IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 13, 2022

**STATE OF TENNESSEE v. PATSY HENSLEY**

**Appeal from the Criminal Court for White County**
**No. CR9347 Gary McKenzie, Judge**

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**No. M2021-01495-CCA-R3-CD**

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Defendant, Patsy Hensley, was convicted of first-degree premeditated murder and received a life sentence. On appeal, Defendant argues that the trial court's exclusion of testimony from her expert witness violated her right to present a defense and that the prosecutor improperly commented during closing argument on her decision not to testify at trial. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JILL BARTEE AYERS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and TIMOTHY L. EASTER, JJ., joined.

M. Todd Ridley, Assistant Public Defender, Tennessee District Public Defenders Conference (on appeal) and Craig Fickling, District Public Defender, and Laura Dykes, Assistant Public Defender (at trial), for the appellant, Patsy Hensley.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Bryant C. Dunaway, District Attorney General; and Mark Gore and Beth Willis, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

### Factual and Procedural Background

This case arises from Defendant's shooting of her husband, Mark Hensley ("the victim"), as he lay sleeping in a recliner. Defendant originally told investigators that she found the victim dead when she arrived home from visiting a relative's house. However,

she later admitted to shooting the victim but claimed that she could not remember anything about the incident. The White County Grand Jury indicted Defendant for premeditated first-degree murder.

*Pretrial Hearing*

The State filed a pretrial motion to exclude testimony from a defense expert on the issue of Defendant's mental state at the time of the murder. At the hearing on the motion, Dr. Katheryn Smith, a forensic psychiatrist, testified as an expert in the field of psychology and forensic pathology. She examined Defendant and prepared a written report. Dr. Smith noted that she spent six and a half hours with Defendant on one occasion and an additional one and a half hours on a second occasion. She was also provided with discovery materials, some of Defendant's medical records, and information about the death of Defendant's brother.

Dr. Smith testified that Defendant's medical records revealed that she had been treated by Dr. Robert Knowles for both medical and mental health treatment. Her mental health history included diagnoses of anxiety, depression, and Post-Traumatic Stress Disorder ("PTSD") for which she was prescribed medication. Defendant was also on Social Security Disability.

Dr. Smith interviewed Defendant's sister, Cynthia Palmer, who said that Defendant was the first family member on the scene when their brother committed suicide by blowing himself up in a vehicle. Defendant saw his charred remains in the car. Dr. Smith testified that she administered tests to Defendant that included the personality assessment inventory, the life events checklist, the PTSD checklist, and the competency to stand trial assessment instrument. Defendant reported trauma related to childhood sexual abuse and her brother's death. Dr. Smith testified that Defendant's score on the PTSD checklist indicated the presence of PTSD. She concluded that Defendant "did meet the standard for competency to stand trial." She found nothing to support an insanity defense and had no information to offer an opinion on diminished capacity. Dr. Smith testified that her diagnosis of Defendant's mental condition was PTSD, an anxiety disorder, and a depressive disorder.

Concerning Defendant's PTSD, Dr. Smith testified:

> [F]or an insanity defense, I have information that she has PTSD, but I don't have information from her about her thoughts and feelings at the time of the offense, because she said she doesn't remember these things. And I would need that information to do an analysis of whether any symptom she was experiencing prevented her from knowing the nature or wrongfulness of her actions.

Dr. Smith opined that Defendant was more prone to acting in a state of passion than someone who does not suffer from PTSD if there was a "qualifier there that has to do with facing a threat that is directly relevant to the foundation for her PTSD, which is seeing her brother after he had burned up in the fire." Dr. Smith further opined:

> I mean, the symptoms of PTSD being activated in a situation where she is reminded of the traumatic experience, so she is having intrusive memories, and thoughts, and feelings, and/or flashbacks, and a heightened state of arousal, a physiological response, so that would be activation of PTSD. So, in other words, the things that she normally tries to avoid are present in her body and her mind.

