IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #02C01-9406-CR-00107
APPELLEE,	*	Shelby County
VS.	*	Hon. Joseph B. Brown, Jr., Judge
CHRISTOPHER S. BECKHAM,	*	(Death Penalty)
APPELLANT.	*	

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OPINION FILED: _____

CONVICTION AFFIRMED; SENTENCE REVERSED

William M. Barker, Judge

OPINION

In this capital case, the appellant, Christopher S. Beckham, was convicted by a jury of first-degree premeditated murder. In the sentencing hearing, the jury found one aggravating factor, that the murder was especially heinous, atrocious, or cruel. See T.C.A. § 39-13-204(i)(5).[1] The jury further found that the aggravating circumstance outweighed the evidence of mitigating circumstances beyond a reasonable doubt, and sentenced the appellant to death by electrocution.

In this appeal, the appellant alleges that numerous errors occurred during the guilt phase and during the sentencing phase of the trial. Having carefully considered the appellant's contentions as to errors occurring during the guilt phase, we affirm the judgment of conviction. As to the alleged errors occurring during the sentencing phase, we conclude that the evidence is insufficient to support the jury's finding that the murder was especially heinous, atrocious, or cruel. That being the only aggravating circumstance found by the jury, we, therefore, reverse the appellant's sentence of death and remand this case for the trial court to sentence the appellant to life imprisonment.

BACKGROUND

The state's proof at the guilt phase of the trial established that on November 26, 1992, sometime after midnight, the body of Brian Brown, the victim, was found in an area of Memphis, Tennessee known as Boxtown. The victim's car was later found in the parking lot of a bar. Dr. Sandra Elkins, the assistant medical examiner who performed the autopsy on the victim's body, determined that the cause of death was a non-survivable, loose contact, gunshot wound to the head. She explained that the bullet entered the back of the victim's head, approximately two inches to the left of the mid-portion of the head, and

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[1] The state also sought to rely upon three other aggravating circumstances: (1) the defendant committed the murder for remuneration or the promise of remuneration, (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant, and (3) the murder was committed while the defendant was engaged in committing robbery, theft, or kidnapping. See T.C.A. § 39-13-204(i)(4), (6), and (7). The trial court only allowed the jury to consider whether the murder was especially heinous, atrocious, or cruel and whether the murder was committed while the defendant was engaged in committing robbery, theft, or kidnapping.

exited through the left eyeball, tearing the eyelid as it exited. Dr. Elkins testified that the victim would have been immediately incapacitated and unconscious and that death would have occurred within minutes.

Dr. Elkins testified that there were red pressure marks around the victim's wrists. She described the pressure marks on the right wrist, where the victim had been wearing a tight leather band, as spotty red marks. The pressure mark on the victim's left wrist was a more circular pattern. While Dr. Elkins testified that a restricting material would have been put on the wrists while the victim was still alive and within several hours of death, she could not say what type of restrictive device caused the marks.

The victim's father testified that the victim was 21 years old. He last saw the victim alive on the Sunday before he was killed. The witness testified that he made the funeral arrangements, attended the funeral, and was there when the victim was lowered into the ground. As part of his testimony, the victim's father identified a 1991 photograph of the victim and photographs of the victim's body that were taken at the morgue.

The state's evidence revealed that at the time of the murder, the Deja Vu Corporation operated three exotic clubs in Memphis which were referred to as the North Club, the East Club, and the South Club. The appellant was employed at the North Club as a security guard or "bouncer." The victim had previously been employed at the North Club and at the East Club.

On November 25, 1992, Michael Byford, the appellant's roommate, who was also a bouncer for the Deja Vu club, and the appellant left their house in Byford's Ford pickup truck to go to work at the North Club. On the way there, Byford's beeper went off three times during the 25-30 minute drive. Byford testified that the beeper belonged to Tim Neal, who had been the general manager of the North Club before absconding with the club's money. Byford had taken the beeper as collateral for some money that Neal owed him. According to Byford, when he and the appellant got to the North Club, they went to

the office, and he called the number on the beeper. It turned out to be the victim who had been calling Neal's beeper. Byford testified that he told the victim who he was, why he had Neal's beeper, and what had happened to Neal. The victim told Byford that he had to talk to Jeff Breunig, the regional manager of the Deja Vu Corporation, about getting his pay check and his job back.

After Byford hung up the phone, Jimmy Tittle, the manager of the North Club, came into the office. The appellant told him that the victim had been on the phone. Tittle called the victim back and told him to come to the club so they could talk about getting the victim's job back. On cross-examination, Byford testified that the appellant and Tittle were talking in the office about the victim's threat to do a drive-by shooting. They decided that the victim needed to talk to Rex Wilbanks, the manager of the South Club, about the threats.

The victim came to the club around 6 p.m. Byford was just leaving the office and spoke to him as he walked out. Richard Smith, who had also been in the office, walked out with Byford. As the victim went into the office, Smith shut the door behind him. Smith asked Byford if he could borrow his truck, and Byford took him outside and showed him how to start the truck. Smith got in and pulled the truck behind the club. The appellant and Tittle were still in the office at the time.

Byford testified that 20 or 30 minutes later, Tittle came out of the office and asked about the truck. Byford told him that he had let Smith borrow it, and Tittle looked nervous and scared. A little while later, Byford went outside to look around, and he noticed that the victim's Mustang was still in the parking lot. At about 9:00 or 9:30 p.m., the appellant and Smith came in the front door. The appellant gave Byford back his keys, and the two of them went in the office. The appellant and Smith stayed there 10 or 15 minutes and then left together. In his statement to the police, Byford said that Tittle then came out of the office and told him that he would not have to worry about the victim anymore. Byford testified that he later walked outside to see where they had parked his truck, and he

noticed that the victim's Mustang was gone.

