APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 16, 2004 Session

STATE OF TENNESSEE v. JONATHAN WESLEY STEPHENSON

Appeal from the Circuit Court for Cocke County
No. 5012 & 5040 Ben W. Hooper, II, Judge

No. E2003-01091-CCA-R3-DD - Filed March 9, 2005

The Defendant, Jonathan Wesley Stephenson, appeals as of right his sentence of death. In 1990, he was convicted of first degree murder and conspiracy to commit first degree murder in the death of his wife. His conviction for murder was based on his role in the killing under the criminal responsibility statute. The jury sentenced the Defendant to death for the murder and the trial court imposed a consecutive sentence of twenty-five years in prison for the conspiracy. On direct appeal, our supreme court affirmed both convictions, but remanded for resentencing because of an error which nullified the jury's verdict. See State v. Stephenson, 878 S.W. 2d 530, 534 (Tenn. 1994). On remand, by agreement of the parties, the Defendant was sentenced to life without parole for the murder and to sixty years for the conspiracy. In 1998, the Defendant filed a petition for writ of habeas corpus in the Circuit Court for Johnson County in which he challenged his life sentence. On appeal, this court affirmed the trial court's dismissal of the petition. See Jonathan Stephenson v. Howard Carlton, Warden, No. 03C01-9807-CR-00255, 1999 WL 318835 (Tenn. Crim. App., Knoxville, May 19, 1999), app. granted (Tenn. Sept. 20, 1999). On further review, the Tennessee Supreme Court concluded that the Defendant's life sentence for the murder conviction was illegal because life without parole was not a statutorily authorized punishment at the time of the offense. The Court remanded the case for further proceedings. See Stephenson v. Carlton, 28 S.W. 3d 910, 912 (Tenn. 2000). After his life sentence was declared void, resentencing proceedings began in the Circuit Court for Cocke County. At the conclusion of the proof, the jury found as the sole aggravating circumstance that the "defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration." Tenn. Code Ann. §39-13-204(i)(4). The jury further found that the mitigating circumstances did not outweigh the aggravating circumstance and imposed the death penalty. The Defendant now appeals. We affirm the judgment of the trial court.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Carl R. Ogle, Jr., Jefferson City, Tennessee, John E. Herbison, Nashville, Tennessee, and Tim S. Moore, Newport, Tennessee, for the appellant, Jonathan Wesley Stephenson.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Angela M. Gregory, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and James B. Dunn, Assistant District Attorney General, for the appellee, State of Tennessee.

[DELETED ISSUES]

OPINION

[DELETED RE-SENTENCING HEARING]

Analysis

[DELETED I. DOUBLE JEOPARDY]

[DELETED II. AGGRAVATING CIRCUMSTANCES UNDER APPRENDI V. NEW JERSEY]

[DELETED III. MOTION TO SUPPRESS]

[DELETED IV. TRIAL TESTIMONY OF ABSENT FORMER WITNESSES]

V. Admission of Rifle

The Defendant argues that because neither the cause nor the manner of the victim's death was disputed at sentencing, the admission of the rifle owned by Ralph Thompson served only to inflame the jury and prejudice it against the Defendant. He contends that the trial court erred in failing to balance the probative value against the prejudicial effect of introducing the rifle into evidence.

Tennessee Code Annotated section 39-13-204(c) provides for the admission of evidence in a capital sentencing proceeding as follows:

> [E]vidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish

> or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence . . . .

The issue of a Defendant's guilt or innocence is not relevant at a resentencing proceeding. See State v. Hartman, 703 S.W. 2d 106 (Tenn. 1985). "At a resentencing hearing, both the State and Defendant are entitled to offer evidence relating to the circumstances of the crime so that the sentencing jury will have essential background information 'to ensure that the jury acts from a base of knowledge in sentencing the Defendant.'" State v. Adkins, 725 S.W. 2d 660, 663 (Tenn. 1987) (quoting State v. Teague, 680 S.W.2d 785, 788 (Tenn.1984)).

