IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 26, 2006 Session

STATE OF TENNESSEE v. RICKY THOMPSON

Direct Appeal from the Circuit Court for McMinn County
Nos. 89-705, -06, -07 Jon Kerry Blackwood, Judge

No. E2005-01790-CCA-R3-DD - Filed April 25, 2007

The Defendant, Ricky Thompson, was convicted of first degree murder, and he was sentenced to death. On appeal, he contends that: (1) his due process rights were violated because he was incompetent to stand trial and the trial court failed to hold a competency hearing; (2) his right to self-representation was denied; (3) the evidence is insufficient to establish the elements of premeditation and deliberation; (4) the trial court erred when it instructed the jury on the definition of reasonable doubt; (5) the trial court erred when it instructed the jury about the burden of proving the Defendant's mental state at the time of the offense; (6) the trial court erred when it instructed the jury on the definition of premeditation and when it instructed the jury to consider whether the Defendant was guilty of the greater charged offense before considering any lesser-included offenses; (7) the trial court erred when it admitted the victim's younger brother's testimony because it violated the constitutional guarantees to due process and against cruel and unusual punishment; (8) the evidence is insufficient to support the aggravating circumstance that the Defendant knowingly created a great risk of death to two or more persons other than the victim during the murder and that this aggravating circumstance is unconstitutionally overbroad; (9) the evidence is insufficient to support the aggravating circumstance that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind and that this aggravating circumstance is unconstitutionally vague and overbroad; and (10) the death penalty was arbitrarily imposed and is disproportionate to the penalty imposed in similar cases. After throughly reviewing the record, briefs, and applicable law, we affirm the Defendant's conviction but modify the Defendant's sentence of death to reflect a sentence of life imprisonment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court as to Part I, in which DAVID G. HAYES and J.C. MCLIN, JJ., joined. DAVID G. HAYES, J., delivered the opinion of the court as to Part II, in which J.C. MCLIN, J., joined; ROBERT W. WEDEMEYER, J., dissented as to Part II.

Brock Mehler[1], Nashville, Tennessee (on appeal) and Charles M. Corn, Athens, Tennessee (at trial

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[1]Mr. Mehler replaced Mr. Rogers prior to the hearing on the motion for new trial.

and on appeal), and Randy G. Rogers and Lee E. Ledbetter, Athens, Tennessee (at trial) for the appellant, Ricky Thompson.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; Jerry N. Estes, District Attorney General, for the appellee, State of Tennessee.

OPINION

PART I

A. Procedural History and Facts
I. Procedural History

In 1991, a McMinn County jury convicted the Defendant of first degree murder, aggravated assault, and arson. The jury imposed a sentence of death for the murder conviction, and the trial court imposed sentences of six years and four years, respectively, for the aggravated assault and arson convictions. On appeal, in 1996, this Court reversed the convictions and remanded for a new trial. See State v. Ricky Thompson, No. 03C01-9406-CR-00198, 1996 WL 30252 (Tenn. Crim. App., at Knoxville, Jan. 24, 1996), *perm. app. denied* (Tenn. July 1, 1996) (concurring in the results only).

In June 1998, the Defendant was found incompetent to stand trial. In April 1999, a different trial judge determined that the Defendant had become competent. In June 2000, the Defendant was tried, and the jury again convicted him of first degree murder, aggravated assault, and arson.[2] The jury found that two aggravating circumstances applied and that those circumstances outweighed any mitigating circumstances beyond a reasonable doubt. Based upon this finding, this second jury again sentenced the Defendant to death for the murder conviction.

The Defendant filed a motion for new trial and/or judgment of acquittal, and, on October 15, 2003, the trial court modified the jury's verdict to not guilty by reason of insanity. On appeal by the State, this Court concluded that the evidence was legally sufficient to support the jury's verdict. See State v. Ricky Thompson, No. E2002-02631-CCA-R3-CD, 2003 WL 22018899 (Tenn. Crim. App., at Knoxville, Aug. 27, 2003), *perm. app. granted* (Tenn. Feb. 2, 2004). We reversed the judgment of the trial court, reinstated the jury's guilty verdicts and sentence of death for the murder conviction, and remanded the case for consideration of the remaining issues presented in the Defendant's motion for new trial and for sentencing on the aggravated assault and arson convictions. The Tennessee Supreme Court affirmed this Court's judgment. See State v. Thompson, 151 S.W.3d 434 (Tenn. 2004).

On remand, the trial court heard the motion for new trial on June 23, 2005. The trial court

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[2]The defendant raises no issues with respect to the aggravated assault and arson convictions.

sentenced the Defendant to three years each for the aggravated assault and arson convictions, and it ordered that the sentences should be served consecutively to each other and to the death sentence. On July 5, 2005, the trial court denied the Defendant's motion for new trial, and it is from that judgment that the Defendant now appeals.

II. Pretrial Competency Hearings
a. June 1998 Competency Hearing[3]

At the conclusion of pre-trial motions hearings in February 1998, the trial court, Judge Charles Lee, on its own motion ordered that the Defendant's competency to stand trial and ability to consult with counsel be evaluated. Following the evaluation, a competency hearing was held in June 1998. At the outset of the hearing, Judge Lee noted that the report received from the Middle Tennessee Mental Health Institute ("MTMHI") indicated that, in the opinion of the evaluators, the Defendant was "not competent to consult with counsel at this time" but that the Defendant did not meet the criteria for judicial commitment. Judge Lee noted the agreement of the parties that the Defendant was incompetent and stated that the purpose of the hearing was to determine "what now to do with the [D]efendant upon that finding."

Two experts testified on behalf of the State: Dr. Samuel Craddock, MTMHI staff psychologist, and Dr. Royeka Farooque, MTMHI staff psychiatrist. Dr. Craddock testified that the Defendant was evaluated over a twenty-four day period in April 1998, during which time he was interviewed and underwent psychiatric testing. The doctors also received reports of the Defendant's behavior from MTMHI staff. Following their evaluation, the doctors concluded that the Defendant was not competent to stand trial. Dr. Craddock testified, "[W]e felt as though he was substantially depressed; suspicious of his attorneys and the judicial system; and that he would not be able to work effectively to achieve the best possible outcome for himself." Dr. Craddock said that this conclusion was based on the Defendant's state of mind and the doctors' view that the Defendant's impressions of his attorneys had no basis or justification in reality. Dr. Craddock and Dr. Farooque concluded that the Defendant did not meet the standards for being committed for treatment because he was not a danger to himself or others. This conclusion was based mostly on observations of the Defendant's behavior while he resided at MTMHI. The doctors felt that the Defendant's emotions affected his competence but not to the point that he could be committed. Dr. Craddock said it would be difficult to guess how the Defendant would function outside of a structured living environment, but he believed it was likely that the Defendant would resume abusing alcohol and drugs. Dr. Craddock said that the doctors concluded that the Defendant's unfitness might be a short-term condition and that the Defendant could achieve competence with proper medication. The doctor saw no reason why the medications could not be administered while the Defendant was in the custody of the Department of Correction.

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[3]For thorough consideration of the issues presented in this appeal, we have reviewed the record on appeal in the case under submission and also the record from the Defendant's previous appeal. Some of the facts articulated in this section are from the record in the previous appeal, which we have made a part of this record.

Dr. Craddock further testified that the evaluation showed that the Defendant had an intelligence quotient of 88, which is slightly below average, and a seventh grade reasoning level. The doctor attempted to administer the Minnesota Multiphasic Personality Inventory ("MMPI") assessment, but the results were not valid because the Defendant refused to answer multiple questions, including questions regarding his family background. Dr. Craddock said the Personal Assessment Inventory ("PAI") indicated that the Defendant had features of depression, anxiety, and schizophrenia, as well as paranoia and a history of alcohol use. A third personality assessment tool, the Malone Test, showed that the Defendant had features of depressive, dependent schizotypal and borderline personalty disorders. Dr. Craddock noted that, at times, the Defendant refused medications, tests, and meals while being evaluated. He said that the Defendant stopped taking his medication after voicing his suspicion that he was being poisoned by the MTMHI staff, and the Defendant also stated his belief that the staff, the judge, and the attorneys wanted to steal from him. Dr. Craddock agreed that the staff had characterized the Defendant as "demanding and manipulative," and they noted several incidents when the Defendant became very angry and would "fly off." Dr. Craddock said the Defendant would sometimes laugh inappropriately after behaving inappropriately. He believed that the Defendant's behavior was the result of "extremely poor judgment" and not an effort to appear mentally ill. In response to the trial court's questions, Dr. Craddock said that the Defendant could be treated at MTMHI or in the Department of Correction Special Needs Facility to restore his competency.

Dr. Rokeya Farooque, a forensic psychiatrist at MTMHI, testified that the Defendant was diagnosed with depressive disorder, a "[v]ery minor form of mental illness," as a result of which he was adjudged not competent to stand trial, to assist his attorneys, or to represent himself. The problematic behaviors she observed did not come from a major depressive disorder or other mental illness but were the result of his personality disorder, which was the reason that the Defendant did not need to be committed for psychiatric treatment. Dr. Farooque opined that the Defendant was not schizophrenic, which she described as a "major mental illness," rather she diagnosed the Defendant with "schizotypal personality," a personality disorder involving "inflexible maladaptive behaviors" in dealing with oneself or others over a long period of time. Dr. Farooque said that it was very rare for a patient, such as the Defendant, who was charged with a serious crime to have his behavior attributed to any kind of seizure disorder, but she always tried to rule this out in the beginning of her assessment with a scan of the patient's head. She said that, although there was no physical indication that the Defendant needed a neurological evaluation, she tried to conduct a scan everyday, and the Defendant refused. Dr. Farooque said that she believed the Defendant had a chance to become competent with antidepressant medication and support counseling and therapy. She said that the Defendant's pessimistic outlook about his lawyers and a trial were the result of depression and anxiety that could be treated with medication. However, she said that medication could not be used to correct the Defendant's personality disorder that caused his self-defeating behavior.

