IN THE TENNESSEE COURT OF CRIMINAL APPEALS

AT JACKSON

NOVEMBER 1995 SESSION

STATE OF TENNESSEE, Appellee,	) C.C.A. NO. 02C01-9412-CR-00281
VS.	) SHELBY COUNTY
ANDRE S. BLAND, Appellant.	) HON. ARTHUR T. BENNETT, JUDGE) (DEATH PENALTY)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS, Judge

OPINION

The appellant, Andre S. Bland, was convicted of attempted aggravated robbery, especially aggravated robbery, attempted first-degree murder, and first-degree murder. In the sentencing hearing, the jury found one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. See T.C.A. § 39-13-204(i)(5). 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 raises the following three issues:

> Whether the evidence adduced at trial was sufficient to sustain a conviction for first-degree murder?
>
> Whether the "especially heinous, atrocious, or cruel" aggravating circumstance is unconstitutionally vague or overbroad?
>
> Whether the trial court erred by denying appellant's motion to suppress his statement to the police?

Having carefully considered the appellant's several claims, we find no reversible error and thus affirm the judgment of the trial court.

BACKGROUND

The several offenses for which the appellant was convicted involved three different victims. These offenses all occurred in the same criminal episode in the parking lots of an apartment complex during a short time span on the night of October 9, 1992. Accordingly, the separate indictments were consolidated for trial by order of the trial court. The appellant was indicted along with three other co-defendants, but their cases were severed by the trial court and heard on separate dates. In this appeal, the appellant raises issues challenging only the conviction for first-degree murder and the sentence of death.

The evidence at trial showed that the victim, Ontrain Sanders, was killed in Memphis, Tennessee on the evening of October 9, 1992. Dr. Sandra K. Elkins, Assistant Medical Examiner for Shelby County, performed the autopsy on the victim. She testified that the victim bled to death as a result of four (4) or five (5) gunshot wounds that lacerated the femoral artery in the right thigh. Dr. Elkins located nine (9) separate gunshot wounds between the groin area and the knee in the victim's right leg, but because of the large number of wounds in such a small area, she was medically able to ascertain only one (1) entry wound and one (1) exit wound. Dr. Elkins removed one (1) bullet and one (1) bullet fragment from the victim's leg. Dr. Elkins testified that there were no signs of drugs or alcohol in the victim's system at the time of death. She also testified that prior to the infliction of the wounds, the victim appeared to be in a normal state of health for a twenty (20) year old male.

Dr. Elkins testified that, depending on certain variables, such as strenuous physical activity, a victim of this type of wound might live as long as ten (10) or fifteen (15) minutes after being shot. She further testified that the victim in this case could have been conscious for four (4) to five (5) minutes after suffering the wound.

Shortly after midnight on October 9, 1992, Officer R. G. Moore of the Memphis Police Department arrived at the scene of the crime. The crime scene was actually two adjacent parking lots, 3570 Cazassa and 1885 Winchester, in the Southbrook Apartment Complex in Memphis, Tennessee. He testified he saw one victim, Marcel Nugent, receiving treatment from paramedics in an upstairs apartment at 1885 Winchester, and one victim, Ontrain Sanders, receiving treatment from paramedics in the back of an ambulance at 3570 Cazassa.

Officer Moore noticed one car in the Winchester lot with a broken side window, one car with its tires shot, and another car with a shattered rear window. He found pieces of white wood beside the car with the broken side window. Inside that same car, he found a broken beer bottle. Officer Moore also retrieved from the Winchester scene a pair of brown sandals, two (2) spent 9 mm casings, and one (1) bullet fragment.

Officer Moore testified that he followed a trail of blood from the Winchester lot around an apartment building and into the Cazassa lot. The blood trail was 273 feet long and ended underneath a pickup truck in the Cazassa lot. Officer Moore found blood on the side of the truck and on the ground at the rear end of the truck. Officer Moore further testified that he retrieved from the Cazassa scene near the pickup truck an unemployment check, a dollar bill and change covered in blood, a black cap, one (1) spent casing from underneath the pickup truck, and one (1) bullet fragment. Officer Moore also testified that both parking lots were dimly lit by street lights.

The state called to the stand Earnest Earl Norman, Jr. and Marcel Nugent, the two surviving victims of the crimes. Norman and Nugent were visiting a friend of Norman's at 1885 Winchester on the evening of October 9, 1992. They arrived sometime between 10:30 and 11:30 p.m. and stayed inside the apartment about thirty (30) minutes. Both witnesses testified they saw about four (4) to six (6) men standing around the parking lot before they went upstairs to visit Norman's friend. Neither witness could testify as to the identity of anyone in that group of men. They also testified that they heard one (1) or two (2) gunshots about ten (10) to fifteen (15) minutes after they went inside.