Dr. Smith agreed that the threat of setting a house on fire could trigger Defendant's PTSD. She noted Defendant reported that the victim threatened to kill Defendant, her granddaughter, and himself by burning their house down.

On cross-examination, Dr. Smith acknowledged that she could not say for certain that Defendant's PTSD was triggered by the victim's comments about burning the house down. She also agreed that she could not offer an opinion as to whether Defendant lacked the capacity due to mental disease to form the requisite mental state for first-degree murder; however, she concluded that Defendant was competent to stand trial. Dr. Smith reiterated that she could not render an opinion about Defendant's mental state at the time of the offense because of Defendant's reported lack of memory of the events associated with the victim's death. She testified that Defendant could not provide her with the information necessary to analyze what was going through Defendant's mind at the time of the murder.

Dr. Smith agreed that during the first interview when she asked Defendant about the victim, Defendant said, "I was really not worried. I thought he was just blowing off steam." Defendant further said, "When I went to sleep, everything was fine. When I woke up, from what they told me, I found him and supposedly called 9-1-1." Dr. Smith acknowledged that when Defendant was asked about possible defenses, the only thing Defendant knew to say was that the victim told her that he was going to kill her and her granddaughter and then "burn the house down, and nobody would ever know what happened to [her] and [her granddaughter]." However, during her second interview, which was closer to the trial date, Defendant said, "I considered the sincerity in his voice. I feared for my life, at least my granddaughter's life." Dr. Smith agreed that Defendant's statements in the first and second interviews were incongruent.

Dr. Smith indicated in her report that the only thing Defendant said was that she could not remember the events surrounding the murder. Dr. Smith also noted in the report,

"She cannot recall events surrounding her late husband's [the victim's] death, although there is no test that can be given to substantiate whether her claim of memory loss is true. If she is being honest about her memory loss, then she may suffer from dissociative amnesia." Dr. Smith testified that Defendant performed "very well on the instrument to look at competency to stand trial." She agreed that in a letter to Polly Gibson,[1] Defendant indicated that the victim committed suicide. Dr. Smith acknowledged that the statements in the letter were also incongruent with what Defendant had told Dr. Smith about what happened.

The trial court made lengthy findings and pointed out that Dr. Smith was unable to render an opinion as to diminished capacity or that Defendant could not form the requisite mental state. The trial court concluded that Dr. Smith's proposed testimony did not satisfy the standard set forth in *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997) ("psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law" and emphasizing that this "psychiatric testimony must demonstrate that the defendant's inability to form the requisite culpable mental state was the product of a mental disease or defect, not just a particular emotional state or mental condition") and thus, the court excluded her testimony. The trial court further determined that the exclusion of Dr. Smith's testimony would not violate Defendant's right to present a defense in accordance with *State v. Brown*, 29 S.W.3d 427, 434-35 (Tenn. 2000). In particular, the trial court said:

> Well, it's not critical - - how can his be critical to the - - how can this be critical, [*t*]*he defense might, maybe, if it was triggered*, but there's no memory. The defense's expert cannot form an opinion because there is no memory. This is her testimony from the victim [sic] as to what happened.
>
> In my opinion, that testimony is a big nothing burger. It's a big, "I don't have an opinion. I don't know. Maybe. Could have." And in this room, it's not maybe and could have. If there was more from the victim, and what she - - or, I'm sorry, the defendant, and I apologize if I'm getting those confused, but if there was more from the defendant as to memory and what took place, maybe there would have been an opinion. And if there was an opinion, then I think they would have rang the bell, and it would substantially assist the trier of fact. But, I don't know how this is critical to the defense when it

[1] Ms. Gibson is later identified as the victim's former mother-in-law from a previous marriage.

> is a big, "I have no opinion." There's a lot of mights and could, but, "I have no idea."

(*Emphasis in original*). The trial court concluded that Dr. Smith's testimony was not reliable nor was it relevant as it would not substantially assist the trier of fact in this case.

