IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9512-CC-00369
Appellee	)	
	)	HARDIN COUNTY
vs.	)	
	)	Hon. C. Creed McGinley, Judge
JACK JAY NORTH, JR.,	)	
	)	(First Degree Murder)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jack J. North, Jr., appeals his conviction by a jury for premeditated and deliberate first degree murder, entered by the Circuit Court of Hardin County. The jury sentenced the appellant to imprisonment for life without the possibility of parole. The appellant raises before this court the following issues:

(1) Whether the trial court improperly admitted at trial the appellant's pre-trial statements to the police;
(2) Whether the trial court improperly admitted an electronic organizer;
(3) Whether the trial court improperly admitted a "gruesome photograph" of the victim;
(4) Whether the trial court improperly admitted letters written by the appellant, while in jail awaiting trial, to his cousin Daniel Burcham;
(5) Whether the trial court improperly limited defense counsel's direct examination of a witness concerning statements made by the appellant to the witness in the Hardin County Jail;
(6) Whether the trial court improperly permitted the co-defendant to invoke his Fifth Amendment protection against self-incrimination outside the presence of the jury;
(7) Whether the evidence adduced at trial is sufficient to support the appellant's conviction for first degree murder and his sentence of life imprisonment without the possibility of parole;
(8) Whether the appellant's sentence is unconstitutional.

After carefully reviewing the record, we affirm the judgment of the trial court.

I. Factual Background

At trial, the State adduced the following testimony. John Goodin, a retired welder who resides in Adamsville, Tennessee, testified that he was a longtime friend of the victim, Ronald "Frog" Phillips. On September 1, 1994, at approximately 7:00 a.m. or 7:30 a.m., Goodin was traveling to Corinth, Mississippi, and decided to stop at Mr. Phillips home in Crump, Tennessee, near the entrance to Shiloh National Military Park. He intended to ask Mr. Phillips to accompany him to Corinth. When he arrived at Mr. Phillips' home, he noticed that Phillips' car was gone and the door to the house was propped open with a

couch cushion. Goodin walked through the front door into the living room. He observed blood on the couch in the living room, and, from the living room, he observed Mr. Phillips' feet protruding from the bathroom door. Goodin entered the bathroom in order to determine if Mr. Phillips was alive. According to Goodin, Phillips was "cold and stiff."

Because the victim did not own an operational telephone, Goodin went to the house of Sonnie Cromwell, Mr. Phillips' landlord, and asked that he call the police. Mr. Cromwell testified that his mother called the police while he and Goodin returned to Mr. Phillips' house. She subsequently joined them in front of the house, where they awaited the police. Mr. Cromwell confirmed that the victim had owned a 1981 Oldsmobile Toronado, which Cromwell had sold to the victim for $350.

Danny Robertson, a resident of Stantonville, Tennessee, testified that he was self-employed doing carpentry, roofing, and painting. He had known Phillips for approximately three or four years. Phillips occasionally assisted Robertson in completing painting jobs. Robertson also socialized with the victim. On the morning of September 1, Robertson was driving to work when he was stopped by Sonnie Cromwell, who was standing outside Phillips' home. The police had not yet arrived. Robertson entered the house and observed Phillips' body on the bathroom floor. Robertson touched Phillips' leg, and noted that the victim was "real cold." Later that day, Robertson identified the victim's car, which had been recovered by the police. At the request of the police, he also identified a radio belonging to the victim.

Jackie Surratt, who lives in Adamsville, Tennessee, testified that he was acquainted with Mr. Phillips. Mr. Surratt had hired the victim to paint the inside of his home, and the victim had completed the job on August 31, 1994, on the

evening prior to his death. Surratt paid Phillips $250 in cash that evening. Michael Bowden, a friend of the victim, drove past Phillips' home sometime after 10:30 p.m. on the night of August 31. As he passed the victim's home, he observed Phillips standing in his kitchen. Phillips' car was parked in front of his home.

Deputy Russ Alexander of the Hardin County Sheriff's Department testified that, on the morning of September 1, the dispatcher notified him that a body had been found at a house, located in Crump, Tennessee, approximately one tenth of a mile from Shiloh National Park. He arrived at the house at approximately 7:30 a.m. There were three people at the house, who told Deputy Alexander the victim's name and informed him that the victim had been shot. Alexander entered the house and observed Phillips' body lying on the bathroom floor. The deputy determined that Phillips had been shot at least twice, once in the arm and once in the head. In fact, the victim's head "was almost completely gone." Alexander then left the house, "sealed" the crime scene, and called the Sheriff.

Deputy Alexander further recounted that, earlier on the morning of September 1, at approximately 2:00 a.m., he had encountered the appellant and the appellant's co-defendant, Galen Rhodes, while patrolling the county. The appellant's vehicle, a Suzuki Samurai, was parked on the side of a bridge, facing eastward, away from Savannah, Tennessee. Alexander and another officer pulled to the side of the bridge, behind the appellant's vehicle. Alexander asked the appellant and Rhodes if anything was wrong. The appellant indicated that he was experiencing engine problems. Alexander testified that neither the appellant nor Rhodes appeared to be intoxicated. Alexander escorted the appellant and Rhodes to a gas station and then continued his patrol.

Later that morning, at approximately 5:00 a.m., Deputy Alexander received a call from the dispatcher informing him that a man had been involved in an accident on Lick Creek Road in Hardin County[1] and had reported being beaten and robbed near Shiloh National Park. When he arrived at the address indicated by the dispatcher, the deputy observed the appellant's Suzuki Samurai, lying on its side in a ditch. The windshield was cracked in at least one place.

The appellant was sitting on the front porch of a nearby house. He appeared to have suffered "a pretty severe head injury." The deputy could smell alcohol on the appellant. The appellant informed Alexander that he and Rhodes had offered a ride to a man at Shiloh National Park. The man had proceeded to beat the appellant with a gun and seize control of the appellant's vehicle. The beating rendered the appellant unconscious. When he awoke, he was seated alone in his vehicle, which was in a ditch. The appellant did not know where his alleged assailant had gone, nor did he know where Rhodes had gone.

Johnnie Brown testified that, at approximately 4:45 a.m. on September 1, 1994, he was at his home on Lick Creek Road in Hardin County, preparing to go to work. Through a window, he observed someone, later identified as the appellant, on his porch, asking for help. Brown instructed the appellant to go to the front door. Brown then went to his bedroom, obtained his pistol, and told his wife to call the police. At the front door, Brown observed that the appellant "was all wet and covered with blood." Brown also noticed that the appellant had been drinking. The appellant informed Brown that he had been assaulted. At the appellant's request, Brown's wife attempted to call the appellant's mother. Although they could not reach his mother, the Browns did contact a relative. At some point, Brown "had a weird feeling," and pointed his gun at the appellant,

[1]Alexander testified that, on that morning, it was warm and had been raining. Lick Creek Road is hilly and curves in several places.

searching the appellant for weapons. The appellant was unarmed. Brown testified that, when he pointed his gun at the appellant, the appellant "hollered real loud, 'Please don't point that gun at me. ... I've already had too many guns pointed at me tonight." Brown received the impression that the appellant was attempting to warn someone.

Following Deputy Alexander's arrival at the scene, an ambulance transported the appellant to the Hardin County General Hospital Emergency Room. Deputy Alexander remained at the scene to ensure the removal of the appellant's vehicle. While awaiting the tow truck, he observed a bottle of Seagrams Gin and several "double-aught" shotgun shells in the appellant's vehicle. Alexander then went to the hospital and arrested the appellant for DUI.[2] He asked that a blood-alcohol test be administered. At this time, Alexander received the call from the dispatcher concerning the discovery of a dead body at a house in Crump, Tennessee, near the entrance to Shiloh National Park.

