APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE TENNESSEE COURT OF CRIMINAL APPEALS

AT NASHVILLE

AUGUST 1997 SESSION

FILED

January 15, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9606-CR-00230**
	)	
Appellee,	)	**DAVIDSON COUNTY**
	)	**(No. 87-F-1682 Below)**
VS.	)	
	)	**The Honorable Ann Lacy Johns**
DONALD RAY MIDDLEBROOKS,	)	
	)	**(RESENTENCING - DEATH PENALTY)**
Appellant.	)	

FOR APPELLANT:

Lionel R. Barrett, Jr.
Washington Square Two, Suite 418
222 Second Avenue North
Nashville, TN 37201

Richard McGee
601 Woodland Street
Nashville, TN 37206

FOR APPELLEE:

John Knox Walkup
Attorney General & Reporter

Michael E. Moore
Solicitor General

Kathy Morante
Deputy Attorney General
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Victor S. Johnson III
District Attorney General

Roger D. Moore
Assistant District Attorney General

John C. Zimmerman
Assistant District Attorney General
Washington Square, Suite 500
222 Second Avenue North
Nashville, TN 37201-1649

OPINION FILED: January 15, 1998

SENTENCE OF DEATH AFFIRMED

CURWOOD WITT
Judge

[Section I. Background - Deleted]

[Section II. Constitutionality of "Heinous, Atrocious, and Cruel" Aggravating Circumstance - Deleted]

III. INTRODUCTION OF EVIDENCE OF VICTIM'S RACE AS A MOTIVE FOR THE COMMISSION OF THE CRIME

The appellant contends that the state was improperly allowed to introduce irrelevant and inflammatory evidence tending to exploit its belief that the murder of the victim was based upon the appellant's racist beliefs. Specifically, the appellant objects to the testimony of Shannon Stewart, who testified that he had conversations with the appellant on the morning of the crime in which the appellant expressed racial animosity. The appellant contends that the prosecutor's closing argument also improperly called on the jury to impose the death penalty because of the appellant's racist beliefs. We find this issue to be without merit.

Prior to the sentencing hearing, the appellant filed a motion in limine seeking exclusion of this evidence of racial belief. At the hearing on the motion, the appellant argued that while this testimony was relevant at the first trial to show premeditation, the state was not required to prove the elements of first-degree murder at the resentencing hearing, and the prejudicial impact of this testimony would be extreme. The trial court took the matter under advisement until Stewart was called as a witness, at which time it made the following ruling:

> What I needed to do and did do is read the transcript so I could understand exactly what the questions and answers were, and it appears to me that it is relevant, and I have conducted the requisite balancing test and find it to be admissible, if the State chooses to introduce it.
>
> In response to your argument that the stated basis of admissibility previously was to prove premeditation. You have to put that in the context. That was in a case where both phases were being tried, and the proof was being introduced in the guilt or innocence phase, so the State would not have been addressing that at sentencing. For purposes of this hearing, where this jury is just hearing all this for the first time, the evaluation has to be made independent of that totally, which, you know, for the reason I just stated, did not address before, but it is relevant and admissible for sentencing. That is the evaluation I have conducted, not based on what was done the last time, because it is apples and oranges.

Stewart then testified before the jury about his conversations with the appellant prior to the night of the murder:

> [The appellant] was telling me stuff, you know, that I really didn't, you know, care to listen to at that age, you know, telling me like he was KKK and he said a nigger walked up to him and said, Hi, and he hit him in his mouth and he had a little ring on, a tiger head, and he showed me some blood in the creases of his ring, and stuff.

Based on this proof, the state made the following argument during the final closing argument:

> The testimony in this case tells you more about Donald Middlebrooks from the days it happened, from Shannon Stewart, than all the psychologists that you can bring in this courtroom, from 1989 to the present. Shannon Stewart told you more about this man than any Ph[.]D. could ever do.
>
> * * * *
>
> And when we found out from his psychologist that the psychologist had conveniently neglected to dictate on the transcription words such as we [sic] used racial epithets. The complexity of this murder dealt with race.
>
> * * * *
>
> You decide this case on evidence. We've said that, and there are some pretty ugly things in this case that are embarrassing and frightening to many of you on the jury. What happened in this case is every mother's worst nightmare, but even so, in this case, because, no doubt, Kerrick Majors had been told that there were a small group of people in this world who will never like you, no matter what you do, what you become, or how you treat them. They will only see your skin.

We note that on direct appeal, the supreme court held that Stewart's testimony was admissible:

> The testimony is clearly relevant to show premeditation and a motive for the victim's brutal slaying. The testimony is also relevant to contradict the defendant's statement that Roger Brewington was the leader in the commission of the offense. In addition, given the relevancy of the statements, we find that the prejudicial effect did not substantially outweigh their probative value. State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978). Accordingly, we hold that the trial court correctly admitted Shannon Stewart's testimony about these statements.

Middlebrooks, 840 S.W.2d at 330.

