IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 8, 2003 Session

STATE OF TENNESSEE v. STEVEN RAY THACKER

Direct Appeal from the Circuit Courts for Dyer and Lake Counties
Dyer County No. C00-54; Lake County No. 01-CR-8238 R. Lee Moore, Jr., Judge

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No. W2002-01119-CCA-R3-DD - Filed December 18, 2003

Capital defendant, Steven Ray Thacker, appeals his conviction and sentence of death resulting from the January 2, 2000, murder of Ray Patterson. A Dyer County jury convicted Thacker of first degree murder. Following a separate sentencing hearing, the jury found that the proof supported two aggravating circumstances beyond a reasonable doubt: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant, Tenn. Code Ann. § 39-13-204(I)(6), and (2) the murder was knowingly committed by the defendant while the defendant had a substantial role in committing or was fleeing after having a substantial role in committing a first degree murder, rape, robbery, burglary, theft or kidnapping, Tenn. Code Ann. § 39-13-204(I)(7). The jury further determined that the mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death. The trial court approved the death verdict. The defendant appeals, presenting for our review the following claims: (1) the trial court erred in denying the defendant's motion for a change of venue to a county outside the judicial district; (2) the trial court erred in admitting a redacted statement made by the defendant; (3) the trial court erred in admitting evidence of other crimes; (4) the trial court erred in permitting the cause of death to be proven by lay testimony; (5) the trial court erred by failing to grant a mistrial based upon the State's comments during closing argument; (6) the trial court erred by not permitting the defendant to argue self-defense; (7) the evidence is insufficient to support a conviction; (8) the trial court erred in denying the motion to suppress the defendant's confession; (9) the trial court erred by prohibiting the introduction of mitigation evidence; (10) the State committed prosecutorial misconduct in eliciting testimony about the defendant's prior bad acts; (11) the trial court erred in refusing to permit an expert witness to explain details of the defendant's mental condition; (12) the trial court erred in permitting the prosecutor to argue that mitigators must outweigh aggravators beyond a reasonable doubt to impose a sentence of life without parole; (13) the trial court erred by limiting the defense to statutory mitigators; (14) the trial court erred in permitting the introduction of certain victim impact evidence; (15) the trial court erred by permitting the State to present evidence that the defendant was fleeing from present charges; (16) the death penalty is unconstitutional; and (17) the sentence of death is not proportionate. After review, we find no error of law requiring reversal. Accordingly, we affirm the jury's verdict of guilt as to the offense of first degree murder and the jury's imposition of the sentence of death in this case.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

Charles S. Kelly, Sr., and Wayne Emmons, Dyersburg, Tennessee, for the appellant, Steven Ray Thacker.

Paul G. Summers, Attorney General and Reporter; Gill R. Geldreich, Assistant Attorney General; C. Phillip Bivens, District Attorney General, and Karen Burns, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A. Guilt Phase

Elizabeth Patterson testified that her husband, Ray Patterson, the victim, operated a service station/wrecker service with his brother, Jerry Patterson, in Dyersburg. On Sunday morning, January 2, 2000, Mrs. Patterson answered a telephone call requesting wrecker service. She gave the phone to the victim, who wrote the following on an envelope: "Oldsmobile Cutlass, '85, pull to AutoZone Store." The victim expressed his intent to go on the wrecker call and to be in church if he returned in time.

Mrs. Patterson did not find the telephone call unusual as she was used to her husband receiving wrecker calls at odd hours, any day of the week. She explained that, when her husband responded to wrecker calls, it was not unusual for him to carry a .25 caliber automatic handgun in his left pocket for his own protection. Mrs. Patterson added that her husband had towed people's cars for free on occasion. Her daughter, Karen Bobo, confirmed that her father would often tell people who could not pay, to come back and pay him later. Both Mrs. Patterson and her daughter, Karen, related that the victim usually carried a pocket knife, his wallet, money, and a pack of cigars on his person.

On Sunday, January 2, 2000, Melissa Atkeson was working at the Northside Truck Stop on St. John Avenue in Dyersburg. A man approached Ms. Atkeson and inquired as to whether there was a wrecker service that was open on Sundays. Ms. Atkeson provided the man with Ray Patterson's name and telephone number. The man went to a pay phone and made a telephone call. After making the telephone call, the man returned to the front of the building and sat and had coffee until Mr. Patterson arrived. During this time, Ms. Atkeson engaged in conversation with the man. Ms. Atkeson later learned the man's identity to be Steven Ray Thacker.

Several witnesses testified that they observed Ray Patterson accompanied by an unidentified man on January 2, 2000. Thomas Burns was employed as a maintenance worker at the Dyersburg welcome center. Mr. Burns recalled that, on January 2, 2000, the victim brought a man with him to the welcome center. Later that afternoon, Thomas Burns learned that Ray Patterson had been killed. Burns later saw the defendant's picture in the newspaper and recognized him as being with the victim at the welcome center. Curtis Hinson, an employee of Triple-A Taxi in Dyersburg, testified that on Sunday, January 2, 2000, he passed the Patterson Brothers' wrecker on Lake Road. Mr. Hinson was able to observe the victim and another male individual in the cab of the wrecker.

Wyman Brasfield, a wrecker driver for Brasfield Body Shop, testified that on January 2, 2000, on his way to visit his daughter in south Dyersburg, he passed Patterson Brothers' Service Station. The Patterson wrecker was parked outside the station with a car on it. Mr. Brasfield observed the victim in the building with his back to the window. He also noticed that there was another person with the victim, although he could not identify the individual. Mr. Brasfield decided to stop to talk to the victim about a vehicle stuck in deep water; however, his wife urged him on to their daughter's house. On the way back from their daughter's house, the Brasfields observed police officers in front of the Patterson Service Station; they also noticed "[the victim's] body laying out front there." Later that day, Wyman Brasfield received a call to tow a vehicle on Rambo Road at Timmy Capps's residence. Mr. Brasfield recognized the vehicle that had been on the Patterson wrecker earlier that day.

Kenneth Campbell and Emily Guinn were on their way to church on January 2 when they stopped at Patterson's Service Station on Main Street for a drink. Mr. Campbell pulled up to the soft drink machines and got out. He observed a person walking towards his truck, but thought nothing of it. However, as Mr. Campbell was attempting to get a soda from the machine, he saw the victim lying on the ground between the gas pumps and the office. Mr. Campbell then left the parking lot in order to find a telephone to call the police. He circled the block and as he neared the service station, he noticed "someone dragging the body near the roll-up door of the gas station." Mr. Campbell then drove directly to the police station.

At approximately 12:20 p.m., on January 2, 2000, Paul Gage and his wife were at the Dyersburg AutoZone. While there, a man asked Mr. Gage about "a place to get a car worked on." Mr. Gage referred the man to his nephew, Tim Capps, and gave the man directions to Capps's business. Mr. Gage later recognized the defendant's picture on television as the individual encountered at AutoZone.

David Fisher, an officer with the Dyersburg Police Department, testified that he received a radio report of an injured person lying on the pavement at 200 North Main, the BP station. Officer Fisher, upon arriving at the scene, discovered the deceased victim lying in the first service bay of the service station. Officer Fisher observed that a blood trail led from the first fuel pump island directly to the position in which the body was found. The victim was dressed in an "ordinary service station type uniform with a light jacket." "His inner shirt was torn, and the jacket and shirt, around the

collar area, was pulled backwards, as if he'd been dragged to the location that he was found." Officer Fisher also observed that the victim "had an apparent wound to his upper torso that appeared to be a substantial wound."

Jerry Walker and Ronnie Collins, two EMTs with the Dyersburg Fire Department, arrived shortly thereafter. Mr. Walker stated that, upon his arrival at the scene, he examined the victim for vital signs, and there were none. He further stated that, upon opening the victim's shirt, they observed a wound "in his shoulder, coming down, it looked like. It looked like a knife wound." No other wounds were discovered. Mr. Walker was unable to determine if the knife wound was the cause of death.

Tony Douglas, a paramedic employed by Methodist Hospital Emergency Services, also responded to the call at the Patterson Service Station. Mr. Douglas examined the deceased for wounds and discovered "a puncture wound on the right side of the chest somewhere around two to three inches long and in a moon-shape." No other wounds were discovered. Mr. Douglas opined that this wound was fatal, in that it resulted in the loss of blood. Mr. Douglas admitted that he did not know whether the victim had suffered a heart attack.

Investigator Jim Joyner later arrived at the service station. When asked about blood at the scene, he responded, "[i]t was a very large amount of blood. Blood was all over the station, out in the front, in the service bay, in the office." In addition, there was a large blood spatter from the cash register to the wall of the office. He stated that the blood trail went out the door of the office toward the service bay door. A Discover credit card in the name of Forrest R. Boyd was found on the counter next to the credit card machine. There was no evidence found of any spent or fired rounds from a semiautomatic weapon. Neither the victim's gun nor his wallet was found on his person. Additionally, the Patterson wrecker was not at the service station.

Investigator Joyner related that he "received information that a possible suspect was Steven Thacker, and that he would possibly be driving a 1985 Oldsmobile, maroon in color, with a Missouri license plate." "A BOLO [be-on-the-lookout] was put out to other agencies. At the time, we had a local news station, and I believe that photograph was also put on the local news channel." Later on that same day, the Dyer County Sheriff's Department received information that the suspect may be driving a cream color 1984 Pontiac 6000. Investigator Joyner was later notified that the Union City Police Department had located both the vehicle and the suspect at the Super 8 Motel in Union City. The vehicle was found backed up to Room 127, and the window screen had been torn from the window outside Room 127.

Derrick O'Dell, a patrol officer with the Union City Police Department, testified that he responded to information that the alleged vehicle was at the Super 8 Motel. Upon arriving at the motel, Officer O'Dell "sat up on the southeast corner of the building where [he] could observe the back of the building and also the eastern door." Shortly thereafter, he observed a white male exiting the building; the man was carrying two Wal-Mart bags. The man walked toward the dumpster. Officer O'Dell then approached the man and talked with him. The man identified himself as George

and stated that he was from Florida. Another officer arrived, and at this time, the man's identity was revealed as Steven Thacker. The defendant was then transported to the Obion County Jail.

Upon a search of Room 127 at the Super 8 Motel, officers discovered "[s]everal items . . . belonging to the victim, including several credit cards in the victim's name, a .25 caliber automatic pistol . . . , hair dye, and numerous other items." Some items were bloodstained. On the bed, officers discovered "a couple of knives and cigarettes and [an American Express credit card in Mr. Patterson's name.]" Two coats, one a green Carhart coat, the other a brown coat, were seized from the motel room and sent to the Tennessee Bureau of Investigation.

Tina Canada, the manager at the B&B Market at Big Boy Junction in Dyersburg, was at work on Sunday, January 2, 2000, to catch up on some paperwork. She recalled a man coming into the store to purchase antifreeze. The man also asked an elderly gentleman, Sam Brown, whether there was an outside water faucet. The man tried to put water into the car, and then he asked Mr. Brown for directions to AutoZone. Ms. Canada recalled that the man was calm; "he was not agitated, was not jittery, was not nervous, just concerned about getting his car fixed." The man then left the store, heading back toward town. Ms. Canada did not specifically identify the defendant.

Michael L. Parson, the sheriff of Polk County, Missouri, was contacted by the Dyersburg Police Department regarding the credit card issued to Forrest Boyd. Sheriff Parson verified that Forrest Boyd was a resident of Polk County and that Mr. Boyd was not in Dyer County, Tennessee. He added that "anyone that had his credit card or vehicle in Dyer County, Tennessee would have been unauthorized." Sheriff Parson stated that he advised Tennessee authorities that Steven Ray Thacker may be in possession of Mr. Boyd's credit card and vehicle. He described Mr. Boyd's vehicle as a "mid-eighties . . . 1985 Oldsmobile Cutlass, burgundy in color . . . license plates . . . 540JBJ."

Investigator Monty Essary, of the Dyersburg Police Department, testified that, in addition to other investigatory duties, he accompanied the victim's body to the Methodist Hospital morgue. At the morgue, he removed the victim's clothing, including two bloodstained shirts. The clothing was bagged and sent to the Tennessee Bureau of Investigation (TBI) Crime Lab. Investigator Essary also went to Room 127 at the Union City Super 8 Motel. In the hotel room, Essary recovered a green Carhart coat and a pair of black Dan Post boots, which were packaged and sent to the TBI Crime Lab. A blood sample from Steven Thacker was obtained at the Methodist Hospital emergency room. The sample was forwarded to the TBI Crime Lab. A "Buck five-and-a-half-inch knife" was recovered from the red Pontiac Firebird and sent to the crime lab. Investigator Essary related that he received a DNA report on the above-mentioned items. The report reflects that the DNA obtained from the blood on the victim's shirt matched the DNA obtained from blood on the knife, the Carhart coat, and the boots.

Investigator Jimmy Gray, of the Dyersburg Police Department, stated that he assisted in the investigation of the victim's death. Investigator Gray located a red Pontiac Firebird at T & T Auto Sales, a business owned by Timmy Capps. The vehicle had been in the possession of Steven Ray

Thacker at some point. A prescription bottle belonging to a Rachel Boyd was also found in the vehicle.

Dyersburg Police Officer Jim Porter related that he had known the victim for about twenty years. He described the victim as approximately "5'9" or 5'10" . . . Ray probably weighed 200 pounds, or so." Officer Porter also stated that he participated in the investigation of the victim's death. Officer Porter described Steven Ray Thacker as "over 6 foot tall, 230, 240 pounds." He further related that, upon being brought to the Dyersburg Police Department, the defendant "was taken to the criminal investigation division, which is in the basement of the police department." Officer Porter first encountered the defendant in the hallway from the back door to the criminal investigation division and directed the defendant into an interview room.

The defendant was advised of his rights; he acknowledged that he understood those rights, and he voluntarily waived the same. The defendant also stated that he wished to waive his right to an attorney. The defendant then provided a statement in which he provided the following details. The defendant stated that he left his home in Chouteau, Oklahoma, on about December 28, 1999, and traveled to Springfield, Missouri. He left Springfield on December 31, and headed to Dyersburg, Tennessee. He stated that his car broke down "two-and-a-half miles this side of the Mississippi River." "Some guy picked [him] up . . . and took [him to Dyersburg.]" He related that the man dropped him off at a truck stop and that is when he called Patterson's to tow the vehicle. Thacker stated that the victim towed the vehicle to his station. The defendant then related that, "[w]ell, he wasn't gonna give my credit – my card back 'cause I couldn't pay the bill. And I knew I was wanted in other states, so I just stabbed him and took off." He explained that he stabbed the victim while the victim was facing the credit card machine. The victim turned around and attempted to pull his gun out, but the defendant hid behind a truck. The victim then ran out into the parking lot towards the tow truck and fell on the ground. Thacker moved the wrecker off the property, returned to the station, and"drug [Patterson] into the building, and then I guess I took off from there and got the tow truck and drove out into the country."

The defendant explained that he later traded the Oldsmobile Cutlass that he was driving for a Camaro, but that vehicle had problems so he took it back. He stated that the knife he used to stab the victim was probably in that vehicle. He ultimately ended up with a Pontiac 6000. Shortly after the murder, the defendant went to a local Wendy's restaurant and purchased a sandwich. He then drove to Union City and checked into a room at the Super 8 Motel. Thacker admitted to taking the victim's wallet and handgun from his person after he pulled his body back into the building. Approximately eighty dollars and some credit cards were in the victim's wallet. He also took the wrecker, because his vehicle was still on the back. The wrecker was eventually abandoned in the woods after Thacker discovered how to get his car off the wrecker.

Thacker stated that he was planning to drive to the Smoky Mountains to go camping. He further stated that he got the Oldsmobile Cutlass from Boyd. He likewise acquired some camping gear and the knife that was used to stab the victim from Boyd.

B. Penalty Phase

Sheriff Mike Parson of Polk County, Missouri, testified that, on January 2, 2000, there were outstanding warrants for the arrest of Steven Ray Thacker in Polk County. Jim Porter, a criminal investigator with the Dyersburg Police Department, related that, during the statement made by the defendant, he stated that he "knew [he] was wanted in other states, so [he] just stabbed him and took off."

