IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1993

STATE OF TENNESSEE,	)	No. 03C01-9303-CR-00065
	)	
Appellee,	)	Hamilton County
	)	
v.	)	Hon. Stephen M. Bevil, Judge
	)	
LEROY HALL, JR.,	)	(First degree murder and aggravated arson)
	)	
Appellant.	)	

For the appellant:

Karla G. Gothard
701 Cherry Street
Suite 300
Chattanooga, TN 37402
(At trial only)

William R. Heck
212 James Building
Chattanooga, TN 37402
(At trial and on appeal)

Brock Mehler
Capital Case Resource Center
704 18th Avenue South
Nashville, TN 37920
(On appeal only)

For the appellee:

Charles W. Burson
Attorney General of Tennessee
and
Joel W. Perry
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

William H. Cox
District Attorney General
and
Thomas J. Evans
Assistant District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Leroy Hall, Jr., was convicted of first degree murder and aggravated arson. The jury imposed the death penalty, finding the existence of two aggravating circumstances: T.C.A. § 39-13-204(i)(5)[1] and T.C.A. § 39-13-204(i)(7) (1991).[2] The trial court imposed a twenty-five-year sentence for aggravated arson, a class A felony, to be served consecutively. In this appeal as of right directed solely at the murder conviction and sentence, the defendant raises the following issues relative to the guilt phase of the trial:

> (1) whether there was sufficient evidence of premeditation and deliberation to support the conviction for first degree murder,
>
> (2) whether the trial court erred in allowing the prosecution to introduce evidence of the defendant's prior bad acts,
>
> (3) whether the trial court erred in allowing the prosecution to introduce certain autopsy photographs of the victim,
>
> (4) whether the trial court erred in allowing "misleading and speculative" testimony regarding the manner in which the offense occurred,
>
> (5) whether he was denied the opportunity to present evidence of his diminished capacity, and
>
> (6) whether the trial court gave incorrect instructions to the jury relative to the elements of premeditation and deliberation.

With regard to the penalty phase of the proceedings, the defendant makes myriad attacks on the constitutionality of the death penalty, the Tennessee death penalty statute, T.C.A. § 39-13-204 (1991), and the sentence and statute as applied in his case. Also, he raises the following issues:

> (7) whether the felony murder aggravating circumstance, T.C.A. § 39-13-204(i)(7) (1991), was unconstitutionally applied in this case,

---

[1] T.C.A. § 39-13-204(i)(5) states, "The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death."

[2] T.C.A. § 39-13-204(i)(7) (1991) states, "The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

(8) whether the trial court erred by requiring disclosure of a report which the defendant claimed was privileged and attorney work product,

(9) whether the trial court erred by allowing the prosecution to cross-examine a defense expert witness about certain "bad acts" committed by the defendant as a child,

(10) whether the trial court erred with regard to its instructions on the mitigating circumstances in T.C.A. § 39-13-204(j)(2)[3] and -204(j)(8),[4]

(11) whether the trial court erred by refusing to instruct the jury relative to nonstatutory mitigating circumstances specifically requested by the defense,

(12) whether the trial court erred in excluding certain evidence the defense argued was mitigating, and

(13) whether the death penalty is constitutionally disproportionate in this case.

GUILT PHASE EVIDENCE

The defendant and the victim, Tracy Crozier, had lived together from 1986 until their separation in late March or early April 1991. In the early morning hours of April 17, 1991, the defendant threw gasoline on the victim as she sat in her car, setting fire to both. The victim received third degree burns to more than ninety percent of her body and died several hours later in the hospital. In addition to the evidence pertaining to the April 17th offenses, several witnesses testified that the defendant had previously set two other fires to the victim's vehicle.[5]

The victim's grandmother, Gloria Mathis, testified that the victim left the defendant and moved in with her about three weeks before the offense. Even after the

---

[3] T.C.A. § 39-13-204(j)(2) states, "The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."

[4] T.C.A. § 39-13-204(j)(8) states, "The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment."

[5] The defendant was indicted for two additional counts of arson for these earlier fires that were alleged to have occurred on April 1, 1991, and April 6, 1991. The trial court severed these counts from the murder and aggravated arson trial on motion of the defendant, and they were later dismissed.

separation, the defendant would frequently call the Mathis home, often late at night. On the night of April 6, 1991, Ms. Mathis was awakened by a fire outside her home. When she looked outside, she saw that the victim's car, a four-door Toyota, was burning. She called the fire department.

Chris Mathis, the victim's uncle, also witnessed the April 6th incident. He testified that he saw the defendant approach the victim's car just before it "blazed up." He said that the defendant later told him on several occasions: "If I can't have her, nobody can't [sic]." Mathis admitted that he fired a gunshot into the air when he saw the defendant at the scene. He also admitted that he had threatened the defendant if the defendant failed to leave the victim alone.

On the night of April 16, 1991, Viola Wylene Price was sitting in her car outside her home when she saw "a ball of fire" in the middle of the street. She started to get out of her car but stopped when she saw a black car, later identified as being similar to the defendant's, approaching at a high rate of speed. After the car passed, Price entered her house and called 9-1-1. She then went to the scene where her son, Billy Ray Wilson, was helping the victim cross the street. Ms. Price testified that the victim had been completely burned and that her head, hair and skin were melted. The victim was able to tell Price her name and telephone number and the victim identified the defendant when Price asked who did this to her.

Billy Ray Wilson testified that when he approached the scene, he saw that a car was on fire and he heard someone in the car screaming for help. Wilson ran to the driver's side of the car, which was open, but he could not see anyone because of the flames. He went around to the passenger's side where he was able to pull the victim from the car. Wilson moved the victim away from the car and tried to remove her burning clothes. In response to Wilson's questions, the victim referred to the defendant

and said "he threw gas on me, gas bomb." She repeated: "[I]t was gas, gas bomb. He set me on fire."

The victim was taken to Erlanger Hospital where she was examined by Dr. Sonya Merriman, a plastic surgeon and burn specialist. Dr. Merriman testified that the victim was awake and alert despite having burns to over ninety-five percent of her body. The victim told Dr. Merriman that "he threw gasoline on me and burned me." The victim was given intravenous fluids and incisions were made in her body in an attempt to allow tissues to expand. Nonetheless, the victim's condition deteriorated. According to Dr. Merriman, the victim did not sleep for long periods of time or lose consciousness until just before her death. In Dr. Merriman's opinion, the consistency and uniformity of the burns were indicative of a dousing of flammable material and not just a splashing or splattering.

Law enforcement officers investigated the cause of the fire. Earl Atchley, Commander of the Chattanooga Fire Department, received the 9-1-1 call at 12:06 a.m. on April 17, 1991. When he arrived at the scene the fire was "fully involved" and the victim was badly burned and unrecognizable. Atchley testified that the victim recognized him because he had also investigated the fire of April 6, 1991. According to Atchley, the victim referred to the earlier fire and said that the same person had committed the act. Atchley recovered a plastic container and a tupperware lid near the victim's car.

Ed Forester, an investigator with the Arson Division of the Chattanooga Police Department, examined the scenes of both the April 6th and April 17th fires. At the former, Forester discovered that an accelerant had been poured around the exterior of the car and that the fenders and vinyl bumpers were melted. There was a strong odor of alcohol and also a yellow plastic jug found at the scene. Forester obtained an

arrest warrant for the defendant based in part on Chris Mathis' statements.

Forester testified that the vehicle burned on April 6th was the same vehicle involved in the April 17th fire. The most severe damage to the car was on the driver's side where the metal was discolored, the roof sagged, and the seat springs were weak and sagging. Whereas the glass on the passenger's side was fire or carbon stained, glass found on the driver's side had no such markings. This, according to Forester, indicated that the driver's side window had been broken out before the fire. A melted plastic container was found near the open driver's door of the victim's vehicle. The victim's shoes, socks and remains of clothing were also recovered and later tested positive for the presence of gasoline. Car keys were found some thirty feet from the victim's car. Forester went to the hospital around 12:30 a.m. but was unable to interview the victim. The victim's skin was burned, her eyes were swollen and turned backwards, and her mouth and tongue were swollen and protruding.

Mike Donnelly, an arson investigator with the State of Tennessee Fire Marshall's office, examined the victim's car after the offense. He found evidence of three "separate and distinct" fires to the car. Like Forester, Donnelly related that the most extensive damage was to the driver's side of the car. Burn patterns emerged from the interior of the vehicle to the exterior. The carpet, interior roof, console, and floorboard all were extensively damaged on the driver's side of the car. Donnelly testified that he also examined the car for possible alternative sources of the fire and found that the electrical system, the battery and the fuel system were all intact.

Donnelly opined that the fire had been started on the driver's side of the vehicle, both front and rear seat areas. These areas had suffered the greatest amount of damage and were where the greatest amount of combustibles had been consumed. Donnelly testified that gasoline, which had been carried in a plastic container recovered

from the scene, had been applied to the driver's side of the vehicle as an accelerant. Donnelly also testified that, based on his examination of the car and his viewing of photographs of the victim's burns, the gasoline had been poured directly onto the victim.

The defendant's proof during the guilt phase of the proceedings consisted of the testimony of Morris Forester, Jeffery Scott Green and the defendant. Forester and Green were drinking with the defendant on the evening of April 16, 1991. According to Forester and Green, the trio had consumed about two and one-half cases of beer and the defendant was intoxicated. While Forester believed that the defendant left his house that night around 10:00 p.m., Green recalled seeing the defendant between 10:30 p.m. and 11:00 p.m.

The defendant testified that he and the victim began living together in January of 1986 when he was eighteen and she was sixteen. The victim left in March 1991 to live with her grandmother. However, according to the defendant, they continued to see one another after the separation. The defendant testified that he had been drinking and smoking crack cocaine since his separation from the victim.

On the night of April 16th, he and Jeffery Scott Green went to Morris Forester's home and drank beer. At one point, the defendant went home to shower. Thereafter, he obtained a hammer at a pawn shop and, after seeing the victim's car near her grandmother's house, tried to call the victim several times. He then returned to Forester's about 6:30 p.m. or 7:00 p.m. and resumed drinking.

After consuming approximately one case of beer, the defendant again left Forester's. He took five beers with him and also stopped to purchase a six pack of beer. According to the defendant, he was angry because he felt that the victim had lied

to him. He drove to his trailer and tore up certain possessions that belonged to the victim. He said that he obtained a two-quart tea jug and that he intended to locate the victim in order to burn her car. He went to the victim's work place and her grandmother's house, but was unable to find her at either location. The defendant testified that as he drove by the victim's grandmother's home, he was threatened by Chris Mathis and a second man whom he did not know.

