IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 17, 2008 Session

STATE OF TENNESSEE v. JOEL RICHARD SCHMEIDERER

Direct Appeal from the Circuit Court for Maury County
No. 14488 Jim T. Hamilton, Judge

No. M2007-01922-CCA-R3-DD - Filed April 9, 2009

A Maury County jury convicted the Defendant, Joel Richard Schmeiderer, of premeditated first degree murder, and it sentenced him to death. On appeal, the Defendant claims: (1) the trial court erred when it denied his motion for a continuance; (2) the trial court erred when it conducted voir dire; (3) the evidence is insufficient to support his conviction; (4) the trial court erred when it allowed the State to enter and argue non-statutory aggravating circumstances during the penalty phase of the trial; (5) the prosecutor's closing argument constituted misconduct and plain error; (6) the death penalty was imposed arbitrarily and is excessive or disproportionate to the penalty imposed in similar cases; (7) the Tennessee death penalty statute is unconstitutional; (8) the Tennessee death penalty statute is applied in a cruel and unusual way; and (9) the trial court violated the Defendant's constitutional right to present mitigation evidence. After a thorough review of the record and the applicable law, we affirm the conviction and the sentence of death.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Sharon D. Aizer, Columbia, Tennessee (on appeal); Claudia S. Jack, Shipp Weems, and Michelle VanDeRee, Columbia, Tennessee (at trial) for the Defendant, Joel Richard Schmeiderer.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; James E. Gaylord, Assistant Attorney General; Mike Bottoms, District Attorney General; Joel Douglas Dicus and Patrick S. Butler, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Pre-Trial Hearing on Motion to Continue

A Maury County Grand Jury indicted the Defendant for first degree murder on July 26, 2001. On January 9, 2003, the Defendant filed a motion to continue his trial, which was set for February 3, 2003. The trial court granted the motion and reset the trial for May 3, 2004. The Defendant filed a second motion to continue on April 28, 2004, citing a need for more time to conduct mental evaluations. The trial court held a hearing on the Defendant's second motion to continue, at which the Defendant presented the following evidence: Dr. Stephen Montgomery, a forensic psychiatrist, testified that he examined the Defendant for ninety minutes at Riverbend Maximum Security Prison on April 20, 2004. He interviewed the Defendant, took note of the Defendant's current and past psychiatric symptoms, and performed a mental status examination on the Defendant. Dr. Montgomery said, "The only significant finding was that [the Defendant's] . . . range of emotional expression appeared to be somewhat incongruent with the situation he was facing and the topics that we were discussing." Dr. Montgomery continued, "[I]t appeared to [me] he approached . . . [the situation he faced] . . . in a somewhat nonchalant and jovial way instead of a serious way."

Dr. Montgomery testified that he received some of the Defendant's school, medical, and legal records from Dr. Ann Charvat, who was the defense team's mitigation specialist. He told the court that he had not received all of the records and that his evaluation would not be final without them. Discussing the Defendant's medical history, Dr. Montgomery testified that the Defendant "suffered a possible head injury in 1982, when he fell down the stairs breaking his nose." In 1995, the Defendant voluntarily committed himself to Cumberland Hall Psychiatric Facility, where he underwent an electroencephalogram ("EEG"). The EEG results were considered "abnormal," and, according to Dr. Montgomery, "This would mean or could possibly mean that [the Defendant] has some impairment or dysfunction in his brain." Dr. Montgomery said the Defendant's physicians recommended a "CAT" scan of his head to get a more detailed evaluation. In 1998, the Bedford County Medical Center "noted [the Defendant] to be stuporous and lethargic, with a drug screen positive for cannabis and some other unidentified substance." Accordingly, the Defendant's physicians again recommended a "CAT" scan of the Defendant's head. Dr. Montgomery said the Defendant suffered additional injuries while he was incarcerated, and he concluded that the Defendant needed further neurological and neurophysiological evaluations. He estimated this testing would take eight to ten weeks.

Dr. Montgomery explained the possible connection between a brain injury and the Defendant's alleged conduct involved in this case by stating that damage to the frontal lobes of a person's brain could cause that person to "act in a rash, impulsive manner." He said such an injury, coupled with stress, could interfere with the Defendant's ability to appreciate the wrongfulness of his conduct or conform it to social standards.

On cross-examination, Dr. Montgomery said defense counsel contacted him three to four months before his testimony at this pre-trial hearing. He testified he saw no indication the Defendant was incompetent to stand trial or mentally retarded. Dr. Montgomery acknowledged that an abnormal EEG did not necessarily indicate brain damage or abnormality. He opined that during his interview with the Defendant, the Defendant was somewhat defensive and denied

having a psychiatric disorder. Dr. Montgomery testified that defensiveness and denial indicate conscious decision-making, which is inconsistent with brain damage.

Dr. Ann Marie Charvat, the defense team's mitigation specialist, testified that she worked to "explain[] the context within which the crime occurred" and to "identif[y] the social influences beyond the control of the individual." Dr. Charvat said she began working on the Defendant's case one year before the hearing and performed an assessment of the Defendant, collected documents, interviewed the Defendant's mother, and collected the Defendant's school, medical, and legal records. Dr. Charvat said she usually tried to identify five themes in a defendant's past that help provide the "context" of the crime: (1) dysfunctional family; (2) community response; (3) institutional involvement; (4) cognitive or emotional disorders; and (5) distortion of perception with respect to the "failure of the social institutions to adequately socialize a person." Dr. Charvat stated that there were "a number of irregularities about [the Defendant's] family . . . ." She stated that, without a complete psychological evaluation, her mitigation evaluation was incomplete. On cross-examination, Dr. Charvat stated she had interviewed very few witnesses, and she described her future interviews as "necessary." She also sought additional records in order to complete her evaluations

After hearing the evidence, the trial court denied the Defendant's motion to continue the Defendant's trial date.

B. Trial

The Defendant was indicted for the first degree murder of Tom Harris, which occurred on July 11, 2001, while the victim and the Defendant were housed at South Central Correctional Center ("SCCC"). At the Defendant's trial, the State presented the following evidence: Daniel Eugene Devers testified that, on July 11, 2001, he was acting as the 2:00 p.m. to 10:00 p.m. shift supervisor at SCCC when inmate Harris was found strangled in his cell with a sock around his neck. Officer Devers described the incident saying that, around 8:30 p.m., he was alerted to a situation in Apollo B Pod of the prison, and when he went to cell 201 he observed Sergeant Hallman inside the cell and a body, which had blood on its rib area, lying on its side on the floor. Officer Devers also noticed blood on the floor. He said that the officers rolled the body over to see the face and noticed that the victim's head was "blue from the neck up" and that there was a standard prison issued sock around the victim's neck. The officers removed the body, and the prison guards then searched each cell in Apollo B Pod.

Officer Devers said that SCCC housed around 1650 inmates at a time and that there were generally two inmates housed in each cell. The prisoners were locked in their cells seven times a day to be counted. The prisoners were also locked in their cells between 9:15 p.m. and 6:00 a.m. Officer Devers explained that each inmate had a key that opened his own cell door.

On cross-examination, Devers testified that some prison inmates exchanged keys to their respective cells and that others jammed their cell doors open so the cell could be entered without a key. The officer said that, when the guards searched all the cells in Apollo B Pod, they found bloody items in cells 104, 118, 122, and 224.

SCCC guard Chris Sawyer testified that he responded to the call for help on July 11, 2001. He helped to secure each inmate and to transport the victim's body to the hospital. The victim was pronounced dead shortly after the ambulance left the prison. After returning from the hospital, Sawyer helped search the cells. While searching cell 120, Sawyer found a pair of standard prison issued blue pants that appeared to have blood on them. Sawyer turned those pants over to Sergeant Rodriguez to deliver to the Tennessee Bureau of Investigation ("TBI"). On cross-examination, Sawyer elaborated that, when he helped lock down the prison, he locked the doors, secured the cells, and made sure there were two inmates in each cell.

Sergeant Omar Rodriguez testified that, after he heard about the incident in Apollo B Pod, the prison began locking down the units. Then, officers gathered to search every cell in Apollo B Pod. The teams were instructed to bring back to Sergeant Rodriguez anything of relevance, and he would give the item an ID number. Sergeant Rodriguez remembered Sawyer bringing him bloody pants from cell 120, which was the Defendant's cell. On cross-examination, Sergeant Rodriguez stated that the inmates were all strip-searched and that each inmate's cell was also searched. He acknowledged there was no reference in his report about bloody clothing found in Apollo B Pod cell 120.

Robert Craig, an inmate at SCCC in July 2001, testified that he was the victim's cellmate and that he had been in that cell for only one night when he found the victim "unconscious." He said he last saw his cellmate alive between 3:45 p.m. and 5:00 p.m., on July 11, 2001, during the afternoon count. After the afternoon count, Craig left the cell to eat and play basketball and cards. Craig explained that, because he was new to the cell, he had not yet been given a key. Therefore, Craig and the victim had a piece of cardboard in the cell door, which prevented the door from locking and allowed Craig access to the cell. Craig said that, when he returned to his cell in the evening, he saw the victim lying on the floor. The cell door had been shut without the piece of cardboard, so Craig could not enter the cell. Craig thought the victim was asleep, and he unsuccessfully tried to wake the victim by pounding on the door. Because the victim did not respond to the pounding, Craig enlisted the aid of another inmate, who looked in the cell door's window and called the guard. After the guard opened the door to the cell, Craig tried to enter to retreive his shower items. The guard made him stay in the cell until he was taken to solitary confinement pending an investigation. Craig said that his cell was number 201 and that the guard at the entry to Apollo Pod B could not see the cell's door from his post.

Officer Jeremy Miller Means, a correctional officer at SCCC, testified that he was the Apollo B Pod officer on duty on July 11, 2001. Officer Means stated that, when he went to cell 201 to give Craig an educational pass around 7:00 p.m. the victim was alive in the cell. Officer Means acknowledged that, from where he is posted, he cannot see the door to cell 201. He recalled that he was working on his logbook when Craig motioned for him to unlock the cell door with his master key. Describing the scene when he arrived at cell 201, Officer Means said, "I found [the victim] face down on the cell floor and there were spots of blood on the cell floor and there happened to be a sock around his neck." He noticed that "stuff was scattered around" the cell, which was different from his previous trip to the cell hours earlier. Officer Means secured the cell and called for help. On cross-examination, Officer Means said that, when he

helped search the cells, he found a pair of bloody pants in cell 230, which housed inmates Ricky H. Krans and Larry T. Hampton. Officer Means also acknowledged that it was possible he visited cell 201 at 6:00 p.m. instead of 7:00 p.m.

Nurse Rudolph Witsom Slagel, Jr., testified that he worked at SCCC at the time the victim was killed. Nurse Slagel said he was called to a cell in Apollo B Pod, where he saw an inmate on the floor with no signs of life and a "bluish discoloration to his face and neck area." The victim was "removed from the cell and taken to the medical department."

Douglas Ford, an inmate at SCCC, testified that, around 8:20 or 8:25 p.m., he saw the Defendant and inmate Charles Sanderson exit the victim's cell at a "fast pace." Ford explained "[he knew] that [the victim] didn't mess with none of them guys" and that "it just caught [his] attention for them to come out of the room walking real fast." He said that, after the Defendant and Sanderson left cell 201, they walked together to cell 120, the Defendant's cell. Ford later saw the victim's cellmate look in the window of the cell he shared with the victim and call for a guard. On cross-examination, Ford admitted that he had been convicted of two counts of rape of a child. Ford said that he was "[g]ood friends" with the victim and saw him daily. Ford knew Sanderson from spending time in segregation with him, but he did not know the Defendant, who had only been at the prison "a couple of days."

Agent Vance Jack with the TBI testified that the Wayne County Sheriff's Department called him to report a homicide that had occurred at the prison. Agent Jack saw the victim's body at the hospital and described it saying, "You could see indentations where it appeared there was some type of ligature had been around his neck. Impressions were still on his neck and it was obvious that there was a busted lip right in the center of his mouth on the top lip, some abrasions to his ankles." After inspecting the body, Agent Jack went to SCCC to interview the Defendant.

