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

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**C.C.A. NO. 02C01-9502-CC-00046**
	)	
VS.	)	**DYER COUNTY**
	)	
GLENN BERNARD MANN,	)	Honorable **JOE G. RILEY**, Judge
	)	
Appellant.	)	(First Degree Murder)

For the Appellant

William P. Redick, Jr.
Peter D. Heil
Capital Case Resource Center
704 18th Ave. South
Nashville, TN 37203

For the Appellee

Charles W. Burson
Attorney General and Reporter

Amy L. Tarkington
Assistant District Attorney General
Criminal Justice Division
450 James Robertson Pkwy.
Nashville, TN 37243-0493

C. Phillip Bivens
District Attorney General
Dyer County Courthouse
Dyersburg, TN 38024

OPINION FILED: _____

FIRST DEGREE MURDER CONVICTION AND DEATH SENTENCE AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Glenn Bernard Mann, was convicted of premeditated first degree murder, aggravated rape, and aggravated burglary. At the conclusion of the penalty phase of the trial, the jury found two aggravating circumstances: first, the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death, Tenn. Code Ann. § 39-13-204(I)(5) (1991); second, the murder was committed while the appellant was engaged in committing burglary, Tenn. Code Ann. § 39-13-204(I)(7). The jury further found that the aggravating circumstances outweighed the evidence of mitigating circumstances beyond a reasonable doubt and sentenced the appellant to death by electrocution.[1]

In this appeal as of right, the appellant raises the following issues for our review:

(1) Whether the evidence is sufficient to sustain a conviction for premeditated first degree murder;

(2) Whether the trial court incorrectly instructed the jury regarding the laws of homicide;

(3) Whether the appellant's trial counsel was afforded the appropriate time, assistance, and compensation;

(4) Whether the appellant's statements were introduced against him in violation of his constitutional rights;

(5) Whether the jury was properly selected;

(6) Whether the trial court incorrectly instructed the jury regarding the jury's consideration of mitigating evidence;

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[1] In addition to the sentence of death, the trial court imposed concurrent sentences of twenty-five years incarceration in the Tennessee Department of Correction for the aggravated rape conviction and six years incarceration for the aggravated burglary conviction. In this appeal, the appellant does not challenge the aggravated rape and the aggravated burglary convictions and sentences.

(7) Whether the death penalty unconstitutionally infringes upon the appellant's right to life;

(8) Whether the prosecutor infringed upon the appellant's right to trial by offering a life sentence in return for a guilty plea;

(9) Whether the Tennessee death penalty statute is unconstitutional.

Having carefully considered the appellant's claims, we find no reversible error and thus affirm the conviction and the sentence of death.

1. FACTS

A. Guilt/Innocence Phase

During the early morning hours of July 3, 1993, Annie Lou Wilson was brutally murdered in her home in Dyer County, Tennessee. She was sixty-two years old. Dr. O'Brien C. Smith, Assistant Medical Examiner for Shelby County and Deputy Chief Medical Examiner for Western Tennessee, testified that Ms. Wilson died as a result of multiple injuries to the head, neck, chest, and abdomen. Dr. Smith opined that she had suffered at least fifteen blows to the head by a blunt force, resulting in injuries including lacerations, bruises, and abrasions. Dr. Smith testified that such injuries to the head could, in some cases, be lethal but, in this case, were not the cause of death. Moreover, Dr. Smith testified that examination of the injuries failed to reveal whether the blows to the head rendered Ms. Wilson unconscious.[2] Dr. Smith found injuries to Ms. Wilson's neck consistent with manual strangulation, but also excluded these injuries as the probable cause of death.

Regarding the cause of death, Dr. Smith testified that Ms. Wilson suffered eleven separate knife stab wounds to a three inch by four inch area of the chest overlying the heart and lungs. These stab wounds ranged in depth from just under one inch to over four inches. One wound pierced the lung,[3] and another,

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[2]However, Dr. Smith later observed that blood patterns on her body indicated that Ms. Wilson might have been in an upright position when subsequent injuries were inflicted.

[3]A portion of Ms. Wilson's night gown was embedded in this wound.

deeper wound penetrated the heart. Dr. Smith determined that either wound would have been fatal, resulting in death anytime from several minutes to an hour following the infliction of the wounds. Although Dr. Smith could not determine whether the wounds to the head or those to the chest occurred first, his testimony indicated that Ms. Wilson's death was ultimately caused by the stab wounds to the lung and heart, aggravated by her other injuries.

Additionally, Dr. Smith found fourteen superficial puncture wounds to the left side of Ms. Wilson's abdomen. Moreover, the stab wounds caused rib fractures. Dr. Smith also observed bruising on Ms. Wilson's left wrist, possibly a defensive injury. However, he did not find any lacerations or cuts on Ms. Wilson's hands or arms. Finally, the autopsy revealed a laceration of the vaginal tissues caused by something being forced into the victim's vagina.

Kathleen Epperson, a close friend of the victim, testified that, on Friday, July 2, 1993, she and another friend, Gene Stafford, met Ms. Wilson at the West Tennessee Opry or "Boogie Barn." Ms. Epperson stated that the three of them usually went dancing at the Boogie Barn on Friday and Saturday nights. Either Mr. Stafford and Ms. Epperson or the victim's daughter would bring Ms. Wilson to the Boogie Barn, but Mr. Stafford and Ms. Epperson would usually drive her home. On this night, they remained at the Boogie Barn until it closed at 11:00 p.m. Mr. Stafford and Ms. Epperson then drove Ms. Wilson home, arriving at the victim's home at approximately 11:30 p.m. When Mr. Stafford and Ms. Epperson dropped her off, Ms. Wilson told them that she would need a ride to the Boogie Barn on Saturday night.

Ms. Epperson further testified that, whenever she and Mr. Stafford would give Ms. Wilson a ride to the Boogie Barn, they would arrive at her house at approximately 5:00 p.m., and she would usually be waiting for them on the front porch. On that Saturday, however, Ms. Wilson was not on the porch. Ms.

Epperson testified that she looked through the window on the front door of Ms. Wilson's house, but did not see the victim anywhere inside. She stated that she and Mr. Stafford assumed that the victim's daughter had given her a ride.

Lottie McPherson, the victim's daughter, testified that she last saw her mother alive when she dropped her off at the Boogie Barn on Friday, July 2, 1993. She called her mother on Saturday afternoon but received no answer. She was not alarmed, however, because her mother would sometimes go out to eat with friends before going to the Boogie Barn. Ms. McPherson also called her mother several times on Sunday morning but, again, received no answer. At that time, she thought something might be wrong, because her mother never slept that late. Ms. McPherson, along with her daughter-in-law, Diane McPherson, went to the victim's house. When she arrived at her mother's house, she noticed that the mail was still in the mailbox, which was unusual, and the front door was unlocked. When she went inside the house, she saw her mother lying on the floor in the bedroom to the left of the bed. She saw "blood all around" her mother, and her mother was cold to the touch. Diane McPherson testified that, after she and Lottie McPherson saw the victim, they called 911.[4]

Tammy Palmer, a neighbor who lived four houses down from Ms. Wilson, also testified. She related that, as she was leaving for work on Saturday, July 3, 1993, at approximately 5:00 a.m., she noticed a black male, wearing a pair of orange shorts, walking down the street. He appeared to be 5'10" to 6' tall and

weighed 180 to 200 lbs. She stated that, when she came out of her house, the man stopped for a few seconds and looked up her driveway toward her. Shortly after the murder, the police asked Ms. Palmer if she could identify the man she had seen from a group of photographs. Ms. Palmer selected a person other than the appellant. However, she told the officers that she was unsure if the

[4]Lottie McPherson also testified that her mother wore a hearing aid and could not hear without it.

person in the chosen photograph was actually the man she had seen. She informed the officers that she would need to see the man in person in order to positively identify him. At trial, Ms. Palmer identified the appellant as the man she had seen. She testified that she did not know the appellant, had never seen him prior to the morning of the murder, and had not seen him since that morning until the day of her testimony.

When Officer Greg Youree of the Dyersburg Police Department arrived at Ms. Wilson's house on the morning of July 4, 1993, he observed a white female lying on the floor in the bedroom to the left of the bed. He testified that the body was covered in blood "from head to toe." Officer Youree immediately called the Criminal Investigation Division (C.I.D.) and cordoned off the property with crime scene tape. After C.I.D. arrived, the police discovered various items near the body, including the victim's hearing aid in a carrying case, a broken ceramic or plaster cat, a blood stained paper bag, a brassiere, pieces of white underwear, and a blood stained Kleenex. Officer Youree and several other officers, including Investigator Jeff Holt, then began a canvass of the neighborhood. Officer Youree testified that the appellant was sitting on the front porch of his house, which was about six houses down from the victim's. The appellant told Officer Youree that he and his wife were friends of Ms. Wilson and, on previous occasions, had eaten dinner at her house. The appellant gave Officer Youree and Investigator Holt permission to search his house. They recovered a pair of white tennis shoes and a pair of shoestrings.

Investigator Jim Porter of the Dyersburg Police Department testified that, pursuant to a search warrant, he obtained blood and saliva samples from the appellant. Porter further stated that, on July 7, 1993, he and Investigators Joe McDowell and Stan Cavness asked the appellant and a number of his family members to accompany them to the police station for questioning. Investigator

Porter testified that no one was under arrest at that time. After the officers questioned LaTonya Mann, the appellant's wife, she signed a form consenting to the search of her house. During this search, Investigator Porter retrieved a kitchen curtain and a white t-shirt. Following an interview with the appellant later that evening, Investigators Porter and Holt, with the permission of Ms. Mann, returned once again to the appellant's house and recovered a pair of orange shorts, a blue wash cloth, and three kitchen knives.

Investigator Joe McDowell of the Dyersburg Police Department testified that he was in charge of this case. He was called to the scene of the crime on July 4, 1993, at approximately 9:50 a.m. He testified that the latch on Ms. Wilson's front door was bent, indicating that the door had been forced open. He stated that the living room area of her house appeared to be undisturbed. When he entered the bedroom, he observed Ms. Wilson lying on the floor next to the bed. He testified that she was on her back, and her left arm was raised above her forehead. She was wearing a nightgown, the front of which was torn or cut. She still had on a portion of her underwear. Investigator McDowell further saw what appeared to be blood on the carpet, wall, and bed. He stated that he retrieved a piece of linoleum with a shoe print from the victim's kitchen floor. With respect to the police's initial canvass of the neighborhood, McDowell confirmed that officers obtained a statement from Tammy Palmer, including a description of a potential suspect. Officer McDowell also confirmed that, during the initial canvass, the appellant consented to a search of his home.