Dr. Larry Southard, MTMHI Director of Forensic Services, testified that the Defendant could be treated in the Special Needs Facility of the Department of Correction with medication and continuing assessment by clinical professionals and that this would be preferable to treatment at a county jail. He believed, however, that the best treatment could be provided in a Department of

Mental Health facility. At the conclusion of the hearing, the trial court ordered that the Defendant should be held for "safekeeping" to detain him and to restore his competency in the most expeditious manner possible. The court ordered the Department of Mental Health to provide consultative services to the Department of Correction and to provide periodic evaluations to the court. At the conclusion of the hearing, the Defendant stated that he would refuse to go to the Special Needs Facility for treatment. The trial court stated that it would investigate the possibility of forcing the Defendant to be medicated.

b. April 1999 Competency Hearing

A second competency hearing was held in April 1999 before Judge John Byars at the DeBerry Special Needs Facility where the Defendant had been housed. Dr. Farooque testified that the Defendant was evaluated for the second time on February 22, 1999, and, following the evaluation, she and the other two evaluators concluded that the Defendant was competent to stand trial at that time. Dr. Farooque said that the Defendant was "appropriate" and "alert," and, although his logic was poor, the Defendant was able to answer all their questions. She saw no signs or symptoms that the Defendant was depressed. She said the Defendant understood the court procedures, the seriousness of the charges against him, and the sentencing options if he was convicted. Further, the Defendant felt his attorneys needed to listen to his input about his case, but, in her opinion, the Defendant "need[ed] to understand that his lawyer has the best knowledge how to prepare his defense." The evaluators did not believe that "there is any mental illness that he is having at the present time that is going to impair his ability to confer with his lawyers." When the Defendant was previously found incompetent, he showed signs of depression and was agitated, demanding, and manipulative. The doctors at that time felt the Defendant was not "putting his best effort forward to help himself" and needed treatment. While in the prison system, the Defendant was no longer in a depressed condition despite the fact that he had stopped taking the medication that had been prescribed for him. She said that the Defendant's mental condition in February 1999 was much improved from the time of his earlier in-patient evaluation when he was wholly focused on wanting to represent himself and "wasn't looking at all the issues."

On further examination, Dr. Farooque said that, although the earlier evaluation took place over twenty-four days and the most recent evaluation lasted about forty-five minutes, she was able to perform a clinical assessment of the Defendant by talking with him. She said that the Defendant's personality disorder, his "inflexible way" of dealing with his environment, would never change and his manipulative behaviors were not likely to change dramatically. She said that the Defendant's psychiatric diagnosis did change, and the doctors no longer saw symptoms of depression. Dr. Farooque said that when she met with the Defendant and his doctor at the special needs facility the Defendant's doctor said that he did not believe the Defendant needed medications other than an anti-depressant. She said that the Defendant told her he stopped taking the anti-depressant because he said it "made him shake . . . ." Dr. Farooque received a letter from the Defendant the day before the competency hearing in which he said he was "very sad" after reading the April, 1999, evaluation report and that he was not trying to delay his trial. She said the Defendant also wrote that his attorneys and the doctors were all out to get him and that he thought it was "rather funny" that he

could "make you all kill me, and I know you all want me to kill myself." Dr. Farooque said that the evaluators were led to conclude that the Defendant might be trying to delay his trial because they saw no evidence of any mental illness when he was insistent on firing his lawyers and said that the lawyers and the prosecutors were all the same. Dr. Farooque said it seemed to her that the Defendant knew that people would say he did not understand what was happening when he made such comments and that she and the other doctors believed "that maybe he is trying to manipulate again the system like he manipulated in the hospital . . . ."

Dr. Craddock testified that, following the Defendant's February, 1999, evaluation, he felt that the Defendant was competent to stand trial. He said that after a thirty-minute meeting with the Defendant he was of the opinion that there was no mental illness impairing the Defendant's ability to work with his counsel. Dr. Craddock said that he had felt the Defendant had always had "a full understanding of the charges against him and his legal situation." Further, the doctor said that, "after giving [the Defendant] the benefit of the doubt for a number of months," he believed that the Defendant's "expressed beliefs were not delusional or the product of a mental illness but more an obstinance and a desire to proceed the way that he wanted to versus the way his attorneys were recommending . . . ." Although he felt the Defendant was not competent after his first evaluation, the doctors did not know at that time whether the Defendant was incompetent because of mental illness or for some other reason. When he initially found the Defendant incompetent, it was because he "wanted to err on the side of caution." After the second evaluation, he felt the Defendant's reasoning ability and judgment were improved.

Dr. Craddock further testified that the Defendant at times was inclined to sabotage himself and recommended another competency evaluation if the start of his trial was delayed for several months. He noted that the Defendant's history of mental illness and his need for medication varied. Dr. Craddock said that it was "very conceivable" that a depressed person could get better without treatment from one year to the next. Further, he said that the Defendant did not perform well in understanding cause and effect relationships, and he felt that the Defendant's counsel would have to spend an "above-average amount of time" helping the Defendant understand and prepare for the consequences of his legal decisions. He believed that the Defendant could assist his attorneys in preparing his case and could weigh his options with counsel's assistance, but the Defendant was unable to think of all the possibilities on his own. Dr. Craddock could not say whether the Defendant would retaliate in some way if he did not get his way in making decisions about his case. He said some people thought if they "acted out" it might be to their advantage in the long run, such as obtaining a new trial, but he did not know the Defendant's motives. Dr. Craddock said that he believed the Defendant was capable of understanding and making an assessment about whether, for example, to plead guilty. He said that the Defendant was capable of appreciating his legal situation but might act in a self-defeating manner, although this was not necessarily indicative of mental incompetence. Dr. Craddock's impression was that the Defendant might be trying to delay his trial because he felt that the Defendant was "grasping at reasons why his relationship with his attorneys was not adequate to proceed to trial."

The Defendant testified that he was not trying to use the mental evaluations to delay his trial.

He said that he would disagree with any lawyer who told him that certain testimony was not admissible because it was hearsay. Further, he did not like the rule that allowed doctors who had treated him since his childhood to send their records but not appear in person at trial. He said he would want the doctors to testify in person and tell the truth, even if their testimony hurt his case. The Defendant did not care about having a sentencing phase if he was convicted of murder. He said that he understood the charges, the maximum sentence he faced if convicted, and the role of the prosecutors, defense counsel, the judge and the jury. He "guessed" he would tell his attorneys if a witness lied while testifying, but his attorneys had told him that lying did not matter. He agreed that he gave his attorneys a lot of advice that they did not always take. The Defendant told the prosecutor, "I might as well sit with you when we go to court." The Defendant said that he was dissatisfied with his counsel because they refused to file his motions, and he did not believe it was premature to file them even though Judge Lee had ruled earlier that he would not entertain any motions unless and until the Defendant's competency had been restored.

At the conclusion of the hearing, the trial court found the Defendant competent to advise his attorneys and to stand trial.

III. Proof at Guilt Phase

As summarized in our Supreme Court's opinion affirming this Court's judgment reinstating the jury's guilty verdicts, the following proof was adduced in the guilt phase of the Defendant's June 2000 trial:

> *The Events of October 25-26, 1989.*
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> In the days before the events in question, victim Nina Thompson confided to Vickie Lynn Estelle, her supervisor at the Jiffy convenience store in Athens, Tennessee, that she and her husband, the [D]efendant, were having marital problems. The victim said that she was considering leaving him. On the evening of October 25, 1989, the victim asked Bryan Kevin Helms, a co-worker arriving to relieve her at the end of her shift, to cover for her if the [D]efendant called or came looking for her. Helms agreed and did not ask any questions. The victim left with her niece, Dana Christine Rominger, and did not come home after work that night. Rominger testified at trial that after the victim had spoken to her earlier that day about the problems she was having with the [D]efendant and expressed fear for her own safety, Rominger told her she could spend the night with her. Rominger picked up the victim after work and the women went to Rominger's father's house where they spent the night.
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> The [D]efendant spent the evening and early morning hours looking for the victim. During visits to the convenience store where the victim worked and to the victim's mother's home, the angry [D]efendant stated that "he was ready to kill someone," that he was going "to kill that damn bitch Nina" and "kill the cops if they came to his trailer." He also threatened to "blow out" the brains of his

eight-month-old son, Ricky, who was with him during his search for the victim. At one point, he purchased two gallons of kerosene or gasoline at the convenience store and showed Helms an assault rifle with a bayonet attached.

At 11:00 a.m. the following morning, the victim, Rominger, and the victim's five-year-old daughter drove to the couple's trailer and went inside. The [D]efendant and Nina argued, and the [D]efendant threatened to hurt the victim if she did not do what he said. The victim, her daughter, and Rominger then ran out of the trailer and got into Rominger's car, taking the eight-month-old Ricky with them. The [D]efendant followed, carrying an assault rifle. The victim, still carrying baby Ricky, got out of the car at the [D]efendant's direction. When Rominger began blowing the car horn and screaming for help, the [D]efendant told her to "shut . . . up" and shot her in the leg. Rominger and the victim's daughter fled across the street to a neighbor's trailer. As the victim turned to run, the [D]efendant shot her in the back. She fell to the ground on top of baby Ricky. As the baby crawled out from under his mother's body, the [D]efendant stood over the victim and fired several more shots as she lay on the ground. He also fired several shots into the air and into cars parked nearby. The [D]efendant then picked up baby Ricky, went into his trailer, and set it afire. When he left the trailer, he was overheard as he walked next to the victim's body stating, "See you later," as though nothing had happened. He then carried the baby to a store across the street, bought a soft drink, took some unidentified "powder," and waited for the police.

Evidence of the Defendant's Mental State.

The [D]efendant presented the expert testimony of two witnesses in support of his insanity defense. Dr. Tramontana, a clinical psychologist, opined that the [D]efendant suffered from a mild to moderate impairment of the frontal lobe of his brain. On the day of the crime, this impairment would have affected the [D]efendant's reasoning, his judgment, and his ability to inhibit impulsive reactions. It would also have affected the [D]efendant's ability to focus, concentrate, plan, and organize. Such condition could be aggravated by stress or intoxication. Dr. Tramontana opined that the [D]efendant's mental impairment could have interfered with the [D]efendant's exercise of proper delay in judgment when provoked by circumstances such as were alleged to have occurred on the day of the crime. During cross-examination, Dr. Tramontana admitted that the Minnesota Multiphasic Personality Inventory test administered to the [D]efendant in 1991 was invalid, possibly because the [D]efendant had fabricated or exaggerated his symptoms.

