IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 25, 2008 Session

STATE OF TENNESSEE v. NICHOLAS TODD HILT

Appeal from the Criminal Court for Hamilton County
No. 243556 Don W. Poole, Judge

No. E2007-00546-CCA-R3-CD -Filed January 7, 2009

Appellant, Nicholas Todd Hilt, was indicted for first degree murder, felony murder, attempted first degree murder, rape of a child, and aggravated child abuse in connection with the death of his girlfriend's five-year-old son. After a jury trial, Appellant was found guilty by a Hamilton County Jury of second degree murder, felony murder, rape of a child, and aggravated child abuse. The trial court merged the convictions for second degree murder and felony murder. The jury sentenced Appellant to life without the possibility of parole for the felony murder. At a later sentencing hearing, the trial court sentenced Appellant to twenty-five years for rape of a child and twenty-five years for aggravated child abuse. The sentences were ordered to run concurrently to each other and to Appellant's life sentence. Appellant has appealed, raising the following issues for our review: (1) whether the trial court improperly determined that Appellant was competent to stand trial; (2) whether the trial court improperly denied the motion to sever the charge for rape of a child; (3) whether the trial court improperly denied the motion for judgment of acquittal; (4) whether the State was improperly allowed to admit evidence of a prior bad act; (5) whether the jury properly weighed the aggravating factor and mitigating factors in sentencing Appellant to life without the possibility of parole; and (6) whether the trial court improperly denied Appellant's motion to strike the aggravating factor. After a thorough review of the record and the issues, we find no error of the trial court requiring reversal. Consequently, the judgment of the trial court is affirmed.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Lee Ortwein, Chattanooga, Tennessee, for the appellant, Nicholas Todd Hilt.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; and William H. Cox, District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

In January of 2003, Appellant lived in a duplex located at 1724 Wilson Street, Chattanooga, Tennessee, with his girlfriend, Altreasa Upshaw and her three children, Charlie Fletcher, Kia Fletcher and N.U.,[1] the victim. At the time, the children were ten, nine, and five years of age, respectively.

On Monday evening, January 6, 2003, Ms. Upshaw left her children in the care of Appellant while she was at work. Apparently, Appellant became angry with the children and took them to a cemetery in Hamilton County where he separated the children in three different locations. Charlie Fletcher heard his younger brother N.U. scream several times while they were separated. The next time Charlie Fletcher saw N.U., he noticed that N.U.'s pants were pulled down. The children were then gathered up, placed in the car, and taken back home. When they returned to the residence, Appellant beat N.U. severely. Ms. Upshaw returned home from work after the beating occurred. Appellant admitted to Ms. Upshaw that he had beaten the child but discouraged her from seeking medical attention for the injuries. Ms. Upshaw placed the child in bed with her that night and woke up at some point to discover that N.U. was not breathing. The victim was taken to T.C. Thompson Children's Hospital where his injuries were assessed. N.U. never regained consciousness and ultimately died as a result of his injuries.

Appellant was indicted in March of 2003 by the Hamilton County Grand Jury for first degree murder, felony murder, rape of a child, aggravated child abuse, and attempted first degree murder.[2] On July 31, 2003, the trial court signed an order directing Appellant to be evaluated under Tennessee Code Annotated section 33-7-301(a) for competency to stand trial and insanity. Appellant was referred to Johnson Mental Health Center in Chattanooga. According to a report issued by June E. Young, a psychologist with Johnson Mental Health Center, the facility was unable to "make a determination on an outpatient basis" and referred Appellant to Middle Tennessee Mental Health Institute ("MTMHI") for an inpatient evaluation. The trial court entered an order on September 3, 2003, directing that Appellant be evaluated on an inpatient basis by MTMHI. Appellant was admitted to MTMHI on October 8, 2003. After finishing the initial interview, a psychiatric assessment, and a forensic assessment, Appellant was discharged to court on November 5, 2003, along with a report that detailed Appellant's mental condition.

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[1] It is the policy of this Court to refer to minor victims of sexual assault by their initials.

[2] The indictment for attempted first degree murder related to an incident that occurred on January 5, 2003, during which Appellant "drowned" N.U. in the swimming pool at the downtown YMCA after hours. Appellant gained access to the building by virtue of his employment as a maintenance person. This charge was severed prior to trial and was ultimately dismissed by motion of the State.

According to the report, the staff of MTMHI were of the opinion that Appellant's "condition is such that he is not capable of adequately assisting in his defense" but that Appellant "does not meet the criteria for an insanity defense." The staff of MTMHI further opined that Appellant met the "standards of judicial commitment to a mental health institute." Attached to the report were two certificates of need for involuntary commitment - one prepared by Dr. Samuel N. Craddock, a licensed psychologist, and one prepared by Dr. Rokeya Farooque, a physician. Each certificate of need noted Appellant's severe depression and threats of attempted suicide.[3]

Subsequently, the State filed a motion for a competency hearing. In the motion, the State noted that the evaluation at MTMHI revealed that Appellant was "not competent to stand trial" on the basis of his "depression and discussion of suicide but [complained that the report] in no way states how this condition rendered him incompetent to assist in his defense." The State sought the hearing because MTMHI refused to reveal how Appellant's condition affected his competency unless the procedure outlined in Tennessee Code Annotated section 33-7-301 was followed. The trial court ordered MTMHI to provide the State and Appellant the pertinent medical records relating to Appellant's inpatient evaluation.

A competency hearing was held on February 10, 2004. At the hearing, Dr. Rokeya Sutella Farooque testified. Dr. Farooque is the forensic psychiatrist at MTMHI. She diagnosed Appellant in Axis I as having a major depressive disorder recurrent with psychotic features. In Axis II, Appellant was diagnosed with personality disorder not otherwise specified. In Axis III, Dr. Farooque reported that Appellant has a history of acute promyelocytic leukemia. Dr. Farooque initially determined that Appellant was not competent to stand trial because of his depression and mental condition. When she first assessed Appellant, Dr. Farooque's opinion was that Appellant met the criteria for commitability to a secure psychiatric facility but did not find any basis for an insanity defense. Dr. Farooque felt that Appellant would "not be able to talk with his lawyer, to prepare a defense for himself and communicate with his lawyer rationally and with a description of the incidents with the facts."

At the time he was initially assessed, Dr. Farooque felt that Appellant understood the nature of the charges and the potential consequences. However, she felt that Appellant thought that he was "already convicted" and wanted "the death penalty." His severe depression resulted in a lack of motivation, interest and mental capacity to sit down and communicate with his lawyer in a rational manner. Appellant informed Dr. Farooque that he had "no memory of the incident."