Norman testified that as they were getting ready to leave in his car, a grey Pontiac, one of the men asked them who they were, where they were from, and if they had any money. Norman stated that he and Nugent did not exchange any

words with the men and just tried to ignore them. Norman testified that just before he was ready to get in his car, one of the men hit him in the back of the head. By this point in time, according to Norman, Nugent was already in the passenger side of the car. After the man hit him, Norman turned around and ran. As he was running away, he noticed one of the men chasing him. He could not get a decent look at the man, however, because the man had on a hat covering his face. Just before he jumped a fence near the parking lot, he heard someone yell out, "man, shoot that nigger; man, shoot that nigger." Norman testified he heard one (1) shot fired as he ran away.

After he jumped the fence, Norman ran to a nearby service station and called 911. He then called his cousin for a ride. By the time he and his cousin arrived back at the complex, the police and ambulances were on the scene. He saw the paramedics carry Nugent down from his friend's apartment. Norman gave the police his name and told them what had happened.

Nugent testified that he hopped into the car when Norman turned and ran from the group of men. He stated he heard about two (2) gunshots while Norman was running away. The group of men then tried for about ten (10) or fifteen (15) minutes to get Nugent out of the car, when another car drove into the parking lot. Nugent testified that he saw a man get out of this car and approach the group of men. Nugent stated that it looked like the group of men said something to the man, and then the man turned around and headed back towards his car. According to Nugent's testimony, this lone man did not say anything to the group of men. Nugent stated that he heard gunshots as the man was heading towards his car, but he did not see who was firing.

Nugent attempted to get out of the car while the group's attention was distracted by this other man. One of the men in the group, however, tried to hit him with a stick, so Nugent got back in the car. The group of men then

proceeded to break the car window with sticks and beer bottles, and pulled Nugent out of the car. Nugent testified that a scuffle ensued between he and the group. As he tried to run away from the ensuing scuffle, someone pulled off his jacket. Then someone shot him. Someone then took his watch, asked him for his money, kicked and beat him, and shot him again. Nugent testified that he was shot twice in one leg and once in the other. The group then walked away from Nugent, and Nugent eventually made it upstairs to the apartment of Norman's friend. He lay on the floor of the apartment for about thirty (30) to forty (40) minutes before the ambulance came. Nugent could not identify any of the assailants.

The state also called three witnesses who were friends of the appellant. The first, Charles E. Sanders, lived with his wife and two sons in the Southbrook Apartment Complex at 1885 Winchester. Sanders had a few people over for a crap game on the evening of October 9, 1992. Sanders testified that Little Larry, Steve, Martell, his family, and the appellant were in attendance. He testified they had some whiskey, beer, and boneless catfish during the game, which ended around 10 p.m.

The group wandered outside after the crap game ended. Sanders stated he saw Steve with a stick in his hand, throwing beer bottles, jumping up and down, and trying to get someone out of a car. Sanders testified that he only saw Steve by the car, and that he did not see the appellant in the parking lot. Sanders stated he then heard shots, but he did not see who was shooting. After hearing the shots, Sanders directed his family and Martell to get back inside. Sanders stated that he took a grey .38 caliber pistol away from his eldest son, Carlos, before they all went back inside. Sanders also testified that he knew the appellant owned a silver 9 mm, but stated that he did not see him with it that night.

Terrance Martell Pollard, was also at Sanders' apartment on the night of October 9, 1992. He testified that once the crap game was over, Sanders, Yogi, Steve, Darryl Bailey, the appellant, and he all went outside. He stated that Steve was "into it" with two guys in a grey car. Pollard saw Steve throwing beer bottles and "stuff" at the two men. Pollard further testified that one of the men got hit and ran away, and the other got into the car. He stated that he did not hear any shots fired when the one man ran away.

While Steve was trying to get the man out of the car, a green Cadillac drove into the parking lot. Steve approached the man as he got out of his car and asked him what he was doing there. The man turned around and headed back towards his car when Pollard saw Darryl and the appellant shoot at him. Pollard testified that when they first shot him, Darryl and the appellant were about eight (8) to ten (10) feet away from the man. The man limped on around the building and Darryl and the appellant followed. Pollard testified he heard more shots after the three men ran around the building, but he was not sure how many. Pollard stated that during this time Steve was still trying to get the man out of the grey car.

When Darryl and the appellant came back around to the Winchester lot, Pollard did not see a gun in the appellant's hand, but noticed that Darryl's black automatic was cocked, which meant to Pollard that it was empty. Pollard also saw blood on Darryl's hands. Pollard testified that Darryl helped Steve break the car window and drag the man out of the grey car. He stated that Steve and Darryl were fighting the man when someone yelled that the man had a gun. Pollard stated he then saw the appellant shoot the man. The appellant had a silver 9 mm. Pollard also stated that Darryl got the jacket from the man they pulled out of the grey car.

The appellant's third friend, Carlos Sanders, is the son of the previous witness, Charles E. Sanders. Carlos Sanders testified that before the crap game that night, Darryl, Martell, Yogi, Steve, the appellant, and he discussed robbing two guys that came into the parking lot in a Pontiac.