The defendant proceeded to drive through the parking lots of several bars and nightclubs looking for the victim's car. The defendant admitted purchasing gasoline and a cigarette lighter at a Conoco station and putting gasoline in the car and in the tea jug. He took paper towels from a dispenser near the gas pumps and put them in the opening of the tea jug, which he then placed in his car. He returned to the area near the victim's grandmother's house. He then indicated that he had the gas for protection against Chris Mathis and the second man.

As the defendant was about to leave, the victim pulled up in her car. According to his testimony, the defendant entered the victim's car on the driver's side and told her that he wanted her to move back in with him. He told her that he was drunk and that he needed her. The defendant asked the victim whether she was pregnant and told her that she could not get an abortion. The defendant also asked the victim why he had been blamed for the earlier burnings of her car. An argument ensued and the victim called the defendant a "crazy S.O.B." She also told him that he needed to turn himself in.

According to the defendant, he exited the victim's vehicle and told her to get out because he was going to burn the car. She tried to lock the door but the defendant reached in, grabbed the keys and threw them toward his car. The defendant testified that he again told the victim to get out of the car but she did not do so. The

defendant then ran to his car where he grabbed the gasoline-filled jug. He lit the paper towels in the jug with his lighter and threw the jug into the driver's side of the car. He testified that he was aware that the victim was in the front seat crying but that he threw the jug anyway.

After he threw the gasoline jug, the victim got out of the car and ran toward the defendant, catching him on fire. She ran to the passenger's side of the car, according to the defendant, and began rolling on the ground. The defendant then left the scene, not knowing what to do. Although flames were rolling out the driver's side of the victim's car, the defendant thought that the fire on the victim had been extinguished. Two or three minutes later, the defendant returned to the scene but did not see the victim. He fled because something ran toward him.

On cross-examination, the defendant denied pouring gasoline onto the victim, claiming that it splattered. He also denied breaking the glass on the driver's side door, insisting that the door had been open. He testified that he told the victim to get out of the car three times and that he did not intend to kill the victim, but rather, to burn her car. The defendant admitted that he initially denied the offense when questioned by police. He also told police that he made the gas jug for protection, but then threw it at the victim because she was laughing at him.

PENALTY PHASE EVIDENCE

Detective Ed Forester was recalled to testify during the sentencing phase. He testified that, in addition to the April 17, 1991 offenses, he investigated fires that had been set to the victim's car on April 1, 1991 and April 6, 1991. Forester obtained warrants for the defendant's arrest relative to the first two fires and questioned the defendant about the April 17th offenses. Although the defendant was aware that he

was a suspect in the April 1st and April 6th incidents, he initially denied committing the April 17th offenses.[6]

Forester also testified that he had obtained a statement from the victim following the April 6th fire. The victim, who was not an eyewitness to either the April 1st or April 6th offenses, told Forester that the defendant had previously threatened to kill her and to "total" her car. On one occasion, according to the victim, the defendant tried to run her off the road.

The defense proof during sentencing included the testimony of Dr. Roger Meyer, a clinical psychologist. Dr. Meyer evaluated the defendant after the offense by gathering basic information and performing a series of tests. Dr. Meyer ultimately concluded that the defendant exhibited characteristics associated with a borderline personality disorder and a post-traumatic stress disorder.

Dr. Meyer related the type, nature and results of the numerous tests he administered to the defendant. A mental status examination revealed that the defendant was not insane or psychotic. A Slosson Intelligence test indicated that the defendant's IQ was eighty-seven, and that his mental age was thirteen years, eleven months. The defendant's basic skills as measured by a Wide Range Achievement test showed his level of education in general areas to reflect grades six to nine. However, a neuropsychological examination revealed no evidence of significant neurological trauma.

---

[6] The evidence regarding the April 1st and April 6th fires was admitted during the sentencing phase of the proceedings as part of the prosecution's attempt to establish the aggravating circumstance in T.C.A. § 39-13-204(i)(6), which provides that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." The jury, however, rejected this factor.

Dr. Meyer's findings also embraced a number of personality traits. A sixteen-factor personality test showed that the defendant is extremely introverted, emotionally unstable, easily led and has low self-esteem. According to Dr. Meyer, the test also reflected that the defendant has little self-control and is not rule abiding or moralistic. Dr. Meyer also testified that the defendant has severe emotional problems, dissociative experiences revealing traits of post-traumatic stress and a borderline personality disorder. He stated that the defendant is not a psychopath or sociopath. However, he has problems controlling rage and anger and, in Dr. Meyer's opinion, was involved in an "emotional tug of war" with the victim. He testified that the test results indicated some evidence that the defendant may be "faking bad" or malingering. He explained that the results do not necessarily mean that a patient is faking but could just reflect that the patient is overemphasizing the stress and emotional problems he is experiencing.

On cross-examination, Dr. Meyer testified that the defendant is not mentally retarded. He acknowledged that one of his reports reflected the defendant's IQ as seventy-eight, instead of eighty-seven, but explained that the discrepancy was a typographical error. Dr. Meyer testified that, notwithstanding this error, the educational and personality findings he had related would be valid even if the intelligence evaluations may have been affected.

Dr. Meyer restated his opinions that the defendant exhibited signs often associated with borderline personality disorders and post-traumatic stress disorders and that the defendant committed the offenses under extreme emotional distress. However, when questioned about specific childhood behavior of the defendant, Dr. Meyer conceded that the defendant has exhibited many traits consistent with an antisocial personality disorder. The behavior included the defendant's burning of his own bed in 1972, the setting of a fire to his mother's boyfriend's car seat in 1973 and

the setting of a fire to a wooded area in 1975. Other acts committed by the defendant and acknowledged by Dr. Meyer included truancy, driving under the influence, fighting and sneaking up on the defendant's mother with a knife.[7]

The defense also presented evidence relative to the defendant's relationship with the victim, as well as the defendant's abuse of drugs and alcohol. Jeffery Scott Green, for instance, testified that the relationship between the victim and defendant was a "rocky" one and that the defendant abused alcohol, marijuana and crack cocaine. Christie Griffin, the defendant's step-sister, testified that the defendant would get sad when he fought with the victim but that he believed they would work out their problems. David Hall, the defendant's brother, testified that the defendant and the victim fought about once a week. According to Hall, the victim would often address the defendant in abusive and cursing language. Hall also related that the defendant was abusing crack and had asked to borrow money.

The defendant's mother, Sarah Griffin, testified that the family moved several times when the defendant was young. From ages fourteen to seventeen, the defendant resided with another family while his family moved to Alabama. The defendant and the victim had been happy together the first three or four years of their relationship, according to Ms. Griffin, but they started to have problems during the past two years. The couple separated and reconciled on several occasions. Ms. Griffin testified that in December of 1990, the defendant moved to Oklahoma where he planned to find work. He returned after only a few days to reconcile with the victim. She also testified that during the most recent separation in March 1991, the defendant

---

[7] The prosecution apparently learned this information from a report prepared by a defense investigator. The trial court ruled, over defense objections, that the report was discoverable and not privileged. The prosecution argued that it could cross-examine Dr. Meyer with the defendant's "bad acts" as a child to impeach Dr. Meyer's opinions regarding the defendant's borderline personality and post-traumatic stress disorders. The rulings of the trial court and the use of this information by the prosecution are raised as error by the defense.

was very upset and would cry and drink alcohol excessively. The defendant, according to his mother, was a "basket case" when he did not see the victim.

The defense introduced medical records showing that the victim had received two abortions in 1985 and one abortion in 1990. The prosecution, in rebuttal, presented a witness who related that the defendant was aware of one of the abortions in question and had encouraged the victim to have it done.

GUILT PHASE ISSUES

(1)

The defendant challenges the sufficiency of the convicting evidence relative to first degree murder and argues that there was no evidence that he acted with premeditation and deliberation. He asserts that the proof shows a crime committed by an emotionally and mentally disturbed man in the midst of a tumultuous personal relationship. The state responds that there was sufficient evidence of premeditation and deliberation.[8]

When the sufficiency of the evidence is challenged, the standard for review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 2789 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). A conviction that is approved by the trial court accredits the testimony which favors the state and resolves all conflicts in favor of the state's theory. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983).

At the time of the offenses, T.C.A. § 39-13-202(a)(1) (1991) provided that the "intentional, premeditated and deliberate killing of another" is first degree murder.[9] A premeditated act is "one done after the exercise of reflection and judgment." T.C.A. § 39-13-201(b)(2) (1991). A deliberate act is "one performed with a cool purpose."

---

[8] The defendant went to trial on three charges: (1) first degree murder by an unlawful, intentional, premeditated and deliberate killing, (2) first degree murder by a reckless killing committed during the perpetration of arson (felony murder), and (3) aggravated arson. However, he entered guilty pleas before the jury to arson and felony murder. After the trial court refused to "accept" the guilty pleas, the defendant persisted in such pleas before the jury, contesting only the charges that the killing was premeditated and deliberate. At the conclusion of the proof, the trial court instructed the jury that it could return a guilty verdict for either felony murder or for a premeditated and deliberated murder, but not for both. Under this instruction, the jury reported that the defendant was found guilty of aggravated arson and premeditated and deliberate murder. No finding regarding a felony murder was reported.

[9] Although not relevant to our inquiry, we note that the definition of first degree murder contained in T.C.A. § 39-13-202 was amended in 1995. See T.C.A. § 39-13-202 (Supp. 1996).

T.C.A. § 39-13-201(b)(1) (1991). As is usually the case, a determination of culpable mental states, such as premeditation and deliberation, must be inferentially made from the circumstances surrounding the killing. Bass v. State, 191 Tenn. 259, 231 S.W.2d 707, 711 (1950); Taylor v. State, 506 S.W.2d 175, 178 (Tenn. Crim. App. 1973).

Our supreme court has discussed the then existing elements of first degree murder in State v. Brown, 836 S.W.2d 530 (Tenn. 1992) and State v. West, 844 S.W.2d 144 (Tenn. 1992). In Brown, the supreme court acknowledged that the Tennessee courts had often commingled the elements of premeditation and deliberation. The court relied upon the following historical definitions:

> "Premeditation" is the process simply of thinking about a proposed killing before engaging in the homicidal conduct; and "deliberation" is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended. "Deliberation" is present if the thinking, i.e., the "premeditation," is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a "careful weighing" of the proposed decision.

Brown, 836 S.W.2d at 540-41 (quoting C. Torcia, Wharton's Criminal Law §140 (14th ed. 1979) (emphasis in original)); see also State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1993).