Agent Jack and another agent, Agent Jerry Tenry, interviewed the Defendant in the Skylab, where inmates are held in segregation. The agents read the Defendant his *Miranda* rights, and he chose not to invoke them. Agent Jack said that they told the Defendant they wanted to give him an opportunity to explain what happened. The Defendant then told them, "'Well, you're the investigators . . . . You tell me.'" Agent Jack said they told him that they believed he and Sanderson went into the victim's cell and that a "struggle ensued." During the struggle, Sanderson's finger was bitten and began bleeding. Agent Jack further surmised to the Defendant that the Defendant then punched the victim and "ultimately took a sock and strangled . . . [the victim] to death." This struggle explained why the Defendant had the victim's and Sanderson's blood on him.

Agent Jack stated that, after hearing this story, the Defendant said, "'That's pretty much it,'" seemingly without remorse. Agent Jack said the Defendant acted like it "was a joke" and laughed after being asked whether killing someone bothered him. Agent Jack hypothesized to the Defendant that he had killed the victim either because the victim was a "baby raper" or to "get back in the system for avenues of escape." The Defendant confirmed their statements by again saying, "'That's pretty much it.'"

In the victim's cell, Agent Jack found blood on pamphlets, on a cardboard box, on the door handle, in the hallway directly outside the cell, and on the outward face of the cell door. The agent also observed a blood-soaked towel hanging in the cell and a bloody sock lying over a cardboard box. Agent Jack said a blood trail led from the victim's cell down the stairs to the Defendant's cell. In the Defendant's cell, the agent found a ripped shirt, spotted with blood, in a plastic bag under the Defendant's bunk. Agent Jack added that each inmate had an identification number printed on his clothing and that the bloody pants and shirt had the Defendant's identification number on them. Moreover, the Defendant wore a much smaller size of clothing than his cellmate. Agent Jack also stated that inmate Sanderson had a bite mark on his finger.

On cross-examination, Agent Jack stated that inmate Jeffrey Hubert, the Defendant's cellmate, had informed him of the Defendant's possible motives, which Agent Jack suggested to the Defendant while interviewing him. Agent Jack said he knew that the victim was convicted of rape of a child for which he was serving twenty-five years. As for his collection of evidence, Agent Jack explained that he did not take fingerprints because of the high traffic within a prison but that he did collect clothing from the Defendant and Sanderson and photograph their bodies. He also sent the bloody sock for DNA analysis.

Agent Jack said that, during his interview with the Defendant on July 12, 2001, he asked the Defendant if he knew why they were interviewing him. The Defendant assured them he did. They asked him why he had blood on his shirt, and, in response, the Defendant told them to tell him why they thought he had blood on his shirt.

On redirect examination, Agent Jack read his statement describing his interview with the Defendant, which confirmed much of his testimony. Additionally, the statement included that:

> [The Defendant] told us that it amazed him that the guards had missed the shirt with the blood on it in the first search. I told him that there was blood on the shirt but there was a large tear in the shirt.
>
> [The Defendant] explained to me that he had taken his teeth and tore off a portion of the shirt which had a large blood stain in it and disposed of it.

Inmate Jeffrey Hubert testified that he was the Defendant's cellmate for one night. Hubert stated that on July 11, 2001, the Defendant was in the cell with Sanderson and that they stopped talking each time he entered the cell. Hubert said he was not in his cell when the guards locked down the prison. When Hubert returned to his cell, the Defendant was already there. The Defendant told him "it was going to be a long night." Hubert and the Defendant were in their cell for about two hours before guards searched it. Hubert recalled that the Defendant seemed nervous during the search and that, when the two left the cell for the search, the Defendant told him the guards were going to find blood on some pants the Defendant left in the cell, explaining he had been injured on the "ball court" earlier that day. Hubert stated that, when they returned to the cell, the Defendant "went straight to a plastic bag . . . and pulled out a shirt that had a blood stain on it" and ripped a bloody spot out of his shirt with his teeth and flushed it down the toilet. The Defendant also told Hubert he had left "them" a bloody trail that "they" had overlooked.

Hubert testified that he asked the Defendant "if he[] stuck the old man upstairs." The Defendant responded that the victim had not been "stuck" but that the Defendant had strangled him. The Defendant told Hubert that he killed the victim with a sock and that he was surprised at how much the victim struggled, saying the victim bit Sanderson on the hand. The Defendant said the entire process of killing the victim took three minutes, and he justified the killing because the victim was a "baby raper" whose twenty-year sentence was not long enough for the crime. The Defendant also said he hoped to escape when he returned to court for killing the victim. Hubert testified that the Defendant told him he wanted to "throw[] the old man over the railing so everybody could have [seen] it" and to "go on a rampage" and kill three or five other people. Hubert recalled that the Defendant went to sleep when the searches were complete.

On cross-examination, Hubert testified that he was six-foot-three and weighed 326 pounds. Hubert admitted that he had several felony convictions, which included aggravated burglary, theft of property valued over $10,000, and felony reckless endangerment.

Inmate Daniel Matthew Pollen testified that he was housed in the cell next to the victim's cell on July 11, 2001. Pollen said that, about 8:10 p.m. on the night the victim was killed, he was lying in his cell watching television and heard a loud thump on the floor followed by a loud thump on the wall. He confirmed that these sounds were not ordinary.

Special Agent Jerry Tenry with the TBI testified that he and Agent Jack interviewed the Defendant in the Skylab. Agent Tenry said they offered the Defendant a chance to tell them his side of the story, and the Defendant said, "'Well, you're the investigator, you tell me.'" After Agent Jack told the Defendant what they thought happened, "[the Defendant] just kind of leaned up and smiled and he said, 'That's about right.'" The Defendant denied being sorry for killing the victim.

Dr. Charles Harlan, the pathologist who performed the autopsy on the victim's body, testified that the victim's body had a line around its neck with broken capillaries, which indicated that "some object [was] tied or wrapped around the neck tightly." The victim's right shoulder was bruised and scraped. Dr. Harlan determined the cause of death was strangulation, which can be completed in as little as thirty seconds or take as long as a few minutes, depending on whether the pressure is sufficient to close the jugular or whether the victim struggles.

Charles Hardy, a serology and DNA analyst with the TBI crime lab, testified that he tested the pair of pants involved in this case and that he found on them blood matching both the victim and Sanderson. He also tested the Defendant's shirt, and found it contained the victim's blood. The towel found in the victim's cell had Sanderson's blood on it, as did swabs from the television in the cell and the door handle to the cell. Agent Hardy said he did not find any blood on Sanderson's clothing. He determined that the sock found lying over a cardboard box bore both the Defendant's and the victim's blood, and the victim's shirt bore only the victim's blood. On cross-examination, Agent Hardy explained that the top of the sock had Sanderson's and the victim's blood but that the toe of the sock only had Sanderson's blood.

The Defendant then presented the following proof: Sanderson's testimony from Sanderson's trial was read into evidence without objection. During his testimony, Sanderson admitted his prior convictions included four burglary convictions, one aggravated burglary conviction, one grand larceny conviction, and one armed robbery with a deadly weapon conviction. In July 2001, Sanderson was housed at SCCC, where he met both the victim and the Defendant. Sanderson said that on July 11, 2001, the victim "bumped" into Sanderson in the sally port[1] while waiting for a meal. Sanderson said he asked the victim "if [he] could get an excuse me or sorry or something," to which the victim responded, "Fuck you, punk, I ain't got to say nothing." The men then went to eat, and Sanderson planned to "rough [the victim] up a little bit" because of his "disrespect." Sanderson explained that the prison had a class system based on charges, gang affiliation, and race, and he considered the victim to be of a class lower than himself because the victim had been convicted of rape of a child.

Sanderson had played football with the Defendant, but he did not describe their relationship as close. Sanderson visited the Defendant in his cell on July 11th, and later, when he saw the Defendant out in "the pod," Sanderson told him he was going to "straighten something out real quick." After learning of the plan, the Defendant agreed to be Sanderson's look out and remain outside the victim's cell. Sanderson stated that he entered the victim's cell while the victim was silently sitting on his bed looking through a book. Sanderson then poked his finger in the victim's face, and the victim bit him. After the victim bit Sanderson, Sanderson "put [his] finger through [the victim's] nose and pulled back on it." The victim released Sanderson's finger, and then Sanderson hit the victim in the mouth. The victim fell against the back wall, and Sanderson continued to hit him. Sanderson acknowledged that the victim never hit him. Sanderson said that, after hitting the victim, he went over to the sink and cleaned his hands. He wiped his hands on the towel, and then he walked out while telling the victim "that was the end of that." Sanderson testified that the victim was still alive when he left the cell. According to Sanderson, after exiting the victim's cell, Sanderson and the Defendant went to their respective cells, and Sanderson watched television until lock-down was called.

During Sanderson's cross-examination at his trial, Sanderson said he did not take any action against the victim immediately after the victim bumped into him during mealtime. Sanderson clarified that he was not angry with the victim, instead, he merely sought to teach the victim some "respect." He said, "Anybody that disrespects gets taught a lesson." Sanderson had no explanation for the blood on the victim's television.

After hearing the evidence, the jury convicted the Defendant of premeditated first degree murder.

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[1] A sally port is a doorway where there are doors on either side of a small area, and one door must close one door before the other door is opened.

C. Sentencing Hearing

At the sentencing hearing, Thomas A. Smith, the Bedford County Circuit Court Clerk, testified that in August 1999, when the Defendant was eighteen years old, a jury convicted the Defendant of two counts of attempted first degree murder and one count of first degree murder, and that in December 1999 the Defendant pled guilty to aggravated assault.

Tony Bruce Stout testified that he was the victim in one of the Defendant's attempted first degree murder convictions. He said that, on October 9, 1998, he and his friend James Helmet initially encountered the Defendant at a BP gas station in Belfast, Tennessee. Helmet and the Defendant argued, and, when Stout and Helmet tried to drive away, the Defendant, two other men, and a woman followed them. Stout said that the Defendant's car approached them at a high speed and stayed close to his back bumper. Stout recalled that a gun emerged from the back window of the Defendant's car and discharged three or four times. The car followed his truck closely as the shooter continued to shoot. Stout drove up to a house, and the Defendant rammed Stout's truck with his car. Stout and Helmet jumped out of the truck and began yelling at the man who lived in the house to call the police. The Defendant then began pilfering Stout's radio and other electronics from his truck. When Stout shouted at him to stop, the Defendant pulled out a gun and shot at them. Stout ran into the woods; Helmet died in front of the house from gunshot wounds. On cross-examination, Stout said he could not tell who drove the car chasing him.

Ted Olkowski also testified about the events involved in the Defendant's attempted first degree murder conviction, stating that, on October 9, 1998, he lived in a rural area near Shelbyville, Tennessee, with his wife. He said that, on that date, he heard a crash, and he saw a truck on his lawn that had been hit by car. The men in the truck exited and ran behind Olkowski's house while yelling that someone shot at them and ran them off the road. Olkowski said that he saw the car that rammed the truck come back to the property and that it stopped in the middle of the road. At that point, the Defendant, without speaking to Olkowski, "stepped out and walked up to [Olkowski], pointed a gun in [his] chest and pulled the trigger, and it misfired." The Defendant tried to un-jam his gun, and then the Defendant and his friend vandalized Helmet's truck. Olkowski said, "[T]he boy who owned the truck, ran from around the back of the house . . . hollering get out of the truck. So they did. You know, he got out, pulled the pistol back out and fired off a round at him (Helmet), when he was about halfway up the driveway." Helmet fell to the ground, and the Defendant aimed downwards towards the body and tried to shoot him again, but the gun jammed.

Linda Olkowski testified similarly to her husband, saying that she heard a crash outside the house and saw that a blue truck had crashed into her cedar tree. She saw "two boys . . . running at [her], screaming ['call the sheriff, somebody is shooting at us.'" She called the sheriff twice, the second time being after she heard gun shots. Linda testified that the Defendant, who was fifteen feet from Helmet, aimed and shot Helmet, who then fell back against her house. She saw the Defendant try to shoot Helmet again.