Dr. Bernet, a psychiatrist, recounted the [D]efendant's history of mental health problems, which included numerous hospitalizations from 1968 to 1984. Dr. Bernet testified that the [D]efendant had an impairment to the frontal lobe of his brain as a result of chronic alcohol abuse. This impairment affected his ability to

exercise self-control and curb impulsive behavior. Furthermore, the [D]efendant suffered from a chronic psychiatric disorder called schizo-affective schizophrenia, which caused a loss of touch with reality, delusions, hallucinations, and drastic mood swings. These two conditions (the frontal lobe defect and the schizophrenia), could aggravate one another. Dr. Bernet testified that the [D]efendant's mental defects could diminish his ability to appreciate right and wrong and conform his actions to the law. He admitted, however, that the [D]efendant's condition would come and go and that he would have "good periods" during which he could function normally. Dr. Bernet also admitted that the report he had prepared after evaluating the [D]efendant stated that the [D]efendant's mental deficiencies were not serious enough to support an insanity defense. This latter testimony was later stricken from the record and the jury was instructed to disregard it, after the trial court decided that such testimony was barred by the passage, in 1995, of an amendment to the insanity statute that provided that "no expert witness may testify as to whether the [D]efendant was or was not insane as set forth in subsection (a) [of that statute]."

The defense also presented the testimony of Nancy Smith, the [D]efendant's first cousin, who testified that the [D]efendant had been strange and out of touch with reality at times since he was a child. She also testified about the [D]efendant's history of mental health problems, which included suicide attempts and repeated hospitalization over the years. On cross-examination, the [D]efendant's cousin admitted that the [D]efendant had not had any mental health problems requiring treatment from 1985 until the date of the shooting, although he continued to abuse drugs.

The State relied on the testimony of lay witnesses and cross-examination of the [D]efendant's experts to rebut the claim of insanity. The [D]efendant's physician, who had been treating the [D]efendant for six months before the homicide, testified that on October 25, 1989, the day before the shooting, the [D]efendant came to his office and appeared to be "stable." Family members, co-workers of the victim, neighbors, and others in contact with the [D]efendant testified that although the [D]efendant appeared somewhat withdrawn or different, they never saw anything bizarre or unusual about his behavior and that he was a good father. There was testimony that the [D]efendant appeared agitated and angry the night before the killing, exhibiting an assault rifle and stating that he was mad enough to kill someone. He was also reported to have instructed his brother-in-law on how to feign mental illness.

After the killing, the [D]efendant gave the police a detailed account of the shooting and showed no emotion. He did not appear to be under the influence of drugs or alcohol.

Thompson, 151 S.W.3d at 436-38. The Defendant's statement to police was as follows:

> Today, my wife, Nina Thompson, came to our trailer this morning and came inside. My son, Ricky, who is nine months old, and I were in the living room watching cartoons. Nina started telling me that we should get back together. I told her not to take Ricky, and she said that she would not. She grabbed Ricky and ran out the door. Christy Rominger was in the yard, and they ran toward the car. Nina had gotten in, but when I got to the car she got out with Ricky in her arms. I told her 15 or 20 times to sit Ricky down, but she wouldn't. I shot my rifle toward the car, and when it hit it must have glanced down and hit Christy. I then shot Nina five or six times, and when she fell I began shooting into the other cars parked at the trailer. I think I threw my gun down on the ground in front of the trailer. It is an SKS caliber or 7.62 x .39 caliber . . . . I ran down toward Jackie Curtis' to call the police.

Upon this proof, the jury returned a verdict convicting the Defendant for the first-degree murder of Nina Thompson, the aggravated assault of Rominger, and arson.

IV. Proof at Penalty Phase

The Defendant testified in his own defense. He said that he understood that he did not have to take the stand but wanted to make a statement to the jury. The Defendant said, "I think if you found me guilty of first degree murder then you should go ahead and give me the death penalty, if you think that." When asked to explain why he wanted the death penalty, the Defendant said, "I think if they think I'm guilty of that, killing my wife the way I did, then I deserve it, if that's what they think." The Defendant said that he cared about his son but would rather have his son hate him than the victim. He agreed that he was telling this to the jury because he was remorseful for killing the victim. The Defendant said that he was "tired of it all." He acknowledged telling his counsel that it was some other part of him that killed the victim and that "when she grabbed the baby she didn't care about him."

When asked whether, before the victim came into his life, anyone ever cared about him besides his grandmother and a cousin, the Defendant said he thought his parents also loved him. He said that his father did not attend either of his trials, and his mother was deceased. The Defendant said that he "sometimes" felt that he was mentally ill. With respect to the events surrounding the murder, the Defendant said that he tied the door to his trailer with a coat hanger "[t]o keep everybody out, I guess." Initially, the Defendant did not respond to his counsel's question whether he wanted to die. The Defendant then said, "Yes, I want to die. If you give me the death penalty, I'd rather have it." He said that after a person dies, he goes on to the "next level, in front of God or whatever." The Defendant said that he would not hold anything against the jury if they sentenced him to death and that he had tried to commit suicide many times "probably [because he] was tired of life at that point in time." He said that he loved the victim, her daughter, and their son.

On cross-examination, the Defendant testified that he first told the trial judge that he wanted to plead guilty and receive a death sentence five or six months before the trial began, but the court refused to allow it. He denied telling the jury that he wanted to die in an effort to prove that he was

crazy or to manipulate the jurors. The Defendant acknowledged saying that he ran after his wife on the day of the murder because he was afraid she would hurt the baby. He said that the victim did not care about the baby "unless somebody was around," and she was a bad mother while he was a good father. He recalled "bits and pieces" about the victim's murder but did not remember shooting her first in the back as she held the baby or multiple times as she lay on the ground. The Defendant recalled throwing gas around the trailer but did not believe he had set the trailer on fire. He did not deny the murder but said, "Part of me killed my wife. What part, I don't know." The Defendant said that he was a good husband and had never threatened to harm the children in an attempt to force the victim to stay with him. He denied holding a gun to his son's head and threatening to kill him if the victim did not return home in the early morning hours before the murder.

The defense introduced the written statement of Terry Hahn who was unavailable to testify for health reasons. Hahn said that she had dated the Defendant's brother, Jerry Thompson, for two years and was acquainted with the Defendant as well as his parents from 1986 through 1992. She said that the Defendant's family was "extremely unstable." Hahn said that the Defendant's mother was a heavy drinker who was promiscuous and violent when she drank and was not a good mother. She described the Defendant's father as "very cold and non-caring toward his children." Hahn said that the Defendant's brother had "serious psychological problems" and eventually killed himself.

The affidavit of Thomas Lanier, a correctional counselor at the DeBerry Special Needs Facility in Nashville, Tennessee, was read into evidence. Lanier said that during the time he observed the Defendant, from 1998-2000, the Defendant seemed to be fearful of the other inmates and was "no more of a behavior problem than anyone else in the unit." Bradley McLure and Pamela Covington, correctional officers at the special needs facility, also testified by affidavit. McLure said that he observed the Defendant during 1999, and the Defendant seemed intimidated by other inmates and was withdrawn. Covington said that she observed the Defendant in her capacity as security supervisor at both DeBerry and at Riverbend prison. She said the Defendant was a good prisoner who did not cause any problems.

Nancy Smith, the Defendant's cousin, testified that the Defendant's father was not around to care for him. Smith said that she had observed the Defendant's mother and the Defendant in a physical altercation and heard the Defendant's mother refer to her children using vulgar expressions. Smith said she did not believe that the Defendant's mental condition had worsened since the victim's murder, but she felt the Defendant was more withdrawn.

Dr. Diana McCoy, a forensic psychologist, testified that she was retained to perform investigative services in preparation for the penalty phase of the Defendant's trial. She said that she interviewed the Defendant five times over a total of fourteen hours and collected records from many of the Defendant's psychiatric hospitalizations. She said she also talked with the Defendant's family members, acquaintances, and prison staff in investigating the Defendant's background and had read the transcript of the guilt phase of his trial.

Dr. McCoy said that the Defendant had a significant history of psychiatric diagnoses and

treatment from an early age. She said that the most "glaring thing" in the Defendant's social history was his "very poor, very chaotic, really pitiful childhood." The doctor said the Defendant's background, one of the worst she had heard, included a promiscuous, alcoholic, mother "who was physically and verbally abusive of her children, went in and out of their lives, [and] abandoned them for long periods of time." She said the behavior of the Defendant's mother was "always inappropriate," and the Defendant's childhood was "pretty horrible." Dr. McCoy said that the Defendant's father was not any better; he worked, drank, and always had a "hands-off" approach to his children. Dr. McCoy said that the Defendant had tried to protect his parents and did not talk much about them. As a result, she obtained most of her information about the Defendant's parents from others. She said that the Defendant's grandparents seemed to be "good people," but she believed they found it difficult to set any limits for the Defendant and his brother. She said that the Defendant had a history of inappropriate behavior toward women.

Dr. McCoy was unable to obtain the Defendant's school records and relied on the Defendant for information about his youth and his schooling. She felt that the Defendant was forthcoming because he did not paint himself in the best light. The Defendant reported that he was suspended in the fifth grade for throwing a book at a teacher who he said had taunted him about not having a mother. The Defendant said that he quit school in the tenth grade after he was suspended for squirting disappearing ink on a teacher and the principal. The Defendant reported spending a lot of his childhood years alone with no friends and no one to attend school events or other activities with him. Dr. McCoy said that, when the Defendant was eighteen years old, his father remarried. She said the Defendant's new stepmother tried to help the Defendant with his behavior and other problems, but in Dr. McCoy's opinion the efforts came too late. Dr. McCoy said that the Defendant's father and stepmother reported that the Defendant went into periods of deep depression during which he would not speak to them and slashed his wrists. Dr. McCoy stated that, based on her discussions with the Defendant's father and other family members, the Defendant's father went "overboard" the few times that he tried to discipline the Defendant. She said that the Defendant's father locked him in a closet, burned his arm with a match until his skin blistered as punishment for playing with matches, and once beat the Defendant "from head to toe" until the Defendant could not sit down. Dr. McCoy said that the Defendant's father ignored the Defendant the rest of the time. Dr. McCoy found that the Defendant had suffered severe emotional abuse and neglect as well as sexual and physical abuse during childhood. She said it was not surprising that both the Defendant and his brother began using drugs and alcohol at a very young age, something that their mother had tolerated in her home.