Accordingly, premeditation requires evidence of a "previously formed design or intent to kill," and deliberation requires some period of reflection, during which the mind is free from the influence of excitement or passion. West, 844 S.W.2d at 147; Brown, 836 S.W.2d at 540. Moreover, to insure that the elements would be considered separately, the court in Brown deemed it prudent to abandon a commonly given instruction that premeditation could be "formed in an instant." Brown, 836 S.W.2d at 543. In this regard, our court, in Gentry, considered the nature of proof from which a jury might rationally infer the elements of first degree murder:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, planning activity;
>
> (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and
>
> (3) facts about the nature of the killing from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

881 S.W.2d at 4-5 (quoting 2 W. LaFave and A. Scott, Substantive Criminal Law § 7.7 (1986) (emphasis in original).

We conclude that, in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of a premeditated and deliberated first degree murder. There was evidence that the defendant and the victim had a troubled relationship and were in the midst of a separation. The defendant, according to one witness, had made threats toward the victim, including telling Chris Mathis to the effect that no one could have her if he could not. The defendant admitted that, on the night of the killing, he was angry because he felt that the victim had lied to him.

The defendant's testimony included his procurement of materials used to commit the offense. He located a tea jug to fill with gasoline in order to burn the victim's car and he set out to find the victim. He related how he went to a gas station, filled the jug with gasoline, purchased a cigarette lighter and put paper towels in the opening of the jug. Also, the defendant's testimony clearly recounted his actions in searching for the victim. He went to the victim's place of employment and to her grandmother's house. He drove through the parking lots of numerous bars and nightclubs in his effort to find the victim. His testimony included the names of each establishment, the roads he traveled and his actions. Notwithstanding the defendant's testimony that he only

intended to burn the victim's car, a rational trier of fact could infer planning activity from such evidence.

When finally locating the victim, he told her that he was going to burn her car, but he prevented her from leaving the scene or locking herself inside the car by taking her car keys. According to the defendant's own testimony, an argument ensued and he returned to his car to retrieve the gasoline jug. The defendant further admitted that he was aware the victim was lying prone on the front seat when he lit the gasoline jug and threw it into the car. The defendant fled the scene and later denied to police that he committed the offense.

We conclude that this evidence was sufficient for a rational trier of fact to find the elements of premeditation and deliberation beyond a reasonable doubt. The defendant's contentions that his actions were indicative of anger, passion and an intent to burn the victim's car are unavailing. The jury heard the defendant's testimony in this regard and could rationally conclude that his actions were consistent with an intent to kill and deliberation. Moreover, although the defendant testified that he had been drinking on the night in question, he recounted his actions and whereabouts with clarity and detail.

The defendant attacks certain aspects of the state's proof that purportedly demonstrate the elements of premeditation and deliberation and offers other inferences that could have been drawn. For instance, he argues that the evidence regarding the extent of the victim's injuries did not by itself establish premeditation. See, e.g., Brown, 836 S.W.2d at 546. He contends that the opinion testimony relative to the "pouring" of gasoline on the victim was speculative and inadmissible, and, in any event, not probative of the elements of the offense. He contends that the inference that he broke the driver's side window of the victim's car before setting it ablaze conflicted with

testimony that the driver's door was open and that, in any event, such evidence would indicate anger, not deliberation. The defendant further argues that evidence relative to his prior threats against the victim must be viewed in contrast to the evidence that he and the victim continued to have contact with one another after their separation. Finally, he argues that evidence that he procured the materials with which to make the bomb was not probative of premeditation, but rather could have been done in a state of passion. See, e.g., West, 844 S.W.2d at 148.

Essentially, the defendant's contentions require a reweighing of the evidence, something this court may not do. That is, it is of no consequence that alternative inferences might exist depending upon what view of the evidence is made, because our review is limited to whether or not the jury's guilty verdict is rationally supported by the evidence when viewed in the light most favorable to the state. Under such a review, we conclude that the circumstances of the killing and the inferences that can be rationally drawn from the evidence by the jury are sufficient to sustain the first degree murder conviction. T.R.A.P. 13(e); Jackson v. Virginia, 443 U.S. at 318, 99 S. Ct. at 2789.

(2)

The defendant contends that the trial court erred in allowing evidence about the previous fires set to the victim's car on April 1, 1991 and April 6, 1991. He argues that said evidence was not relevant to a material trial issue and it was improperly used to prove that he committed the offenses on April 17, 1991. The state insists that the trial court's rulings with respect to evidence of the earlier fires were correct.

Testimony regarding fires to the victim's car on April 1st and April 6th 1991 was elicited through several witnesses. Gloria Mathis, the victim's grandmother,

testified that the defendant had burned the victim's car twice before the offenses in question. The defendant objected based upon a lack of proof that the defendant committed either fire. The defendant requested that Ms. Mathis' statement be stricken from the record and that a curative instruction be issued or that the trial court grant a mistrial. The prosecution contended that the evidence of the earlier fires was intended to show the victim's state of mind and to show a "pattern of conduct by the defendant" through the similarity of the offenses.

The trial court ruled that it would allow testimony only about prior burnings that related to the defendant. The state assured the court that it would present a witness who would testify that the defendant had set the April 6th fire. The trial court overruled the defendant's objection relative to any evidence of prior fires "on the stipulation that if [the defendant's involvement is] disproven, [it would] sustain the motion for a mistrial." The trial court sustained the defendant's objection to Ms. Mathis' statement and instructed the jury to disregard the witness' statement that the car had been burned "twice before."

Ms. Mathis was then questioned about the April 6th fire but did not implicate the defendant as the person who had caused the fire. The trial court instructed the jury that Ms. Mathis' testimony relative to the April 6th fire was being admitted contingent upon it being made relevant at a later time. Her son, Chris Mathis, was later permitted to relate facts regarding the April 6th incident. In fact, it was Chris Mathis, an eyewitness, who connected the defendant to the April 6th fire. The defense, who had earlier noted an "ongoing objection," did not contemporaneously object to Chris Mathis' testimony.

Before the testimony of Viola Wylene Price, the prosecution advised the court that Price and Commander Earl Atchley of the Chattanooga Fire Department

would relate statements made by the victim on the scene to the effect that the defendant had burned her car on two previous occasions. The prosecutor argued that the evidence was relevant to the victim's state of mind, insofar as she knew the defendant's prior acts and therefore would not have associated with him voluntarily. The defense again noted that such evidence of prior acts would lead the jury to conclude that the defendant had committed the acts for which he was being tried. The trial court ruled that the victim's statements were admissible as "excited utterances." See Tenn. R. Evid. 803(2). The court further ruled that it would instruct the jury that the statements were admitted to show the victim's existing state of mind but not "as to whether there were in fact two prior fires or whether there weren't two prior fires."

Price was allowed to testify that the victim told her that the defendant had tried to set fire "to her twice before." Likewise, Atchley testified that the victim said that the defendant had committed the offense and that he was the "same guy that set the automobile on fire on the 6th." The trial court, on each occasion, instructed the jury that the statements were "excited utterances," and not offered to prove the defendant committed the prior fires.

Ed Forester and Mike Donnelly testified relative to the prior fires in the course of their testimony about their investigations. Before Forester's testimony, the prosecution informed the trial court that the witness would relate his findings with regard to his April 1st and April 6th investigations. The state argued that the evidence was relevant to show the victim's state of mind with regard to her relationship with the defendant and to rebut the defendant's theory that the victim was with the defendant willingly on the night of her death. The defense objected on the grounds that Forester's statement that the victim suspected the defendant of the April 1st fire had nothing to do with her state of mind and that there had been no evidence connecting the defendant to

the April 1st fire. The trial court sustained the defendant's objection relative to evidence of the April 1st fire, stating that it was too remote and that the victim's mere suspicion of the defendant for the April 1st fire was not enough to allow its introduction. The trial court also ruled that Forester could testify to the April 6th fire because there had been proof of the defendant's involvement. The court further noted that evidence of the April 6th fire had been admitted because "it was relevant and probative to the issue of premeditation and intent of the defendant when he . . . set the fire on April the 17th, . . . since there was proof that he himself actually set the fire."

Forester then testified that he had met the victim on April 1, 1991, and that he had investigated a fire to the victim's car on April 6, 1991. He related the details of the April 6th fire. At one point in this testimony, he refers to "both previous fires." The defendant later objected out of the presence of the jury but stated no basis for the objection. The trial court stated that it did not hear the reference to more than one previous fire and never ruled on the defendant's objection. .

Donnelly testified that the investigation of the victim's car revealed evidence of "three separate and distinct fires." He added that he learned fires had been set to the car on April 1st and April 6th, in addition to the day of the offenses being tried. The defense objected to his testimony and moved for a mistrial on the basis of the cumulative references that had been made to the earlier fires. The trial court denied the mistrial motion because it did not think that the defendant had suffered any prejudice. However, the trial court offered a curative instruction for the jury to disregard the reference to the April 1st fire, but the defendant declined the instruction.

As the defendant correctly notes, evidence that an accused has committed some other crime or bad act independent of that for which he is charged is generally inadmissible, even though it may be a crime or act of the same character as

that on trial. Tenn. R. Evid. 404(b); State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993); Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980). However, if evidence that a defendant has committed a crime separate and apart from the one on trial is relevant to some matter actually in issue in the case on trial and if its probative value is not outweighed by the danger of its prejudicial effect, the evidence may be admitted. Tenn. R. Evid. 404(b); Howell, 868 S.W.2d at 254. Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent or the rebuttal of accident or mistake defenses. In State v. Parton, 694 S.W.2d 299, 301 (Tenn. 1985), the supreme court stated that admissibility was also contingent upon the trial court finding clear and convincing evidence that the prior crime, wrong or act was committed by the defendant. See, e.g., State v. Holman, 611 S.W.2d 411, 412-13 (Tenn. 1981).

As our previous recital of the facts indicates, the record does not provide a pattern of clear cut testimony, objections and rulings regarding the previous fires. Sometimes the defendant objected without specifying the basis of the objections, one time he claimed a continuing objection, while other times there was no specific objection made. The trial court's rulings were, similarly, often not specific. In this respect, we note that at no time did either of the parties refer to Rule 404(b) or request a jury-out hearing as provided by Rule 404(b) at which specific rulings upon each questioned proffer of evidence could be made. See, e.g., State v. Bigbee, 885 S.W.2d 797, 806 (Tenn. 1994). As the rule indicates, the trial court was not obligated to conduct such a hearing absent a request. In any event, the ultimate result is that there is no record of a trial court analysis and determination regarding issue relevance and potential prejudice.