Dr. Sam Craddock, a psychologist at MTMHI, also testified in regard to his evaluation of Appellant. Dr. Craddock interviewed Appellant on a number of occasions and also spoke with friends and family of Appellant. Appellant acknowledged at least one suicide attempt and his social history revealed possible hallucinations. Dr. Craddock admitted that there was a possibility that

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[3] At some point after his initial arrest, Appellant attempted to stab himself in the neck with a pen and grab a police officer's weapon. He was treated and released at the hospital for self-inflicted injuries to his neck as a result of that incident.

Appellant was "malingering" or exaggerating some of his symptoms. Dr. Craddock agreed that Appellant was capable of understanding his charges and the possible penalties but that Appellant was "legitimately depressed" to the extent that he lacks the motivation to defend himself. Dr. Craddock admitted that this reaction would be typical for a person who was suffering from leukemia and facing severe criminal charges. Dr. Craddock opined that Appellant would require medication for a period of time before becoming competent to stand trial.

After the hearing, Appellant was admitted to MTMHI for approximately eleven months. At a status hearing on April 4, 2005, counsel for the State informed the trial court that Appellant had been deemed competent for trial. On July 20, 2005, counsel for Appellant filed a motion for reevaluation of Appellant's competency. The trial court held a hearing on the motion on August 29, 2005. At that hearing, the jail psychologist, Dr. Mark W. Peterson, testified that Appellant was exhibiting a "psychotic delusional state that was becoming worse and worse." Dr. Peterson reported that Appellant had been "refusing his medication for a number of weeks." The trial court ordered Appellant to take his medication and informed him that if he did not take it voluntarily he would be "forced" to take it by the staff at the jail.

On October 10, 2005, the trial court ordered that Appellant be reevaluated for competency to stand trial by the doctors at MTMHI. Subsequently, during several status hearings, the trial court was informed that Appellant was continuing to refuse his medication. At a status hearing on February 23, 2006, the trial court again heard testimony from Dr. Peterson from the Hamilton County jail. Dr. Peterson met with Appellant one week prior to the hearing and was able to speak with Appellant at that time. Appellant was basically "nonresponsive" and Dr. Peterson was unable to ascertain whether Appellant's refusal to cooperate was as a result of mental illness or a voluntary act. Further, Dr. Peterson informed the trial court that the jail guidelines prohibited him from forcefully administering medication to Appellant without a finding that Appellant was incompetent. At that point, the trial court felt that Appellant needed to be reevaluated by the doctors from MTMHI.

On April 13, 2006, the trial court held another hearing in regard to Appellant's competence to stand trial. At the hearing, Dr. David Solovey testified that Appellant would not talk when he attempted to interview him prior to the hearing. Dr. Solovey stated that he was unable to perform the majority of the testing required to determine competence but that based on his observations and a review of Appellant's medical records he opined that Appellant was "not competent at the present time." Dr. Solovey informed the court that his decision was based on the fact that Appellant had refused to eat in the past month, had not taken his medication in the last six months, and refused to communicate with most people. Dr. Solovey felt that Appellant was in a "progressive state of decline."

Dr. Farooque testified as to her history with Appellant. She deemed Appellant competent to stand trial on March 7, 2005, and examined Appellant on October 13, 2005. As of October 13, 2005, Dr. Farooque believed Appellant was still competent to stand trial. At that time, Appellant stated that he had stopped taking his medication because it was "making him more . . . mentally ill." Appellant also reported that he wanted the death penalty and wanted to go back to MTMHI. On the

day of the hearing, Dr. Farooque attempted to interview Appellant but he refused to communicate with her. Dr. Farooque saw and heard Appellant speaking with someone in the jail, but when she addressed him, he covered up his face and refused to speak to her. Dr. Farooque testified that she could not give a "complete decision" about Appellant's competence to stand trial because he refused to talk to her. The trial court determined at that time that Appellant was still competent to stand trial.

Shortly thereafter, during a hearing on pretrial motions, Appellant addressed the trial court at length regarding his feelings and emotions. Appellant asked the trial court to just give him the "death penalty." Appellant and the trial court launched into a lengthy, rather heated discussion of Appellant's guilt, behavior, and attitude. After that hearing, the trial court recused itself from the case. On the basis of some of the "irrational" statements made by Appellant during his rant to the trial court, counsel for Appellant requested another competency evaluation. On May 26, 2006, the trial court ordered an additional forensic evaluation of Appellant by Dr. Ronnie G. Stout.

At the next hearing on June 1, 2006, Dr. Stout testified that he is a clinical psychologist with MTMHI. He was on the treatment team when Appellant was a patient at MTMHI and interviewed Appellant for about forty-five minutes immediately preceding the hearing. In his opinion, Appellant was still competent to stand trial. At this meeting, Appellant was "cooperative" and "cordial." Appellant indicated to Dr. Stout that he was "depressed." Appellant was subdued and his speech was low and soft. Appellant's conversation was goal-directed and sensible. Appellant even apologized for some of the prior things that he had said to Dr. Stout and others. Dr. Stout did not feel that Appellant was delusional or hallucinating. Dr. Stout did not see any evidence that Appellant was not competent to stand trial.

Dr. Solovey testified that he interviewed Appellant the night before the hearing to determine competence. Dr. Solovey had attempted to interview Appellant in the past with little success. Dr. Solovey explained that he asked Appellant questions that were relevant to competency and Appellant responded by asserting that he "didn't trust himself with others," that he "wanted the death penalty," and continued to "rant." At one point Appellant claimed that he was being deprived of his rights. Dr. Solovey opined that Appellant's behavior represented paranoia to the extent that it prevented him from "successfully interact[ing] with [Appellant]" in order to assess his competence. Appellant appeared "distressed and animated." Dr. Solovey also opined that Appellant was "unable to assist . . . his attorney in any parts of the defense" at that time, partially due to the fact that he had remained unmedicated for such a long period of time. Dr. Solovey felt that medication would give Appellant a "better chance" of competence.

At the conclusion of the hearing, the trial court determined that it had heard "nothing that changes the Court's earlier order that [Appellant] is in fact competent to stand trial." The trial court felt that Dr. Stout came to the conclusion that Appellant had the ability, but "maybe not the willingness," to assist in his defense. As a result, the trial court ruled that Appellant has "the ability to cooperate . . . he does have the ability to understand and to assist counsel in regard to trial."