The appellant and Smith returned to the North Club approximately 45 minutes later and again went back to the office. After staying in the office a few minutes, Smith left the club, and the appellant came back out and worked the cash register for Byford. Byford testified that he stayed at the North Club until midnight, whereupon he and one of the waitresses went to the South Club to pick up some uniforms. They got back to the North Club around 2:00 a.m. Approximately 30 minutes later, he and the appellant picked up Rex Wilbanks and went to a small bar, which was located next door to the South Club. On the way over to the South Club, the appellant told Byford that the victim "caught a bullet," and that the gun had been so close to the victim's head that the hull did not eject. When Byford asked the appellant what the victim had said, the appellant told him that the "only thing he said, he was just begging and pleading, said, you know, 'just tell my brother that I love him.'"

At the bar, the appellant told Byford and Wilbanks about the murder. Byford described the appellant as acting normally, laughing, and carrying on. The appellant said that he threw the handcuffs and other stuff in the river. When the appellant and Byford returned home, the appellant took his gun to his room and shut the door. The next time Byford saw the gun, it had been taken apart.

Tittle testified to a slightly different version of events. He testified that November 25, 1992, was his first day as manager of the North Club. When he got to work that day at 5:00 p.m., Byford and the appellant were waiting for him in the parking lot. The three of them went inside, and Tittle went to the office to work and to get the club ready for opening. He testified that Jeff Breunig (the regional manager) called him a few minutes after he came into the club and told him about the victim's threats. Breunig also said that the victim had been fired for dealing cocaine in the club, and that the victim had been to the East Club threatening to kill Breunig, the general manager, and the assistant manager. According to Breunig, the victim had said "I guess you've heard about drive-by shootings"

and "everybody better be watching out." Breunig told Tittle to keep his eyes open and that the victim had been fired that day and was not to be rehired. Tittle testified that he then called the victim in order to calm him down. Tittle told the victim that he would see what he could do to get the victim's job back for him. Tittle denied that he told the victim to come to the North Club.

According to Tittle, the victim appeared at the office between 5:15 and 5:45 p.m. Tittle further testified that the appellant, who was 6'2" and 280 pounds at the time, grabbed the victim, pushed him back against the wall, spun him around, and handcuffed him. The victim asked what was going on, and the appellant said that he heard the victim had threatened to shoot his friends. The victim denied making the threats. The appellant draped a coat over the victim's shoulders and led him out the back door. Byford's truck, with Smith driving, was waiting out back. Tittle assumed that the appellant and Smith would just "shake the victim up." The victim was 5'8" and 170 pounds.

Approximately an hour and a half later, the appellant and Smith came back to the office. Tittle testified that the appellant appeared calm when he returned to the club and that all the appellant said was that he had "popped" the victim. Tittle further testified that on November 27, 1992, the appellant told him that he took the victim out and stopped on the side of the road, where he put him out of the truck and told him to empty his pockets. The appellant said that "the boy thought I was going to let him go." The appellant also said that he told the victim "I hope you remember this." The victim relaxed and let out a sigh right before the appellant shot him in the back of the head. The appellant said that he threw the victim's stuff in the river, parked the victim's car at a bar, and threw the keys in a ditch. On cross-examination, Tittle testified that the appellant had also said that he did not know how it happened, that things just went wrong, and that "the boy just wouldn't let it go."

On the evening of November 28, 1992, the police closed the North Club and took several people to the station for questioning. Sergeants Timothy Cook and Larry

Morgan, homicide detectives with the Memphis Police Department, interviewed the appellant. Sergeant Cook testified that at 5:40 a.m. on November 29, 1992, the appellant signed an Advice and Waiver of Rights form. Sergeant Cook testified that the appellant took full responsibility for what happened, and that he was concerned that none of his friends get in trouble for what he did. Sergeant Cook said that it was an unusual case because the appellant was very cooperative.

The appellant's statement, which was read into evidence, reflected that the appellant and Byford received a call on Neal's beeper. When they got to work, the appellant found out that threats had been made by the victim. He also found out that the victim was calling on the beeper. He said that he, Byford, and Tittle wanted to get even with the victim, so Tittle and Byford lured the victim over to the office. When the victim came into the office, the appellant asked Tittle if that was him and Tittle nodded. The appellant pulled his gun out, put the handcuffs on the victim, and left the office through the back door where Smith was waiting with Byford's truck. They found a deserted street, and the appellant told Smith to stop the truck. Once stopped, the appellant took the handcuffs off and got the victim out of the truck. After admitting that he had made the threats, the victim told the appellant to "make it quick," so the appellant shot him in the head. The appellant stated that his original purpose for getting the victim over to the club was "to whip his ass." He further stated that he was sorry.

The appellant testified that he had lived in Memphis for three years. On November 25, 1992, he and Byford had gone to work at the North Club. He took his .45 automatic and a .44 Magnum as part of his job. Byford's beeper went off three times on the way to work. When they got to the club, no one was there so they waited outside. Finally, they walked in and found Tittle, who appeared upset, on the phone. When he got off the phone, Tittle said that the victim had gone up to the East Club and made death threats against Kim Wilbanks and a few other managers. The appellant was close friends with Kim and Rex Wilbanks and considered them family. The victim had threatened to do a drive-by shooting.

Byford left the office to make a phone call. He came back and said that the victim was the person who had been beeping him. Byford gave Tittle the phone number, and Tittle called the victim. The appellant left the office to take the cash register to the front of the club. When he returned, Tittle said that the victim was on his way. Tittle was mad about the threats, and thought it would be best if the victim talked to Wilbanks at the South Club. They decided that when the victim came to the club, the appellant would confront him, and then they would decide what to do from there.

The victim arrived at the club around 6:00 p.m., and Smith brought Byford's truck around to the back door. The appellant confronted the victim about the death threats. The victim looked at him as though he did not know what the appellant was talking about, so the appellant told the victim that he knew he was talking about the drive-by shooting threats. The appellant grabbed the victim by the shoulder and pushed him against a file cabinet. The appellant then drew his .45 automatic and laid it across the victim's shoulders so that he could feel the gun. When the victim asked what was going on, the appellant told him to be calm, that they were going to have a talk with Wilbanks at the South Club. The appellant handcuffed the victim and draped a jacket across his shoulders.