McDowell additionally testified that, on July 7, 1993, the appellant and various members of the appellant's family were asked to come to the police station for questioning. He confirmed that these individuals were not under arrest at that time. During an initial interview with Investigators McDowell and Cavness, the appellant denied any involvement in the murder. After further

questioning, however, he confessed. Investigator Cavness had a tape recorder in his pocket that he assumed was recording their conversation with the appellant. However, after the interview, Cavness discovered that the tape recorder did not work. The two investigators asked the appellant if he would mind giving another recorded statement. At first the appellant declined, but eventually he agreed on the condition that they allow him to see his wife. Investigator Porter brought the appellant's wife to the station. Following a brief encounter between the appellant and his wife, during which the appellant's wife cried, the appellant gave Investigator McDowell another recorded statement. McDowell had a tape recorder in his pocket, and there was a tape recorder on the table in the room where the interview took place.

Investigator Holt testified that, on July 7, 1993, he was standing outside the interview room while Investigators McDowell and Cavness questioned the appellant. From his position in the hall, Holt was able to overhear the conversation between the investigators and the appellant. He asserted that neither McDowell nor Cavness threatened the appellant or otherwise applied coercive techniques of interrogation. Investigator Porter was also in the hall during the questioning of the appellant. He also testified that he did not hear the investigators threaten the appellant.

The following is a summation of the appellant's recorded confession:[5]

> On the morning of July 3rd, 1993, the appellant woke up and decided to walk around the neighborhood. He was wearing red shorts, white "K-Swiss" tennis shoes, and no shirt. He had experienced strange feelings or urges in the past and was feeling "funny" that morning. As he walked through the neighborhood, the appellant saw a woman standing in her driveway. He continued walking and, at some point, decided to go to the victim's house and steal her television set. He planned to pawn the television set for rent money.
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> He arrived at Ms. Wilson's home at approximately 6:00 a.m. He knocked on the door several times, and, when he received no

[5]The precise order in which the events occurred is, in fact, somewhat unclear. See infra part 2(A).

answer, he shoved it open with his shoulder. As he headed toward the T.V., Ms. Wilson came out of her bedroom. The appellant grabbed a sheet from a nearby couch and threw it over Ms. Wilson's head. He then began to run toward the front door. However, when he reached the front door, Ms. Wilson called his name. The appellant then pushed her into the bedroom and onto the bed.

Ms. Wilson reached for her hearing aid, but the appellant knocked it out of her hand. Because she was "hollering" and calling his name, the appellant grabbed a sheet from the bed and covered Ms. Wilson's face. He attempted to hold her down by placing his hand around her neck. The appellant then tore off the victim's underwear, stuck his two middle fingers inside her vagina, and masturbated. Ms. Wilson continued to yell and call his name, so the appellant grabbed a ceramic statue of a cat and hit her over the head. The appellant stated that he thought he hit Ms. Wilson in the head twice, knocking her to the floor on the left side of the bed.

While Ms. Wilson was lying on the floor, the appellant ran to the kitchen and obtained a "thick blade knife." The appellant stated that the victim was still conscious at this time and was still calling out his name. Upon returning, the appellant stabbed Ms. Wilson in the chest. He stabbed her several times, because, at first, the knife "wouldn't go in." The appellant then "pulled the knife out, got up and went home." His hands and his shorts were stained with blood.

When he arrived at home, his wife woke up. The appellant did not tell his wife where he had been or what he had done,[6] and she did not see any blood. He went to the bathroom and washed his hands with a blue wash cloth. He then went to bed. The appellant initially claimed that he burned the shorts he was wearing, but later recanted his story. He also stated that he discarded the knife near a levee.

The appellant asserted that he did not want to kill Ms. Wilson; he only wanted to steal her television. He explained that he initially threw a sheet over Ms. Wilson's head so that he could leave before she identified him. Finally, the appellant stated that he was not on any kind of drug at the time of the murder. He told Investigator McDowell that he had a problem and needed help.

Linda Littlejohn, a forensic specialist in shoe and tire track comparisons, fiber comparisons, and physical comparisons, employed by the Tennessee Bureau of Investigation (T.B.I.), performed a shoe track comparison on the white tennis shoes recovered from the appellant's house and a partial foot print on a piece of linoleum recovered from the victim's house. Ms. Littlejohn determined that the shoes were consistent in size, shape, and tread design with the print on the linoleum. She concluded that either shoe could have made the print.

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[6]Indeed, the appellant stated that he had not told anyone what had happened prior to his confession to the police.

However, Ms. Littlejohn could not find any individual characteristics, such as cuts, tears, or wear patterns, on the shoes and could not, therefore, specifically match a shoe with the print. Ms. Littlejohn also compared the three knives recovered from the appellant's house with the cuts in the victim's nightgown and concluded that any of the knives could have made the cuts. Finally, she testified that she found no evidence of fiber transfers from another source onto the victim's clothing or bedding.

Samera Zavaro, a serology specialist with the T.B.I., testified that she found human blood on one of the white tennis shoes. However, the quantity was insufficient to conduct further tests. She found no blood on the orange shorts recovered from the appellant's house. She did find human blood on a blue wash cloth, also recovered from the appellant's house. However, she did not conduct further tests, instead preserving the blood for a DNA analysis. She found blood on a ceramic cat removed from the victim's house. She concluded that the blood on the cat was consistent with the victim's blood. Finally, Ms. Zavaro found semen and spermatozoal in combed pubic hair obtained from the victim's body. Margaret Bash, a forensic DNA analyst with the T.B.I., was only able to perform adequate DNA analyses on a pair of the appellant's socks and a pair of red shorts. Ms. Bash found blood on these items matching that of Patrick Sweatt, an individual with whom the appellant had fought on July 1, 1993.

The appellant presented no evidence at the guilt phase of the trial.

B. Penalty Phase

During the penalty phase of the trial, Dr. Smith again testified for the State. He stated that the fifteen blows to Ms. Wilson's head were not fatal and were probably "insufficient to cause unconsciousness." Nevertheless, the blows would have been severely painful and would have caused profuse bleeding.

Additionally, because the force of the blows was moderate to severe, the blows would have produced a large amount of medium velocity blood spatter. However, because the photographs and diagram of the crime scene did not reflect the expected blood spatter, Dr. Smith stated that the victim's head was probably wrapped in a blanket.[7] Smith also observed that manual strangulation, reflected by the bruises on the victim's neck, would have been painful, involving "extreme distress as [the victim became] hungry for air." Moreover, Dr. Smith testified that the stab wounds in the victim's heart and lungs would have been painful, would have interfered with Ms. Wilson's ability to breathe, and would have caused some bleeding. The puncture wounds in the abdomen, although not fatal, would have caused moderate pain and a small amount of bleeding. Dr. Smith opined that Ms. Wilson could have survived minutes or an hour after the stabbings. He testified that all of the wounds were inflicted prior to Ms. Wilson's death. Finally, although he could not positively identify the source of blood patterns on the victims underwear, legs, and feet, Dr. Smith stated that the patterns indicated that the victim was in an upright position during the infliction of the source wounds.[8]

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[7]According to Dr. Smith, apparent blood spatters in the victim's bedroom that were marked on a crime scene diagram were inconsistent with a scenario involving an unconscious victim.

[8] This court is aware of the very recent decision of State v. Odom, __S.W.2d__ (Tenn. 1996), in which a seventy-eight year old murder victim was raped, robbed, and duffered multiple stab wounds, including penetrating wounds to the heart, lungs, and liver. In the medical examiner's opinion death occurred "rather quickly." Id. The Tennessee Supreme Court found this evidence insufficient to sustain a finding by the jury that the murder was especially "heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." See, Tenn. Code Ann. Section 39-13-204(i)(5).

In the instant case, however, the evidence revealed that the sixty-two year old victim was digitally raped and suffered numerous, severely painful blows and stab wounds. She was also manually strangled which, according to medical testimony, would have caused severe distress as her air supply was cut off. All of these injuries were inflicted prior to the victim's death. Moreover, the victim could have survived as long as one hour following the stabbings. We are convinced that the medical testimony, in this case, concerning the severely painful nature of the wounds inflicted and the strangulation of the victim distinguish this case from Odom. Although the

Dr. Chris Sperry, the Deputy Chief Medical Examiner for Fulton County, Georgia, testified on behalf of the appellant. He opined that the initial blows to the head rendered Ms. Wilson unconscious. He arrived at this conclusion for two reasons: first, the stab wounds in the victim's chest and the stab wounds in the victim's abdomen were clustered together; and two, there were no cuts on the victim's arms or hands. He stated that, if the victim had been conscious during the stabbings, she probably would have tried to defend herself. In the process, she would have sustained injuries to the arms and hands. There was no evidence that the victim's arms were tied down. Finally, if the victim was unconscious during the stabbings, she did not feel the pain caused by the various stab wounds.

William Redick, Jr., the director of the Capital Case Resource Center, testified on behalf of the appellant. He stated that the imposition of the death penalty costs the state approximately $5 million. The incarceration of a defendant for life costs $1 million. Mr. Redick further testified that a defendant serving a life sentence would not be eligible for parole until he had been incarcerated for twenty-five years. Finally, Mr. Redick admitted that he does not believe any case warrants the imposition of a sentence of death.

LaTonya Mann, the appellant's wife, testified that she and the appellant had been married for a little more than a year. She told the jury that the appellant was a kind and considerate husband. Ms. Mann made an emotional plea for her husband's life.

Johnnie Mae Mann, the appellant's mother, testified that she has ten living children. The appellant is her ninth child. At school, he was a slow learner and was placed in special education classes. Ms. Mann testified that the appellant

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appellant has not raised the issue, we have no hesitation in concluding that the evidence is sufficient to sustain the "heinous, atrocious or cruel" aggravating factor.

dropped out of school in the ninth grade. The appellant lived with his parents until he married. Ms. Mann asked the jury to forgive her son and grant him a second chance. She stated that she has already lost three children and does not want to lose another.

John Herman Mann, the appellant's father, testified that he served as the preacher for the Original Church of Jesus Christ in Dyersburg for nineteen years. He told the jury that he is sorry that Ms. Wilson was killed. However, he asserted that killing his son would not correct that wrong. He asked the jurors to look into their hearts and spare a life instead of taking one.