*Trial*

At approximately 11:35 a.m. on July 1, 2018, Defendant called 9-1-1 and reported that the victim had been shot. Deputy Travis Bates of the White County Sheriff's Office ("WCSO") was dispatched to the residence shared by the victim and Defendant and met Sergeant Lanny Wheeler in the driveway. Deputy Bates testified that he entered the home and saw the victim in a recliner lying on his left side with a gunshot wound to his abdomen.[2] He said that Defendant was standing on the back porch talking on the phone. Deputy Bates talked with Defendant who told him that she went down the road to her sister and brother-in-law's house, returning within fifteen minutes, to find the deceased victim in the chair.

Emergency Medical Services and other law enforcement personnel arrived on the scene, and Defendant gave consent for the residence to be searched. She also consented to a search of the family vehicles and her cell phone. Deputy Bates testified that Defendant told them that she had "cleaned up the place" and "there was clothes pushed up in the washing machine." Defendant said that she cleaned up blood from the kitchen floor. Deputy Bates's body camera footage was introduced as an exhibit and played for the jury.

Deputy Bates testified that at one point, Defendant was sitting in a swing in her front yard. He overhead her ask multiple times about someone named Michael. He later learned that Defendant had taken a shotgun to the home of her brother-in-law, Michael Palmer. Deputy Bates testified he was advised that Defendant told investigators the location of a shotgun shell casing. He was asked to find the shell casing and located it between Defendant's residence and Mr. Palmer's residence. He said, "It was like off into like where they throw tires at. It's like an old sinkhole. And it was off in there."

Detective Shannon Jenkins of the WCSO testified that she was dispatched to the scene on July 1, 2018, and spoke with Defendant. She and Investigator Chris Isom of the district attorney general's office talked with Defendant in Investigator Isom's vehicle. Detective Jenkins testified that Defendant never indicated that the victim had provoked her to kill him. Defendant agreed to a gunshot residue ("GSR") test, and Detective Jenkins

[2] Dr. Miguel Laboy performed an autopsy on the victim and determined that the victim actually had two gunshot wounds to his chest that were in the "intermediate range."

explained the test to her. Detective Jenkins testified that Defendant requested to use the restroom, but Detective Jenkins did not want her to wash her hands before the GSR test was performed.

Marla Moore, a nurse practitioner, testified that the victim was once married to her first cousin who passed away from Leukemia. She also knew Defendant from high school. Ms. Moore testified that Defendant called her at 11:46 a.m. on July 1, 2018, and left a voicemail. Defendant called again at 12:14 p.m., and when Ms. Moore answered, Defendant said that the victim had been shot, that he was dead, and that she needed Ms. Moore to come to her residence right away. Ms. Moore and her mother, Joyce Whitaker, drove to Defendant's residence. At one point, Defendant walked over to their vehicle and said that she found the victim shot after returning home from taking some food to her sister. Ms. Moore testified that Defendant seemed to be in disbelief about what happened, and she walked around to each side of the vehicle asking Ms. Moore and her mother to hold her hands and not leave her. Ms. Moore further testified:

> [Defendant] was leaning in the window of my mother's, the driver's side, like this (indicating). And she had a soda in her right hand. And she was mentioning that she needed to go to the restroom. And we advised her that she should speak to the detective, or whoever was with her, and ask permission to do that. And, um, she did that while she was standing there. Detective Jenkins was moving around doing what detectives do. And, um, she said, "I need to test your hands for gunpowder residue before you - - before you go to the bathroom, so we need to get that done." And, um, again, standing like this (indicating), a soda in this hand, she leaned back, and as Detective Jenkins moved away from her, she poured soda on her opposite hand and did a washing sort of thing, shook it off.

Joyce Whitaker testified similarly to Ms. Moore that Defendant, who had been talking to investigators, walked up to their vehicle and said that she found the deceased victim after returning from her sister's house. Ms. Whitaker testified that Defendant indicated that she needed to use the restroom "really bad" but an officer told Defendant that she needed to wait until the GSR test was performed. At that point, Defendant turned away from the officer and poured "Coke" on her hand "like she was trying to wash her hand."