Elizabeth Patterson, the victim's widow, stated that she and the victim had been married for thirty-five years at the time of his death. The couple had three grown children. Mrs. Patterson related that her husband was her sole source of financial support prior to his murder. Since his death, Mrs. Patterson has had no income, and she had to borrow money to pay for their grave sites. She further explained that she was forced to borrow money until she received the insurance proceeds. Mrs. Patterson stated, "I lost my best friend and companion. And I can't sleep at night in my bed. I sleep on my couch."

Mrs. Patterson described her husband as "a good man. He was a good Christian man. He would help anybody out." She proceeded to describe incidents of where her husband would tow people for free.

On cross-examination, Mrs. Patterson stated that her husband earned approximately $15,000 per year at the service station. She also stated that she received $250,000 from her husband's life insurance policy.

In mitigation, the defendant presented the testimony of Kimberly Bowen, a resident of Huntington, West Virginia, who stated that from 1994 until 1997, she and the defendant "were mates. We lived together, laughed together, cried together, all of the above." She stated that, during this time, the Defendant "worked a variety of things. I actually met him when he worked with me at Red Lobster. . . . And then, he went on to get into the construction business." In describing the defendant, Ms. Bowen stated:

> Steve made me laugh a lot. He was very, very tender with me and my kids. Probably the best example would be when he went into construction and would be gone for a week or two at a time, he would plant notes throughout the house, 'cause he knew that I'd go into the bill drawer to pay bills one day and there'd be a little note letting me know that he missed me, or, you know, in the laundry room. It didn't really matter, you know, just little spots that he would have little notes to remind me of him.

She further described the defendant as selfless. To illustrate, she provided an account of the defendant's aid to flood victims in Milton, West Virginia. Ms. Bowen stated that it always seemed that the defendant was "seeking approval." She also noticed what she termed "revving." She explained:

> Once again, eighty percent of the time, it seemed to me like Steve was seeking approval from everybody around him, but maybe twenty percent of the time, he

> would get revved up and be – he wouldn't be Steve. In my opinion, he wouldn't be Steve. From what I observed, it was – there was almost a regular contingency to it in the later months, but then, you know, smaller bursts, it seemed to me. Throughout the year, I learned to adapt with that. But it still – it affected our relationship. It affected it almost regularly to the point where I felt like we needed to seek help in order to stay together.

Ms. Bowen stated that they sought help at a mental health facility in Huntington, West Virginia. It was here that they learned that the defendant had a bipolar personality. The defendant began taking lithium, and Ms. Bowen related that it appeared that the medication was working. There was one incident where the defendant forgot to take his medication with him on a two-week job; the defendant "ended up in Columbus, trying to get back, and he kept missing the turnoff, and he kept going faster and faster. Finally, they stopped him at 140 miles an hour. And he was on high." Ms. Bowen adamantly denied the defendant's use of alcohol or illegal drugs; she also denied any exhibitions of violent behavior.

When questioned about the murder in Tennessee, Ms. Bowen stated that the act was not the act of the Steve Thacker that she knew. Indeed, she stated that it was "[s]o polar opposite. It's frightening."

On cross-examination, Ms. Bowen stated that she had told an investigator that the defendant had severe mood swings. In this regard, she clarified that "the depression was the rev." She explained that his "highs" were when he was trying to seek approval; then, she described the lows, the "revving," with periods of spending sprees and "the need for sex." She further stated that the defendant voluntarily stopped taking his medication. Ms. Bowen testified that their relationship ended because "it was a wear on me to always be . . . the stable, you know, home base, if you will. I always felt like I was somehow responsible for Steve's ability or inability to act correctly within society."

Ms. Bowen further acknowledged that on December 16, 1999, the defendant had contacted her, told her he was married and was about to get a divorce, and stated that he loved her. The defendant further indicated that "he wanted to come and see the kids."

Crystal St. Clair, also a resident of Huntington, West Virginia, stated that she first met the defendant in 1993 and that the defendant worked with her husband. Mrs. St. Clair said the defendant was one of her best friends. She stated that the defendant was " a caring, giving person. He basically got along with most anyone." She added that "he was the type of person that would try to keep trouble down rather than create trouble." Mrs. St. Clair testified that she thought enough of the defendant to trust him with her children. She stated that she never worried about her children when they were with the defendant. Mrs. St. Clair acknowledged that when the defendant left West Virginia in 1997, she lost contact with him. She advised, however, that they would "periodically touch base with each other."

On cross-examination, Mrs. St. Clair admitted that she was aware of the defendant's diagnosis of bipolar disorder, as well as his voluntary decision to discontinue medication.

Roxanne Evans, a resident of New Carlisle, Ohio, and the defendant's paternal aunt, testified that her brother was in the Air Force and that when the defendant was two years old, the family was transferred to Spain. When the defendant was four years old, his parents separated. After the divorce, the defendant's father moved in with Ms. Evans. Ms. Evans could not recall her brother "doing a lot of things with the children." Notwithstanding, at some point, her brother did gain custody of his three children: the defendant; an older sister, Sherry; and a younger sister, Nicole. This was short-lived, however, as her brother remarried and his new wife "couldn't deal with the children anymore and literally packed their clothes, sat them on the porch, and when my brother came home from work, told him that either the children left, or she left, and, at that point, my brother took the children from my mother and dad's house." The defendant's mother was not around much. Despite the absence of his parents, the defendant maintained a close relationship with his grandfather.

As an adult, the defendant contacted his aunt and asked if he could visit them. The defendant wanted to go through family photographs; "[f]amily was real important to Steve." During this visit, the defendant developed a friendship with his cousin, David. Since that time, the defendant has maintained contact with the family by writing letters, sending holiday cards, and other correspondence.

Ms. Evans related that, as a child, the defendant "was always very quiet, what I would say was introverted." She added that the defendant was very "affectionate." She related the defendant's behavior as a child as "hungry for acceptance, hungry for attention." Ms. Evans concluded by stating that:

> He's a very loving and caring person. He has a problem, and I believe that in a controlled situation that he could live a semi-productive life, and I believe that somehow God could use his talents. He's an extremely gifted artist. I believe that God could use his talents maybe to touch someone somewhere, even if it is in a prison.

Gloria Shettles, an investigator with Inquisitor, Incorporated, testified that there is no difference in cost between housing an inmate on death row compared to housing any other maximum security prisoner.

As its final witness, the defense presented the testimony of Dr. Keith Allen Caruso, a forensic psychiatrist. Dr. Caruso interviewed the defendant on July 17, 2001; in addition, he "reviewed a lot of other documents relative to this case." Based on information from these sessions, Dr. Caruso was able to make the following conclusion:

> I believe that Mr. Thacker has a number of conditions, the first of which is bipolar disorder. It's more commonly known as manic-depressive illness. Essentially, that's a mood disorder where someone's emotional state may cycle from depression, where

someone's sad and blue and is feeling very tired and is unable to sleep, may think about suicide, may not be eating, and things of that nature. So, from a depressive episode, they may cycle up to a manic or hypomanic episode where they're very excitable, they can be extremely irritable, they can be very, very impulsive and not think through the consequences of their actions. They tend to be very distractible and follow whatever occurs to them at a particular moment. They may have tremendous amounts of energy and feel very agitated and either not be able to sleep or not need to sleep. They may also have their thoughts racing a great deal where they jump from one thought to the next, to the next, to the next. These folks – this is an episodic condition, meaning that there are times when there are depressive episodes, there are times when there are manic or hypomanic episodes, and the difference between manic episodes and hypomanic episodes is pretty much that during a hypomanic episode, someone's not quite as severely impaired as they are during a full manic episode where they may actually hear things, or see things, or develop delusional beliefs, in other words, beliefs that are really not based in reality. So, someone may cycle between these episodes, and there may be periods, also, in between that they may return to normal functioning.

. . .

In addition, Mr. Thacker . . . also has a history of alcohol dependence that has been in remission since he's been in confinement, and a history of polysubstance dependence where he had abused a number of different drugs. That has been in remission since he went through rehab in his teen years. He also has a personality disorder with borderline and antisocial traits. Essentially, a personality disorder is a condition that someone may have that characterizes how they generally function in most situations, and, generally, it's a personality disorder if they become rather fixed in some of the behaviors that they use . . . . People with personality disorders tend to be kind of rigid in the things that they do and they tend to think about the world a little bit differently. They tend to have problems – some problems with their emotional states, as well. They tend to have problems controlling their behavior and behaving in maladaptive ways, as well, although I think a lot of Mr. Thacker's problems with his emotional state and the way that he's thought about and the way that he'd been thinking, particular around the time of the offense, were more affected by the bipolar disorder.

With regard to the murder of the victim, Dr. Caruso stated, "I think this crime was a convergence of many factors. I think that there are some things dating back to Mr. Thacker's childhood that put him on the path that he wound up here today."

Dr. Caruso stated that the defendant's mental condition may be treated with a "mood-stabilizing medication like lithium." Dr. Caruso acknowledged that the defendant had previously been prescribed lithium for his bipolar disorder but voluntarily stopped taking the medication. He stated that once the defendant stopped taking the medication, he became ill again, and "the cycling of the mood disorder continues." Dr. Caruso concluded that the defendant "was suffering from a hypomanic episode [at the time of this crime]." He elaborated:

> Well, I think that bipolar disorder is the severe mental disease. I think, in addition, there was extreme mental or emotional disturbance. In fact, there were a number of stressors, based on Mr. Thacker's history of abandonment and rejection, would again provoke him into a state of extreme emotional disturbance, in addition to the underlying mental disorder that he has, in addition to the bipolar disorder.

On cross-examination, Dr. Caruso stated that approximately two percent of the United States' population suffers from bipolar disorder. He further stated that, of those persons on a regimen of mood-stabilizing medication, "two-thirds to three-quarters of folks" function normally in society. He related that the biggest problem with treating bipolar disorder is that the patients are noncompliant with the medication treatment. When questioned regarding the defendant's reasoning for terminating treatment with the lithium, Dr. Caruso affirmed that the defendant voluntarily stopped taking the drug because it slowed him down too much and he did not like the effect it had on him.

Dr. Caruso further conceded that the defendant was competent to stand trial and that a defense of insanity could not be supported in this case. He further admitted that "[he] didn't feel that there was anything here that prevented Mr. Thacker from forming the mens rea for the alleged offenses." In other words, the defendant "knew what the expected outcome of a murder was;" "[h]e was able to form a motive for that murder," and "[h]e was able to understand that that murder was wrong and against the law."

The inmate records of Steven Ray Thacker from Riverbend Maximum Security Institution in Nashville were entered into evidence, revealing that the defendant "has had no disciplinary reports in his two-year sojourn there."

At the close of the proof, the jury was instructed on the following statutory aggravating circumstances:

> (1) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant;
> (2) The murder was knowingly committed by the defendant while the defendant had a substantial role in committing or was fleeing after having a substantial role in committing a theft.

See Tenn. Code Ann. § 39-13-204(i)(6), (7). The trial court additionally instructed the jury as to applicable mitigating circumstances, as follows:

> Tennessee law provides that in arriving at the punishment, the jury shall consider . . . any mitigating circumstances raised by the evidence which shall include, but are not limited to, the following: (1) the crime was committed while the defendant was suffering from extreme mental and emotional disturbance due to his bipolar disorder, hypomanic episode, superimposed upon personality disorder NOS with borderline and antisocial traits, particularly exacerbated by feelings of abandonment and anticipated loss. Number 2, the crime was committed while the defendant was suffering from severe mental disease, bipolar disorder, hypomanic episode, which

> substantially impaired his capacity to control his behavior. Number 3, any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing, that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

See Tenn. Code Ann. § 39-13-204(j)(2), (9). After receiving further instructions from the court, the jurors retired from open court to begin their deliberations. In less than two hours, the jury returned with its verdict of death, finding that the State had proven both statutory aggravating circumstances beyond a reasonable doubt and that these aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.

I. CHANGE OF VENUE

On August 9, 2000, the defendant filed a motion for a change of venue based on grounds that the widespread pre-trial publicity in Dyer County and contiguous counties had resulted in undue excitement against the defendant that would prejudice a fair trial on the merits. A hearing on the motion was conducted on August 25, 2000. At the hearing, Rachel Jacobs, an investigator with Inquisitor, Inc., testified that she researched the various sources of media in the area and obtained packets from the *Commercial Appeal*, the *Dyersburg News*, the *State Gazette*, and the *Tennessean* newspapers, as well as from newspapers in Springfield, Missouri, and Tulsa, Oklahoma. The collection of articles was extensive and was submitted as evidence. Ms. Jacobs's research of the video media from Memphis area television stations revealed that sixty-nine separate segments on this subject had been aired from the date of the defendant's arrest until July 18, 2000, the day preceding her testimony.

Ms. Jacobs stated that she and another investigator from Inquisitor conducted a random survey in Dyer County concerning the population's exposure to the defendant's case. Thirty-two persons were polled, and of the thirty-two, approximately two-thirds had knowledge about the case. Of the thirty-two people, forty-two percent stated that they did not believe that Mr. Thacker could receive a fair trial in Dyer County.

Ms. Jacobs performed a similar study in neighboring Lake County. Ms. Jacobs discovered that the residents of Lake County received information from basically the same media sources as residents of Dyer County. Ms. Jacobs admitted on cross-examination that she did not conduct a poll of Lake County residents.

At the conclusion of the hearing, the trial court entered the following findings, in relevant part:

> [U]nder the circumstances, where both sides feel like a change of venue is appropriate . . . it would be somewhat amiss for me not to grant a change of venue. So, I think the way we're deal [sic] with that is this: Your motion, as far as the change of venue, will be granted in that the Court will follow the Rules of Criminal Procedure first, which would mean a change of venue to Lake County. I will allow

> you . . . if you feel like that's something that will – that you need to introduce some additional proof on at a later time, we will allow you to do so. . . . Again, it's not something that's written in concrete at this point. I'm not convinced – I don't know that we have evidence that would indicate that a jury pool out of Lake County would be tainted. I don't know for sure whether or not we will be better having the trial in Lake County or the trial with a Lake County [jury] here. . . . I'll just have to take that under advisement. . . . I don't think the publicity has been such that we cannot seat an impartial jury from Lake County, Lauderdale County, or Gibson County, and I'd want to talk to the judges down there about how we would do that, if we did it. So, the process that will be followed will be taken under advisement, but we will have a change of venue . . . .

The trial court then ordered that venue was to be changed to Lake County.

On May 15, 2001, the trial court revisited the "change of venue" issue. The defendant presented Leigh Anne Hudgings, an investigator with Inquisitor, Inc., to testify regarding her study as to whether the Lake County jury pool was tainted. Ms. Hudgings conducted a random sampling of ninety-seven Lake County residents. The results of the survey reflected that over half of the people surveyed, 51.1%, had prior knowledge of the crime. Of the 51.1%, 46%, or one out of every four persons surveyed, had already formed opinions of the case. On cross-examination, Ms. Hudgings admitted that she did not attempt to determine whether or not those persons polled were actually qualified to sit on a jury panel.

Evan Jones, editor and publisher of the *Lake County Banner*, testified on behalf of the State. Mr. Jones stated that the *Lake County Banner* provided weekly news to the residents of Lake County. He added that Lake County television markets were generally WPSD in Paducah, Kentucky, and the station in Cape Girardeau. Mr. Jones explained that while Dyer County followed the Memphis television stations, Lake and Obion County watch the Paducah and Cape Girardeau stations. He added that KMIS, a Missouri radio station, broadcasts Lake County football games.

With regard to the defendant's case, Mr. Jones testified that the *Lake County Banner* had only printed two stories about Steven Thacker in the past calendar year. One story ran January 5, 2000; the other on August 30, 2000. Both stories ran on the front page.

> After hearing argument from counsel, the trial court made the following findings:
> I don't think . . . that there is sufficient proof that would indicate that we cannot seat a jury that can be fair and impartial from Lake County residents. Again, the worse case scenario is that one out of four has either formed or expressed an opinion. We can pull a big enough jury pool, I think, where we can seat twelve men or women who have not formed or – expressed or formed any opinion as to guilt or innocence in this case, and can have a trial from which the jury can find that issue solely and alone from the evidence that's introduced, and from the law that's charged by the Court. So, your motion will be denied. . . .