Proof at Trial

At trial, Dr. Gregory Alan Talbott of T.C. Thompson Children's Hospital in Chattanooga testified that the five-year-old victim was brought into the emergency room on January 7, 2003, in cardiac arrest. N.U. was unconscious and in shock. After doctors tried to stabilize him, he was admitted to the pediatric intensive care unit with severe head and abdominal injuries as well as injuries to his genital region and anus. N.U. had no neurological function from the time that he was admitted up to the time of his death. Dr. Talbott described the victim's injuries as including bleeding around the surface of the brain, massive swelling of the brain, external bruises, and a hematoma with swelling over his forehead. The victim's liver was shattered, there was blood throughout his abdomen, and his spleen, kidney, and pancreas were bruised. The victim also had purple contusions and lacerations at the base of his penis as well as a rectal tear that was accompanied by other smaller anal contusions.

From the moment N.U. was admitted to the hospital, Dr. Talbott felt that his injuries were almost certainly fatal. The injuries were not consistent with an accident unless it was a severe car accident or possibly falling out of a second story window. N.U.'s injuries were fresh and so severe that they could not have occurred a day or two before admission to the hospital. The injuries were, in Dr. Talbott's opinion, consistent with being beaten to death.

Mary Katherine Spada was called to examine N.U. as party of her job as a sexual assault nurse examiner with the Children's Advocacy Center. When Ms. Spada performed her exam, N.U. was in the pediatric intensive care unit and unresponsive. According to Ms. Spada, the victim had various injuries to his genital area. The tissue above N.U.'s penis was actually pulled apart and the skin was ripped open. The victim's anal area also had numerous lacerations. It looked as though a large object had been forced into the anal area, and the object actually caused the anal area to split. There was clear fluid and blood coming from N.U.'s anal area.

Chattanooga Police Officer Jason Irvin interviewed Appellant in regard to N.U.'s injuries. Appellant signed a waiver of rights form and gave a taped statement to authorities in which he essentially confessed to inflicting the injuries to the victim.[4] In the statement, Appellant stated that on Monday, January 6, 2003, he took the children's mother, Altreasa Upshaw, to work. Appellant came back home to watch the children. N.U. made Appellant upset because he would not stay out of the room where they kept the dogs. The other two children kept running in and out of the house. Appellant locked the children out of the house for about thirty minutes so that he could study. At some point thereafter, Appellant placed the children in the back of his car and drove them to a cemetery. At the cemetery, he separated the children. Kia Fletcher was duct taped to a headstone. Charlie Fletcher was left at a separate location near a flag pole. Charlie testified that he could hear

[4] Appellant also informed authorities that he "drowned" N.U. on Saturday night at the YMCA, his place of employment. He took the children to the YMCA at around 1:00 a.m. Appellant got mad at the victim for wandering off from the game room, so he took him to the pool area and "drowned" him. Appellant reported that he used CPR to revive N.U. Appellant told police that he decided to kill N.U. because he was angry that he got lost.

N.U. screaming but did not know what was happening to N.U. Charlie found the victim all alone at a little house down by the river. Charlie noticed that N.U.'s pants were down, and he was crying. Appellant then gathered the children up and placed them back in the vehicle. Charlie helped the victim pull up his pants before they got into the vehicle.

Appellant drove the children back to their house. Appellant dragged N.U. up the stairs and the other children followed. According to one of the neighbors, N.U. had a toboggan-like mask over his head and face when Appellant was dragging him into the house. Once they got inside the house, Appellant demanded that N.U. take a bath. N.U. kept coming out of the bathroom, and Appellant was getting angry. Charlie and Kia stayed in their rooms. Appellant slammed N.U. against the wall in the hallway until he was placed in the tub. Appellant slammed the victim into the wall about ten times. Appellant told N.U. to get up, and when he did so, Appellant pushed him back to the ground. N.U. was able to get out of the shower with the help of Kia and Charlie. They toweled him off, got him dressed, and laid him down on the couch by carrying him from the bathroom into the living room. Appellant also pushed Kia into a dresser. Charlie and Kia testified that they saw Appellant stomp on the victim and throw him up against the wall in the bathroom. Charlie also saw Appellant stomp the victim in the stomach while he was lying on the floor. At the time of the attack, Charlie was ten years old. He testified that he did not know if his brother was alive after the attack. When his mother came home, Appellant "started laughing" when his mother asked "what was wrong with him." Kia stated that Appellant grabbed a knife to keep her mother from calling the police.

When Appellant picked Ms. Upshaw up from work, Appellant did not tell her anything about N.U.'s condition. When she arrived at the house, she tried to wake up N.U. He woke up momentarily, then went back to sleep. She kept trying to wake him up. Appellant admitted that he beat the victim up. Appellant was "talking crazy" and "wanted [her] dead." Ms. Upshaw claimed that Appellant even had a knife. Ms. Upshaw tried to call the police, but Appellant snatched the phone away from her and would not allow her to call to get help. Ms. Upshaw decided to place the victim in bed with her and Appellant that night, and they all fell asleep. Around 5:30 a.m., Ms. Upshaw awoke to discover that N.U. was not breathing. She called 911.

When they arrived at the hospital, she informed staff that the victim had fallen off a bunk bed. Hospital staff quickly ascertained from the nature and severity of N.U.'s injuries that they were not accidental. N.U. died on January 8, 2003, as a result of his injuries. An autopsy was performed and the cause of death was listed as blunt head and abdominal trauma. There were multiple blunt trauma injuries to the victim's head and abdomen consistent with having been thrown up against a wall and stomped in the abdomen. N.U.'s liver was lacerated and there were also multiple injuries of the penis, genitalia, anus, and rectum. The injury to the anus was caused by some type of penetration that occurred so forcefully that the tissue was stretched to the point that it tore. The victim's penis and scrotum had multiple bruises. The penis was torn near the root of the penis where it attaches to the body. Based on the autopsy, the medical examiner concluded that the injuries to the penis were caused by pulling or stretching it away from the body forcefully.

Appellant was arrested. At the time of his arrest, he requested a pen so that he could write a letter. He was given a pen, and Appellant used the pen to stab himself in the neck. Appellant was taken to the hospital where he met with Wilbert Bunch, a licensed clinical social worker. Mr. Bunch testified that Appellant was depressed and sad but did not have any difficulty expressing his thoughts or responding to questions. Appellant informed Mr. Bunch that he was in the Navy and had a prior suicide attempt. Appellant also reported that he thought that at some point he had been treated with anti-depressant medication. During his interview of Appellant, Mr. Bunch did not feel that Appellant was "suicidal, homicidal or psychotic." Mr. Bunch recommended that Appellant be taken back to the jail and placed on suicide watch until he was evaluated by mental health professionals at the jail.