Jospeh Cody Uttmor testified that he was with the Defendant on October 9, 1998. He said that he and the Defendant had been high on Xanax for several weeks at that point and planned to visit a friend at Vanderbilt hospital that night. Uttmor stated that they had briefly stopped at a gas station when one of their friends, Dan Rodriguez, became angry with Stout and Helmet. Uttmor said he, Rodriguez, and the Defendant followed Stout's truck, but they never planned to kill anyone.

On cross-examination, Uttmor clarified that the Defendant arrived while he and Rodriguez were at a different gas station. The three of them left that gas station and went to the Defendant's house, where they took some more Xanax. They then went to the BP gas station where they got into a disagreement with Stout and Helmet because Rodriguez was hitting Helmet's truck. The Defendant, driving a Chrysler Sebring chased Stout and Helmet, who were in a truck. Someone shot at the truck from the car. After the truck ran off the road, the Defendant used his car to rear-end the truck. Uttmor stated that the Defendant became angry because his car was damaged, so he tried to steal from the truck to pay for the damage to his car. Uttmor recalled that, after Olkowski came out of the house, the Defendant got out his gun, took aim, and shot Helmet once. Uttmor told the Defendant to stop shooting and then left the scene.

Tonya Ann Schmeiderer, the Defendant's mother, testified that she gave birth to the Defendant when she was seventeen years old. His father, Gary Swaggart, was a married man thirteen years her senior. Swaggart denied the pregnancy, and, according to Schmeiderer, he was not affectionate with or supportive of the Defendant. Swaggart's other children hit, pushed, and threw things at the Defendant because the Defendant called Swaggart his father.

Schmeiderer said the Defendant was a good student in elementary school but began getting into trouble soon after they moved to Tennessee and he started high school. In one instance, he was caught vandalizing a police car with a friend. In tenth grade, the Defendant got into trouble in school for urinating on himself because the teachers would not let him go to the restroom. Schmeiderer recalled that, after that incident, the Defendant was sent to alternative school. Around the same time, the Defendant began to steal drugs, money, and guns, but his mother was unsure whether he used drugs. Schemiederer never sought mental help for the Defendant, and, at the age of fifteen, the Defendant was taken into State custody, where he remained until age eighteen. The Defendant briefly enrolled in college before he was imprisoned for killing Helmet. Schmeiderer asked the jury to spare his life.

The Defendant's aunt and sister testified and asked the jury to spare the Defendant's life. The Defendant's aunt testified that she was close to the Defendant because he visited her when he was a child. She spoke with the Defendant while he was incarcerated, and he told her he had been re-baptized. The Defendant's sister added that she and her brother were also close and recounted how they used to play with their dog together.

Mickey Sawyers, a case manager from Riverbend Maximum Security Prison, testified that he had worked with the Defendant, who was incarcerated at Riverbend, for two years. He stated that the Defendant remained disciplinary-free after he was put on administrative segregation. Sawyers described the Defendant as "very quiet almost to the point of being

withdrawn." On cross-examination, Sawyers explained that administrative segregation is where a inmate only has contact with other people when transported from his cell to places like the showers or the recreation yard.

Ron Mosby, the volunteer chaplain at Riverbend Prison, testified that, while he did not know what the Defendant's convictions were, he stated that he found the Defendant "very quiet" and ready to study the scriptures. Mosby declared the Defendant's life as one "worth saving." Similarly, Adam Olsen, a ministerial volunteer at the prison, testified that he baptized the Defendant. On cross-examination, he conceded that he did not know about the Defendant's convictions.

Dr. Ann Marie Charvat, a mitigation specialist, testified that she had conducted many interviews to gather information about the Defendant's past. She testified that the Defendant was impacted greatly by the community's rejection of him as Gary Swaggart's son and by Swaggart's attempts to get custody of Jessica Schmeiderer but not the Defendant. Dr. Charvat discussed at length that the Defendant had worked on a farm that belonged to an elderly couple in Tennessee and that he enjoyed working there. She said the Defendant was sentenced to alternative school twice and then put into State custody because of various charges against him. After the Defendant was placed in State custody, he was prescribed Prozac for his depression. The doctors also found the Defendant had an abnormal EEG, which suggested a need for more testing. According to Dr. Charvat, the Defendant smoked marijuana at this point in his life. While in the State's custody, the Defendant was put into a "punitive environment," and he reported to his mother that he was restrained and kicked and that someone poured WD-40 in his eyes. The Defendant was later moved to a new facility "where he got his GED, scored well, and was eventually released."

Speaking about the Defendant's mental state, Dr. Charvat described the Defendant as "be[ing] excluded" from most things in life. She tied this to her conclusion that "he experienced extreme psychological abuse." Dr. Charvat testified, "[T]here . . . hits a point when the stress is high, his judgment slows way down . . . . [T]here are periods of time when the stress is high, or when he is impaired on the alcohol or drugs, that his reaction time is very, very, very slow."

On cross-examination, Dr. Charvat emphasized that "psychological abuse was evident in [the Defendant's] home . . . [and] in [his] community." She admitted that she did "not know which one of those influences was big enough, and powerful enough to change how [the Defendant] felt about himself." Dr. Charvat stated that the Defendant's needs as a child might have "created a pain that stayed with him" that "began to create who he was" and create an "inability to cope with certain situations."

The Defendant chose not to testify on his own behalf. After hearing the evidence presented, the jury sentenced the Defendant to death.

II. Analysis

On appeal, the Defendant claims: (1) the trial court erred when it denied his motion for a continuance; (2) the trial court abused its discretion when it conducted voir dire; (3) the evidence is insufficient to support the conviction; (4) the trial court erred when it allowed the State to enter and argue non-statutory aggravating circumstances during the penalty phase of the trial; (5) the prosecutor's closing argument constituted misconduct and plain error; (6) the death penalty was imposed arbitrarily and is excessive or disproportionate to the penalty imposed in similar cases; (7) the Tennessee death penalty statute is unconstitutional; (8) the Tennessee death penalty statute is applied in a cruel and unusual way; and (9) the trial court violated the Defendant's constitutional right to present mitigation evidence.

A. Denial of Continuance

The Defendant asserts that the trial court erred when it denied his motion for a continuance because his defense team did not have sufficient time to review the transcript from Sanderson's trial and because the Defendant needed additional time for his experts to complete their medical testing and evaluations. The State counters that the Defendant has not shown how having more time to review the Sanderson trial transcript would have helped him. Further, the State argues the Defendant is merely conjecturing that Dr. Montgomery's testing would have been conclusive and that Dr. Charvat's testimony about the results of Dr. Montgomery's testing would have been favorable to the Defendant.

The Defendant was indicted on July 26, 2001, and his trial was initially set for February 3, 2003. The Defendant filed his first motion for a continuance on January 9, 2003, citing that his defense team had not received the institutional records from when he was in juvenile custody. The trial court granted a continuance of approximately fifteen months, resetting the trial for May 3, 2004. On April 28, 2004, the Defendant filed a second motion for a continuance. With respect to the Sanderson trial transcript, the trial court ordered the State to provide the defense team with the portion of the transcript the defense team said it needed and found that the defense team had ample time to review the transcript before trial. The trial court denied the motion for a continuance, finding that the experts who testified at the hearing on the motion spoke in terms of "conjectures and probabilities." It also said the experts would have an additional two weeks to work before their testimony was needed.

The decision of whether to grant a continuance is one within the sound discretion of the trial court, which will not be overturned absent a clear showing of abuse of discretion that resulted in prejudice to the defendant. *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004); *State v. Russell*, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999). "An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied [a] defendant a fair trial or that it could be reasonably concluded that a different result would have . . . followed had the continuance been granted." *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995). "In order to establish an abuse of discretion, the complaining party must make a clear showing of prejudice as a result of the continuance being denied." *Russell*, 10 S.W.3d at 275 (citing *State v. Teel*, 793 S.W.2d 236, 245 (Tenn. 1990)).

1. Defense Team Not Prepared

The Defendant argues that his defense team was not prepared to proceed with trial because his attorneys did not have the transcripts from Charles Sanderson's trial. The State counters that the defense team received the transcript soon after the hearing on the second motion to continue and that the minor delay was not prejudicial to the Defendant. Addressing this issue, the trial court said in its written order, "Defense counsel was provided with Sanderson's transcribed testimony today, which provides ample time for review before the guilt phase of this matter begins. The remaining portions of the transcript shall be made available to defense counsel during the week."

On review, we conclude that the trial court did not abuse its discretion when it denied the Defendant's motion for a continuance based on the Defendant's argument for more time to review the trial transcript. The Defendant received a portion of the transcript the day of the pre-trial hearing on May 3, 2004. The case went to trial on May 10, 2004. As part of his case, the Defendant presented Sanderson's testimony from Sanderson's own trial, meaning the Defendant utilized the transcript at trial. The Defendant has not shown that a week was not sufficient time to review the Sanderson transcript. Further, he has not shown how more time would have benefitted him in his trial preparation. Under these circumstances, we cannot conclude the Defendant has shown that he was denied a fair trial or that the result would have been different if the trial court had granted a continuance. Therefore, we conclude the trial court did not abuse its discretion.

2. Need for Additional Testing

The Defendant also contends that the trial court erred when it denied his motion for a continuance because there were objective medical findings showing he suffered from a brain dysfunction, and he should have been given time to follow-up on those initial findings. The State responds that the medical findings were speculative in nature.

The trial court found the proposed expert testimony was unsubstantiated and found it "noteworthy" that "both experts spoke in terms of conjecture and probabilities." Both Dr. Montgomery and Dr. Charvat testified that the Defendant "could" suffer from a brain injury, that further testing was necessary to determine "whether" the Defendant had a brain impairment, and that such a condition "could" mitigate the Defendant's actions. The court determined that the experts could finish their work while the court empaneled a jury and tried the Defendant. The court further suggested that the experts locate different doctors who could perform the suggested examinations within a shorter time frame.

We conclude that the Defendant has not proven that the trial court abused its discretion when it denied his motion for a continuance in this regard. He has presented no proof that, had the experts been able to perform further tests, the outcome would have been different. The experts spoke in possibilities when speaking about damage to the Defendant's brain. Dr. Montgomery acknowledged that even an abnormal EEG is not necessarily indicative of brain

dysfunction. Moreover, the doctor said that the Defendant showed signs of decision-making in that he chose to hide his psychiatric problems. Dr. Charvat explained her process of investigating as a sort of pandora's box of facts: she is continually led to new parties to interview and investigate by the evidence she gathers and reviews. At the time of the hearing, she did not specify whom exactly she needed to interview and what specific information she sought. In sum, we agree with the trial court that the Defendant presented only "conjectures and possibilities" instead of known facts that would have been presented to the jury. On appeal, no additional arguments have been presented to show that the Defendant was prejudiced by the denial of the motion. Accordingly, we conclude that the trial court did not err when it denied the Defendant's motion for continuance and that the Defendant is not entitled to relief on this issue.

B. Voir Dire

The Defendant next argues that the trial court erred during voir dire. Specifically, the Defendant asserts that the trial court erred because: (1) it allowed the State to shift the burden to the Defendant to "put on evidence" of mitigation; (2) it limited his questions, and the phrasing of those questions, of prospective jurors; (3) it struck eleven women without allowing for rehabilitation of those potential jurors and without making a record; (4) it improperly denied the Defendant's request to strike prospective juror Jonathan White for cause; and (5) it improperly excused prospective juror Manual Oskian for cause. The State's response to each of these assertions will be discussed in their respective sections below.

Article I, section 9 of the Tennessee Constitution guarantees a criminal defendant the right to trial "by an impartial jury." In fact, every accused is guaranteed "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1995) (citing *Tooms v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954)). Thus, the function of voir dire is essential. Voir dire permits questioning by the court and counsel in order to lead respective counsel to the intelligent exercise of challenges. *Id.* (citations omitted). A trial court is vested with great discretion in conducting the selection of a fair and impartial jury. *State v. Howell*, 868 S.W.2d 238, 247 (Tenn. 1993), *cert. denied* 510 U.S. 1215 (1994); *State v. Harris*, 839 S.W.2d 54, 65 (Tenn. 1992), *cert. denied*, 507 U.S. 954 (1993); *see* Tenn. R. Crim. P. 24(a). Thus, this Court must uphold the trial court's ruling unless the defendant establishes the existence of a clear abuse of discretion. *State v. Raspberry*, 875 S.W.2d 678, 681 (Tenn. Crim. App. 1993).