Nevertheless, as the state contends, the record indicates that the evidence of the previous fires is relevant to the defendant's motive and intent regarding his conduct for which he is now being tried. In this respect, we note that the trial court

stated at one point that the April 6th fire was relevant to intent and premeditation. We agree. In State v. Smith, 868 S.W.2d 561 (Tenn. 1993), the defendant objected to the introduction of evidence that he committed previous assaults against his estranged wife, one of the murder victims. The defendant claimed that the evidence violated Rule 404(b). The supreme court stated:

> In response to the Defendant's assertions that the evidence of the two episodes was irrelevant and inadmissible under Tenn. R. Evid. 404(b), the State cites a line of cases, see, e.g., State v. Turnbill, 640 S.W.2d 40, 46-47 (Tenn. Crim. App. 1982); and State v. Glebock, 616 S.W.2d 897, 905-906 (Tenn. Crim. App. 1981), which hold that violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim. Also, in the present case, the victims, despite the Defendant's threats to kill them if they did so, had filed charges against the Defendant based on these prior assaults. The evidence of these violent episodes was admitted not to prove the Defendant acted in accord with this character but as part of the proof establishing his motive for the killings. The probative value of this evidence is not outweighed by the danger of unfair prejudice.

Smith, 868 S.W.2d at 574 (emphasis added) (citations omitted). We believe the facts in the present case are similar to those in Smith. The defendant committed prior acts of arson toward the victim and charges were brought. The defendant was aware of the charges. As in Smith, these facts were highly probative of the defendant's motive and intent. We conclude that the probative value of the evidence is not outweighed by the danger of unfair prejudice and was, therefore, admissible.

(3)

The defendant argues that the trial court erred by admitting a photograph taken of the victim at an autopsy. He argues that the victim's appearance in the photograph had been altered by medical procedures and that the prosecution's expert witness, as well as lay witnesses, were able to describe the victim's condition without the use of photographs. The state contends that the photograph was relevant

to show the nature of the victim's injuries and that the trial court did not abuse its discretion in this regard.

The record indicates that the prosecution sought to introduce a series of four photographs, contending that they accurately depicted the consistency of the burns received by the victim. Dr. Merriman testified that the photographs would best illustrate her testimony, although she conceded that she could describe the victim's condition, including her charred, hardened and discolored skin, without them. Dr. Merriman also admitted that the photographs, taken at the autopsy, did not reflect the victim's condition at the time of her admittance to the hospital. In this regard, she acknowledged that incisions had been made in the victim's skin and that fluids provided to the victim produced a swelling to her body, eyes, lips and tongue.

Nonetheless, the trial court ruled that one of the photographs, which depicted the victim's back as she lay on her side, was admissible, stating that it was representative of all the burns and was relevant to assist the jury in understanding the seriousness and degree of the burns. The trial court ruled that the other photographs, which more graphically depicted the victim's head, torso, face and extremities, were inadmissible because their probative value was outweighed by the danger of unfair prejudice.

The leading case regarding the admissibility of photographs of murder victims is State v. Banks, 564 S.W.2d 947 (Tenn. 1978), in which the supreme court indicated that the determination of admissibility is within the discretion of the trial court after considering the relevance, probative value and potential unfair prejudicial effect of such evidence. The general rule, as stated in Banks, is that "photographs of the corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Id. at 950-951 (citing People

v. Jenko, 410 Ill. 478, 102 N.E.2d 783 (1951)). On the other hand, "if they are not relevant to prove some part of the prosecution's case, they may not be admitted solely to inflame the jury and prejudice them against the defendant." Banks, 564 S.W.2d at 951 (citing Milam v. Commonwealth, 275 S.W.2d 921 (Ky. 1955)).

Thus, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Banks, 564 S.W.2d at 951; see also Tenn. R. Evid. 403. In Banks, the court stated that "[t]he more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." 564 S.W.2d at 951 (citation omitted). Also, it noted that autopsy photographs are often condemned "because they present an even more horrifying sight and show the body in an altered condition. . . ." Id.[10]

In the present case, the admitted photograph did depict the victim in a different condition due to the treatment procedures that had been administered. This factor weighs against admissibility. Banks, 564 S.W.2d at 951. Likewise, the testimony of Dr. Merriman and several lay witnesses conveyed the graphic and extensive nature of the victim's burns and the extent of her injuries, further weighing against the admission of the photograph. Id. On the other hand, the trial court found that the photograph was relevant to "the seriousness and the degree of the burns." The trial court ruled that the photograph showed the nature of the injury and the consistency of the burns received by the victim. This, in turn, was relevant to an assessment of how the offense was committed by the defendant. We note that part of the prosecution's theory, as related by Dr. Merriman and Mike Donnelly, was that the victim's injuries

[10] The defendant relies upon State v. McCall, 698 S.W.2d 643 (Tenn. Crim. App. 1985), in which the victim had been shot in the chest and later run over and dragged by a car. This court held that it was error to admit photographs of the victim because, with the exception of the gunshot wound, all of the harm to the victim was caused by the subsequent passing of a vehicle. Conversely, in the present case, the photograph that was admitted, although altered, was limited in nature and depicted injuries the victim received as a result of the defendant's conduct. Thus, we do not consider McCall to be dispositive of this issue.

were consistent with a dousing of flammable material, and not just a splashing or splattering. In this regard, the evidence was relevant to the manner in which the offense occurred and to clarify testimony on the issue. See, e.g., Banks, 564 S.W.2d at 951. See also Smith, 868 S.W.2d at 576 (trial court did not abuse its discretion in allowing autopsy photograph of victim during guilt phase in part to illustrate testimony); State v. Caughron, 855 S.W.2d 526, 536 (Tenn. 1993).

The trial court excluded several other photographs that were more graphic in nature on the ground that their probative value was substantially outweighed by the risk of prejudice to the defendant. By contrast, the photograph that was admitted was more limited in nature, revealing the victim's back as she lay on her side. Given the trial court's full consideration of this issue, as evidenced by its admission of one photograph and exclusion of several others, we conclude that the trial court did not abuse its discretion in this regard. Banks, 564 S.W.2d at 951. See also Cazes, 875 S.W.2d 253, 263 (Tenn. 1994); Smith, 868 S.W.2d at 576; State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993); Caughron, 855 S.W.2d at 536. It was not error for the trial court to admit this photograph.

(4)

The defendant contends that the trial court erred in allowing "misleading and speculative" opinion testimony about how gasoline was used in the homicide. In essence, Mike Donnelly, a Tennessee Fire Marshall arson investigator, gave his opinion that the gasoline had been "poured rather than thrown" onto the victim. The defendant contends that Donnelly's testimony does not meet the four-part test for admission of scientific expert testimony provided in State v. Williams, 657 S.W.2d 405, 412 (Tenn. 1983). In Williams, our supreme court recognized the following requirements for expert testimony: (1) the witness must be an expert, (2) the subject matter of the witness' testimony must be proper, (3) the subject matter must conform to a generally accepted

explanatory theory, and (4) the probative value of the witness' testimony must outweigh its prejudicial effect. Id. at 412. In fact, the defendant now claims that Donnelly's testimony met none of these factors.

Unfortunately, the defendant's objections at trial were not so plainly stated. Donnelly testified in detail to substantial training and experience relative to fire and explosion investigations. Without objection, the trial court accepted him as an expert witness in the field of arson investigation. Donnelly testified that he believed that the fire had been started on the driver's side of the car, both front and rear seat areas. He indicated that these areas had suffered the greatest amount of damage and were where the greatest amount of combustibles had been consumed. Donnelly said that gasoline had been applied to the driver's side of the car as an accelerant. He also testified that based on his examination of the car and his viewing of the photographs of the victim's burns, he believed that the gasoline had been poured directly onto the victim. He said that his belief was based upon the fact that damage was limited to the interior of the car, being confined to the driver's side of the car, both front and rear. Likewise, he relied upon the fact that both the front and back of the victim's body was burned, an indication that accelerant was not just splashed onto her while she was in the car.

During the course of this testimony, the defendant's objection primarily related to the fact that Donnelly was not a doctor, in terms of his attempting to interpret how an accelerant was applied to the victim's body. The trial court concluded that Donnelly was entitled to give his opinion based upon his expertise, his review of the autopsy photographs, the lab and investigative reports, and his personal inspection of the materials and car. In this respect, the trial court's ruling was within its discretion and was appropriate. See State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993).

The more specific attacks upon Donnelly's testimony that the defendant now raises under Williams cannot be pursued because they were not previously raised. Obviously, if any question had been raised in the trial court about the reliability of the scientific principles involving fire accelerants and paths of burning, full explanation may have been forthcoming from Donnelly or other experts. Without proper objection, we will not fault the trial court or the state for not presenting a greater foundation for the opinions Donnelly gave. Otherwise, we note that expert testimony regarding the nature of accelerants or the paths that fires take is not uncommon. See, e.g., Otis v. Cambridge Mutual Fire Insurance Company, 850 S.W.2d 439, 443-444 (Tenn. 1992). In this respect, given the record of Donnelly's expertise, the items he reviewed, and the nature of the conclusions he reached, we are unable to hold that his testimony was improperly speculative or otherwise inadmissible.

(5)

Next, the defendant contends that the trial court erred by refusing at the guilt phase to allow him to present proof of his mental state at the time of the offense. Particularly, he asserts that the trial court should have allowed the testimony of Dr. Roger Meyer, testimony regarding the troubled relationship between the defendant and the victim, and testimony regarding the defendant and victim using drugs. The state's response is limited to defending the trial court's rejecting evidence of the victim's drug use, leaving unanswered the defendant's other assertions. In any event, we agree with the state that the trial court did not err by refusing to allow evidence of the victim's purported drug use at other times. Moreover, we note that contrary to the defendant's claim, the trial court held that evidence of the defendant's intoxication and alcohol consumption was relevant and admissible.

Regarding Dr. Meyer not testifying at the guilt phase, the defendant now contends that Dr. Meyer was an expert witness whose testimony was relevant to show that the defendant had diminished capacity so as to be unable to premeditate or deliberate the victim's killing. He relies upon State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992), app. denied, (Tenn. 1993), involving a pre-November 1989[11] offense, in which this court indicated that a defense of diminished capacity could be used if a defendant were shown to be incapable of forming a specific criminal intent. Later, this court in State v. Phipps, 883 S.W.2d 138, 143 (Tenn. Crim. App. 1994), acknowledged that the overhaul of the criminal code in 1989 did away with the concept of common law defenses, but stated that "diminished capacity is not a defense that absolves the accused from culpability; rather, it is a rule of evidence which allows the introduction of evidence to negate the existence of specific intent when a defendant is charged with a specific intent crime." In this respect, this court held that "evidence, including expert testimony, on an accused's mental state, is admissible in Tennessee to

[11]The substantive criminal code in Tennessee was completely changed, effective November 1, 1989.

negate the elements of specific intent, including premeditation and deliberation in a first- degree murder case." Id. at 149.