In the instant case, the sentencing jury was not the same jury which convicted the Defendant and was familiar with the nature and circumstances of the Defendant's crime only through the proof presented at the resentencing hearing. The rifle supported the testimony given by Dr. Blake as to the cause of death and the nature of the murder. As to the circumstances surrounding the murder, Agent Caldwell testified that the rifle was recovered from the home of Ralph Thompson and smelled as though it had been recently cleaned. The rifle thus served to connect the Defendant, who admitted in his statement to having hired Ralph Thompson to kill his wife, with Thompson. For his part, although Thompson denied killing the victim, he admitted owning the rifle and shooting it on the night of the murder. The rifle was admissible to show the nature and circumstances of the crime. This issue is without merit.

VI. Polygraph Test

During his testimony at sentencing, Agent Davenport read from the report he made some thirteen years earlier during his investigation of the Defendant's case. In testifying from the report, Agent Davenport noted that the Defendant had twice offered to take a polygraph test. The first reference occurred as Agent Davenport read the conclusion of his initial interview with the Defendant:

> Stephenson stated that he had no objection to us looking at his truck or taking anything out of it. Stated he hadn't shot his shotgun in the past month or so.
>
> He stated that he did not know anyone that would have killed his wife. Stephenson also agreed to take a polygraph test.

The defense did not object to this testimony. Continuing to read from his investigation report, Agent Davenport testified that at the conclusion of his second interview, "Stephenson stated that he was still willing to take a polygraph test." In response, the defense immediately moved for a mistrial. The court denied the motion and contemporaneously instructed the jury as follows:

> Ladies and Gentleman of the jury, I think it's been mentioned, a polygraph test, in the reading of these reports.

> Results of polygraph tests are absolutely inadmissible. The mere fact that the word has been mentioned on two occasions, I will instruct you not to draw any inference at all from that. None whatsoever, just disregard that statement and for the primary reason polygraph test results are totally inadmissible.

The Defendant asserts that Agent Davenport was reading from a previously prepared document with the intended purpose of putting polygraph evidence before the jury. He urges this Court not to countenance such "improper tactics" by the prosecution.

"[P]olygraph examination results, testimony on such results, or testimony regarding a Defendant's willingness or refusal to submit to a polygraph examination is not admissible during capital or non-capital sentencing hearings." State v. Pierce, 138 S.W. 3d 820, 826 (Tenn. 2004). In this case, the transcript reflects that the references made by the State's witness to the Defendant's offers to take a polygraph test were not elicited by the prosecutor's particular line of questioning. Agent Davenport was asked, based on his investigation report, what the Defendant told him "in regards to that murder that evening" and what the Defendant said at his second interview. Regarding the admissibility of incompetent evidence, "the correct practice is to reject such evidence at once, and not permit it to go to the jury." Stokes v. State, 64 Tenn. 619, 621 (1875). Any potential error, however, resulting from unsolicited testimony that offers otherwise inadmissible testimony may be cured by a proper instruction to the jury to disregard the comment. See State v. West, 767 S.W.2d 387, 397 (Tenn. 1989); State v. Foster, 755 S.W.2d 846, 849 (Tenn. Crim. App. 1988). In response to the motion for mistrial, the trial court promptly instructed the jury to give no consideration, "none whatsoever," to the references to polygraph testing. This court concludes that the trial court took proper corrective action and did not err in refusing to grant a mistrial. This issue is without merit.

VII. Testimony about Victim's Ring

The Defendant submits that the trial court erred in allowing the admission of testimony about a ring that the Defendant had given to his girlfriend, Julie Webb. The Defendant argues that the testimony concerning the ring, "obviously intended to suggest that the Defendant had stolen the ring from his young son," was not relevant to either an aggravating circumstance or any mitigating factors at sentencing.