1. Shifting of Burden to Defendant

The Defendant claims that the trial court erred when it permitted the State to improperly shift the burden to him to present evidence mitigating against the imposition of the sentence of death by pointing out several times to the jury, and in several ways, that the defense would be presenting such evidence. The State counters that the Defendant did not object until the third day of voir dire and, therefore, cannot complain that the jury impaneled on the first two days was tainted. Further, it asserts that the comments did not shift the burden but rather alluded to the possibility that the defense would bring up mitigating circumstances, which is, in fact, an accurate statement in most cases. Finally, the State contends that the comments are not jury

instructions and that the jury was properly instructed that the Defendant did not have the burden of proving a mitigating circumstance.

The record reflects that the prosecution repeatedly said during the voir dire of prospective jurors that the defense would be presenting evidence of mitigating circumstances. The Defendant did not object until the third day of voir dire, and he objected to only one statement, which will be discussed below. According to Tennessee Rule of Appellate Procedure 36(a), relief is not available to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error." Therefore, a defendant must object contemporaneously to statements by the prosecution that the defendant believes to be legally wrong or misleading. *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001). The Defendant has, therefore, waived our review of the statements occurring before and after his objection, statements to which he made no contemporaneous objection.

In the comment made by the prosecutor to which the Defendant did object, the prosecutor said, "The defense can put on evidence they want to, in this part of the trial. We call them mitigating circumstances. Anything . . . they want you to consider about the defendant . . . whatever, that they think you need to consider in making this decision." Defense counsel objected, claiming that the prosecutor shifted the burden of presenting mitigating evidence to the Defendant. The trial court ruled that the State had merely told the jury that the Defendant presenting mitigating evidence was a possibility, which is a fact jurors "need to know."

We understand the Defendant's argument to be that the prosecutor, by repeatedly informing the jury that the Defendant can present mitigating evidence, created the expectation that if the Defendant did not present such evidence then there is no evidence mitigating against a sentence of death. In fact, any evidence presented to the jury from the State or the defense can constitute evidence of a mitigating circumstance. *See* T.C.A. § 39-13-204(j)(9) (2003). Upon our thorough review of the record, we do not agree with the Defendant's interpretation of the prosecutor's comments. The State said, "The defense *can* put on evidence . . . ." (emphasis added). This comports more with the State's contention that its comments were informing the jury of what may happen during the trial and did not shift the burden to present mitigating proof to the Defendant. We conclude that the trial court did not abuse its broad discretion when it allowed the State to tell the jury that the Defendant can present mitigating evidence.

2. Questioning of Prospective Jurors
a. Mitigating Circumstances

The Defendant contends that the trial court erroneously limited the remarks he made and questions he asked potential jurors during voir dire. First, the Defendant argues that the trial court erred when it refused to allow the Defendant to ask each potential juror what he or she considered to be a mitigating circumstance. The State responds that the trial court, in an effort to limit the defense's use of open-ended questions, properly required the defense to use a more narrowly tailored question to elicit the jurors' propensity for bias.

A Defendant has a right to "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *Akins*, 867 S.W.2d at 354. Therefore, a trial court "shall permit the parties to ask questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges." Tenn. R. Crim. P. 24(b)(1). As previously set forth, however, the scope and extent of voir dire is entrusted to the discretion of the trial court, and the trial court's rulings will not be reversed on appeal absent an abuse of discretion. *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999). Merely "[r]equiring defense counsel to ask clearer, more-pointed and understandable questions is not an abuse of discretion." *State v. Jerry Lynn Walde*, No. 03C01-9603-CC-00109, 1997 WL 789964, at *6 (Tenn. Crim. App., at Knoxville, Dec. 23, 1997), *perm. app. denied* (Tenn. Jan. 4, 1999).

During voir dire, the Defendant requested permission to ask each juror to explain what he or she considered to be a mitigating circumstance of homicide. The trial court said defense counsel must ask a "more-pointed" question, requiring the Defendant to list several statutory mitigating factors and, following each factor, ask each juror whether he or she considered the factor "mitigating." In our view, the trial court's limitation was intended to extract a "clearer, more-pointed and understandable" question. *See id.* Therefore, the trial court did not abuse its discretion in this matter. *Id.*

b. Phrase "Put a Fellow Citizen to Death"

The Defendant next contends that the trial court erred when it prohibited him from saying that the State was seeking to "put a fellow citizen to death" because such a limitation "tends to minimize the impact of the jury's role" in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The State disagrees with the Defendant's interpretation of *Caldwell* and says the trial court did not err when it required the Defendant to say that the State was "seeking the death penalty" instead of that the State was seeking to "put a fellow citizen to death."

In *Caldwell*, the U.S. Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328. As a result, *Caldwell* prohibits remarks that "suggest to the jury that their decision to impose the death penalty would be temporary, tentative, or conditional, depending on the review of higher courts." *McCormick v. State*, No. 03C01-9802-CR-00052, 1999 WL 394935, at *20 (Tenn. Crim. App., at Knoxville, June 17, 1999), *no Tenn. R. App. P. 11 application filed*. For example, a trial court may not instruct the jury, as the *Caldwell* trial court did, that the jury's imposition of a death sentence is not binding or valid in any sense because it is subject to appellate review. *Id*.

We conclude the trial court did not violate *Caldwell* when it required the Defendant to use the phrase "seeking the death penalty" instead of "seeking to put a fellow citizen to death." The phrase "seeking the death penalty" did not suggest to the jury that its decision to impose a death sentence was only "temporary, tentative, or conditional." *McCormick*, 1999 WL 394935, at *20. The limitation did not lessen the impact upon the jurors of the nature of their responsibility as jurors sitting on a trial where the death penalty is requested. *Id*.; *see Caldwell*,

472 U.S. at 328. The trial court did not abuse its broad discretion or violate *Caldwell* when it limited the Defendant, and the Defendant is not entitled to relief on this matter. *Id*.

3. Excusing Prospective Jurors

The Defendant argues that the trial court violated his right to equal protection of the laws when it excused eleven potential jurors, all of whom were women, without giving the Defendant a chance to rehabilitate them and without making a record of its decision. The State responds that the trial court did not violate the Defendant's constitutional rights and that the trial court properly excused each of the jurors based upon each juror's explanation of how serving as a juror would be a hardship for them. The State points out that many of the female jurors were excused because they were solely responsible for the care of their small children, which has been found by other courts to be a valid reason for being excused, citing *Johnson v. United States*, 307 F. Supp. 2d 380, 387 (D. Conn. 2003).

Pursuant to Tennessee Code Annotated section 22-5-307(a) (2003), a person summoned for jury service must appear at the specified time and place "unless excused therefrom or discharged by the judge." In the case under submission, the prospective jurors were excused when they appeared in court based on the court's consideration of the information provided by the jurors to the trial court's inquiries. At the time of the Defendant's trial, the relevant code section provided that "any person may be excused from serving as a juror . . . when, for any reason, the person's own interests, or those of the public, will, in the opinion of the court, be materially injured by the person's attendance." *See* T.C.A. § 22-1-104(a) (2003) (repealed 2009). The statute further provided that "any person, when summoned to jury duty, may be excused upon a showing that such person's service will constitute an undue hardship." T.C.A. § 22-1-104(b) (repealed 2009). Further, the law in effect at the time of the Defendant's trial provided that the "court may discharge from service a grand or petit juror . . . for any other reasonable or proper cause, to be judged by the court." T.C.A. § 22-1-105 (Supp. 2008).[2]

The Defendant in this case contends that the trial court systematically excluded women from the jury venire. Further, the Defendant states that, had this exclusion been the result of the State's use of peremptory strikes, he could have sought some recourse, but, because it was perpetuated by the trial court, he had no such recourse. The United States Supreme Court has addressed whether peremptory challenges on the basis of gender violate the Equal Protection Clause holding, "Intentional discrimination on the basis of gender by a state actor violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1984). The Court clarified that intention to exclude based on gender is a requirement for there to be an Equal Protection violation. Even exclusions "based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." *Id.* at 143. The Court then gives the example that "challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect

[2] At the time of the Defendant's trial, this statute was codified at Tennessee Code Annotated section 22-1-106.

women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based." *Id.* (citing *Hernandez v. New York*, 500 U.S. 352 (1991)).

According to our review of the record, during voir dire the Defendant objected stating:

> Your Honor, we had 30 jurors come today. Out of those 30 jurors for cause, there w[ere] 12 people that approached Your Honor, asking for a for-cause-excuse; Your Honor granted all of them with the exception of one, Ms. Hanes. Actually, there w[ere] 13 including Ms. Hanes. Out of the 12 of the 30, 11 were females. And, of course, females have certain problems, and the Court addressed it: Children, et cetera.
>
> I would like to take exception to the Court's ruling excluding these 11 people. Females are a recognizable class that the courts have held there should be adequate provocation before they're excused. I don't know how many remaining jurors in that 30, were females. But I do know that 11 approached Your Honor. And I know we have lost the opportunity to have at least 11 females on the jury.

In total, the trial court excused thirteen prospective jurors based upon an undue hardship before the Defendant's objection, and eleven of those thirteen jurors were female.[3] The trial court asked that the potential jurors who felt incapable of serving due to the necessary five-night sequestration to identify themselves. The trial court then called each potential juror up to the bench and had a private conversation about the person's reasons for not being able to serve by staying in a hotel for five nights. After each conversation, the trial court announced why it was dismissing that potential juror. The following occurred during the questioning of each juror:

a. Alberta Hooks

The Court: So, Ms. Hooks, we'll just start with you. You want to come up here?

(Ms. Hooks complied.)

The Court: Yes, ma'am.

(Whereupon, a discussion took place between Ms. Hooks and the Court. And then, the following proceedings were had.)

The Court: She has children problems. A single parent. And thank you. Good luck to you.

Ms. Hooks: Thank you.

(Ms. Hooks was excused).

[3] In the trial court's order on the Defendant's motion for new trial, it also addresses why female jurors Linda Knox, Jane Karp, Kay Pitts, Shannon Cyphers, and Joe Etta Braswell were excused. These jurors were excused after the Defendant's objection and do not seem to be the subject of this appeal. We will, therefore, not address the trial court's excusing these jurors.

b. Jennifer Miller

The Court: All right. We'll just start here on the front row. And your name is?
Ms. Miller: Miller.
The Court: Jennifer Miller, should be number 22

(Whereupon, a discussion took place between Ms. Miller and the Court. And then, the following proceedings were had.)

The Court: She has two children. No one will be able to pick them up. Okay.

(Ms. Miller was excused.)

c. Tina Foster

The Court: All right. Yes, ma'am.
Ms. Foster: Tina Foster.
The Court: Yes, ma'am.
Ms. Foster: I've got children. My husband works all day. I just don't think the youngest one would do well, for five days, without her mamma.
The Court: Okay. All right. We'll excuse you then. Ms. Tina Foster. Thank you, ma'am.

(Ms. Foster was excused.)

d. Frances Smith

(Whereupon, a discussion took place between Ms. Smith and the Court. And then, the following proceedings were had.)

The Court: What's your name?
Ms. Smith: Frances Smith.
The Court: This is Frances Smith. And she has two children. And no one can help but her. Right?
Ms. Smith: Right.
The Court: Okay. Ms. Smith, we'll excuse you. Thank you.

(Ms. Smith was excused.)

e. Sandy Small

The Court: All right. Yes, ma'am.

(Whereupon, a discussion took place between Ms. Small and the Court. And then, the following proceedings were had.)

The Court: What is your name, Ms?
Ms. Small: Sandy Small.
The Court: Sandy Small. She has two children. Her husband works out of town. So we'll excuse you.