We believe, though, that the record before us does not show any error by the trial court in its ruling regarding the type of evidence the defendant could present at the guilt phase. After the state rested its case-in-chief in the guilt phase of the trial, defense counsel requested the trial court to rule on whether or not Dr. Meyer's testimony could be admitted. The trial court asked about the nature of the testimony and the following discussion occurred:

> [DEFENSE COUNSEL]: Talking about the type of individual that -- what his testing revealed about the defendant in this case, and then take him to the situation where -- I mean there's going to be proof -- there's already been proof put on about alcohol consumption, and what that consumption -- what effect that consumption would have had on him with his type of personality, in addition to exploring his state of mind, given his personality makeup, posing facts that have been presented here in court about the incident and how it occurred, what his expert opinion would be about how he would react under those circumstances.
>
> THE COURT: I don't understand -- of course, state of mind is important if it goes to a defense. If it goes to negating key elements in the case --
>
> [DEFENSE COUNSEL]: Intent, Your Honor.
>
> THE COURT: But just general state of mind, what his feelings are, what his attitude was toward the victim in general, I don't see how that particular state of mind contributes toward a defense. I assume at this time, based on what I've heard up to this point, his defense is intoxication, and he could not form the requisite intent to premeditate and deliberate and commit an intentional murder. Is that correct?
>
> [DEFENSE COUNSEL]: Well, it's not only with reference to intoxication, but it's also with reference to emotional distress and stress that was produced by the relationship between the parties.

After further discussions, the trial court stated the following:

> Anything going towards state of mind that would create a defense or an excuse for this killing, the Court will allow. But just a general state of mind of the defendant about attitudes toward the deceased, I don't think it's relevant at this time, I don't think it's admissible. I'm not going to allow that testimony

> about drugs and whatever between the two people just to show generally what the defendant was thinking, unless it goes specifically toward a defense. And, as I understand what you said, it does not.
>
> Also, the law of the State of Tennessee does not recognize diminished capacity in this state.[12] And the only relevancy I see as far as the doctor's testimony would be going toward insanity as a defense in this case and not as to diminished capacity.
>
> Now, as far as the defense of intoxication, if there is credible testimony from the doctor and he can give an opinion as to the extent of the state of intoxication of Mr. Hall at the time of commission of the offense, then that would be relevant, but just general stress or general attitude toward life would not be a defense in this case. Any testimony going toward the defense of intoxication, I will allow . . . .

The defense made no further proffer during the guilt phase about the intended nature of Dr. Meyer's testimony.

We do not believe that the defendant was entitled to introduce at the guilt phase expert evidence of his particular personality or character traits for the purposes stated by defense counsel. In Shelton, this court noted that a cornerstone to a diminished capacity defense is "that the defendant's state of mind at the time of the offense had to be the product of a mental disease or defect, not just any mental condition." 854 S.W.2d at 122. In this respect, as Shelton also indicates, it is the showing of a lack of capacity to form the requisite culpable intent that is central to diminished capacity. Id. We do not believe Phipps intended to expand the admission of evidence beyond this point.

However, the defendant's proffer at the guilt phase was in terms of the expert testifying about the defendant's "personality makeup" and how he would react under the circumstances otherwise proven. This proffer did not advise the trial court of

---

[12]The trial in this case occurred some seven months before Shelton was decided. At the time of the trial, the trial court's view that diminished capacity was not recognized in Tennessee had supporting authority from this court. See State v. Taylor, 645 S.W.2d 759, 763 (Tenn. Crim. App. 1982); State v. Croscup, 604 S.W.2d 69, 72 (Tenn. Crim. App. 1980).

the asserted existence either of mental disease or defect or of the inability to form the mental state necessary to prove intent, premeditation or deliberation. As a threshold to the admissibility of expert testimony, the testimony must "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." Tenn. R. Evid. 702. Also, expert testimony can lead to a danger of undue prejudice or confusion of the issues because of its "aura of special reliability and trustworthiness." Ballard, 855 S.W.2d at 561. In this respect, expert testimony that the defendant would react in any given manner because of his "personality makeup" misleads the jury regarding the defendant's mental state because it, by itself, bears no relevance to whether the defendant was capable of forming the requisite mental state.

Society is comprised of myriad individuals with diverse personalities and temperaments who are jointly and severally bound by society's common codes of conduct and responsibility. The mere fact that one is more apt, by personality type, to become emotional in response to a particular stimulus does not provide a means for that person to be absolved from the same responsibility to which the law holds another who might be less apt to respond as passionately to the same stimulus. If it did, then each person would be the law unto him or herself based solely upon his or her particular personality makeup. Thus, as a predicate to admissibility, expert witness testimony about a defendant’s mental condition presented for the purpose of negating a culpable mental state must be based upon that condition being a product of mental disease or defect that bears on the defendant’s capability to form the mental state required for the offense.

Our review of the record leads us to believe that the trial court's rulings were entirely justified given the substance of the defendant's proffer. In fact, the trial court did not bar Dr. Meyer from testifying and expressed a willingness to entertain expert testimony that would be probative in terms of tending to negate the culpable

mental state required for an offense. In this sense, the fact that Dr. Meyer did not testify at the guilt phase was not the result of erroneous rulings by the trial court.

Finally, we acknowledge that Dr. Meyer testified at the sentencing phase and stated, at one point, that he believed the defendant to have a borderline personality disorder and that such people could have brief episodes of rage during "temporary states of mental illness." However, the trial court was not advised during the guilt phase that these points were involved. Also, as far as the potential for prejudice, we believe that any fair review of Dr. Meyer's testimony, including the cross-examination, would result in a conclusion that Dr. Meyer's positions were greatly weakened -- to the point that his conclusions bearing on diminished capacity are quite suspect.

(6)

The defendant claims that the trial court gave incorrect instructions to the jury on the first degree murder elements of premeditation and deliberation. As we noted, our supreme court has held that an instruction to the jury that premeditation may be formed "in an instant" should be abandoned. Brown, 836 S.W. 2d at 546. The court concluded that such an instruction improperly blurs the distinction between premeditation and deliberation and does not properly allow the jury to consider whether a defendant's actions were done with reflection and a cool purpose. Id. See also West, 844 S.W.2d at 147.

In the present case the trial court properly instructed the jury on the separate elements of intent, premeditation, and deliberation. However, the instructions also charged that:

> Premeditation means that the intent to kill must have been formed prior to the act itself. Such intent to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it

> preceded the act, however short the interval, as long as it was the result of reflection and judgment.

The instruction contained the language the court in Brown held should be abandoned. The defendant did not object to the instruction at trial in March of 1992 nor did he raise the erroneous instruction as an issue in his initial motion for a new trial. Brown was decided in June 1992 and the defendant included the issue in his amended motion for a new trial filed in August 1992. In denying relief on this ground during the motion for a new trial hearing, the trial court noted that Brown was not to be applied retroactively and that, in any event, there was sufficient evidence of premeditation and deliberation in this case to render any error harmless. The state on appeal argues these identical grounds and claims that the issue is without merit. We agree.

In State v. Meadows, 849 S.W.2d 748, 754 (Tenn. 1993), our supreme court reaffirmed its position regarding retroactivity when it stated that "newly announced state constitutional rules will be given retroactive application to cases which are still in the trial or appellate process at the time such rules are announced, unless some compelling reason exists for not so doing." The first step in determining whether a case will be given retroactive application is whether it announces a new constitutional rule. "[A] case announces a new constitutional rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1970 (1989).

This court has held on numerous occasions that the Brown decision did not create a new constitutional rule. See, eg., State v. Lofton, 898 S.W.2d 246 (Tenn. Crim. App. 1994), app. denied, (Tenn. Feb. 27, 1995); State v. Jimmy Sills, No. 03C01-9410-CR-00370, Hamilton Co. (Tenn. Crim. App. May 10, 1995), app. denied, (Tenn. Sept. 11, 1995); State v. Joe Nathan Person, No. 02C01-9205-CC-00106, Madison Co. (Tenn. Crim. App. Sept. 29, 1993); State v. Willie Bacon, Jr., No. 1164, Hamilton Co. (Tenn. Crim. App. Aug. 4, 1992), app. denied. Also, as stated in Lofton, the

supreme court did not hold in Brown that the instruction on premeditation violated a constitutional right. Lofton, 898 S.W.2d at 249-250. It only stated that it would be prudent to abandon the instruction because of the potential for confusion. Id. We conclude that the trial court did not err in its instructions relative to the elements of premeditated and deliberated first degree murder.

SENTENCING PHASE

(7)

The defendant initially contends that the use of T.C.A. § 39-13-204(i)(7) (1991), that the “murder was committed while the defendant was engaged in committing . . . any . . . arson. . . ," as an aggravating factor in this case was unconstitutional. First, he argues that the jury's finding that the murder occurred in the perpetration of arson is inconsistent and irrational with respect to its verdict of premeditated first degree murder. Second, he argues that the use of circumstance (7) along with T.C.A. § 39-13-204(i)(5), that the “murder was especially heinous, atrocious, or cruel," amounted to an improper "double weighing" of aggravating circumstances because they were based on the same underlying facts, that is, the burning of the victim's car. In other words, the defendant claims that the same facts should not support two separate aggravating circumstances for imposition of the death penalty. Also, he claims that the state’s proof of a premeditated first degree murder shows that the felony of arson was collateral to the killing and that enhancement to aggravated arson based on serious bodily injury to the victim, for which he received a separate twenty-five-year sentence, renders the use of the felony to impose the death penalty to be improper.

The application of circumstance (7) to a premeditated murder conviction is not improper or inconsistent with the jury's verdict where a premeditated murder is committed during the perpetration of a felony. State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992). Also, we believe that this circumstance is broad enough to allow the

jury to consider the defendant's commission of a felony even though the felony, itself, was the means by which the victim's death was caused.

Moreover, we note that the aggravated arson conviction and sentence have not been appealed. Any claim of double enhancement would affect the lesser crime not the greater. However, we still do not believe that the aggravated arson conviction and twenty-five-year sentence have any bearing on the application of aggravating circumstance (5). Certainly, the means by which the defendant chose to kill the victim "involved torture [and] serious physical abuse beyond that necessary to produce death." That is, we are not obligated to view a death by burning as the equivalent of death by other means in considering whether circumstance (5) applies. The evidence in this case reflects that the victim suffered for hours from third degree burns that covered over ninety-two percent of her body while she remained conscious before dying. The physical abuse as existing beyond that necessary to show serious bodily injury under the aggravated arson statute implicates circumstance (5) and supports its application in this case. We conclude that the application of these aggravating circumstances was constitutional.