Ms. Whitaker further testified that the victim was previously married to her niece, Tammy, and that Ms. Whitaker was the caretaker for Tammy's mother and Ms. Whitaker's sister, Polly Gibson. Ms. Whitaker retrieved Ms. Gibson's mail for her, and Ms. Gibson received an eight-page letter from Defendant dated May 30, 2019. In the letter, Defendant

stated that the mobile home where she and the victim lived was purchased so that Defendant's daughter and granddaughter would have a place to live. Defendant indicated that before the shooting, she and the victim were discussing the victim's request to have his name added to the deed of the home, but she did not want to do that. Defendant wrote that the victim also wanted her granddaughter to leave, and he threatened to kill her granddaughter and himself and burn down the home if the child did not leave. Ms. Whitaker testified that Defendant indicated that she went to sleep after the discussion, and the victim was "gone" when she woke up. Defendant did not give an explanation in the letter for the victim's absence and claimed that she could not remember anything. She indicated that she did not kill the victim and that he killed himself. Defendant also wrote that if she killed the victim, it was because he was threatening her granddaughter.

Michael Palmer testified that he arrived home at approximately 11:30 to 11:40 a.m. on July 1, 2018, after dropping his son off at work. He said that Defendant came to the home approximately one minute later and said that she had brought some "Polk salad[3]" over for her sister, Cynthia, and placed it in the kitchen. Mr. Palmer testified that as Defendant was leaving, she asked if he could "put something up" for her. He followed her to her truck, and Defendant retrieved a "short-barrel pistol grip shotgun." Mr. Palmer testified that Defendant asked him if he would keep the gun for a few days because "when the weapon was brought up around the family, it just caused trouble." He took the gun inside the house and placed it underneath the bed in the main bedroom. Mr. Palmer's mother-in-law later called and told him that the victim had been shot. He then went to the scene and told law enforcement personnel that Defendant brought shotgun to his house. They later retrieved the weapon.

Special Agent Darrin Shockey of the Tennessee Bureau of Investigation ("TBI"), testified that he arrived on the scene at approximately 1:00 p.m. to perform a GSR test on Defendant. He had gotten information that Defendant had cleaned up and touched the victim's body; therefore, he expected Defendant to have gunshot residue on her hands "whether she's shot the gun or not." Special Agent Shockey testified that he was informed that Defendant had washed her hands with soda, so he did not perform the test "because it would serve no purpose." He said that Michael Palmer also spoke with him and told him that Defendant brought a shotgun to his house at approximately 11:30 a.m. that day. Special Agent Shockey and Investigator Isom followed Mr. Palmer to his house and retrieved the gun from underneath the bed in the master bedroom. Special Agent Shockey testified that Defendant told him that she stepped in the victim's blood, and her bloody socks were in the washing machine.

[3] The court reporter utilized the spelling "Polk Salad." However, we note that referenced dish is made from pokeweed and the correct spelling is poke salad or poke sallet.

Special Agent Shockey, Investigator Isom, and Detective Jenkins later interviewed Defendant at the sheriff's office. She was advised of her *Miranda* rights, and she waived those rights and gave a statement. Defendant originally repeated her claim that she left the house for ten to fifteen minutes and that the victim was dead when she returned. However, Defendant changed her story when confronted with inconsistencies between it and the evidence.

Defendant then admitted that she shot the victim with a "sawed off shotgun" because he had been threatening to "stick potato chips in the electrical vents and burn [the] house down." She said that the victim was constantly "picking and fussing" at her fifteen-year-old granddaughter who also lived in the residence. Defendant told them that she took the shotgun to Mr. Palmer's house and discarded the shotgun shell alongside the road on the way to the house. She admitted that the victim was asleep in his chair when she shot him.