Dr. McCoy said that the Defendant's background created a sense of abandonment and self-esteem issues in him. Given his family setting, it would have been very difficult for the Defendant to develop normally because he had no "building block" for a normal adolescence or ability to cope with adulthood. Dr. McCoy said that the Defendant began developing depression in his later teenage years and began "acting out against society." The Defendant received his first psychiatric treatment at age nineteen, but the doctor believed he should have been treated sooner. Dr. McCoy noted that the Defendant had an extensive history of psychiatric diagnoses and treatments, but it was her opinion that he "clearly wasn't cured." Regarding the Defendant's history of suicide attempts, she

said that some were "attention seeking" while others were genuine attempts to kill himself. Dr. McCoy said that the Defendant was very childlike and immature in his constant need for attention and believed his suicide efforts were a sign of a disturbed person.

Dr. McCoy reviewed the various diagnoses the Defendant was given following outpatient and inpatient treatments beginning when he was eighteen years old. Diagnoses from 1969 through 1974 included character disorder, gross emotional immaturity, depression, sociopathic, and passive aggressive personality. Beginning in 1975, in addition to the previous diagnoses, a drug dependence was noted, and the Defendant was diagnosed as being schizophrenic with unspecified mental retardation and having anti-social personality disorder. Dr. McCoy noted that schizophrenia was among the most serious of mental illnesses and said that it was noted in the Defendant's history several times from between 1975 and 1979. The Defendant continued to be diagnosed with schizophrenia and depression from 1979 to 1984. The doctor noted that it was not unusual that the Defendant received no treatment in 1982 or 1983 because many mentally ill people never received treatment unless it was in connection with criminal proceedings. Dr. McCoy testified that the Defendant met the victim in 1984, and they were married a few years later. Although the relationship was "pretty chaotic," it also provided a kind of stability in the Defendant's life, which might explain the Defendant's lack of psychiatric treatment after 1984. She said that the Defendant did take a lot of Valium and believed that he was "self-medicating" during these years.

Dr. McCoy said that people sometimes achieve a kind of temporary stability in their life until they are faced with an even bigger stressor that "just knocks them back down again." She opined that someone with the Defendant's background would have "great difficulty" in life. Dr. McCoy found it interesting that, when the Defendant first received psychiatric treatment at age eighteen, the psychiatrist noted that the Defendant's prognosis was very poor because of his "gross emotional immaturity" and his "infantile rage." As to his relationship with the victim, Dr. McCoy said that the Defendant had a very difficult time trusting the victim. McCoy said that the "real sad thing" was that the Defendant's fear of abandonment and his constant jealousy led to the couple's constant fighting and his biggest fear coming true – that the victim would leave him and he would be alone. Dr. McCoy said that the victim "fed the flames" of the Defendant's jealousy by telling anyone who was around that the Defendant could not satisfy her. Dr. McCoy said that when the baby came along it was the last stressor for an already unstable couple. She said that "cocaine entered the scene" and that both the Defendant and the victim abused drugs and alcohol. From Dr. McCoy's investigation, she saw no reason to doubt the validity of the Defendant's history of diagnosed mental health problems.

Dr. McCoy said that the Defendant was not the "most logical or reasonable" person and not a "terrifically clear thinker, where he is going to think through the consequences of what he does." The Defendant described his relationship with the victim as having "really, really reached a sorry state" after the baby was born and the couple began using cocaine. The Defendant told her that the victim would go back and forth between telling him that she loved him and did not love him, and he became paranoid and unable to sleep very well as a result. Dr. McCoy said the Defendant believed that the victim was going to try to kill him in his sleep. Dr. McCoy concluded that, at the

time of the murder, the Defendant's mental state "due to mental illness and intoxication, was such that his ability to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law was substantially impaired, significantly affecting his judgment." She did not conclude that the Defendant was insane but that his judgment was affected, and he had "incredibly poor reasoning abilities." The doctor said it was not inconsistent for the Defendant to recall only "bits and pieces" of the murder and that his actions and thoughts at the time of the murder could qualify as a psychosis, that is that the Defendant was out of touch with reality as shown by his "pretty distorted reasoning" at the time. Dr. McCoy said that while in prison the Defendant received psychiatric care and treatment and was "truly miserable" about what he had done to his family and himself. She noted that, from 1990, the Defendant's treatment record reflected diagnoses of psychosis and major depression and suicide gestures. Dr. McCoy believed that the Defendant's stress levels in prison came from his concern for his children and his feelings of guilt and remorse for his actions rather than from his status as a death-row inmate.

Dr. McCoy reviewed the Defendant's prison psychiatric records between the time he was declared incompetent in February, 1998, and then competent in April, 1999. She said that, in the eleven months he was in custody at the DeBerry Special Needs Facility, the Defendant was given some therapy but was mainly treated with medication. She said that nothing in his records led her to conclude that the Defendant became competent while at DeBerry; she believed that the Defendant was mentally ill at the time of the murder and continued to be mentally ill.

On cross-examination, Dr. McCoy testified that she worked as a psychologist specializing in mitigation work and that she was personally opposed to the death penalty. She agreed that her opinion of the Defendant's mental state at the time of the offense was based entirely on what the Defendant had told her. She believed the Defendant was truthful with her to the extent that he was aware of what was going on when he told her that he did not intend to shoot the victim and had little knowledge of what happened after he followed her outside that day. The doctor testified that the Defendant told her that he had no memory of talking to the victim's body after the shooting or of shooting at nearby cars.

Dr. McCoy acknowledged that the Defendant was raised primarily after age four or five by his grandparents who appeared to be loving and caring. She said that even without alcohol or drugs the Defendant was in a "fragile state" when he killed the victim. The Defendant had discussed with her his deteriorating relationship with the victim in the year leading up to the murder. She acknowledged that the Defendant's history showed no evidence of any serious psychological incident, evaluation, or treatment from February 1985 to the date of the murder. Dr. McCoy said that, although the Defendant was not receiving psychiatric treatment, since 1985 he had been seeing a medical doctor, Dr. Rogers, who had diagnosed anxiety and was prescribing Valium for the Defendant up to the day before the murder. Dr. McCoy said she did not know what, if anything, happened to the Defendant from the time the Defendant was found incompetent and the time he was declared competent less than a year later. She agreed that it was possible that he was cured or that nothing had changed and he was in the same condition as when he was found incompetent. Dr. McCoy said that a "suicide gesture" was a way of trying to get attention or trying to manipulate

something in one's environment. She said that she did not interpret the Defendant's request that the jury give him the death penalty as a suicide gesture.

Following deliberations, the jury returned its verdict sentencing the Defendant to death. The jury found that the State had proven two statutory aggravating circumstances: (1) the Defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of the murder; and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. See Tenn. Code Ann. § 39-2-203(i)(3), (5) (1982). The jury also found that these statutory aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.

B. Analysis

On this appeal from the denial of his motion for new trial, the Defendant contends that: (1) his due process rights were violated because he was incompetent to stand trial and the trial court failed to hold a competency hearing; (2) his right to self-representation was denied; (3) the evidence is insufficient to establish the elements of premeditation and deliberation; (4) the trial court erred when it instructed the jury on the definition of "reasonable doubt;" (5) the trial court erred when it instructed the jury about the burden of proving the Defendant's mental state at the time of the offense; (6) the trial court erred when it instructed the jury on the definition of "premeditation" and when it instructed the jury to consider whether the Defendant was guilty of the greater charged offense before considering any lesser-included offenses; (7) the trial court erred when it admitted the victim's younger brother's testimony because it violated the constitutional guarantees to due process and against cruel and unusual punishment; (8) the evidence is insufficient to support the aggravating circumstance that the Defendant knowingly created a great risk of death to two or more persons other than the victim during the murder and that this aggravating circumstance is unconstitutionally overbroad; (9) the evidence is insufficient to support the aggravating circumstance that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind and that this aggravating circumstance is unconstitutionally vague and overbroad; and (10) the death penalty was arbitrarily imposed and is disproportionate to the penalty imposed in similar cases.

I. Defendant's Competency

The Defendant contends that the trial court erred when it failed to hold a new competency hearing before or during his June, 2000, trial despite being presented with several indicia of his incompetence. He points to the finding that he was incompetent only two years earlier, his long history of disturbed behavior, and his demeanor during the sentencing phase of the trial. The defendant concludes that he was tried while incompetent in violation of his due process rights and is entitled to a new trial.

It is fundamental that an accused cannot be tried, convicted, or sentenced while he is mentally incompetent. See Berndt v. State, 733 S.W. 2d 119, 121 (Tenn. Crim. App. 1987) (citing Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975); State v. Stacy, 556 S.W.2d

552 (Tenn. Crim. App. 1977); Mackey v. State, 537 S.W.2d 704 (Tenn. Crim. App. 1975)). The standard for determining competency is whether an accused has "'the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.'" State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) (quoting Mackey, 537 S.W.2d at 707). When there is a question about a defendant's competency to stand trial, the trial court is obligated to conduct a hearing to inquire into the matter. If warranted, the trial court on its own motion or at the request of either party may order a mental evaluation of the defendant. See Tenn. Code Ann. § 33-7-301(a)(1) (1997); Berndt, 733 S.W.2d at 122; State v. Haun, 695 S.W.2d 546, 549 (Tenn. Crim. App. 1985).

In determining whether a trial court should have *sua sponte* ordered a competency hearing, this Court considers whether the facts before the trial court at the time the trial commenced should have led the trial court "to experience doubt" regarding the defendant's competency to stand trial. Berndt, 733 S.W.2d at 122 (quoting Pate v. Smith, 637 F.2d 1068, 1072 (6th Cir. 1981)); see also Williams v. Bordenkircher, 696 F.2d 464, 467 (6th Cir. 1983). The defendant has the burden of establishing his incompetency by a preponderance of the evidence. State v. Reid, 164 S.W.3d 286, 307 (Tenn. 2005); State v. Oody, 823 S.W. 2d 554, 559 (Tenn. Crim. App. 1991); see also, Medina v. California, 505 U.S. 437 (1992) (holding that defendants may properly be required to establish their incompetency by a preponderance of the evidence). "On appeal, the findings of the trial court are conclusive unless the evidence preponderates otherwise." State v. Leming, 3 S.W.3d 7, 14 (Tenn. 1998) (citing Oody, 823 S.W.2d at 559).