The state called two witnesses who lived in the apartment buildings surrounding 3570 Cazassa. Henry Charlton Adams testified that on the night of October 9, 1992, he heard gunshots close to his back door. Adams lived in an upstairs apartment overlooking the parking lot at Cazassa. When he looked out his back door, Adams saw a man kneeling in a shooting position next to a green pickup truck. Though he did not actually see the man fire the gun, it appeared to Adams as if the man was shooting up underneath the truck. Adams heard about three (3) shots. Adams further testified the man had a large shiny gun. Adams stated it was dark, but that there was a street light near the pickup. Adams also stated, however, that he could not identify the person he saw kneeling with the gun.

After he saw the man run back between the buildings, Adams heard someone holler, "Oh God, please help me!" It was just after midnight when he called 911. When he came back to look out into the parking lot, he saw someone trying to crawl out from underneath the pickup truck. Adams testified that the person under the truck stopped hollering after a short while.

The state's next witness, Floyd Prentiss Johnson, owned the green pickup truck under which the victim was found. Johnson's upstairs apartment also overlooked the lot at Cazassa. Johnson testified that he initially heard three (3) gunshots that evening. When he looked out his window, Johnson saw a man lying under his truck. Johnson stated that the man's upper body was exposed from under the truck and covered in blood. Johnson testified that the man was calling out, "Oh God, help me!" Because he still heard shots being fired in the

vicinity, Johnson stayed up on his balcony while he tried to calm the man down. Johnson testified the man stopped responding to him a few minutes before the ambulance arrived, which was about fifteen (15) to twenty (20) minutes after he first saw the man.

Cathleen Cummins was one of the paramedics at the scene that night. She testified that when they arrived, the victim was lying face-up halfway under the pickup truck. She further testified that when they first came into contact with the victim, the victim's lips were starting to pale and he was having trouble breathing. The victim was bleeding from a large wound on his right thigh. Cummins stated the victim was not responding to CPR. Thirty-five (35) minutes elapsed from when they arrived on the scene until they got to the hospital.

The appellant went to the Memphis police station on his own accord to turn himself in at about 1 p.m. on October 12, 1992. Before interviewing the appellant, Sgts. H. A. Ray and Timothy Cook gave the appellant an advisement of rights form to sign. Sgt. Cook was not assigned to this case, but since it was routine to have two (2) officers present during interviews, Sgt. Ray asked Sgt. Cook to participate. The appellant read the first couple of lines out loud, so the officers could be sure he could read, then acknowledged that he understood his rights and signed the form. This initial advisement of rights commenced at 1:15 p.m. and concluded at 1:19 p.m.

The appellant's statement was taken at 2:37 p.m. During that hour or so between the signing of the advisement of rights form and the taking of the statement, the officers talked with the appellant about the crimes and located a secretary to type the statement. There is no recording of the conversations that took place before the typing of the statement. According to Sgt. Ray, however, since there was no secretary in his department at that time, a good portion of that hour was spent locating a secretary.

Just prior to the typing of the statement, the appellant was again advised of his rights. And again the appellant stated that he understood them. Sgt. Ray testified that the appellant was asked a question, the secretary typed the question, the appellant then answered the question, and the secretary typed the answer. The appellant was able to see the typing as it appeared on the word processing screen. According to Sgt. Ray, he was "sure" they informed the appellant he would be charged with first degree murder. Moreover, as Sgt. Ray stated, the portion at the top of the typewritten statement indicated that the charge would be first degree murder. Once the typing was completed, the appellant was put back in the interview room to review the statement.

The officers did not sit in the interview room while the appellant was reviewing his statement. The officers instructed him to correct any mistakes he found or have one of the officers correct them for him. The appellant initialed the part of the statement that advised him of his rights and also initialed the bottom of the first two pages and signed and dated the last page. The appellant had Sgt. Cook write in a correction to the answer of the question, "who was beating Earnest Norman?", which both the appellant and Sgt. Cook initialed.

Sgt. Ray testified that at no point were promises, force, threats, or coercion used to obtain the statement. He further testified he did not inform the appellant that he would be charged with voluntary manslaughter due to the location of the victim's wounds. Sgt. Ray testified that he does not remember Sgt. Cook being left alone with the appellant at any time.

The appellant's statement was read into evidence by Sgt. Ray during the state's direct examination in its case in chief.[1] At the top of the statement is some

[1] The trial court conducted a pre-trial hearing on the appellant's motion to suppress his statement to the police. The motion was denied. During the hearing, however, the appellant testified to a slightly different account of events from that to which Sgts. Ray and Cook testified. First of all, the appellant testified that he did not sign a waiver of rights form when he first arrived at the station. According to the appellant, he did not sign the form until after the statement was taken, and that the officers were lying when they say it was signed at 1:19 p.m.

biographical information about the appellant, a statement of the charge of first degree murder, and a description of the appellant's rights. The appellant's initials appear next to the questions about understanding the rights and voluntarily giving the statement. The appellant stated that on October 9, 1992, he shot Ontrain Sanders four (4) or five (5) times in the leg with a silver chrome 9 mm. He stated that he also shot Marcel Nugent in the leg two (2) times with the same gun. According to the appellant, even though Darryl Bailey had a black .38 revolver that night, the appellant was the only one shooting. The appellant also stated that he knew Carlos owned a gun, but he did not know if Carlos had it on him that night. The appellant stated that he dumped the gun near a fence in the Southbrook Apartments.