Defendant told the investigators that she was on medication for her "nerves" and that she had anxiety and problems with depression but she did not know the reason. She said that all she could think about when she woke up on the morning of the shooting was, "one of these mornings I'm going to get up, and this place is going to be on fire. And all this stuff that I've worked for, and all this stuff that I have put back for my granddaughter is going to be gone. And what if she's here and it's on fire, and she can't get out?" Defendant told the investigators that she had witnessed her brother "burn up in a car." She said that the victim did not threaten her with anything either the night before or the morning of the shooting. The audio recording of Defendant's interview was played for the jury.

Crystal Vaughn, records custodian for Tennessee Farm Bureau Insurance, testified that the victim had an insurance policy active at the time of his death for $50,000 designating Defendant as the sole beneficiary. She said that payout on the policy was pending. Ms. Vaughn testified that Defendant also had a life insurance policy that listed the victim as the beneficiary. On cross-examination, Ms. Vaughn testified that Defendant had not made a claim on the victim's insurance policy.

Whitney Garrett, a security and collection officer for First National Bank, testified that the victim had an Individual Retirement Account ("IRA") Certificate of Deposit for $20,072.95 at the time of his death that designated Defendant as the sole beneficiary. On cross-examination, Ms. Garrett testified that Defendant also had three IRA accounts, although she was unsure of the beneficiary.

## Analysis

### I. Exclusion of Expert Testimony

Defendant argues that the trial court denied her the constitutional right to present a defense by excluding testimony from her expert witness, Dr. Smith, as to the effects Defendant's PTSD might have had on her state of mind at the time of the murder. The State contends that the trial court did not abuse its discretion in excluding the testimony because the evidence was inadmissible and further, was not critical to the defense.

Initially, Defendant concedes in her brief, and we agree, that the trial court properly concluded that Dr. Smith's testimony was not admissible on the issue of diminished capacity in accordance with *Hall*, 958 S.W.2d at 679. She contends, however, that exclusion of Dr. Smith's testimony impaired her right to a defense. Generally, "[a]dmission of evidence is entrusted to the sound discretion of the trial court, and a trial court's ruling on evidence will be disturbed only upon a clear showing of abuse of discretion." *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004). The Tennessee Rules of Evidence provide that all "relevant evidence is admissible," unless excluded by other evidentiary rules or applicable authority. Tenn. R. Evid. 402. Additionally, "[e]vidence which is not relevant is not admissible." *Id.* Relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

A defendant has "the right to present a defense[,] which includes the right to present witnesses favorable to the defense," under both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *Brown*, 29 S.W.3d at 432 (citing *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Washington v. Texas*, 388 U.S. 14, 23 (1976); *Chambers v. Mississippi*, 410 U.S. 284, 302; *State v. Sheline*, 955 S.W.2d 42, 47 (Tenn. 1997)). However, in presenting a defense, the defendant must still comply with the rules of procedure and evidence. *State v. Flood*, 219 S.W.3d 307, 316 (Tenn. 2007) (citing *Chambers*, 410 U.S. at 302). "So long as the rules of procedure and evidence are not applied arbitrarily or disproportionately to defeat the purposes they are designed to serve, these rules do not violate a defendant's right to present a defense." *Id.* (internal citations omitted). "The facts of each case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence." This court must consider whether: "(1) the excluded evidence is critical to the defense; (2)

the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important." *Brown*, 29 S.W.3d at 434-35 (citing *Chambers*, 410 U.S. at 298-301).

At the pretrial hearing, Dr. Smith testified that although Defendant had PTSD from childhood sexual abuse and her brother's death, she found nothing to support an insanity defense for Defendant, and she had no information to offer an opinion on diminished capacity. Dr. Smith opined that Defendant was more prone to acting in a state of passion than someone who does not suffer from PTSD if there was a "qualifier there that has to do with facing a threat that is directly relevant to the foundation for her PTSD, which is seeing her brother after he had burned up in the fire." However, she could not testify with certainty that Defendant's PTSD was triggered by the victim's comments made at some point about burning Defendant's house down with her and her granddaughter inside. At the pretrial hearing, Dr. Smith testified that she could not render an opinion about Defendant's mental state at the time of the murder because Defendant reported a complete lack of memory of the events associated with the victim's death. In fact, during their first interview, Defendant told Dr. Smith that she was not really worried about the victim and thought that "he was just blowing off steam." Defendant further told Dr. Smith, "When I went to sleep, everything was fine. When I woke up, from what they told me, I found him and supposedly called 9-1-1." Because Dr. Smith's testimony was based on Defendant's claim that she could not remember any of the events surrounding the murder, she could not testify that there was a triggering event; thus, the testimony was speculative and did not bear sufficient indicia of reliability.