. . . .

(Whereupon Ms. Small was excused.)

f. Dena McClellan

The Court: All right. Yes, ma'am.

(Whereupon, a discussion took place between Ms. McClellan and the Court. And then, the following proceedings were had.)

The Court: Her daughter graduates from high school. All right. We'll excuse you. Thank you.

(Mc. McClellan was excused.)

g. Lou Ann Gibbs

The Court: Yes, ma'am. What's your name?

Ms. Gibbs: Lou Ann Gibbs.

. . . .

(Whereupon, a discussion took place between Ms. Gibbs and the Court. And then, the following proceedings were had.)

The Court: Her job is going to take her out of town until next week. So, thank you, ma'am.

(Ms. Gibbs was excused.)

Ms. Jack: Is that Ms. Gibbs?

The Court: Ms. Gibbs.

h. Elizabeth Daniels

The Court: This is Elizabeth Daniels.

. . . .

(Whereupon, a discussion took place between Ms. Daniels and the Court. And then, the following proceedings were had.)

The Court: All right. Two children, 6 and 10. No one's there when they get home from school. Thank you.

(Ms. Daniels was excused.)

i. Theresa Blocker

The Court: All right. Yes, ma'am.

(Whereupon, a discussion took place between Ms. Blocker and the Court. And then, the following proceedings were had.)

The Court: All right. A 7-year-old at home and her husband works nights. Thank you, ma'am.

(Ms. Blocker was excused.)

General Dicus: What was her name, Judge?

The Court: Theresa Blocker.

j. Nelda Bone

The Court: All right. Yes, ma'am.
Ms. Bone: Nelda Bone.
The Court: All right. Ms. Bone is number 8.
(Whereupon, a discussion took place between Ms. Bone and the Court. And then, the following proceedings were had.)
The Court: She's across from her mother-in-law who's ill. Thank you, ma'am.
(Ms. Bone was excused.)

k. Kimberly Sisk

The Court: Kimberly Sisk. All right. She has her grandfather. Thank you, ma'am.
(Ms. Sisk was excused.)

Upon our detailed examination of the record, the trial court excused each one of these female jurors for reasons other than gender. Each of these jurors requested to be excused and provided the trial court with reasons why serving as a juror would be an undue hardship. It is clear that the trial court acted within its discretion when it excused these jurors based upon their showing that service as jurors would constitute undue hardship. *See* T.C.A. § 22-1-104(b) (repealed 2009).

Further, we find no merit in the Defendant's contention that the trial court's excusing these women amounted to a systematic excusing of women from the jury venire. As previously stated, the trial court correctly applied the hardship provision of Tennessee Code Annotated section 22-1-104(b). The fact that such application allows the trial court to excuse mothers who have no alternative methods of childcare is, as other courts have found, perhaps an inevitable result of a hardship exemption. *See Bratcher v. Commonwealth*, 151 S.W.3d 322, 345-46 (Ky. 2004) (holding that a trial court's application of the hardship provision of the Kentucky statute to excuse mothers with no alternative methods of childcare was perhaps an inevitable result of a hardship exemption); *People v. Olson*, 377 N.E.2d 371, 376 (Ill. App. 1978) (holding trial court's excusal of women who were unable to make arrangements for the care of their children was not unreasonable); *State v. Taylor*, 771 S.W.2d 387, 400 (Tenn. 1989) (holding that proof did not show a systematic exclusion of women in the grand jury selection process where the trial court stated that there were no automatic exemptions granted women but that women would frequently offer compelling reasons for excusal, namely the care of young children); *see also Johnson*, 307 F. Supp. 2d at 387 (holding, "Trial courts have long recognized that jurors with young children should be excused for cause when they are unable to obtain child-care for their children"); *McArthur v. State*, 351 So.2d 972, 975 (Fla. 1977) (upholding the constitutionality of a Florida statute excusing from jury service pregnant women and women with small children); *State v. George*, 476 S.W.2d 903, 906-07 (S.C. 1996) (holding that statutory excusals of three women with young children from jury service pursuant to "child care" exemption did not violate defendant's right to a venire pool reflecting fair cross-section of a community). We conclude that the trial court's actions in the case presently before us do not constitute the sort of

"[i]ntentional discrimination on the basis of gender by a state actor" that violates the constitution. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 130-31.

4. Juror Jonathan White

The Defendant argues that the trial court erred because it did not grant his motion to strike potential juror Jonathan White for cause based on Juror White's belief that life without parole was not a sufficient punishment for first degree murder. The Defendant avers that he was forced to use a peremptory strike to dismiss Juror White, which left Juror Boatwright on the panel. Juror Boatwright, the Defendant says, was incompetent to serve because, "of all the prospective jurors, she was the one whose individual voir dire was the most restricted by the court," meaning the Defendant "knew very little about her." The State counters that Juror White said he would weigh the mitigating circumstances and assign the death penalty only when the mitigation was not sufficient. Further, it asserts there is no evidence to support the Defendant's contention that Juror Boatwright was incompetent.

The Defendant points us to the following exchange between defense counsel and Juror White, which occurred after defense counsel gave Juror White a hypothetical situation where a defendant, with an abusive childhood as well as an ongoing psychiatric disorder, is charged with murdering another person:

> **Q:** Would you be able to balance [the facts] out, or would that mean anything to you?
> **A:** I could balance that out.
> . . . .
> **Q:** [I]n those facts, you hear things that tend to mitigate, or tend to soften, or tend to give a reason for the behavior or conduct of the person who's on trial.
> **A:** Uh-huh (affirmative). Yes.
> **Q:** Okay. And could you carry those mitigating factors with you into the jury[]room?
> **A:** Yes, ma'am.
> . . . .
> **Q:** Now, [the State] touched on some other penalties which is life. And life, in Tennessee is 51 years before you could come before a board and be eligible for parole. The other, is life without the possibility of parole, which means, when they take you to the penitentiary; that's going to be the home for the rest of your life. And we've talked about the death penalty. Do you see life, 51 years in prison as a harsh punishment?
> **A:** No.
> **Q:** You don't think that's a harsh punishment?
> **A:** No.
> **Q:** What about life without the possibility of parole? Where you spend the rest of your life in a cage.
> **A:** No.

Q: You don't think that's an adequate punishment?
A: No.
Q: So, given any of the specific set of circumstances, your inclination would be, if certain factors are met and you don't feel the mitigation is sufficient, that the only option for the punishment would be death?
A: Yes.

In response to the State's voir dire, the following exchange took place between the prosecuting attorney and Juror White:

Q [the State]: Now, if we get to . . . the punishment stage of the trial, if you found him guilty of first degree murder, the judge will tell you [there are] three possible punishments that you can consider. There's life in prison[], which in Tennessee, is 51 years before you're eligible for parole. Life without parole, which is just what it says, you can never be paroled. Or the death penalty. Do you think you would be able to fairly, and impartially, consider all three punishments?
A [Juror White]: Yes, sir.

As previously stated, both the United States and Tennessee Consitutions guarantee a criminal defendant to the right to a trial by an impartial jury. *See* U.S.Const. amend. VI; Tenn. Const. art. I, § 9. To that end, parties in civil and criminal cases are granted "an absolute right to examine prospective jurors" in an effort to determine that they are competent. See T.C.A. § 22-3-101 (2003). The "proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *State v. Reid*, 213 S.W.3d 792, 835-36 (Tenn. 2006). "[T]his standard . . . does not require that a juror's biases be proved with 'unmistakable clarity.'" *Id.* Instead, the trial court must have the "definite impression" that the prospective juror cannot follow the law. *State v. Hutchinson*, 898 S.W.2d 161, 167 (Tenn. 1994) (citing *Wainwright*, 469 U.S. at 425-26). Irrespective of whether the trial judge should have excluded the challenged jurors for cause, any possible error is harmless unless the jury who actually heard the case was not fair and impartial. *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993); *State v. Thompson*, 768 S.W.2d 239, 246 (Tenn. 1989). The failure to correctly excuse a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); *State v. Jones*, 789 S.W.2d 545, 549 (Tenn. 1990). Finally, the trial court's finding of bias of a juror because of his or her views concerning the death penalty are accorded a presumption of correctness, and the defendant must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision. *Reid*, 231 S.W.3d at 836

Initially, we note that we do not agree with the Defendant's characterization of Juror Boatwright as incompetent. The fact that defense counsel knew little about her is insufficient to establish her incompetence, in part because defense counsel had time to conduct a complete voir

dire of Juror Boatwright. There is simply no evidence in the record to find that Juror Boatwright was in any way incompetent. Accordingly, the Defendant has not proven that his jury was not fair and impartial and any error in the trial court's failure to excuse Juror White would, therefore, be considered harmless. Nevertheless, we turn to consider whether the trial court should have excused Juror White for cause.

After reviewing the answers and responses of Juror White, we conclude that the trial court did not err by failing to remove Juror White for cause. Juror White confirmed that he would weigh the various enhancement and mitigating factors and determine the appropriate punishment. While Juror White said that he did not think that life without the possibility of parole was an adequate punishment for committing murder, he also said that he could fairly and impartially consider all three punishments: life with the possibility of parole; life without the possibility of parole; and a sentence of death. The Defendant has not established by convincing evidence that the trial court's determination was erroneous, and he is, therefore, not entitled to relief on this issue.

5. Prospective Juror Manual Oskian

The Defendant argues that the trial court erred when it removed Prospective Juror Manual Oskian because Oskian never said he would be biased. The State argues that the trial court properly dismissed Oskian based upon Oskian's responses that his judgment might be impaired because his co-worker's son was also on trial for murder and that he would be uncomfortable at work if he was empanelled on the jury.

During the questioning of Oskian, the following transpired:

The Court: And you had indicated that you worked with a person [at Saturn], whose son . . . is charged with murder; is that correct?
A [Oskian]: He's in trial. Uh-huh (affirmative).
. . . .
A: In Marshall County.
. . . .
A: [F]or me to be working with him, his son being tried and me being here, it's kind of like trying to put me in the spot.
The Court: So you think it might put you in a bad situation, because –
A: Yes. Yes.
Q: – his son was at trial as we speak?
A: Yes, sir.
Q: And if you were on this jury, that might cause you some conflict with this gentleman, this person?
A: Yes, sir.
Q: Why would that be?
A: When you work with somebody – I don't know how to phrase it – but on an assembly line, and you work with somebody, you always communicate.
Q: Would it make you uncomfortable then, to sit on this jury, because of that?

A: I think so. I think so.
Q: You think it might, in some manner, affect your judgment?
A: It might. It might.

Later, when being asked questions by defense counsel, Oskian elaborated, saying, "[I]t would . . . affect[] me when I [was] . . . working. I have known [my coworker] for 12 years. I've worked next to him for 12 years. What's going to happen to me the next 12 years, when his trial comes up?" He then said, "Just being in this trial" would "make [him] feel uncomfortable either way" the verdict went. The trial court then excused Oskian from the jury venire.

As previously stated, a trial court may discharge from service any juror for any reasonable or proper cause, to be judged by the court. T.C.A. § 22-1-105 (Supp. 2008). Whether to excuse a juror from the venire is a matter left within the sound discretion of the trial court. *See Raspberry*, 875 S.W.2d at 681. To be entitled to relief, the Defendant would have to show that, because Oskian was excused, he was left with a jury what was not fair and impartial. *See generally*, *Howell*, 868 S.W.2d at 248; *Thompson*, 768 S.W.2d at 246.

Our review of the record reveals that the trial court did not abuse its discretion when it removed Prospective Juror Oskian. Oskian expressed his concern that his close relationship with his co-worker, whose son was on trial for murder, might affect his judgment in this case. Further, he said that serving as a juror would make him uncomfortable at his place of employment. The Defendant has not shown that the trial court erred by excusing Juror Oskian, and he has not shown that the jury that was empanelled was not fair and impartial. As such, he is not entitled to relief on this issue.

C. Sufficiency of the Evidence

The Defendant argues that the evidence presented was insufficient to support his conviction for premeditated first degree murder because the evidence against him was circumstantial and did not prove that he acted with premeditation. The State counters that the circumstantial evidence, including the evidence of the Defendant's motive, sufficiently supports the jury's finding of premeditation.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*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, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence.