According to the appellant, after the victim came into the office, Tittle took the .44 revolver and aimed it at the victim's head. The appellant told him to put the gun away. Tittle opened the back door, and the appellant walked the victim to the truck. Smith, the victim, and the appellant headed toward the South Club. When the victim said the handcuffs were tight, the appellant took them off in the truck. When they arrived at the South Club, Wilbanks asked the victim about the threats, and the victim eventually admitted to making them. Wilbanks pulled out his brass knuckles and was about to hit the victim in the face, but the appellant stopped him and said he would take care of it. The appellant, Smith, and the victim got back in the truck and drove off. The appellant testified that he did not mention going to the South Club in his statement to the police because he did not want Wilbanks to get in trouble.

The appellant testified that he had planned to take the victim to a remote area to scare him, and then, make the victim take his clothes off and walk back. While driving around, the appellant asked the victim why he made the threats. Instead of being scared, the victim started making more threats. The victim's threats were disconcerting because the appellant did not expect them. The appellant told Smith to stop the truck, and the appellant and the victim got out. The appellant testified that the victim walked to the back of the truck and said "if you're going to do anything, you better make it quick." So the appellant put the gun to the victim's head and shot him. The appellant testified that things went further than he planned. After shooting the victim, the appellant got back in the truck and told Smith it was over.

When the appellant and Smith returned to the club, the appellant gave Byford his keys and went in the office. The appellant told Tittle that he had shot the victim, and Tittle seemed shocked. The appellant told Tittle that "the boy just wouldn't let it go." Tittle told Smith and the appellant to take the victim's car to Harpo's Bar and leave it there. After the North Club closed, the appellant and Byford went to the South Club. The appellant told Byford in the truck that he had shot the victim. They met Wilbanks at the South Club and went to a bar next door. The appellant told Byford and Wilbanks that the victim had started making more threats and that he shot him. After Byford and the appellant went home, the appellant took his gun apart, but could not touch it anymore even though he normally cleaned it every night.

On November 28, 1992, when the appellant arrived at the North Club, he was told that the police were coming to talk to them. Tittle said that they should tell the police that the victim was never at the club. That night, the police took the appellant and several others to the station for questioning. After four or five hours, the appellant was interviewed. The appellant testified that he asked for an attorney, but the detectives threatened to arrest all of his friends for first-degree murder if he did not talk. The appellant was shaken and did not want anyone else to go to jail, so he gave a statement to the police. The appellant testified that he had not read or seen all of the statement given to the police. He would not

confirm that it was his signature on the confession, and he further denied telling the police that he had caught the hull of the bullet in his hand. Instead, he testified that the gun did not function properly and failed to eject the cartridge.

In rebuttal, the state offered the testimony of Phyllis Cole, a secretary with the Memphis Police Department. She testified that she typed the appellant's statement on the morning of November 29, 1992, and that his statement was typed word for word. Sergeant Morgan testified that the appellant never asked for an attorney and that the appellant signed the Waiver of Rights form in his presence. Sergeant Morgan further testified that the appellant was never pressured or coerced. Instead, Sergeant Morgan described the appellant giving the statement as "just like earning a merit badge." Finally, Sergeant Morgan said that although he did not put it in the supplement to the appellant's statement, the appellant had said that he had held his hand over the top of the ejection port of the pistol and had caught the hull when it was ejected.

Based on this evidence, the jury found the appellant guilty of first-degree premeditated murder.

At the sentencing phase of the trial, the trial court allowed the state to rely on two aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel, and (2) the felony-murder circumstance. See T.C.A. § 39-13-204(i)(5) and (7). The state did not offer any additional proof in support of these aggravating circumstances at the sentencing hearing.

In mitigation, the appellant testified on his own behalf. He testified that he was born in Bolivar, Tennessee. When he was about two-years-old, he and his family moved to Houston, Texas, where his parents still live. The appellant testified that he was close to his mother, but that his father was controlling and did not spend much time with the children. The appellant has one sister, who he is not close to, one half brother, who the appellant has not spoken to in six years because the brother had made threats to his

mother, and another half brother who had died. At eighteen years of age, the appellant joined the Marines. Because of a knee injury, he was honorably discharged after less than a year. The appellant has no criminal record. Since he has been in Memphis, he has tried to maintain two jobs, working at clubs and convenience stores.

The appellant testified that his family did not come to the trial or the sentencing hearing because his sister had recently had throat surgery and the appellant's father had decided the family needed to stay with her. Since being in prison awaiting trial, the appellant has tried to get some GED courses and has completed two Bible study courses. He also has practiced his art work. Several of his drawings were admitted into evidence. The appellant testified that he is sorry for what he has done and that he takes full responsibility for his actions.

SUFFICIENCY OF THE EVIDENCE

The appellant argues that the evidence is insufficient to support the conviction of first-degree murder. Specifically, he contends that there is insufficient proof of premeditation and deliberation because the state failed to establish that the homicide was committed with coolness and reflection and without passion or provocation. Having reviewed the entire record, we conclude that the evidence in this case is sufficient to convict the appellant of first-degree premeditated murder.

A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves any conflicts in favor of the state's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the state is entitled to the strongest legitimate view of the evidence and to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after a consideration of the evidence in the light most favorable to the state, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson

v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); T.R.A.P. 13(e).

A criminal offense may be proven through direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). Here, the parties agree that the proof of premeditation and deliberation was circumstantial in nature. Before an accused may be convicted of a criminal offense based upon circumstantial evidence, the facts and the circumstances "must be so strong and cogent as to exclude every other reasonable hypotheses save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). "A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 484, 470 S.W.2d at 613.