The appellant stated that Carlos Sanders, Martell, Darryl Bailey, Steve, Yogi, and he were present during the shooting. When asked who was beating Earnest Norman, the appellant initially answered Lil Steve, Lil Darryl, and Yogi. A correction was made to the statement, however, and the names Martell and Carlos were added. Both the appellant's and Sgt. Cook's initials appear after the correction.[2]

The appellant stated he was inside Charles Sanders' apartment playing dice with Lil Larry, Carlos and Charles Sanders, and Pat, when Steve came into the apartment to get the appellant's 9 mm. The appellant went outside and took

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Secondly, he testified that the officers informed him if he confessed he would be charged with a lesser degree of homicide because the victim was shot below the waist. The appellant further testified that the portion of the written statement which informed the appellant of the charge of first degree murder was not on the statement when the secretary typed the questions and answers. The appellant also claimed that the secretary did not type any statement concerning the rights of the appellant while the appellant was watching.

Thirdly, the appellant testified that the correction of the answer to the question "who was beating Earnest Norman?" was not made by him. Though the appellant initialed the answer to that question but no other, he claimed that the officers asked him to initial. He testified, however, that when he initialed it, the correction was not there. He also testified that Sgt. Ray was the only officer present when he signed the statement.

[2] There is some discrepancy concerning the question about the beating of Earnest Norman. According to the testimony at trial, Earnest Norman was only hit one time in the back of the head before he ran away. Marcel Nugent, on the other hand, was beat and kicked before and after he was shot. When the police asked this question, therefore, they might have confused the names. This is the correction over which the appellant and police officers have conflicting stories as to when the correction was actually made.

the gun from Steve. Yogi told the appellant they were getting ready to rob some guys that were upstairs in an apartment. When the men came downstairs from the apartment, Yogi approached them, said something to them, and then hit one of the men. That man ran, while the other locked himself in the car. Steve and Darryl started hitting the car window with some objects. Darryl pulled the guy out, and Steve, Darryl, Yogi, Carlos and Martell hit the guy with the objects.

The appellant stated that the man in the Cadillac then drove up, got out of the car, and came towards the group. The appellant shot the man in his leg. The man then ran around the building and the appellant chased him and shot him in the leg again. The man attempted to crawl under a truck and the appellant shot him again in the leg. The appellant then went back around to the Winchester lot. The group was still beating the man they pulled out of the car, so the appellant walked up to him and shot him in both legs. The appellant then dumped his gun and ran to his girlfriend's house and went to sleep.

The appellant stated he was not shooting to kill, and that is why he shot them in their legs. He shot Ontrain Sanders because "he jumped out [of his car] and approached us and said what's up and I turned around and I shot him in his leg." He shot Marcel Nugent because "he started running from Yogi and them so I shot him in his leg so he couldn't get away." The appellant also stated that he did not get any money or valuables from these robberies.

During the sentencing phase, the state offered the testimony of Dr. Elkins and Vivian Lewis, the victim's mother. Dr. Elkins testified concerning the amount of pain the victim endured as a result of this type of injury. She opined that since the femoral nerve, the major nerve trunk servicing the leg, was contused, the victim would indeed have experienced pain. She also stated that other nerves in the surrounding area were completely destroyed, thus causing pain as well.

Vivian Lewis, the victim's mother, testified through the aid of an interpreter for the hearing impaired. She stated that the victim was twenty (20) years old and had two young daughters, ages two (2) and four (4), living with him prior to his death. Because of the death, she had to take care of the daughters. She further testified that the oldest daughter keeps asking about her father's whereabouts. According to Ms. Lewis, the victim was a very nice young man; and the family is extremely hurt by his loss. Ms. Lewis found out about the murder from her sister-in-law early that morning.

During this phase of the trial, the appellant called his grandmother and mother to the stand, and as well testified on his own behalf. The appellant was raised by his grandmother, Virginia Louise Bland, and lived with her at the time of this offense. The appellant was nineteen (19) years old the night of the murder. Ms. Bland testified that when she first heard about the murder, she told the appellant that turning himself in was the right thing to do. She stated that the appellant agreed. Ms. Bland said she insisted the appellant tell the truth. Ms. Bland also testified that she knew of the appellant's juvenile record of car thefts and assaults and batteries.

Marilyn Louise Boyd, the appellant's mother, had talked with the appellant about the murder. They agreed that turning himself in was the best thing. She testified that she did not know the whereabouts of the appellant's father. She also testified she knew of the appellant's juvenile record, and that she had talked to him about it.

The appellant took the stand on his own behalf. The appellant admitted responsibility for the crimes and testified that he turned himself in because he "just couldn't take it" and he did not want to "run for it." He stated that it was on his conscience and it had been "hurting" him. He further testified that he did not

mean to kill anyone, and that is why he shot the men in their legs. He testified he knew what he did was wrong.