On September 1, at approximately 7:30 a.m., Hardin County Sheriff Sammy Davidson was notified of a homicide in the Shiloh area. The Sheriff arrived at the scene of the murder at approximately 8:11 a.m. Davidson spoke with Deputy Russ Alexander and entered the house. In the house, he noticed several items on the floor, including shotgun wadding and shotgun pellets. The carpet and two couches in the living room appeared to be stained with blood. Davidson examined the victim's body, observing what appeared to be gunshot wounds to the victim's arm and head. The Sheriff also noticed that the lining of the left front pocket of the victim's pants had been partly pulled out. Phillips' wallet, containing his social security card, was lying on the floor. The police

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[2]Alexander testified that the appellant was never formally charged with DUI. On September 3, 1994, arrest warrants were issued, charging the appellant with first degree murder and theft of property. On November 28, 1994, a grand jury indicted the appellant on one count of premeditated and deliberate murder, one count of first degree murder during the perpetration of a burglary or theft, and one count of theft of property worth more than $1,000, but less that $10,000.

could not locate any cash in the wallet, the victim's pockets, or the victim's home.

Outside the home, the Sheriff observed that the light bulb had been removed from the front porch light. The broken bulb was lying in the grass in front of the porch. Davidson then walked to the neighboring building, which housed the AmVets Club. He spoke with the owners and discovered that someone had tampered with the electric meter attached to the building. Moreover, someone had cut the telephone line. No one appeared to have broken into the AmVets Building. The damage occurred on the side of the building adjacent to the victim's home.

At some point on September 1, Deputy Alexander recounted to Sheriff Davidson and Mike Fielder, a criminal investigator with the Hardin County Sheriff's Department, the appellant's alleged assault, which had purportedly occurred a short distance from Ronald Phillips' home. At approximately 12:00 p.m., Fielder went to the Hardin County Jail, where he obtained a statement from the appellant. In this statement, the appellant again recounted that he had been assaulted by a stranger in the vicinity of Shiloh National Park. Following this interview, Fielder transported the appellant to the scene of the murder, where Sheriff Davidson questioned the appellant concerning the assault. Police also began to search for Galen Rhodes and located Rhodes in Corinth, Mississippi. On the same day, Sheriff Davidson traveled to Corinth and spoke with Rhodes at the Alcorn County Jail. That night, Special Agent Chris Carpenter of the Tennessee Bureau of Investigation (T.B.I.) obtained a statement from Rhodes. Consequently, the police recovered the victim's 1981 Oldsmobile Toronado from the home where Rhodes resided with his parents. Moreover, as a result of Rhodes' statement, the police determined that the appellant was a suspect in Phillips' murder.

On September 2, 1994, at 2:30 a.m., at the Hardin County Jail, Agent Carpenter recorded the following statement by the appellant:[3]

> Yesterday, 8-31-94, I came up to Savannah [from Corinth, Mississippi] to pay off a ticket for David Berryman[, a friend]. The courthouse was closed so we, being myself and Galen Rhodes, messed around Savannah. Later that evening, we went to Waynesboro and back to Savannah. That night, we went driving around the bottom and got stuck.
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> A few days ago, we made us a gun. It was a shotgun that we had pieced together. I had put a pistol grip on it from an old BB gun I had. We had it with us while we were riding around Savannah. We shot it down by the river. I shot about three turtles. That's the last time I shot it. The only reason I had made the thing was I had gotten shot at in Corinth about a week or so ago.
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> Around 2:30 or so, I was pulled over by the law and checked. They let us go after I explained that I had been through a field and got stuck and had been looking for part of my bumper I had lost earlier that day. After they let us go, I went on across the bridge and got gas.
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> I then started to head home to Corinth down Shiloh Road. I was driving the green Suzuki that I had gotten from Chris Wilbanks. I was driving down the road and Galen told me to pull over at the bar. I pulled over there and Galen got out with the gun. I got out with him. And he was going over towards the bar.
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> Galen went to the electric box and used some kind of something on the wire. I was standing over by a bush and he cut the wire and said, "Lights out." He said something about cutting the alarm or power off or something like that.
>
> I was standing there wondering what the hell was going on. What he was going to do next -- maybe break into the bar. ...
>
> Galen had the gun and walked over to the house. I followed him over and he looked in the window and saw somebody on the couch ... . He wanted me to go knock on the front door. And I said, "No ... ," and I started towards my jeep. I was walking off towards my jeep and told him to come on, but he didn't. It was raining and I was trying to cover my tapes up and stuff when I heard the gunshot.
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> ... Galen was standing there in the door with the gun pointed in. Then I heard some guy yelling. I thought Galen was robbing the guy or something. He yelled, "Get your ass over here." I didn't know what was happening, so I went over there. I saw the guy with one arm around his stomach and one arm in the air. The guy was saying something like, "Oh God! Don't shoot. What did I do?" That's when I knew Galen had shot him.

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[3]Carpenter testified that, while conducting the interviews of the appellant and Rhodes, he observed that both suspects had branded their arms with the letter "G."

> Galen was asking me did I trust him. My father had died when I was young and I didn't trust anyone very much. Galen knew I didn't trust. And before all of this started, he said that he was going to prove to me that he could be trusted. The guy was crawling across the floor. And I walked in the house and Galen was reloading the gun. I don't know what he did with the empties.
>
> I went in the house. And somehow, I had a knife in my hand and he told me to stick his ass. I said, "You're crazy, man." The guy had crawled into the bathroom by then. I said, "The guy is still talking. Let's go. You've proved your point." Which Galen said, "He's seen us." I said that I was leaving and I ran out to my jeep. I got in my jeep. And as I was doing that, I heard the second shot.
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> After I heard that, I was fixing to drive off when [Rhodes] came out of the house and he said, "Come here." He then said, "Now, do you trust me?" I said, "Let's go." I left out in the jeep and left.
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> I pulled over ... . And he pulled up behind me in the guy's car. It was a dark colored car. I was trying to put my top on. ... I left and he passed me on the way to Corinth.
>
> I was looking for somewhere to pull off. I wanted to call the law, but I thought I was as involved in it as he was. I was scared. I turned down this one road and eventually lost control of the jeep because I was trying to get away from him. The next thing I know, I'm wrecked. And I got out and walked to a man's house.
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> Galen had the gun the last time I saw it. I didn't want to touch it. I don't know where it is. I did not kill that man. I didn't know who he was or anything. I didn't know what he thought he was going to do. I was there, but I didn't participate in any of it. I lied to the police because I was scared, but this is the absolute truth.
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> When I pulled up down at the reststop, Galen told me he loved me. He wanted to know if [I] trusted him then. He grabbed me by the face and kissed me on the head. I didn't know him for no longer than a month and he goes and shoots that man just to prove a point. I don't understand. We had been drinking pretty heavily that day and I was drinking last night.

On the morning of September 2, at approximately 10:00 a.m. or 10:30 a.m., Sheriff Davidson, accompanied by James Robertson, an investigator with the Fire Marshall's Office, visited the scene of the appellant's automobile accident.[4] Davidson described the area as "congested" with undergrowth. Davidson and Robertson searched the area and discovered several items,

[4]Robertson testified that he regularly assists Sheriff Davidson and police agencies in criminal investigations. He was previously a deputy sheriff in McNairy County and the Chief of Police in Adamsville, Tennessee. He has maintained his certification as a police officer in Tennessee.

including a stereo later identified by Danny Robinson as belonging to the victim. The stereo was approximately 120 or 150 feet from the location of the accident. They also discovered a wallet belonging to David Berryman, a friend of the appellant, and an "empty cartridge shotgun hull" with a "ruptured head." On September 3, an additional search produced a glove. Finally, on September 8, the police located a sawed-off shotgun in a field approximately 100 or 125 feet from the location of the accident.