State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (*State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant was convicted of premeditated first degree murder. First degree murder is defined as a "premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2001). Premeditation refers to "an act done after the exercise of reflection and judgment." T.C.A. § 39-13-202(d) (2001). Whether the defendant premeditated is for the jury to decide, and the jury may look at the circumstances of the killing to decide that issue. *Bland*, 958 S.W.2d at 660. The Tennessee Code states that, while "the intent to kill must have been formed prior to the act itself," that purpose need not "pre-exist in the mind of the accused for any definite period of time" for a defendant to have premeditated the killing. T.C.A. § 39-13-202(d). The following factors have been accepted as actions that demonstrate the existence of premeditation: the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, declarations by the defendant of an intent to kill, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, and calmness immediately after the killing. *Bland*, 958 S.W.2d at 660. In addition, a jury may consider destruction or secretion of evidence of the murder, *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000), and "the planning activities by the appellant prior to the killing, the appellant's prior relationship with the victim, and the nature of the killing." *State v. Halake*, 102 S.W.3d 661, 668 (Tenn. Crim. App. 2001) (citing *State v. Gentry*, 881 S.W.2d 1, 4-5 (Tenn. Crim. App.1993)). Also, "[e]stablishment of a motive for the killing is a factor from which the jury may infer premeditation." *State v. Leach*, 148 S.W.3d 42, 54 (Tenn. 2004).

After considering the evidence in the light most favorable to the State, we conclude that the evidence is sufficient to support the jury's finding that the Defendant acted with premeditation when he killed the victim. The evidence proved that the Defendant and Sanderson were quietly talking in the Defendant's cell before this crime and that they stopped their conversation each time the Defendant's cellmate entered the cell. The two admittedly agreed to go teach the victim some "respect." They entered the victim's cell while he was quietly reading at a time that the guard would not be able to see the victim's cell. The Defendant took a sock and strangled the victim, telling his cellmate that he was surprised at how much the victim struggled. The Defendant then tore off a bloody section of his shirt, flushed the section down the toilet, and hid the rest of his bloody clothes under his bed. Shortly after the killing, the Defendant fell asleep in his cell. The Defendant told his cellmate, and later confirmed to investigators, that he killed the victim because the victim's sentence was not long enough for the crime the victim committed and because being charged with the victim's death would give him an opportunity to escape while being transported to and from court. This evidence is sufficient to support the jury's finding that the Defendant acted with premeditation when he killed the victim. He is not entitled to relief on this issue.

D. State's Arguing Non-Statutory Aggravating Factors

The Defendant claims the trial court erred when it allowed the State to introduce into evidence and argue non-statutory aggravating factors during the penalty phase of the trial. The Defendant specifically takes issue with the trial court's allowing the State to compare Sanderson's prior criminal record with the Defendant's prior criminal record. The Defendant argues that the State made this comparison to argue that, while Sanderson was sentenced to life without parole for killing the victim, the Defendant should be sentenced to death. This, the Defendant asserts, was an impermissible reliance by the State upon a non-statutory aggravating circumstance in seeking the imposition of the death penalty. Before addressing the State's response, we will put the Defendant's argument into context with the record.

The record shows that Sanderson was tried for killing the victim and that the State sought the death penalty at that trial. During the penalty phase of that trial, as aggravating evidence, the State introduced Sanderson's prior criminal record, which included burglary, larceny, and armed robbery. The jury sentenced Sanderson to life without parole for his part in killing the victim. Before the penalty phase of the Defendant's trial began, the Defendant moved to be allowed to mention to the jury during his opening statement that Sanderson was sentenced to life without the possibility of parole for killing the victim as evidence mitigating against the jury's imposition upon him of a sentence of death. The trial court granted the Defendant's motion. In response, the State asked the court to allow it to introduce Sanderson's prior convictions, which it had introduced at Sanderson's trial as an aggravating circumstance, arguing to the court that this evidence rebutted the Defendant's introduction of Sanderson's sentence as a mitigating circumstance. The trial court ruled, again before the penalty phase of the Defendant's trial began, that it would allow the State to introduce Sanderson's prior convictions. On appeal, the State contends that this evidence was properly admitted by the trial court as rebuttal evidence.

This issue is made more complicated by the timing involved. The State introduced the evidence of Sanderson's prior conviction in its opening statement during the penalty phase of the trial, saying:

> Charles Sanderson . . . has already been tried and convicted of first degree murder. The jury in his case gave him life without parole. Okay.
>
> But the rest of the story is, is that — Let me tell you a little bit about what the jury had to consider. That Mr. Sanderson had convictions like burglary, and theft, and armed robbery. No murders. No attempted murders. No aggravated assaults.
>
> And I'm going to submit to you, ladies and gentlemen, that you're dealing with two, completely, different people here.

The prosecutor made this statement before the Defendant introduced Sanderson's sentence for the victim's murder, life without the possibility of parole, as a circumstance mitigating against the jury's imposition of a sentence of death for the Defendant. At the close of the State's proof during the penalty phase, it offered as evidence a copy of Sanderson's prior criminal convictions, which it had used as an aggravating circumstance in Sanderson's death penalty trial. The Defendant waived his opening statement, and there is no indication in the record that the Defendant ever introduced Sanderson's sentence of life without parole. It appears that the only time that the jury heard of Sanderson's sentence was from the State during its opening argument.[4]

When considering whether to impose the death penalty, the jury is limited to considering the aggravating circumstances listed by statute. T.C.A. § 39-13-204(i) (2003). The State generally may not argue that the jury impose a death sentence based on any factor that is not a statutory aggravating circumstance. *See State v. Bane*, 57 S.W.3d 411, 424 (Tenn. 2001); *Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979). *Cozzolino* has been interpreted as not barring the State from also entering evidence of the nature and circumstances of the crime, including victim impact evidence. *See State v. Reid*, 91 S.W.3d 247, 280 (Tenn. 2002); *State v. Nesbit*, 978 S.W.2d 872 (Tenn. 1998). The aggravating circumstances relevant to this case include that "[t]he defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person" and that "[t]he murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement . . . ." T.C.A. § 39-13-204(i)(2), (8). Any aggravating circumstance that the jury finds must be found unanimously and beyond a reasonable doubt. T.C.A. § 39-13-204(i).

[4] In its order on the Defendant's motion for new trial, the trial court states, "On Defendant's Motion, the Court allowed the co-defendant's certified conviction to come into evidence during the penalty phase." The Defendant, however, sought to introduce Sanderson's sentence and not just his conviction. Further, we have combed the record and can find no evidence that Sanderson's certified conviction or sentence was ever offered or admitted into evidence, other than its discussion during the State's opening statement.

The jury may consider any mitigating circumstances, including but not limited to the ones listed in the Tennessee Code Annotated. T.C.A. § 39-13-204(j). Evidence relevant to the issue of punishment and therefore admissible at a capital sentencing hearing, includes "any evidence tending to establish or rebut any mitigating factors." T.C.A. § 39-13-204(c). Rebuttal evidence "'tends to explain or controvert evidence produced by an adverse party.'" *State v. Stephenson*, 195 S.W.3d 574, 600 (Tenn. 2006) (quoting *Cozzolino*, 584 S.W.2d at 68). It must be relevant and material to the issues in the case. *State v. Lunati*, 665 S.W.2d 739, 747 (Tenn. Crim. App. 1983). However, to quote the Tennessee Supreme Court, "One cannot rebut a proposition that has not been advanced." *Cozzolino*, 584 S.W.2d at 768. A trial court has discretion in admitting or rejecting rebuttal evidence, and the trial court's decision of admission will not be overturned absent a clear abuse of discretion. *State v. Scott*, 735 S.W.2d 825, 828 (Tenn. Crim. App. 1987), *rev'd on other grounds by State v. Adams*, 864 S.W.2d 31 (Tenn. 1993); *Beasley v. State*, 539 S.W.2d 820, 823 (Tenn. Crim. App. 1976).

We conclude that the admission of the evidence of Sanderson's prior convictions, at the time it was admitted, was error. The State is limited to presenting evidence during the penalty phase that is relevant to the statutorily enumerated aggravating factors or to the nature and circumstances of the crime. Sanderson's prior convictions, which were mostly non-violent in nature, were not relevant at the time they were admitted. They were only relevant as evidence rebutting the Defendant's introduction of Sanderson's sentence of life without parole as a mitigating circumstance. Therefore, the State should not have been allowed to introduce this evidence until after the Defendant had introduced the evidence of the mitigating circumstance. "One cannot rebut a proposition that has not been advanced." *Cozzolino*, 584 S.W.2d at 768. The reasoning for this rule seems abundantly clear, and this case is a prime example of the necessity of this rule. The Defendant herein never presented Sanderson's sentence of life without parole to the jury. Therefore, the State was allowed to present rebuttal evidence for a proposition that was never advanced. The Defendant may have chosen to refrain from entering Sanderson's sentence as a matter of strategy, knowing that the State would be allowed to enter Sanderson's prior convictions in rebuttal.

We conclude, however, that the trial court's error admitting evidence of Sanderson's and his prior convictions was harmless. The jury heard Sanderson's prior convictions during the guilt phase of the trial. The evidence of the Defendant's prior convictions, which were all violent, was relevant to the aggravating circumstance that the Defendant was previously convicted of one or more felonies whose statutory elements involve the use of violence to the person. *See* T.C.A. § 39-13-204(i)(2). The only new information presented during the State's opening statement was that a jury had sentenced Sanderson to life without the possibility of parole for killing the victim. This information is, arguably, favorable to the Defendant's position that he should not be sentenced to death for killing the victim. We acknowledge that the argument comparing the Defendant's prior record with Sanderson's prior record was not favorable, but the State presented this evidence only briefly in its opening argument of the penalty phase and, after entering Sanderson's prior convictions into evidence, made no arguments related to Sanderson during its closing arguments. In fact, in its closing argument, the State relied on the two relevant aggravating circumstances.

As further support for our holding that this error was harmless, we note that the Defendant invited this error by repeatedly telling the court and the State that it would be presenting evidence of Sanderson's sentence as mitigating evidence. He never informed the trial court or the State's attorney that he would no longer be entering Sanderson's sentence as a mitigating circumstance. The fact that the Defendant did not do so appears to be more of an oversight than a matter of strategy. Because we find that the error herein was harmless, the Defendant is not entitled to relief on this issue.

E. Closing Argument

The Defendant contends that the State's closing argument during the penalty phase of the trial constituted prosecutorial misconduct. He acknowledges that he has waived our review of this issue by failing to object but urges us to review the State's actions for plain error. In support of his contention, the Defendant points to the prosecutor's reference to the need for specific deterrence as a justification for imposing upon him a sentence of death and to its claim that the Defendant committed three murders. The State claims that the statements were proper argument about the relevant aggravating circumstances and that, even if improper, they did not affect the jury's sentencing decision.

In its closing argument, the State argued for the death penalty as "justice" for the Defendant:

> If you find anybody's at fault, make no mistake about it, [the Defendant] brought us all right here. He brought us to this place in time. He brought himself to this place in time. They're not really asking you for justice. They're asking you for mercy. He didn't show his victims any mercy. They don't want justice. Because if you do justice, ladies and gentlemen, do justice under the law and give only one punishment for a man that kills, and kills again, and keeps killing.
>
> There is only one punishment left for somebody that you've tried to put in prison, you've tried to punish, you've tried to reform, and he keeps on killing. There's only one left. And I am sorry his life has called on all of us to extract [t]his punishment, but make no mistake about it, [the Defendant] brings us here. Give him not what he wants now, but what he does.