Appellant presented Dr. Solovey to testify in his behalf at trial. He reviewed Appellant's social, mental, and employment history. He learned that Appellant was abused by his mother as a child. Appellant completed high school, attended some college and then entered the military. Appellant was injured in the Navy after a suicide attempt. He was discharged and diagnosed with posttraumatic stress disorder and paranoia traits. Appellant was subsequently diagnosed with leukemia. Appellant had periods of blackouts, memory lapses, and depression. Appellant also reported hearing the voice of a deceased friend. Dr. Solovey reported that Appellant exhibited bizarre behavior in jail which included eating his own feces. Dr. Solovey summarized the treatment that Appellant had received since his arrest. Dr. Solovey concluded that, at the time of the offenses, Appellant was suffering from paranoid delusions and a psychotic process. Dr. Solovey felt that Appellant was not in a reasonable mental state and was not able to appreciate the wrongfulness of his conduct. Dr. Solovey admitted that he first met Appellant nearly three years after N.U.'s death. Further, Dr. Solovey testified that Appellant never actually told him that he was delusional.

In rebuttal, the State called Dr. Farooque. She summarized Appellant's care and treatment since his incarceration. Based on all of her evaluations of Appellant, she concluded that "there is no information to propose that [Appellant], as a result of a serious mental illness or other defect, would have been unable to recognize or appreciate the nature and wrongfulness of his alleged actions."

At the conclusion of the proof, the matter was submitted to the jury. The jury found Appellant guilty of second degree murder, felony murder, rape of a child, and aggravated child abuse. As a result, the trial court merged the convictions for felony murder and second degree murder. Appellant was sentenced to life without parole for felony murder. The trial court sentenced Appellant to twenty-five years for rape of a child and twenty-five years for aggravated child abuse, to be served concurrently to each other and to the life sentence for felony murder. Appellant seeks review of the following issues on appeal: (1) whether the trial court improperly determined that Appellant was competent to stand trial; (2) whether the trial court improperly denied the motion to sever the charge for rape of a child; (3) whether the trial court improperly denied the motion for judgment of acquittal; (4) whether the State was improperly allowed to admit evidence of a prior bad act; (5) whether the jury properly weighed the aggravating factor and mitigating factors in sentencing

Appellant to life without the possibility of parole; and (6) whether the trial court improperly denied Appellant's motion to strike the aggravating factor.

Analysis

Competency

Appellant claims on appeal that the trial court erred in determining that Appellant was competent to stand trial. Specifically, Appellant contends that "[t]he record is . . . replete with evidence of Appellant's incompetence, as established both by the testimony of the doctors as well as by the words and actions of Appellant in the courtroom." Specific examples of Appellant's incompetence include his "mistrustfulness of counsel, [sic] and members of the defense team to such an extent that he ceased to communicate with them substantially prior to trial." The State disagrees, arguing that the trial court properly determined that Appellant was competent.

The Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Tennessee Constitution prohibit the trial of a person who is mentally incompetent. *Pate v. Robinson*, 383 U.S. 375, 378 (1966); *State v. Blackstock*, 19 S.W.3d 200, 205 (Tenn. 2000). The test for determining whether a defendant is competent to stand trial is whether the defendant 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, 173-74 (Tenn. 1991) (quoting *Mackey v. State*, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975)); *see also Dusky v. United States*, 362 U.S. 402-03 (1960). The burden is on the defendant to establish his incompetency to stand trial by a preponderance of the evidence. *State v. Reid*, 164 S.W.3d 306, 308 (Tenn. 2005) *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); *see also Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (holding that criminal defendants may be required to prove their incompetency to stand trial by a preponderance of the evidence but not by clear and convincing evidence); *Jordan v. State*, 135 S.W. 327 (Tenn. 1911) (finding no error in the trial court's jury charge referencing the presumption of sanity[5] until rebutted and overturned). Furthermore, the "findings of the trial court are conclusive on appeal unless the evidence preponderates otherwise." *Oody*, 823 S.W.2d at 559 (citing *Graves v. State*, 512 S.W.2d 603 (Tenn. Crim. App. 1973)).

In applying these principles to this case, we conclude that the evidence in the record does not preponderate against the trial court's finding that Appellant was competent to stand trial. This case presents a classic battle of the experts. The State's experts, Dr. Farooque and Dr. Stout, testified that Appellant was competent to stand trial, whereas the defense experts, Dr. Solovey and Dr. Peterson, found Appellant incompetent to stand trial. The trial court held several exhaustive evidentiary

[5] At the time *Jordan* was decided, the term present insanity was used rather than competency. The test for present insanity was whether the defendant was of sufficient mental capacity to give sane advice to his counsel involving the charge in the indictment. *Jordan*, 135 S.W. at 328. The jury charge in *Jordan* related to the issue of competency to stand trial as opposed to insanity at the time of the offense.

hearings and considered the expert testimony of Dr. Farooque, Dr. Stout, Dr. Solovey, and Dr. Peterson. The trial court found that Appellant certainly suffered from depression and appeared to have difficulty communicating at times. The trial court further found, however, that "[e]verybody maybe understands [Appellant's] resignation, but he does have the ability to cooperate, he does have the ability to understand . . . and to assist counsel in regard to trial." In other words, Appellant understood the nature of the proceedings and understood the charges against him. The trial court determined that Appellant displayed an "unwillingness" to assist in his own defense. The fact that Appellant was unwilling to assist in his own defense does not indicate that he actually lacked the ability to do so. In short, the trial court heard the evidence and accredited the testimony of Dr. Farooque and Dr. Stout. After carefully reviewing the record, we conclude that the evidence does not preponderate against the trial court's finding that Appellant was competent to stand trial.

Denial of Motion to Sever

Appellant contends that the trial court improperly denied a motion to sever Count 3, rape of a child. Specifically, Appellant argues that Count 3, rape of a child, fails to satisfy the requirements of Rule 8(a) of the Tennessee Rules of Criminal Procedure because it was "not part of the same conduct nor did it arise from the same criminal episode as the other conduct alleged in the remaining counts." In other words, because the allegations of aggravated child abuse were not based on the rape and because the rape did not result in the murder, it was not impossible to prove the other charges without introducing evidence of the rape. The State disagrees, arguing that the rape of the victim was part of the same criminal episode and that Appellant has presented no evidence to the contrary.