Agent Chris Carpenter testified that, on September 6, he received from the victim's brother an unfired double-aught shotgun shell, found in the parking lot of the AmVets Club. On the same day, a search of the appellant's vehicle produced a glove that appeared to be the mate of the glove recovered at the scene of the appellant's accident. The police also found another, identical pair of gloves in the vehicle. This pair did not appear to have been worn. A search of the victim's vehicle produced a third pair of gloves. These gloves were the "same size, style, color and manufacturer" as the other pairs.[5]

Oakley W. McKinney, a forensic scientist at the T.B.I. Crime Laboratory, testified at the appellant's trial. He is a specialist in latent evidence and was in charge of the Crime Scene Team that examined the victim's residence and the sight of the appellant's accident. He stated that, at the victim's residence, the Crime Scene Team failed to discover any identifiable fingerprints, made by either the appellant or the co-defendant Rhodes.[6]

Linda Littlejohn, a forensic scientist with the T.B.I., also testified. She is

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[5]The gloves, the appellant's clothes, and the appellant's vehicle were apparently tested for the presence of blood. The gloves tested negative. The test revealed blood on the appellant's clothing, but DNA tests were never performed on the blood. Agent Carpenter conceded that the blood was probably the appellant's blood. DNA tests performed upon blood discovered in the appellant's car excluded the victim as the source.

[6]Agent Carpenter testified that he did not find any identifiable fingerprints in the victim's vehicle.

assigned to the Trace Evidence Section of the T.B.I. Laboratory in Nashville. She was a member of the Crime Scene Team that examined Ronald Phillips' home and the scene of the appellant's accident. She testified that two knives, one recovered at the victim's residence and another recovered from the appellant's car, were identical. Two cups, one recovered from the victim's residence and another recovered from the appellant's car, were also identical. The crime scene team additionally obtained two, unfired, double-aught shotgun shells from the appellant's Suzuki Samurai. Finally, an electrostatic photograph taken in the front bedroom of the victim's house revealed shoe prints matching a shoe belonging to the co-defendant, Galen Rhodes.

Robert Royce, a Firearms Examiner with the T.B.I., testified. He accompanied the Crime Scene Team investigating Phillips' murder. Physical evidence at the victim's home indicated that two shots had been fired. On a sofa in the living room, he discovered a "plastic over-powder wad." Scattered across the floor, the team discovered five fragments of "shot wadding" and four "double-aught buckshot pellets." Two fragments of wadding were discovered directly underneath the victim on the bathroom floor. Although Royce was unable to determine the manufacturer of the buckshot recovered at the murder scene, the shot wadding was "consistent with Federal manufactured wadding materials." The unfired shell discovered in the parking lot of the AmVets Club was "Federal double-aught buck maximum load shotshell," as were the two unfired shotgun shells recovered from the appellant's vehicle.

The medical examiner submitted to Royce several items recovered from the body of Ronald Phillips, including two double-aught buckshot pellets, a fragment of a rifle slug, capable of being fired from a shotgun, and three additional lead fragments. The buckshot removed from the body was "within the same size and weight specifications" as the double-aught buckshot recovered

from the victim's residence. The buckshot removed from the body was also consistent with the unfired shotgun shells found in the appellant's vehicle. Finally, the rifle slug fragment submitted by the medical examiner was consistent with the "fired rifle slug shot shell" with the "ruptured head" found at the scene of the appellant's accident by Sheriff Davidson and Investigator Robertson.

With respect to the shotgun submitted to Royce in connection with the instant case, Royce testified that the shotgun was a Harrington and Richardson Model 1900, a model manufactured between 1900 and 1942. The gun would normally have a thirty-two inch barrel. The barrel on the gun recovered from the scene of the appellant's accident had been sawed off to form a twelve inch barrel.[7] Royce testified that the gun was operational and described the firing mechanism:

> This is a single shot shotgun. You have to manually insert the shot shell in the chamber and you have to close it. Then you have to cock the hammer manually and then you have to pull the trigger.

Royce also indicated that, intermittently, a shot shell case would jam in the shotgun, and the agent had to force the shell out. He opined that this defect could have resulted in the "ruptured head" on the shell found at the scene of the appellant's accident. However, Royce testified that, due to the poor condition of the gun, he was unable to discover from test firing the weapon enough individual characteristics to match definitely with shells furnished for comparison.

Russell Davis, a forensic scientist assigned to the Microanalysis Section of the T.B.I. Crime Laboratory, testified that he had analyzed gunshot residue kits taken from the appellant and co-defendant Rhodes. With respect to both kits, he concluded, "Elements indicative of gunshot residue were inconclusive. Due to the results, I cannot eliminate the possibility that the individual could have

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[7]Royce confirmed that a shotgun barrel obtained from the appellant's girlfriend, Tonja Stuckey, had once been attached to the shotgun.

fired or handled the gun." He further opined that, if a person were wearing gloves when firing or handling the weapon, he would expect to find either low amounts of residue or no residue. On cross-examination, he conceded that intervening events, such as an automobile accident or exposure to the rain, would also affect the test results.

The tow truck operator, who removed the appellant's vehicle from the scene of the accident, discovered an electronic organizer in the vehicle and delivered the organizer to Sheriff Davidson approximately two weeks following the accident. On October 7, 1994, Special Agent Carpenter received the organizer from Sheriff Davidson. When Agent Carpenter pressed the "Memo" button and the "Up" button, the word "Murder" appeared on the screen. When he pressed the "Up" button again, "Murder - Number One Tag Number XKM 747 Wayne County" appeared. When he pressed the button marked "Secret," "Name Steve" appeared. Finally, when he pressed the "Up" button again, "Kenny Gann, G-A-N-N, Booneville, Mississippi" appeared.

Dr. Jerry Francisco, the Medical Examiner for Shelby County and Pathology Consultant for Medical Examiners of West Tennessee, examined the body of Ronald Phillips. He concluded that the victim had died as a result of multiple shotgun wounds to the body. Dr. Francisco testified at trial that there were at least three separate shotgun wounds. He determined the number of separate wounds from the shot patterns on the victim's body:

> [T]here was one to the head which was probably the final shot. This was a near to contact shotgun wound to the head that virtually exploded the head. There was one to the abdomen that was present on the side of the abdomen that was essentially a full pattern of shots that were damaging the internal organs.
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> And there were shot patterns to the right arm as well as shot patterns to the leg. These could have been from two separate shots or the same shot. But that represents at least three ... .

Dr. Francisco further stated that a trail of blood at the scene of the murder,

leading to the victim's body, would indicate that shotgun wounds were inflicted prior to the wound to the head. The doctor opined that the wound to the head would have caused death immediately. Finally, Dr. Francisco testified that blood alcohol and urine alcohol tests performed on the victim revealed levels of .1 percent and .16 percent respectively.