In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), our Supreme Court discussed the elements of first-degree murder at length. The Court said that the element of deliberation contemplates a lapse of time between the decision to kill and the actual killing. The Court further stated that "the deliberation and premeditation must be akin to the deliberation and premeditation manifested where the murder is by poison or lying in wait -- the cool purpose must be formed and the deliberate intention conceived in the mind, in the absence of passion, to take the life of the person slain." Id. at 539 (quoting Rader v. State, 73 Tenn. 610, 619-20 (1880)). Thus, in order to convict a defendant for first-degree murder, a jury must find that the defendant killed with coolness (deliberation) and after reflective thought (premeditation). State v. West, 844 S.W.2d 144, 147 (Tenn. 1992); see also State v. Brooks, 880 S.W.2d 390, 392-93 (Tenn. Crim. App. 1993).

There is no specific time required to form the requisite deliberation. State v. Gentry, 881 S.W.2d 1, 3-4 (Tenn. Crim. App. 1993). Deliberation is present when the circumstances suggest that the defendant contemplated the manner and the

consequences of his act. State v. West, 844 S.W.2d at 147. While deliberation and premeditation are similar, they are defined as separate and distinct elements of first-degree murder. See T.C.A. § 39-13-201(b)(deliberate act is "one performed with a cool purpose" and premeditated act is "one done after the exercise of reflection and judgment."); see also State v. Brooks, 880 S.W.2d at 392-93. Deliberation and premeditation may be inferred from the circumstances where those circumstances affirmatively establish that the defendant premeditated his assault and then deliberately performed the act. State v. Richard Nelson, No. 02C01-9211-CR-00251 (Tenn. Crim. App., at Jackson, Oct. 14, 1993). This Court has held that Brown requires "proof that the offense was committed upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement" before a second-degree, intentional murder can be elevated to murder in the first degree. State v. David L. Hassell, No. 02C01-9202-CR-00038, Slip Op. at 3 (Tenn. Crim. App., at Jackson, Dec. 30, 1992).

With regard to premeditation and deliberation, the Court in State v. Brown recognized the following relevant circumstances: (1) the fact that a deadly weapon was used upon an unarmed victim, (2) the homicidal act was part of a conspiracy to kill persons of a particular class, (3) the killing was particularly cruel, (4) the defendant made declarations of his intent to kill the victim, or (5) preparations were made before the homicide for concealment of the crime, as by the digging of a grave. 836 S.W.2d at 541-42. The elements of deliberation and premeditation are questions for the jury and may be inferred from the manner and circumstances of the killing. State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993).

Looking at the facts in the present case in the light most favorable to the state, as we are required to do on appeal, we conclude that the evidence is sufficient to support the jury's finding of premeditation and deliberation. There was testimony that Byford, Tittle, and the appellant were upset about threats the victim had made toward some of the managers at the East Club. Tittle called the victim and told him to come to the North Club and talk about getting his job back. It was agreed that the plan was to "whip

his ass" for making threats. When the victim arrived at the club, the appellant shoved him against a wall, handcuffed him, interrogated him about prior death threats, and took him through the back door where Smith was waiting with the pick-up truck. Smith and the appellant drove the victim around for approximately two hours. Eventually, they ended up in a remote area where the appellant took the victim out of the truck and shot him execution-style in the back of the head. There was testimony that the victim begged and pleaded for his life and asked the appellant to tell his brother that he loved him. There was also testimony that the appellant told the victim "I hope you remember this," and that the victim relaxed his shoulders and sighed with relief right before the appellant shot him.

Based on the proof presented, we conclude that a rational trier of fact could have found the elements of first-degree murder beyond a reasonable doubt. T.R.A.P. 13(e).

JURY INSTRUCTIONS[2]

The appellant asserts that the trial court erred by (a) refusing to instruct that "fear" was one of the human emotions which could render the mind incapable of cool reflection, (b) charging the jury to sequentially consider the degrees of homicide, and (c) including "moral certainty" in its definition of reasonable doubt.

A. Instruction on passion

The appellant argues that the trial court erred by refusing to include "fear" in its definition of passion which renders the mind incapable of cool reflection. The appellant asserts that the trial court's instruction created an arbitrary threshold below which evidence would not be considered. Specifically, the appellant asserts that evidence of human emotions short of terror was rendered legally irrelevant by the instruction and that the jury

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[2] It should be noted that the appellant failed to include in the record the transcript of the jury instructions as actually given at the guilt phase or at the penalty phase. Instead, the typewritten instructions are included in what is commonly called the "technical" record.

was thereby permitted to disregard evidence of the appellant's state of mind because it failed to rise to the level of terror.

The first part of the trial court's instruction on premeditated murder tracked the language of T.P.I.--Crim. 7.01. The Court then went on to further explain premeditation and deliberation in accordance with State v. Brown, 836 S.W.2d 530 (Tenn. 1992). At the end of the instruction on premeditated murder, the trial court defined "passion" as "any of the human emotions known as anger, rage, sudden resentment or terror which renders the mind incapable of cool reflection." This definition was taken directly from State v. Bullington, 532 S.W.2d 556, 560 (Tenn. 1976). Since the trial court's instruction is a full and fair statement of the law, this issue is without merit.

Moreover, as pointed out by the state, the proof does not support a finding that the appellant was fearful of the victim at the time of the murder. At most, the testimony showed that the appellant was fearful that the victim would carry out threats of a drive-by shooting sometime in the future. At the time of the shooting, however, the victim was unarmed. The victim was also of a substantially smaller build than the appellant, and he had been handcuffed for at least part of the time before the murder. A criminal defendant is only entitled to instructions on the issues of fact raised by the evidence and material to his defense. State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975).