2. ANALYSIS

A. Sufficiency of the Evidence

The appellant claims that, although the evidence adduced at trial could support a finding of felony murder or second degree murder, the evidence is insufficient to sustain a conviction of premeditated first degree murder. Specifically, the appellant contends that the State did not prove the requisite elements of premeditation and deliberation. He asserts that the appellant's state of mind at the time of the killing precluded premeditation and deliberation. Moreover, the appellant argues that, assuming there was a design to kill, no more than an instant passed between its formulation and its execution. Therefore, the appellant could not have engaged in sufficient deliberation prior to the killing. The State contends that, although the appellant only planned a burglary when he entered Ms. Wilson's house, once inside the house he did indeed carry out a premeditated and deliberate killing.

A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant

must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993).

The State may prove a criminal offense by direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). See also State v. Brown, 836 S.W.2d 530, 541 (Tenn. 1992) (“the cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence”). Before a jury may convict a defendant of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). See also State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). As in the case of direct evidence, the weight to be given circumstantial evidence and

"'[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)(citation omitted). In this case, both direct and circumstantial evidence was available for the jury's consideration.[9]

At the time of this offense, the relevant statute defined first degree murder as "[a]n intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1991). A person acts intentionally "with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1991). Additionally, premeditation necessitates "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992), and "the exercise of reflection and judgment," Tenn. Code Ann. § 39-13-201(b)(2) (1991). Deliberation requires a "cool purpose" and the absence of "passion or provocation." Tenn. Code Ann. § 39-13-201(b)(1) and Sentencing Commission Comments.[10]

Once a homicide has been proven, it is presumed to be a second degree murder, and the State has the burden of establishing premeditation and deliberation. Brown, 836 S.W.2d at 543. Again, although the jury may not engage in speculation, State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995), the jury may infer premeditation and deliberation from the circumstances surrounding the killing. Gentry, 881 S.W.2d at 3; Taylor v. State, 506 S.W.2d 175, 178 (Tenn. Crim. App. 1973). Our supreme court has delineated several circumstances which may be indicative of premeditation and deliberation, including the use of a deadly weapon upon an

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[9]We address the admissibility of the appellant's statements to the police later in this opinion. See infra part 2(D).

[10]With respect to deliberation, we note that, in State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), this court stated, "The [mere] presence of agitation or even anger, in our view, does not necessarily mean that the murder could not have occurred with the requisite degree of deliberation."

unarmed victim, the fact that the killing was particularly cruel, declarations by the defendant of his intent to kill the victim, and the making of preparations before the killing for the purpose of concealing the crime. Brown, 836 S.W.2d at 541-542. This court has also recently noted several factors from which the jury may infer the two elements, including planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. Bordis, 905 S.W.2d at 222 (quoting 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7 (1986)).

Initially, the record supports an inference that the appellant killed Ms. Wilson because she was able to identify him. Nevertheless, the appellant suggests that, at the time of the killing, he lacked the mental capacity to either premeditate or deliberate. He contends that "he was suffering from an 'extreme mental or emotional disturbance' ... he was 'substantially impaired' mentally" and, accordingly, could not have killed "upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement." Gentry, 881 S.W.2d at 4. The record contains some evidence, essentially the appellant's own statements to the police, indicating that, at the time of the killing, the appellant was experiencing a "strange feeling" over which he had no control. However, at trial, the appellant introduced no expert testimony in support of his argument.[11] Again, the weight assigned to the evidence is a question for the jury. Therefore, on appeal, this court will not disturb the jury's determination, reflected in its verdict, that the appellant was not experiencing psychological problems sufficient to preclude premeditation and deliberation.

Alternatively, the appellant argues that the formation of the plan to kill and the administration of the fatal blows occurred simultaneously. In support of his argument, the appellant refers to his statement to the police. In his statement,

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[11] Although the appellant challenges the trial court's denial of expert services, see infra part 2(C)(iii), the record reflects that the trial court did grant the appellant access to a psychologist. However, the appellant never introduced the testimony of the psychologist concerning his mental state at the time of the offense.

the appellant claimed that he did not intend to kill Ms. Wilson when he entered her house. According to the appellant, when the victim called his name, he instinctively hit her with the ceramic cat. The appellant asserts that, although Dr. Smith testified that the fatal wounds resulted from the subsequent stabbings, Dr. Smith also testified that the initial blows to Ms. Wilson's head were potentially fatal. Again, before a jury may convict a defendant of premeditated first degree murder, it must find that the defendant consciously engaged in conduct which resulted in the death of the victim, Bordis, 905 S.W.2d at 221, and killed "upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement." Gentry, 881 S.W.2d at 4. See also State v. Brooks, 880 S.W.2d 390, 392-93 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994) ("the jury must find that the defendant formed the intent to kill prior to the killing, i.e., premeditation, and that the defendant killed with coolness and reflection, i.e., deliberation"). "While it remains true that no specific length of time is required for the formation of a cool, dispassionate intent to kill, Brown requires more than a 'split-second' of reflection in order to satisfy the elements of premeditation and deliberation." West, 844 S.W.2d at 147.[12]

The record, including the appellant's statement to the police, reveals that the appellant had more than a "split-second" in which to form the requisite elements. Between the time the victim called out the appellant's name and the time the appellant hit the victim with the ceramic cat, the appellant pushed Ms. Wilson from the living room into the adjacent bedroom, pushed her onto the bed, threw a sheet over her head, tore her underwear, and, arguably, raped her.[13] In

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[12]In Brown, the supreme court suggested abandoning an instruction to the jury that premeditation can be formed in an instant. 836 S.W.2d at 543. The court observed that, because deliberation requires more time, the instruction could confuse a jury. Id.

[13]It is not altogether clear from the record whether the appellant raped Ms. Wilson before or after the initial blows to the head. The appellant's statement suggests that he raped her before hitting her in the head with the ceramic cat. The appellant engaged in the following exchange with Investigator McDowell:

> Mann "You know, oh okay before I hit her in the head with the statue and I took her in the room and I tore her what's the name off ... Panties ... ."
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> ...

any event, the record supports the State's position that the stabbings were, in fact, the fatal blows. The appellant did not stab the victim until after he beat her, raped her, and, deciding that an additional tool was needed to accomplish the murder, obtained a knife from the kitchen. The appellant's statement to the police suggests that, as he retrieved the knife from the kitchen, Ms. Wilson continued to call his name. Accordingly, the jury could very well have concluded that the appellant had ample opportunity to premeditate and deliberate Ms. Wilson's death.

Moreover, the act of obtaining a knife from the kitchen required a certain degree of coolness and reflection. Additionally, the appellant stated to the police that, after killing Ms. Wilson, he went home, cleaned off the blood, and went to bed. "Calmness immediately after a killing may be evidence of a cool, dispassionate, premeditated murder." West, 844 S.W.2d at 148 (citing State v. Browning, 666 S.W.2d 80, 84 (Tenn. Crim. App. 1983), and Sneed v. State, 546 S.W.2d 254, 258 (Tenn. Crim. App. 1976)).

Accordingly, contrary to the appellant's assertion, the existence of repeated blows to the victim was not the only evidence at trial supporting a finding of premeditation and deliberation. Brown, 836 S.W.2d at 542 ("[l]ogically, of course, the fact that repeated blows ... were inflicted on the victim is not sufficient, by itself, to establish first-degree murder").[14] Having reviewed the proof in a light most favorable to the State, we conclude that the evidence is sufficient to support the jury's verdict. This issue, therefore, is without merit.

McDowell	Okay, is that when you had sex with her before you hit her in the head?
Mann	Well, I didn't have sex with her ... I put my two middle fingers in her ...

[14]The appellant, in fact, argues that the random and haphazard nature of the wounds indicate the absence of premeditation and deliberation. We would note that, although the appellant inflicted various types of wounds, the record reflects that he did so in a systematic manner. The jury could have inferred from the nature of the wounds that the appellant simply wanted to assure Ms. Wilson's death.

B. Instructions on Homicide

The appellant raises the following issues concerning the trial court's instructions on the laws of homicide: the trial court should have instructed the jury on the presumption of second degree murder; the trial court erred in giving the jury sequential instructions on first degree murder, second degree murder, and voluntary manslaughter; the trial court failed to define "passion"; and the trial court erroneously defined "intentional." These issues will be addressed in order below.[15]

I. Presumption of Second Degree Murder

The appellant contends that the trial court should have instructed the jury that the law presumes a homicide to be a second degree murder, and the State must prove the premeditation and deliberation necessary to elevate the crime to first degree murder. See Brown, 836 S.W.2d at 543. The State argues that the trial court properly instructed the jury according to the law. See State v. Haynes, 720 S.W.2d 76, 85 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1986). Specifically, the State notes, and we agree, that the court correctly instructed the jury on the lesser included offense of second degree murder.[16] Previously, faced with an argument identical to the appellant's, we held that "[w]hen jury instructions given are full, fair, and accurately state the law, there is no requirement that special instructions be given." State v. Kelley, 683 S.W.2d 1, 6 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1984) (citing State v. Chestnut, 643 S.W.2d 343, 352 (Tenn. Crim. App. 1982)).[17] Accordingly, this

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[15]The State argues that these and other issues have been waived. However, in capital cases, because of the qualitative difference between death and other sentences, our supreme court has normally addressed the merits of an issue even if the appellant did not timely object to the error or raise the issue in the motion for new trial. See State v. Bigbee, 885 S.W.2d 797, 805 (Tenn. 1994); State v. Duncan, 698 S.W.2d 63, 67-68 (Tenn. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240 (1986); State v. Strouth, 620 S.W.2d 467, 471 (Tenn. 1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1491 (1982). Accordingly, we consider the merits of the issues raised in the appellant's brief.

[16]The appellant contends that, because the trial court's instruction on second degree murder failed to include a definition of "passion," it was erroneous. This issue is addressed infra part 2(B)(iii).

[17]The defendant has a constitutional right to a correct and complete charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn.), cert. denied, 498 U.S. 1007, 111 S.Ct. 571 (1990); State v. Forbes, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995). However, this court need only

issue is without merit.

ii. Sequential Instructions

The appellant next contends that the trial court erred in giving sequential instructions on first degree murder, second degree murder, and voluntary manslaughter. We disagree. This court has repeatedly upheld "acquittal-first" instructions. See State v. Raines, 882 S.W.2d 376, 381-82 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); State v. McPherson, 882 S.W.2d 365, 375 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); State v. Rutherford, 876 S.W.2d 118, 119-20 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994); State v. Beckham, No. 02C01-9406-CR-00107 (Tenn. Crim. App., at Jackson, Sept. 27, 1995). Accordingly, this issue is without merit.

iii. Definition of "Passion"

The appellant also contends that the trial court's instruction on first degree murder was erroneous, because the instruction did not include the definition of "passion." The trial court instructed the jury as follows: "The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation." The State asserts that the trial court employed the ordinary usage of the word "passion," and, accordingly, further instruction was unnecessary.