Agent Carpenter obtained a third statement from the appellant on January 31, 1995, at approximately 3:00 p.m. The appellant's attorney was present. He and Agent Carpenter waited outside the room in which Special Agent Scott Walley interviewed the appellant.[8] Following the appellant's interview with Agent Walley, Agent Carpenter read the appellant's statement to the appellant. The appellant indicated that the statement was accurate, but ultimately, after consulting with his attorney, refused to sign the statement. The appellant's statement contained the following information:

> I was in that house when that man was shot. I had said earlier that I was not. I was scared earlier. And I thought that if I said I wasn't in the house, that I wouldn't be in trouble.
>
> I was over at my jeep when Galen shot that man (Ronald Phillips) the first time. I was outside and I had not been in that house until after I heard that first shot.
>
> I heard a man yelling in pain and Galen yelled at me to get my ass over there, and I ran to the house.
>
> Galen was standing in the doorway with the gun in his hand. Galen was yelling "I got you mother fucker" at the man on the ground.
>
> Galen said he was going to kill me if I didn't pick up this knife on the floor and stab this guy. I told Galen I wasn't going to stab him. I told Galen I'd help Galen with an alibi, but we needed to stop the bleeding of this man's arm.
>
> I was telling Galen that the man wasn't going to die. We could get him some help. I was on my knees on the bathroom floor talking to the man when all of a sudden Galen said, "He's seen our faces." And Galen stepped up and shot that man in the head and killed him. There were only two shots fired.
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> Galen shot both shots. I did not shoot that man at all. The gun

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[8]During cross-examination, Agent Carpenter mentioned that Agent Walley administered a polygraph test to the appellant during this interview.

> used to shoot that man was not mine. I helped Galen make it in my kitchen, but it was not my gun. It was ours. I put the handles and the tape on that gun, but it was not my gun. I did not own the gun. It was not my gun alone.

Tonja Stuckey, the appellant's girlfriend at the time of the murder, also testified on behalf of the State. At the time of the crime, she was living with the appellant at his mother's home in Corinth, Mississippi. On the evening of September 1, 1994, she spoke with the appellant at the Hardin County Jail.[9] The appellant told Stuckey that he was present when Ronald Phillips was killed, but that Rhodes had "done it all." Subsequently, Stuckey spoke with the appellant on the telephone. During their conversation, the appellant again indicated that Rhodes had committed the killing and that he had witnessed it.

Stuckey further testified that she had previously overheard the appellant discussing the "Crypts" and the "Black Gangster Disciples" and that the appellant was a member of a gang and had burned a "G" on his arm with a clothes hanger as a symbol of his membership.[10] The appellant demonstrated to Stuckey hand signals used by his gang. Moreover, Stuckey stated that, prior to the murder, the appellant had told her that he wanted to become the leader of a gang, or a "King G." The appellant had also informed Stuckey that, in order to become a "King G," he would have to kill someone.[11]

According to Stuckey, Rhodes had also become a member of the appellant's gang immediately before the killing. Moreover, the night before the murder, she observed the appellant and Rhodes, at the home of the appellant's

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[9]Stuckey told the police that she was the appellant's wife, April Moore, in order to gain access to the appellant.

[10]Stuckey denied that she was a member of a gang. She did testify that the appellant had scratched a "G" on her arm with a knife, which faded without leaving a scar.

[11]On cross-examination, Stuckey conceded that she had not mentioned these remarks by the appellant during her previous statement to the police. She explained that the police never asked about these remarks.

mother, with a sawed-off shotgun. Indeed, that night, they accidentally shot a hole in the clothes dryer. She later discovered the sawed-off portion of the gun in her car, and delivered it to the police.[12] She did not know who had placed the object in her car. However, she testified that the appellant had borrowed her car at some point during the day before the murder.

On cross-examination, Stuckey confirmed that she had earlier told police that Rhodes was strange, exhibiting paranoid and nervous symptoms, and that she was afraid of Rhodes. Stuckey indicated that, at the time of her statement to the police, she was attempting to protect the appellant. Stuckey admitted that, shortly after the appellant's arrest, her mother committed her to East Mississippi State Hospital, a mental institution, for her "nerves."

The defendant presented proof at trial. Felesa Burcham, a friend of the appellant, testified. She stated that, on the night of August 30, 1994, she was at the appellant's home with several friends, including the appellant, Galen Rhodes, David Houser and David Berryman. Tonja Stuckey was also present. However, Stuckey was sleeping in a bedroom. The group drank beer and ate dinner. At some point, Galen Rhodes left to buy more beer. He was gone for approximately one hour and returned with a half a case of Bud Light and a shotgun. Burcham testified that the shotgun "wasn't in very good shape." Rhodes showed the gun to the group, and the appellant and Rhodes removed the handle from a BB gun belonging to the appellant and taped the handle to the shotgun. They then sawed off the barrel of the shotgun. According to Burcham, Rhodes proceeded to load the gun and cock it. He threw the gun to the appellant, and the gun discharged. Burcham testified that the appellant "crawled Galen's tail for doing that ... . And Galen just stood there and laughed about it."

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[12]Sonya Britton, a friend of the appellant, testified that Stuckey told her that she had delivered the entire gun to the police. Britton further asserted that she had previously "caught [Stuckey] in a bunch of lies."

Subsequently, Rhodes threatened to shoot David Berryman.

Burcham denied being a member of a gang or knowing any gang members. She denied ever overhearing the appellant discuss becoming a "King G" or killing anyone. With respect to the "G" that she and her companions had burned onto their arms, she testified that the "G" was simply a sign of friendship. On cross-examination, she admitted heating a coat hanger on a stove until the hanger was "red hot" and holding it to her skin until she had branded herself with a "G." She stated that the appellant was the first among members of the group to brand himself with a "G."

On the morning of August 31, the appellant and Rhodes practiced shooting the shotgun in Burcham's backyard. They also fired guns belonging to Burcham's father. Both the appellant and Rhodes left Corinth later that day for Savannah, Tennessee, in order to pay a speeding ticket for David Berryman. Burcham encountered Rhodes the next day. He pulled into her driveway in a brown-colored car that she did not recognize and asked her if she had seen the appellant. Burcham testified, "[Rhodes] was real fidgetive and everything. And I could tell by his voice. His voice was shaking."

Camilla McRae, the appellant's mother, also testified on behalf of the appellant. She confirmed that the appellant and his friends had accidentally discharged a shotgun in her house on the evening of August 30. Rhodes told her that the gun belonged to him, and she ordered him to remove the gun from her house. McRae also testified that she had known the victim, Ronald Phillips. In the early 1980's, she and the victim were friends and socialized together. At that time, the appellant was living with his father. McRae stated that she did not recall the appellant ever meeting the victim.

Chris Wilbanks testified that he had previously worked with the appellant at Aqua Glass Company. He temporarily traded his 1988 Suzuki Samurai for the appellant's 1986 Pontiac Fiero. He stated that he had kept several sets of gloves, issued by Aqua Glass, in his vehicle. He stated that the gloves were warm and would not ordinarily be worn to drive or perform light work. Wilbanks also testified that the appellant was a "smooth talker ... [c]onning-wise -- you know, persuasiveness."

The appellant testified at trial. He stated that he had known Galen Rhodes for "[a] couple of weeks at the most." He confirmed that he and Rhodes, on the evening of September 30, worked on an old shotgun, including attaching to the shotgun a handle removed from the appellant's BB gun and cutting the barrel off the shotgun. The appellant stated that Rhodes had brought the gun and ammunition to his house, where the appellant and his friends were drinking beer, eating pizza, and socializing. When asked why he had helped Rhodes fix the gun, the appellant replied, "I really didn't have a personal reason for making it. It was more of an accessory thing to have with me." The appellant explained that, approximately one week before the murder, following a confrontation between himself and an acquaintance, someone had shot at him. Consequently, he needed the gun for protection. The appellant also confirmed that the shotgun accidentally discharged at his mother's home on the evening of August 31, when Rhodes threw the gun to the appellant. The appellant became angry, but Rhodes only laughed. David Berryman also confronted Rhodes, who then threatened to shoot Berryman.