The appellant stated he shot Ontrain Sanders because after they exchanged words, Sanders headed back towards his car like he was "fixing to get his gun or something." According to the appellant, when he and Darryl Bailey followed Sanders around the corner, it was a "spur of the moment thing"; they had been drinking and smoking and just got caught up in the commotion.[3] The appellant stated he shot Sanders four (4) times because the automatic gun he was using just kept firing. The appellant testified that he shot Marcel Nugent because Nugent was trying to get a gun. He further testified that he was not involved in the robbery of Nugent.

The appellant testified that when he was a juvenile he had three (3) or four (4) assault and battery charges and three (3) or four (4) auto theft charges, but that this was his first charge since turning eighteen (18).

SUFFICIENCY OF THE EVIDENCE

In his first issue,[4] the appellant claims the evidence adduced at trial was insufficient to sustain a conviction of first-degree murder. Specifically, the appellant contends that the state did not prove the requisite elements of premeditation and deliberation. According to the appellant, the state's reliance on the existence of "repeated shots" could not convince a rational jury beyond a reasonable doubt that the killing was premeditated and deliberate. The state, however, asserts that evidence other than just that of the "repeated shots" was

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[3] Although there was some testimony that the appellant and his friends were drinking the night of the murder, there is no evidence in the record that indicates the appellant was intoxicated. Nor did the appellant raise the issue of intoxication at trial or on appeal.

[4] We note at the outset that the appellant raises only three issues in this appeal.

introduced which tends to support the jury's verdict that the killing was premeditated and deliberate.

At the time of this offense, first-degree murder was defined as "an intentional, premeditated and deliberate killing of another." T.C.A. § 39-13-202(a)(1) (1991).[5] Once a homicide has been proven, it is presumed to be a second-degree murder and the state has the burden of establishing premeditation and deliberation. State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

Intentional is defined as "the conscious objective or desire to engage in the conduct or cause the result." § 39-11-106(a)(18). Premeditation necessitates "the exercise of reflection and judgment," § 39-13-201(b)(2), requiring "a previously formed design or intent to kill." State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). Whereas deliberation is defined as a "cool purpose," "without passion or provocation." § 39-13-201(b)(1) and comments. "While it remains true that no specific length of time is required for the formation of a cool, dispassionate intent to kill, Brown requires more than a 'split-second' of reflection in order to satisfy the elements of premeditation and deliberation." West, 844 S.W.2d at 147.[6] Accordingly, before a jury can convict the defendant for first-degree murder, it must find that the defendant consciously engaged in the conduct to cause the death, and killed "upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement." State v. Gentry, 881 S.W.2d 1, 4 (Tenn. Crim. App. 1993). See State v. Brooks, 880 S.W.2d 390, 392-93 (Tenn. Crim. App. 1993) ("the jury must find that the defendant formed the intent to kill prior to the killing, i.e., premeditation, and that

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[5] In his brief, the appellant also contends that the state failed to prove the necessary elements to sustain the conviction under the felony murder indictment. The jury, however, did not convict the appellant of murder during the perpetration of a robbery. Though the jury initially returned with a conviction for murder in the first degree and murder in the perpetration of a robbery, the trial judge instructed the jury it could only return a conviction on one count of the indictment. After additional deliberation, the jury returned with a verdict for murder in the first degree.

[6] In Brown, the Supreme Court acknowledged the fact that premeditation could be formed in an instant, but suggested abandoning such an instruction to the jury. The Court also noted that deliberation cannot occur instantaneously.

the defendant killed with coolness and reflection, i.e., deliberation"); State v. Bordis, No. 01C01-9305-CR-00157 (Tenn. Crim. App., Nashville, Feb. 24, 1995), perm. to app. denied, (Tenn. July 10, 1995).

The elements of premeditation and deliberation are questions for the jury and may be inferred from the circumstances surrounding the killing. Gentry, 881 S.W.2d at 3; Taylor v. State, 506 S.W.2d 175, 178 (Tenn. Crim. App. 1973). The Supreme Court has distinguished several relevant circumstances which can be considered, including: the use of a deadly weapon upon an unarmed victim; the fact that the killing was particularly cruel; declarations by the defendant of his intent to kill; and the making of preparations before the killing for the purpose of concealing the crime. State v. Brown, 836 S.W.2d 530, 541-42 (Tenn. 1992). This Court has also recently noted several factors from which the jury may infer the two elements: facts about what the appellant did prior to the killing which would show planning; facts about the appellant's prior relationship with the victim; and facts about the nature of the killing. State v. Bordis, No. 01C01-9305-CR-00157 (Tenn. Crim. App., Nashville, Feb. 24, 1995), perm. to app. denied, (Tenn. July 10, 1995) (quoting 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7 (1986)).

The appellant places great weight on his presumption that the jury found premeditation and deliberation solely upon the fact that the appellant fired repeated shots into the victim's legs. Arguing that this finding by the jury is inappropriate, the appellant relies upon Brown, wherein the Supreme Court opined that the existence of repeated shots to the victim "is not sufficient, by itself, to establish first-degree murder." Brown, 836 S.W.2d at 542. The state asserts, however, that in Brown the only evidence of premeditation and deliberation was the fact that the victim had suffered repeated blows. In contrast, the state contends there was substantial other proof of premeditation and deliberation in the present case, such as the fact that the appellant shot the

victim after the victim tried to interfere with the attack on Nugent and the fact that the appellant chased the victim around a building and shot him after he crawled underneath a pickup truck. The multiple shots, the state argues, taken into consideration with the other evidence presented below, could lead a jury to convict the appellant of first degree murder.