The appellant does not offer any authority which requires the trial court to define "passion." Moreover, although Tennessee courts have defined the term, see, e.g., State v. Burlington, 532 S.W.2d 556, 560 (Tenn. 1976), we have been

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invalidate the jury charge "if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law." Forbes, 918 S.W.2d at 447 (citing State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994)). This court has observed that the instruction, that a homicide is presumed to be second degree murder, is designed to inform the jury that the State has the burden of proving each and every element of the offense of first degree murder. State v. Montague, No. 03C01-9306-CR-00192 (Tenn. Crim. App. at Knoxville, November 21, 1994), perm. to appeal denied, (Tenn. 1995). We conclude that the jury instructions in this case served that purpose.

unable to find any case which requires a court to provide that definition. We conclude that the word "passion" is "in common use and can be understood by people of ordinary intelligence." Raines, 882 S.W.2d at 383. In the absence of anything in the charge to obscure the meaning of such terms, it is not necessary for the court to define or explain them. Id. See also State v. Braden, 867 S.W.2d 750, 761 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993). This issue is without merit.

iv. Definition of "intentional"

Finally, the appellant argues that the trial court's instruction defining "intentional" created the possibility of a non-unanimous jury verdict. The trial court, in defining "intentional," quoted verbatim Tenn. Code Ann. § 39-11-106(a)(18). In essence, the trial judge instructed the jury that a person acts "intentionally" when that person acts with a conscious objective either (1) to cause a particular result or (2) to engage in particular conduct. See also T.P.I. Crim. No. 2.08. The appellant claims that the trial court's disjunctive instruction permitted the jury, in convicting the appellant of premeditated first degree murder, to choose either general intent or specific intent. Therefore, according to the appellant, it is impossible to determine whether the jury unanimously found that the appellant intended to cause the result, i.e., specific intent, rather than simply engage in the conduct, i.e., general intent.[18]

[18]The appellant cites State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993), and State v. Brown, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991), for the general proposition that, in cases involving a potential for a "patchwork verdict" based on different offenses in evidence, the trial court must augment the general unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts. See also Forbes, 918 S.W.2d at 446 ("[w]here there is technically one offense, but evidence of multiple acts which would constitute the offense, a defendant is still entitled to the protection of unanimity"). Compare Schad v. Arizona, 501 U.S. 624, 632-633, 111 S.Ct. 2491, 2497-2498 (1991)(a plurality of the Supreme Court observed that there is no general requirement under the federal constitution that a jury reach agreement on preliminary factual issues which underlie a verdict, either with respect to actus reus or mens rea, unless the "differences between means [of committing a crime] become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses"); United States v. Sanderson, 966 F.2d 184, 187-188 (6th Cir. 1992). However, we do not agree with the appellant that the relevant statutes and jury instructions in this case provided alternative mental states from which members of the jury could choose in finding the appellant guilty of premeditated first degree murder.

As the appellant correctly observes in his brief, the legislature has abandoned the "confusing distinction between general and specific intent." Sentencing Commission Comments, Tenn. Code Ann. § 39-11-301 (1991). This court is unconvinced that Tenn. Code Ann. § 39-11-106(a)(18), in defining "intentional," perpetuates this distinction. Rather, because "intentional" offenses include both offenses which only require particular conduct, e.g., rape and burglary, and offenses which also require a particular result, e.g., homicide, the definition of "intentional" must encompass both factual circumstances. Indeed, in the instant case, the appellant was charged with aggravated rape and aggravated burglary in addition to first degree murder.

We acknowledge that "[s]imply reading a statute to the jury, when the statute is ambiguous and open to more than one interpretation, does not satisfy 'the demands of justice' or the accused's constitutional right of trial by jury." Raines, 882 S.W.2d at 382. However, in this case, the trial court's instructions concerning premeditated first degree murder clarified any ambiguity inherent in Tenn. Code Ann. § 39-11-106(a)(18). The trial court gave the jury the following instruction:

> For you to find the defendant guilty of [premeditated first degree murder], the State must have proven to you, the jury, beyond a reasonable doubt the existence of the following essential elements. ... that the killing was premeditated. ... Premeditation means that the intent to kill must have been formed prior to the act itself.

(Emphasis added). As the instruction states, in order to convict the appellant of premeditated first degree murder, the jury was required to find not only that he intended to engage in the act, i.e., the assault, but also that he intended to cause the result, i.e., Ms. Wilson's death. The trial court correctly instructed the jury according to the laws of this state. This issue is without merit.

C. Trial Counsel's Compensation, Services, and Time to Prepare for Trial

In his next issue, the appellant contends that his trial counsel was not given the compensation, time, or services necessary to provide an adequate defense pursuant to the United States and Tennessee constitutions. Specifically, the appellant claims that the trial court erroneously denied motions for continuances, denied motions for compensation, denied motions for appointment of co-counsel, and denied motions for the provision of expert services. The State contends that the trial court acted properly and within the confines of the law.

A brief summary of the pre-trial proceedings is helpful in reviewing this issue. The indictment was returned against the appellant on August 9, 1993. The appellant retained counsel, and his retained counsel appeared before the court for the arraignment of the appellant on August 24, 1993. Although originally scheduled for November 30, 1993, the trial was continued until February 1, 1994.

On January 27, 1994, the court again continued the trial until May 3, 1994. On that same day, the court granted the appellant's motion for a declaration of indigency, but denied counsel's motion for compensation. The court stated that it was under a duty to appoint the public defender before appointing or compensating private counsel.[19] However, there was neither a motion for the appointment of the public defender nor a motion for withdrawal of private counsel before the court at that time. The public defender was not appointed until April 8, 1994.

During an ex parte hearing on January 27, 1994, the court denied the

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[19]Defense counsel also submitted a motion for the appointment of co-counsel. Apparently Mr. Strawn, a law partner of lead counsel Mr. Kelly, had been assisting in the representation and requested appointment. However, because the judge believed he was obligated to appoint the public defender, he did not appoint Mr. Strawn as co-counsel. Mr. Strawn had, in fact, previously filed a notice of appearance. On March 1, 1994, the court allowed Mr. Strawn to withdraw his notice of appearance.

appellant's motion for a jury statistician and a mitigation specialist. The court held that the Constitution does not require the appointment of either expert, and the court noted that the investigator already appointed could perform the same kind of work as a mitigation specialist. On January 28, 1994, the court authorized $3,000 for the investigative services of Terry W. Sweat and Gail Hedrick, and $3,000 for the psychological services of Dr. Gillian Blair.[20] On the same day, the court denied a request for a neuropharmacologist, a statistician, and a forensic expert, because the appellant failed to indicate who would be performing these services and how much compensation would be required. On April 8, 1994, the court authorized an additional $1,500 for the investigative services of Terry W. Sweat. On May 27, 1994, the court granted the appellant's motion for $3,000 for the services of Dr. Chris Sperry, an expert pathologist.

On May 3, 1994, the trial court continued the trial until May 31, 1994. The court, however, denied motions for further continuances on May 13 , May 18, and May 31, 1994. The trial court also denied the appellant's motion for a continuance following the State's presentation of proof at the sentencing phase of the trial.

I. Time to Prepare

The appellant claims that his counsel was not afforded adequate time to prepare for trial. Primarily, he contends that co-counsel (i.e. the public defender) was not appointed until less than two months prior to trial, that lead counsel and co-counsel were unable to sufficiently discuss the case, that lead counsel planned a vacation the week before the trial, and that counsel did not have time to prepare for the sentencing phase of the trial.

The granting or denial of a continuance is a matter left to the sole discretion of the trial court. State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim.

[20]An earlier motion for support services was denied on December 15, 1993, because the appellant had not yet been declared indigent.

App. 1991), perm. to appeal denied, (Tenn. 1992). An appellate court may reverse a conviction only if the denial of the continuance was an abuse of discretion, and a different result might reasonably have been reached had the continuance been granted. State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990). We can find nothing in the record which suggests that the trial court abused its discretion, thereby prejudicing the appellant. Although the court denied three motions by defense counsel for continuances just prior to trial, he had earlier granted several such motions. As already noted, although the trial was originally scheduled for November 30, 1993, it began on May 31, 1994. In other words, the trial court postponed the trial date by approximately six months.

With respect to the appellant's argument that co-counsel did not have adequate time to prepare for trial, we note that lead counsel had been representing the appellant since August, 1993. Thus, by the time co-counsel was appointed, lead counsel had invested well over seven months in the case. This scenario is quite similar to the one presented in State v. Dillingham, 03C01-9110-CR-319 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1993). In Dillingham, the public defender was only afforded one month to prepare for a case with which a previous attorney had been involved. Id. Finding no abuse of discretion, this court declined to interfere with the trial court's denial of the motion for continuance, because the public defender had the benefit of prior counsel's preparations and efforts. Id. Co-counsel in the instant case was appointed in early April, 1994, somewhat less than two months before trial.[21] Although a capital case will clearly require more preparation by defense counsel than a non-capital case, we conclude that co-counsel was afforded adequate time to familiarize himself with the facts and assist in the appellant's defense.

[21]When the public defender was appointed on April 8, 1994, the trial was tentatively set for May 3, 1994. However, on May 3, 1994, the court continued the trial until May 31, 1994.

The appellant also argues that lead counsel and co-counsel did not have sufficient opportunities to meet and discuss the case. On this same note, the appellant argues that lead counsel's pre-planned vacation interfered with counsel's trial preparations. The trial court is not responsible for counsel's time management. Furthermore, there is no evidence in the record indicating that just under two months was not adequate time for the attorneys to meet and prepare for trial.