The appellant admitted test firing the shotgun at Felesa Burcham's home on the morning of August 31, 1994. Rhodes was present and later accompanied

him to Savannah, Tennessee. According to the appellant, he had agreed to drive to Savannah and to pay David Berryman's traffic ticket, as Berryman had to work on that day. However, the courthouse in Savannah was closed. Therefore, the appellant and Rhodes went to a liquor store and bought a fifth of Seagrams gin and a fifth of fire water. That evening, he and Rhodes drove to the river "bottom" and fired several boxes of ammunition into the river.[13] Subsequently, on the way back to Corinth in the early morning hours of September 1, the appellant stopped in the parking lot of the AmVets Club in order to go to the bathroom. When he returned, Rhodes stated that he intended to shoot out a light on a pole attached to the side of the AmVets building. The appellant convinced Rhodes to return to the jeep. However, Rhodes then obtained from the car a pair of wire strippers belonging to the appellant.[14] Rhodes clipped a wire on the side of the AmVets building, but the light did not go out.

The appellant suggested mixing more drinks. Rhodes indicated that he knew a man who lived in a house approximately two hundred yards away. He told the appellant that he would go to this man's house and trade the shotgun for marijuana. The appellant followed. At the house, Rhodes suggested that they play a joke on his friend by "cutting" or "blowing" a light. The appellant refused and returned to the jeep. He then heard a gunshot and saw Rhodes standing in the doorway of the house with the shotgun pointed into the house. Rhodes told the appellant to approach the house. The appellant observed a man lying on the

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[13]The appellant indicated that, on the night of August 31 and in the early morning of September 1, he and Rhodes spent a large amount of time driving about, at one point driving toward Waynesboro, Tennessee, in search of a party. The appellant also recounted that, at a Quickmart in Adamsville, they spoke with Officer Phillip McClemore of the Adamsville Police Department. Additionally, the appellant mentioned his encounter with Deputy Alexander.

Officer McClemore confirmed at trial that he spoke with the appellant on the evening of August 31 or in the early morning hours of September 1. The appellant expressed an interest in "doing some drug work" for the police. According to Officer McClemore, the appellant appeared to be in a good mood and was not noticeably intoxicated. McClemore testified that the appellant's companion was "quiet," and the appellant appeared to be "directing him during that period of time."

[14]The appellant testified that he used the wire strippers to work on radios.

floor in the house. Rhodes was saying, “I got you, you MF. I got you.” The man in the house crawled into the bathroom.

According to the appellant, he attempted to dissuade Rhodes from killing the victim. Rhodes wanted to kill the man, because he knew Rhodes. Nevertheless, the appellant finally convinced Rhodes to leave the house. The appellant followed the victim into the bathroom and told the victim that he would call the police and help the victim “clean[] up.” Rhodes then returned, walked into the bathroom, “cussing the guy and stuff,” and shot the victim in the head.

Rhodes threatened to harm both the appellant and his mother should the appellant ever recount the morning’s events to anyone. The appellant ran from the house to his jeep and drove toward Corinth. He observed Rhodes pull out behind him in the victim’s car. It was raining, and the appellant was forced to pull to the side of the road in order to put the top on his jeep. Rhodes pulled in behind him. He still had the shotgun and, again, threatened the appellant. Rhodes then indicated that he was going home, and drove away. For a short distance, the appellant followed behind Rhodes, but finally, in an attempt to escape Rhodes, turned off onto another road. Because he was driving fast, he had an accident and lost consciousness. When he awoke, he could smell gas and threw his personal possessions from the car. He asserted that he did not have with him either the victim’s radio or the shotgun. He then walked to a nearby house. According to the appellant, he lied to Brown, the owner of the house, and, subsequently, to the police, because he was afraid.

On cross-examination, the appellant stated that he did not know how the shotgun or the victim’s radio came to be at the scene of his accident. He denied that either he or Rhodes wore gloves during the incident. He testified that it was a coincidence that there were gloves issued by Aqua Glass in the victim’s car as

well as in the appellant's car. Moreover, he claimed that he did not know who tampered with the meter base at the AmVets Club or who broke the light bulb in the light fixture on Phillips' front porch.

With respect to the electronic organizer found in the appellant's vehicle, the appellant admitted at trial that the organizer belonged to him. However, he claimed that Rhodes played with the organizer the day before the murder. The appellant denied touching the organizer that day and denied any knowledge of the memoranda recorded on the organizer.

The appellant also denied being a member of a gang. With respect to the "G" burned onto his arm, the appellant testified:

> Mainly, it's just that -- We kind of kidded around a lot. We called ourselves, you know, the little Gs; you know, our buddies and stuff like that. And it's just a -- kind of like a street name down in Corinth that people call each other. You know, they say, you know, "What's up G," you know. But it's not really focused on ... like what everybody else has been saying.

The appellant asserted that the "G" "stands for friendship meaning love between me and my friends." He claimed that he first learned about gangs in the Hardin County Jail, following his arrest for the instant offense. He conceded that he wrote a letter to his cousin, Daniel Lee Burcham, a resident of the Tishimongo County Jail in Mississippi, in which he stated that he was forming his own nation of gangsters. However, he further testified that, prior to trial, he had changed his mind "when he met God." Moreover, the appellant insisted that, when he instructed his cousin to tell any gang members in jail that the appellant "is a governor for the 74 Gangster Disciples," this statement was "[j]ust BS." He explained that his cousin was to be sent to the Mississippi State Penitentiary, and the appellant was afraid that, without some protection, his cousin would be killed. The appellant also admitted writing to his cousin, "How about psycho killer? Ha! Ha! That's me." He explained that he was merely referring to a song.

Lester Posey, a former inmate of the Hardin County Jail, also testified on behalf of the appellant. He was incarcerated in the Hardin County Jail at the time of the appellant's arrest, serving a one year sentence for failure to appear in court to answer a charge of writing a bad check. He and the appellant became friends, as they shared a mutual interest in gangs. Posey had lived in Chicago, Illinois, prior to moving to Tennessee, and was familiar with gangs. Posey characterized the appellant as a "want-to-be" with respect to gangs. He also stated that the appellant requested information from Posey concerning gangs, because the appellant was worried about his cousin who was soon to be incarcerated in the penitentiary. Finally, Posey testified that some gangs, including the "BGD's" and "GD's," use the letter "G" as a symbol. Moreover, the letter burned onto the appellant's arm "was done right."

The appellant's co-defendant, Galen Rhodes, invoked his Fifth Amendment privilege during the appellant's trial. The appellant, therefore, through the testimony of Agent Chris Carpenter, introduced three prior statements by Rhodes.[15] Agent Carpenter recorded the first statement in the Alcorn County Jail in Corinth, Mississippi, on September 1, 1994, at approximately 10:37 p.m.:

> I have a bunch of friends that run together. Last Sunday, four of us were together and Jay North wanted us to get branded. He wanted to put a G on our arm. I didn't want to, but Jay said, "Take it or die," so I did.
>
> About Monday or Tuesday night, Jay decided to make a gun. We went outside of his mother's house here in Corinth, went around back, and he pulled part of a shotgun out. It was a regular size shotgun, but the stock was gone.
>
> He brought it into the house and he sawed the barrel. I helped him hold it. He went and got his BB gun and took the handles off and put them on the shotgun. He put the handles on them and taped them up. It was a single barrel shotgun.
>
> Jay was saying that he was going to have to take some people out.

[15]Carpenter testified that the appellant and co-defendant were incarcerated in separate facilities so that they could not discuss the case together.

I walked outside and he came out there and shot the gun off. ... He shot it up in the air and then he shot it in the house. ...

Jay came to me yesterday and told me that he was going to Savannah to pay off a ticket for David Berryman. ...

We go up to Savannah and go to the courthouse and it's closed. We left the court house. ...

We started drinking ... .

We went on down in the [river] bottom and he pulls off and stops the jeep. He was talking about some stuff he was going to have to take care of. He kept saying that he was going to have to do something to somebody -- a blast from the past. ...

It was pretty late ... .