(8) and (9)

The defendant argues that the trial court erred by requiring the defense to disclose a report that had been prepared by his court-appointed investigator, Colin Mitchell, through the testimony of Dr. Meyer. The defendant argues that the report was attorney work product and was privileged. He argues that he was prejudiced by the disclosure because the prosecution was then permitted to cross-examine Dr. Meyer regarding numerous acts committed by the defendant as a child, and then argue these acts to the jury during summation. The state concedes that the report was undiscoverable work product under Rule 16(b)(2), Tenn. R. Crim. P.,[13] but argues that because the defendant allowed Dr. Meyer to review the report before testifying, the report is discoverable as a basis of his evaluation. They also argue that the specific instances of conduct were properly admitted as an impeachment of Dr. Meyer's evaluation that the defendant exhibited various character traits consistent with both a borderline personality disorder and a post-traumatic stress disorder by showing, instead, that the defendant also exhibited several character traits of an antisocial personality disorder. We agree.

Rule 703, Tenn. R. Evid., provides that an expert may base his or her opinion on facts or data "perceived by or made known to the expert at or before the hearing." Furthermore, Rule 705, Tenn. R. Evid., provides that the court may require disclosure of the underlying facts or data relied upon by the expert in formulating his opinion. Dr. Meyer testified that he completed his evaluation and report of the defendant in December 1991. On cross-examination, he testified that he relied upon the defendant's statements and the investigator's report to develop facts surrounding the defendant's background. In a jury-out hearing, Dr. Meyer testified that he received

---

[13] In State v. Nichols, 877 S.W.2d 722, 730 (Tenn. 1994), the supreme court concluded that "when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable under Rule 16(b)(1)(B)." In this case, Dr. Meyer prepared an evaluation report in advance of trial and therefore, the investigator's report is considered an internal memorandum and is generally nondiscoverable, as the state concedes, under Tenn. R. Crim. P. Rule 16(b)(2).

the investigator's report about one week prior to trial, used it to verify various aspects of the defendant's childhood and educational background, and considered it before testifying at trial. When cross-examination resumed, Dr. Meyer admitted that he altered his opinion of the defendant's evaluation somewhat after reviewing the investigator's report relative to the defendant's childhood background and behavior. Thus, information in the investigator's report helped form a basis for Dr. Meyer's opinions and it was then subject to disclosure to the state.

Relative to the defendant's claim that he was prejudiced by the cross-examination of Dr. Meyer about several instances of the defendant's setting fire to things as a child, the state argues that the specific instances of conduct were used as a basis to impeach Dr. Meyer's evaluation and to show that the defendant exhibited character traits associated with an antisocial personality disorder. As discussed earlier, Rule 404(b), Tenn. R. Evid., deals with the admission of prior bad acts of the defendant. A jury-out hearing was held in which the trial court ruled that specific instances of conduct could be discussed relative to the reliability of Dr. Meyer's diagnosis. We conclude that the prior bad acts contained in the investigator's report upon which Dr. Meyer, in part, based his evaluation of the defendant were admissible to impeach the doctor's diagnosis and that the danger of their prejudicial effect did not outweigh their probative value.

(10)

The defendant contends that the trial court erred with regard to its instructions to the jury on the mitigating circumstances in T.C.A. § 39-13-204(j)(2) and (j)(8). The T.C.A. § 39-13-204(j)(2) circumstance is that the “murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." The T.C.A. § 39-13-204(j)(8) circumstance is that the “capacity of the defendant to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law was substantially impaired as a result of mental disease or

defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment." The defendant contends that the use of "extreme" in the former provision and "substantially" in the latter, deprived the jury of potential mitigation evidence that falls short of these standards.

The defendant's argument was rejected by our supreme court in addressing the identically worded provisions under the previous death penalty statute. State v. Smith, 857 S.W.2d 1, 16-17 (Tenn. 1993). See also T.C.A. § 39-2-203(j)(2)and (j)(8). The defendant in Smith argued that "the use of the modifier in (j)(2) and (j)(8) misled the jury in its consideration of evidence of his mental and emotional impairments and intoxication at the time of the offense." Smith, 857 S.W.2d at 16. The supreme court, however, concluded that there was no likelihood of the jury being misled by these provisions. Id. at 17.

Also, the defendant's contention that the jury is not provided a basis upon which to consider mitigating evidence that falls short of being "extreme" or "substantial" is unavailing. As the state notes, the jury was instructed on T.C.A. § 39-13-204(j)(9), which provides that the jury may consider "[a]ny other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." (Emphasis added). We note as well that a considerable portion of the defense argument to the jury related to the various aspects of the defendant's mental and emotional states, from his youth to the time of trial. Thus, the qualifiers in the statutory provisions in question did not unconstitutionally limit the jury's consideration of mitigating evidence. Cazes, 875 S.W.2d at 268. We conclude that the defendant is not entitled to relief on this issue.[14]

---

[14] We note that the defendant also relies on Smith v. McCormick, 914 F.2d 1153, 1163-65 (9th Cir. 1990), which we conclude is distinguishable. The Ninth Circuit reversed the denial of habeas corpus relief in part because Montana's death penalty structure interfered with the consideration of mitigating evidence. The defendant is correct that Montana statutes contained similar mitigation factors modified by "extreme" and "substantial." However, Montana statutes also provided that the death penalty was required if the sentencer found one or more aggravating circumstance and no mitigating circumstances "sufficiently substantial" to call for leniency. Id. at 1163. Tennessee provisions do not contain such a

(11)

The defendant's next contention is that the trial court erred in failing to instruct the jury relative to nonstatutory mitigating circumstances. The defendant submitted numerous requests for jury instructions as to what he characterized as nonstatutory mitigating factors. The requests, in our view, may be generally considered as falling into one or more of the following categories:

> (1) The defendant's background and family history (request nos. 19, 37, 45-47);
>
> (2) The defendant's history of mental and emotional problems (nos. 20-22, 26, 27, 29, 35);
>
> (3) The defendant's low intellect and learning disabilities (nos. 23-25);
>
> (4) The defendant's personality traits (nos. 30-34, 37);
>
> (5) The defendant's involvement in a turmoiled relationship with the victim and its effect on his mental state (nos. 28, 36, 39, 48, 52);
>
> (6) The defendant's expression of remorse and amenability to treatment in a prison setting (nos. 40, 41, 44, 55, 56);
>
> (7) The effect of the defendant's drug and alcohol abuse (nos. 38, 49, 51); and
>
> (8) The jury's consideration of mercy and compassion (nos. 42, 44, 64-66).

The trial court refused to include these nonstatutory mitigating factors in the jury instructions on the basis of State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), and State v. Wright, 756 S.W.2d 669 (Tenn. 1988). In Wright, the supreme court, in addressing the pre-1989 death penalty provisions, held that there is no constitutional or statutory requirement for specific instructions to be given regarding mitigating factors other than those provided in the statute. Id.

In the present case, the trial court also noted that:

---

limitation. See T.C.A. § 39-13-204(f) and (g).

> [a]fter reviewing [the special requests] I found that many of them are already included in the charge that the Court is giving . . . or some of them are what I felt like are . . . repetitious . . . . And I've also found that many of them . . . are not appropriate as far as accurate statement of the law.

Thus, the trial court instructed the jury on the mitigating factors set forth in T.C.A. § 39-13-204(j)(2), (j)(7), (j)(8) and (j)(9). The charge relative to (j)(9) was as follows:

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

In addition, the trial court instructed the jury that "[n]o distinction shall be made between mitigating circumstances one through four and those otherwise raised by the evidence." See T.P.I. Crim. 7.04 (3d ed.).

The defendant contends that under the present death penalty sentencing provisions, specifically T.C.A. § 39-13-204(e),[15] the trial court is obligated to charge the jury on nonstatutory mitigating factors when such factors are raised by the evidence and properly requested by the defense. He further argues that failing to give such instructions deprives the jury of the opportunity to give mitigating weight to any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 3964 (1978); see also Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669 (1986).

After the defendant's case was on appeal, our supreme court held in State v. Odom, 928 S.W.2d 18 (Tenn. 1996), that with T.C.A. § 39-13-204(e) requiring

---

[15] This statute states, "The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both which shall include, but not be limited to, those circumstances set forth in subsection (j). No distinction shall be made between mitigating circumstances as set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations." (Emphasis added).

that no distinction be made between statutory mitigators and any other potential mitigator raised by the evidence, the trial court shall, upon the defendant's timely and proper request, submit the nonstatutory mitigating circumstances to the jury in writing. Id. at 31. The court warned, though, that it is constitutionally improper for the trial court to instruct in such a way as to convey to the jury an indication that the trial court has found or believes that certain facts have been established. Id.; see Tenn. Const. art. VI, § 9.

We conclude, though, that the trial court in this case did not err in rejecting the defendant's requested instructions under the circumstances presented and that, in any event, the record does not disclose any measure of prejudice to the defendant from deviating from the Odom procedures. Each of the defendant's requests for jury instructions regarding specific mitigators had the trial court telling the jury that it "shall consider as a mitigating circumstance the fact that" the defendant was, for example, "immature for his age, and lacked normal emotional development . . . ." Needless to say, these requests would have had the trial court overstep the bounds of its authority by violating the constitutional prohibition against a trial court charging or commenting on the facts, primarily in terms of the weight of the evidence. See Tenn. Const. art. VI, § 9.

Also, as the trial court noted, many of the defendant's special requests are repetitious of one another and potentially duplicative of the statutory mitigating circumstances upon which the jury was instructed. See, e.g., T.C.A. § 39-13-204(j)(2), (j)(7) and (j)(8). However, this did not mean that the defendant was limited in presenting his contentions about mitigation to the jury. Obviously, the defendant's witnesses presented substantial evidence upon which he relied. Moreover, in closing argument at the sentencing phase, the defendant made detailed arguments regarding

virtually every point in mitigation that he sought to present by instruction. Finally, we note that the trial court included the following in its definition of mitigation:

> A mitigating circumstance is any aspect of Leroy Hall, Jr.'s character, background history, or physical condition or the nature and circumstances of the crime which in fairness or mercy, calls for a sentence less than death . . . . The law does not identify or limit what you can consider concerning Leroy Hall, Jr.'s character, background history, and physical condition or the nature and circumstances of the crime [as] mitigating.

In consideration of the improprieties of the defendant's requested instructions, the substance of his proof and argument actually made, and the instructions issued by the court, we hold that the trial court properly instructed the jury relative to mitigating circumstances.

(12)

As a corollary to the preceding issue, the defendant argues that the trial court erred in refusing to allow certain evidence that the defense claimed was mitigating in nature. We note, of course, that under the Eighth and Fourteenth Amendments to the United States Constitution, a capital sentencer must not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any circumstances of the offense offered by the defendant as a basis for a sentence less than death. Skipper, 476 U.S. at 8, 106 S. Ct. at 1671; Lockett, 438 U.S. at 604, 98 S. Ct. at 2964. In addition, T.C.A. § 39-13-204(c) provides:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. . . .