In the present case, the appellant initially shot the victim after the victim turned around and headed back towards his car. The appellant stated he thought the victim was "fixing to get a gun or something." Though the appellant testified that he followed the victim around the building because there was "so much going on" and it was a "spur of the moment thing," if the appellant had the wits to conclude the victim intended to get a gun, the appellant certainly had enough time to reflect and form a "cool, dispassionate intent to [follow and] kill" the victim. Furthermore, after the first shot was fired, the appellant followed the victim around the corner and shot him several more times. As the state asserts, it took the appellant 273 feet to catch up with the hobbling victim. From this casual chase, as the state suggests, the jury could logically conclude the appellant deliberately acted with "cool purpose" and "without passion or provocation."

"Calmness immediately after a killing may be evidence of a cool, dispassionate, premeditated murder." State v. West, 844 S.W.2d 144, 148 (Tenn. 1992) (citing State v. Browning, 666 S.W.2d 80, 84 (Tenn. Crim. App. 1983); Sneed v. State, 546 S.W.2d 254, 258 (Tenn. Crim. App. 1976)). After the appellant followed Ontrain Sanders around the buildings and shot him, the appellant returned to the Winchester lot where his friends were beating on Marcel Nugent. From the testimony, the jury may have reasonably inferred that the appellant did not shoot Nugent immediately upon his return from the Cazassa lot. It appears from the testimony that the appellant was not involved in the physical beating of Nugent. According to the testimony, sometime after the

beating of Nugent started, someone yelled that Nugent had a gun. It appears that Nugent at some point broke free and started to run away from the attackers. The appellant then proceeded to shoot Nugent, according to the appellant, so he could not get away. Appellant's friends robbed Nugent, and then the appellant shot Nugent again. Though this turn of events might not evoke an image of "calmness," it could indicate to the jury that the appellant was calm enough to return to the Winchester lot, stand and observe the beating and robbery of Nugent, and then shoot Nugent two separate times. Moreover, the appellant stated in his statement to the police that after the shootings, he dumped the gun, went to his girlfriend's house, and fell asleep. All of this could be indicative of "calmness immediately after the killing," which suggests premeditation and deliberation.

Since the appellant has challenged the sufficiency of the convicting evidence, this Court must review the record to determine whether the appellant has met his burden on appeal of showing that "the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the state's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, "the state is entitled to the strongest legitimate view of the trial evidence and all reasonable or legitimate inferences which may be drawn therefrom." State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court does not reweigh or reevaluate the evidence. Id. The jury's verdict, therefore, will only be disturbed if, after a consideration of the evidence in the light most favorable to the state, a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (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). Before the defendant may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 612 (Tenn 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 613. Here, both direct and circumstantial evidence was available for the jury's consideration.[7]

After a review of the evidence in a light most favorable to the state, as seen above, the jury could reasonably have concluded that the appellant planned his actions, had a motive, and killed in accordance with the plan, i.e., premeditated and deliberated. Accordingly, this issue is without merit.

"ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

Next, the appellant contends that the language of the aggravating circumstance, that "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," T.C.A. § 39-13-204(i)(5), is "facially vague and wholly undefined," and that the trial court failed to provide the jury with definitions of the terms contained in this statute. The appellant claims this statutory language "create[s] a substantial risk that the [death penalty] will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759,

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[7] The appellant raises questions concerning the admissibility of the appellant's statement. This issue will be addressed infra.

1764 (1980) (citing Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972)). The state argues that Tennessee courts have repeatedly affirmed the language used in this aggravator, that the trial judge did in fact define those terms for the jury, and that, even though not asserted by the appellant to the contrary, there was sufficient evidence to support the jury's application of this aggravating circumstance.

The appellant was sentenced to death based upon the "especially heinous, atrocious, or cruel" aggravating circumstance as amended in 1989. The previous language of this aggravator included the phrase "in that it involved torture or depravity of mind," which has now been substituted by the phrase "in that it involved torture or serious physical abuse beyond that necessary to produce death." The Supreme Court has repeatedly held that the language in the old statute is not unconstitutionally vague or overbroad. See Hartman v. State, 896 S.W.2d 94, 106 (Tenn. 1995); State v. Cazes, 875 S.W.2d 253, 267 (Tenn. 1994); State v. Black, 815 S.W.2d 166, 182 (Tenn. 1991); State v. Williams, 690 S.W.2d 517, 533 (Tenn. 1985).

The appellant contends that the statute as amended is unconstitutionally vague. The appellant, however, does not offer any authority in support of his contention. The United States Supreme Court requires that the aggravating circumstance must narrowly channel the sentencing jury's discretion by "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65 (1980).[8] In light of this mandate, our Supreme Court has ruled that the "especially heinous, atrocious, or cruel" aggravator, prior to its amendment, was constitutionally valid.