At the conclusion of Webb's testimony, the State sought to introduce the ring into evidence. The trial court sustained the Defendant's objection, but noted the possibility that the ring could be used in rebuttal. Thereafter, through cross-examination, the defense elicited testimony from Detective Caldwell that he was not aware of any "criminal record" that the Defendant had as a result of his investigation. The defense elicited further, similar testimony from Agent Davenport:

> Q: [Mr. Ogle]: I know you indicated, Sheriff, that Mr. Stephenson told you he didn't have any criminal arrests, or anything like that. I take it you didn't take his word for that, you checked it, did you not?
> A: [Davenport]: I believe I did.
> Q: And you found no criminal background on Mr. Stephenson whatsoever?

A: I don't remember any, Mr. Ogle. I don't remember any.
Q: Certainly none reflected in your file, is there?
A: I can't find a criminal record. I don't remember a criminal record on Mr. Stephenson.
Q: And as general procedure, that's something you would check during an investigation?
A: That's correct.
Q: And if there were a criminal history that could be significant as far as the case is concerned, is that true?

Gen. Schmutzer: Your Honor, we'll stipulate we don't have a criminal history.

Based on the testimony of both Detective Caldwell and Agent Davenport regarding the lack of the Defendant's criminal history, the State again sought to introduce the ring. The trial court noted that the State's stipulation had not come until several questions regarding the lack of a criminal background had been asked and answered and ruled that the defense had "opened the door" through its questioning of these State's witnesses. Julie Webb was recalled and testified that the Defendant gave the ring to her in November 1989, and the ring was introduced for identification purposes.

Evidence relevant to the issue of punishment and therefore admissible at a capital sentencing hearing includes "any evidence tending to establish or rebut any mitigating factors." Tenn. Code Ann. § 39-13-204(c). "'Rebutting evidence' is that which tends to explain or controvert evidence produced by an adverse party." Cozzolino v. State, 584 S.W. 2d at 765, 768 (Tenn. 1979) (citing State v. Anderson, 159 N.W.2d 809 (Iowa 1968); Hutchinson v. Shaheen, 390 N.Y.S.2d 317 (1976)). In this case, the Defendant gave notice that he intended to rely on the fact that he had "no significant prior record." See Tenn. Code Ann. § 39-13-204(j)(1). At the hearing, the Defendant then pursued a particular line of questioning with two State's witnesses which was designed to and did in fact support this mitigating factor. The State was entitled to offer proof in rebuttal. The testimony of the victim's father and the Defendant's girlfriend established that the Defendant had taken a ring belonging to his young son and given it to his girlfriend. The fact that the Defendant had not been convicted or even arrested for this offense is irrelevant. As the State correctly notes, when the Defendant relies on the Tennessee Code Annotated section 39-13-204(j)(1) statutory mitigating factor, "he inevitably becomes subject to rebuttal evidence offered by the prosecution showing prior criminal activity. Neither the prosecution nor the defense is limited under this statutory provision to proof of prior convictions." State v. Matson, 666 S.W. 2d 41, 44 (Tenn. 1984). This issue is without merit.

VIII. Testimony Suggesting Lack of Remorse

The State elicited testimony that the Defendant had shown no remorse for the murder of his wife. The victim's father, for example, was asked whether the Defendant had "ever expressed to you and your wife any remorse or sorrow of having murdered her?" Mr. Saylor responded, "None whatsoever." Similar, though less direct, testimony was given by witnesses Wade Tate, Jack Sallie, and Judy Hyder. During a bench conference after the last of these witnesses had been asked whether

the Defendant had ever "sought any counseling over remorse for his wife's death," defense counsel argued that "if he's asking about pastoral counseling, those discussions are privileged." The court responded that it assumed the defense had waived the privilege by calling the witness. Defense counsel further stated:

> While we're up here, in order to preserve the record, I understand Your Honor's ruling on the questions about remorse, but to preserve the record I believe we need to make a motion to strike all those references.
>
> The presence of remorse can be a mitigating factor, but we've not advanced that. The absence of remorse is not an aggravating factor. And this Cozzolino case says you can't rebut a proposition that's not been advanced. So, it's not relevant [to] punishment.