As counsel acknowledged during pre-trial hearings, the more important aspect of this particular trial was the sentencing phase. The appellant argues that he was not appointed expert services in time to adequately prepare a mitigation case. However, the record reflects that the court authorized investigative services on January 28, 1994, and, again, on April 8, 1994.[22] Moreover, although the trial court did not authorize funding for a pathologist until a little over a week before trial, time limitations apparently did not impede that expert's testimony in any way. This witness was able to testify that, in his opinion, the initial blows to the victim's head probably rendered her unconscious. We conclude that the trial court did not abuse his discretion nor was the appellant prejudiced by the denial of additional continuances. This issue is without merit.

ii. Compensation

The appellant next contends that the trial court denied him the right to counsel by denying lead counsel's motion for compensation. In support of his argument, the appellant cites numerous provisions of the American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Model Rules of Professional Conduct, and Standards for

[22]The investigator used by defense counsel was associated with lead counsel's firm. Thus, the investigator was arguably available to lead counsel when counsel made his initial appearance in this case in August, 1993. As mentioned earlier, the record does reveal that the trial court denied counsel's request for investigative services in December, 1993, before the appellant was declared indigent.

Criminal Justice. However, the appropriate authority on this issue can be found in provisions of the Tennessee Code, Rules of the Tennessee Supreme Court, and Tennessee Rules of Criminal Procedure.

As the appellant correctly notes, Tenn. R. Crim. P. 44(a) provides that every indigent defendant shall be entitled to the appointment of counsel. However, Rule 44(b) further provides that the "procedures for implementing the assignment of counsel shall be those provided by law." Tenn. Code Ann. § 40-14-202(a) (1994 Supp.), in pertinent part, requires:

> in all felony cases, if the accused be not represented by counsel, and the court determines . . . that the accused is an indigent person who has not competently waived the accused's right to counsel, the court shall appoint to represent the accused either *the public defender*, if there is one for the county, or, *in the absence of a public defender*, a competent attorney licensed in this state.

(Emphasis added). Sup. Ct. Rule 13 further mandates that the appellant "shall not have the right to select the appointed counsel from the Public Defender Service, from the panel of attorneys, or otherwise." Rule 13 continues: "In a capital case two attorneys may be appointed for one defendant and each is eligible for compensation."

Before the appellant was declared indigent, counsel filed a motion for compensation, because, according to counsel, the funds initially paid by the appellant were depleted. As mentioned earlier, once the appellant was declared indigent, the court stated that it had a statutory obligation to appoint the public defender before appointing private counsel. Consequently, the court denied the appellant's motion for compensation. The court further stated that it would appoint the public defender if there was such a motion before the court. However, defense counsel filed neither a motion for the appointment of counsel nor a motion to withdraw.[23] Only several months later did defense counsel

[23]At no time during his representation of the appellant did lead counsel, Mr. Kelly, enter a motion to withdraw due to lack of compensation. Mr. Kelly did, however, enter a motion to withdraw due to ethical considerations. The trial court determined that this motion was without merit.

request the appointment of co-counsel.[24] The court then appointed the public defender to assist in the case. Again, lead counsel did not file a motion to withdraw. We conclude that his actions reflected his intent to continue representation of the appellant regardless of compensation.[25] Accordingly, the trial court did not err in refusing to appoint or compensate lead counsel.

The appellant also infers that the trial court's denial of compensation resulted in ineffective assistance of counsel at the sentencing phase of the trial. However, the appellant fails to explain how lead counsel's performance was deficient or how the appellant was prejudiced by the purported deficient performance. See Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2054 (1984). Moreover, after a review of the record, we cannot conclude that counsel's performance was below the range of competence demanded of attorney's in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1973). Accordingly, this issue is without merit.

iii. Services

At various times before trial, the appellant requested investigative services, a psychologist, a mitigation specialist, a jury selection statistician, a neuropharmacologist, a forensic expert, and a pathologist. The court granted the funding for the investigator, the psychologist, and the pathologist, but denied the request for the neuropharmacologist, forensic expert, mitigation specialist, and jury selection statistician. The appellant claims that the court's denial of the above services violated his right to an adequate defense. See generally State v. Elliot, 524 S.W.2d 473 (Tenn. 1975).

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[24]Mr. Strawn, law partner with lead counsel Mr. Kelly, filed a notice of appearance in this case which the trial court allowed. Mr. Strawn also attempted to receive compensation for his representation. Because, however, the court would not appoint private counsel before appointing the public defender, on March 1, 1994, Mr. Strawn sought and was granted permission to withdraw his notice of appearance.

[25]There was some question in the trial court concerning ABA guidelines governing the trial qualifications of lead counsel and co-counsel in a capital case. Under the guidelines, lead counsel in a capital case should have some prior experience with capital cases. Mr. Kelly possessed such prior experience. Because he did not move to withdraw, the court satisfied the ABA guidelines.

Tenn. Code Ann. § 40-14-207(b) (1990) provides, in pertinent part:

> In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an ex parte hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

Sup. Ct. Rule 13, §2 (B)(10) further provides:

> The defense counsel must seek prior approval for such services by submitting a written motion to the Court setting forth: (a) the name of the proposed expert or service; (b) how, when and where the examination is to be conducted or the services are to be performed; (c) the cost of the evaluation and the report thereof; and (d) the cost of any other necessary services, such as court appearances.

As the statute notes, the decision of whether to authorize the investigative or expert services lies within the discretion of the trial court. See also Cazes, 875 S.W.2d at 261. Further, Rule 13 and relevant case law maintain that the right to these services exists only upon a showing of a particularized need. See State v. Shepherd, 902 S.W.2d 895, 904 (Tenn. 1995); State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992), cert. denied, __ U.S. __, 114 S.Ct. 740 (1994); State v. Black, 815 S.W.2d 166, 180 (Tenn. 1991). "The defendant must show that a substantial need exists requiring the assistance of state paid supporting services and that his defense cannot be fully developed without such professional assistance." Evans, 838 S.W.2d at 192; see also Shepherd, 902 S.W.2d at 904.

Again, upon finding the appellant indigent, the court properly granted the appellant investigative and expert psychological services.[26] The court also granted the appellant's request for a pathologist. Nevertheless, the appellant claims that the court denied him an adequate defense by granting this latter request only a few days before trial. As discussed earlier, the pathologist was only needed to rebut the State's evidence that the initial blows to the head did

[26]Although the court authorized funding for the psychological services of Dr. Gillian Blair, the appellant never introduced her as a witness.

not render the victim unconscious. Because the appellant's expert provided the testimony the appellant sought, we conclude that the trial court's actions were not erroneous.

In denying the motion for the services of a neuropharmacologist, statistician, and forensic expert, the judge stated that the appellant had failed to comply with the requirements of Rule 13. After reviewing the record, we agree. Accordingly, we conclude that the trial court also acted properly in this respect.

Moreover, the trial court appropriately denied the appellant's request for a jury selection expert. The Supreme Court, in Black, 815 S.W.2d at 179-80, held that the trial court may deny a defendant the assistance of a jury expert when the defendant has failed to demonstrate a particularized need. Defense counsel explained that the jury expert was needed "to help counsel determine whether or not these are the jury people that we need not to execute him." This statement does not describe a particularized need.

Finally, the trial court denied the appellant the assistance of a mitigation specialist. Defense counsel asserted that the expert was necessary to "gather all information from [the appellant's] background to attempt to put on mitigation at the sentencing hearing of the case." However, we agree with the trial court that the investigator previously authorized by the court was more than capable of performing this type of work.

Having reviewed the appellant's claims that his trial counsel was not given the compensation, time, or services necessary to provide an adequate defense, we find this issue to be without merit.

D. The Appellant's Statements

The appellant contends that his statements to the police were taken in

violation of his constitutional rights. He claims that he was subjected to custodial interrogation before being advised of his rights, that he was never informed of his rights, and that he never waived any of his rights.

The trial court denied a pre-trial motion to suppress the appellant's statements to the police. The court ruled that the statements were voluntarily given in accordance with the appellant's constitutional rights. Testimony at the suppression hearing revealed that on July 7, 1993, at approximately 2:00 p.m., the appellant and his wife were asked to accompany Investigators Stan Cavness and Jim Porter to the Dyersburg Police Department for questioning. The officers told the appellant and his wife that they were not under arrest. Nevertheless, Porter informed them of their Miranda rights. Other members of the appellant's family were also asked at that time to go to the station and talk with the officers.

From 2:00 p.m. until approximately 4:00.pm, the officers talked with the appellant's family members in order to establish the appellant's whereabouts at the time of the murder. At some point, Ms. Boxley, the appellant's mother-in-law, stated that she did not want to talk to the police and was allowed to leave. The appellant was placed in a conference room. However, the conference room was never locked, and the trial court found that the appellant’s freedom of activity was not restricted. Subsequently, the appellant was escorted to an interrogation room where the appellant gave several statements to the police.

Shortly after 4:00 p.m., Investigator Cavness obtained the "alibi statement" from the appellant. Cavness then conferred with the other officers concerning the statements of the family members. They noticed inconsistencies between the appellant's statement and those of his family members. At about 6:00 p.m., Investigators Cavness and McDowell interviewed the appellant for an hour. Cavness had a tape recorder in his pocket, which, contrary to his assumption, did not record the conversation. The officers testified that they

again informed the appellant of his rights. During this unrecorded conversation, the officers pointed out "holes" in the appellant's alibi. The appellant eventually confessed to the murder.

The officers advised the appellant that he was under arrest and transferred him to the holding cell. The officers then discovered that the tape recorder had not recorded the appellant's confession. Accordingly, the officers asked the appellant if he would give another statement. The appellant stated that he wanted to see his wife first. The officers complied, and the appellant's wife was brought to the station.

At about 9:00 p.m., after the appellant had seen his wife, McDowell obtained a recorded statement from the appellant. The officer again advised the appellant of his rights, and the appellant again confessed to committing the crime. The appellant never asked for an attorney. Sometime during that afternoon, the officers gave the appellant a soft drink.

The appellant testified during the suppression hearing. He stated that he was placed in feet shackles during the unrecorded conversation. Additionally, the appellant stated that McDowell was yelling at him, calling him derogatory names, and "got to grabbing on [him], poking on [him]." He stated that McDowell threatened to kill him. According to the appellant, McDowell also promised that the appellant would receive psychological treatment and would ultimately be placed in a hospital rather than in prison. As mentioned earlier, Officers Jeff Holt and Jim Porter testified that they sat outside the interrogation room during both the unrecorded and recorded conversations and did not hear any threats or use of force. Moreover, during a later pre-trial hearing, appellant's counsel stated that the appellant had indicated to him that he had lied concerning the officers' use of threats, force, or promises to obtain his statement.

The court found that at no point in time were threats, force, or promises used by the police to obtain the appellant's statements. Although the officers indicated to the appellant that they would inform the court about the appellant's psychological problems, they did not guarantee treatment. Additionally, the court found that the appellant was adequately advised of his rights. The appellant was first advised of his rights when the officers asked the appellant and his wife to accompany them to the station. It is unclear whether the appellant was advised of his rights immediately prior to the "alibi statement." Nevertheless, the court found that the conversation did not amount to a custodial interrogation. Finally, the court found that Miranda warnings were given to the appellant prior to the unrecorded and recorded statements. Indeed, in the recorded statement, the appellant acknowledged that he had been informed of his rights several times before.