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[8] In other words, "especially heinous, atrocious, or cruel" must be qualified by language that provides a "'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932 (1976) (quoting Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 2763 (1972) (White, J., concurring)). The phrase "in that it involved torture or depravity of mind" is an example of a constitutional qualifier.

Accordingly, since the statute has been amended by replacing "an entirely subjective standard," i.e., depravity of mind, with a "new, wholly objective standard," i.e., serious physical abuse beyond that necessary to produce death, State v. Van Tran, 864 S.W.2d 465, 487 (Tenn. 1993) (Daughtrey, J., dissenting), the same ruling would apply to the amended version.[9]

In Maynard v. Cartwright, 486 U.S. 356, 365-66, 108 S.Ct. 1853, 1859 (1988), the United States Supreme Court implicitly stated that the "torture or serious physical abuse beyond that necessary to produce death" language modifying "especially heinous, atrocious, or cruel" would suffice to validate an otherwise vague aggravating circumstance. Accordingly, we find the appellant's attack on the constitutionality of this aggravating circumstance to be without merit.

The appellant further argues that the terms in the aggravating circumstance were not defined by the trial court, and thus the jury was not legally instructed on the imposition of the death penalty. This assertion, as the state correctly observes, is wholly without merit. The trial judge, in accordance with the Williams opinion's definitions, did indeed provide the jury with definitions of "heinous," "atrocious," "cruel," and "torture." The trial judge did not define "serious physical abuse beyond that necessary to produce death."[10] However, even if the trial judge failed to define the terms in the aggravator, the application of this aggravator is still not unconstitutionally vague or overbroad. See Hartman v. State, 896 S.W.2d 94, 106 (Tenn. 1995). See also State v. Irick, 762 S.W.2d 121, 133 (Tenn. 1988); State v. Porterfield, 746 S.W.2d 441, 451 (Tenn. 1988).

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[9] In the only other case we have found wherein the appellant challenged the constitutionality of the new statute, State v. Beckham, 02C01-9406-CR-00107 (Tenn. Crim. App. Jackson, Sept. 27, 1995), the Court did not reach the issue. In State v. Odom, 02C01-9305-CR-00080 (Tenn. Crim. App. Jackson, Oct. 19, 1994), in which the appellant challenged the sufficiency of the evidence under this aggravator, this Court suggested that this aggravating circumstance is constitutionally valid. Odom is currently on appeal to the Supreme Court.

[10] This phrase was defined by this Court in State v. Odom, 02C01-9305-CR-00080 (Tenn. Crim. App. Jackson, Oct. 19, 1994) (citing State v. Tuttle, 780 P.2d 1203, 1217 (Utah 1989)): "Physical abuse has been defined as qualitatively and quantitatively different and more culpable than that necessary to accomplish the murder."

Moreover, the jury found that the murder involved "torture" rather than "physical abuse beyond that necessary to produce death."

Since the jury returned a verdict finding that the murder was cruel and torturous, we must decide if there was sufficient evidence to support the sentencing jury's finding. "Cruel" means "disposed to inflict pain or suffering, causing suffering, or painful." Yet a finding of cruelty alone cannot justify the imposition of the death penalty. See Maynard v. Cartwright, 486 U.S. 356, 365-66, 108 S.Ct. 1853, 1859 (1988); Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65 (1980). There must, therefore, be some support for the jury's verdict that the murder involved torture. "Torture" is defined as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." See State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985).

We hold that the jury in this case was reasonably justified in finding the existence of torture. Cases wherein the appellate court overturned the jury's finding of torture involved killings in which the victim died immediately, see, e.g., State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981), or in which no evidence was presented concerning the circumstances surrounding the killing, see, e.g., State v. Williams, 690 S.W.2d 517 (Tenn. 1985); State v. Beckham, 02C01-9406-CR-00107 (Tenn. Crim. App. Jackson, Sep. 27, 1995). Those cases wherein this aggravator was upheld, however, involved murders in which the victim was repeatedly wounded and remained conscious for a period of time after the infliction of the wounds. See e.g., State v. Smith, 893 S.W.2d 908 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Smith, 868 S.W.2d 561 (Tenn. 1993); State v. Black, 815 S.W.2d (Tenn. 1991).

The victim was shot once in the leg, chased around a building, and shot again in the leg. The victim then crawled under a truck and was shot yet again in

the legs. According to the coroner, the victim could have lived as long as fifteen (15) minutes after suffering the wounds, could have remained conscious for about five (5) minutes, and would have suffered pain as a result of nerve damage. Furthermore, there was testimony that the victim called out for help while lying under the truck. The evidence before us is sufficient to warrant a jury finding the "infliction of severe pain or physical mental pain upon the victim while he remain[ed] alive and conscious." State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985). Furthermore, after a thorough review of the record, we hold that the jury was justified in finding the aggravating circumstance outweighed any mitigating evidence presented.[11]

INTRODUCTION OF APPELLANT'S STATEMENT

Finally, the appellant contends that his statement to the police was not freely and voluntarily given and that the trial court erred in not suppressing the statement. Specifically, the appellant contends he gave the statement as a result of a promise that he would be charged with voluntary manslaughter rather than first-degree murder. The appellant filed a pre-trial motion to suppress the statement, which was denied by the trial court after a hearing on the matter.