B. Sequential jury instructions

The appellant argues that charging the jury to first inquire if the defendant was guilty of the greater offense, and only if it acquits, to then proceed to consider each of the lesser included offenses violates due process of law by creating an impermissible risk that the jury will convict of first-degree murder without considering the offenses of second-degree murder or voluntary manslaughter.[3]

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[3] The state points out that this issue has been waived by the appellant's failure to raise it in his motion for new trial. See State v. Baker, 785 S.W.2d 132, 135 (Tenn. Crim. App. 1989). We note that because of the qualitative difference between death and other sentences, our Supreme Court has normally looked at the merits of an issue even though it was not raised at trial. See State v. Bigbee, 885 S.W.2d 797, 805 (Tenn.

The trial court charged the jury on the order in which the principal offense and the lesser included offenses were to be considered:

> When you retire to consider your verdict, you will first inquire, is the defendant guilty of Murder in the First Degree as charged in the indictment...
>
> If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof, and then proceed to inquire whether or not he is guilty of Murder in the Second Degree as included in the indictment...
>
> If you find the defendant not guilty of [second-degree murder], or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Voluntary Manslaughter as included in the indictment...
>
> If you find the defendant not guilty of [voluntary manslaughter], or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Criminally Negligent Homicide as included in the indictment...

This Court has repeatedly upheld the giving of sequential jury instructions. See State v. Raines, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994); State v. McPherson, 882 S.W.2d 365, 375-76 (Tenn. Crim. App. 1994); State v. Rutherford, 876 S.W.2d 118, 119-20 (Tenn. Crim. App. 1993). As pointed out by the appellant, the defendants in Raines and in Rutherford were both convicted of a lesser included offense. This Court noted that it was evident that the sequential instruction had not precluded the jury from considering the lesser charges since it found the defendant guilty of a lesser included offense. This does not imply, as the appellant suggests, that due process is violated in every case where a sequential instruction was given and the defendant was convicted of the offense charged. The appellant also submits that McPherson is distinguishable in that the Court held the issue to be waived. Since the Court then went on to note that this issue was previously resolved in Rutherford, the appellant's argument is not persuasive.

C. Reasonable doubt instruction

1994), State v. Duncan, 698 S.W.2d 63, 67-68 (Tenn. 1985), cert. denied 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986); State v. Strouth, 620 S.W.2d 467, 471 (Tenn. 1981), cert. denied 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982). We have chosen to consider the issue on the merits.

The appellant argues that the jury instruction on reasonable doubt did not "lend content to the moral certainty phraseology" used by the trial court.[4] Thus, he concludes, there was a reasonable likelihood that the jury understood the instruction to allow a conviction based on insufficient proof in violation of the standard set forth in Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30, 112 L.Ed.2d 339 (1990) and Victor v. Nebraska, ___ U.S. ___, 114 S.Ct. 1239, 1247-48, 127 L.Ed.2d 583 (1994). The state submits that the trial court not only charged the jury with T.P.I.--Crim. 2.03, which was recently held to be constitutional in Pettyjohn v. State, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994), but it also added language that clarified even further the standard that must be met before the jury could find guilt beyond a reasonable doubt. In this case, the trial court instructed the jury as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation to let the mind rest easily upon the certainty of guilt. You should not lightly contemplate the dismissal of a doubt which might prove reasonable even if you have reservations as to its application. Reasonable doubt does not mean a doubt that may arise from mere possibility nor does it mean a capricious or imaginary doubt or fantasy. Absolute certainty of guilt is not demanded by law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof necessary to establish the offense. In making this determination of moral certainty, you should endeavor to go so far and to such an extent within the bounds of logic, rationality, reason and human capacity as to assure that the ideal of certainty as it applies to moral certainty is approached as nearly as possible.

In Victor v. Nebraska, the United States Supreme Court ruled that the phrase "moral certainty" may have lost its historical meaning and that modern juries, unaware of the historical meaning, might understand "moral certainty", in the abstract, to mean something less than the high level of determination constitutionally required in criminal cases. While the Court expressed criticism of the continued use of the "moral certainty" phrase, the Court did not actually hold that it was constitutionally invalid. Instead, the Court looked to the full jury charge to determine if the phrase was placed in such a context that a jury would understand that it meant certainty with respect to human affairs. Id. at ___,

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[4] Again the state points out that the appellant has waived this issue by failing to raise it in his motion for new trial. In light of State v. Bigbee, 885 S.W.2d 797, 805 (Tenn. 1994), we have considered the issue on the merits.

114 S.Ct. at 1247-48. In particular, the Supreme Court was concerned with the terms "grave uncertainty" and "actual substantial doubt." Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30, 112 L.Ed.2d 339 (1990).

In this case, while the jury was charged as to "moral certainty," the additional instructions served to clarify the standard of proof. Further, the terms of particular concern to the United States Supreme Court were not included in the charge. In several cases, this Court has upheld similar instructions as consistent with constitutional principles. See Pettyjohn v. State, 885 S.W.2d at 365-66; State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993). Moreover, our Supreme Court has held that "[t]he use of the phrase 'moral certainty' by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt." State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995). We conclude, therefore, that the full charge given by the trial court, although containing the phrase "moral certainty," did not violate the appellant's rights under the United States or Tennessee Constitutions.

PHOTOGRAPHS OF VICTIM AND TESTIMONY OF VICTIM'S FATHER

The appellant contends that the trial court erred by allowing the state to introduce into evidence (a) the testimony of the victim's father, (b) a portrait-type photograph of the victim taken a year before his death, and (c) photographs of the victim's body which were taken at the morgue. In response, the state submits that the testimony of the victim's father and the portrait-type photograph were admissible to show that the victim "was a reasonable creature in being." See State v. Scott, 626 S.W.2d 25, 28 (Tenn. Crim. App. 1981). As to the morgue photographs, the state submits that the trial court properly admitted these photographs into evidence to supplement both the medical testimony and the testimony of the person who initially discovered the victim's body. The state further contends that any error was harmless.