The defendant now complains that the trial court "erred grievously in his assessment and understanding of the evidence introduced by [the defendant] at this hearing." He contends that "no matter if you do pull a 'big enough jury pool,' still, according to statistical survey, there will still be one out of four Lake Countians who believe the defendant is guilty!" The defendant states that "the refusal of the . . . trial court to grant the proper change of venue has deprived [him] of a fair trial by an impartial jury of his peers."

The decision of whether to grant a motion for a change of venue based on pretrial publicity rests within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993). Furthermore, the defendant must show that the jurors were biased or prejudiced against him before his conviction will be overturned on appeal. State v. Melson, 638 S.W.2d 342, 360-61 (Tenn. 1992). The defendant contends that the trial court failed to determine whether "a fair trial probably could not be had" as required by Rule 21(a), Tennessee Rules of Criminal Procedure, which provides:

> In all criminal prosecutions the venue *may* be changed upon motion of the defendant, or upon the court's own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.

(Emphasis added); see also Tenn. Code Ann. § 20-4-201(1) (stating venue "*may* be changed . . . upon good cause shown") (emphasis added). Rule 21 further provides:

> In a multi-county judicial circuit a change of venue shall be to the nearest county in the judicial circuit in which the prosecution is pending where the same cause for change of venue does not exist. If the same cause for change of venue exists in all other counties in the judicial circuit, the venue shall be changed to the nearest county where the same cause for change of venue does not exist.

Tenn. R. Crim. P. 21(c).

Jurors need not be totally ignorant of the facts and issues involved in a case upon which they are sitting, but they must be able to lay aside their opinions or impressions and render a verdict based upon the evidence presented. State v. Bates, 804 S.W.2d 868, 877 (Tenn. 1991). Mere exposure to news accounts of the incident does not, standing alone, establish bias or prejudice. State v. Crenshaw, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001). The test is "whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity." State v. Kyger, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). The burden of proof is on the defendant. Id.; State v. Garland, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981).

The defendant, in addition to citing to numerous newspaper articles and television segments, described as "extremely sensational, attention-grabbing words and pictures," asserts that the short amount of time the jury deliberated at both the guilt and penalty phases was "unconscionable" and indicative that the jurors were tainted by pretrial publicity, "whether they were clearly aware of it or not." However, the defendant has not cited any authority in support of his contention that the brevity of the jury's deliberations indicated prejudice or caprice. Anglin v. State, 553 S.W.2d 616, 620-21

(Tenn. Crim. App. 1977), cert. denied, (Tenn. June 6, 1977), states that brevity of the time of deliberation does not indicate passion, prejudice, caprice, or misconduct on the part of the jury. Guided by Anglin, we reject the defendant's contention that the short amount of time the jury deliberated is proof of being tainted by pretrial publicity.

The record reveals that the defendant used only four of his sixteen peremptory challenges. It has been generally recognized as a rule in this state that the failure to challenge for cause or the failure to use any available peremptory challenge to remove objectionable jurors precludes reliance upon the alleged disqualifications of jurors on appeal. See Adams v. State, 563 S.W.2d 804, 807 (Tenn. Crim. App. 1978), cert. denied, (Tenn. Apr. 10, 1978) (citing Sommerville v. State, 521 S.W.2d 792 (Tenn. 1975)). Moreover, despite his argument that the extensive and "sensational" coverage by the media denied him a fair trial, the defendant has failed to direct this Court to any specific portion of the record, in particular the voir dire examination of the jurors, indicating the biased character of the jurors actually selected. One who is reasonably suspected of murder cannot expect to remain anonymous. With consideration of the defendant's failure to exhaust all peremptory challenges, the careful supervision of voir dire by the trial court, and the assertion by the jurors that they could and would give the defendant a fair and impartial trial, we cannot conclude that the trial court abused its discretion in removing the case to Lake County. This claim is without merit.

II. REDACTED STATEMENT OF DEFENDANT

Prior to the testimony of State's witness Jim Porter, the prosecution discussed the manner in which the defendant's confession would be introduced and the problems with redacted portions of the statement. A typed transcript was used, and the trial court permitted, over defense objection, copies of the transcript to be passed to jurors to read along with Investigator Porter. The trial court observed that the record needed to reflect that there is a "recorded statement . . . written statement that we have [that] has been redacted to take out any reference to any crime other than this particular Ray Patterson crime." It was understood that the redacted portion of the statement would not be read to the jury.

The defendant now complains that Investigator Porter was improperly permitted to read into evidence the following redacted portions of Thacker's statement:

DEFENDANT:	And after he ran the credit card number through, – he got through and pretty much know what happened from there.
PORTER:	Well, I want you to tell me.
DEFENDANT:	Well, he wasn't gonna give my credit – my card back 'cause I couldn't pay the bill.
PORTER:	Okay.
DEFENDANT:	And I knew I was wanted in other states, so I just stabbed him and took off.
	. . .
PORTER:	Camping? Okay. Okay, where did you get this Oldsmobile Cutlass,

Steve?

DEFENDANT: From Boyd. That was his Cutlass.

PORTER: You take anything from that house – his house?

DEFENDANT: Just some camping gear, and that's where the knife came from that I stabbed Patterson with.

(Emphasis added.) The defendant submits that "the error of the trial [c]ourt in allowing the improperly redacted statement to be read in open [c]ourt to the jury, and the prosecutorial misconduct of the District Attorney General in presenting and eliciting the harmful testimony from Investigator Porter, constitute harmful, reversible error." The defendant further complains that the prosecution's use of these statements during closing argument also constitutes reversible error. In this regard, the defendant maintains that the use of these statements are in contravention of Rule 404(b), Tennessee Rules of Evidence.

The State initially responds by asserting that any objection thereto is waived for failure to enter a contemporaneous objection to the introduction of the statements. See Tenn. R. App. P. 36(a). The defendant's failure to raise a contemporaneous objection to this testimony as being a prior bad act effectively waives this issue. See, e.g., State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000), perm. to appeal denied (Tenn. Mar. 17, 2000); State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994). Notwithstanding waiver, we elect to address the issue on its merit.

As a general proposition, evidence of a defendant's prior crimes, wrongs, or acts is not admissible to prove that he committed the crime in question. Tenn. R. Evid. 404. The rationale underlying the general rule is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994). The risk is greater when the defendant's prior bad acts are similar to the crime for which the defendant is on trial. Id.; see also State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996). While such evidence usually does not come in the form of statements or confessions made by the defendant, there exists no valid reason to make an exception to the requirements for prior bad act evidence disclosed in a defendant's confession.

Evidence of a defendant's prior crimes, wrongs or acts may be admissible where it is probative of material issues *other than* conduct conforming with a character trait. Tenn. R. Evid. 404(b). Thus, evidence of a criminal defendant's character may become admissible when it logically tends to prove material issues which fall into one of three categories: (1) the use of "motive and common scheme or plan" to establish identity, (2) to establish the defendant's intent in committing the offense on trial, and (3) to "rebut a claim of mistake or accident if asserted as a defense." McCary, 922 S.W.2d at 514. In order for such evidence to be admitted, the rule specifies three prerequisites:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the

material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). A fourth prerequisite to admission is that the court find by clear and convincing evidence that the defendant committed the other crime. Tenn. R. Evid. 404, Advisory Comm'n Comment; State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985).

In reviewing a trial court's decision to admit or exclude evidence, an appellate court may disturb the lower court's ruling only if there has been an abuse of discretion. DuBose, 953 S.W.2d at 652; State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1980). Where the trial court has been called to pass upon the admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b), its determination is entitled to deference when it has substantially complied with the procedural requisites of Rule 404(b). See DuBose, 953 S.W.2d at 652.

In the present case, we first acknowledge that the trial court was unable to conduct a jury-out hearing due to the defendant's failure to object. Notwithstanding, we are cognizant that the trial court stated that the confession had been redacted to take out any reference to any crime other than the instant offense.

A. "And I knew I was wanted in other states, so I stabbed him."

This statement is relevant to explain the defendant's motive for the murder of the victim and that the murder was committed premeditatively. The statement that he was wanted in other states did not reveal the nature of the offenses for which he was wanted. Moreover, the statement proved a relevant non-character purpose, i.e., his motive, for stabbing the victim with the requisite mental state. Motive is a relevant circumstantial fact that refers to why a defendant did what he did. Evidence of motive is often pertinent as the basis to infer that the act was committed, to prove requisite mental state, or to prove the identity of the actor. See 22 C. Wright & K. Graham, Jr., Federal Practice and Procedure Evidence § at 479 (1978). Indeed, the defendant's possession of a motive strengthens the inference that the death of the victim was caused by an intentional act rather than by a natural accident. There is sufficient evidence to show that the defendant's "wanted" status was relevant to show motive and that motive was a relevant noncharacter purpose in this case. The State did not seek its introduction for propensity purposes. Finally, in making a risk versus benefit analysis in this case, we cannot conclude that the prejudicial impact of the statement outweighed its probative value. Accordingly, the admission of the statement was not error nor was the fact that the prosecutor referred to the admission during closing argument.

B. Statements Made In Reference to Boyd's Oldsmobile Cutlass

During his confession, the defendant responded that he got the Oldsmobile Cutlass from Boyd and that he had taken camping equipment from Boyd's house. We cannot conclude that this statement is evidence of prior bad acts. There is no reference to any theft on behalf of the defendant, and there is no reference to the murder of Forrest Boyd. Accordingly, there was no error in the admission of the statement referring to property taken from Forrest Boyd. Any claim that the admission or reference to this statement was error is without merit.

III. TESTIMONY OF SHERIFF PARSON

Prior to Sheriff Mike Parson of Polk County, Missouri, taking the stand, the defense objected and the following colloquy occurred:

MR. STRAWN: . . . We believe that the information that's going to be elicited from him has already been elicited from other witnesses. We think the danger of the jury being tainted with a potential crime that occurred in another state is too great.

THE COURT: What's the purpose of this witness?

GENERAL BIVENS: Your Honor. He is the one who advised them that Mr. Thacker – he is the one who advised them that Mr. Thacker was a suspect when he was called about the credit card, and that Thacker would be in the car. He described the car to them and gave them the license number. I'll be glad to lead him, Your Honor, and I have cautioned him I'm only going to ask him about the fact that Forrest Boyd was not in Tennessee on January 2nd, that Mr. Thacker was thought to be in possession – was a suspect to be in possession of Mr. Boyd's credit card and car, and that he gave them a description of the car and the license number. I'm not going to touch anything else with him.

THE COURT: Can't we simply – y'all are not in a position where you can stipulate that?

MR. KELLY: It's already in the record that it's Forrest Boyd's card laying there by the machine. It's already been testified to.

GENERAL BIVENS: That's why I don't see any prejudice in it, Your Honor. It establishes how they had that information.

MR. KELLY: What it's going to get in is, it's going to get in an unconvicted prior bad act of a theft in Missouri, without

question. You know, it's not for any other purpose.

GENERAL BIVENS: Your Honor, it goes to the question of premeditation. He knew that he was over here in somebody else's car and with somebody else's credit card, and when that credit card was used, he knew it was gonna come back as stolen.

MR. KELLY: That's already in the record.

THE COURT: No, that's not in the record. The only thing that's in the record is that he used a credit card that's Forrest Boyd's.

MR. KELLY: Unauthorized - -

GENERAL BIVENS: No, sir, there's nothing in the record on that point. That's what we have to establish through him, that he was not authorized to have Forrest Boyd's credit card, and the only way we can establish that –

THE COURT: How can he do that?

GENERAL BIVENS: He actually knows. Your Honor, that Forrest Boyd was dead at that point, and he actually knows about the homicide. They were aware of the homicide.

MR. STRAWN: You see how great the danger is here?

GENERAL BIVENS: But I'm not going to that point, Your Honor, but he had knowledge that the credit card was stolen.

. . .

GENERAL BIVENS: It goes to his premeditation.

THE COURT: –but it does go the issue of premeditation. All right, I'm going to let you put it in, but be careful, now. Being careful goes – it's a two-edged sword. It goes both ways. You could get the wrong information and end it on a mistrial here.

. . .

THE COURT: And by the same token, if you solicit the information –

MR. STRAWN: Your Honor, we almost can't even cross him, because it's so dangerous. . . . And I think it's too dangerous. It's going to get in a prior – an unconvicted prior bad act.

THE COURT: That's why I'm asking you why you can't stipulate that he had or was in possession of a Forrest Boyd credit card, and he was unauthorized to use it?

MR. KELLY: We can.

THE COURT: You can? Then what else do you need him for?

GENERAL BIVENS: Your Honor, they were told that – he told the description of the vehicle and the license plate number. That's the main thing. If they want to stipulate that he had Forrest Boyd's car and credit card and was unauthorized –

MR. KELLY: What's his car got to do – identity is not an issue.

GENERAL BIVENS:	Still, Your Honor, it goes to the premeditation and flight. That's the car that was towed here.
THE COURT:	I don't know that you have to get the car into it.
GENERAL BIVENS:	That's the car that was towed in, Your Honor. Otherwise, the jury is going to have the impression, Your Honor, that he had this car over here and –
MR. STRAWN:	It's the credit card that he's saying goes to premeditation. We're stipulating that's unauthorized.
GENERAL BIVENS:	No, sir, it's the car and the credit card. He knew he was wanted because of that, Your Honor.
	. . .
GENERAL BIVENS:	The question is premeditation, Your Honor. The question is Thacker knew he was wanted, knew that he was and that's why he did this. That's in his statement, Your Honor, just the statement that he knew he was wanted is in his confession, not for what, but that he knew he was wanted, and that's why he did it.
THE COURT:	All right, I'm going to allow him to testify. Now, be careful.

Sheriff Mike Parson testified, during the guilt phase, that Forrest Boyd was a resident of Polk County, Missouri, on January 2, 2000. He further stated that he advised Dyer County law enforcement that Mr. Boyd was not in Dyer County and that anyone who had his credit card or vehicle in Dyer County would have been unauthorized. Sheriff Parson related a description of Mr. Boyd's vehicle, including providing the license plate number. The Sheriff added that a person by the name of Steven Ray Thacker may be in possession of both the credit card and the vehicle.

Sheriff Parson testified again at the sentencing phase. Sheriff Parson stated that on January 2, 2000, there were outstanding warrants for the arrest of Steven Ray Thacker in Polk County, Missouri. He added that he believed that Steven Ray Thacker left the state of Missouri in Forrest Boyd's vehicle.

The defendant complains that the trial court erred by admitting the testimony of Sheriff Parson. The defendant asserts that (1) the trial court failed to conduct a jury out hearing as required by Rule 404(b), Tennessee Rules of Evidence; (2) the defense agreed to stipulate to the fact that the defendant was in possession of Forrest Boyd's credit card and was unauthorized to use it; and (3) the prejudicial effect of the Sheriff's testimony outweighed any probative effect it may have had. In support of these contentions, the defendant states that the testimony of Sheriff Parson was neither relevant nor necessary, because it was already in the record that the credit card of Forrest Boyd was lying beside the cash register in the Patterson service station. From this, he contends, the jurors could infer that the credit card was stolen. The State responds that the evidence was necessary to show motive and, therefore, relevant to the issue of premeditation.

The general parameters regarding admissibility of a defendant's bad acts other than the crime on trial is found in Tennessee Rule of Evidence 404(b). As stated previously, evidence of prior crimes, wrongs, or acts is generally inadmissible as character evidence of the defendant to prove that he committed the crime in question. Tenn. R. Evid. 404(b).

As the defense argues, the defendant's identity was not at issue. Rather, the only issue in this matter was the degree of homicide, the defendant's state-of-mind. Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible for purposes other than to prove the character of a defendant, only if certain conditions are met:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

First, we note that the trial court was required to hold a hearing on the admissibility of Rule 404(b) evidence only upon request. (emphasis added). The defendant failed to request a 404(b) hearing. Thus, the trial court did not err by failing to conduct a hearing. Technically, it is waived. State v. Jones, 15 S.W.3d 880, 895 (Tenn. Crim. App. 1999).