During closing argument, the prosecutor twice referred to the Defendant's apparent lack of remorse for his crime. First, he stated:

> But I submit to you there's one thing that cuts against this man having changed and become a Christian, and that is simply nowhere in this record, nowhere from that witness stand have you heard one person say that this Defendant has shown any remorse or any sorrow over the death of his wife, over what he has done. None.

The prosecutor further argued:

> Has he at any time ever shown any remorse? No. Well, I take that back. Probably the closest thing to it was that very night when [he] told Julie Webb, "I didn't love her but I'm going to miss the bitch." That was about the closest thing he's ever come to showing any sorrow or remorse for taking her life.

Before this Court, the Defendant asserts that by allowing such testimony and argument, the trial court erroneously permitted the State to interject a non-statutory aggravating circumstance into the proceeding. The State counters that the Defendant has waived this issue. In the alternative, the State contends that evidence regarding lack of remorse was proper rebuttal evidence to the Defendant's evidence of his reformed character and religious conversion while in prison.

Examining the closing argument first, this Court observes that the Defendant made no objection to the prosecutor's remarks. "It is well settled that without a contemporaneous objection to a prosecutor's statements, the error is waived." State v. Farmer, 927 S.W. 2d 582, 591 (Tenn. Crim. App. 1996) (citing State v. Sutton, 562 S.W.2d 820, 825 (Tenn. 1978); State v. Compton, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982)).

With respect to the testimony concerning the Defendant's lack of a showing of remorse, the Defendant also failed to contemporaneously object to the prosecutor's questions. In fact, the Defendant only moved to strike references to remorse after the fourth witness had essentially

completed her testimony. Nonetheless considering the issue, it lacks merit. As discussed in the previous section, the sentencing statute generally permits all evidence deemed relevant to the issue of punishment to be admitted in a capital sentencing proceeding. The prosecution is expressly permitted to rebut any mitigating factors relied on by a Defendant. See State v. Bane, 57 S.W. 3d 411, 424 (Tenn. 2001) (citing Tenn. Code Ann. § 39-2-203(c) (1982); Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001)).

IX. Closing Argument - "Appeal to Vengeance"

In closing argument, the prosecutor stated:

> You've heard the pleading by the family to not give him the death sentence, which you would expect.
>
> It was a plea that the Saylors didn't get the opportunity to make for Lisa.

In response to the Defendant's objection, the prosecutor noted that the point of his argument was that the jury was not to allow sympathy or prejudice to guide its decision. The court allowed the argument to proceed. The prosecutor continued, stating that "His Honor will tell you at the end of his charge that you're not to let sympathy or prejudice guide your decision. That you use reason and common sense."

Citing State v. Bigbee, 885 S.W. 2d 797, 812 (Tenn. 1994), the Defendant argues that this type of argument has been characterized by our supreme court as a "thinly veiled appeal to vengeance" which is not permissible in a capital proceeding and which error in part led to a reversal in that case. In Bigbee, the Court held that among other errors, a portion of the prosecutor's argument was improper as follows:

> Finally, the prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings in Sumner and Montgomery Counties, and encouraging the jury to give the Defendant the same consideration that he had given his victims. Although the prosecutor could have properly counseled the jury to avoid emotional responses that were not rooted in the trial evidence, the argument here encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence. As such, the argument was improper.

Bigbee, 885 S.W. 2d at 812 (citations omitted). The Court also noted that the prosecutor's remarks encouraged the jury to further punish the Defendant for killings in Montgomery County for which he had previously been convicted and sentenced to life imprisonment. The Court concluded that while these errors "might have been harmless standing alone, we find that, considered cumulatively, the improper prosecutorial argument and the admission of irrelevant evidence affected the jury's sentencing determination to the Defendant's prejudice." Id.

On close examination, this Court concludes that the challenged portion of the prosecutor's argument did not rise to the level of the argument found improper in Bigbee. The prosecutor's remarks essentially urged the jury not to be swayed by sympathy or emotion in response to the pleas of the Defendant's family for a sentence other than death. We find nothing improper in the prosecutor's argument.