It is the duty of the trial court to determine the voluntariness and the admissibility of the appellant's statement. State v. Pursley, 550 S.W.2d 949, 950 (Tenn. 1977). Moreover, the trial court's determination that a confession was given knowingly and voluntarily is binding on the appellate courts unless the appellant can show that the evidence preponderates against the trial court's ruling. State v. O'Guinn, 709 S.W.2d 561, 566 (Tenn.), cert. denied, 479 U.S. 871, 107 S.Ct. 244 (1986). See also State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994).

I. Custodial interrogation

The appellant claims that he was in custody during the first, "alibi statement." According to the appellant, because there is no clear evidence that he was advised of his rights immediately prior to this statement, this statement should have been suppressed. The appellant further argues that the subsequent statements were tainted by this first involuntary statement and should have been suppressed. See State v. Smith, 834 S.W.2d 915, 918 (Tenn. 1992).

In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966), the United States Supreme Court ruled that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires police officers, before initiating questioning, to advise the putative defendant of his right to remain silent and his right to counsel. If these warnings are not given, statements elicited from the individual may not be admitted for certain purposes in a criminal trial. Stansbury v. California, __ U.S. __, 114 S.Ct. 1526, 1528 (1994). However, an officer's obligation to administer Miranda warnings only attaches "'where there has been such a restriction on a person's freedom as to render him "in custody."'" Id. (citing Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1970)). In Miranda, the Court explained that a "custodial interrogation" refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612.

Thus, when determining whether or not there was custodial interrogation, the initial inquiry is whether the suspect was "in custody." The trial court will be given a wide latitude of discretion in its decision, and that decision will not be overturned by this Court unless it appears there has been an abuse of the trial court's discretion and a violation of the appellant's rights. See State v. Smith, 868 S.W.2d 561, 570 (Tenn. 1993), cert. denied, __ U.S. __, 115 S.Ct. 417 (1994); State v. Nakdimen, 735 S.W.2d 799, 802 (Tenn. Crim. App. 1987).

We conclude that the trial court did not abuse its discretion in determining that the appellant was not in custody during the initial "alibi statement." "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury, __ U.S. at __, 114 S.Ct. at

1529.[27] Specifically, the inquiry is "how a reasonable person in the suspect's position would have understood his position," i.e., would he have felt that he was not free to leave and, thus, in custody. Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151 (1984). See also Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988); State v. Mosier, 888 S.W.2d 781, 784 (Tenn. Crim. App. 1994); State v. Furlough, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990).

Again, the appellant and his wife were asked to come to the station and were told that they were not under arrest.[28] Although the appellant was placed in a conference room for nearly two hours while the officers interviewed his relatives, he was neither locked in the room nor told that he could not leave. Moreover, the record indicates that, during those two hours, the appellant was not entirely isolated. His wife was in the conference room for a portion of the two hours. The officers periodically checked on the appellant and even offered him a soft drink. The appellant never asked if he could leave, and the officers never told him that he could not. The record further reflects that Ms. Boxley, the appellant's mother-in-law, decided she did not want to talk to the police, and the officers allowed her to go. Accordingly, the circumstances do not demonstrate that a reasonable person would have believed he or she was not free to leave.

The appellant also contends that the two subsequent statements, the unrecorded statement taken around 6:00 p.m. and the recorded statement taken around 9:00 p.m., were tainted by the involuntary "alibi statement." Since we

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[27]The officers uncommunicated belief that the person being questioned is a prime suspect has no bearing on the custodial interrogation determination. Id. at 1529-1530. In Beckwith v. United States, 425 U.S. 341, 346, 96 S.Ct. 1612, 1616 (1976), the United States Supreme Court expressly rejected the contention that the "in custody" requirement which triggers Miranda warnings was satisfied merely because the police interviewed a suspect who was the "focus" of a criminal investigation. The Court held: "It was the compulsive aspect of custodial interrogation and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose Miranda requirements with regard to custodial questioning." Id. Nor are warnings required simply because the questioning takes place at the station house. Mathiason, 429 U.S. at 495, 97 S.Ct. at 714.

[28]As mentioned earlier, Investigator Cavness testified that the appellant and his wife were nonetheless advised of their rights.

have concluded that the "alibi statement" did not stem from custodial interrogation, this contention is without merit.

ii. Waiver

Alternatively, the appellant argues that the State has failed to demonstrate by a preponderance of the evidence that the appellant waived his rights. He contends that the officers never obtained a written waiver of rights from him and claims that the oral testimony of the officers is insufficient to support the court's finding that the statements were given voluntarily.

Although the right to counsel and the right against self-incrimination are constitutional rights, they may be waived, provided the waiver is made "voluntarily, knowingly, and intelligently." State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992), cert. dismissed, 510 U.S. 124, 114 S.Ct. 651 (1993)(citing Miranda, 384 U.S. at 444, 86 S.Ct. at 1612). "A waiver is valid if the suspect is aware of the nature of the right being abandoned and the consequences of the decision to abandon the right." Stephenson, 878 S.W.2d at 547. The totality of the circumstances must be examined to determine whether the choice was uncoerced and whether the person understood the consequences of his decision. Id. at 545.

McDowell, Cavness, Porter, and Holt testified at the suppression hearing that the appellant was advised of his rights before the unrecorded statement and before the recorded statement. Although the police failed to obtain a written waiver, the law does not require a written waiver. In support of his argument, the appellant refers to his young age (22), lack of a high school education, race (African-American), and psychological condition. However, the appellant was not a stranger to the criminal justice system. He had been questioned by the police in the past and had been incarcerated pursuant to a previous conviction. With

respect to the appellant's psychological condition, there is no evidence in the record, apart from the appellant's own statements, that the appellant was in fact suffering psychological difficulties. The court granted the appellant psychological services, yet the record contains no reports, statements, or findings from the appointed psychologist.

The transcript of the recorded statement indicates that the appellant was informed of his rights prior to questioning. The transcript further states that the appellant had been advised of his rights earlier that evening, that the appellant understood the English language, that the appellant understood his rights, and that the appellant wanted to "come clean" and cooperate. See State v. Van Tran, 864 S.W.2d 465, 471-473 (Tenn. 1993), cert. denied, __ U.S. __, 114 S.Ct. 1577 (1994).

The appellant also contends that he was threatened and offered a promise in exchange for his confession. With respect to the promise, the appellant argues that Investigator McDowell assured him that he would receive treatment and would be sent to a hospital rather than to a jail. The record reflects that the appellant suggested to the officers that he suffered uncontrollable urges and required psychological treatment. The record reflects that McDowell told the appellant that he would inform the court that the appellant suffered a psychological problem and needed treatment. The record does not indicate, however, that McDowell promised the appellant that he would receive treatment.

Moreover, as mentioned earlier, the transcript of a subsequent pre-trial proceeding indicates that the appellant was untruthful about the offer of any promises and the use of force by the officers. Indeed, our examination of the totality of the circumstances surrounding the appellant's interviews with the police reveals that the appellant's waiver of his rights was not the product of

intimidation, coercion, or deception, but was the appellant's free and deliberate choice. As stated above, the trial court's determination that a confession was given knowingly and voluntarily is binding on the appellate courts unless the appellant can show that the evidence preponderates against the trial court's ruling. O'Guinn, 709 S.W.2d at 566; Stephenson, 878 S.W.2d at 544. The appellant has failed to carry his burden. We conclude that the trial court's denial of the motion to suppress was proper.

E. Jury Selection

The appellant next contends that the court, the prosecution, and defense counsel erred in numerous ways in selecting the jury. Specifically, the appellant presents the following arguments: the court inappropriately denied the appellant's motion for change of venue; the court failed to adequately question prospective jurors concerning their exposure to pre-trial publicity; the court inappropriately rehabilitated jurors who stated they would automatically impose the death penalty and inappropriately prevented defense counsel from rehabilitating jurors who stated they could not impose the death penalty; the court prevented the jurors, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985), from fully understanding their responsibility for determining the appellant's penalty; and the jury selection process in Dyer County fails to produce a venire representing a fair cross-section of the community.[29]

I. Pre-trial Publicity

The appellant argues that the majority of prospective jurors were exposed to pre-trial publicity. In this regard, the appellant asserts that the court and the parties failed to conduct adequate voir dire of individual jurors. Moreover, the

[29]Prior to submitting briefs in this case, the appellant filed a motion to remand the case to the trial court for an evidentiary hearing in order to further develop the record with respect to the following issues: whether the appellant was denied effective assistance of counsel; whether pre-trial exposure to information affected the impartiality of prospective jurors; and whether the jury selection process in Dyer County results in a significant under-representation of a cognizable group. A panel of this Court denied that motion.

appellant argues that the trial court should have changed the venue of the case.

Specifically, the appellant claims that, during voir dire, forty of the fifty-six prospective jurors stated that they had previously either read or heard information about the case. According to the appellant, thirty-three of those forty jurors were not questioned concerning the nature and extent of their exposure to pre-trial publicity. Moreover, eleven of the twelve jurors who served on the jury were exposed to pre-trial publicity. Nine of these jurors were not asked about the nature and extent of their exposure.

The State contends that the jurors were properly questioned concerning their exposure to publicity, and the trial court appropriately determined that a fair trial could be held in Dyer County. As the State notes in its brief, eleven jurors were dismissed due to exposure to pre-trial publicity or a predisposition to impose the death penalty. The majority of the remaining prospective jurors indicated that they had read or heard something about the case but were unable to remember much of that information and had not formed an opinion concerning the appellant's guilt or innocence. At least nine prospective jurors stated that they could not remember any information about the case or had not been exposed to any pre-trial publicity.

Rule 24 of the Tennessee Rules of Criminal Procedure provides: "If the trial judge, after examination of any juror, is of the opinion that grounds for challenge for cause are present, he shall excuse that juror from the trial of the case." The rule continues:

> A prospective juror's exposure to potentially prejudicial information makes him unacceptable as a juror. Both the degree of exposure and the prospective juror's testimony as to his state of mind shall be considered in determining acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and if he remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial

> risk that his judgment will be affected, his acceptability shall depend on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial.