Next, the State sought to introduce evidence (1) that Forrest Boyd was not in Dyer County, Tennessee, on January 2, 2000; (2) that the defendant's possession of Forrest Boyd's credit card was unauthorized; and (3) a description of the vehicle. This evidence was relevant to establish premeditation. While evidence had already been introduced that Forrest Boyd's credit card was found at the scene of the murder, no evidence was before the jury at that time that the defendant's possession of the credit card was unauthorized. Similarly, there was no other evidence establishing the fact that the defendant's use of Mr. Boyd's vehicle was unauthorized. Thus, Sheriff Parson's testimony was highly relevant in establishing the defendant's motive for the murder.

Finally, we conclude that the evidence was more probative than prejudicial. The State's examination of Sheriff Parson and Sheriff Parson's responses were restricted to very vague inquiries as to the presence of Forrest Boyd in Dyer County and whether the use of his credit card and/or car in Dyer County were authorized. No information was elicited regarding the murder of Forrest Boyd. Indeed, there is no indication from the testimony that Forrest Boyd is deceased. Additionally, the prosecution was careful to not elicit the term "theft," "steal," or an equivalent term from Sheriff Parson. Therefore, for the reasons stated, we conclude that the testimony of Sheriff Parson did not invoke error.

IV. PROOF OF DEATH BY LAY TESTIMONY

The defendant next asserts that the trial court erred by permitting a first degree murder conviction to be obtained by lay testimony as to the cause of death. Specifically, the defendant complains that the State only presented the testimony of two emergency medical technicians and a paramedic as to the cause of the victim's death. The defendant asserts that "[t]he fact that a wounded person dies is not conclusive that death resulted from the wound."

The law of this State is that a non-expert, after describing a wound, may express an opinion that it caused death. See Owens v. State, 202 Tenn. 679, 682, 308 S.W.2d 423 (1958). Moreover, there need be no direct expert evidence as to the cause of death, and death may be presumed to have been caused by apparent wounds, particularly when there is no suggestion in the record that the deceased died from any other cause than that relied upon by the State. McCord v. State, 198 Tenn. 226, 278 S.W.2d 689, 691 (1955); Bryant v. State, 503 S.W.2d 955, 958 (Tenn. Crim. App. 1973); State v. Roscoe L. Graham and Kendrick L. Cavil, No. 02C01-9507-CR-00189 (Tenn. Crim. App. at Jackson, Apr. 20, 1999); State v. Richard Lee Franklin, No. 03C01-9706-CR-00219 (Tenn. Crim. App. at Knoxville, Aug. 10, 1998); see also Berry v. State, 523 S.W.2d 371, 374 (Tenn. Crim. App. 1974) (cause of death need not be scientifically shown in every case). There is nothing in the record to suggest that the death of the victim was occasioned by natural causes, by accident, or by the deceased himself. Bryant, 503 S.W.2d at 958. Indeed, the defendant admitted to inflicting the stab wound. When emergency personnel arrived at the scene, the victim had no vital signs. The lay testimony alone is sufficient to establish that the victim died from the stab wound. This claim is without merit.

V. PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT

During closing argument, the prosecutor made the following comment:

> And Mr. Kelly says he's sorry. Where's the evidence that he's sorry? Is dragging Ray Patterson's body across the parking lot of that service station into that bay, is that showing I'm sorry? Is taking this dead man's wallet, pistol, credit cards, showing I'm sorry, I'm sorry? Does taking this wrecker out and getting his car off and then coming back into town and getting other means of escape show I'm sorry, I'm sorry? When he sees Jim Porter in AutoZone, does he go up and say, "Officer, I'm sorry. In a fit of passion, I killed a man. I'm sorry." No. He tries to cover up his crime. He trades cars. He leaves town. He makes an escape route at the motel where he goes. He dyes his hair so he won't look the same. Now, is that somebody who is sorry, or is that somebody who has planned and cold-bloodedly, premeditatedly killed somebody?

The defendant moved for a mistrial based upon the prosecutor's comment to the jury that they had heard nothing remorseful from any witnesses and that the comment was an improper comment regarding the defendant's failure to testify. The State responded that "Mr. Kelly made the argument in his closing that the defendant was remorseful and sorry. My comment was that there was no

evidence of remorse or sorrow." The trial court denied the defendant's motion. The defendant now complains that this was error.

Where a defendant complains of a prosecutor's closing argument, he is required to show that the argument was so inflammatory or the conduct so improper that it affected the verdict to his detriment. Harrington v. State, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965). A prosecutor is strictly prohibited from commenting on the defendant's decision not to testify. State v. Reid, 91 S.W.3d 247, 297 (Tenn. 2002); Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). However, we do not conclude that the statements made by the prosecutor constitute a comment on the defendant's failure to testify. During closing argument, counsel for the defendant remarked:

> I am very sorry that Mr. Patterson is deceased. I knew Mr. Patterson, I know his family, and I'm very sorry this happened. And so is my client. By we can't undo that. And you're not to use – the Court's gonna tell you you're not to use sympathy in deciding what the appropriate offense is that Mr. Thacker committed.

The statements made by the prosecution were rebuttal argument directed to the defense counsel's earlier argument that the defendant was sorry about the murder. The gist of the prosecutor's comments was directed more toward the defendant's actions and omissions after the killing, rather than the defendant's failure to testify. We do not think the statement can be fairly characterized as a comment on the defendant's failure to testify. See generally State v. Miller, 771 S.W.2d 401, 405 (Tenn. 1989). Thus, there was no error committed by the trial court in refusing to grant a motion for mistrial on this basis.

VI. FAILURE TO PERMIT ARGUMENT & INSTRUCTION ON SELF-DEFENSE

During a jury instruction conference prior to closing arguments at the guilt phase, the trial court inquired as to a charge of "self-defense." The prosecution objected stating:

> [I]t has to be raised by the proof. It can't be strictly an argument. There has to be some proof of self-defense, and there is absolutely nothing in this testimony or proof that indicates self-defense, Your Honor.

Counsel for the defendant responded:

> There's evidence of a firearm on the victim, Your Honor, and evidence that it was loaded. I just think that raises enough of an inference for us to argue it.

The trial court concluded that there was no proof that the victim had ever "pulled" his weapon on the defendant and the charge was not provided.

To determine whether self-defense is fairly raised by the proof and must be instructed to the jury, "a court must, in effect, consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence." State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993). A person is justified in using force against another person when he or she reasonably believes (1) that death or serious bodily injury is imminent, and (2) that the force used is immediately necessary to protect against the other person's use or attempted

use of unlawful force. Tenn. Code Ann. § 39-11-611(a). On the other hand, a person is not justified in using or threatening force against another if he or she provoked the other person's use or attempted use of unlawful force unless (1) he or she "abandons the encounter or clearly communicates to the other the intent to do so," and (2) the other person still persists in using unlawful force. Tenn. Code Ann. § 39-11-611(d)(1)-(2). A defendant who seeks to avoid criminal responsibility for his conduct upon a theory of self-defense must be free from fault in bringing about the necessity of using force or should have clearly abandoned his initial intent to do harm. See State v. Dereke Emont Fitzgerald, No. W2000-01279-CCA-R3-CD (Tenn. Crim. App. at Jackson, Oct. 24, 2000).

Even considering the evidence in the light most favorable to the defendant, we cannot conclude that the evidence raised a factual issue as to whether the defendant acted in self-defense. Although several witnesses testified that the victim carried a weapon, there was no evidence that the victim was the aggressor who pulled his gun on the defendant. According to the defendant, the victim tried to pull his gun out only after Thacker had stabbed him. Moreover, Thacker admitted that he stabbed the victim as the victim was facing toward the credit card machine with his back toward him. There is simply no objective basis for us to find that the defendant *reasonably* believed that he was in imminent danger of death or serious bodily injury. Accordingly, the refusal to instruct the jury on self-defense was not error.

VII. SUFFICIENCY OF THE EVIDENCE

The defendant argues that the evidence presented at trial is insufficient to support his conviction for first degree murder. Specifically, the defendant asserts that "the proof was lacking that it was a premeditated murder and that it occurred in perpetration of 'theft;'" that theft only occurred as an afterthought, according to the evidence. In this regard, he asserts that the trial court erred by failing to grant his motion for judgment of acquittal or by failing to act as the thirteenth juror.

A motion for judgment of acquittal raises a question of law for the trial court's determination. State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). When the trial court is presented with a motion for judgment of acquittal, the only concern is the legal sufficiency, as opposed to the weight, of the evidence. State v. Blanton, 926 S.W.2d 953, 957 (Tenn. Crim. App. 1996). Appellate courts are ill-suited to assess whether the verdict is supported by the weight and credibility of the evidence. State v. Moats, 906 S.W.2d 431, 435 (Tenn. 1995). For that reason, in Tennessee, the accuracy of a trial court's thirteenth juror determination is not a subject of appellate review. Id.; State v. Burlison, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993). Instead, once the trial court approves the verdict as the thirteenth juror, appellate review is limited to determining the sufficiency of the evidence. Burlison, 868 S.W.2d at 719.

Accordingly, the standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction; that is, whether the evidence presented

at trial was so deficient that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, 513 U.S. 1086, 115 S. Ct. 743 (1995). A jury conviction removes the presumption of innocence with which a defendant is cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Likewise, it is not the duty of this Court to revisit questions of witness credibility on appeal, that function being within the province of the trier of fact. See generally State v. Adkins, 786 S.W.2d 642, 646 (Tenn. 1990); Burlison, 868 at 718-19. Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). In State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990), this Court held these rules applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence.

A. Premeditated Murder

Initially, we note that, where the jury returns guilty verdicts as to alternative counts of first degree murder, the two verdicts merge into one count of first degree murder. Carter v. State, 958 S.W.2d 620, 624-25 (Tenn. 1997). Accordingly, a general verdict of guilty is sustainable if any one count in the indictment is supported by the proof. See Tenn. Code Ann. § 40-18-111. Thus, proof of either felony murder or premeditated murder is sufficient to sustain the conviction.

Once a homicide has been proven, it is presumed to be second degree murder, and the State has the burden of establishing first degree murder. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). The State must prove all elements of first degree murder, including premeditation, beyond a reasonable doubt. Id. Premeditation requires "the exercise of reflection and judgment," Tenn. Code Ann. § 39-13-202, and a "previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn.1992) (citing McGill v. State, 475 S.W.2d 223, 227 (Tenn. 1971)). Notably, the intent to kill does not have to pre-exist for any definite period of time. Tenn. Code Ann. § 39-13-202(d); State v. Sims, 45 S.W.3d 1, 20 (Tenn. 2001) cert. denied, 534 U.S. 956, 122 S. Ct. 357 (2001).

Although there is no concrete test for determining the existence of premeditation, Tennessee courts have relied upon certain circumstances to infer premeditation. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998). Specifically, the following factors have been used to support a jury's inference of premeditation: (1) the defendant's prior relationship to the victim which might suggest a motive for the killing; (2) the defendant's declarations of intent to kill; (3) the defendant's planning activities before the killing; (4) the manner of the killing, including the defendant's using a deadly weapon upon an unarmed victim, killing the victim while the victim is retreating or attempting

escape, or killing the victim in a particularly cruel manner; (5) the defendant's demeanor before and after the killing, including a calm demeanor immediately after the killing. See Id. at 914- 15; State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997) (citing Brown, 836 S.W.2d at 541-42, and West, 844 S.W.2d at 148); State v. Gentry, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993); State v. Anderson, 835 S.W.2d 600, 605 (Tenn. Crim. App. 1992). Although the jury may not engage in speculation, State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App.), the jury may infer premeditation from the circumstances surrounding the killing, State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993); Taylor v. State, 506 S.W.2d 175, 178 (Tenn. Crim. App. 1973). This Court has also recognized several factors from which the jury may infer the two elements, including planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. Bordis, 905 S.W.2d at 222 (citing 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7. (1986)).

The evidence, in the light most favorable to the State, reveals that the defendant stabbed the victim from behind, after the defendant attempted to use Forrest Boyd's credit card without authorization. The defendant stated, as his reason for killing, that he " was wanted in other states." The testimony of Sheriff Parson supported the defendant's assertion that he stabbed the victim because he feared detection of his prior crimes. The defendant's contention is that there was not sufficient time for the defendant to "exercise reflection and judgment" or to form an intent to kill before the attack on the victim. We disagree. Taking the evidence in the light most favorable to the State, the evidence is sufficient to establish premeditation.

The procurement of a weapon is probative to prove premeditation. State v. Bush, 942 S.W.2d 489, 501 (Tenn. 1997). Although the defendant contends he did not procure the knife to kill the victim, the jury could infer that the defendant was armed to kill this victim or any other individual who interfered with his flight from capture. This would also establish a motive for the killing which the jury may use to infer premeditation. State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998). "Calmness immediately following a killing is evidence of a cool, dispassionate, premeditated murder." State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997). The defendant's actions after stabbing the victim exhibit a coolness of purpose and a calculating demeanor. Additionally, we look to the defendant's demeanor following the murder. The defendant dragged the victim's body out of sight. He then removed personal belongings, including a gun, cash, and credit cards from the victim. Then, recognizing that he was unable to remove Boyd's vehicle from the victim's tow truck, the defendant proceeded to drive the tow truck to a secluded location where he eventually unloaded the Boyd vehicle. The defendant then proceeded to purchase a hamburger from a Wendy's drive-thru and visit a local AutoZone, before securing a different vehicle and obtaining a motel room in Union City. Upon a search of the defendant's motel room, a bottle of men's hair dye was found. There is sufficient evidence concerning motive and the defendant's calmness after the murder to support the jury's findings of premeditated murder. See generally Gentry, 881 S.W.2d at 4-5.

B. Felony Murder

Felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any . . . theft." Tenn. Code Ann. § 39-13-202(a)(2). As to felony murder, "[n]o culpable mental state is required for conviction . . . except the intent to commit the [theft]." Tenn. Code Ann. § 39-13-202(b). The defendant complains that he cannot be found guilty of felony murder committed during the perpetration of a theft as the killing was not in perpetration of the theft. Specifically, the defendant asserts that the theft of the wallet and gun did not occur until after the defendant had driven the wrecker a distance away from the service station and parked it, then came back and pulled his body back into the service station. The defendant characterizes the theft as an "afterthought" and collateral, rather than a killing for the purpose of theft.

In State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999), our supreme court held:

> The law does not require that the felony necessarily precede the murder in order to support a felony-murder conviction. The killing may precede, coincide with, or follow the felony and still be considered as occurring "in the perpetration of" the felony offense, so long as there is a connection in time, place, and continuity of action.

However, the court further held that:

> Thus, in a felony-murder case, intent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim.
>
> Proof that such intent to commit the underlying felony existed before, or concurrent with, the act of killing is a question of fact to be decided by the jury after consideration of all the facts and circumstances.

Id. at 107 [citations omitted].

When determining whether a killing was committed in perpetration of a felony, the general rule is, "[i]f the felony and killing occur as part of a continuous criminal transaction, the felony murder rule applies." State v. Pierce, 23 S.W.3d 289, 294-95 (Tenn. 2000) (citations omitted). Farmer v. State, 201 Tenn. 107, 296 S.W.2d 879 (1956), provided guidance on the meaning of "in the perpetration of" by declaring that in order for an offense to constitute first degree murder under the felony murder rule,

> it must have been done in pursuance of the unlawful act, and not collateral to it. In other words, "The killing must have had an intimate relation and close connection with the felony . . . , and not be separate, distinct, and independent from it; . . . ."

Id., 201 Tenn. at 115-16, 296 S.W.2d at 883 (quoting Wharton on Homicide, § 126 (3rd ed.).

Although Buggs, 995 S.W.2d at 107, held that "for the felony murder doctrine to be invoked, the actor must intend to commit the underlying felony at the time the killing occurs," it also stated

that the "jury may reasonably infer from a defendant's actions immediately after a killing that the defendant had the intent to commit a felony prior to, or concurrent with, the killing," id. at 108. By granting the State the strongest legitimate view of the evidence together with all reasonable inferences which could be drawn therefrom, we conclude there is proof from which the jury could rationally infer that the victim's murder was committed in the perpetration of theft. The jury could have rationally inferred that the defendant, when confronted with the realization that Boyd's credit card was of no value to the defendant, formed an intent to take the victim's property. The defendant's brief departure from the service station in order to remove the wrecker with the attached vehicle and his return to conceal the victim's body and take the victim's possessions could rationally be viewed as a continuous action. Such an inference is sufficient to justify a finding that the defendant was guilty of first degree murder committed in the perpetration of theft.