The victim's father was the state's first witness. He testified that the victim

was 21 years old. The last time the witness saw the victim alive was the Sunday before he was killed. The witness testified that he made the funeral arrangements for the victim, attended the funeral, and was there when the victim was lowered in the ground. The witness was asked to identify a picture of the victim which was taken in 1991. He was then asked to identify two photographs of the victim's body after it was taken to the morgue. The record reflects that defense counsel offered to let the witness take a moment to step off the stand at this point. The witness then identified the photographs of his son, and the photographs were introduced into evidence. The witness was excused; as he left the stand, the trial judge said "[a]ll right. My condolences, sir. You may step down."

The record reflects that a bench conference was held, and defense counsel expressed concern that the victim's father was in the back of the courtroom crying. Because the victim's father was the only witness before the jury retired for the day, no action was taken to remove him from the courtroom. One other time during the trial, the trial court stated "[p]lease advise them no displays." The record does not reflect that there were any further disruptions or displays of emotion. The morgue photographs were also identified by the person who found the body and by Dr. Elkins, the assistant medical examiner who performed the autopsy.

Our courts have held that pictures of a homicide victim while he or she was still alive should not be admitted at trial, unless relevant to a material issue. In State v. Dicks, 615 S.W.2d 126 (Tenn.), cert. denied 454 U.S. 933, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981), for example, our Supreme Court stated that "it would have been better had the 'before' picture of [the victim] been excluded since it added little or nothing to the sum total of knowledge of the jury." Such an error, however, may not be prejudicial to the outcome of the proceedings. Id. at 128. See also State v. Strouth, 620 S.W.2d 467, 472 (Tenn. 1981); State v. Richardson, 697 S.W.2d 594, 597 (Tenn. Crim. App. 1985).

Here, the introduction of the photograph of the victim while he was alive added little or nothing to the state's case during the guilt and innocence phase of the trial.

Moreover, the witness's testimony that he made the victim's funeral arrangements, attended the victim's funeral, and was there when the victim was lowered into the ground was not relevant to any contested material issue being tried. In fact, the evidence appears to have been offered by the prosecution for the sole purpose of invoking the sympathy of the jury. The indications in the record regarding the emotional reaction of the witness, however understandable, reinforce the appearance of the state's tactic. However, an error does not mandate the setting aside of a final judgment of conviction unless "considering the whole record...[it] more probably than not affected the judgment or would result in prejudice to the judicial process." T.R.A.P. 36(b). Having reviewed the entire record under this standard, and in light of the substantial evidence of the appellant's guilt, we find that the introduction of the photograph and the testimony of the victim's father was not prejudicial error as to the appellant's conviction.

As to the admission of the morgue photographs of the victim's body, this was within the trial court's discretion. "[T]he admissibility of photographs is a matter to be determined by the trial court in the exercise of its sound discretion." Cagle v. State, 507 S.W.2d 121, 132 (Tenn. Crim. App. 1973). Absent a clear showing of abuse of discretion, the trial court's ruling will not be overturned. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). In Banks, our Supreme Court noted that photographs of the deceased may be admitted if relevant to issues on trial and if not substantially outweighed by the danger of unfair prejudice to the defendant. Id. at 951. In this regard, "[t]he more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." Id. at 951-52; see Tenn. R. Evid. 403. The Court in Banks noted that autopsy photographs in particular have been condemned by the courts as they often depict the victim in a substantially altered, and more gruesome, condition. Id. at 952.

Here, the appellant objected to the admission of the photographs prior to trial. The trial court ruled that the photographs, which showed the entry and exit wounds of the fatal bullet, were relevant to the manner in which the victim was killed. The trial court

further found that the photographs were not unfairly prejudicial because they were not excessively gruesome or inflammatory. We agree. The photographs were used by the physician who performed the autopsy to assist in explaining her testimony about the manner and cause of death. The photographs were not especially gruesome or shocking in nature. Accordingly, we conclude that the appellant has failed to show that the trial court abused its discretion in admitting the photographs into evidence. See State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App. 1988); Freshwater v. State, 2 Tenn. Crim. App. 314, 326, 453 S.W.2d 446, 451-52 (1969).

TESTIMONY ASSOCIATING APPELLANT WITH DANNY OWENS

The appellant argues that testimony elicited from Michael Byford, in which the appellant was associated with Danny Owens, a "notorious Memphis criminal," was irrelevant and unfairly prejudicial. He contends that the prejudice was so great that the trial court's curative instruction to the jury was not sufficient to cure the error and that a mistrial should have been declared. The issue is based on the following colloquy that occurred during the state's direct examination of Byford:

Q: How long have you known [the defendant]?
A: Probably about a year and a half.
Q: Where did you meet him at?
A: I worked with him.
Q: Where at?
A: At Danny Owens' Gigi's Angels.
Q: Where was Gigi's Angels located?
A: On Winchester and Tullahoma.

Defense counsel immediately requested a bench conference and objected to the relevancy of evidence linking the appellant to Danny Owens. Counsel further requested a mistrial. The state argued that the evidence was relevant to show how long the witness had known the appellant. Recognizing the potential prejudice, the trial court denied the request for a mistrial but gave the following cautionary instruction to the jury:

> Ladies and gentlemen, as a caution, any mention of any association of the accused or this witness with any person who may or may not be in the news

> these days associated with any criminal activity is not to be considered by you as having any effect or any bearing whatsoever on the issue of guilt or innocence in this case.

The declaring of a mistrial is a matter "of great delicacy, in which the trial court should act with caution, and . . . such action should be taken only when necessity requires." Bellis v. State, 157 Tenn. 177, 180, 7 S.W.2d 46, 46 (Tenn. 1928). Although subject to review by appellate courts, the decision of whether to grant a mistrial is within the discretion of the trial court, and a reviewing court will not disturb that action absent a finding of abuse of that discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990).