X. Closing Argument - Consideration of Proof

Regarding evidence of whether the Defendant himself or Ralph Thompson actually fired the fatal shot, the prosecutor told the jury to "listen closely to the charge from the judge" and "[i]f he tells you that it is important as to who pulled the trigger, then you consider it." The Defendant contends that the prosecutor's argument was "egregiously improper" in that it suggested to the jury that they should disregard any proof which the trial court did not expressly tell them it was important for them to consider including factual evidence that the Defendant himself may have committed the murder. The ultimate gist of the Defendant's argument is that the State could not prove the murder was committed for remuneration or promise of remuneration if the Defendant himself shot and killed his wife.

The record reflects that the challenged remarks were made as the prosecutor began to discuss its burden of proving an aggravating circumstance. The prosecutor stated:

> The State, as you all well know, has to prove an aggravating circumstance, beyond a reasonable doubt.
>
> And I submit to you the State has to go no further than the words that came from this Defendant's mouth on December 5th, when he finally came across to telling the truth about what happened to the officers, and you heard it because the aggravating circumstance is, that you employ another to commit a crime for remuneration or the promise of remuneration, there's absolutely no question.
>
> Ralph asked me if he killed Lisa would I give him my boat, motor and truck and I told him I would. The same thing he'd offered Glen Brewer. I don't need to go any further than that, folks.
>
> Now, apparently defense believes that maybe if they can show that their client pulled the trigger, that that doesn't apply. I submit to you, listen closely to the charge from the judge.
>
> If he tells you that it is important as to who pulled the trigger, then you consider it. If he doesn't, I submit to you . . .

Following the Defendant's objection being overruled, the prosecutor continued:

> Listen closely to the Court's charge. If he tells you to consider it I submit to you, I know you will, there'll be no question about it. If he doesn't, I submit to you, you don't.
>
> That's not the end of it. The fact that the State has proved the aggravating circumstance, you're to go further and look at the mitigating circumstances.

Closing argument is a valuable privilege that should not be unduly restricted. See State v. Bane, 57 S.W. 3d 411, 425 (Tenn. 2001) (citing Bigbee, 885 S.W.2d at 809). The trial court has wide discretion in controlling the course of arguments and will not be reversed absent an abuse of that discretion. Id. In the present case, the trial court overruled the objection to the prosecutor's argument, noting that the court had just instructed the jury that it would not be bound by any principles of law mentioned in counsel's argument, but was bound to apply the law only as instructed by the court. "The general principle in criminal cases is that there is a duty upon the Trial Judge to give the jury a complete charge on the law applicable to the facts of the case. The Defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the Judge." Poe v. State, 370 S.W. 2d 488, 489 (Tenn. 1963) (citing Crawford v. State, 44 Tenn. 190, 194-195 (Tenn. 1867); Green v. State, 285 S.W. 554 (Tenn. 1926); Myers v. State, 206 S.W.2d 30 (Tenn. 1947); Harbison v. Briggs Paint Co., 354 S.W.2d 464 (Tenn. 1962). In our view, the prosecutor's remarks served only to emphasize the trial court's charge to the jury and otherwise fell within the wide range of permissible argument. This issue is without merit.

XI. Victim Impact Evidence

The Defendant contends that no victim impact evidence was introduced by the State and the court's instruction served only to invite the jury to render a verdict based on sympathy for the victim's family. In its charge, the trial court instructed the jury regarding victim impact evidence as follows:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. You may consider this evidence in determining an appropriate punishment.
>
> However, your consideration must be limited to a rational inquiry into the culpability of the Defendant, not an emotional response to the evidence.
>
> Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt the aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of the alleged aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find

> that the aggravating circumstance found outweighs the finding of one or more mitigating circumstances beyond a reasonable doubt.