VIII. SUPPRESSION OF DEFENDANT'S CONFESSION

On March 22, 2000, the defendant filed a motion to suppress or determine the admissibility of his confession made to law enforcement officials.[1] A hearing on the motion was held on August 25, 2000. At the hearing, the State presented Officer Tack Simmons. Officer Simmons related the events immediately preceding the defendant's arrest at the Super 8 Motel in Union City. Specifically relating to the defendant's initial arrest, Officer Simmons stated that, after detaining the defendant, Officer Simmons inquired as to the defendant's name. The defendant replied, "Steve Patterson." Recalling that the victim's name was Patterson, Officer Simmons surmised that Patterson was not the defendant's true identity. At this time, the defendant was placed in handcuffs. While the defendant was being placed in Officer O'Dell's patrol car, Officer Simmons advised him of his rights. The defendant indicated that he understood his rights. Officer O'Dell then transported the defendant to the county jail. O'Dell stated the distance to the Obion County Jail was approximately "a mile and a quarter." On the way to the jail, the defendant

> made a spontaneous utterance that we did better than the Springfield police. I asked him what he was talking about. He said that – To quote him, what I have in my notes, "You did a better job than Springfield. They walked by me for four days while I hid in the woods." And I ask[sic] why they were looking for him, and Mr. Thacker stated who was looking for him. Mr. Thacker stated "the police." I asked why they were looking for him. Mr. Thacker stated, "Because it was a stolen car." I asked him if the victim of the stolen car was still with us, meaning . . . was she still alive. Mr. Thacker stated, "Yeah, she made it. She jumped out of the car, leaving the kid, and got away." Then he stated, "I didn't hurt the kid. I dropped the kid and grandmother off at a relative's house, and the police started chasing me from there." And that was the end of our conversation.

[1] The motion to suppress filed by defense counsel was generic in nature and also challenged any evidence seized as the result of any searches. As the defendant limits his argument on appeal to the suppression of his confession, we will do the same.

Officer O'Dell testified that, during the trip to the jail, the defendant was "very calm" and did not exhibit any strange behavior. Officer O'Dell verified that the defendant had indicated to Officer Simmons that he understood his rights. The defendant did not ask for counsel during this time.

Dyersburg Police Officer Terry Ledbetter, along with Captain Dudley, transported the defendant from the Obion County Jail to the Dyersburg Police Department. Nothing was said to the defendant on the way to Dyersburg other than a general inquiry as to whether the defendant had a cold. The defendant was turned over to Investigator Jim Porter upon arriving at the Police Department.

Investigator Porter stated that he escorted the defendant to an interrogation room. No written advisement or waiver of rights was used; rather, Investigator Porter recorded both the advisement of rights and the defendant's subsequent statement. Investigator Porter recalled that the defendant appeared to understand what he was saying and did not appear to be under the influence of drugs or alcohol. Porter proceeded to advise the defendant of his rights and that he was going to be charged with first degree murder. He continued to inquire as to whether the defendant understood his rights and whether he "wanted to talk . . . about it." The defendant responded that he wished to give a statement. Relating the specific circumstances of the interrogation, Porter recalled that the defendant was only in the interrogation room for approximately two minutes prior to the interview commencing, the defendant was offered and accepted a cigarette, and the interview lasted approximately fifteen to twenty minutes. At no time was the defendant advised that if he provided a statement, "things would go a lot better for him." During the interview, the defendant admitted that he killed the victim. The defendant also stated how and why he killed the victim. Investigator Porter testified that throughout the defendant's statement, the defendant remained "calm and collected."

At the conclusion of the hearing, the defense advised the court that the defendant would be having a mental evaluation the following day and that this evaluation might provide evidence of mental disease or disturbance. Notwithstanding, the trial court opted to rule upon the evidence before it and found:

> [W]ith the evidence that's before the Court on the Motion to Suppress, the Court will overrule the Motion to Suppress, the statement of Mr. Thacker given to Officer, excuse me, to Investigator Porter. There just simply is nothing there to – as a basis at this point for the Court to suppress any such statement. It appears that from the evidence before the Court at the present time that the defendant was advised of his rights by Officer Simmons and by Officer Porter. . . .

The defendant asserts that the trial court erred when it denied his motion to suppress his confession. Specifically, the defendant asserts that his "alleged confession, given soon after his arrest to Investigator Jim Porter, should have been suppressed, in view of the testimony of Dr. Keith

Caruso that he suffered from a severe mental illness - bipolar disorder - and a severe mental disturbance on the date the crime was committed, January 2, 2000." The defendant argues that "it is clear from the evidence that he was not mentally capable of making a decision concerning giving a statement or not giving a statement and about waiving his constitutional rights to counsel." Additionally, the defendant asserts that he was without counsel in an oppressive, coercive, police-dominated atmosphere at the Dyersburg Police Department. He concludes that his mental disturbance, coupled with the coercive police atmosphere, rendered his confession involuntary.

We review the trial court's denial of the defendant's motion to suppress by the following well-established standard:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the trial court's application of law to the facts, as a matter of law, is reviewed *de novo,* with no presumption of correctness. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). This court may consider the proof at trial, as well as at the suppression hearing, when considering the appropriateness of the trial court's ruling on a pretrial motion to suppress. See State v. Henning, 975 S.W.2d 290, 299 (Tenn.1998) (holding that because the rules of appellate procedure "contemplate that allegations of error should be evaluated in light of the entire record[,]" an appellate court "may consider the proof adduced both at the suppression hearing and at trial").

State v. Levitt, 73 S.W.3d 159, 169 (Tenn. Crim. App. 2001).

The Fifth Amendment to the United States Constitution provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Similarly, Article I, section 9 of the Tennessee Constitution states that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. However, an accused may waive this right against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). In Miranda, the United States Supreme Court held that a suspect must be warned prior to any questioning that he has the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. 384 U.S. at 479. The Supreme Court held that a suspect may knowingly and intelligently waive the right against self-incrimination only after being apprised of these rights. Id. Accordingly, for a waiver of the right against self-incrimination to be held constitutional, the accused must make an intelligent, knowing, and voluntary waiver of the rights afforded by Miranda. Id. at 444. A court

may conclude that a defendant voluntarily waived his rights if, under the totality of the circumstances, the court determines that the waiver was uncoerced and that the defendant understood the consequences of waiver. State v. Stephenson, 878 S.W.2d 530, 545 (Tenn.1994).

The United States Supreme Court has interpreted the Fifth Amendment in part to require that an incriminating statement or confession be freely and voluntarily given in order to be admissible. Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897). This even applies to statements obtained after the proper Miranda warnings have been issued. See State v. Kelly, 603 S.W.2d 726 (Tenn. 1980). Statements and confessions not made as a result of custodial interrogations must also be voluntary to be admissible. See Arizona v. Fulimante, 499 U.S. 279, 286-88, 111 S. Ct. 1246, 1252-53 (1991). It must not be extracted by "any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Bram, 168 at 542-43, 18 S. Ct. at 187 (citation omitted). Moreover, due process requires that confessions tendered in response to either physical or psychological coercion be suppressed. Rogers v. Richmond, 365 U.S. 534, 540-41, 81 S. Ct. 735, 739 (1961); Kelly, 603 S.W.2d at 728-29. This has evolved into the "totality of circumstances" test to determine whether a confession is voluntary. Fulimante, 499 U.S. at 285-87, 111 S. Ct. at 1251-52; State v. Crump, 834 S.W.2d 265, 271 (Tenn.), cert. denied, 506 U.S. 905, 113 S. Ct. 298 (1992).

The voluntariness test under the Tennessee Constitution has been held to be more protective of individual rights than the test under the United States Constitution. See Stephenson, 878 S.W.2d at 544. For the relinquishment of rights to be effective, the defendant must have personal awareness of both the nature of the right and the consequences of abandoning his rights. See id. at 544-45. Additionally, his statements cannot be the result of intimidation, coercion or deception. Id. at 544. In determining whether the statements were voluntary, the reviewing court looks at the totality of the circumstances surrounding the relinquishment of the right. Id. at 545.

The trial court found that the statements were made voluntarily. We have studied the evidence, and considering the totality of the circumstances, we cannot conclude that the trial court erred by denying the defendant's motion to suppress on this issue. Again, the court's determination that the statements were given knowingly and voluntarily is binding upon the appellate courts unless the defendant establishes that the evidence in the record preponderates against the trial court's ruling. Henning, 975 S.W.2d at 299. In the instant case, the defendant asserts that "coercive police tactics" combined with his mental disease/defect rendered his confession/statements involuntary. The record reveals that the defendant was properly advised of his rights under Miranda and that the defendant indicated that he understood those rights. When the voluntariness of a statement given to police is challenged based on the defendant's competency to waive the rights provided by Miranda, the determinative issue is "whether the defendant had the capacity in the first place to form a will of his own and to reject the will of others." State v. Benton, 759 S.W.2d 427, 431 (Tenn. Crim. App. 1988). The defendant presented no evidence of his mental condition at the motion to suppress. Notwithstanding, Dr. Caruso did testify at the subsequent trial regarding the defendant's mental condition. Dr. Caruso conceded that the defendant was competent to stand trial and that a defense

of insanity could not be supported in this case. He further admitted that "[he] didn't feel that there was anything here that prevented Mr. Thacker from forming the mens rea for the alleged offenses." In other words, the defendant "knew what the expected outcome of a murder was;" "[h]e was able to form a motive for that murder," and "[h]e was able to understand that that murder was wrong and against the law." Although the defendant was diagnosed as suffering from bipolar disorder, we cannot rationally conclude that the defendant was incapable of understanding his rights and providing a voluntary statement. Moreover, from the proof at the suppression hearing, we would be constrained to conclude that coercive police tactics were not employed. We have reviewed the record and find that the evidence does not preponderate against the trial court's ruling. See Henning, 975 S.W.2d at 299. Thus, the defendant is not entitled to relief on this issue.

IX. LIMITATION ON MITIGATING EVIDENCE

The defendant next complains that the trial court erroneously prohibited the introduction of mitigation evidence. During the penalty phase of the defendant's trial, he presented the testimony of Kim Bowen and Roxanne Evans.

A. Testimony of Kim Bowen

The following colloquy occurred during Kim Bowen's testimony:

Q:	Did Steve ever talk with you about his childhood and the way he was raised?
A:	Yes, he did.
Q:	What did he relate to you about that sort of thing?
A:	Many things. Actually, he told me that he – Steve, from what I could observe –
GENERAL BIVENS:	Your Honor, can I voice an objection at this time?
THE COURT:	State it, or approach the bench, whichever –
GENERAL BIVENS:	I don't mind stating, Your Honor, this would be hearsay, Your honor, and it's not hearsay that we could rebut. I think, you know, this proof could be put on through other witnesses who may have observed this, but anything she says about his childhood that she's relating that he told her is strictly hearsay, Your Honor.
MR. STRAWN:	He's the party defendant in this case, Your Honor, and I think these statements, even though they may be statements against interest, she can say what he told

her.

THE COURT: They're not statements against interest.

. . .

THE COURT: To start off, they're self-serving statements.

GENERAL BIVENS: Yes, sir.

MR. KELLY: Mr. Strawn's reason for the admissibility is not correct, and Your Honor has ruled that. The problem is, is that this is mitigation, and the case law and all – to the effect that it's sorta like a wrestling match with one of these blind referees, that just about anything goes in this mitigation.

THE COURT: I've given you quite a bit of leeway so far, because nobody's objected, but it is hearsay. It is a self-serving declaration or statement.

MR. KELLY: Your Honor, what I'm saying is –

THE COURT: What is it that you had planned to get from this?

MR. STRAWN: Well, I think she's going to testify that Steve told her that he just didn't have a close relationship with either parent when he was growing up.

THE COURT: Can't that come from a sister, or someone who has observed that?

MR. STRAWN: It can.

THE COURT: All right. Let's do that. Your objection is sustained.

B. Testimony of Roxanne Evans

Roxanne Evans also testified during the penalty phase.

Q: You've told us he has two sisters. Is his mother still alive?

A: Yes, sir.

Q: Is his father still alive?

A: Yes, sir.

Q: Are they here today?

A: No, sir.

Q: Are they here by their own choice –

A:	Yes, sir.
Q:	– or not here by their own choice?
GENERAL BIVENS:	Objection, Your Honor. That would be hearsay, Your Honor.
THE COURT:	It is. Sustained.
MR. STRAWN:	It would be.
THE WITNESS:	I know why her brother's not here – I mean, I know why my brother's not here.
THE COURT:	Wait just a second, ma'am.
THE COURT:	The State's objection has been sustained. You're going to have to lay the ground work. If she knows and somebody's told her, you know, she can't testify about it.
MR. STRAWN:	Right. I understand.
Q: (By Mr. Strawn)	Do you know, from your own knowledge, or have you observed any events on the part of either your brother or his former wife, Steve's mother, or, for that matter, his sisters, that would lead you to any conclusions as to why they're not here today, from your own personal knowledge?
A:	From what I've observed in the past and from what I know –
THE COURT:	Ma'am, you can't testify about what somebody's told you.
A:	All right. From what I've observed – I'm not for sure I know how to answer that without saying what I've been told, but from what I've observed –
GENERAL BIVENS:	I would object, then, Your Honor, if she can't answer –
THE COURT:	If she can't do it without . . .
Q: (By Mr. Strawn)	From what you've observed. Go ahead.
A:	They have chosen not to be here.

The defendant is correct in his argument that evidence is not excluded at a capital sentencing hearing merely because the evidence is hearsay. See Tenn. Code Ann. § 39-13-204(c). Thus, as long as evidence or testimony is relevant to the circumstances of the murder, the aggravating circumstances of the murder, or the mitigating circumstances and has probative value in the

determination of punishment, such evidence is admissible. See State v. Reid, 91 S.W.3d 247, 305 (Tenn. 2002); State v. Teague, 897 S.W.2d 248, 250 (Tenn.1995); see also State v. Hall, 8 S.W.3d 593, 602 (Tenn.1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98 (2000). The admission of evidence, however, is not without constraints. Evidence may properly be excluded if it is so unduly prejudicial that it renders the trial fundamentally unfair. State v. Burns, 979 S.W.2d 276, 282 (Tenn.1998), cert. denied, 527 U.S. 1039, 119 S. Ct. 2402 (1999). Additionally, the admissibility of evidence ultimately is entrusted to the sound discretion of the trial court. Absent an abuse of that discretion, such rulings will not be reversed on appeal. Reid, 91 S.W.3d at 305; State v. Caughron, 855 S.W.2d 526, 541 (Tenn.), cert. denied, 510 U.S. 979, 114 S. Ct. 475 (1993).

The defendant's assertion that the prohibited testimony of Kim Bowen and Roxanne Evans was relevant to establish the defendant's estranged relationship with his parents is correct. Thus, the evidence was admissible, albeit hearsay, for the purpose of establishing mitigating evidence. Notwithstanding, the testimony sought to be elicited from Kim Bowen was, in fact, brought forth through the testimony of Roxanne Evans. Moreover, any reason explaining his parents' absence from his trial was not relevant to mitigation other than adding to the strained relationship between the defendant and his parents. This fact was already before the jury. Thus, any error in refusing to admit such hearsay testimony was harmless. For these reasons, we cannot conclude that the trial court abused its discretion. This issue is without merit

X. PROSECUTORIAL MISCONDUCT OF PRIOR BAD ACTS EVIDENCE

The defendant submits that the prosecutor engaged in misconduct during the sentencing phase by attempting to elicit testimony from Roxanne Evans and Derrick O'Dell regarding prior bad acts of the defendant. To establish a claim for prosecutorial misconduct, the defendant must prove that the "improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965). In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this Court set forth five factors that should be considered in making this determination:

(1) The conduct complained of viewed in context and in light of the facts and circumstances of the case.