Implicit in Rule 24 is the recognition that jurors do not live in a vacuum. Because certain cases are by their very nature apt to generate publicity, it is not inconceivable that some jurors will have formed an impression or opinion concerning the case. In addressing this problem, the United States Supreme Court has observed:

> It is not required ... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Irvin v. Dowd, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642-1643 (1961). See also Brown, 836 S.W.2d at 549. Accordingly, jurors may sit on a case, even if they have formed an opinion on the merits of the case, if they are able to set that opinion aside and render a verdict based upon the evidence presented in court. Id.

Accordingly, in interpreting Rule 24, this court has held that prospective jurors who have been exposed to information which will be developed at trial are acceptable, if the court believes their claims of impartiality. State v. Shepherd, 862 S.W.2d 557, 569 (Tenn. Crim. App. 1992), perm. to appeal denied, (Tenn. 1993). With respect to jurors who have been exposed to information which is inadmissible at trial because of its prejudicial effect, Rule 24 "implicitly places the burden upon the trial court to assess the level of prejudice apart from the juror[s'] statements." Id.[30] In either case, the determination of impartiality remains a

[30]We note that the appellant did not offer into evidence any newspaper article or television report which contained information that would have been inadmissible at trial.

matter within the trial court's discretion. Brown, 836 S.W.2d at 549. See also State v. Sammons, 656 S.W.2d 862, 869 (Tenn. Crim. App. 1982). In other words, "[a] trial court's findings of juror impartiality may be overturned only for 'manifest error.'" Cazes, 875 S.W.2d at 262 (quoting Patton v. Yount, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 2889 (1984)).

Upon motion of the appellant, the trial court permitted individual voir dire of prospective jurors regarding their pre-trial exposure to publicity and their general attitude toward the imposition of the death penalty. See Tenn.R.Crim.P. 24 (a); Cazes, 875 S.W.2d at 263 (when a crime is highly publicized, the better procedure is to grant the defendant individual voir dire; individual voir dire is mandated only if there is a significant possibility of exposure to potentially prejudicial material). Cf. State v. Claybrook, 736 S.W.2d 95, 98-101 (Tenn. 1987). As the appellant suggests, upon examination, a majority of the prospective jurors revealed that they had either read or heard something about this case prior to the trial. Again, the appellant claims that thirty-three of the forty jurors who had previously been exposed to information about the case were not questioned about the extent of that information.

Initially, we note that, although questions concerning the content of any publicity to which jurors have been exposed may be helpful in assessing impartiality, such questions are not constitutionally mandated, and the trial court's failure to delve into the jurors' exposure is not reversible error, unless the appellant's trial was rendered fundamentally unfair. Cazes, 875 S.W.2d at 262. In any case, contrary to the appellant's claim, those jurors with knowledge of the case were indeed asked the source and extent of that knowledge. The majority stated that they had either read about the case in the State Gazette or had heard friends talk about the case. The trial court excused nine of those jurors because of their extensive exposure to the facts of the case or personal relationships with the victim or members of her family. All of the remaining jurors who had

experienced some exposure indicated that either they did not remember any of the facts about the case or had not formed any opinion concerning the case. These remaining jurors asserted that they could follow the law and the court's instructions thereon.

Rule 21 of the Rules of Criminal Procedure provides for change of venue "if it appears to the court that, due to the undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." The mere fact that jurors have been exposed to pre-trial publicity will not warrant a change of venue. Sammons, 656 S.W.2d at 869. Moreover, "[b]efore an accused is entitled to a reversal of his conviction on the ground that the trial judge erroneously denied his motion for a change of venue, he must demonstrate ... that the jurors who actually sat were 'biased and/or prejudiced.'" State v. Harris, No. 85 (Tenn. Crim. App. at Knoxville, November 8, 1990), perm. to appeal denied, (Tenn. 1991) (quoting State v. Burton, 751 S.W.2d 440, 451 (Tenn. Crim. App. 1988). The decision of whether the venue should be changed is within the sound discretion of the trial court, and his decision will be reversed only upon a showing of an affirmative and clear abuse of discretion. See State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993), cert. denied, __ U.S. __, 114 S.Ct. 1339 (1994); Rippy v. State, 550 S.W.2d 636, 638 (Tenn. 1977).

After thoroughly reviewing the record, we conclude that the court did not abuse its discretion. The trial court carefully and meticulously orchestrated the jury selection process to ensure the selection of an impartial jury. See Cazes, 875 at 262 (the ultimate goal of voir dire is to insure that jurors are competent, unbiased, and impartial). Accordingly, although a majority of jurors were exposed to pre-trial publicity, we conclude that the appellant's trial was not rendered fundamentally unfair as a result. See generally State v. Melson, 638 S.W.2d 342, 359-62 (Tenn. 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770

(1983).

ii. Juror Rehabilitation

The appellant next contends that the trial court improperly rehabilitated six jurors after they indicated a propensity to impose a sentence of death without reserving judgment until the presentation of mitigation proof. He further claims that the court improperly denied defense counsel the opportunity to rehabilitate one juror who harbored scruples about the death penalty.

Initially, we note that, at the conclusion of voir dire, the court informed the appellant that he had not exercised one of his peremptory challenges. As the State contends, in order to assign as error the trial court's ruling on challenges for cause, an appellant must exercise all of his peremptory challenges. Middlebrooks, 840 S.W.2d at 329. Moreover, "the failure to exclude a juror for cause is grounds for reversal only if the [appellant] exhaust[ed] all of his peremptory challenges *and* an incompetent juror is forced upon him." Id. (emphasis added). See also State v. Kilburn, 782 S.W.2d 199, 202 (Tenn. Crim. App. 1989)("[o]nly when a defendant exhausts all his peremptory challenges and is forced to later accept an incompetent juror ... can he complain about the jury composition"). Of the six prospective jurors about whom the appellant complains, none actually served as a juror on the case. Accordingly, "any error in not excusing these potential jurors is harmless because they were not forced upon [the appellant] at the trial." State v. Thompson, 768 S.W.2d 239, 246 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3288 (1990). See also State v. Simon, 635 S.W.2d 498, 510-11 (Tenn.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473 (1982). The appellant's claim is without merit.

Additionally, the appellant's contention, that he was improperly prevented from rehabilitating one juror who indicated that she was opposed to the death penalty, is meritless. When asked by the prosecutor if she could impose the

death penalty, Juror Carson indicated that she probably could not. The Court then asked Carson on two separate occasions if she could consider the death penalty as a possible punishment. Each time, Carson indicated that, regardless of the evidence, she would feel uncomfortable considering the imposition of the death penalty. Finally, the court inquired, “Now, let me make sure I understand. Are you saying that you would automatically vote against the death penalty in any case regardless of what the evidence might show? Is that correct?” Carson replied affirmatively.

We agree with the State that Ms. Carson’s final response left “no leeway for rehabilitation.” Strouth, 620 S.W.2d at 471. State v. Alley, 776 S.W.2d 506, 517-518 (Tenn. 1989), cert. denied, 493 U.S. 1036, 110 S.Ct. 758 (1990). In any event, assuming that the questioning of Ms. Carson by the prosecutor and the court “had not reached the point that left no leeway for rehabilitation,” we must consider whether the dismissal of Ms. Carson for cause was appropriate under the dictates of Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985). See Alley, 776 S.W.2d at 517-518. In Wainwright, 469 U.S. at 424, 105 S.Ct. at 852, the United Stated Supreme Court delineated the following standard for determining whether a juror was properly excused for cause: "whether the juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" The Supreme Court further observed that "this standard does not require that a juror's bias be proved with 'unmistakable clarity.'" Id. Finally, the Court noted that "deference must be paid to the trial judge who sees and hears the jurors." Id. at 426, 853.

We conclude that Ms. Carson's responses to questioning by the prosecutor and the court adequately demonstrated that her views concerning the death penalty "would [have] 'prevent[ed] or substantially impair[ed] the performance of [her] duties as a juror in accordance with [her] instructions and

[her] oath.'" Wainwright, 469 U.S. at 424, 105 S.Ct. at 852. See also, State v. Smith, 893 S.W.2d 908, 915-16 (Tenn. 1994), cert. denied, __ U.S. __, 116 S.Ct. 99 (1995). Moreover, as noted earlier, great deference should be given to the trial judge, who is "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Wainwright, 469 U.S. at 426, 105 S.Ct. at 853. The trial court's findings "shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that [those findings were] erroneous." Alley, 776 S.W.2d at 518. The appellant has failed to meet this burden.

iii. Caldwell Violations

The appellant next argues that the trial court committed errors in violation of the Supreme Court's decision in Caldwell, 472 U.S. at 320, 105 S.Ct. at 2633. Specifically, the appellant contends that the trial court improperly sustained the prosecutor's objection when defense counsel referred during voir dire to "voting to kill the defendant," "how [the jurors] feel about killing the defendant," and "frying" the defendant. According to the appellant, the court's ruling shielded the jury from the harsh reality that it would sit in judgment of the appellant's life.

The appellant's argument is without merit. In Caldwell, the United States Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29, 2639. In the subsequent case of Romano v. Oklahoma, __ U.S. __, 114 S.Ct. 2004, 2010 (1994), the Court noted that it has

> since read Caldwell as "relevant only to certain types of comment - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, 477 U.S. 168, 184 n.15, 106 S.Ct. 2464, 2473 n.15 (1986). Thus, "[t]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215 (1989).

The record is devoid of any indication that either the court or prosecutor misled the jurors as to their role in the sentencing process. The prospective jurors were asked whether or not they personally could impose the death penalty if the State proved that the aggravating circumstances existed beyond a reasonable doubt and that these aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. See Tenn. Code Ann. § 39-13-204(g)(1). These questions properly outlined the sentencing jury's duty in a capital case. The appellant offers no authority, and we cannot find any, which requires the court to allow the appellant to employ colorful semantics, such as "kill" and "fry," to convey to the prospective jurors their duty under the law.

iv. Juror Pool

Finally, the appellant contends that the jury selection process in Dyer County did not afford the appellant a jury representative of a fair cross-section of the community.[31] Specifically, the appellant claims that the use of a list of registered drivers as the pool from which to draw prospective jurors essentially denies African-Americans the opportunity to serve on a jury. The appellant neither offers legal authority nor cites to any proof in the record which would support his argument.