Tennessee Code Annotated section 39-2-203 has been interpreted as only permitting introduction of evidence relevant to punishment at the sentencing phase. Evidence is relevant to punishment only if it is relevant to a statutory aggravating circumstance or to a mitigating circumstance raised by the defendant. Cozzolino v. State,

584 S.W.2d 765, 767-68 (Tenn. 1979); see also State v. Adkins, 653 S.W.2d 708, 715-16 (Tenn. 1983).

Regardless, at a resentencing hearing, both the state and the defendant "are entitled to offer evidence relating to the circumstances of the crime so that the sentencing jury will have essential background information 'to ensure that the jury acts from a base of knowledge in sentencing the defendant.'" State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987) (quoting State v. Teague, 680 S.W.2d 785, 788 (Tenn. 1984)); see also State v. Bigbee, 885 S.W.2d 797, 813 (Tenn. 1994); State v. Nichols, 877 S.W.2d 722, 731 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S. Ct. 909 (1995).

In State v. Teague, 897 S.W.2d 248 (Tenn. 1995), the supreme court held that "[e]vidence that is admissible as being relevant to the issue of guilt or innocence may also be admissible at a resentencing hearing in support of a mitigating circumstance." Id. at 253. The issue raised on appeal in Teague was whether the defendant should be allowed to present proof of innocence at a resentencing hearing. The supreme court noted that the "test for admissibility is not whether the evidence tends to prove the defendant did not commit the crime, but, whether it relates to the circumstances of the crime or the aggravating or mitigating circumstances." Id. at 252.

In the present case, Stewart's testimony at the resentencing hearing was relevant to the nature and circumstances of the murder, especially to show the appellant's motive and intent. From the record, it is clear that race was an integral dynamic of the circumstances surrounding this murder, and the jury was entitled to have this base of knowledge in sentencing the appellant.

Moreover, Stewart's testimony was relevant to rebut the statutory mitigating circumstances raised by the appellant. Among others, the appellant raised these statutory mitigating circumstances: (1) the appellant acted under extreme duress or under the substantial domination of another person, and (2) the capacity of the appellant to

appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a defense to the crime, but which substantially affected his judgment. Tenn. Code Ann. § 39-2-203(j)(6), (8)(1982) (repealed). These mitigating circumstances were raised to offer an explanation for the appellant's participation in the murder. Therefore, although Stewart's testimony was presented during the state's case-in-chief rather than in rebuttal, it was still relevant to rebut the mitigating circumstances. Stewart testified after the jury was shown the appellant's video-taped statement to the police. In this statement, the appellant depicted Brewington as the primary perpetrator of the offense and attributed the racist remarks to Brewington. Clearly, Stewart's testimony was offered to rebut these claims by the appellant in his statement to the police.

The state was also properly allowed to address this proof during closing arguments. It is well established that closing argument must be temperate, must be predicated on evidence introduced during the trial of a case, and must be pertinent to the issues being tried. State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978). The prosecutor may state an ultimate conclusion which would necessarily follow if the testimony of the prosecution witnesses were believed by the jury. State v. Brown, 836 S.W.2d 530, 552 (Tenn. 1992). Moreover, both parties must be given the opportunity to argue not only the facts in the record but any reasonable inferences therefrom. See Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976).

Based in great measure upon the role of the prosecutor in the criminal justice system, more restrictions are placed on the state than the defendant. Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). Accordingly, "the state must refrain from argument designed to inflame the jury and should restrict its commentary to matters in evidence or issues at trial." Id. Here, the prosecutor's argument was based on proof of the appellant's racial animosity and the reasonable inference that it played a significant role in the appellant's participation in this murder.

Finally, even if it was error to admit Stewart's testimony and to allow the state to address this proof during closing argument, such error was harmless in that the proof was cumulative of other admissible evidence. See Hartman v. State, 896 S.W.2d 94, 100-101 (Tenn. 1995). The appellant made several racial comments during his videotaped statement to the police, which was viewed by the jury. Furthermore, Dr. Smalldon, the defense's expert witness, admitted that the appellant used several racial epithets while being interviewed by him. Dr. Smalldon also testified that the appellant told him all three, "[the appellant] and Roger and Tammy, made racial taunting remarks at the victim."

[Section IV - Prosecutorial Misconduct - Deleted]

V. CONSTITUTIONALITY OF THE DEATH PENALTY STATUTES

The appellant raises several challenges to the constitutionality of Tennessee Code Annotated section 39-2-203 and -205 (1982) (repealed 1989). As acknowledged by the appellant, our Supreme Court has repeatedly rejected these arguments. See, e.g., Bigbee, 885 S.W.2d at 813-14; Brimmer, 876 S.W.2d at 87-88; Cazes, 875 S.W.2d at 268-69; State v. Hutchison, 898 S.W.2d 161, 173-74 (Tenn. 1994), cert. denied, ___ U.S. ___, 116 S. Ct. 137, 133 L.Ed.2d 84 (1995); State v. Bane, 853 S.W.2d 483, 488-89 (Tenn. 1993); State v. Smith, 857 S.W.2d 1, 21-24 (Tenn. 1993); Black, 815 S.W.2d 166, 181, 185; State v. Melson, 638 S.W.2d 342, 366-68, (Tenn. 1982).

As an intermediate appellate court, it is beyond our statutory function to overrule the holdings of our supreme court. See Reimann v. Huddleston, 883 S.W.2d 135, 137 (Tenn. App. 1993), perm. app. denied (Tenn. 1994). Thus, we decline the invitation to revisit these issues which have previously been decided.

[Section VI. Proportionality Review - Deleted]

VII. CONCLUSION

We have carefully considered the issues raised by the appellant as to the resentencing hearing and have determined that none has merit. Accordingly, we affirm the appellant's sentence of death.