In the case under submission, at the time the Defendant's trial began, he had undergone two mental evaluations to determine his competency. Both evaluations were primarily conducted by Drs. Craddock and Farooque. As noted, the Defendant was initially found incompetent in 1998. Following his second evaluation, in February 1999, the trial court held a second competency hearing in April 1999. Both doctors testified that their opinion was that the Defendant's diagnosis had changed, and he was at that time competent to stand trial and to assist his attorneys in his defense. Both doctors also concluded that the Defendant was trying to delay his trial. Dr. Craddock testified that the Defendant's beliefs about his attorneys and his legal situation were not caused by any mental illness or delusions; rather, they were manifestations of the Defendant's obstinance and his efforts to control his case and get his own way rather than listening to the advice of his counsel.

The Defendant discounts the finding of competency based on the brief nature of the February 1999 evaluation, characterizing it as a "30-minute 'drive by' evaluation." In their testimony, however, both doctors explained that being able to talk with the Defendant and observe him and his responses to their questions allowed them to form an opinion about his competency. The doctors explained that their conclusion that the Defendant had become competent was based primarily on the fact that he no longer showed any of the signs or symptoms of the depression they had observed in him the year before. They explained that it was his depression that led them to conclude that the Defendant was not competent in 1998. Dr. Farooque said that the Defendant at the second evaluation was "alert" and responded appropriately to her questions. In particular, she found that the Defendant understood the nature of the charges and his legal situation and concluded that there

was no mental illness that would prevent him from advising or assisting his attorneys. Dr. Farooque acknowledged that recommended counseling with the Defendant by MTMHI doctors did not take place while he was held at DeBerry after initially being found incompetent. She noted, however, that the Defendant was prescribed an anti-depressant by his doctor at the prison facility, although he eventually discontinued its use. She further noted that a person's psychiatric condition could change and that it was not at all unusual for someone with depression to improve even without treatment. Defense expert Dr. McCoy, although of the opinion that the Defendant continued to be mentally ill, agreed that it was possible that the Defendant's depression was resolved in the year before his second evaluation.

The record does not reflect any motion by the defense seeking further inquiry into the Defendant's mental state before trial. The trial court was in a position to observe the Defendant during pre-trial proceedings. Having nothing before it to suggest that the Defendant was not competent, the trial court was entitled to rely on its own observations together with the findings of the evaluating experts, which were based on the Defendant's most recent competency evaluation, in proceeding to trial.

The Defendant also points to his demeanor and behavior as evidence of his incompetency in arguing that, at the very least, the trial court was obligated to order a competency hearing during the trial itself. We cannot agree. The record is devoid of any evidence of problematic behavior or interruptions by the Defendant until after the guilt phase was concluded and the jury had returned its verdict convicting him as charged. Following the guilt phase, the trial court was able to observe and interact with the Defendant during various exchanges with him before the sentencing phase began. There is no indication that the Defendant's statements, behavior, or demeanor should have caused the trial court to doubt his competency when, for example, the trial court confirmed that the Defendant understood and wished to reject a plea that the State was offering and that he wanted to exercise his right to testify during the sentencing phase.

During the sentencing phase, the Defendant twice objected as the affidavits of corrections officers were read into evidence, at one point commenting, "That's not true. They're a bunch of snoops." The trial court advised the Defendant to be quiet or he would be removed or gagged. During defense counsel's closing argument, the Defendant first stated that he objected to his counsel "saying anything." Counsel prepared the jurors for further possible outbursts from the Defendant by telling them, "Ricky probably will object. I'm going to say some things he doesn't like." As if on cue, the Defendant immediately interrupted his attorney and declared, "You haven't done shit on this case." As defense counsel concluded, he was directing his remarks to those jurors who might have a "fundamental religious belief" when the Defendant announced that he was "right with God." Lastly, twice during the prosecutor's closing statement, the Defendant said, "Give me the death penalty and let's go home." Outside the jury's presence, the trial court inquired whether the Defendant wanted to stay in the courtroom and whether he could be quiet, to which he replied affirmatively. This was the extent of the interruptions by the Defendant.

We conclude the noted interruptions of his counsel's remarks during the sentencing phase

did not suggest that the Defendant did not understand what was happening at that point in his trial or that he was unable to advise his attorneys. Rather, the Defendant's behavior indicated that he was fully aware of his legal predicament and understood that the jury was considering whether or not he should be sentenced to death for his first degree murder conviction. The trial court was aware of Dr. Craddock's testimony predicting that the Defendant might "act out" or resort to self-defeating behavior if his case did not go his way, and the doctor's opinion that this did not reflect an inability to understand or assist his situation but a refusal to do so. Defense counsel likewise forecasted the likelihood that the Defendant would interrupt counsel's closing statement because he disagreed with some of the remarks counsel was making. We do not conclude that the Defendant's limited interruptions at the conclusion of the proceedings should have caused the trial court to doubt his competency and order a hearing on the matter.

In our view, the Defendant has not met his burden of establishing that he was incompetent to stand trial either before or during his trial. The record demonstrates that the Defendant had the ability to consult with his counsel and had a "rational as well as factual understanding of the proceedings." Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 789 (1960). Accordingly, the record supports the trial court's finding that the Defendant was competent and does not show that the trial court abused its discretion in failing to *sua sponte* order a competency hearing and further evaluation of the Defendant at any point during the trial. The Defendant is not entitled to relief on this issue.

II. Defendant's Right to Self-Representation

The Defendant contends that he was denied the right to represent himself at trial. He asserts that he made timely and unequivocal requests to proceed without the assistance of counsel and says that, although he was prepared to waive counsel, the trial court prevented him from doing so.

The Defendant contends that he first expressed a desire to proceed pro se during pre-trial hearings in February 1998 before Judge Charles Lee. The transcript, however, supports the trial court's understanding that the Defendant's complaints at that time were focused on his dissatisfaction with defense counsel's performance and the lack of the Defendant's own input into his case and did not involve a definite request to represent himself. The transcript from that proceeding reveals that the trial court asked the Defendant at that hearing,

> THE COURT: Mr. Thompson, is it your request recognizing that in this case the State wishes to proceed with this as a capital case, are you asking this Court to consider allowing you to act as your own counsel?
>
> THE DEFENDANT: Not completely by own counsel but I want something to say about what they do on my case.
>
> . . . .

THE COURT: But strategy calls if you want to go against the advice of your attorney is still your call to make as long as you are competent to make those decisions.

Now, recognizing that is it your desire for the court to consider allowing you to act as your own counsel?

THE DEFENDANT: No.

After further addressing aspects of his counsel's representation, the Defendant informed the court that he no longer sought their removal. The Defendant explained that in view of the court's instructions to the court clerk to provide copies of all pleadings filed by defense counsel to the Defendant, "[I]t will make what I will know more or less going on. Then I can have some control of my case, too."

Prior to testimony from the first witness at his April, 1999, competency hearing, the Defendant stated, "I'm telling the Court now that I'm firing both of these lawyers." Observing that the Defendant's court-appointed attorneys were present, then-presiding Judge John Byers stated that he would "handle the case based upon the participation of the lawyers" and began the hearing. At the conclusion of the proof regarding his competency, the Defendant expressed dissatisfaction with his counsel's refusal "to file motions and different things that I've asked them to [file]." At the conclusion of the hearing, the following exchange transpired between the Defendant and Judge Byers:

THE DEFENDANT: I've fired these lawyers.

THE COURT: Mr. Thompson, The Court is going to, these lawyers are going to represent you. It's the opinion of The Court that you're not able to represent yourself. You're not knowledgeable in the law from what I've heard here. And if you want to make communications to The Court, they're going to have to be through Counsel so they can make a determination of what's in your best interest. All right?

THE DEFENDANT: Will The Court appoint me new counsel then?

THE COURT: No. No. These -

THE DEFENDANT: So I have to start filing malpractice lawsuits to get them off my case?

THE COURT: That's something that if you've got a pen and pencil you can do. There's nothing I can do about that. But you've got counsel and that's not going to make me remove counsel.

Now, on this wanting to subpoena witnesses, you give them names of witnesses and why you want them subpoenaed. They're going to have to make the

> determination as to whether these witnesses will be competent witnesses. Okay?
>
> THE DEFENDANT: So you're saying they're going to control my case?
>
> THE COURT: They're going to represent you. They're going to represent you in accordance with the law and present your case in court. And I'm the judge and I'm going to make the rulings. Some of the rulings you're going to like and some of them you're not going to like. If I'm wrong, you've got a right to an appeal. Okay? We're going to do our utmost to see that you get a fair trial, but we're not going to let you take over the system. Okay? I'll make the decisions.
>
> THE DEFENDANT: Do I have to come to court at all?
>
> THE COURT: Yes, sir. You'll be at court.
>
> THE DEFENDANT: I thought I could decline to come to court.
>
> THE COURT: No, sir. You can't decline anything. You'll be at court. You'll be at court when this case is tried. Anything further?
>
> THE DEFENDANT: Can I just go ahead and plead guilty?
>
> THE COURT: Not now. Not now. You need to consult with your counsel.
>
> THE DEFENDANT: Now can I put them on the witness stand?
>
> THE COURT: No, sir. . . . Now, this proof is in the competency hearing. Based on the testimony that the Court has heard today from the expert witnesses, the Court concludes that Mr. Thompson is competent to advise counsel. He is competent to stand trial. The Court so rules.

On November 15, 1999, the Defendant filed pro se a three-page "Motion." In the motion, the Defendant asserted that he had "fired Mr. Charlie Corn of the Public Defender's Office," one of his two attorneys, and listed various reasons in support of his "action." The Defendant wrote that neither of his attorneys had done anything on his case and that he had "repeatedly asked the Court to take the Public Defender's Offices off his case." In paragraph form, the Defendant listed ten reasons that he sought counsel's removal. Paragraph seven reads as follows, "Ricky Thompson wants to act as his own counsel to represent himself, if the Court wants someone to Mock Justice, Let me do it, don't let the Public Defenders Offices make Mockery of Justice."

Before this Court, the Defendant submits that he timely asserted his desire to proceed pro se first before Judge Byers at the April, 1999, competency hearing, and as renewed in the November, 1999, motion. The record contains no ruling disposing of the November, 1999, motion.

"The right to assistance of counsel in the preparation and presentation of a defense to a criminal charge is grounded in both the Tennessee and United States Constitutions." State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984) (citing U.S. Const. amend. VI; Tenn. Const. art. I, § 9). "It is settled law that there exists the alternative right — the right to self representation — which also has its foundation based on the Sixth Amendment." Id. at 60 (citing Faretta v. California, 422 U.S. 806 (1975)). The right to self-representation, however, is not absolute. To invoke the right, the Defendant must: (1) timely assert the right to proceed pro se; (2) clearly and unequivocally exercise the right; and (3) knowingly and intelligently waive his or her right to assistance of counsel. State v. Herrod, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988). Additionally, Rule 44(b)(2) of the Tennessee Rules of Criminal Procedure provides that indigent Defendants should execute a written waiver before being allowed to proceed pro se.