Typically when a prosecutor's statement is not the subject of a contemporaneous objection, the issue is waived. Tenn. R. Crim. P. 33 and 36(a); *State v. Thompson*, 10 S.W.3d 299, 234 (Tenn. Crim. App. 1999); *State v. Green*, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997); *State v. Little*, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992). The Defendant herein did not object to the statements by the prosecutor during the prosecutor's opening argument of the penalty phase of the trial. Thus, if this Court is to review the claims of prosecutorial misconduct we must do so through the process of "plain error" review embodied in Rule 52(b) of the Tennessee Rules of Criminal Procedure, which provides, "An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion

for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice."[5]

This Court has, in its discretion, from time to time reviewed allegations of prosecutorial misconduct as "plain error" even in the absence of a contemporaneous objection. *See, e.g., State v. Marshall*, 870 S.W.2d 532 (Tenn. Crim. App. 1993) (determining in absence of objection that prosecutor's jury argument was not plain error)*, overruled on other grounds by State v. Carter*, 988 S.W.2d 145 (Tenn. 1999); *State v. Butler*, 795 S.W.2d 680 (Tenn. Crim. App. 1990) (considering whether statements of prosecutor were plain error despite lack of objection by defendant); *Anglin v. State*, 553 S.W.2d 616 (Tenn. Crim. App. 1977) (determining that, in order to justify reversal on the basis of improper argument and remarks of counsel in absence of objection, it must affirmatively appear that the improper conduct affected the verdict to the prejudice of the defendant).

Appellate courts are advised to review issues pursuant to the plain error doctrine sparingly. *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007). In *Bledsoe*, our Supreme Court recently revisited the question of when to consider an issue pursuant to the plain error doctrine. 226 S.W.3d at 353-55. The Court stated the following:

> [A]n error "may be so plain as to be reviewable . . . , yet the error may be harmless and therefore not justify a reversal." *United States v. Lopez*, 575 F.2d 681, 685 (9th Cir. 1978); *see Adkisson*, 899 S.W.2d at 642. The magnitude of the error must have been so significant "'that it probably changed the outcome of the trial.'" *Adkisson*, 899 S.W.2d at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)); *see also United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987).

Id. at 354-55.

In exercising our discretion as to whether plain error review under Rule 52(b) of the Tennessee Rules of Criminal Procedure is appropriate, the Tennessee Supreme Court has directed that we examine five factors: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused must not have waived the issue for tactical reasons; and (5) consideration of the error must be necessary to do substantial justice. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (citing *State v. Adkisson*, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994)). All five factors must be present for plain error review. *Smith,* 24 S.W.3d at 283. It is the accused's burden to persuade an appellate court that the trial court committed plain error. *See United States v. Olano*, 507 U.S. 725, 734 (1993). Further, our complete consideration of all five of the factors is not necessary when it is clear

[5] This rule by its terms allows plain error review only where there is a failure to allege error in the new trial motion or where the error is not raised before the appellate court. Nevertheless, the rule has been interpreted by the appellate courts to allow appellate review under some circumstances in the absence of a contemporaneous objection as well.

from the record that at least one of them cannot be satisfied. *Smith*, 24 S.W.3d at 283. In that vein, we turn to address whether a substantial right of the Defendant was affected.

For a "substantial right" of the accused to have been affected, the error must have prejudiced the Defendant. In other words, it must have affected the outcome of the trial court proceedings. *Olano*, 507 U.S. at 732-37 (analyzing the substantially similar Rule 52(b) of the Federal Rule of Criminal Procedure); *Adkisson*, 899 S.W.2d at 642. This is the same type of inquiry as the harmless error analysis under Rule 36(b) of the Tennessee Rules of Appellate Procedure, but the appellant bears the burden of persuasion with respect to plain error claims. *See Olano*, 507 U.S. at 732-37. Further, we have held that the proof necessary to prove that a defendant's "substantial right" has been affected is essentially the same requirement as that required to find prosecutorial misconduct. *State v. Armstrong*, 256 S.W.3d 243, 250 (Tenn. Crim. App. 2008) (citing *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003)).

A capital sentencing jury is not precluded from consideration of the future dangerousness of a particular defendant where such is a relevant factor under a state's capital sentencing law. *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984); *California v. Ramos*, 463 U.S. 992, 1001 (1983); *Jurek v. Texas*, 428 U.S. 262 (1976). However, Tennessee Courts have held that generally, the issue of specific or general deterrence should be avoided by the prosecution during closing argument at a capital sentencing hearing. *State v. Bates*, 804 S.W.2d 868, 881 (Tenn. 1991), *cert. denied*, 502 U.S. 841; *State v. Irick*, 762 S.W.2d 121, 131 (Tenn. 1988), *cert. denied*, 289 U.S. 1072. Specifically, the deterrence argument is usually irrelevant to the aggravating circumstances listed in Tennessee's statute. *Bates*, 804 S.W.2d at 882. Thus, unless "relevant to some theory raised by the State[']s proof, or the defense, it interjects an element into the jury's considerations not provided for by the law." *Id*.; *see also State v. Hines*, 758 S.W.2d 515, 520 (Tenn. 1988). In reviewing the propriety of argument in a capital sentencing proceeding, the reviewing court must determine whether the prosecutor's comments affected the sentencing decision. *Irick*, 762 S.W.2d at 131. "If the Court cannot say the comments had no effect on the sentencing, then the jury's decision does not meet the standard of reliability required by the Eighth Amendment." *Id*. (Citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985))

In making this determination, we consider: (1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *State v. Sims*, 45 S.W.3d 1, 16 (Tenn. 2001).

We decline to view these issues as plain error because we cannot conclude that it affected the outcome of the trial. Although the comments about which the Defendant complains were an attempt to improperly sway the jury, when viewed in context they were not so inflammatory as to require reversal. The evidence presented at the sentencing hearing clearly proved the existence of two aggravating circumstances, first: that, the Defendant murdered another inmate while in prison; and second, that he had previous felony convictions involving violence. *See* T.C.A. § 39-13-204(i)(2), (8). The proof of any mitigating circumstances was scant. Any improper conduct by the prosecutor was far outweighed by the strength of the evidence

supporting the jury's finding that the aggravating circumstances outweighed proof of any mitigating factors. Based upon the proof presented at the sentencing hearing, it is clear that these comments, although improper, did not affect the jury's sentencing decision. *See Sims*, 45 S.W.3d at 15-16 (holding that prosecutor's comments "the only proper verdict that this defendant has earned, that he deserves, that all his life's been crying out for, sentence me to death, because if you don't stop me, if you don't stop me, I'm going to take somebody else away from you. I'm going to take away a valued member of this community if you don't stop me," although improper, did not mandate reversal); *State v. Hall*, 976 S.W.2d 121, 167 (Tenn. 1998) (holding prosecutor's comment "can you risk that kind of individual in a life sentence? And it's also presuming that he's going to stay in the penitentiary," did not affect the jury's sentencing decision); *State v. James Blanton*, No. 01C01-9307-CC-00218, 1996 WL 219609, at *36-37 (Tenn. Crim. App., at Nashville, Apr. 30, 1996) (holding that prosecutor's comments that society needed to be protected against the defendant and that if the jury did not do what the law requires then somebody else would have to die did not affect the jury's sentencing decision), *affirmed on appeal State v. Blanton*, 975 S.W.2d 269 (Tenn. 1998). The Defendant is not entitled to relief on this issue.

F. Mandatory Review Pursuant to T.C.A. § 39-13-206(c)(1)

When a defendant is sentenced to death for first degree murder, there is a mandatory review of the sentencing process, per Tennessee Code Annotated section 39-13-206(c)(1)(2009). It requires that the reviewing court determine whether:

> (1) The sentence of death was imposed in any arbitrary fashion;
> (2) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;
> (3) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
> (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

T.C.A. § 39-13-206(c)(1). We have carefully reviewed the record in this case, and, as we will discuss more fully, we have determined that the Defendant's sentence was not imposed in an arbitrary fashion. We have also determined that the evidence supports the jury's findings that the State proved two aggravating circumstances beyond a reasonable doubt and that these aggravating circumstances outweigh the mitigating circumstances offered by the Defendant. *See* T.C.A. § 39-13-204(i)(2), (8). Finally, we conclude that the sentence of death imposed by the jury in this case is neither excessive nor disproportionate to the penalties imposed for similar offenses.

1. Arbitrary Fashion

To review whether a sentence of death was imposed in an arbitrary fashion, this Court examines the record to ensure the trial and the sentencing hearing were conducted in a manner consistent with the applicable statutes and procedural rules. *See, e.g., State v. Banks*, 271

S.W.3d 90, 161 (Tenn. 2008); *State v. Young*, 196 S.W.3d 85, 115 (Tenn. 2006); *State v. Hugueley*, 185 S.W.3d 356, 380 (Tenn. 2006). After a review of the record, we conclude that the trial court conducted the Defendant's trial in accordance with the Tennessee Code and the Tennessee Rules of Criminal Procedure. As such, we conclude the sentence of death was not imposed in an arbitrary fashion. *See Banks*, 271 S.W.3d at 161; *Young*, 196 S.W.3d at 115; *Hugueley*, 185 S.W.3d at 380; *see also* T.C.A. § 39-13-206(c)(1).

In addition to our mandatory review of whether the sentence of death was imposed in an arbitrary fashion, the Defendant contends that the current review process is inadequate because to determine whether a sentence of death was imposed "in an arbitrary fashion" a reviewing court looks only to whether the trial court followed procedural rules. He calls this reasoning ambiguous, circuitous, and impermeable to attack.

This Court is bound by the decisions of the Tennessee Supreme Court. The Tennessee Supreme Court has held that, if a trial court follows the applicable statutory provisions and procedural rules in determining whether the death penalty is appropriate, then the result is not arbitrary. *See State v. Rimmer*, 250 S.W.3d 12, 43 (Tenn. 2008) (citing *State v. Vann*, 976 S.W.2d 93, 118-19 (Tenn. 1998); and *State v. Cazes*, 875 S.W.2d 253, 270-71 (Tenn. 1994)). Recently, our Supreme Court, faced with a similar challenge to our state's death penalty review process, held, "We continue to find the review process to be a significant contributor to safeguarding against the arbitrary and capricious application of the death penalty. We also continue to find the existing procedures to be adequate to enable this Court to properly carry out its review in death penalty cases." *Banks*, 271 S.W.3d at 160. Accordingly, the Defendant is not entitled to relief on this issue.

2. Aggravating Circumstances

The second area of mandatory proportionality review is whether the evidence supports the jury's finding of statutory aggravating circumstances. T.C.A. § 39-13-206(c)(1). In this case, the jury found two aggravating circumstances existed: that the Defendant was previously convicted of one or more felonies involving the use of violence to the person; and that the murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful custody. T.C.A. § 39-13-304(i)(2), (8). The record proved that the Defendant had three prior felony convictions that involved violence: first degree murder, aggravated assault, and two counts of attempted murder. Additionally, the record proved that the Defendant was incarcerated at SCCC when he committed this murder. These aggravating circumstances are clearly supported by the record.

In addition to our mandatory review of the aggravating circumstances, the Defendant asserts that the trial court erroneously admitted the Defendant's prior violent felonies multiple times, which inflamed the passions of the jury to the Defendant's prejudice. The Defendant's contention, however, bears on the admission of evidence and not on proportionality. Upon review, we conclude that the trial court did not abuse its discretion when it admitted the Defendant's prior convictions in the manner that they were admitted.

3. Aggravating Circumstances Outweighing Mitigating Circumstances

In carrying out our obligation under Tennessee Code Annotated section 39-13-206(c)(1)(C), we must determine whether a reasonable juror could find beyond a reasonable doubt that the aggravating circumstances established by the State outweigh the mitigating circumstances presented by the Defendant. *Rimmer*, 250 S.W.3d at 34; *State v. Stephenson*, 195 S.W.3d 574, 593-94 (Tenn. 2006). Following a detailed review of this record, we find that a reasonable jury could find, based on the evidence in this case, that the aggravating circumstances outweigh the mitigating circumstances.

The mitigating evidence presented to the jury included that the Defendant may have only been an accomplice in the victim's killing, which he alleged Sanderson perpetrated. The Defendant was only twenty-one at the time of this offense, and he might have had a brain injury that impaired his judgment. He also had a traumatic childhood and spent some of his childhood in State custody, where he may have suffered some abuse. The Defendant had a history of substance abuse, and he was abusing drugs when he committed his first murder. Members of the Defendant's family testified that, after the victim's murder, the Defendant converted to Christianity and was re-baptized. His family members asked for the jury to spare his life. The Defendant has done well in administrative segregation in the prison. There was also some evidence that the Defendant's co-defendant had received life without the possibility of parole for killing the victim.