We also fail to see how Dr. Smith's testimony was critical to the defense. At trial, the jury heard evidence that Defendant told investigators that she was on medication for her "nerves" and that she had problems with anxiety and depression and that she had witnessed her brother "burn up in a car." Defendant told investigators several different stories about what happened to the victim. She did not initially indicate that the victim did anything that provoked her to kill him. Defendant agreed to a GSR test but then poured soda over her hands in an attempt to invalidate the test. She told investigators that the victim had been threatening to "stick potato chips in the electrical vents and burn [the] house down;" however, the proof showed he was asleep in the recliner when she shot him twice. Defendant also said that the victim did not threaten her either the night before, or the morning of, the shooting. Dr. Smith's testimony that Defendant was more prone to acting in a state of passion than someone who does not suffer from PTSD could not have been critical to the defense because while one of Defendant's stories included the victim's threat to burn down the house, there was no proof indicating a trigger of Defendant's PTSD at the time of the shooting.

We conclude that the trial court's decision to exclude Dr. Smith's testimony did not violate Defendant's right to present a defense. Defendant is not entitled to relief on this issue.

## II. Improper Comment on Defendant's Decision Not to Testify at Trial

Defendant contends that she is entitled to a new trial because the State improperly commented during closing argument on her decision not to testify at trial. The State counters that trial court properly concluded that the comments were not improper because the prosecutor "did not comment upon [Defendant's] Fifth Amendment Right against self-incrimination."

"[C]losing argument is a valuable privilege that should not be unduly restricted." *State v. Bane,* 57 S.W.3d 411, 425 (Tenn. 2001). Closing argument gives each side the opportunity to persuade the jury of its theory of the case and to highlight the strengths and weaknesses in the proof. *State v. Banks*, 271 S.W.3d 90, 130 (Tenn. 2008). The argument of an advocate must be temperate, predicated upon evidence introduced during the trial, and pertinent to the issues which must be resolved by the jurors. *State v. Griffis*, 964 S.W.2d 577, 599 (Tenn. Crim. App. 1997). "[P]rosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices." *Banks*, 271 S.W.3d at 131. "A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *Id.* (citing *Young*, 470 U.S. at 11-13). Indeed, "[a]n improper closing argument will not constitute reversible error unless it is so inflammatory or improper that it affected the outcome of the trial to the defendant's prejudice." *Id.*

To evaluate the prejudicial impact of an improper prosecutorial argument, the following factors should be considered: (1) the conduct at issue in light of the facts and circumstances of the case; (2) any curative measures taken by the trial court and the State; (3) the prosecutor's intent in making the improper argument; (4) the cumulative effect of the improper argument; and (5) the relative strengths and weaknesses of the case. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). Courts also "take[ ] into account whether the improper remark of the prosecutor was made in response to the defendant's comments or argument." *Id.*; *see also* Tenn. R. Crim. P. 29.1(c)(2) ("[t]he state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument").

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const.

amend. V. Similarly, article I, section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. Both provisions guarantee criminal defendants the unfettered right to remain silent and not testify at trial. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). Both provisions further prevent the State from commenting on the accused's silence. *Griffin v. California*, 380 U.S. 609, 615 (1965); *State v. Jackson*, 444 S.W.3d 554, 586 (Tenn. 2014). It is possible, however, for the State to describe the proof as uncontradicted or make other indirect references to the defendant's silence without infringing on the defendant's Fifth Amendment rights, so long as the defendant is not the only person who could offer the contradictory proof. *Jackson*, 444 S.W.3d at 586-87 (internal citation omitted).