Applying these criteria, we conclude that the Defendant did not successfully invoke his right to represent himself at trial. The record shows that any attempt to do so at the first competency hearing before Judge Lee was neither clear nor unequivocal, and the Defendant concedes that he ultimately abandoned the idea during the hearing. The record of the second competency hearing in April, 1999, before Judge Byers does not support the Defendant's contention that he "again tried to assert his right to fire his attorneys and represent himself." Although the trial court offered its opinion that the Defendant lacked the "ability" to represent himself, the Defendant made no express request to do so. Rather, the Defendant's focus was again on his counsel's performance, and he appeared intent on "firing" counsel or having them removed or replaced. Lastly, we consider the November 15, 1999, pro se motion, which included the Defendant's statement that "Ricky Thompson wants to act as his own counsel to represent himself . . . . Although the statement at first glance conveyed a request by the Defendant to proceed pro se, we conclude that the request was not clear and unequivocal when considered in light of the entire pleading and surrounding circumstances. In the very next paragraph, the Defendant further stated, "Ricky Thompson wants a Transcript of the Court Hearing that took place on April 20th 1999 so I can get ready for Trial and Ricky Thompson needs this Transcript *for Counsel*, either way, we need this Court Transcript to prepare for Trial" (emphasis added).

In our view, the Defendant contemplated going to trial both pro se and with counsel. While it is apparent that the Defendant was often dissatisfied with his appointed attorneys and repeatedly sought their removal, it is not clear that he wanted to proceed with no counsel at all if the trial court declined to remove his attorneys of record. Moreover, there is no indication that the Defendant ever moved the trial court to rule on his November 1999 motion or that he reasserted his right to represent himself in the seven months before his June 2000 trial began. "Because a Defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself." Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989) (citing Brewer v. Williams, 430 U.S. 387, 404 (providing that courts must indulge in every reasonable presumption against waiver of the right to counsel)).

Based on the record presented, we conclude that the Defendant's right to self-representation was not denied because the Defendant never made a clear and unequivocal assertion of the right.

Therefore, he is not entitled to relief on this issue.

III. Sufficiency of the Evidence of Premeditation and Deliberation

The Defendant asserts that the evidence was insufficient to establish the elements of premeditation or deliberation. He focuses, however, on deliberation, and the essence of his argument is that his was a crime of passion with no evidence of the required "cool purpose" of mind to support a first-degree murder conviction. In his brief, he states:

> Assuming arguendo, that the evidence is sufficient to establish premeditation, it is insufficient to establish the separate and distinct element of deliberation. Clearly, this was a crime of passion. The intent to kill was formed in passion, and it was certainly executed at a time of high passion. Even if one speculates that a cooling-off period occurred in the morning hours prior to the victim's appearance at the trailer on the 26th, it cannot be denied that their arguing and her act of snatching the child and running away was sufficient provocation as to excite passion in fact.

The Defendant concludes that under the facts presented, he can be convicted of no greater offense than second degree murder.

In reviewing a challenge to the sufficiency of the evidence, we consider the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the State. On appeal, the relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See State v. Leach, 148 S.W.3d 42, 53 (Tenn. 2004); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). "Questions regarding the credibility of witnesses, the weight and value of the evidence, and any factual issues raised by the evidence are resolved by the trier of fact." Leach, 148 S.W.3d at 53.

At the time of the October, 1989, offense, first degree murder was defined as "[a]n intentional, premeditated and deliberate killing of another." See Tenn. Code Ann. § 39-13-202 (a)(1) (1989). A "deliberate act" was defined as "one performed with a cool purpose" and a "premeditated act" as "one done after the exercise of reflection and judgment." See Tenn. Code Ann. §§ 39-13-201(b)(1), (2) (1989). Our Supreme Court has reiterated that, despite the tendency to intermingle them, the elements are distinct and both must be proven in order to sustain a first-degree murder conviction. State v. Brown, 836 S.W. 2d 530, 539-41 (Tenn. 1992). In Brown, the Supreme Court opined:

> Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.

Id. at 541 (citing 2 W. LaFave and A. Scott, Substantive Criminal Law § 7.7 (1986)). Stated differently, this Court has held that "[i]n order to convict a Defendant for premeditated murder, the

jury must find that the Defendant formed the intent to kill prior to the killing, i.e., premeditation, and that the Defendant killed with coolness and reflection, i.e., deliberation." State v. Brooks, 880 S.W.2d 390, 392 (Tenn. Crim. App. 1993).

The existence of premeditation and deliberation are questions for the jury that may be inferred from the manner and circumstances of the killing. See State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). Circumstances tending to indicate premeditation and deliberation include the use of a deadly weapon on an unarmed victim, the fact that the killing was particularly cruel, declarations by the Defendant of his intent to kill the victim, the making of preparations before the killing for the purpose of concealing the crime, and calmness immediately after the killing. See Bland, 958 S.W.2d at 660 (citing Brown, 836 S.W.2d at 541-42; State v. West, 844 S.W.2d 144, 148 (Tenn. 1992)). Premeditation and deliberation can also be shown by "proof of motive, evidence of a plan or design to kill, or the very nature of death." State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995).

In the present case, with the exception that the Defendant made no effort to conceal his crime, there was evidence of all of these indicators of a deliberate, premeditated killing. The evidence showed that the Defendant first threatened the victim that she would "pay" when he was asked to leave the victim's workplace the day before the murder. When she did not return home from work, the Defendant began searching for her. As his search intensified, he became visibly angry. He displayed a rifle with an attached bayonet to her co-worker in an apparent effort to convince him to reveal the victim's whereabouts. The Defendant made repeated statements to witnesses that no one was going to get his baby, that he was mad enough to kill someone, that he would kill "the cops" if they came to get his baby, and that he was going to "kill that bitch Nina." Eventually, the Defendant returned home without finding the victim.

The Defendant testified that he was at home "watching cartoons" with the baby when the victim came to their home the next day. An argument ensued, and the victim attempted to leave with the baby. The Defendant chased after the victim, but stopped long enough to pick up his loaded and readily accessible rifle, and reached the car before she could get away. The Defendant pointed the rifle into the car, made eye contact with the victim's young niece, and fired, shooting the niece as she screamed for help. The Defendant returned his sights to the victim and shot her from behind as she walked away. The Defendant dropped the rifle after shooting the victim the first time, then immediately picked it back up and began shooting her again, striking her at least four more times after she fell to the ground. After the murder, the Defendant kicked the victim's body. After setting their trailer on fire, the Defendant took the baby across the street and waited for police to arrive showing no apparent emotion. From this evidence, the jury could reasonably find that the Defendant had ample opportunity and did in fact reflect on the manner and consequences of his action. Accordingly, we conclude that there was sufficient proof from which the jury could find both premeditation and deliberation.

Moreover, the fact that the Defendant became upset, "distraught," or even enraged after the victim "snatched" the child and ran away does not mean that the murder could only have been committed on impulse and without a "cool mind . . . capable of reflection," as the Defendant urges.

Brown, 836 S. W. 2d at 541. "'Deliberation' is present if the thinking, i.e., the 'premeditation,' is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a 'careful weighing' of the proposed decision." Id. (quoting C. Torcia, Whartons' Criminal Law § 140 (14th ed. 1979). When the Defendant first threatened to kill the victim, he had conceived the thought and decided what he would do if she tried to take the baby. In arming himself, chasing the victim outside, and shooting her repeatedly at close range after the first shot felled her, the Defendant carried out his preconceived plan. The evidence showed that it was not a plan hastily conceived in the passions of that moment or executed without adequate time for the Defendant to reflect about his proposed decision. In our view, the victim acted precisely the way the Defendant anticipated that she might, and he responded by killing her as he had already determined he would if his fears were realized. The circumstances of the offense do not negate the element of deliberation. As we have observed, the "presence of agitation or even anger . . . does not necessarily mean that the murder could not have occurred with the requisite degree of deliberation." Gentry, 881 S.W.2d at 5. Accordingly, the evidence supports the jury's finding that the Defendant committed a premeditated and deliberate murder. The Defendant is not entitled to relief on this issue.

IV. "Reasonable Doubt" Instruction

The Defendant contends that the trial court erred when it instructed the jury on the definition of "reasonable doubt." In both phases of the trial, the trial court instructed the jury on the definition of "reasonable doubt" as follows:

> Reasonable doubt is that doubt engendered by an investigation of all of the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

See Tenn. Pattern Instruction-Crim. §2.03 (5th ed. 2000).

The Defendant submits that by expressly defining reasonable doubt to exclude a doubt that may arise from possibility, the challenged instruction suggested an improperly high degree of doubt required for acquittal and understated the State's burden of disproving other possible theories or defenses. The Defendant acknowledges that both the Tennessee Supreme Court and the Sixth Circuit Court of Appeals have rejected challenges to the pattern jury instruction given in his case, but he asserts that the decisions have focused primarily on the "moral certainty" language within the instruction and have not addressed the point he posits here.

In Victor v. Nebraska, the United States Supreme Court upheld the following language in a California instruction defining reasonable doubt:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to

> some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

511 U.S. 1, 17 (1994). The Defendant contends that the use of the word "mere" modifying possible doubt and the inclusion of the explanatory phrase that "everything . . . is open to some possible or imaginary doubt" distinguishes the California instruction from the Tennessee instruction. He contends that without such modifying or explanatory language, Tennessee's instruction impermissibly excludes any possible doubt, even a reasonable, possible doubt, as a basis for the jury to find that reasonable doubt existed.