(2) The curative measures undertaken by the court and the prosecution.

(3) The intent of the prosecutor in making the statement.

(4) The cumulative effect of the improper conduct and any other errors in the record.

(5) The relative strength or weakness of the case.

Our supreme court approved these factors in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

A. Testimony of Roxanne Evans

Roxanne Evans, the defendant's aunt, testified concerning the defendant's childhood. On

cross-examination, the following exchange was made:

Q:	Do you remember your brother working for an auto pinstriping shop during that time?
A:	Yes, sir.
Q:	Do you remember any problem that developed with Steven and your brother that had anything to do with that shop?
A:	Yes, sir.
Q:	What happened?
A:	I apologize if my memory seems a little fuzzy. That was the period of time my mother had passed away in '85, and I was going through a divorce at the same time, so it was a very traumatic time for me, also, but I'm trying to remember as best I can. I do remember an incident that Steve took a car and drove to Florida, a car from the shop my brother worked at.
Q:	Not your brother's car; is that correct?
A:	No, sir.
Q:	Some customer's car; is that correct?
A:	I don't know if it was a customer's car, or if it was a lot car. I don't know.
Q:	And drove it to Florida; is that correct?
A:	I believe so.
Q:	And wrecked it?
MR. KELLY:	May it please the Court, may we approach?
MR. KELLY:	Mr. Bivens is getting into some more prior bad acts.
GENERAL BIVENS:	Your Honor, they're the ones that were bringing up her character and how she knows him and what he was doing during that time.
MR. KELLY:	That don't authorize him to bring up prior bad acts, and we object to that. We think it's grounds for a mistrial.
THE COURT:	What do you say – that opens the door?
GENERAL BIVENS:	Yes, sir, when they –
THE COURT:	To what?
GENERAL BIVENS:	When they come in and she talks about her

relationship with him and how close he was to these people and how caring he was, and all that, they brought up the character issues on this, Your Honor.

MR. STRAWN: She didn't say he was good.

THE COURT: I'm not sure if – I don't think she was asked that. No more questions about that. Do you want some kind of limited instruction, or do you want to just leave it alone? I can instruct the jury to disregard the question about what happened on the Florida trip, or leave it alone. It's your pleasure, Mr. Kelly.

MR. KELLY: It was actually said that he took a car down there – said he took a car down there. That actually came out. I'm trying to think, quickly, whether or not we need a limited instruction on that, or not.

MR. STRAWN: I'll give an opinion so he'll give the opposite one, but I think Your Honor ought to give a limiting instruction on it.

More discussion ensued and the trial court opted not to provide a limiting instruction. The State asked no further questions of Roxanne Evans. The defendant submits that "a bell, once rung, cannot be unrung." He contends that the trial court should have declared a mistrial as the prejudicial effect of this testimony far outweighed the probative value.

The objectionable testimony was, "I do remember an incident that Steve took a car and drove to Florida, a car from the shop my brother worked at." On direct examination, Ms. Evans related general information relating to the defendant's family life and the fact that the defendant was introverted and eager to please others. We are mindful that this testimony was elicited during the penalty phase of the defendant's trial. Evidence is not excluded at a capital sentencing hearing merely because the evidence is otherwise inadmissible under the Rules of Evidence. See Tenn. Code Ann. § 39-13-204(c); see also State v. Stout, 46 S.W.3d 689, 702 (Tenn. 2001); Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999). Thus, as long as evidence or testimony is relevant to the circumstances of the murder, the aggravating circumstances of the murder, or the mitigating circumstances and has probative value in the determination of punishment, such evidence is admissible. See State v. Teague, 897 S.W.2d 248, 250 (Tenn. 1995); see also State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98 (2000). Evidence regarding the defendant's character and background is likewise admissible regardless of its relevance to any aggravating or mitigating circumstance. See Sims, 45 S.W.3d at 13. The admission of evidence, however, is not without constraints. Evidence may properly be excluded if it is so unduly prejudicial that it renders the trial fundamentally unfair. State v. Burns, 979 S.W.2d 276, 282 (Tenn.1998), cert. denied, 527 U.S. 1039, 119 S. Ct. 2402 (1999). Additionally, the admissibility of evidence ultimately is entrusted to the sound discretion of the trial court. Absent an abuse of that discretion, such rulings will not be reversed on appeal. Reid, 91 S.W.3d at 305; State v. Caughron, 855 S.W.2d

526, 541 (Tenn.), cert. denied, 510 U.S. 979, 114 S. Ct. 475 (1993).

The admissibility of the testimony in question is governed by Rule 405, Tennessee Rules of Evidence. This rule permits inquiry on cross-examination into specific instances of conduct relating to character. Tenn. R. Evid. 405. Before the specific instances of conduct may be admitted, however, the trial court must conduct a hearing outside of the jury's presence to determine "that a reasonable factual basis exists for the inquiry." Id. The court must also conclude "that the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues." Id.

In Sims, 45 S.W.3d at 14, our supreme court was faced with the question of whether section 39-13-204(c) precludes application of Tennessee Rule of Evidence 405 in the penalty phase of a first degree murder trial. The court concluded that section 39-13-204(c) provides trial judges wider discretion than would normally be permitted under the Rules of Evidence and that the trial judges are not required to strictly follow the Tennessee Rules of Evidence in determining whether the State should be allowed to question a defendant's witnesses regarding prior convictions of the defendant. Sims, 45 S.W.3d at 14. Our supreme court adopted the following principles:

> The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

Id.; see also Stout, 46 S.W.3d at 703.

In Sims, the prosecution cross-examined the defendant's mitigation witnesses with the defendant's prior convictions for theft and aggravated burglary. 45 S.W.3d at 7. Our supreme court determined that the prior convictions were relevant to rebut mitigation evidence offered by the defendant and that their probative value was not outweighed by unfair prejudice to the defendant. Id. at 14. Specifically, two of Sims's witnesses testified on direct examination that Sims was not by nature an aggressive person and had to be encouraged to defend himself. Id. The supreme court held the convictions for theft and burglary relevant, although these offenses did not endanger other persons, to rebut the defendant's assertion that he had no violent tendencies. Id. Additionally, because the State did not inquire into the underlying facts of these offenses and because the offenses were already in evidence, the supreme court concluded that any prejudicial effect was outweighed

by the convictions' probative value. Id. Finally, the supreme court advised that a limiting instruction should be given before permitting the jury to consider evidence of prior convictions. Id. Notwithstanding, the high court found that the failure to provide a limiting instruction in this case did not amount to fundamental or prejudicial error. Id.

Similarly, in Stout, 46 S.W.3d at 702, the prosecution cross-examined one of the defendant's mitigation witnesses with the defendant's prior convictions for aggravated burglary, theft, reckless endangerment, and robbery. Our supreme court determined that these prior convictions were relevant to rebut mitigation evidence that the defendant was a "fine, active Christian." Id. at 703. The supreme court further held that the trial court's failure to provide a limiting instruction on the jury's consideration of this evidence was harmless as "it is clear from the record that the prosecution used the evidence to rebut the mitigating evidence, to impeach the defense witness, and not to introduce evidence of a non-statutory aggravating circumstance." Id. at 704.

A review of the record reveals that Ms. Evans, when questioned whether she had "ever seen any exhibition on [the defendant's] part of violent behavior," responded:

> No. I have a memory of Steve as a little child, and he always – he had this little impish grin, just a little elfish grin. He was always very quiet, what I would say was introverted. Of course, back then, I didn't know. I just knew that he was quiet, but he was always very quiet. . . . I learned from his first grade teacher that he was just a joy to have in class. He couldn't do enough for her. . . . I just have a hard time getting the – you know, the memory of him as a little boy. He was very affectionate.

As stated previously, our supreme court has, on prior occasion, held that property offenses, although not specifically a danger to other persons, were relevant to rebut a claim that the defendant does not have violent tendencies. Sims, 45 S.W.3d at 14. Additionally, Crystal St. Clair, another mitigation witness, testified that the defendant "was a caring, giving person. . . . I mean – and he was the type of person that would try to keep trouble down rather than create trouble." Accordingly, we conclude that the trial court did not abuse its discretion in permitting testimony regarding the defendant's act of taking a vehicle to Florida. Likewise, we cannot conclude that the prosecutor engaged in improper conduct. Furthermore, while the trial court should have provided a limiting instruction to the jury, any failure to so instruct was harmless.

B. Testimony of Officer O'Dell

During the guilt phase of the defendant's trial, Union City Police Officer Derrick O'Dell testified for the State. During his direct examination, the following colloquy occurred:

Q:	After Mr. Thacker was arrested, did you, personally, transport him to the Obion County Jail, or sheriff's department?
A:	Yes, sir, I did.

Q:	And did you question him in any manner after he was under arrest?
A:	Only after he made a statement that we did better than the Springfield Police Department.
Q:	Had he been advised of his Miranda rights prior to that time?
A:	Yes, sir. After Officer Simmons handcuffed him, he immediately advised him of his Miranda warning.

This concluded the State's examination of this witness, and the defense declined cross-examination. No contemporaneous objection was entered by the defense. Rather, after the State called its next witness, defense counsel approached the bench, during which the following exchange occurred:

MR. KELLY:	I would think Mr. Bivens needs to prepare his witnesses not to cause a mistrial in this case.
GENERAL BIVENS:	Your Honor, I apologize. That was completely by surprise, and that's why —
MR. STRAWN:	That's why I didn't touch it.
MR. KELLY:	The witness testified that only – he said that, you know, that the Springfield, Missouri Police Department, and it didn't, you know, quite go enough, and we certainly didn't want to –
. . .	
GENERAL BIVENS:	Your Honor, it was – I did not anticipate that.
THE COURT:	You'd better warn them.

The record reflects that the prosecutor was surprised by Officer O'Dell's response about the Springfield police. The question was not asked to elicit any response relating to any prior bad acts or arrests. Finally, considering the defendant's confession that he knew he was wanted in other states, we cannot conclude that this constituted prosecutorial misconduct. Moreover, any prejudice arising from Officer O'Dell's remarks is harmless in light of the remaining evidence.

XI. LIMITATION ON TESTIMONY OF DEFENDANT'S MENTAL CONDITION

Next, the defendant complains that the trial court impermissibly prevented mitigation witness, Dr. Keith Caruso, from fully explaining and discussing the details of his diagnosis of the defendant's mental condition by the threat of allowing the prosecutor to get into alleged crimes in Missouri and Oklahoma.

Prior to Dr. Caruso's testimony, a jury-out hearing was held. During the hearing, the State

expressed concern that Dr. Caruso's opinion was based, in part, on the two prior murders committed in Missouri and Oklahoma. The prosecutor continued that should Dr. Caruso go into the basis of his opinion, the door would be opened regarding the prior murders. The court then warned Dr. Caruso:

> Doctor, what we have before the Court is, is I don't know that it's an objection or it's something that's cautionary from the district attorney general, and that is that your diagnosis, the basis of your diagnosis may deal with information about two prior murders . . . in Oklahoma and in Missouri, which has not been before this jury, if I can make sure that we do everything possible to keep it out. However, if that is the basis of your opinion as to his condition, or part of your basis, and you go into that, then the door is going to be opened. Do you understand?

Dr. Caruso replied affirmatively. Defense counsel assured the court that "we don't need to go into that for him to render his opinion and diagnosis in this case." The following exchange then occurred:

GENERAL BIVENS:	Well, Your Honor, my concern is, is there's other information that's been brought out through other witnesses that are also in that report, and that he can't piecemeal it. He can't say, "I relied on this, and didn't on this."
THE COURT:	What are you talking about, specifically?
GENERAL BIVENS:	Well, just his background, his family history. You know, he can't go into any of that information and then not be subject to be questioned about the other information that was also the basis, Your Honor. He can give his opinion. I'm not saying that. But if he can't go into the background information that's the basis of that opinion without going into all the background information –
MR. KELLY:	In the first place . . . Mr. Bivens has got way more than he's entitled to in the report that's required to be given to him. Even though he has it, he don't need to, contrary to law, take advantage of the situation that he's got more than he ought to have. Secondly, we're not even offering Dr. Caruso's report as an exhibit in this case. . . .
THE COURT:	. . . [N]umber one, if that's his report, they are entitled to it. Number two, what Mr. Bivens is saying is, you can't get in, on a piecemeal basis, the background material, and then, all of a sudden, tell me I can't go into the other background material. However, Mr. Bivens, that's exactly what I'm going

to tell you —

. . .

THE COURT: As far as the material on his family background, I'm going to let them go into that, but if they open the door any other way to the Missouri case and the Oklahoma case, I don't see how that opens the door into going in to the Oklahoma or Missouri case.

GENERAL BIVENS: Your Honor, because it's all set out in the report as what he considered in making his diagnosis . . . and I rely on Rule 705 . . .

THE COURT: So, we're going to get into the law now?

GENERAL BIVENS: Yes, sir, I understand – but that I can cross-examine him about the basis of his report if they go into the basis of his report . . . .They can put him on the stand and they can ask him did he diagnose him as being bipolar, and he can explain what bipolar is, and that diagnosis. But if he starts going into this background material that he used to make that determination, they're opening the door. They can't say, well, we want you to talk about bad childhood as part of your diagnosis, but don't talk about prior murders that were also part of your diagnosis.

MR. STRAWN: Your Honor, he can talk about anything he wants to that is the basis of his opinion. Why can't he talk about – if I say, "Did you take a history as to his childhood –

THE COURT: There's no question he can do that. The question is whether or not –

. . .

THE COURT: – when he does that, is he opening the door to cross-examination about all these other things.

After further discussion on this issue, the trial court opted to place Dr. Caruso on the stand to determine the basis of Dr. Caruso's opinion. Dr. Caruso stated that:

> There were a number of things that I considered, including two interviews that I had with the defendant at Riverbend that totaled seven hours, and then there was a host of materials that were sent to me, including statements from other witnesses, prior legal records, some news clippings, some medical records. I think that about summarizes it.

He continued that the defendant provided a personal history, which included a history of his

childhood. When questioned regarding the murders in Oklahoma and Missouri, Dr. Caruso stated:

> I am aware of those. I think that, in fact, though, those are not the only basis for diagnosing him with a hypomanic episode at the same time.

Dr. Caruso later admitted that these offenses were considered as a "portion" of the basis of his report. The trial court then engaged Dr. Caruso in a discussion:

THE COURT:	Doctor, I guess the question that the Court needs answering is, your diagnosis of the bipolar condition, is it based on all the material in your report, or can your diagnosis be made without the information that you obtained about the two prior homicides?
DR. CARUSO:	I think that – I looked at this question in terms of what did I have supporting this diagnosis, and, in fact, I think probably, in addition to reports from the defendant, probably – and, candidly, one of the points that I raise in my report is that he's had some difficulties with deceitfulness, over the years. I looked for other corroboration, and, in fact, some of the best corroboration was from Kim Bowen . . . his prior medical records . . . and also I believe . . . Harold Ramos . . . .
THE COURT:	Gentlemen, my feeling is – Mr. Bivens, although I think you're probably correct, from strictly an evidentiary standpoint, I am scared to death to allow you or anyone else to go into those prior homicides. So, the questioning on the basis of his opinion will be limited to the histories of Kim Bowen, the employer, and the medical records.

Dr. Caruso then inquired as to whether he would be permitted to include the interviews with the defendant, excluding the events in the other states. The trial court, again noting that the information was more likely than not opening the door to the prior homicides, permitted Dr. Caruso's request, but excluding any reference to the prior homicides. The trial court continued to caution the defendant about opening the door to the prior homicides. Despite the wide latitude afforded the defendant in the trial court's ruling, the defendant, nonetheless, complains that the trial court impermissibly limited Dr. Caruso's testimony.

Dr. Caruso proceeded to testify that he found the defendant to have a number of conditions. He explained the symptoms of the disorders. When Dr. Caruso was asked, "did you determine or discover that the crime for which we're here today . . . was an issue with Mr. Thacker?," Dr. Caruso began to expound upon the cause of the murder of the victim. Specifically, Dr. Caruso related certain instances during the defendant's childhood, many of which were already before the jury from Ms. Evans's testimony. At this point, the trial court interrupted:

THE COURT: Let me stop you just a second, Doctor. I want to see the lawyers up here.