As previously discussed, the State presented evidence of two aggravating circumstances. T.C.A. § 39-13-304(i)(2), (8). As our Supreme Court has written, "The State, of course, is required to show only one aggravating circumstance beyond a reasonable doubt in order to justify imposition of the death penalty." *State v. Moore*, 614 S.W.2d 348, 351-52 (Tenn. 1981). We conclude that a reasonable jury could have found that the aggravating circumstances outweighed the mitigating circumstances. The Defendant is not entitled to relief on this issue.

4. Proportionality of the Death Sentence

When this Court conducts the proportionality review required by Tennessee Code Annotated section 39-13-206(c)(1)(D), we do not function as a "super jury" that simply substitutes our judgment for the sentencing jury. *State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001). Rather, our task is to take a broader perspective than the jurors who sentenced the Defendant in order to determine whether his sentence "is disproportionate to the sentences imposed for similar crimes and similar defendants." *State v. Thacker*, 164 S.W.3d 208, 232 (Tenn. 2005) (quoting *Bland*, 958 S.W.2d at 664). In doing so, the pool of cases upon which we draw in conducting this analysis are "first degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or death." *State v. Rice*, 184 S.W.3d 646, 679 (Tenn. 2006).

No two defendants or their crimes are ever identical. Accordingly, the purpose of our review of other capital cases is not to identify cases that correspond precisely with the particulars

of the one being analyzed. *State v. Copeland*, 226 S.W.3d 287, 306 (Tenn. 2007); *Thacker*, 164 S.W.3d at 233. Instead, our task is to "identify and invalidate the aberrant death sentence." *Thacker*, 164 S.W.3d at 233 (quoting *Bland*, 958 S.W.2d at 665). A sentence is not disproportionate because a defendant has received a life sentence under similar circumstances. *State v. Carruthers*, 35 S.W.3d 516, 569 (Tenn. 2000). Rather, a death sentence will be excessive or disproportionate where "the case taken as a whole is plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed." *Thacker*, 164 S.W.3d at 233 (quoting *Bland*, 958 S.W.2d at 668); *Godsey*, 60 S.W.3d at 782.

This Court uses "the precedent-seeking method of comparative proportionality review, in which we compare a case with cases involving similar defendants and similar crimes." *Copeland*, 226 S.W.3d at 305 (quoting *Davis*, 141 S.W.3d at 619-20). We examine "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved, and we compare this case with other cases in which the defendants were convicted of the same or similar crimes." *State v. Stevens*, 78 S.W.3d 817, 842 (Tenn. 2002). Our approach does not employ a rigid, objective test. Rather, each member of the Court draws upon his or her experience and judgment in comparing the case being reviewed with other cases. *See Bland*, 958 S.W.2d at 668.

When we conduct this comparison with regard to the nature of the crime, we generally consider "(1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims." *Rimmer*, 250 S.W.3d at 35; *see also State v. Rollins*, 188 S.W.3d 553, 575 (Tenn. 2006). With regard to the defendant, we generally compare the defendant's "(1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation." *Rimmer*, 250 S.W.3d at 35; *see also Rollins*, 188 S.W.3d at 575.

On review, we conclude that the Defendant's sentence is proportionate to other cases where the death penalty has also been imposed. Summarizing the facts pertinent to the factors listed above, the Defendant strangled another inmate with a sock until the victim died of asphyxiation. *See Bland*, 958 S.W.2d at 667; *State v. Dellinger*, 79 S.W.3d 458, 475 (Tenn. 2002). The Defendant was motivated to kill the victim because the victim was convicted of rape of a child or because the Defendant thought that he could escape if he re-entered the court system. The victim was a middle-aged man with no mentioned serious physical or psychological ailments. The Defendant was not provoked, although there was testimony that the Defendant's co-defendant was provoked into attacking the victim to teach him "respect." The Defendant has already been convicted of first degree murder, aggravated assault, and two counts of attempted murder, along with other less serious convictions. He was a twenty-one-year-old, Caucasian male when he attacked the victim. The Defendant has shown no remorse for this killing, and he minimally cooperated with authorities. The Defendant confirmed he had said he wanted to kill additional inmates while on a killing "rampage." As for the final characteristic of the Defendant

to consider, we recognize that the Defendant has shown steps toward a potential for rehabilitation by converting to Christianity and by behaving well in administrative segregation at the prison.

The Defendant points us to the following facts: that his prior convictions arose from when he was abusing drugs; he was young when he committed his crimes; his silence cannot be interpreted as a lack of remorse; the victim was not helpless; and his offense was less egregious than those of other offenders who did not receive the death penalty. We find his arguments unpersuasive and conclude that the death penalty in this case is proportional to similar cases where an inmate murdered someone while incarcerated for previous violent felonies. *State v. Henderson*, 24 S.W.3d 307, 316-18 (Tenn. 2000) (analysis under T.C.A. § 39-13-204(i)(8), (9)) (imposed the death penalty where the defendant was a twenty-four-year-old male with criminal history and killed uniformed police officer while in custody with the intent of escaping); *State v. McKinney*, 74 S.W.3d 291, 312-14 (Tenn. 2002) (analysis under T.C.A. § 39 13 204(i)(2)) (imposed the death penalty where the defendant was a twenty-three-year-old male with a prior conviction of aggravated robbery); *State v. Hugueley*, 185 S.W.3d 356, 384 85 (Tenn.2006) (analysis under T.C.A. § 39-13-204(i)(2), (5), (8), (9)) (imposed the death penalty where the defendant was an inmate who killed a middle-aged corrections counselor who defendant felt "disrespected" him). We conclude that the Defendant's sentence of death is not excessive or disproportionate when considered in context with other similar cases. The Defendant is not entitled to relief on this issue.

G. Constitutionality of Death Penalty on Its Face

The Defendant argues that the Tennessee death penalty statute is unconstitutional on its face. Specifically, the Defendant alleges that the statute: (1) does not properly guide a jury about the standards of proof when considering whether the aggravating circumstances outweigh the mitigation evidence; (2) permits the jury to give too little weight to non-statutory mitigating factors; (3) does not inform the jury of its right to impose mercy; (4) does not require the jury to actually determine that death is appropriate but rather calls for the foreperson to list aggravating and mitigating circumstances; (5) fails to inform the jury about what happens if it does not reach a unanimous verdict; (6) requires the jury to impose death if the aggravating circumstances outweigh the mitigating circumstances; and (7) allows for the introduction of relatively unreliable evidence for aggravated circumstances and for rebuttal to mitigation evidence. Also, the Defendant argues that he was prejudiced because the State presented the final closing argument and that the death penalty was imposed discriminately on the basis of his race, sex, geographic region, and economic and political status. The State argues that Tennessee courts have already reviewed and rejected these claims.

The State correctly asserts that these arguments have already been made and rejected as grounds of relief. *State v. Bush*, 942 S.W.2d 489, 524 (Tenn. 1997) (citations omitted). This Court defers to, and is bound by, the rulings of the Tennessee Supreme Court. As such, the Defendant is not entitled to relief on these issues.

H. Constitutionality of Death Penalty as Applied

The Defendant claims that Tennessee's death penalty statute is applied in a cruel and unusual manner and that it is, therefore, unconstitutional. In Tennessee, an inmate sentenced to death is administered three chemicals to carry out the imposed sentence. The lethal injection protocol was upheld by the Tennessee Supreme Court in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). As recently as November 2008, the Tennessee Supreme Court continued to cite *Abdur'Rahman* for the principle that the lethal injection protocol in Tennessee does not violate a defendant's Eighth Amendment right against cruel and unusual punishment. *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008). In addition, the United States Supreme Court recently held that Kentucky's triple-injection method of execution was constitutional and did not violate an inmate's right against cruel and unusual punishment. *Baze v. Rees*, – U.S. – , 128 S. Ct.1520, 1529 (2008). In that opinion, the Supreme Court further stated, "A state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk" of severe pain when compared to known and available alternatives. *Id.* at 1537. Tennessee's lethal injection protocol has been recognized as substantially similar to Kentucky's. *Baze*, – U.S. –, 128 S. Ct. at 1527 (citing *Workman v. Bredesen*, 486 F.3d 896, 902 (2007)). Thus, we conclude the Tennessee method of lethal injection is constitutional with respect to the Eighth Amendment, and the Defendant is not entitled to relief on this issue.

I. Right to Present Mitigation Evidence

The Defendant contends that the trial court violated his Eighth Amendment right to present mitigation evidence when it denied his motion for continuance and that, because of this error, he is entitled to a new sentencing hearing. The State contends the trial court did not exclude anything, rather the defense counsel chose not to call Dr. Montgomery. The State adds that the Defendant's argument that Dr. Montgomery would have contributed mitigating evidence is purely speculation.

"In a capital sentencing hearing, evidence may be presented as to any matter the Court deems relevant to the punishment, including the Defendant's character, background history, and physical condition, and any matter relevant to establish or rebut any mitigating factors." T.C.A. § 39-13-204(c) (2003). Additionally, the United States Supreme Court has held that the exclusion of relevant mitigating evidence from a sentencing hearing violates the Eighth Amendment. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). The Tennessee Supreme Court discussed a trial court's admission of mitigation evidence during the penalty phase of a trial in *Rimmer* where it said, "While the trial court has some discretionary authority, the purpose of the statute is to permit any probative evidence of mitigation." 250 S.W.3d at 23. The Court wrote that, even if the trial court erred by denying a particular piece of evidence, "[t]he death sentence may stand if the error can be classified, in the context of the entire proceeding, as harmless beyond a reasonable doubt." *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Howell*, 868 S.W.2d 238, 244 (Tenn.1993)). Moreover, while the State bears the burden of persuasion, "the exclusion of proof is harmless when we can conclude beyond a reasonable doubt that the sentence would have been the same even if the excluded evidence had been allowed." *Id.* (citing *State v. Cauthern*, 967 S.W.2d 726, 739 (Tenn. 1998)).

The Defendant moved for a continuance to permit his mitigation experts more time to attain funding, to investigate his case, and to perform tests on him. The trial court denied his motion, rationalizing that the trial had already been delayed and that the experts could work between the motion hearing and the sentencing phase. The Defendant did not call Dr. Montgomery at all during the penalty phase of the trial. He did call Dr. Charvat, who testified about the Defendant's traumatic childhood and potential brain damage.

We conclude that the trial court's denial of the Defendant's motion to continue did not violate the Defendant's Eighth Amendment right to present mitigating circumstance evidence. The trial court did not prohibit the Defendant from presenting mitigation evidence from Dr. Montgomery. The Defendant failed to show how more time would have changed Dr. Montgomery's testimony. He has also failed to show what, if anything, Dr. Montgomery's testimony would have added. Rather, he asks us to speculate that, if Dr. Montgomery had more time to test the Defendant, those tests would have shown that the Defendant suffered brain damage, which the jury would have then considered a mitigating circumstance. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude: (1) the trial court did not err when it denied the Defendant's motion for a continuance; (2) the trial court did not err when it conducted voir dire; (3) the evidence is sufficient to support the conviction; (4) the trial court did not allow the State to argue non-statutory aggravating circumstances and, while the evidence of Sanderson's prior convictions was improperly admitted, the error was harmless; (5) the prosecutor's closing argument was not plain error because it did not affect the outcome of the trial; (6) the death penalty was not imposed arbitrarily and is not excessive or disproportionate to the penalty imposed in similar cases; (7) the Tennessee death penalty statute is constitutional; (8) the Tennessee death penalty statute is not applied in a cruel and unusual way; and (9) the trial court did not violate the Defendant's Eighth Amendment right to present mitigation evidence. As such, we affirm the trial court's judgment and imposition of the sentence of death.

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ROBERT W. WEDEMEYER, JUDGE