In Austin v. Bell, 126 F.3d 843 (6th Cir. 1997), the Federal Court of Appeals considered a challenge to the same version of Tennessee's pattern jury instruction given in the Defendant's case. Although focusing on the "moral certainty" language, the Court of Appeals concluded that Tennessee's pattern instruction was most comparable to that of the California instruction upheld in Victor. In upholding the constitutionality of the instruction, the Court of Appeals opined that Tennessee's instruction did not impermissibly understate the state's burden of proof. Id. at 847. In addition, the Tennessee Supreme Court has repeatedly upheld the use of the reasonable doubt instruction containing the identical "moral certainty" language and the phrases "let the mind rest easily" and "arise from possibility" found in the instruction given in the instant case. See State v. Bush, 942 S.W.2d 489, 521 (Tenn. 1997). In Bush, the Court observed that, although "neither of these phrases have been before the United States Supreme Court, the courts of this state have consistently upheld the constitutionality of this instruction."[4] Id. (citing State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), *cert. denied*, 513 U.S. 1114 (1995); Pettyjohn v. State, 885 S.W.2d 364 (Tenn. Crim. App. 1994); State v. Christopher S. Beckham, No. 02C01-9405-CR-00107, 1995 WL 568471 (Tenn. Crim. App, at Jackson, Sept. 27, 1995), *perm. app. denied* (Tenn. Sept. 9, 1996); Richard Caldwell v. State, No. 02C01-9405-CR-00099, 1994 WL 716266 (Tenn. Crim. App., at Jackson, Dec. 28, 1994), *app. granted in part, denied in part*, (Tenn. May 30, 1995); State v. Victoria Voaden, No. 01C01-9305-CC-00151, 1994 WL 714223 (Tenn. Crim. App., at Nashville, Dec. 22, 1994), *perm. app. denied* (Tenn. May 1, 1995); Harold V. Smith v. State, No. 03C01-9312-CR-00393, 1994 WL 330132 (Tenn. Crim. App., at Knoxville, July 1, 1994), *no Tenn. R. App. P. 11 perm. app. filed*).

We conclude that the challenged instruction did not impermissibly raise the degree of doubt required for acquittal or correspondingly decrease the State's burden of proof in violation of the Defendant's due process rights. The Defendant is not entitled to relief on this issue.

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[4]The Supreme Court noted that it was not bound by the decision in Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn. 1994), wherein the district court held that the phrase "let the mind rest easily," when used to qualify "moral certainty," did not sufficiently convey to the jury the requisite burden of proof required by the Constitution.

V. Instructions on Insanity

The Defendant asserts that the trial court erroneously instructed the jury as to the burden of proving the Defendant's mental state, i.e., his sanity or insanity, at the time of the offense. He asserts that the trial court gave two contradictory instructions on insanity, and it is not possible for this Court to discern which of the instructions the jury followed in reaching their verdict.

At the time of the offense, Tennessee law provided that insanity was an absolute defense to prosecution "if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of law." See Tenn. Code Ann. § 39-11-501 (1991). "If the evidence adduced either by the Defendant or the State raises a reasonable doubt as to the Defendant's sanity, the burden of proof on that issue shifts to the State. The State must then establish the Defendant's sanity to the satisfaction of the jury and beyond a reasonable doubt." Graham v. State, 547 S.W.2d 541, 544 (Tenn. 1977) (citing Collins v. State, 506 S.W.2d 179 (Tenn. Crim. App. 1973); Covey v. State, 504 S.W.2d 387 (Tenn. Crim. App. 1973)). In the present case, the trial court's instruction on insanity included the following statement:

> Whether the Defendant had the capacity to form the culpable mental state required to commit a particular offense is not to be confused with the defense of insanity. If you find by a clear and convincing evidence that the Defendant was insane as defined in these instructions at the time of the commission of the offense, the Defendant must be found not guilty of all offenses.

Regarding the Defendant's plea of insanity, the trial court charged the jury as follows:

> The law allows you to infer that the Defendant is sane. Therefore, in the first instance, the State need not introduce any evidence of the Defendant's insanity. However, if the evidence adduced either by the Defendant or the State raises a reasonable doubt as to the Defendant's insanity — or sanity — the burden is upon the State to establish the Defendant's sanity beyond a reasonable doubt.

Lastly, the State's burden of proving the Defendant's sanity was reiterated as follows:

> For the Defendant to be held legally responsible for his conduct, the State must have proven beyond a reasonable doubt either that he was not suffering from mental disease or defect, or that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct.

The State concedes that the trial court initially misstated the law on insanity by instructing the jury on the "clear and convincing" standard of proof required under the post-1995 law that was not applicable at the time of the offense. As the State correctly notes, however, the Defendant made no contemporaneous objection to the challenged instruction at trial and thus risks waiver. See Tenn.

R. App. P. 36(a). Considering the issue despite the waiver, this Court concludes that the latter instructions correctly set forth the applicable law by charging the jury that the State had the burden of proving the Defendant's sanity beyond a reasonable doubt once the issue of the Defendant's mental state had been raised by the evidence. The jury is presumed to have followed the trial court's directions. See State v. Blackmon, 701 S.W.2d 228, 233 (Tenn. Crim. App. 1985). Moreover, the particular language from the post-1995 insanity law that the Defendant contends was prejudicially erroneous, that is, "If you find by . . . clear and convincing evidence that the Defendant was insane . . . ," did not speak to the *burden* of proof but to the *degree* of proof required to acquit the Defendant. For this reason alone, we conclude that there is no reason to believe that the jury applied the burden of proving the Defendant's mental state other than as it was correctly instructed by the trial court.

The Defendant contends that the trial court also erred in instructing the jury how it should consider expert testimony about the Defendant's mental state by mischaracterizing and commenting on the testimony of Dr. Bernet. Dr. Bernet was initially allowed to testify to the findings as reflected in his evaluation report that factors, including the Defendant's psychiatric disorder, history of substance abuse with brain damage, acute intoxication, and sudden agitation, interfered with the Defendant's "ability to act in a reasonable manner" at the time of the crimes but were not "serious enough to constitute an insanity defense." Later, the trial court interrupted defense counsel's redirect examination of Dr. Bernet as follows:

> Now, ladies and gentlemen of the Jury, the Court wants to make an instruction to you. Previously, this witness made testimony that it would not support an insanity defense.
>
> I wish to instruct you now that while this witness may be able to give opinions based upon his examination, et cetera, and what his findings are, whether or not there is sufficient evidence here for insanity defense is a question of law for you people to determine.
>
> Do you understand what I am saying? It is for you to determine from all of the evidence in the case and can you consider it in that light.

The Defendant made no contemporaneous objection to the trial court's instruction and defense counsel continued questioning the witness. After Dr. Bernet was excused, defense counsel moved for a mistrial on the ground that the trial court's efforts to cure "whatever mistake that may have been [made] -- if in fact it was a mistake" could not repair any possible damage. The trial court overruled the motion, explaining that it had instructed the jury as to its responsibility for determining the ultimate question of the Defendant's sanity or insanity because it believed that the doctor's testimony may have "encroached over into the jury's realm of making the decision . . . ."

The Defendant contends that in instructing the jury that "this witness made testimony that it would not support an insanity defense," the trial court mischaracterized and oversimplified Dr. Bernet's testimony because the doctor later altered his opinion. We cannot agree that the trial court's

instruction constituted an improper comment on the evidence. As recited above, Dr. Bernet did initially testify that the factors contributing to the Defendant's mental state would not "constitute an insanity defense." Dr. Bernet went on to testify to his opinion, based on more recent information, that the Defendant had shown "features of insanity" at the time of the offense but said he was not in a position to say that the Defendant was insane at the time of the offense. In our view, the trial court referenced the doctor's testimony only to the extent necessary to identify for the jury the part that he found problematic. The trial court ensured that the jurors understood that the determination of the question of the Defendant's sanity was ultimately theirs to make. In doing so, the trial court briefly and accurately stated the doctor's conclusion. This Court concludes that the trial court's limited remarks did not constitute an improper comment on the evidence. The Defendant is not entitled to relief on this issue.

VI. Homicide Instructions

The Defendant next contends that the trial court erred when it instructed the jury on the definition of premeditation and when it instructed the jury to consider whether the Defendant was guilty of the greater charged offense before considering lesser-included offenses. During the guilt phase, the trial court instructed the jury regarding the definition of premeditation in pertinent part as follows: "Premeditation means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant." The trial court subsequently corrected itself and instructed the jury as follows:

> Okay. Previously while instructing you on the definition of premeditation, I instructed you that such intent or design to kill may be conceived and deliberately formed in an instant. This was not a correct statement of the law. You will disregard that instruction. I will reread the instruction on premeditation now to clarify the instruction.
>
> Premeditation means that the intent to kill must have been formed prior to the act. It is not necessary that the purpose to kill preexists in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the inference.

The Defendant contends that the trial court's instruction as corrected was "incomprehensible" in that it did not explain why the "formed in an instant" language in the instruction initially given was incorrect and because it still essentially told the jury that an intent to kill could be formed in the same moment the act was committed.

The Defendant made no objection to the new instruction on premeditation. The failure to make a contemporaneous objection puts the Defendant at risk of waiver. See Tenn. R. App. P. 36(a). Appellate relief is generally not available when a party has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." State v. Leonard Dale Kincer, No. M2004-01403-CCA-R3-CD, 2005 WL 1114438, at *8 (Tenn. Crim. App., at Nashville, May 11, 2005); see also State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) (holding

that waiver applies when the Defendant fails to make a contemporaneous objection). Despite the risk of waiver, we address the issue and determine the Defendant is not entitled to relief.

Generally, in determining whether instructions are erroneous, this Court must review the charge in its entirety and read it as a whole. State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997) (citing State v. Stephenson, 878 S.W.2d 530, 555 (Tenn. 1994)). A charge should be considered prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law. Id. (citing State v. Forbes, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995); Graham v. State, 547 S.W.2d 531, 531 (Tenn. 1977)).

In the present case, the jury was instructed that in order to find premeditation, it must find that the intent or purpose to kill must have been formed before the killing and that the purpose had to preexist in the mind for some period of time, "however short," before the act was carried out. As we have previously discussed, this is a correct statement of the law as to the element of premeditation which required the jury to find that the Defendant formed the intent to kill some time prior to the killing. See State v. Brooks, 880 S.W.2d 390, 392 (Tenn. Crim. App. 1993). In giving the corrected instruction, the trial court specifically told the jury that its earlier instruction had erroneously stated that "such intent or design to kill may be conceived and formed in an instant." The trial court admonished, "This was not a correct statement of the law." The court then reread the entire definition of premeditation without the "formed in an instant" language. Although we agree with the Defendant that it would have been more complete to advise the jury that premeditation required the exercise of reflection and judgment, see Tenn. Code Ann. § 39-13-201(b)(2), we do not conclude that the instruction as given incorrectly defined premeditation or misled the jury.