(emphasis added). The trial court therefore maintains its authority to determine the admissibility of evidence offered in the sentencing phase and to exclude any evidence not relevant to the above factors. See, e.g., Smith, 857 S.W.2d at 17; State v. Johnson, 632 S.W.2d 542, 548 (Tenn. 1982); see also Lockett, 438 U.S. at 604, 98 S. Ct. at 2964, n.12.

In determining the effect of an error excluding relevant mitigating evidence, we look to the standard set forth in Skipper. There, the United States Supreme Court held that an error in excluding evidence is not harmless if the exclusion of the evidence "may have affected the jury's decision to impose the death sentence." Id. at 8, 106 S. Ct. at 1673. In Skipper, the trial court had excluded the testimony offered relative to the defendant's good behavior and adjustments since his incarceration for the offense. The Supreme Court concluded that the "exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id.

In the present case, the defendant sought to elicit testimony from the defendant's mother relative to the nature of the defendant's relationship with the victim. The witness related that the couple was very happy for the first few years of their relationship but started having problems the past two years. The couple separated and reconciled several times. The trial court sustained an objection as to what the victim told the witness about the relationship in November 1990; however, the defendant made no proffer of evidence in this regard. See Tenn. R. Evid. 103. We, therefore, cannot conclude that the ruling was improper. See Tenn. R. Evid. 103(a)(2).

The defendant further elicited from the defendant's mother statements made by the defendant regarding his feelings toward the victim. The prosecution

objected because the defense had not specified a time period with regard to the question. The trial court overruled the objection, but limited the defense to questions "within the approximate period of time when the murder took place." The witness was then permitted to testify as to the nature of the relationship from December 1990 to the time of the offense. Again, the defense made no proffer of any additional testimony it sought to admit. The nature of the relationship between the victim and the defendant, insofar as it was a troubled one and had a potential effect on the defendant's mental state, was clearly conveyed to the jury through the testimony of this witness and others. We cannot conclude that the trial court erroneously excluded additional mitigating evidence in this regard. See, e.g., Smith, 857 S.W.2d at 17-18.

The defendant also claims that the trial court should have allowed admission of certain photographs as mitigating evidence. The photographs included one of the defendant at thirteen years of age, and several of the victim. The defendant argued that the jury should consider the photos because they depicted how he looked at his mental age of thirteen, and how, according to the defense, the victim "really did look in reality" and not how the state had "represented her to be." The trial court ruled that the photographs were not relevant to any factors in mitigation and excluded them on that basis.

The testimony of Dr. Meyer established clearly his opinion relative to the defendant's emotional and intellectual levels, as well as his mental age. Introduction of the defendant's photo in this regard would arguably have been cumulative. Thus, exclusion of the defendant's photograph, we conclude, did not affect the jury's decision to impose the death penalty. See Skipper, 476 U.S. at 8, 106 S. Ct. at 1669. The defendant's claim with regard to the victim's photographs is also without merit. First, he failed to show how such evidence, purporting to show what the victim "really" looked like, would have been relevant in mitigation. T.C.A. § 39-13-204(c). Second, we

cannot, on this record, conclude that the exclusion of such photographs affected the jury's decision to impose the death penalty. Accordingly, the trial court did not abuse its discretion in excluding this evidence. See Smith, 857 S.W.2d at 17-18.

Finally, the defendant argues that the jury should have been allowed to consider the medical histories of the victim's past abortions as mitigation evidence. In ruling on this issue, the trial court said:

> There's proof before this jury, the defendant testified about [the victim] having an abortion, that it was weighing on his mind, and that . . . he was concerned about the fact that she might be pregnant and have another abortion. That testimony was introduced without objection from the state and it is before this jury. Whether he was or was not suffering under the fact that she had had abortions . . . is a question the jury will have to decide . . . . It's something that the jury can consider as a mitigating factor.

Thus, the trial court allowed evidence that the victim had abortions in the past. The prosecution objected to admitting the entire records of the procedures and the trial court sustained the objection:

> There are some pages that I don't think are relevant, and I don't think it's necessary for the jury to . . . know the exact procedure used. The gross description I don't think is necessary to prove at this point what the defense is trying to prove in this case, which is the fact that the defendant knew that she'd had an abortion.

On appeal the defendant has advanced no basis upon which to hold that the trial court's ruling in this regard was an abuse of discretion. The trial court's ruling that the particulars of the abortion procedures were not relevant mitigating factors is supported by the record. See T.C.A. § 39-13-204(c). The evidence in the record, in particular the defendant's testimony in the guilt phase, reveals that the fact of the victim's abortions may have affected the defendant's mental state, but not the particulars of such procedures. Accordingly, the defendant is not entitled to relief on the ground that the trial court unconstitutionally deprived the jury of mitigating circumstances. See Smith, 857 S.W.2d at 17-18.

(13)

The defendant contends that the death sentence is excessive and disproportionate given his mental impairments, including their relationship to the "aggravating aspect of his criminal behavior, i.e., the use of fire" in his criminal actions. Pursuant to T.C.A. § 39-13-206(c)(1)(D) (Supp. 1996), we are obligated to assess whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

The defendant draws his argument substantially from the conclusions he claims were given by Dr. Meyer. However, it is apparent that the jury was fully apprised of Dr. Meyer's training, evaluation of the defendant, and opinions formed. It found, though, that the existing aggravating circumstances in the context of the evidence surrounding the killing outweighed beyond a reasonable doubt the existing mitigating circumstances. We believe the evidence supports such a view and we are unable to accept all of Dr. Meyer's testimony at face value, as the defendant would have us do.

Finally, we note that we have reviewed many other cases resulting in either death or life sentences and we are unable to say that our comparison leads us to believe that the death sentence is inappropriate in this case. The circumstances in which the victim was doused with gasoline and set afire and left to burn certainly showed torture, depravity and cruel physical abuse. The victim was left to suffer excruciating pain before her death. In consideration of all the evidence, we are unable to conclude that the death penalty was either arbitrary, excessive or disproportionate to a penalty imposed in other crimes.

(14)

The defendant's final issue consists of numerous constitutional attacks against the Tennessee Death Penalty statute, T.C.A. §§ 39-13-204 and -206, under the

Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 8, 9, 16, and 17 of the Tennessee Constitution; and Article II, Section 2 of the Tennessee Constitution. His contentions, generally, are: (A) that the statute fails to narrow in a meaningful manner the class of death eligible defendants, (B) that the death sentence in Tennessee is imposed arbitrarily and capriciously, (C) that death by electrocution is cruel and unusual punishment, and (D) that the manner of conducting a proportionality review of death sentences in Tennessee is constitutionally inadequate.

(a)

The defendant argues that the death penalty provisions fail to narrow in a meaningful manner the class of death eligible defendants in Tennessee. He asserts three arguments in support of this position. First, he contends that the aggravating circumstance in T.C.A. § 39-13-204(i)(6), that the murder was committed "for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another," duplicates the felony murder aggravating factor in T.C.A. § 39-13-204(i)(7) (1991). His claim is without merit. Although the state attempted to prove factor (6) in this case, and the jury was so instructed, the jury rejected it. Moreover, the jury's finding of factor (7) has been held to be proper for a conviction of premeditated first degree murder. See Middlebrooks, 840 S.W.2d at 346.

Second, the defendant contends that the aggravating circumstance in T.C.A. § 39-13-204(i)(5), that the murder was "especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," is unconstitutionally vague and overbroad. Our supreme court rejected similar contentions, however, in analyzing the former version of this factor, T.C.A. § 39-2-203(i)(5), which read: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." See State v. Black, 815 S.W.2d 166, 181-82

(Tenn. 1991); State v. Barber, 753 S.W.2d 659, 670 (Tenn. 1988); State v. Williams, 690 S.W.2d 517, 526-30 (Tenn. 1985). Likewise, it has reviewed the current version of the statute and found it to be constitutional. State v. Odom, 928 S.W.2d 18, 24-26 (Tenn. 1996).

Third, the defendant contends that the aggravating factors in T.C.A. § 39-13-204(i)(2), (i)(5), (i)(6), and (i)(7) fail to narrow the class of death eligible defendants because they combine to encompass the majority of the homicides in this jurisdiction. There is nothing in the record to support the defendant's argument. Moreover, (i)(2) and (i)(6) do not pertain to this case. Factor (i)(2) was not relied upon by the state and

factor (i)(6) was rejected by the jury. Thus the claim with respect to these factors is without merit. See, e.g., State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); State v. Cauthern, 778 S.W.2d 39, 47 (Tenn. 1989).

(b)

The defendant argues that the death penalty in Tennessee is imposed capriciously and arbitrarily.[16] He asserts ten arguments in support of this contention. First, he complains that the prosecutors in this state have unlimited discretion as to whether to seek the death penalty in a given case. Second, the defendant argues that the prosecutor's unfettered discretion to subject any defendant charged with first degree murder to a capital sentencing hearing constitutes an improper delegation of judicial power and of legislative power in violation of Article II, Section 2 of the Tennessee Constitution. Third, he argues that such discretion violates state and federal guarantees of equal protection and results in the wanton and freakish imposition of the death penalty that was condemned in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). Fourth, the defendant argues that the failure to create a uniform system of jury selection results in unequal treatment for capital defendants that necessarily results in the arbitrary and capricious imposition of the death penalty. Fifth, he argues that the manner of selecting "death qualified" jurors results in juries that are prone to conviction. Sixth, the defendant argues that capital defendants should be allowed to address jurors' popular "misconceptions" regarding parole eligibility, the cost of incarceration versus the cost of execution, general deterrence and the method of execution. Seventh, he argues that it is constitutional error to instruct juries that they must agree unanimously in order to impose a life sentence without telling juries the effect of a nonunanimous verdict. Eighth, he argues that the Tennessee Pattern Jury Instructions create a reasonable likelihood that jurors believe that they must unanimously agree on the

[16] In support of his contentions, the defendant cites to numerous studies, newspaper articles, law review articles, and journals. There is no evidence in the record, however, with respect to any of his contentions. See, e.g., Smith, 857 S.W.2d at 23.

existence of any mitigating factors. Ninth, the defendant argues that the Tennessee death penalty statute fails to require that the jury make the ultimate determination of whether death is appropriate in a specific case. And tenth, the defendant submits that it is constitutional error to deny the defendant the right to give final closing argument in the penalty phase of a capital trial based upon his contention that once an aggravating circumstance is proven, the burden of proof shifts to the defendant to present mitigating evidence.

Relative to the defendant's first argument that prosecutors have unlimited discretion as to whether to seek the death penalty in a given case, our supreme court has held that opportunities for discretionary action that inhere in the processing of a murder case, including the authority of the prosecutor to select those persons whom he or she wishes to prosecute for a capital offense, do "not render the death penalty unconstitutional on the theory that the opportunities for discretionary action render imposition of the death penalty freakish or arbitrary." Brimmer, 876 S.W.2d at 86 (quoting Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 2937 (1976)). See also Cooper v. State, 847 S.W.2d 521, 536-38 (Tenn. Crim. App. 1992) (rejecting similar claim in post-conviction context). This issue is without merit.