It is the duty of the trial judge to determine the voluntariness and the admissibility of the statement. State v. Pursley, 550 S.W.2d 949 (Tenn. 1977). Moreover, the trial court's determination that a confession was given knowingly

[11]Although not raised as an issue on this appeal, we note that the trial court's jury instructions included in the technical record contained an arguably misleading and partially erroneous instruction concerning the element of deliberation. Among other instructions, the jury was told, "The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect." (emphasis added). This instruction is somewhat confusing and appears to be out of context. We do not believe the emphasized phrase should have been included. See State v. Brooks, 880 S.W.2d 390 (Tenn. Crim. App. 1993). However, the charge in the case sub judice did not include other problematic instructions noted by this Court in Brooks. Also, this Court further noted in Brooks that, "[B]ecause the evidence from the record could either support or fail to support a finding of deliberation, we cannot conclude that the erroneous jury instructions were harmless." Id. At 393. In the case sub judice, overwhelming evidence supports a finding of deliberation. Brooks is clearly distinguishable on its facts and the questioned instruction. We conclude that any error in the trial court's instructions concerning deliberation was harmless.

and voluntarily is binding on the appellate courts unless the appellant can show that the evidence preponderates against the trial court's ruling. State v. O'Guinn, 709 S.W.2d 561, 566 (Tenn. 1986); see also, State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994); State v. Rickman, 876 S.W.2d 824, 830 (Tenn. 1994). In the instant case, we find that the appellant has failed to show how the evidence preponderates against the trial court's ruling.

In the suppression hearing,[12] the appellant testified that he came to the police station on his own accord to turn himself in. He testified, however, that the officers told him if he confessed he would not be charged with first-degree murder because the victim was shot below the waist. He claimed the officers informed him they knew it was not an intentional killing. He further claimed that he signed a waiver of rights form after he gave his statement, but not before. He stated that the secretary typed the questions and answers as they were being given, and that he could read the typing on the computer monitor. He contended, however, that the part of the written statement which informed him of the charge of first-degree murder was added to the statement after he signed it.

Sgts. H. A. Ray and Timothy Cook testified that the appellant came into the police station and surrendered. Prior to interviewing the appellant, the officers advised the appellant of his rights by way of an advisement of rights form. The appellant read the first couple of lines aloud (so the officers could be certain he could read), read the remainder of the form to himself, acknowledged that he understood his rights, and signed the waiver. The officers then talked with the appellant for a short while before locating a secretary to transcribe the statement.

The officers testified that the appellant was again advised of his rights before questions were asked. While the officers asked the questions and the

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[12] See also note 1, supra.

appellant gave his answers, the appellant was able to watch on the computer screen as the secretary typed. After the typing was completed, the appellant was escorted to an interview room where he had the opportunity to review the statement. The appellant asked the officers to make one correction, and then the appellant signed the statement. The officers testified that they did not make any promises or threats, or use any force or coercion before or while taking the statement. The officers further testified that they did not comment on the location of the victim's wounds or state that the appellant would be charged with voluntary manslaughter rather than first-degree murder.

At the conclusion of the testimony at the suppression hearing, the trial court stated it was "of the opinion that the statement was freely and voluntarily given without any threats or promises or coercion . . . and that [it] meet[s] the tests of Miranda and other cases that are attendant thereto, and will allow the statement to be admitted into evidence in the case." It appears the trial judge found the testimony of the officers more credible than the appellant's. Furthermore, there is nothing before this Court which preponderates against the trial court's findings. "The issue of credibility of witnesses is primarily that of the trier of fact, in this case, the trial judge, since he had the opportunity to hear the witnesses and observe them as they underwent examination." O'Guinn, 709 S.W.2d at 565 (citing Houston v. State, 593 S.W.2d 267, 271 (Tenn. 1980)). Accordingly, this issue is without merit.

CONCLUSION

After a thorough review of the issues and the record before us as mandated by T.C.A. §§ 39-13-206(b), and (c), and for the reasons stated herein, we affirm the appellant's conviction and sentence of death. We conclude that the sentence of death was not imposed in an arbitrary fashion, the evidence supports the jury's finding of the aggravating circumstance, and the evidence supports the jury's finding that the aggravating circumstance outweighs any mitigating circumstances. Moreover, a comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant,

convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases.[13]

[13] No execution date is set in this opinion. T.C.A. § 39-13-206(a)(1) (1995 Supp.) provides for automatic review by the Tennessee Supreme Court upon affirmance of the death penalty. If the death sentence is upheld by the higher court on review, the Supreme Court will set the execution date.

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PAUL G. SUMMERS, Judge

CONCUR:

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DAVID H. WELLES, Judge

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WILLIAM M. BARKER, Judge