Lastly, the Defendant challenges the homicide instructions in that they required the jury first to consider whether the Defendant was guilty of the greater offense before considering in turn whether any lesser-included offenses were proven. The Defendant acknowledges that the Tennessee Supreme Court has rejected similar challenges to "sequential charging" but presents the issue here to preserve it for further appellate review. See State v. Rutherford, 876 S.W.2d 118, 119-20 (Tenn. 1995), *rev'd on other grounds* (Tenn. 1996); see also State v. McPherson, 882 S.W.2d 365, 375 (Tenn. Crim. App. 1994); State v. Raines, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994), *perm. app. denied* (Tenn. July 5, 1994). We conclude that the Defendant is not entitled to relief on this issue.

VII. Testimony of Joe Vann

During the guilt phase, the State was permitted to call Joe Vann, the victim's younger brother, as a rebuttal witness over the Defendant's objection. The Defendant argues that Vann's testimony was patently unreliable because he made no statement to authorities in the eleven years since the murder occurred and because his testimony contained obvious discrepancies with that of other witnesses. The Defendant concludes that the trial court committed reversible error in admitting the testimony because its prejudicial effect far outweighed any probative value. In order to address this claim, we find it necessary to present the witness's testimony in some detail.

Vann testified that he was twenty-eight years old, married, and worked at Ray Pipes. He said he had a tenth-grade education, and his only criminal record was for misdemeanor driving offenses and truancy in the 1990s. Vann said that he was seventeen years old when the victim was murdered. He said he had nine brothers and five sisters, including the victim, and that he was particularly close to the victim because they had grown up together while the others were older and had already left home. Vann said that after the victim had her first child, Vanessa, by a neighbor, she continued to live at their parents' home. He said that Vanessa's father had nothing to do with her and did not provide the victim with child support. Vann said that he saw the victim every other weekend after she married the Defendant and moved out.

Vann said that he had a good relationship with the Defendant. He said that they took trips to the mountains, looked at cars together, and the Defendant bought him beer. Vann said that he had one conflict with the Defendant when the Defendant and the victim lived at Hillside Trailer Park. Vann said he was there one day when the victim checked on the baby and found him in his crib with a gun in his hands. According to Vann, the victim slung the gun to the ground, and the Defendant ran into the baby's room. Vann said that he did not see the Defendant hit the victim but heard a sound and saw the victim emerge with her mouth bleeding. Vann said that he told the Defendant not to hit his sister, and the Defendant denied so doing. Vann said that when he questioned the Defendant why the victim had a bloody mouth, and the Defendant responded, "I'll shoot you." Vann said he told the Defendant he would shoot him if he hit the victim again. Vann said the victim tried to calm them, and the Defendant told her to get the children and they would all go out to eat pizza. Vann said the Defendant kept "a bunch of guns" and a lot of "lawyer books" and "gun books" around the trailer. Vann said that every time the Defendant brought the victim back to see her mother, the Defendant would accuse the victim of going next door to see Vanessa's father. Vann said that the victim did not have contact with Vanessa's father and that their mother had tried to explain to the Defendant that the victim was only visiting her. Vann said that the Defendant was very jealous of the victim and felt he was even jealous of Vann and his other siblings. He said he never knew the Defendant to have a job but was aware that he made some money by selling cars and guns. Vann said that he was present when the Defendant advised Vann's brother, David, on how to get disability or social security benefits. Vann testified:

> He was telling David how to go to his doctor, speak to his doctor, and say that he's hearing voices and just look away from his doctor and just stare at the walls and just start talking and then go back to the subject matter that he was talking about, that he was hearing the voices and stuff, then his doctor would give him a — see a psychologist or something, another doctor, to, you know, prove the fact.

Vann said that the victim and the Defendant argued "all the time" and their normal routine was to separate about twice a month. He said that the victim usually left the Defendant and returned to her parents' home on these occasions.

Vann testified that, on the day before the murder, he was at home with his mother, Elizabeth Vann. He said that in the evening, as it was getting "dusky dark," they heard a car slow down. Vann said he turned on the porch light and saw the Defendant in his blue Dodge van parked in the

neighbor's driveway across the road. Vann said that the Defendant exited the van and asked "where in the hell is Nina?" Vann said that he replied, "Ricky, she ain't here, I ain't seen her," and the Defendant accused him of lying. Vann said the Defendant threatened, "well, you better tell me right now or I'll kill you and your momma and all of your family" and waived a gun as he spoke. Vann said that he told the Defendant to come over to his yard, and the Defendant stated:

> [H]e was going to piss — you know, he was going to kill me and my momma and my whole family if we didn't tell him where she was, and he's going to come back and piss on our graves, and all they'd do to him was send him to Moccasin Bend and he'd be up there about a couple of months and be back in time to come back and piss on our graves, the grass won't even be on our graves yet.

Vann said he had his father's shotgun at the time and would have "blow[n] his damn head off" if the Defendant had come into the yard because the Defendant was threatening his mother and upset her. Vann said they did not call for help because they lived out in the country and "the law" did not usually respond quickly.

On cross-examination, Vann testified that the Defendant acted jealous and never wanted the victim to spend time with her brothers. Vann said the Defendant was not crazy, but "crazy like a fox." Vann testified he observed the Defendant drinking, but did not see the Defendant or the victim using drugs. Vann said that he did not come forward before the Defendant's first trial because he was trying to get the incident out of his mind because it was not good for him to think about his sister's murder. He said he related the encounter with the Defendant to some of his family members. Vann said he was sure that the Defendant came to his house at "about dark" the night before the murder. On further examination, Vann said that neither the police nor Detective Farris ever interviewed him or took a statement from him after the murder.

In urging that Vann's testimony was not properly admitted, the Defendant emphasizes the fact that both trial judges ultimately found that the testimony was not credible. This Court has held that "any competent evidence which explains or is a direct reply to, or a contradiction of, material evidence introduced by the accused, or which is brought out on his cross-examination, is admissible in rebuttal." Nease v. State, 592 S.W.2d 327, 331 (Tenn. Crim. App. 1979). Questions concerning the admission or rejection of rebuttal evidence address themselves to the sound discretion of the trial court. State v. Scott, 735 S.W.2d 825, 828 (Tenn. Crim. App. 1987) (citing State v. Lunati, 665 S.W.2d 739, 747 (Tenn. Crim. App. 1983)); Beasley v. State, 539 S.W.2d 820, 823 (Tenn. Crim. App. 1976). The trial court's decision in this regard will not be reversed on appeal in the absence of a clear abuse of discretion. Id. at 823-24.

In the present case, the Defendant presented extensive testimony from both expert and lay witnesses in support of his insanity defense. The trial court properly permitted in rebuttal Joe Vann's testimony suggesting that the Defendant gave advice on how to feign mental illness. The defense also presented proof that the Defendant was incapable of premeditation and deliberation because of mental illness. The State was entitled to rebut such evidence through Vann's testimony to the effect that the Defendant, in the hours before killing the victim, displayed a weapon, threatened to kill

members of the victim's family, and contemplated receiving further psychiatric treatment if he carried out his threats. The trial court did not abuse its discretion in permitting Vann's rebuttal testimony.

VIII. Sufficiency of the Evidence of Aggravating Circumstances

The Defendant argues that there was insufficient evidence to support the jury's finding of the (i)(3) and (i)(5) aggravating circumstances. "In determining whether the evidence supports the jury's findings of statutory aggravating circumstances, we view the evidence in a light most favorable to the State and ask whether a rational trier of fact could have found the existence of the aggravating circumstances beyond a reasonable doubt." State v. Rollins, 188 S.W.3d 553, 571 (Tenn. 2006) (citing State v. Reid, 164 S.W.3d 286, 314 (Tenn. 2005)).

The first aggravating circumstance the jury found was that the Defendant knowingly created a great risk of death to two or more persons in the course of murdering the victim. See Tenn. Code Ann. § 39-2-203(i)(3) (1982). The proof showed that the Defendant, after making direct eye contact with Rominger, shot at close range into the car in which Rominger and the victim's five-year-old daughter were sitting, striking Rominger in the leg. The Defendant then turned his weapon on the victim, first firing at her feet and then at her back as she held their baby in her arms thereby placing the baby's life in jeopardy. There was ample proof supporting the finding of the (i)(3) aggravator.

The jury also found that the murder was "especially heinous, atrocious or cruel in that it involved torture or depravity of mind." See Tenn. Code Ann. § 39-2-203 (i)(5) (1982). The Defendant submits that there is no evidence to establish that the victim was tortured and, without evidence of either torture or mutilation of the victim's body, no evidence to support a finding that he possessed depravity of mind at the time of the killing. The State contends that there was evidence of both torture and depravity of mind.

"Torture" is defined as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985). The record reflects that no autopsy was performed on the victim's body. Based on his visual examination of the body, Dr. William Foree, the medical examiner, testified that the victim died as the result of at least five bullet wounds. Dr. Foree took photographs and made a diagram that showed the victim had suffered a bullet wound to her left buttock and multiple shots to the front of her body. Asked whether any or all of the wounds would have proven fatal, Dr. Foree said, "Well, some of them would not have been enough to kill her, but there were several that were." The State notes that by all accounts, the Defendant first shot the victim as she was walking away from him and the only wound to the victim's backside was to her buttock "making it very unlikely that she died immediately." We agree that the jury could reasonably have inferred that the victim was at least initially alive and conscious as she suffered further bullet wounds. This evidence of torture also proved the Defendant's depravity of mind. See Williams, 690 S.W.2d at 529 (providing that proof of torture necessarily establishes the murderer's depravity of mind because "one who wilfully inflicts such severe physical or mental pain on the victim is depraved.").

The Defendant further challenges the constitutionality of the aggravating circumstances as being vague and/or overbroad. Our Supreme Court has repeatedly rejected similar challenges and has held that the (i)(5) aggravating circumstance is not unconstitutionally vague or overbroad. See State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991); State v. Barber, 753 S.W.2d 659, 670 (Tenn. 1988), *cert. denied*, 488 U.S. 900 (1988); Williams, 690 S.W.2d at 526-30.

Based on the foregoing, we conclude that there was sufficient evidence to warrant the jury's finding of the (i)(3) and (i)(5) aggravating circumstances. The Defendant's assignment of error fails.

C. Conclusion

In consideration of the foregoing and the record as a whole, the judgment of the trial court convicting the Defendant for first degree murder is affirmed.

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ROBERT W. WEDEMEYER, JUDGE