At the following bench conference, the trial court warned:

THE COURT: Number one, the responses are nonresponsive to your questions. Number two, he is rambling, and you're getting real close to going over the line.

The trial court again warned defense counsel that Dr. Caruso must be responsive to the answers.

Although section 39-13-204(c) permits great latitude in the introduction of evidence during the penalty phase of a capital trial, the admissibility of evidence ultimately is entrusted to the sound discretion of the trial court. Reid, 91 S.W.3d at 305. Absent an abuse of that discretion, such rulings will not be reversed on appeal. Id. As recognized by the State both at trial and on appeal, Tennessee Rule of Evidence 705 requires disclosure of the underlying facts or data relied upon by the expert in formulating his opinion. See State v. Hall, 958 S.W.2d 679, 712 (Tenn. 1997). In State v. Hall, the doctor based his evaluation of the defendant, in part, upon an investigator's report. Id. at 712. This Court held, and the supreme court approved, that the prior bad acts of the defendant which were contained in an investigator's report were admissible to impeach the doctor's diagnosis and that the danger of their prejudicial effect did not outweigh their probative value. Id. Thus, in the present case, the trial court ruled more than leniently with regard to the defendant's examination of Dr. Caruso. As the State's brief points out, "a defendant cannot have it both ways." We cannot conclude that the trial court abused its discretion by curtailing the witness's non-responsive answers and by limiting examination to information from Ms. Bowen, Mr. Ramos, previous medical records, and the defendant's childhood history. This issue is without merit.

XII. STATE'S ARGUMENT REGARDING LIFE WITHOUT PAROLE

The defendant asserts that the prosecutor, on more than one occasion, made an incorrect statement of the law to the jury. Specifically, he contends that the prosecutor repeatedly told the jurors that the mitigating factors have to outweigh the aggravating factors beyond a reasonable doubt in order to impose a sentence of life without the possibility of parole. During opening argument at the sentencing phase, the prosecutor remarked:

> [A]t the end, you're going to be asked to make a decision. The judge is going to instruct you that if you find that there are at least one aggravating circumstance and that there are no mitigating circumstances, you have to impose the death penalty. If you find that there are aggravating circumstances and that there are mitigating circumstances and that the aggravating circumstances outweighs, beyond a reasonable doubt, that mitigating circumstance, you impose the death penalty. If you find that those mitigating circumstances do outweigh that aggravator, but there is an aggravator there, beyond a reasonable doubt, but these mitigators outweigh it beyond a reasonable doubt, you impose life without parole. If you find that there are no aggravating circumstances at all, you impose a sentence of life in prison.

Later, during closing argument, the prosecutor stated:

> [R]emember the taker and the giver? Is that mitigating circumstance beyond a reasonable doubt greater than those aggravators? No. Your only choice in this case, with those two aggravators, and if you find a mitigator, but a mitigator that does not outweigh those aggravators beyond a reasonable doubt, is to impose the death penalty.

And, again, in rebuttal closing:

> [W]hat you've got to look at are those aggravators and if you feel there are mitigators there and if you feel that those mitigators outweigh those aggravators.
>
> . . .
>
> You have to find not only that there's mitigating factors to not impose the death penalty, you've got to find that those mitigators outweigh that aggravator. The proof is, beyond a reasonable doubt, they don't.

At the close of argument, defense counsel requested a curative instruction from the court relating to the erroneous statement of law made by the State. The trial court denied the request, stating that any error was cured by the jury charge, which will advise the jury as to the applicable law.

As asserted by the State, the defendant failed to make a contemporaneous objection to the prosecutor's comments. Failure to object to a prosecutor's alleged misconduct during closing argument waives later complaint. State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App.1992). The failure to object to the prosecutor's statements results in waiver on appeal. State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999) (citing Tenn. R. App. P. 36(a)).

Notwithstanding waiver, we note that Tennessee Code Annotated section 39-13-204, provides, in relevant part:

> If the jury unanimously determines that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, the sentence shall be imprisonment for life. . . .
>
> . . .
>
> If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or imprisonment for life. The trial judge shall instruct the jury that, in choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, the jury shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances. . . .
>
> . . .
>
> If the jury unanimously determines that:

(A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and

(B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death.

Tenn. Code Ann. § 39-13-204(f)(1), (2), (g)(1). The trial court instructed the jury in accordance with the statute. The jury is presumed to follow the instructions of the trial court. State v. Walker, 910 S.W.2d 381, 397 (Tenn. 1995), cert. denied, 519 U.S. 826, 117 S. Ct. 88 (1996). Moreover, from the context of the prosecutor's comments, one can reasonably infer that the prosecutor's intent was not to misinform the jurors but merely to emphasize the proof needed to impose a sentence of death, i.e., aggravating circumstances must outweigh mitigating circumstances. We cannot conclude that the improper argument by the State affected the verdict to the defendant's prejudice. This claim is without merit.

XIII. LIMITATION OF DEFENSE TO STATUTORY MITIGATORS

The defendant next complains that the trial court erred in "limiting defense argument of mitigating factors and in taking the mitigating factor 'history of abuse and neglect' out of the charge." During closing argument, the trial court interrupted defense counsel to inquire specifically as to the mitigating factors relied upon by defense counsel. A bench conference followed, at which time the State objected to the "history of abuse and neglect" mitigating circumstance. The following colloquy ensued:

GENERAL BIVENS: Your Honor, I'm going to object to the history of abuse and neglect. He never went into that, never stated that. Dr. Caruso, he simply talked about the bipolar disorder.

MR. STRAWN: He talked about rejection and abandonment. That's abuse.

GENERAL BIVENS: But he never specifically stated that that had anything to do – he said that was even considered in his diagnosis of the mental disturbance or disorder.

THE COURT: I think he's right. I think you can argue it, but as a part of the catchall.

MR. STRAWN: As part of the catchall?

THE COURT: We'll take it out of the charge.

The trial court subsequently instructed the jury as follows regarding the mitigating circumstances:

Tennessee law provides that in arriving at the punishment, the jury shall consider . . . any mitigating circumstances raised by the evidence which shall include, but are not limited to, the following: (1) the crime was committed while the defendant was suffering from extreme mental and emotional disturbance due to his bipolar disorder, hypomanic episode, superimposed upon personality disorder NOS with borderline

> and antisocial traits, particularly exacerbated by feelings of abandonment and anticipated loss. Number 2, the crime was committed while the defendant was suffering from severe mental disease, bipolar disorder, hypomanic episode, which substantially impaired his capacity to control his behavior. Number 3, any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing, that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

(Emphasis added); see Tenn. Code Ann. § 39-13-204(j)(2), (8), (9).

Tennessee Code Annotated section 39-13-204 states in relevant part:

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

Tenn. Code Ann. § 39-13-204(e)(1). This statute requires a trial court to "instruct the jury on nonstatutory mitigating circumstances when raised by the evidence and specifically requested by either the State or the defendant." State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996). However, the right to have the jury instructed on nonstatutory mitigating circumstances is statutory rather than constitutional in nature and thus, the failure to instruct the jury on nonstatutory mitigating circumstances when raised by the evidence is subject to harmless error analysis. State v. Hodges, 944 S.W.2d 346, 351-52 (Tenn. 1997).

The trial court determined that the fact that the defendant suffered from a history of abuse and neglect was not fairly raised by the evidence. Indeed, although evidence was introduced through the defendant's aunt, that the defendant's father did not do much with his children, that his father sent the children to live with his parents, and that the defendant's older sister was often left in charge of her younger siblings, Roxanne Evans further testified that the defendant was very close to his grandfather and that family was very important to the defendant. Although we concede that the defendant's childhood was not perfect, there was no testimony that the defendant was ever abused or neglected during his childhood. Accordingly, we conclude that, because no evidence was presented from which the jury could infer that the defendant was abused or neglected during his childhood, this issue was not fairly raised by the evidence, and the trial court did not err by refusing to specifically so instruct. Notwithstanding, even had the proof established a history of abuse or neglect, any such error was harmless. The record indicates that the trial court instructed the jury to consider

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

> circumstances of the offense favorable to the defendant which is supported by the evidence.

Thus, the instruction expressly informed the jury that it could consider anything to be a mitigating circumstance if it was raised by the evidence. This issue has no merit.

XIV. VICTIM IMPACT TESTIMONY

At the sentencing hearing, the State presented the testimony of Elizabeth Patterson, the wife of the victim. Elizabeth Patterson stated that she and the victim had been married for thirty-five years at the time of his death. The couple had three grown children. Mrs. Patterson related that her husband was her sole source of financial support prior to his murder. Since his death, Mrs. Patterson has had no income, and she had to borrow money to pay for their gravesites. She further explained that she was forced to borrow money until she received the insurance proceeds. Emotionally, Mrs. Patterson stated, "I lost my best friend and companion. And I can't sleep at night in my bed. I sleep on my couch." Mrs. Patterson described her husband as "a good man. He was a good Christian man. He would help anybody out." She proceeded to describe incidents of where her husband would tow people for free, specifically recalling an incident involving an elderly couple stranded on I-55.

The defendant challenges admission of this victim impact evidence on grounds that (1) the testimony of Elizabeth Patterson was unduly prejudicial and (2) that Mrs. Patterson's testimony was admitted prior to evidence of one or more aggravating circumstances being established. The defendant also asserts that the prosecutor improperly argued victim impact during closing argument.

In State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1998), our supreme court held that "victim impact evidence and argument is [not] barred by the federal and state constitutions." See State v. Austin, 87 S.W.3d 447, 463 (Tenn. 2002); State v. Reid, 91 S.W.3d 247, 280 (Tenn. 2002); see also Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991) (holding that the Eighth Amendment erects no *per se* bar against the admission of victim impact evidence and prosecutorial argument); State v. Shepherd, 902 S.W.2d 895, 907 (Tenn.1995) (holding that victim impact evidence and prosecutorial argument not precluded by the Tennessee Constitution). Notwithstanding the holding that victim impact evidence is admissible under Tennessee's death penalty sentencing scheme, the introduction of such evidence is not unrestricted. Nesbit, 978 S.W.2d at 891; see also Austin, 87 S.W.3d at 463.

> Although victim impact evidence is admissible, such evidence generally should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.

Nesbit, 978 S.W.2d at 891; see also Reid, 91 S.W.3d at 280. Victim impact evidence may not be

introduced if (1) it is so unduly prejudicial that it renders the trial fundamentally unfair; or (2) its probative value is substantially outweighed by its prejudicial impact. See Nesbit, 978 S.W.2d at 891; see also Austin, 87 S.W.3d at 463; State v. Morris, 24 S.W.3d 788, 813 (Tenn. 2000) (appendix), cert. denied, 521 U.S. 1082, 121 S. Ct. 786 (2001). There is no bright-line test in determining the admissibility of victim impact evidence; thus, the admissibility must be determined on a case-by-case basis. Nesbit, 978 S.W.2d at 891. Mrs. Patterson testified regarding her marriage to the victim, her financial dependence upon him, the emotional impact of his death upon her, and what type of person the victim was. This is the type of testimony contemplated by Nesbit. Accordingly, Mrs. Patterson's testimony was not unduly prejudicial.

To enable the trial court to supervise the admission of victim impact testimony, our supreme court has established certain procedural guidelines which must be followed before victim impact evidence may be admitted by the trial court. First, the State *must* notify the trial court of its intent to produce victim impact evidence. Nesbit, 978 S.W.2d at 891; Austin, 873 S.W.3d at 463. Second, upon receiving the State's notification, the trial court *must* hold a hearing outside the presence of the jury to determine the admissibility of the evidence. Nesbit, 978 S.W.2d at 891; Austin, 873 S.W.3d at 463. Finally, the trial court *should not* permit introduction of such evidence until the court determines that evidence of one or more aggravators is already present in the record. Nesbit, 978 S.W.2d at 891; Austin, 873 S.W.3d at 463. Although the admission of unduly prejudicial victim impact evidence may implicate due process concerns, the procedure established in Nesbit is not constitutionally mandated. Austin, 87 S.W.3d at 463.

In the present case, the State notified the trial court of its intent to introduce victim impact evidence, and the trial court conducted a jury-out hearing to determine the admissibility of the evidence. However, the trial court failed to make a finding that proof of an aggravating circumstance existed in the record. The requirement that proof exists in the record of an aggravating circumstance before the presentation of victim impact evidence lessens the risk that the admission of unduly prejudicial victim impact evidence will render the trial fundamentally unfair. Austin, 87 S.W.3d at 464-65. Although the trial court failed to specifically find that proof existed in the record of an aggravating circumstance, Mrs. Patterson was the State's final witness to testify at the sentencing hearing. Accordingly, the proof of an aggravating circumstance preceded her testimony. The failure of the trial court to specifically make this finding on the record is harmless. Moreover, the defendant's argument that Mrs. Patterson was the first witness at the trial to testify and, therefore, no proof of an aggravator existed is without merit. Mrs. Patterson's testimony during the guilt phase is not "victim impact testimony."

Finally, the defendant asserts that the prosecutor engaged in "inflammatory rhetoric" during his closing argument at the sentencing phase. He argues that such "inflammatory rhetoric" "diverts the jury's attention from its proper role or invites an irrational, purely emotional response to the evidence" and is not permissible and "should not be tolerated."

The prosecutor began closing argument at the sentencing phase stating:

Ladies and Gentlemen, as I lay in bed last night with my wife of twenty-five years,

> I though about Liz Patterson. I thought about what she testified to, that she doesn't sleep in her bed anymore. She sleeps on the couch, because her husband of all those years is gone. I'm sad, and I felt sorry for Liz Patterson.

This was the only reference to Mrs. Patterson's testimony in approximately eight pages of closing argument made by the prosecutor. Initially, this Court acknowledges that the defendant failed to contemporaneously object to the prosecutor's statement. The defendant's failure to object to these comments constitutes waiver on appeal. See State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999) (citing Tenn. R. App. P. 36(a)); 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) (failure to object to prosecutor's alleged misconduct during closing argument waives later complaint).

Notwithstanding waiver, while victim impact argument by the prosecution about the evidence is permissible, restraint should be exercised. This Court has consistently cautioned the State against engaging in victim impact argument which is little more than an appeal to the emotions of the jurors, as such argument may be unduly prejudicial. Nesbit, 978 S.W.2d at 891; State v. Shepherd, 902 S.W.2d 895, 907 (Tenn. 1995) ("We caution the State to utilize such arguments advisedly."); State v. Bigbee, 885 S.W.2d 797, 808 (Tenn. 1994) ("[T]he State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury."). Indeed, prosecuting attorneys must remember that jurors are to base their decision upon a reasoned moral response to the evidence. See California v. Brown, 479 U.S. 538, 542-43, 107 S. Ct. 837, 839-40 (1987). The jury should not be given the impression that emotion may reign over reason. In each case, the trial court must strike a careful balance. Nesbit, 978 S.W.2d at 892. Argument on relevant, though emotional, considerations is permissible, but inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely emotional response to the evidence is not permissible and should not be tolerated by the trial court. Id. We cannot conclude that the brief statement made by the prosecutor constituted improper "inflammatory rhetoric." The statement was a brief reflection on the testimony of Mrs. Patterson and how her life has changed since her husband's murder. Although the statement may be considered emotional, we conclude that the statement was within the realm of acceptable argument.

Moreover, the jurors were properly instructed by the trial court regarding the function of victim impact evidence and that they were to apply the law as provided by the court. The jury is presumed to follow the instructions of the court. See State v. Walker, 910 S.W.2d 381, 397 (Tenn.1995), cert. Denied, 519 U.S. 826, 117 S. Ct. 88 (1996). With consideration of this mischaracterization of the function of victim impact testimony, the curative measure of the trial court, and the strength of the aggravating circumstances proven by the State, we conclude this issue is without merit.

XV. AGGRAVATING CIRCUMSTANCE (i)(6)

The defendant next contends that the trial court erred in permitting the State to rely upon aggravating circumstance (i)(6). Aggravating circumstance (i)(6) provides that the "murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution

of the defendant or another." Tenn. Code Ann. § 39-13-204(i)(6). The defendant complains that it was error to permit the State to rely upon evidence that the defendant was fleeing from pending charges in another jurisdiction which had nothing to do with the instant cause involving the death of the victim.