A trial judge's decision with respect to a motion for severance of offenses is one entrusted to the sound discretion of the judge and will not be reversed on appeal absent an abuse of that discretion. *State v. Shirley*, 6 S.W.3d 243, 245 (Tenn. 1999). Additionally, "a trial court's refusal to sever offenses will be reversed only when 'the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice for the party complaining.'" *Id.* at 247 (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The Tennessee Supreme Court has opined that:

> [B]ecause the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts should usually only look to that evidence, along with the trial court's findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses.

Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000). Rule 8(a) of the Tennessee Rules of Criminal Procedure governs mandatory joinder of offenses. Pursuant to Rule 8(a):

> Two or more offenses shall be joined in the same indictment, presentment, or information, . . . or consolidated pursuant to Rule 13 if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s), presentments(s), or information(s) and if they are within the jurisdiction of a single court.

The term "same conduct" or "same criminal episode" has been described as referring to a single action which may be divisible into distinct offenses. *See State v. Dunning*, 762 S.W.2d 142, 143-44 (Tenn. Crim. App. 1988). The Advisory Commission Comments to Rule 8 further explain that the rule:

> [I]s designed to encourage the disposition in a single trial of multiple offenses arising from the same conduct and from the same criminal episode, and should therefore promote efficiency and economy. Where such joinder of offenses might give rise to an injustice, Rule 14(b)(2) allows the trial court to relax the rule.

Tenn. R. Crim. P. 8, Advisory Comm'n Cmts.; *see also State v. Carruthers*, 35 S.W.3d 516, 573 (Tenn. 2000). Severance of offenses is controlled by Tennessee Rule of Criminal Procedure 14(b) which provides in pertinent part:

> (b) Severance of Offenses
>
> . . . .
>
> (2) If two or more offenses have been joined or consolidated for trial pursuant to Rule 8(a), the court shall grant a severance of offenses in any of the following conditions:
>
> (i) If before trial on motion of the state or the defendant it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.
>
> (ii) If during trial with consent of the defendant it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether, in light of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Turning to the case herein, we note that the trial court held an evidentiary hearing on the motion to sever. At the hearing, the State argued that Rule 8(a) required mandatory joinder of the offenses because the rape was part of the same criminal episode and part of the same conduct of abuse that Appellant inflicted upon N.U. The trial court determined that "it does appear this is the same conduct, it's part of the same child abuse which resulted in the homicide and it should be joined and should not be severed. So at this point, we'll overrule the motion concerning the

severance." Thus, the trial court found that evidence of each offense was relevant and material to proof of the other. In other words, the trial court found that the evidence necessary to prove the rape, aggravated child abuse, and murder charges was so inextricably linked that all three offenses should be considered simultaneously. Because the trial court found that joinder of the offenses was required by Rule 8(a), in order to obtain a severance, Appellant had to show that severance was "necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." Tenn. R. Crim. P. 14(b)(ii). After a review of the record, we conclude that the trial court did not abuse its discretion in denying the motion to sever the offenses. The rape at the cemetery and the beating inflicted on N.U. upon the return home following the rape are both part of a single continuing episode of abuse. Appellant is not entitled to relief on this issue.

Denial of Motion for Judgment of Acquittal

Appellant contends that the trial court improperly denied his motion for judgment of acquittal. Specifically, Appellant states that "the State failed to prove all the essential elements for the conviction of rape of a child, that he was guilty beyond a reasonable doubt of the other offenses . . . and the court erred in failing to find that the weight of the evidence established that Appellant was not sane at the time of the offenses.[6] The State, on the other hand, argues that Appellant has waived the issue by choosing to offer proof after the denial of the motion. Further, the State posits that the evidence is sufficient to support the convictions and does not support an insanity defense.

According to Tennessee Rule of Criminal Procedure 29(a):

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has noted that "[i]n dealing with a motion for judgment of acquittal, unlike a motion for a new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence." *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). A motion for judgment of acquittal made at the conclusion of the State's proof is waived for appellate purposes when a defendant thereafter presents evidence on his or her own behalf. *Mathis v. State*, 590 S.W.2d 449, 453 (Tenn. 1979); *see* Tenn. R. Crim. P. 29(a). After the trial court denied the motion, Appellant failed to stand on his motion; instead, he elected to call witnesses to testify on his behalf. Therefore, we conclude this issue is not

[6] While Appellant challenges the "weight of the evidence" with respect to the "other offenses" for which he was convicted, he does not specifically address the murder conviction in his brief on appeal. Despite Appellant's failure to raise this issue, we will review the sufficiency of the evidence with respect to the felony murder conviction.

the proper subject of review. However, we will address the sufficiency of the evidence regarding the convictions that Appellant challenges on appeal. In doing so, we review all the evidence, not just that offered by the State in its case-in-chief.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

A. Rape of a Child

In order to convict Appellant of rape of a child, the State had to prove beyond a reasonable doubt that Appellant engaged in unlawful sexual penetration with N.U. and that N.U. was less than thirteen years of age at the time of the penetration. *See* T.C.A. § 39-13-522. Sexual penetration means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." *Id.* 39-13-501(7).

Appellant contends that the State's proof consisted almost exclusively circumstantial evidence. According to Appellant, there are "other explanations" that could have been drawn from the evidence that would display a lack of proof that the penetration of N.U. was caused intentionally, knowingly, or recklessly as required by law. We note that a criminal offense may be established exclusively by circumstantial evidence. *State v. Tharpe*, 726 S.W.2d 896, 899-900 (Tenn. 1987); *State v. Jones*, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995). However, the trier of fact must be able to "determine from the proof that all other reasonable theories except that of guilt are excluded." *Jones*, 901 S.W.2d at 396; *see also, e.g., Tharpe*, 726 S.W.2d at 900.

Reviewing the evidence in a light most favorable to the State, the proof at trial showed that Appellant took the victim, and the other children to a cemetery where he separated the children. While they were separated, Charlie was left at a flagpole and Kia was duct taped to a headstone. Charlie could hear N.U. screaming and ran to find him. He found N.U. screaming near a little house down by the river bank. N.U.'s pants were pulled down. Appellant was not present when Charlie located N.U. Charlie helped N.U. pull his pants up and walked him to the flag pole. When N.U. was later taken to the hospital, his examination revealed extensive injuries to both his genital region and his anus. N.U. had a rectal tear and other smaller contusions. According to the testimony at trial, it appeared that a large object had been forced into the anal area, causing the area to split. The victim's penis had been pulled away from the body and actually ripped open. The injuries were estimated to be recent.