Assuming that the witness's reference to Danny Owens was improper and should not have been elicited by the prosecution, the appellant has failed to demonstrate that the trial court abused its discretion in failing to grant a mistrial. Although the trial court was apparently familiar with Owens and recognized a risk of prejudice by association, the appellant has not substantiated this record on appeal, either during the trial or during the motion for a new trial hearing, with appropriate evidence to support his argument. As a result, there is no evidence of Owens' alleged criminality, any ongoing investigation of Owens at or near the time of the appellant's trial, or any pervasive publicity about Owens existing near the time of the appellant's trial that may have affected the jury in this case. Counsel's statement on appeal characterizing Owens as a "notorious Memphis criminal," even if true, does not substitute for evidence in this record. Nor does the attachment to the appellant's brief-- a typed copy of a newspaper article regarding Owens' criminal activities purportedly published in March of 1994 by the Memphis Commercial Appeal. See State v. Bennett, 798 S.W.2d 783, 789 (Tenn. Crim. App. 1990). The appellant, therefore, is not entitled to relief on this issue.

SUPPRESSION OF CONFESSION

The appellant argues that the trial court erred in failing to suppress his statement to the police. Specifically, he contends that the police detectives continued

questioning him despite his request for an attorney. This, the appellant argues, violated his rights under the Fifth and Sixth Amendments of the United States Constitution and under Article I, Sections 8 and 9 of the Tennessee Constitution. See Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); State v. Stephenson, 878 S.W.2d 530, 545-47 (Tenn. 1994); State v. Mosier, 888 S.W.2d 781, 784-85 (Tenn. Crim. App. 1994). Having reviewed the transcript of the suppression hearing, we find the trial court properly allowed the appellant's confession to be introduced into evidence.

The trial court conducted an evidentiary hearing on the appellant's motion to suppress his typed statement to the police. At the hearing, the only witness was Sergeant Timothy Cook with the Homicide Bureau of the Memphis Police Department. Sergeant Cook testified that he and Sergeant Larry Morgan interviewed the appellant on the morning of November 29, 1992, as part of the investigation into the murder of Brian Brown. After the appellant had read his Miranda rights aloud and Sergeant Cook had also read them for the appellant, the appellant signed a Waiver of Rights form. Sergeant Cook testified that the appellant signed the Waiver of Rights form freely and voluntarily, that there were no promises or threats made toward the appellant, and that the appellant was not coerced into signing the waiver. After the appellant signed the waiver form, the sergeants advised him that he was under arrest and asked whether he wanted to tell them what happened. After the appellant gave an oral statement, a secretary was located so that a typewritten statement could be taken. Before taking the typewritten statement, the appellant was re-advised of his Miranda rights. The appellant read the statement afterwards and initialed each page and signed the last page. Sergeant Cook testified that the appellant was cooperative and was only concerned that no one else would get in trouble for what he had done. He further testified that the appellant did not request an attorney at any point during the questioning process.

The determination by a trial court that a confession was given knowingly and voluntarily is binding on the appellate courts unless the defendant can show that the evidence preponderates against the trial court's ruling. State v. O'Guinn, 709 S.W.2d 561,

566 (Tenn.), cert. denied 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). While the appellant testified at trial that twice he asked for an attorney, the only testimony presented at the suppression hearing reflects that the appellant did not request an attorney and that the appellant voluntarily and knowingly gave his statement to the police. Accordingly, we find that the evidence does not preponderate against the ruling of the trial court. This issue is without merit.

SUFFICIENCY OF EVIDENCE TO SUPPORT THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

The appellant contends that there was insufficient evidence under the standard enunciated in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), to support a finding that the murder involved "torture or serious physical abuse beyond that necessary to produce death." T.C.A. § 39-13-204(i)(5). The appellant also argues that even if the Court finds that the Jackson standard was met, that application of this aggravating circumstance would be unconstitutional because: (1) expanding the scope of the circumstance to encompass the facts of this case would defeat its constitutionally required narrowing function, and (2) the evidence on which the finding of this aggravating circumstance was based is insufficiently trustworthy to meet the heightened standard of reliability required in capital cases.

In response, the state argues that the facts are sufficient to support the application of the "especially heinous" aggravating circumstance to this case. Specifically, the state points out that the appellant assaulted the victim, handcuffed him, drove him around in a pick-up truck for two hours, let him out of the truck, and shot him in the head. There was also testimony that the victim thought the appellant was going to let him go and that he was begging and pleading for his life. Correctly, the state does not argue that the evidence supports a finding of physical abuse beyond that necessary to produce death. Instead, the state submits that the evidence in this case supported a finding that the murder involved mental torture of the victim.

For the reasons stated below, we hold that the evidence is insufficient to support a finding that the murder was especially heinous, atrocious, or cruel, and we reverse the appellant's sentence of death. Because we find the evidence to be insufficient, it is unnecessary for us to reach the issue of whether application of this aggravating circumstance would be unconstitutional. We note, however, that our Supreme Court has repeatedly held that this aggravating circumstance is not unconstitutionally overbroad. See State v. Williams, 690 S.W.2d 517, 526-30 (Tenn. 1985); State v. David Keen, ___ S.W.2d ___, ___, No. 02S01-9112-CR-00064, Slip Op. at 34 (Tenn. filed May 23, 1994); State v. Black, 815 S.W.2d 166, 181(Tenn. 1991); State v. Barber, 753 S.W.2d 659, 670 (Tenn.) cert. denied 488 U.S. 900, 109 S.Ct. 248, 102 L.Ed.2d 236 (1988).