We passed the building I call the red barn. It had lights down the front of it and it had a flashing arrow sign out front. We got on past it. Jay says he's going to turn around and go back and talk with his uncle. ... And he pulls in ... --right by a camper by the red barn.

... He got the gun and got out. He got some shells and put them in his pocket. He told me to wait and he'd be right back. ... He was gone about an hour and then I heard a shot.

I got out of the jeep and walked up there ... . I saw lights on at the house by the red barn. ... I started to walk to the house and came up to the door. And I saw back through the open front door to the bathroom. I saw Jay ... holding the gun with his right hand and I was scared. I turned around and was going to leave.

I saw the man in the bathroom lying on the floor and Jay was standing over him with the gun. The guy was still alive and saying, "Please don't kill me." I turned to go out ... . And [Jay] sticks the gun to my head and says, "I'll kill you."

He grabs me by the shirt and pulls me into the house ... and takes me far enough to where I can see the guy on the floor who is still alive. He took the gun and stuck it down to the guy's head and pulled the trigger while I was watching. I was scared to death. ... [Jay] told me I was going to leave in the guy's car. I told him no. He pulled the gun up and said, "I'll shoot you right here, too."

... I got in the car ... . He told me to get in it and carry it to my house, which I did. ...

... I stayed around here in Corinth until the sheriff came to get me.

Rhodes gave another statement to Agent Carpenter at the McNairy County Jail on September 2, 1994, at approximately 6:00 a.m. In this statement, Rhodes admitted that he shot Phillips in the arm. He stated that the appellant

threatened to kill him if he refused to shoot the victim. Rhodes further claimed that, after shooting the victim, he gave the shotgun to the appellant and left the victim's house. He heard another shot, and the appellant exited the victim's house, carrying the victim's wallet and car keys. In the same statement, however, Rhodes admitted, "I didn't run out like I said. I watched Jay as he shot the guy in the head."

Rhodes gave a final statement to the police at the McNairy County Jail on September 3, 1994, at approximately 5:15 p.m. He admitted in this statement that he had shot the victim both in the arm and in the head. He claimed that, with respect to the shot to the victim's head, the gun accidentally discharged. He further stated, "Jay had threatened me with the gun earlier that night; said he would kill me. I was scared that if I didn't shoot that man, Jay would kill me. It was just an accident. I didn't want to shoot that man, but I was scared of Jay ... . I didn't mean to shoot him. It just happened."

Following the jury's verdict of guilt, the trial court proceeded to the sentencing phase. Neither the State nor the appellant presented proof during this phase, relying instead upon the proof adduced during the guilt phase and argument by counsel. The jury, finding that the murder was especially heinous, atrocious, and cruel, that the murder was committed for the purpose of evading arrest or prosecution, and that the murder was committed during the course of one of several statutorily enumerated crimes, sentenced the appellant to life imprisonment without the possibility of parole.

II. Analysis

a. The Appellant's Statements[16]

[16]The appellant only contests the admission at trial of his statements to Deputy Fielder and Special Agent Carpenter on September 1 and 2, 1994. The admissibility of the appellant's statement dated January 31, 1995, is not at issue.

The appellant first challenges the trial court's admission at trial of the appellant's pre-trial statements to the police. On February 14, 1995, the trial court conducted a suppression hearing to determine the admissibility of the appellant's statements.[17] At the hearing, Investigator Mike Fielder testified that he recorded a statement by the appellant at approximately noon on September 1, 1994, at the Hardin County Jail. Fielder confirmed that, prior to the interview, he advised the appellant of his constitutional rights and obtained the appellant's signature on a waiver of rights form. With respect to the appellant's physical condition, Fielder stated that, at the time of the interview, the appellant had stitches on his face, as a result of his accident in the early morning hours, and was wrapped in a blanket. However, according to Fielder, the appellant did not appear to be under the influence of any medication or otherwise incapable of understanding his constitutional rights. Fielder testified:

> The only thing he told me was that he was having trouble speaking due to, I think, some kind of injury he had around the mouth or whatever. He was having some kind of trouble speaking. And I told him, I said, "You know, do the best you can. You know, if you get tired or whatever, stop."

The appellant never indicated to Fielder that he was tired or wanted to stop answering questions. Finally, Fielder testified that he informed the appellant that the police were searching for information concerning another crime that had occurred in the vicinity of the appellant's accident.

Sheriff Davidson testified that, prior to questioning the appellant at the scene of the murder on September 2, he again advised the appellant of his constitutional rights. Special Agent Carpenter confirmed that Sheriff Davidson

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[17]In the appellant's Motion to Suppress and in his Motion for New Trial, the appellant challenged the admissibility of his pre-trial statements on the basis of violations of his rights under the Fourth and Fourteenth amendments to the United States Constitution and Article I, §§ 7 and 8 of the Tennessee Constitution. However, the focus of the suppression hearing was the possible violation of the appellant's privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution. Moreover, at the hearing convened by the trial court for the purpose of considering the appellant's Motion for New Trial, the trial court again addressed the possibility of a Fifth Amendment violation. Thus, although the appellant's failure to raise a Fifth Amendment challenge in his Motion for New Trial would normally result in the waiver of this issue, see Tenn. R. App. P. 3(e), we will address the merits of the appellant's claim. See also Tenn. R. Crim. P. 52(b).

recited the Miranda warnings to the appellant. At this time, the appellant merely repeated the information that he had already given to Investigator Fielder.

Agent Carpenter testified that he obtained a statement from the appellant at approximately 2:30 a.m. on September 2, 1994, at the Hardin County Jail. He advised the appellant of his constitutional rights and obtained the appellant's signature on a waiver of rights form. Carpenter further testified that, at the time of the statement, the appellant

> knew that he had been arrested for DUI, that there was a man killed down the road from where that happened and that [Carpenter] needed to get a written statement from him.

Carpenter informed the appellant that he was a suspect in the homicide case. Nevertheless, according to Carpenter, the appellant "was rather anxious to speak with [the police]." The appellant did not request a lawyer or otherwise indicate during the interview that he no longer wanted to answer questions. Carpenter could not recall whether or not the appellant ever asked if he needed a lawyer, but Carpenter asserted that he never informed the appellant that he did not need a lawyer. Finally, Carpenter testified that he would have terminated the interview had the appellant ever requested an attorney. Indeed, the record reflects that, when the appellant did invoke his right to counsel after learning of co-defendant Rhodes' confession, Carpenter immediately ceased questioning the appellant.

With respect to the appellant's physical condition, Carpenter stated:

> [North] had been in an accident previously that evening. However, the injuries that I saw were just scratches to the face. His lip was swollen some. But all that did was have difficulty with him speaking. As to what he was saying, it wasn't slurred or anything. And he was speaking articulately, like he knew what was going on.

The appellant informed Carpenter that he had attended Corinth High School and had obtained a GED.

Special Agent Walley of the T.B.I. testified that, on September 2, 1994, he briefly interviewed the appellant in order to determine if it was possible to administer a polygraph test. He stated:

> Mr. North was coherent as far as answering questions concerning his name, date of birth. I believe social security number was asked, day of the week and that kind of thing. ... He seemed all right in that area as far as understanding what we were talking about. But could not be, in my opinion, reliably given a polygraph exam due to the fact that he did have some injuries, being stitches in his head, face and leg. And he stated that he was experiencing soreness from the accident and some pain.

Agent Walley testified that, because a polygraph monitors a subject's physiological responses, any pain, including "just a soreness from some type of muscle pull," might interfere with test results.