As stated above, the determination of credibility of the witnesses along with the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *Pruett*, 788 S.W.2d at 561. It appears from the verdict that the jury accredited the testimony of the State, even though mostly circumstantial, to find that Appellant was guilty of rape of a child. The evidence is sufficient to sustain the conviction for rape of a child. Appellant is not entitled to relief on this issue.

B. Aggravated Child Abuse and Felony Murder

Appellant also asks this Court to review the sufficiency of the evidence with respect to his convictions for aggravated child abuse and felony murder. To convict Appellant of aggravated child abuse, the State was required to prove: (1) that Appellant knowingly, other than by accidental means treated N.U in such a manner as to inflict injury; and (2) that the act of abuse resulted in serious bodily injury. *See* T.C.A. §§ 39-15-401(a) & -402(a)(1). Serious bodily injury includes bodily injury which involves: "(A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." T.C.A. § 39-11-106(34). A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. T.C.A. § 39-11-106(a)(20). To convict Appellant of felony murder, the State had to prove that N.U. was killed "in the perpetration of or attempt to perpetrate any . . . aggravated child abuse." T.C.A. § 39-12-202(a)(2). The State was not required to prove a culpable mental state, other than "the intent to commit the enumerated offense." T.C.A. § 39-12-202(b).

After a review of the evidence, we conclude that there was sufficient evidence presented at trial for a rational trier of fact to find Appellant guilty of aggravated child abuse and felony murder. There was testimony from both of the victim's siblings that Appellant stomped, kicked, and threw the victim, severely beating him. The doctor that treated N.U. at the hospital testified that his injuries were extensive and would have required extreme force and were consistent with being punched or stomped on by another person. The medical examiner testified that the victim died as a result of blunt head and abdominal trauma. Appellant himself admitted to Ms. Upshaw and in his

statement to police that he repeatedly slammed N.U. against the wall because he was angry. Appellant is not entitled to relief on this issue.

C. Insanity

Appellant also contends that the trial court erred in determining that there was not ample evidence admitted at trial to establish his insanity. Specifically, Appellant contends that the State "failed to rebut" Appellant's proof of insanity.

Appellant failed to raise this issue in a motion for new trial. Generally, the failure to present an issue in a motion for new trial results in waiver of the issue on appeal. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides that for appeals "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." *See also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial).

Despite Appellant's waiver, this issue is without merit. The proof admitted at trial clearly does not support the affirmative defense of insanity. In order to prove insanity, Appellant was required to put on proof to show that "as a result of a severe mental disease or defect, [he] was unable to appreciate the nature or wrongfulness of [his] acts" by "clear and convincing evidence." T.C.A. § 39-11-501(a). Dr. Solovey testified that Appellant was suffering from delusions at the time of the offenses but admitted that Appellant never claimed that he was delusional. The proof, including Appellant's own statement, indicated a conscious disregard for N.U.'s life. As a result of his own anger toward the victim, Appellant tried to drown him at the YMCA and severely beat him. Further, the opinion of Dr. Farooque was that there was "no information to propose that [Appellant], as a result of a serious mental illness or other defect, would have been unable to recognize or appreciate the nature and wrongfulness of his actions." Appellant is not entitled to relief on this issue.

Admission of Evidence of Additional Act of Abuse

Next, Appellant complains that the trial court improperly allowed evidence of the "alleged attempted murder incident at the YMCA." The State disagrees.

Appellant was originally charged with five separate counts in the indictment - first degree murder, felony murder, rape of a child, aggravated child abuse, and attempted first degree murder. The attempted first degree murder charge related to Appellant's attempt to kill N.U. the day prior to the events that ultimately killed N.U. by "holding the victim underwater in a swimming pool until the victim lost consciousness and CPR was required to bring the victim back to consciousness."

This charge was severed prior to trial by agreement.[7] However, the State advised the trial court and Appellant that it intended to offer evidence of what had occurred at the YMCA if Appellant's mental state became an issue at trial.

During trial, the State informed the trial court that it intended to introduce evidence concerning the incident at the YMCA based on statements made by counsel for Appellant during opening statements that claimed Appellant's "state of mind" would be an issue during trial. The State argued that the facts relating to the attempted drowning "clearly" established Appellant's motive, lack of mistake, lack of insanity, and general mental state and that counsel for Appellant opened the door to such evidence during opening statements. The State sought to introduce a portion of Appellant's statement to police in which he discussed the incident at the YMCA. In his statement, Appellant informed police that he "killed" the victim on "Saturday night" at the YMCA in a swimming pool at around 1:00 a.m. Appellant stated that he used CPR to bring the victim back to life. Further, Appellant admitted that he drowned N.U. because "he decided to go off and he got lost and I got mad." The trial court determined:

> [T]he Court's [sic] determined that his prior misconduct of the swimming pool incident at the YMCA is relevant on issues of motive, intent, absence of mistake, and that the probative value of this would outweigh the prejudicial effect on it and this incident concerning what happened the previous day would be admissible.

As we begin our analysis, we note well-established precedent providing "that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996). Moreover, the Tennessee Rules of Evidence embody, and our courts traditionally have acknowledged, "a policy of liberality in the admission of evidence in both civil and criminal cases." *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978); *State v. Robinson*, 930 S.W.2d 78, 84 (Tenn. Crim. App. 1995). To be admissible, evidence must satisfy the threshold determination of relevancy mandated by Tennessee Rule of Evidence 401. *See, e.g., Banks*, 564 S.W.2d at 949. Rule 401 defines "relevant evidence" as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant "evidence may be excluded if its probative value is substantially outweighed by . . . the danger of unfair prejudice." Tenn. R. Evid. 403; *see also Banks*, 564 S.W.2d at 951. A trial court abuses its discretion in regards to the admissibility of evidence only when it "applie[s] an incorrect legal standard, or reach[es] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

The general rule is that evidence of a defendant's prior conduct is inadmissible, especially when previous crimes or acts are of the same character as the charged offense, because such evidence

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[7] The charge was eventually dismissed by the State.

is irrelevant and invites the "finder of fact to infer guilt from propensity." *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). Tennessee Rule of Evidence 404(b) permits the admission of evidence of prior conduct if the evidence of other acts is relevant to a litigated issue such as identity, intent, or rebuttal of accident or mistake, and the probative value outweighs the danger of unfair prejudice. *See* Tenn. R. Evid. 404(b) Advisory Comm'n Cmts.; *State v. Parton*, 694 S.W.2d 299, 303 (Tenn. 1985); *State v. Hooten*, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987). However, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). Before admitting evidence under Rule 404(b), the rule provides that (1) upon request, the court must hold a hearing outside the jury's presence; (2) the court must determine that the evidence is probative on a material issue and must, if requested, state on the record the material issue and the reasons for admitting or excluding the evidence; and (3) the court must exclude the evidence if the danger of unfair prejudice outweighs its probative value. Tenn. R. Evid. 404(b).