The United States Supreme Court set forth a three-pronged test in Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979), for determining whether a jury was properly selected from a fair cross-section of the community pursuant to the Sixth and Fourteenth Amendments. Accordingly, in order to establish a prima facie violation of the fair cross-section requirement, the defendant must show:

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[31]The appellant also appears to raise a Fourteenth Amendment equal protection challenge to the selection of the venire. However, the appellant has failed to present any proof of purposeful discrimination in the selection process. See Evans, 838 S.W.2d at 193 (citing Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280 (1977)). See also Batson v. Kentucky, 476 U.S. 79, 93-97, 106 S.Ct. 1712, 1721-1722 (1986).

> (1) that the group alleged to be excluded is a "distinctive" group in the community;[32]
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;
>
> (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 363, 99 S.Ct. at 668. The Tennessee Supreme Court has adopted this test. State v. Buck, 670 S.W.2d 600, 610 (Tenn. 1984). See also Adkins v. State, 911 S.W.2d 334, 353 (Tenn. Crim. App.), perm. to appeal dismissed, (Tenn. 1995); State v. Blunt, 708 S.W.2d 415, 417 (Tenn. Crim. App. 1992), perm. to appeal denied, (Tenn. 1993).

T.J. Jones, the Circuit Court Clerk for Dyer County, outlined to the trial court the method by which his office selects the jury venire in Dyer County. He testified that his office selects the jury venire from a list of licensed drivers in the county. Out of the total county population of 38,000 people, there are 28,000 licensed drivers. Members of Jones' office calculate the number of jurors required for a two year period, which in this case was approximately 3,000. They then divide the number of licensed drivers by the number of jurors needed. The quotient determines the number of names they will skip when they count down the alphabetical list of 28,000 licensed drivers to obtain 3,000 jurors. Mr. Jones further testified that, of the 150 jurors available for the selection of the appellant's jury, twelve or thirteen were African-Americans. Consequently, African-Americans constituted approximately eight percent of the prospective jurors. Finally, Jones testified that approximately seven percent of the population of Dyer County is African-American.

Accordingly, the record reveals no disparity between the size of the cognizable group in the community and its representation in the appellant's jury

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[32]We recognize that the appellant automatically satisfies the first prong as the United States Supreme Court has recognized African-Americans to be a distinctive group in the community. See Alexander v. Louisiana, 405 U.S. 625, 628, 92 S.Ct. 1221, 1224 (1972).

venire. Nor does the record contain evidence that the use of driver's license rolls has resulted in the systematic exclusion of African-Americans in the jury selection process. Indeed, our supreme court has approved the use of voter registration lists to select potential jurors. See State Caruthers, 676 S.W.2d 935, 939 (Tenn. 1984), cert. denied, 469 U.S. 1197, 105 S.Ct. 981 (1985). Although no court in this state has addressed the use of driver's license rolls in selecting jury venires, we can see no material difference between the use of a list of registered voters and the use of a list of registered drivers.[33] The appellant has failed to establish a prima facie case under either the state or federal constitution. Having completely reviewed the record, we do not find any error in the selection of the jury in this case. This issue is without merit.

F. Instructions Concerning Mitigating Evidence

The appellant claims that the use of "extreme" and "substantial" as modifiers in describing the mitigating circumstances set forth in Tenn. Code Ann. §§ 39-13-204(j)(2), (8) (1991) created a reasonable likelihood that the jury understood them to prohibit consideration of the appellant's mental disturbance unless it exceeded some undefined threshold. Accordingly, the appellant asserts, the jury was prevented from considering as mitigation "any aspect of [the appellant's] character or record." Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978). Our supreme court has repeatedly rejected this argument. See Smith, 893 S.W.2d at 920; Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 16-17 (Tenn.), cert. denied, __ U.S. __, 114 S.Ct. 561

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[33] We note that the statistics provided by the Dyer County Circuit Court Clerk reveal that licensed drivers in Dyer County constitute 73.68 percent of the entire population of the county. Thus, it is readily apparent that the list of licensed drivers "provide[s] a large and easily accessible source of names, to which all potential jurors have equal access and which disqualifies jurors solely on the basis of objective criteria." Id. See also United States v. Rogers, 73 F.3d 774, 777 n.2 (8th Cir. 1996)(the author of the opinion noted that several federal districts supplement their jury lists with persons who have a driver's license to increase minority representation); Inabinett v. State, 668 So.2d 170, 173 (Ala. Cr. App. 1995)(selecting jurors from a list of licensed drivers does not violate the fair cross-section requirement of the Sixth Amendment); State v. Paz, 798 P.2d 1, 9 (Idaho 1990), cert. denied 501 U.S. 1259, 111 S.Ct. 2911 (1991), overruled on other grounds by State v. Card, 825 P.2d 1081 (Idaho 1991)(voter registration lists and driver's license lists are appropriate sources from which to select jurors); State v. Marshall, 531 N.W.2d 284, 287 (N.D. 1995)(unsubstantiated assertion that the use of jury source lists other than voters and driver's license lists, like phone books, would have been more representative was insufficient to establish a Sixth Amendment claim).

(1993), and cert. denied, __ U.S. __, 114 S.Ct. 682 (1994). Therefore, this issue is without merit.

G. The Appellant's Right to Life

The appellant claims that the imposition of the death penalty in this case violates substantive due process and equal protection principles. The appellant contends that the State has no compelling interest in executing the appellant because it offered the appellant a life sentence in exchange for a guilty plea.[34] The Tennessee Supreme Court has consistently found that the death penalty is constitutional and does not impermissibly infringe upon the right to life. See, e.g., Smith, 893 S.W.2d at 926; Cazes, 875 S.W.2d at 253; Smith, 857 S.W.2d at 1; Black, 815 S.W.2d at 166; State v. Boyd, 797 S.W.2d 589 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800 (1991); Teel, 793 S.W.2d at 236; Thompson, 768 S.W.2d at 239. This issue is without merit.

H. Guilty Plea Offer

The appellant asserts that his constitutional rights were violated when the State offered the appellant a life sentence in return for a guilty plea and when, in response to the appellant's decision to undergo a trial, the State sought the death penalty. The appellant relies upon United States v. Jackson, 390 U.S. 570, 583, 88 S.Ct. 1209, 1217 (1968), in which the United States Supreme Court stated that the death penalty cannot be imposed in "a manner that needlessly penalizes the assertion of a constitutional right."

In Jackson, the Supreme Court determined that the death sentence provided by a federal kidnapping statute was unconstitutional, because it could only be imposed upon the recommendation of a jury accompanying a guilty verdict. 390 U.S. at 572, 88 S.Ct. at 1211. The Court observed that, under the

[34]The issue of whether the plea offer unconstitutionally tainted the imposition of the death penalty is addressed infra part 2(H).

federal statute, only a person “who abandon[ed] the right to contest his guilt before a jury [was] assured that he [could not] be executed.” Id. at 581, 1216. The appellant argues that the offer of a life sentence in return for a guilty plea in this case presented the appellant with the same unconstitutional dilemma confronted by defendants under the statute at issue in Jackson. We disagree.

The Court's holding in Jackson was based upon statutory interpretation. Cf. Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 493 (1978). Under the statute in Jackson, if the defendant pled guilty, he was completely shielded from execution. In Tennessee, however, the guilt phase and sentencing phase are separate. See Tenn. Code Ann. § 39-13-204 and Tenn. Code Ann. § 39-13-205. Accordingly, the State may seek the death penalty after a jury verdict or after a guilty plea. The Jackson Court suggested that there is nothing wrong with offering a life sentence in return for a guilty plea in those states where "the choice between life imprisonment and capital punishment is left to a jury in *every* case -- regardless of how the defendant's guilt has been determined." Jackson, 390 U.S. at 582, 88 S.Ct. at 1217 (emphasis in original).[35]

Tennessee courts have adopted a similar position with respect to this issue. See Parham v. State 885 S.W.2d 375, 381(Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994)("a guilty plea is not rendered involuntary by the fact that the accused is faced with an election between a possible death sentence on a plea of not guilty and a lesser sentence upon a guilty plea"). Accordingly, we find that the appellant's constitutional rights were not violated by the State’s offer of a life sentence in return for a guilty plea. This issue is without merit.

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[35]Moreover, in McCleskey v. Kemp, 481 U.S. 279, 312, 107 S.Ct. 1756, 1778 (1987) (citations omitted), the Supreme Court noted,

> [A] prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. . . Of course, "the power to be lenient [also] is the power to discriminate," . . . but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice.”

I. Constitutionality of Tennessee's Death Penalty Statute

The appellant acknowledges that the constitutionality of Tennessee's death penalty statute has been upheld by the Tennessee Supreme Court, but raises the following issues in order to preserve them for subsequent proceedings.

The appellant argues that (1) the death penalty statute fails to meaningfully narrow the class of eligible defendants; (2) the prosecution has unlimited discretion in seeking the death penalty; (3) the death penalty is imposed in a discriminatory manner based upon economics, race, geography, and sex; (4) there are no uniform standards for jury selection; (5) the juries tend to be prone to returning guilty verdicts; (6) the defendant is denied the opportunity to address the jury's popular misconceptions about parole eligibility, cost of incarceration, deterrence, and method of execution; (7) the jury is instructed it must unanimously agree to a life sentence, and is prevented from being told the effect of a non-unanimous verdict; (8) the courts fail to instruct the juries on the meaning and function of mitigating circumstances; (9) the jury is deprived of making the final decision about the death penalty; (10) the defendant is denied the final argument during the sentencing phase; (11) electrocution is cruel and unusual punishment; and (12) the appellate review process in death penalty cases is constitutionally inadequate.

These issues have repeatedly been rejected by the Tennessee courts. See Smith, 893 S.W.2d at 908; State v. Brimmer, 876 S.W.2d 75 (Tenn.), cert. denied, __ U.S. __, 115 S.Ct. 585 (1994); Cazes, 875 S.W.2d at 253; Smith, 857 S.W.2d at 1; Black, 815 S.W.2d at 166; Boyd, 797 S.W.2d at 589; Teel, 793 S.W.2d at 236; Thompson, 768 S.W.2d at 239.

3. 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) (1994 Supp.), and for the reasons stated herein, we affirm the appellant's conviction and sentence of death. We conclude that the sentence of death was not imposed in an arbitrary fashion, the evidence supports the jury's finding of the aggravating circumstances, and the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances. Moreover, a comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases.[36]

Accordingly, the judgment of the trial court is affirmed.

[36]No execution date is set in this opinion. Tenn. Code Ann. § 39-13-206(a)(1) provides for automatic review by the Tennessee Supreme Court upon affirmance of the death penalty. If the sentence of death is upheld by the supreme court on review, that court will set the execution date.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY L. SMITH, Judge

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LYNN W. BROWN, Special Judge