The propriety of prosecutorial comments regarding the right to remain silent are reviewed by this court under a *de novo* standard, and the following two-prong test applies: (1) whether the prosecutor's manifest intent was to comment on [the][d]efendant's right not to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on [the] [d]efendant's decision not to testify. *Jackson*, 444 S.W.3d at 588.

In this case, Defendant objected to the following statement by the prosecutor as an impermissible comment on her right not to testify and requested a mistrial:

> Now, we come up with, "Oh yeah, he threatened to burn my trailer down by putting potato chips in an electrical outlet. And I happened to have seen my brother burn up 15, 20 years ago, and that's the reason why I decided to kill my husband today.
>
> And then she throws in there, "He's constantly picking at my granddaughter about the room being messy, about her homework not being done, slamming the door." Did you hear any proof on the witness stand about anytime [the victim] slammed the door to [the granddaughter's] room?"

The trial court denied Defendant's motion for a mistrial. At the hearing on Defendant's motion for new trial, concerning this issue, the trial court found:

> But [the granddaughter] had been living at the residence for some time, and there was some evidence introduced to suggest that there was some animosity between the granddaughter and the victim in the case. And I think, and I'm not quite sure, but it seems like maybe there were other witnesses that might have been asked some

> questions about that. But whether they were or not, I think the point the state was trying to argue was, that there was no - - there was no evidence that corroborated any strained or bad relationship between the victim and the defendant's granddaughter. I think that the comment that was made was, by the state, there's not any evidence that he was mean to her that he picked on her. There was nothing outside of what the defendant says.
>
> She throws in there this, meaning the defendant has said this is what has happened, but you've not heard any other evidence to suggest that there is this strained relationship, or that the victim in this case was mean, or was picking at, or into it with the granddaughter. And so that was the way that this Court kind of took that. And I don't know that it quite got - - it possibly could have been said in a little more articulate manner. But, you know, closing arguments are, unless you've actually stood on the floor and done one, it's awfully hard to criticize that someone maybe could have been a little more articulate on it.
>
> But I did not take it to mean that she didn't testify. I don't see that it ran afoul of that rule. The Court of Appeals may disagree. That's why we have a Court of Appeals.

In our view, the prosecutor's comments about the lack of proof of the victim slamming the door to Defendant's granddaughter's bedroom was not an improper comment on Defendant's right not to testify. The State was responding to defense counsel's opening statement in which she said that the victim got angry and slammed the victim's bedroom door on the day of the murder. "[P]rosecutorial responses to defense arguments are clearly permitted." *Jackson*, 444 S.W.3d at 587; *see also State v. Sutton*, 562 S.W.2d 820, 823-24 (Tenn. 1978) ("Where the criminal defendant raises an issue, so long as the argument is fairly warranted by the facts and circumstances of the case."). Additionally, a prosecutor is free to argue reasonable inferences from the proof presented at trial. *See State v Thomas*, 818 S.W.2d 350, 364 (Tenn. Crim. App. 1991) ("[m]ere argument by the State that proof on a certain point is unrefuted or uncontradicted is not an improper comment upon a Defendant's failure to testify.") (citations and internal quotation marks omitted).

Furthermore, the trial court instructed the jury as follows:

> The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The defendant is presumed innocent, and the burden is on the state to prove her guilt beyond a

> reasonable doubt. She is not required to take the stand on her own behalf, and her election not to do so cannot be considered for any purpose against her, nor can any inference be drawn from such fact.

It is presumed that the jury followed the trial court's instructions. *State v. Reid*, 164 S.W.3d 286, 323 (Tenn. 2005). Defendant is not entitled to relief on this issue.

**Conclusion**

For the foregoing reasons, the judgment of the trial court is affirmed.

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JILL BARTEE AYERS, JUDGE