The rationale underlying Rule 404(b)'s exclusion of evidence of a defendant's prior bad acts is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994). The risk is greater when the defendant's prior bad acts are similar to the crime for which the defendant is on trial. *Id.*; *see also State v. McCary*, 922 S.W.2d 511, 514-15 (Tenn. 1996).

We agree with the trial court that evidence regarding the YMCA incident is "relevant on issues of intent, [and] absence of mistake" and therefore Appellant's prior actions were relevant to a material issue other than to show action in conformity with a character trait. However, we recognize that opening statements by counsel are not evidence and such statements will not alone "open the door" for the prosecution to introduce evidence of other crimes because opening statements provide nothing for the State to rebut. *See State v. Kevin Rudd*, No. W2005-02814-CCA-R3-CD, 2007 WL 2700077, at *6 (Tenn. Crim. App., at Jackson, Sept. 13, 2007) (citing *State v. Boris Terrell Traylor*, No. 01C01-9104-CC-00124, 1992 WL 14140, at *2-3 (Tenn. Crim. App., at Nashville, Jan. 31, 1992)).

In *Kevin Rudd*, we determined that the trial court's decision to allow testimony of a defendant's prior crime as a result of assertions of defense counsel during opening statement was error where the prior crime was substantially similar to the crime for which he was on trial. 2007 WL 2700077, at *7. We reached this conclusion on the basis that, at the time the evidence was admitted, there was no evidence to rebut, "as is the requirement for admission of prior bad acts under Tennessee Rule of Evidence 404(b). In *Kevin Rudd*, we found the error to be harmful and reversed and remanded the matter for a new trial. *Id.*

Turning to the case herein, we determine that the trial court erred in allowing the portion of Appellant's statement that related to the incident at the YMCA to be admitted. At the time the statement was admitted into evidence, there was no evidence of motive, intent, or absence of mistake to rebut. In fact, Appellant did not actually dispute the series of events advanced by the State.

Appellant did not dispute that he killed N.U. Appellant ultimately relied on a theory of mental instability, or insanity in an attempt to convince the jury that he was not guilty. Consequently, we find the error of the trial court in this instance to be harmless. Indeed, the admission of proof of the attempted drowning of N.U. could have actually helped to bolster Appellant's theory of the defense by creating an example of the bizarre behavior that Appellant displayed in the hours leading up to N.U.'s death. Appellant is not entitled to relief on this issue.

Denial of Motion to Strike Aggravating Factor

Appellant argues that the trial court erred in denying his motion to strike the aggravating factor relied on by the State because the factor did not properly narrow the class of offenders eligible for the enhanced sentence in violation of the federal and state constitutions. Specifically, Appellant contends that the aggravating factor relating to the victim's age was an element of aggravated child abuse and use of the aggravating factor to enhance his sentence violated his constitutional rights. In other words, once the jury found him guilty of aggravated child abuse, they had already found the aggravating factor. The State argues that this issue has no merit because it has been previously rejected by the Tennessee Supreme Court in *State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001).

Prior to trial, the State submitted a "Notice of Intent to Seek a Sentence of Imprisonment for Life Without Possibility of Parole." In that notice, the State informed Appellant that pursuant to Tennessee Code Annotated section 39-13-204, it would be relying on the following statutory aggravating circumstance: "[t]he murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older."

In *State v. Hodges*, 7 S.W.3d 609, 629 (Tenn. Crim. App. 1998), this Court examined a similar situation, where the defendant was convicted of both felony murder and aggravated child abuse. On appeal in *Hodges*, the defendant argued, like Appellant herein, that "[a]pplication of this factor in no meaningful way narrows the class of defendants eligible for a sentence of life without parole. This aggravating factor unconstitutionally duplicates a single aspect of the alleged crime-the victim's age-and thereby violates [the defendant's constitutional rights]." In *Hodges*, we determined:

> This issue has been resolved by our supreme court in *State v. Butler*, 980 S.W.2d 359 (Tenn. 1998). In *Butler*, the supreme court held that "there are no constitutional or statutory prohibitions" to relying upon the felony murder aggravating circumstance when seeking a sentence of life without the possibility of parole for defendants charged with felony murder. *Id.* at 360-61 (discussing Tennessee Code Annotated § 39-13-204(i)(7)).
>
> The court first stated that, when the proposed penalty is not death, constitutional provisions prohibiting cruel and unusual punishment and defining the need to narrow the class of offenders "are not at issue." *Id.* at 362-63. Second, the court discussed statutory sentencing requirements-specifically, §§ 39-13-204 and 39-13-207-and determined that "[n]othing in the text of either section 39-13-207 or

> 39-13-204 prohibits the jury from considering an aggravating circumstance when the aggravator duplicates an element of the underlying offense." *Id.* at 362.

We went on in *Hodges* to determine that there were no constitutional or statutory impediments to the use of Tennessee Code Annotated section 39-13-204(i)(1) as a sentencing aggravating factor by the trial court. In so doing, we noted that prior to *Butler*, the court approved the use of Tennessee Code Annotated section 39-13-204(i)(1) as an aggravator in a case in which age was an element of the offense. *Hodges*, 7 S.W.3d at 629 (citing *State v. Lacy*, 983 S.W.2d 686, 696 (Tenn. Crim. App. 1997) (permitting Tennessee Code Annotated section 39-13-204(i)(1) as an aggravating factor in a prosecution for first degree murder by aggravated child abuse).

