even though our Supreme Court has established such standards in numerous cases; the death qualification process skews the makeup of the jury and results in a relatively prosecution-prone, guilty-prone jury, another issue rejected by our Supreme Court in State v. Teel, 793 S.W.2d 236, 246 (Tenn. 1990), where the Court noted that the U.S. Supreme Court has likewise rejected this argument; defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, another argument rejected in Brimmer, 876 S.W.2d at 86-87; the jury is instructed that it must agree unanimously in order to impose a life sentence and is prohibited from being told the effect of a non-unanimous verdict, an issue also rejected in Brimmer, 876 S.W.2d at 87, and in other, earlier cases; the requirement for unanimity for a life sentence violates Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and McKay v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), another claim consistently rejected by our Supreme Court as it was in Brimmer, 876 S.W.2d at 87, and earlier cases; there is a reasonable likelihood that jurors believe they are required to unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances; the jury is not

required to make the ultimate determination that death is the appropriate penalty; and the defendant is denied the final closing argument in the penalty phase of the trial.

As previously and subsequently noted, these complaints about the death penalty have been addressed by our Supreme Court numerous times. The appellant cites various authorities including a study by the Tennessee Public Defenders Conference, the Dallas Times Herald and various other publications not presented to the trial court. Failure to present his arguments regarding the discriminatory imposition of the death penalty to the trial court amounted to a waiver of these issues.

As to popular misconceptions about the death penalty, the appellant has not presented proof regarding such misconceptions and this issue was waived.

Regarding the requirement of unanimity, our Supreme Court has rejected this argument in State v. Boyd, 797 S.W.2d 589, 597 (Tenn. 1989), and other cases, and this Court lacks authority to overrule the Tennessee Supreme Court even if we wanted to do so.

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 other cases and found not to constitute error.

As to the argument that the jury is not required to make the ultimate determination that death is the proper penalty, that is precisely what our procedures require the jury to do. The jurors weigh aggravating and mitigating circumstances and determine whether a defendant deserves a life sentence or deserves to be executed. This issue has also been soundly rejected by our Supreme Court. See Brimmer, 876 S.W.2d at 87.

As to the final closing argument being given by the prosecution, not the defendant, the appellant does not challenge the constitutionality of the procedure, only its unfairness. Only constitutional issues may be reached on post-conviction proceedings. Tenn. Code Ann. § 40-30-203. Furthermore, our Supreme Court has rejected this contention in at least two prior cases, Brimmer, 876 S.W.2d at 87 n.5, State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993), and this argument was recently rejected by this court in State of Tennessee v. Perry A. Cribbs, Tennessee Criminal Appeals, opinion filed at Jackson, February 14, 1997. This entire issue has no merit.

In the next issue, the appellant contends that electrocution is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and Article I, § 16 of the Tennessee Constitution because it is an unnecessarily painful and torturous form of execution. However, our Supreme Court, faced with this issue in virtually every death penalty appeal, has consistently refused to so find. See e.g. State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991); State v. Howell, 868 S.W.2d 238, 258 (Tenn. 1993); State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994). This issue has no merit.

In the penultimate issue and its subissues, the appellant contends that the appellate review process is inadequate, an issue consistently rejected by our Supreme Court. See State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992).

In this regard, he first contends the review is not meaningful because the jury is not required to make written finding concerning the mitigating circumstances. Thus, he reasons the appellate courts cannot reweigh the proof concerning the mitigating circumstances. Our Supreme Court has held that the statute is constitutional and that

defendants are afforded meaningful proportionality review. State v. Melson, 638 S.W.2d 342, 367 (Tenn. 1982).

Next, he contends that the information relied upon for the proportionality review is inadequate and incomplete. Specifically, he contends that the form required of trial judges by Rule 12 of the Tennessee Supreme Court Rules in all first degree murder cases is inadequate. However, it is clear that the Rule 12 form is not the only document relied upon in the appellate court for proportionality review. The Supreme Court has the entire record of the trial and the benefit of having reviewed numerous death penalty and non-death penalty cases. Finally, the issue of the adequacy of the form required by Rule 12 of the Tennessee Supreme Court Rules must be addressed to the creator of the rule and the form, the Tennessee Supreme Court, not this intermediate appellate court. This issue has no merit.

Next, the appellant contends the Supreme Court's methodology for appellate review is flawed because it does not "explore the wellsprings of human emotion." The Supreme Court has heretofore had ample opportunity and shall, no doubt, continue to have ample opportunity to design, implement and refine its methodology for appellate review. Any opinion by this intermediate appellate court as to proper methodology for the Supreme Court to follow would be advisory only and clearly would not bind the Supreme Court in any way. Thus, this issue has no merit.

Next, the appellant contends the proportionality review is conducted in violation of due process and the law of the land because there is no uniform comprehensive and substantially reliable state-wide procedure for collecting and evaluating data regarding death penalty murder cases and non-death penalty murder cases. Thus, the Supreme Court "can act or not act, at its whim." The appellant has cited only statistics regarding death penalty cases to support his assertion that the Supreme Court of Tennessee acts merely on "whim." An examination of even one Supreme

Court opinion in a death penalty case would convince even the most casual observer that such is not the case. Our Supreme Court gives particularized attention to each and every death penalty case and the argument that they do not is without merit as best and spurious at worst.

Finally, the appellant contends that the death penalty statute enacted in 1977 by the General Assembly embraced more than one subject in violation of Article II, § 17 of the Tennessee Constitution.

Our Supreme Court has repeatedly held, as has this Court, that the “subsequent reenactment and codification” of statutes eliminates any question regarding the original caption of the bill passed by the legislature. Harmon v. Angus R. Jessup Associates, Inc., 619 S.W.2d 522, 523 (Tenn. 1981). This issue has no merit.

Finding no merit to any issue, the judgment is affirmed.

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JERRY SCOTT, SPECIAL JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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JOE D. DUNCAN, SPECIAL JUDGE