The appellant also testified at the suppression hearing. He stated that, at the time of his accident in the early morning hours of September 1, he was not wearing a seat belt. He hit the windshield and the dashboard of his jeep and was unconscious for some period of time. He was drunk at the time. At the hospital, he received an I.V. and stitches in his forehead, upper lip, and his knee. He also received some form of medication. Although he remembered being treated by a nurse at the hospital, he did not remember being transported to the hospital or, subsequently, to the jail. Yet, the appellant testified that he arrived at the Hardin County Jail at approximately 7:30 a.m. or 8:00 a.m. He was placed in the prisoners' section of the visiting room for approximately three to five hours. The appellant was experiencing pain and was cold due to the air conditioning in the room and his wet clothing. An officer at the jail brought the appellant a blanket, dry clothes, and a bologna sandwich. However, the appellant testified that he was unable to eat the entire sandwich due to the stitches and swelling around his mouth. Moreover, at the hospital, he had been informed that he might have suffered a "small concussion" and might feel nauseous for four or five days. Finally, at the time of his interview with Investigator Fielder, the appellant

had not slept in forty-eight hours.[18] The appellant could not recall Fielder advising him of his rights, nor could he recall signing a waiver of rights form. According to the appellant, due to his accident, he "was in and out." He conceded on cross-examination that he had stated during the recorded interview with Fielder that he had been advised of his rights, understood his rights, and was giving the statement voluntarily.

The appellant also testified that he did not sleep prior to his interview with Agent Carpenter in the early morning hours of September 2. He was still experiencing "problems from the wreck." He testified that Carpenter advised him of his rights. Yet, he also asserted that he asked Carpenter if he needed an attorney. According to the appellant, Carpenter responded that the appellant did not have to give a statement to the police. The appellant denied that Agent Carpenter informed him that he was a suspect in the Phillips murder. Ultimately, the appellant decided to give a statement because, "I really didn't think I had anything to lose by talking to him, you know." Finally, the appellant testified that, at the time of his statements to the police, he did not understand his rights. However, he also stated that, because he had been arrested several times in the past, "I understand my rights."

The Fifth Amendment of the United States Constitution and Article I, § 9 of the Tennessee Constitution provide the privilege against self-incrimination. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). In Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966), the United States Supreme Court, "in order to combat the inherently coercive pressures of in-custody interrogation and to permit a full opportunity to exercise the privilege against self-incrimination[,]" held that the prosecution may only use a defendant's in-custody statements to law enforcement officers if the State demonstrates the use of

[18]The appellant admitted that no one at the jail prevented him from sleeping.

procedural safeguards, i.e. the apprisal of the defendant, prior to custodial interrogation, of his privilege against self-incrimination and his right to counsel. A defendant may waive his constitutional rights, provided the waiver is made "voluntarily, knowingly, and intelligently." State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992), cert. dismissed, 510 U.S. 124, 114 S.Ct. 651 (1993)(citing Miranda, 384 U.S. at 444, 86 S.Ct. at 1612).

> The relinquishment of the right must be voluntary in the sense that it is the product of a free and deliberate choice rather than the product of intimidation, coercion or deception. Moreover, the waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Stephenson, 878 S.W.2d at 544-45. The totality of the circumstances must be examined to determine whether the choice was uncoerced and whether the person understood the consequences of his decision. Id. at 545.

It is the duty of the trial court to determine the admissibility of the appellant's pre-trial statements to law enforcement personnel. State v. Pursley, 550 S.W.2d 949, 950 (Tenn. 1977). The trial court's determination that a confession was given knowingly and voluntarily is binding upon the appellate courts unless the appellant establishes that the evidence in the record preponderates against the trial court's ruling. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). See also Stephenson, 878 S.W.2d at 544.

> Questions of credibility of witnesses, the weight and value of the evidence, and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld.

Odom, 928 S.W.2d at 23. At the conclusion of the suppression hearing in the instant case, the trial court found that the appellant had knowingly and voluntarily waived his constitutional rights. We conclude that the record supports the trial court's ruling.

We also specifically address the appellant's contention that he at least equivocally invoked his right to counsel during his interview with Agent Carpenter when he asked Agent Carpenter if he needed an attorney. When a suspect invokes the right to counsel, further questioning by the police in the absence of an attorney is constitutionally prohibited. Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885 (1981). Moreover, our supreme court has previously held that, "when a suspect makes an ambiguous or equivocal request for counsel, further questions by officers must be limited to clarifying the suspect's desire for an attorney." Stephenson, 878 S.W.2d at 548. See also State v. Farmer, 927 S.W.2d 582, 594 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1996); State v. Mosier, 888 S.W.2d 781, 785 (Tenn. Crim. App. 1994); State v. Kyger, 787 S.W.2d 13, 22 (Tenn. Crim. App. 1989). In Stephenson, the supreme court held that a defendant's inquiry concerning whether he needed an attorney constituted such an equivocal invocation of the right to counsel. 878 S.W.2d at 548. At the suppression hearing in the instant case, the State failed to adduce any evidence refuting the appellant's contention that he asked Carpenter if he needed an attorney or establishing that Carpenter clarified the appellant's request before continuing the interview.

Nevertheless, in Davis v. United States, 512 U.S. 452, __, 114 S.Ct. 2350, 2356 (1994), the United States Supreme Court stated:

> [W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. ... But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

(Emphasis added). Article I, § 9 of the Tennessee Constitution is, in some respects, broader and more protective of individual rights than is the Fifth Amendment to the U.S. Constitution. Farmer, 927 S.W.2d at 594 (citing State v. Crump, 834 S.W.2d 265, 268 (Tenn.), cert. denied, 506 U.S. 905, 113 S.Ct. 298

(1992)). Accordingly, in Farmer, this court continued to apply the standard set forth by our supreme court in Stephenson, 878 S.W.2d at 548, an opinion issued several months prior to the United States Supreme Court's decision in Davis. 927 S.W.2d at 594. However, in State v. Huddleston, 924 S.W.2d 666, 669-670 (Tenn. 1996), an opinion issued after this court's opinion in Farmer, our supreme court cited, seemingly with approval, the Davis opinion for the general proposition that if a suspect fails to make an unambiguous expression of his or her desire for an attorney, then the police need not terminate their interrogation. Thus, because the appellant knowingly and voluntarily waived his Miranda rights, Carpenter could continue questioning the appellant "until and unless [the appellant] clearly request[ed] an attorney." Davis, 512 U.S. at __, 114 S.Ct. at 2356.

We next address the appellant's implication in his brief that he was illegally detained at the time of his statements to the police, requiring the suppression of those statements. While unclear, the appellant appears to suggest a violation of his right, under the Fourth Amendment to the United States Constitution, to a prompt judicial determination of probable cause, a prerequisite to any extended restraint of liberty after a warrantless arrest. Huddleston, 924 S.W.2d at 671 (citing Gerstein v. Pugh, 420 U.S. 103, 125, 95 S.Ct. 854, 869 (1975)). Initially, we note that the appellant has failed to adequately address this issue in his brief. Accordingly, this issue is waived pursuant to Tenn. R. App. P. 27(a)(4) and (7) and Ct. Crim. App. R. 10(b). Moreover, the appellant failed to adequately raise this issue before the trial court or in his Motion for New Trial.[19] Questions not raised in the trial court will generally not be entertained on appeal. Middlebrooks, 840 S.W.2d at 334. Notwithstanding waiver, we elect to address this contention to the extent

[19]In the appellant's Motion to Suppress his pre-trial statements to the police and in his Motion for New Trial, he alleged, without further explanation, violations of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7 and 8 of the Tennessee Constitution.

possible.