Second, the defendant argues that the discretion accorded the prosecution is an improper delegation of legislative and judicial power in violation of Article II, Section 2 of the Tennessee Constitution. The defendant makes reference to costs and expenditures that result from a prosecutor's decision to seek the death penalty and argues that such appropriations must be made by the legislature. He does not, however, offer support for his contention in the record. The state does not address this issue in its brief.

In State v. Brackett, 869 S.W.2d 936 (Tenn. Crim. App. 1993), the defendant argued that Tenn. R. Crim. P. 5(a), which allows the prosecution to object to the defendant's waiver of a grand jury investigation and jury trial so as to submit to the jurisdiction of the general sessions court, violated Article II, Sections 1 and 2. This court noted:

> Article II, §1 of the Tennessee Constitution provides that the powers of government are to be divided into the Legislative, Executive, and Judicial Departments. In general, the "legislative power" is the authority to make, order, and repeal law; the "executive power" is the authority to administer and enforce law; and the "judicial power" is the authority to interpret and apply law. The Tennessee constitutional provision prohibits an encroachment by any of the departments upon the powers, functions and prerogatives of the others. The branches of government, however, are guided by the doctrine of checks and balances; the doctrine of separation of powers is not absolute....

Brackett, 869 S.W.2d at 939 (citations omitted). The court also noted that Article II, Section 2 states, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Brackett, 869 S.W.2d at 940 n.3. In addressing the defendant's claim, the court noted that the supreme court has the authority to enact rules for our courts, T.C.A. § 16-3-402, and that the rules are approved by resolution of the General Assembly. T.C.A. § 16-3-404. Thus, the court concluded:

> The rule to which the defendant objects in this instance was, of course, initiated by the Supreme Court as a means of improving the criminal procedure in this state. Because the judiciary promulgated and the Legislature approved the rule granting the prosecution the right to reject a non-jury proceeding in the general sessions court, we find no intrusion by either of the other branches of government.

Brackett, 869 S.W.2d at 939-40.

We conclude that the reasoning of Brackett applies here as well. The district attorney general is given statutory authority to prosecute criminal cases in his or her jurisdiction. T.C.A. § 8-7-103(1). When the death penalty will be sought in a first degree murder case, the prosecutor must afford notice to the defendant of the intent to

seek the death penalty, as well as notice regarding the aggravating factors that will be relied upon. Tenn. R. Crim. P. 12.3(b). Thereafter, the proceedings are governed by the provisions passed by the Legislature in T.C.A. § 39-13-204. The defendant in this case has not shown, nor has he cited authority to show, that this functioning violates the separation of powers doctrine under Tennessee law. This issue is without merit.

Third, the defendant argues that the death penalty statute has been imposed discriminatorily on the basis of economics, race, gender and geographic region in the state. This argument has been rejected by the supreme court. See Brimmer, 876 S.W.2d at 87 n.5; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d at 23; State v. Evans, 838 S.W.2d 185, 196 (Tenn. 1992). Moreover, the record is devoid of evidence indicative of an individualized showing of improper discrimination with regard to the sentencing of the defendant in this case. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 292-93, 107 S. Ct. 1756, 1767 (1987); Cooper, 847 S.W.2d at 531.

Fourth, the defendant submits that the failure to create a uniform system of jury selection results in unequal treatment for capital defendants and necessarily results in arbitrary and capricious imposition of the death penalty. Specifically, the defendant contends that all capital defendants should be guaranteed individual sequestered voir dire and a questioning process which would maximize the prospective jurors' candor.

Our supreme court has rejected the argument that the lack of uniform procedures mandating individual sequestered voir dire during jury selection renders the imposition of the death penalty arbitrary and capricious. In Cazes, 875 S.W.2d at 269, the court concluded, without discussion, that this argument had been previously rejected in Caughron, 855 S.W.2d at 542. Further, the court has said that the "ultimate goal of voir dire is to insure that jurors are competent, unbiased and impartial, and the

decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court." Cazes, 875 S.W.2d at 269. See also Black, 815 S.W.2d at 180. In this case, the defendant has not challenged any of the jurors selected or the manner in which the trial court conducted voir dire. This issue is without merit.

Fifth, the defendant argues that the manner of selecting "death qualified" jurors results in juries that are prone to conviction. In State v. Teel, 793 S.W.2d 236, 246 (Tenn. 1990), cert. denied, 498 U.S. 1007 (1990), however, our supreme court stated that "[t]his argument has been rejected by both the Tennessee and United States Supreme Court." See also State v. Harbison, 704 S.W.2d 314, 318 (Tenn. 1986). The defendant has not offered any evidence with which to substantiate his claim, nor has he presented a principled basis with which to distinguish the supreme court holdings in this area.

Sixth, the defendant contends that capital defendants should be allowed to address jurors' popular "misconceptions" concerning parole eligibility, the cost of incarceration versus the cost of execution, general deterrence, and the method of execution in order to avoid arbitrary decision making. This argument, however, has been rejected on several occasions by our supreme court. See Black, 815 S.W.2d at 179; See also Brimmer, 876 S.W.2d at 86-87; Cazes, 875 S.W.2d at 268. Moreover, the defendant did not present any evidence with respect to his contentions.

As his seventh argument, the defendant submits that it is constitutional error to instruct juries that they must agree unanimously in order to impose a life sentence and to prohibit juries from being told the effect of a nonunanimous verdict. See T.C.A. § 39-13-204(h). However, this contention also has been repeatedly rejected by the supreme court. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d at 22-23; Barber, 753 S.W.2d at 670-71.

Relative to this issue, the defendant contends that requiring the jury to agree unanimously to a life verdict violates the holding in McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227 (1990), and in Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860 (1988). The claim has been held to be without merit under Tennessee law. See Brimmer, 876 S.W.2d at 87; Thompson, 768 S.W.2d at 250; State v. King, 718 S.W.2d 241, 249 (Tenn. 1986). In Brimmer, the court noted that McKoy and Mills stand for the principle that any requirement that the jury must unanimously find a mitigating circumstance before it can be considered violates the Eighth Amendment. The court went on to state that the unanimous verdict instruction does not violate these principles. Brimmer, 876 S.W.2d at 87. See also Teel, 793 S.W.2d at 252. In any event, the trial court in the present case instructed the jury that there was no requirement for jury unanimity or agreement as to any particular mitigator. Also, it followed with instructions for each juror to decide the case individually and for each to know that they were not required to reach a unanimous verdict regarding mitigators or their weight. Thus, the concerns expressed in McKoy and Mills are not present in this case.

Eighth, the defendant argues that the Tennessee Pattern Jury Instructions create a reasonable likelihood that jurors are led to believe they must unanimously agree on the existence of any mitigating factors. The supreme court has repeatedly rejected this argument. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268. Moreover, the trial court instructed the jury that "[t]here is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance." It is a well-established rule in Tennessee that a jury is presumed to have followed the instructions of the trial court. State v. Lawson, 695 S.W.2d 202, 204 (Tenn. 1985).

Ninth, the defendant claims that the statute fails to require that the jury make the ultimate determination of whether death is the appropriate penalty in a

specific case. This argument has likewise been rejected by the supreme court. See Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22. The defendant's claim that there is no weighing process for aggravating and mitigating factors is also without merit. In State v. Bane, 853 S.W.2d 483, 488 (Tenn. 1993), the supreme court said that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is not constitutionally required."

As his tenth and final argument in support of his contention that the death penalty is imposed arbitrarily and capriciously in Tennessee, the defendant contends that once an aggravating circumstance is proven, the burden of proof shifts to the defendant to present mitigating evidence. Therefore, the defendant argues, it is constitutional error to deny the defense the right to give the final closing argument in the penalty phase. This issue has been rejected by the supreme court on numerous occasions. See Brimmer, 876 S.W.2d at 87 n.5; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542. In Smith, the court said that the "order [of argument] is not inherently prejudicial to the defendant or favorable to the state in its use at the sentencing stage of a death penalty proceeding." Smith, 857 S.W.2d at 24.

(c)

In another challenge to the death penalty statute, the defendant argues that electrocution is cruel and unusual punishment, therefore, violating the Eighth Amendment of the United States Constitution and Article I, Section 16 of the Tennessee Constitution. Our supreme court rejected this argument in Black, 815 S.W.2d at 179, and has since reaffirmed its holding on several occasions. See State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994); Cazes, 875 S.W.2d at 268; Howell, 868 S.W.2d at 258; Smith, 857 S.W.2d at 23; Bane, 853 S.W.2d at 489.

(d)

The defendant argues that the appellate review process in death penalty cases is constitutionally inadequate in its application. He contends that the appellate review process is not constitutionally meaningful because the appellate courts cannot reweigh proof due to the absence of written findings concerning mitigating circumstances, because the information relied upon by the appellate courts for comparative review is inadequate and incomplete and because the appellate courts' methodology of review is flawed. This argument has been specifically rejected by our supreme court on numerous occasions. Cazes, 875 S.W.2d at 270-71; see also State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992); Barber, 753 S.W.2d at 664.

Moreover, the defendant contends that the statutorily mandated proportionality review is conducted in violation of due process and the law of the land. He argues that there is no comprehensive procedure for gathering information in capital cases and no published set of criteria for the review. In support of his claim, the defendant argues that since the promulgation of the current statute in 1977, the supreme court has found no death sentence to be imposed in a disproportionate manner.[17]

---

[17] We note, however, that in State v. Branam, 855 S.W.2d 563 (Tenn. 1993), the supreme court found the death penalty to be disproportionate and reduced the defendant's sentence to life. Id. at 570-

As previously noted, the appellate review provided for in the statute has been held to afford a meaningful proportionality review. Brimmer, 876 S.W.2d at 87-88; Cazes, 875 S.W.2d at 270-71. Moreover, our supreme court has relied upon and upheld the use of trial court reports in capital cases pursuant to Rule 12, Tennessee Supreme Court Rules. In Harris, 839 S.W.2d at 77, the court noted that it has considered the information in such reports and that, because no two cases or defendants are exactly alike, each review for proportionality must be based on the individual defendant and the nature of the crime. See also Cazes, 875 S.W.2d at 270-71 (Rule 12 report not prepared; supreme court's review for proportionality based on its thorough review of the record and Rule 12 reports in other cases). Accordingly, the defendant is not entitled to relief on this basis.

CONCLUSION

In consideration of the foregoing and the record as a whole, the defendant's conviction for first degree murder and sentence of death are affirmed.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
Gary R. Wade, Judge

_____
John H. Peay, Judge

71.