After the decisions were rendered in *Hodges*, *Butler*, and *Lacy*, the Tennessee Supreme Court examined a similar situation to the instant case in the context of a death penalty case, *State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001). In *Godsey*, the defendant was convicted of felony murder and aggravated child abuse and was sentenced to death. On appeal, the defendant argued that the State could not seek the death penalty where the sole aggravator was the age of the victim because the age of the victim was an element of the underlying felony. *Id.* at 779. The court determined:

> Child abuse becomes aggravated when the "act of abuse results in serious bodily injury to the child; or . . . a deadly weapon is used." Tenn. Code Ann. § 39-15-402. [FN13 In its entirety the statute provides: (a) A person commits the offense of aggravated child abuse or aggravated child neglect who commits the offense of child abuse or neglect as defined in § 39-15-401 and: (1) The act of abuse or neglect results in serious bodily injury to the child; or (2) A deadly weapon is used to accomplish the act of abuse. (b) A violation of this section is a Class B Felony; provided, that, if the abused or neglected child is six (6) years of age or less, the penalty is a Class A felony.] Under these statutes, felony murder by aggravated child abuse may be committed against a person less than eighteen years old. However, the (i)(1) aggravating circumstance applies only if the victim is less than twelve years old. Unlike the felony murder aggravating circumstance at issue in *Middlebrooks*, which applied equally to all felony murderers, the (i)(1) aggravating circumstance does not by its terms apply to all aggravated child abuse murderers. This aggravating circumstance simply does not duplicate the elements of the underlying offense, felony murder by aggravated child abuse. [FN14 In so stating we are aware that aggravated child abuse is punishable as a Class A felony if the victim is under six years of age. In fact, in *Ducker*, this Court held that when the State is invoking this enhanced punishment portion of the aggravated child abuse statute, the age of the victim is an essential element of the Class A felony, aggravated child abuse, and as such, must be charged to the jury. *Id.*, 27 S.W.3d at 899. The defendant in *Ducker* had been convicted of two counts of aggravated child abuse. Therefore, the key issue was the appropriate felony classification for purposes of sentencing. However, when the State is seeking a conviction for felony murder by aggravated child abuse, the enhanced punishment portion of the aggravated child abuse statute is not relevant.

> If the defendant is found guilty of felony murder by aggravated child abuse, the sentencing provisions for first degree murder will apply, not the sentencing provisions for aggravated child abuse. Therefore, the age of the victim contained in subsection (b) of the aggravated child abuse statute is not an essential element of the offense of felony murder by aggravated child abuse.] It narrows the class of death-eligible defendants because it applies to only those defendants whose murder victims are less than twelve years of age. We agree with the State that, in adopting this aggravating circumstance, the General Assembly no doubt recognized that victims under twelve years of age are typically more vulnerable than those between thirteen and seventeen years of age. A younger victim is less able to defend himself or herself and less able to flee. The General Assembly reasonably concluded that persons who attack and abuse these young victims are among the most culpable murderers. *See, e.g. Gilson v. State*, 8 P.3d 883, 923 (Okla. Crim. App. 2000) (finding legislative action that protects vulnerable children legally justified). Thus, we hold that the (i)(1) aggravating circumstance sufficiently and meaningfully narrows the class of death-eligible defendants, even defendants who have been convicted of felony murder in the perpetration of aggravated child abuse. *See also Ex parte Woodard*, 631 So.2d 1065, 1071-72 (Ala. 1993) (upholding the constitutionality of a similar age of victim aggravating circumstance); *State v. Wood*, 132 Idaho 88, 967 P.2d 702, 716-17 (1998); (upholding a similar age of victim aggravating circumstance against a constitutional narrowing challenge); *People v. Rissley*, 165 Ill.2d 364, 209 Ill. Dec. 205, 651 N.E.2d 133, 152-53 (1995) (upholding a similar age of the victim aggravating circumstance); *State v. Wilson*, 685 So.2d 1063, 1071-72 (La. 1996) (upholding a similar age of the victim aggravating circumstance).

Appellant's argument has been previously advanced and rejected by both the Tennessee Supreme Court and this Court. Appellant is not entitled to relief on this issue.

Weighing of Mitigating and Aggravating Factors by the Jury

Appellant contends that the jury improperly weighed the aggravating and mitigating factors in determining his sentence. Appellant does not contend that the State failed to provide ample evidence to prove the sole statutory aggravator, rather Appellant complains that the jury did not give enough weight to the mitigating factors. The State argues that the jury properly weighed the mitigating and aggravating factors.

"In determining whether the evidence supports the jury's findings of statutory aggravating [or mitigating] 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 [or mitigating] 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)).

In the case herein, the jury found the existence of one aggravating factor, that the victim was under the age of twelve and the defendant was at least eighteen years of age. T.C.A. § 39-13-204(i)(1). Appellant does not dispute that the State proved the existence of this aggravating circumstance. The mitigating proof at the sentencing hearing consisted of Appellant's wife's nephew and Dr. Solovey. The testimony included information about Appellant's abusive childhood and past suicide attempts. There is nothing in the record to indicate the jury did not consider the mitigating evidence. The jury heard the proof and determined that the aggravating factor outweighed any mitigating factors it determined were applicable. The evidence supports the jury's determination. Appellant is not entitled to relief on this issue.

Denial of Motion to Strike Aggravator Because it Was Not in the Indictment

Lastly, Appellant complains that the trial court erred in denying his request to strike the aggravating factor because it was not "placed in the indictment in violation of the Fifth and Sixth Amendments to the U.S. Constitution and Article I, section 8, 9, and 14 of the Tennessee Constitution." To support his argument, he relies upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State argues that because Appellant was given proper notice of its right to seek life without the possibility of parole, this issue is without merit. We agree. Recently, in *State v. Rollins*, 188 S.W.3d 553, 571 (Tenn. 2006), the Tennessee Supreme Court rejected an identical argument in regard to a death penalty case by stating:

> This Court has repeatedly rejected the defendant's argument. *See, e.g., State v. Reid*, 164 S.W.3d 286, 311-12 (Tenn. 2005); *State v. Leach*, 148 S.W.3d 42, 59 (Tenn. 2004); *State v. Berry*, 141 S.W.3d 549, 562 (Tenn. 2004); *State v. Holton*, 126 S.W.3d 845, 863 (Tenn. 2004); *State v. Dellinger*, 79 S.W.3d 458, 466-67 (Tenn. 2002). Furthermore, the defendant has failed to provide any persuasive reason to overrule these prior decisions. Therefore, we reaffirm the prior decisions, cited above, and once again hold that neither *Apprendi* nor its progeny requires the State to allege aggravating circumstances in the charging instrument. The trial court properly refused to dismiss the State's notice of intent to seek the death penalty on this basis.

Appellant is not entitled to relief on this issue.

Conclusion

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

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JERRY L. SMITH, JUDGE