As both parties correctly recognize, victim impact evidence should generally 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." State v. Nesbit, 978 S.W. 2d 872, 891 (Tenn. 1998) (citing Payne v. Tennessee, 501 U.S. 808, 822; Payne, 501 U.S. at 830, (O'Connor, J. concurring); Cargle v. State, 909 P.2d 806, 826 (Ok. Ct. Crim. App. 1995)). We must disagree with the Defendant's position that no such evidence was presented in this case. First, the victim's father provided the jury with a "brief glimpse" into his daughter's daily life. He described the rural setting where she and her family lived. The jury learned that the victim had a job painting small figurines at home which allowed her to also care for her two young children. The witness further testified that the victim's children were left alone at the time of the murder until he discovered them and took them to his own home. The jury heard that as a result of the victim's death, her father and mother adopted and continued to raise her children. Such evidence certainly touched on the circumstances surrounding the victim's death and its impact on her immediate family. The trial court did not err in instructing the jury accordingly.

XII. Instruction on Life Sentence

Shortly after the court completed its charge, the jury submitted a note with the following question:

> In the Questionnaire that we filled out as prospective jurors it stated a life sentence consisted of fifty-one years. As stated by you, our judge, on Thursday, October 3rd, 2002, a life sentence in the State of Tennessee was not fifty-one years, it had changed. Please review this law for us. Thank you, the jury.

The court declined the defense's suggestion that the jury be instructed on a Defendant's eligibility for parole under current law. Instead, the court reiterated its earlier remarks to the jury regarding the meaning of a life sentence. The court stated:

> Ladies and gentlemen of the jury: The question has been considered and let me reiterate what I had told you the other day when I brought to your attention that the Questionnaire was in error.
>
> I told you then and I tell you again, totally disregard that question of your understanding of what the law was, that it was a fifty-one, you had to build fifty-one years. That is to be totally disregarded, it is of no concern to you.

> When you stop and think for a moment of the many times that I have told you that your decision is based upon the evidence that you've heard and the law that I give you that applies to that evidence. You have not heard any evidence at all about what a life sentence is.
>
> You must think no more about this question. It is of no concern to you in your deliberations in this case. The issue in this case is whether or not a life sentence should be imposed or the death penalty. That's the issue. It's not a question of what is a life sentence.

The Defendant submits that in response to the jury's inquiry, the trial court erred in refusing to instruct the jury that "a Defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the Defendant has served at least twenty-five (25) full calendar years of such sentence." See Tenn. Code Ann. § 39-13-204(e)(2).

As noted, the offense in the present case was committed in December 1989. At that time, there were two sentencing options: life imprisonment and death. See Tenn. Code Ann. § 39-13-203 (1989). In 1993, the sentencing law was amended to provide for a sentence of life without the possibility of parole. The amended statute was made expressly applicable to offenses committed on or after July 1, 1993. See 1993 Tenn. Pub. Acts ch. 473, §16. Because the offense in this case was committed before the effective date of the amended statute, the trial court did not err in declining to instruct the jury regarding eligibility for parole under Tennessee Code Annotated section 39-13-204(e)(2).

Moreover, the trial court properly instructed the jury that the meaning of a life sentence should not be considered in its deliberations. State v. Bush, 942 S. W. 2d 489 (Tenn. 1997), is most instructive on this issue. In that case, shortly after deliberations began, the jury inquired of the trial court, "How many years does the [defendant] serve if he gets life imprisonment and how long before parole?" Id. at 502. The trial court declined the Defendant's request to instruct the jury as to the availability of parole. Instead, the court instructed the jury only that "parole eligibility is not an issue in a capital case. . . ." Id. at 503. On appeal, our supreme court rejected the defendant's due process challenge to the trial court's instruction. In doing so, the court further stated, "[i]ndeed, the trial court's refusal to give defendant's requested response to the jury question was entirely consistent with prior decisions of this Court holding that the after-effect of a jury's verdict, such as parole availability, is not a proper instruction or consideration for the jury during deliberations." Id. (citing State v. Caughron, 855 S.W.2d 526, 543 (Tenn. 1993); State v. Payne, 791 S.W.2d 10, 21 (Tenn. 1990)). This issue is without merit.