T.C.A. § 39-13-204(i)(5) requires that, in order to be especially heinous, atrocious, or cruel, a murder must have "involved torture or serious physical abuse beyond that necessary to produce death." Before 1989, this aggravating circumstance specified that, in order to be heinous, atrocious, or cruel, a murder must have "involved torture or depravity of mind." T.C.A. § 39-2-203(i)(5). In interpreting the language of the earlier statute, our Supreme Court developed rules to narrow the focus of this aggravating circumstance and to "provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" State v. Williams, 690 S.W.2d 517, 526 (Tenn. 1985) (quoting Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980). In Williams, our Supreme Court ruled that "depravity" could be shown independent of "torture," although "torture" could not be shown independent of "depravity of mind." Specifically, the Court stated:

> "Torture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. In proving that such torture occurred, the State, necessarily, also proves that the murder involved depravity of mind of the murderer, because the state of mind of one who willfully inflicts such severe physical or mental pain on the victim is depraved.

Id. at 529. The Court went on to state that "'depravity of mind' may, in some circumstances, be shown although torture, as hereinbefore defined, did not occur." Id.

Tennessee case law interpreting the language of the pre-1989 statute relied upon "depravity of mind" in addressing the "murderer's state of mind at the time of the killing." State v. Williams, 690 S.W.2d at 529. Unless something could be shown about the defendant's state of mind which demonstrated a specific intent to cause suffering, the especially heinous, atrocious, or cruel aggravating circumstance could not constitutionally apply. State v. Dicks, 615 S.W.2d 126, 132 (Tenn. 1981)(Court adopted the Florida Supreme Court's language that "construed the [identical] provision to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim."). Even under the pre-1989 statute, the Supreme Court never upheld the application of this statutory aggravating circumstance where the proof indicated that the killing was a single bullet shot to the head. In Williams, supra, for example, the defendant shot the victim four times and then set the victim's house on fire in an attempt to conceal the body. The Court held that "the evidence, measured by the standard laid down in Jackson v. Virginia, supra, is not sufficient to support the finding of the jury respecting the aggravating circumstance in [(i)(5)]. It does not support a finding that the defendant tortured the victim prior to his death." Id. at 531.

Similarly, in State v. Pritchett, 621 S.W.2d 127, 139 (Tenn. 1981), the Court noted that a "constitutional construction" of (i)(5), as then worded, required evidence that a defendant inflicted torture on the victim before death or that a defendant committed acts evincing a depraved state of mind. The Court then held that the killing, in which the defendant confronted the victim and then fired two rounds from a twelve gauge shotgun into the back of the victim's neck, did not support this aggravating factor. The Court said that "the evidence is inescapable that [the victim's] death was instantaneous from the first gunshot shell that was fired." Accordingly, the Court concluded that the "firing of the second shot did not inflict torture or physical abuse upon the victim before death." Id. at 139.

Finally, in State v. Van Tran, 865 S.W.2d 465 (Tenn. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994), the defendant shot and killed three

victims; the first victim was shot at least twice, the second victim was shot once in the head, and the third victim was shot once, and then a second time in the back of the head as she lay dying. The trial court charged the jury with a shortened version of the "heinous, atrocious or cruel" factor that it believed suited the facts of the case: "The murder was especially cruel in that it involved depravity of mind." In analyzing the modified instruction on appeal, the Supreme Court said first that the deletion of "torture" from the instruction was proper "since none of the evidence supported [such] a finding" as to any of the three killings. The Court further held that only the killing of the third victim supported a finding of "depravity of mind." Id. at 478-80.

Given the Court's construction of this aggravating factor, and the Tennessee cases outlined above, we conclude that the evidence in the present case is insufficient to support a finding that the murder was especially heinous, atrocious, or cruel.[5] The testimony concerning the actual murder, taken in the light most favorable to the state, shows that the appellant handcuffed the victim, and rode around with him for approximately two hours. The appellant then took the victim out of the truck and shot him in the back of the head. What happened while Smith, the appellant, and the victim were riding around in the truck is pure speculation. The only testimony presented concerning this time period is that of the appellant. The fact that there was a time lapse between the abduction of the victim and the actual murder does not alone support a finding that the victim was mentally tortured. The record does reflect that right before the shooting, the victim begged for his life and was led to believe that the appellant was going to let him go; however, proof that the victim begged for his life in the last few seconds of his life is, by itself, insufficient to support a finding of mental torture that would distinguish this murder from any other

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[5] Our conclusion is supported by several decisions in other jurisdictions. See Stein v. State, 632 So.2d 1361, 1367 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994) (especially heinous, atrocious or cruel aggravating circumstance inappropriate where shooting deaths instantaneous); Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993)(fact that victim begged for his life and multiple gunshots inadequate basis for this factor absent evidence that defendant intended to cause the victim unnecessary and prolonged suffering); Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993)("Murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel"); see generally, Annotation, Sufficiency of Evidence, For Purposes of Death Penalty, To Establish Statutory Aggravating Circumstance That Murder Was Heinous, Cruel, Depraved, or the Like--Post Gregg Cases, 63 A.L.R. 4th 478 (1988 and Supp. 1994).

murder. See, e.g., Bonifay v. State, 626 So.2d at 1313.

Accordingly, we find that the evidence does not support the jury's application of the especially heinous, atrocious, or cruel aggravating circumstance.

CONCLUSION

We have carefully considered the appellant's contentions as to alleged errors occurring during the guilt phase of the trial and conclude that none has merit. The conviction is, therefore, affirmed. As to the alleged errors occurring during the sentencing phase, we have determined that the evidence is insufficient to support the one aggravating circumstance found by the jury. Accordingly, the sentence of death is reversed, and the case is remanded to the trial court for the imposition of a sentence of life imprisonment.[6] In light of our conclusion and the remedy imposed, we decline the opportunity to review the other sentencing issues raised by the appellant, in which the remedy would be the granting of a new sentencing hearing.

_____
WILLIAM M. BARKER, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID G. HAYES, JUDGE

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[6] The appellant cannot be sentenced to imprisonment for life without possibility of parole under T.C.A. § 39-13-202(b)(2). This 1993 amendment to the statute only applies to offenses committed on or after July 1, 1993. See Sentencing Commission Comments, T.C.A. § 39-13-202.