During the penalty phase of the defendant's trial, the State presented the testimony of Sheriff Mike Parson. Sheriff Parson testified that, on January 2, 2000, there were outstanding warrants for the arrest of Steven Ray Thacker in Polk County, Missouri. Jim Porter, a criminal investigator with the Dyersburg Police Department, related that, during the statement made by the defendant, the defendant stated that he "knew [he] was wanted in other states, so [he] just stabbed him and took off." No other evidence concerning prior offenses was introduced by the State.

Our supreme court has previously held that to establish the applicability of this aggravating circumstance, the State must prove that avoidance of prosecution or arrest was one of the purposes motivating the killing. State v. Bush, 942 S.W.2d 489, 504 (Tenn. 1997); State v. Smith, 868 S.W.2d 561, 581 (Tenn. 1993). There is no requirement that this factor be established with prior convictions. See, e.g., Smith, 868 S.W.2d at 581 (factor applied in triple homicide where sons allegedly killed to prevent disclosure of mother's murder). Rather, given the nature of the aggravator, it would be almost impossible to ever prove the factor with "prior convictions." In this regard, we acknowledge that the defendant's hypothesis, "punishment in a capital murder case should not be based upon the speculation and conjecture of possible future convictions of other crimes!" is impractical and unrealistic. Moreover, the testimony supporting the (i)(6) aggravator was well-restrained and revealed neither the nature nor the circumstances of the offenses/warrants. The State must be permitted to prove its case. Accordingly, this issue is without merit.

XVI. CONSTITUTIONALITY OF TENNESSEE DEATH PENALTY STATUTES

The defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, sections 8, 9, 16, and 17, and Article II, section 2 of the Tennessee Constitution are the following:

1. The requirement in Tennessee Code Annotated section 39-13-204(f) and (g) that the additional element of "aggravating circumstance" be proven beyond a reasonable doubt in a second proceeding after a conviction of first degree murder has in effect given the defendant a life sentence renders the statute unconstitutional as violating protections against double jeopardy.

This argument has been rejected by our supreme court. See Houston v. State, 593 S.W.2d 267, 276 (Tenn. 1980), overruled on other grounds by State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

2. Tennessee Code Annotated section 39-13-204(c) permits the introduction of hearsay in the second stage of proceedings as evidence in the State's proof of aggravation or rebuttal of mitigation and thus violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution.

As our supreme court has noted many times, hearsay is admissible in first degree murder sentencing hearings. See Austin, 87 S.W.3d at 459; State v. Odom, 928 S.W.2d 18, 28 (Tenn.1996).

3. The sentencing system provided in Tennessee Code Annotated section 39-13-204 is so vague, broad, and internally contradictory that it results in the arbitrary and capricious imposition of the death penalty in Tennessee in violation of the United States and Tennessee Constitutions.

This argument was rejected in State v. Johnson, 762 S.W.2d 110, 119 (Tenn. 1988), cert denied, 489 U.S. 1091, 109 S. Ct. 1559 (1989).

4. The infliction of death as a punishment for a conviction for murder is without justification and so severe as to constitute "cruel and unusual punishment" prohibited by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

The defendant's argument that the death penalty by any means constitutes cruel and unusual punishment in violation of the state and federal constitutions has been repeatedly rejected by our appellate courts. See State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233 (2001); State v. Pike, 978 S.W.2d 904, 925 (Tenn. 1998) cert. denied, 526 U.S. 1147, 119 S. Ct. 2025 (1999); State v. Nesbit, 978 S.W.2d 872, 902-03 (Tenn. 1998) cert. denied, 526 U.S. 1052, 119 S. Ct. 1359 (1999); State v. Vann, 976 S.W.2d 93, 118 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467 (1999); State v. Blanton, 975 S.W.2d 269, 286 (Tenn. 1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118 (1999); State v. Cribbs, 967 S.W.2d 773, 796 (Tenn.) cert. denied, 525 U.S. 932, 119 S. Ct. 343 (1998); State v. Cauthern, 967 S.W.2d 726, 751 (Tenn.) cert. denied, 525 U.S. 967, 119 S. Ct. 414 (1998).

5. The death penalty statute fails to sufficiently narrow the population of defendants convicted of first degree murder, who are eligible for a sentence of death in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

Although the defendant fails to assert what aggravating circumstances fail to narrow the class of death-eligible defendants, with respect to the (i)(6) and (i)(7) aggravators applicable in the case *sub judice*, our supreme court has rejected such a claim on previous occasions. See Vann, 976 S.W.2d at 117-118 (appendix); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).

6. The death penalty statute fails to sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This argument was rejected by State v. Smith, 857 S.W.2d 1, 21-22 (Tenn. 1993); see also Franklin v. Lynaugh, 487 U.S. 164, 178-80, 108 S. Ct. 2320, 2330 (1988); State v. Hurley, 876 S.W.2d 57, 69 (Tenn. 1993)

7. The death penalty statute fails to sufficiently limit the exercise of the jury's discretion by mandating the jury to impose a sentence of death if it finds the aggravating circumstances outweigh the mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This argument has previously been considered and specifically rejected by the Tennessee Supreme Court. See Smith, 857 S.W.2d at 22 (holding that Tennessee's death penalty statutes "do[ ] not in any way constitutionally deprive the sentencer of the discretion mandated by the individualized sentence requirements of the constitution").

8. The death penalty statutes fail to require the jury to make the ultimate determination that death is appropriate in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This argument has likewise been rejected by the supreme court. See State v. Hall, 958 S.W.2d 679, 718 (Tenn. 1997); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); Smith, 857 S.W.2d at 22.

9. The death penalty statutes fail to inform the jury of its ability to impose a life sentence out of mercy in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

Our appellate courts have consistently rejected the argument that the "mercy instruction" is required at a capital sentencing hearing. See Cauthern, 967 S.W.2d at 749; State v. Bigbee, 885 S.W.2d 797, 813-14 (Tenn.1994); State v. Cazes, 875 S.W.2d 253, 269 n.6 (Tenn. 1994), cert. denied, 513 U.S. 1086, 115 S. Ct. 743 (1995).

10. The death penalty statutes provide no requirement that the jury make findings of fact as to the presence or absence of mitigating circumstances, thereby preventing effective review on appeal in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This claim was rejected in Cazes, 875 S.W.2d at 268-69.

11. The death penalty statutes prohibit the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8, 9, 10, and 16 of the Tennessee Constitution.

Our supreme court has repeatedly rejected this argument. See Cribbs, 967 S.W.2d at 796 (appendix); Hall, 958 S.W.2d at 718; Brimmer, 876 S.W.2d at 87.

12. The death penalty statute allows the State to make final closing arguments to the jury in the penalty phase in violation of the defendant's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution.

This claim has been rejected by our supreme court. Brimmer, 876 S.W.2d at 87 n.5; State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993).

XVII. REVIEW PURSUANT TO TENNESSEE CODE ANNOTATED SECTION 39-13-206(c)

For a reviewing court to affirm the imposition of a death sentence, Tennessee Code

Annotated section 39-13-206(c)(1) requires a determination that:

(1) the sentence was not imposed in an arbitrary fashion;
(2) the evidence supports the jury's finding of statutory aggravating circumstance(s);
(3) the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and
(4) the sentence is not excessive or disproportionate to the penalty imposed in similar cases.

Tenn. Code Ann. § 39-13-206(c)(1). The sentencing phase in the present case was conducted pursuant to the procedure established in the applicable statutory provisions and rules of criminal procedure. We conclude that the sentence of death, therefore, was not imposed in an arbitrary fashion. Moreover, the evidence supports aggravating circumstances (i)(6), the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another, and (i)(7), the murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Additionally, this Court is required by Tennessee Code Annotated section 39-13-206(c)(1)(D) and under the mandates of State v. Bland, 958 S.W.2d 651, 661-674 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536 (1998), to consider whether the defendant's sentence of death is disproportionate to the penalty imposed in similar cases. See State v. Godsey, 60 S.W.3d 759 (Tenn. 2001). The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "disproportionate to the punishment imposed on others convicted of the same crime." Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 662 (quoting Pulley v. Harris, 465 U.S. 37, 42-43, 104 S. Ct. 871, 875 (1984))). If a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed, then the sentence is disproportionate." Stout, 46 S.W.3d at 706 (citations omitted).

In conducting our proportionality review, this Court must compare the present case with cases involving similar defendants and similar crimes. See Id.; see also Terry v. State, 46 S.W.3d 147, 163 (Tenn. 2001), cert. denied, 534 U.S. 1023, 122 S. Ct. 553 (2001). We select only from those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. See State v. Carruthers, 35 S.W.3d 516, 570 (Tenn. 2000), cert. denied, 533 U.S. 953, 121 S. Ct. 2600 (2001). We begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. See Terry, 46 S.W.3d at 163 (citing State v. Hall, 958 S.W.2d 679, 799 (Tenn.), cert. denied, 524 U.S. 941, 118 S. Ct. 2348 (1998)). This presumption applies only if the sentencing procedures focus discretion on the "'particularized nature of the crime and the particularized characteristics of the individual defendant.'" Terry, 46 S.W.3d at 163 (citing McCleskey v. Kemp, 481 U.S. 279, 308, 107 S. Ct. 1756 (1987) (quoting Gregg v. Georgia, 428 U.S.

153, 206, 96 S. Ct. 2909 (1976))).

Applying this approach, this Court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. See Terry, 46 S.W.3d at 164. Regarding the circumstances of the crime itself, numerous factors are considered including: (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 provocation, (7) the absence or presence of premeditation, (8) the absence or presence of justification, and (9) the injury to and effect on non-decedent victims. Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 667); see also Terry, 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the defendant, including: (1) prior criminal record, (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. Stout, 46 S.W.3d at 706; Terry, 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." Terry, 46 S.W.3d at 164. Accordingly, there is no mathematical or scientific formula to be employed. Thus, our function is not to limit our comparison to those cases where a death sentence "is perfectly symmetrical," but rather, our objective is only to "identify and to invalidate the aberrant death sentence." Id. (citing Bland, 958 S.W.2d at 665).

The circumstances surrounding the murder in light of the relevant and comparative factors reveal that the defendant was having car trouble. He contacted the victim to tow the vehicle to his garage. At the garage, the defendant gave the victim the credit card of Forrest Boyd in an attempt to pay for the tow. The defendant knew that his possession of Mr. Boyd's credit card was unauthorized. While the victim attempted to get approval for the credit card charge, the defendant stabbed the victim from behind, because "he knew he was wanted in other states." The defendant then drove off in the victim's tow truck because his vehicle, also belonging to Boyd, was still attached. The defendant, after moving the wrecker off the property, returned to the garage and "drug [Patterson] into the building, and then [he] took off from there and got the tow truck and drove out into the country." The defendant later traded Boyd's vehicle for a Camaro, but that vehicle had problems so he took it back. He ultimately ended up with a Pontiac 6000. Shortly after the murder, the defendant went to a local Wendy's restaurant and purchased a sandwich. He then drove to Union City and checked into a room at the Super 8 Motel. He admitted to taking the victim's wallet and handgun from his person after he pulled his body back into the service station bay.

Evidence was presented establishing that the defendant's parents divorced when he was young. His mother was unable to care for him, and his two sisters and the children were sent to live with their father. Because of his father's new wife, the children were sent to live with their grandparents. Numerous witnesses testified regarding the defendant's character as an adult. Many

noted his odd behavior. Dr. Keith Caruso testified that the defendant has bipolar disorder and that persons with this illness may be very excitable, irritable, very impulsive, have tremendous amounts of energy, feel very agitated, etc. Dr. Caruso also stated that the defendant has a personality disorder with borderline and antisocial traits. He believed that at the time of this crime, the defendant was suffering from a hypomanic episode; that bipolar disorder is a severe mental disease; and that the defendant was also suffering from extreme mental or emotional disturbance at the time of this crime.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. See, e.g., State v. Reid, 91 S.W.3d 247 (Tenn. 2002), imposing the death penalty where the defendant shot two victims during a robbery upon finding aggravating circumstances (i)(2), (i)(6), and (i)(7), despite substantial evidence of the defendant's troubled childhood.

State v. Stout, 46 S.W.3d 689 (Tenn. 2001), the defendant and three co-defendants abducted a woman from her driveway, forced her into the backseat of her car at gunpoint, drove her to an isolated location, and shot her once in the head. Id. at 693-99. After taking a suitcase from the victim's car, the defendant and one of his accomplices left the area, leaving the victim behind. Id. at 693. The defendant was convicted of first degree felony murder, especially aggravated kidnapping, and especially aggravated robbery. Id. at 692. He was sentenced to death on the basis of three aggravating circumstances: (1) that he had prior violent felony convictions, (2) that he had committed the murder to avoid arrest and prosecution, and (3) that he committed the murder while committing robbery or kidnapping. Id. at 696.

State v. Sims, 45 S.W.3d 1 (Tenn. 2001), imposing the death penalty upon finding aggravating circumstances (i)(2), (i)(6) and (i)(7), where the twenty-four-year-old defendant shot the victim in the head and other parts of the body during a burglary.

State v. Hall, 976 S.W.2d 121 (Tenn. 1998), imposing the death penalty upon finding aggravating circumstances (i)(2), (i)(6) and (i)(7), where the defendants murdered their victims by shooting and stabbing them and stole the victims' automobile.

State v. Bush, 942 S.W.2d 489 (Tenn. 1997), finding (i)(5) and (i)(6) aggravating circumstances and imposing death, despite evidence that defendant had troubled childhood and mental disease or defect.

State v. Bates, 804 S.W.2d 868 (Tenn. 1991), the defendant pled guilty to first degree murder and grand larceny and was sentenced to death. Id. at 871, 883. The defendant was on escape status from Kentucky when he abducted the victim, a young woman, as she jogged near an interstate exit. Id. at 872. He took her into some nearby woods, tied her to a tree, gagged her, and shot her once in the head. Id. He then hid her body and stole her car and traveler's checks. Id. He eventually confessed to the crimes. Id. at 873. The jury found three aggravating circumstances: that the defendant had prior convictions for violent felonies, that he killed the victim

to avoid his prosecution for his escape and the theft of her car, and that he committed the murder while kidnapping and robbing the victim. Id. at 882.

State v. Carter, 714 S.W.2d 241 (Tenn. 1986), the defendant and his accomplice abducted a man at an interstate rest stop, shot him to death, rolled his body over a cliff, and stole his pick-up truck. Id. at 243. The defendant was convicted of first degree murder and sentenced to death. Id. at 242. The jury found two aggravating circumstances: that the defendant committed the murder to avoid or prevent his arrest and/or prosecution, and that he committed the murder while committing larceny and kidnapping. Id.

State v. Melson, 638 S.W.2d 342 (Tenn. 1982). The death penalty was upheld, based on aggravating circumstances (i)(5) and (i)(6), where the defendant used a hammer to repeatedly beat victim in head. The victim had attempted to defend herself during ordeal. The only motive was victim's discovery of the defendant's theft. Id. at 367. The defendant had no significant prior history of criminal activity. Id. at 368.

Our review of these cases reveals that the sentence of death imposed upon the defendant is proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and reach the decision that the sentence of death was not imposed arbitrarily, that the evidence supports the finding of the (i)(6) and (i)(7) aggravators, that the evidence supports the jury's finding that the aggravating circumstance outweighs mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

Conclusion

In accordance with the mandate of Tennessee Code Annotated section 39-13-206(c)(1), and the principles adopted in prior decisions of the Tennessee Supreme Court and this Court, we have considered the entire record in this cause and find the sentence of death was not imposed in any arbitrary fashion, the evidence supports the jury's finding of the statutory aggravating circumstances, and the evidence supports the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, we affirm the sentence of death imposed by the trial court.

From a purely procedural standpoint, we observe that the trial court failed to note on the judgment that it was merging the defendant's two first degree murder convictions. Accordingly, the judgment of first degree murder entered by the trial court is modified to show that the defendant's convictions for first degree premeditated murder and first degree felony murder are merged into one judgment.

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JOHN EVERETT WILLIAMS, JUDGE