XIII. Sequestration

During a recess after the close of the Defendant's proof, the following exchange took place:

> THE COURT: Is it all right for them to take Lynn Fillers [a juror] to the funeral home, which is, is it Manes?

OFFICER BILLY WAYNE MOORE: Manes.
THE COURT: While we're taking this recess?
GEN. SCHMUTZER: The State has no objection.
MR. OGLE: No problem, Judge.
THE COURT: You're going to be taking him?
OFFICER BILL WAYNE MOORE: Yes.
THE COURT: I hate to rush him, but . . .

Following the recess, proceedings resumed in the presence of the jury. Before this Court, the Defendant concedes that the trial court permitted the juror to leave court without objection from either party. He asserts, however, that the State nonetheless has the burden of proving that the alleged separation did not prejudice the Defendant.

First, the Defendant has waived this issue by failing to object and in fact consenting to the juror's departure from court. See Tenn. R. App. P. 36(a). Considering this issue despite the apparent waiver, this Court concludes that the Defendant's argument is without merit. In his brief, the Defendant accurately set forth the law regarding jury separation:

> It is well-settled in Tennessee that once jury separation has been shown by the Defendant, the State then has the burden of showing that such separation did not result in prejudice against the Defendant. Gonzales v. State, 593 S.W.2d 288 (Tenn.1980). "'It is the opportunity of tampering with a juror, afforded by the separation which constitutes the ground for a new trial, but if such separation afforded no such opportunity, there can be no cause for a new trial.'" Gonzales, 593 S.W.2d at 291, quoting Cartwright v. State, 80 Tenn. 620 (1883). The burden is on the State to offer a satisfactory explanation as to why there was a jury separation and that the separated juror had no communications with others, or that if communications were had, they did not relate to the case at trial. Gonzales, 593 S.W.2d at 291-92.

State v. Spadafina, 952 S.W. 2d 444, 452 (Tenn. Crim. App. 1996). In arguing that the burden of persuasion is upon the state, the Defendant presumes that jury separation has in fact been established. "[A]t common law, the sequestration rule required that jurors be physically kept together within the presence of each other without food, drink, fire or light until a verdict was agreed upon." State v. Bondurant, 4 S.W. 3d 662, 671 (Tenn. 1999). "[U]nder modern law, the test of keeping a jury 'together' is not a literal one, requiring each juror to be at all times in the presence of all others. . . . The real test is whether a juror passes from the attendance and control of the court officer." Id. (citing State v. Bartlett, 407 A.2d 163, 166 (Vt.1979)). In the instant case, the record reflects only that the court allowed the juror to be escorted to a funeral home in the presence of a court officer. The Defendant does not allege and the record contains nothing to support a finding that the juror in question was ever outside the presence or control of the officer. We therefore conclude that the Defendant has failed at the outset to establish jury separation. It follows that the burden has not shifted to the state to prove a lack of prejudice to the Defendant based on the alleged separation. This issue is without merit.

XIV. Cumulative Effect of Errors

Upon due consideration, this court concludes that there was no error in the re-sentencing of the Defendant. There being no error, the Defendant cannot prevail on this issue.

[DELETED XV. PROPORTIONALITY REVIEW]

[DELETED XVI. JURISDICTION]

Conclusion

This court has conducted the statutorily mandated comparative proportionality review and concluded that the sentenced imposed in the Defendant's case is proportionate to the penalty imposed in similar cases. We have considered the entire record and conclude that the sentence of death was not imposed arbitrarily, that the evidence supports the jury's finding of the (i)(4) aggravating circumstance beyond a reasonable doubt, and that the evidence supports the jury's finding that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. In addition, we have reviewed each of the issues raised by the Defendant and have found no reversible error. Accordingly, we affirm the judgment sentencing the Defendant to death.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID D. HAYES, JUDGE

NORMA MCGEE OGLE, JUDGE