At approximately 6:00 a.m. on September 1, 1994, the appellant was advised that he was being arrested for DUI. The record reflects, however, that the State never issued an arrest warrant charging the appellant with DUI. Instead, at approximately 11:35 p.m. on September 3, 1994, Agent Carpenter served upon the appellant arrest warrants charging him with first degree murder and theft of property. Thus, in the instant case, arrest warrants based upon a judicial determination of probable cause were issued more than forty-eight hours following the appellant's arrest without a warrant.[20] "If the probable cause determination does not occur within forty-eight hours, 'the burden shifts to the government to demonstrate the existence of a *bona fide* emergency or other extraordinary circumstance.'" Huddleston, 924 S.W.2d at 672 (citing County of Riverside v. McLaughlin, 500 U.S. 44, 57, 111 S.Ct. 1661, 1670 (1991)).

Yet, for the purpose of determining the admissibility of the appellant's statements, assuming that a McLaughlin violation has occurred, the question becomes whether the statements were sufficiently products of free will to purge the primary taint of the unlawful invasion. Id. at 674 (citing Brown v. Illinois, 422 U.S. 590, 598, 95 S.Ct. 2254, 2259 (1975), and Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 416 (1963)). In determining whether there is sufficient attenuation, this court should consider four factors:

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[20]The record suggests that the appellant first appeared before the General Sessions Court of Hardin County at 9:00 a.m. on September 6, 1994, five days following his initial arrest and consequent incarceration in the county jail. Accordingly, the record arguably reflects the State's failure to comply with Tenn. R. Crim. P. 5(a), which provides:

> Any person arrested except upon a capias pursuant to an indictment or presentment shall be taken without unnecessary delay before the nearest appropriate magistrate ...

See also Tenn. Code Ann. § 40-5-103 (1990). Nevertheless, the delay in the instant case did not require the suppression of the appellant's statements. Our supreme court has held that the exclusion of a confession given during a period of "unnecessary delay" is only required "if an examination of the totality of the circumstances reveals that the statement was not voluntarily given." Huddleston, 924 S.W.2d at 670 (citation omitted)(emphasis added). See also Middlebrooks, 840 S.W.2d at 328; State v. Readus, 764 S.W.2d 770, 774 (Tenn. Crim. App. 1988). We have already concluded that the record supports the trial court's finding that the appellant's statements to the police were knowing and voluntary.

(1) the presence or absence of Miranda warnings;
(2) the temporal proximity of the arrest and the confession;
(3) the presence of intervening circumstances; and
(4) the purpose and flagrancy of the official misconduct.

Id. at 674-675. The burden of proving, by a preponderance of the evidence, the admissibility of the challenged evidence rests upon the prosecution. Id. at 675.

We conclude that the record reflects sufficient attenuation to permit the introduction of the appellant's statements. Indeed, most importantly, the challenged statements were obtained within twenty-four hours of the appellant's arrest. Thus, the statements were given to the police before the appellant's detention ripened into a constitutional violation. Accordingly, the statements were not the product of any illegality and were admissible at trial. Id. Moreover, the appellant was advised of his constitutional rights prior to each statement. Finally, the appellant does not argue, nor could he, that his initial arrest was not supported by probable cause. Additionally, there is no evidence that the arrest was pretextual, as the arresting officer was notified of the Phillips homicide after arresting the appellant for DUI. This issue is meritless.[21]

b. The Electronic Organizer

The appellant next challenges the admission at trial of the electronic organizer found in the appellant's vehicle, citing Tenn. R. Evid. 402 and Tenn. R. Evid. 403. Initially, we agree with the State that the appellant has waived this issue for failure to contemporaneously object to the admission of the organizer at trial. See Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1); State v. Pilkey, 776 S.W.2d 943, 952 (Tenn. 1989), cert. denied, 494 U.S. 1032, 110 S.Ct. 1483, and 494 U.S. 1483, 110 S.Ct. 1510 (1990)(a failure to enter a contemporaneous objection ordinarily constitutes a waiver of any complaint about the admission of

[21]We note in passing that, because there is no dispute concerning the admissibility of the appellant's January 31, 1995, statement, any error in admitting the appellant's earlier statements to the police would be harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

evidence). On April 19, 1995, the trial court conducted a suppression hearing to determine the admissibility at trial of certain evidence proffered by the State, including the electronic organizer. The trial court denied the appellant's Motion to Suppress, remarking, "The State will be required to make [the evidence] relevant to the case. It would appear to be a question that would go to the weight, not the admissibility. ... The court is not going to deem it inadmissible at this time." Later, in addressing a separate motion by the appellant, the trial court stated, "Any evidence that is not relevant is subject to proper objection based upon the rules of evidence. It's spontaneous objection; okay?" Our supreme court has observed that "the trial court is given broad discretion in the timing of its decisions on the admissibility of evidence. The trial court also has broad discretion in controlling the course and conduct of the trial." State v. Caughron, 855 S.W.2d 526, 541 (Tenn.), cert. denied, 510 U.S. 979, 114 S.Ct. 475 (1993)(citations omitted). Accordingly, a trial court may require a defendant to object when questions are actually asked or evidence proffered. Id. At trial, the appellant failed to object to the organizer's introduction into evidence, despite prompting from the judge. This issue is waived.

In any event, the determination of whether proffered evidence is relevant in accordance with Tenn. R. Evid. 402 is left to the discretion of the trial judge, State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995), as is the determination, pursuant to Tenn. R. Evid. 403, of whether the probative value of evidence is substantially outweighed by the possibility of prejudice. State v. Burlison, 868 S.W.2d 713, 720-721 (Tenn. Crim. App. 1993). See also State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). "In deciding these issues, the trial court must consider among other things, the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial."

Williamson, 919 S.W.2d at 78. This court will not interfere with the trial court's exercise of discretion absent a clear abuse appearing on the face of the record. Id. at 79.

Initially, we note that "'[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'" Huddleston v. United States, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501 (1988)(citation omitted). In other words, evidence is only relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. See also State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). Whether or not the appellant premeditated and deliberated the killing was a question of fact central to the jury's determination of the appellant's guilt. See Tenn. Code Ann. § 39-13-202(a)(1)(1994 Supp.). See also Tenn. Code Ann. § 39-11-401(1991) and Tenn. Code Ann. § 39-11-402(2)(1991). The State argues that the electronic organizer was relevant to the State's theory at trial, also supported by the testimony of Tonja Stuckey, that the appellant planned to kill someone on the night of August 31 or the morning of September 1 in order to enhance the appellant's standing within his gang. However, this argument is valid only if the appellant or his co-defendant in fact recorded the memoranda on the electronic organizer.[22] In essence, the relevance of the organizer depended upon the fulfillment of a condition of fact or the presentation of a sufficient foundation for the introduction of the evidence. See Tenn. R. Evid. 104(b); Tenn. R. Evid. 901(a).[23]

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[22]Even if Rhodes recorded the memoranda, clearly his use of an organizer found in the appellant's vehicle and belonging to the appellant is an item of circumstantial evidence highly relevant to the degree of the appellant's participation in the crime.

[23]Moreover, the memoranda are hearsay. Tenn. R. Evid. 801(c). Nevertheless, the memoranda are admissible if they qualify as admissions by a party opponent pursuant to Tenn. R. Evid. 803(1.2)(A) or (E). We subsequently conclude that the preponderance of the evidence adduced at trial established that the memoranda were authored by either the appellant or Galen

Tenn. R. Evid. 104(b) provides:

> When the relevance of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. In the court's discretion, evidence may be admitted subject to subsequent introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The Advisory Commission Comments to Rule 104 further provide that, if subsequent proof fails to establish relevancy, the conditionally admitted evidence should be stricken with an appropriate jury instruction or, in the case of extreme prejudice, a mistrial should be declared. "'It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offer or has failed to satisfy the condition.'" Huddleston, 485 U.S. at 690 n. 7, 108 S.Ct. at 1501 n. 7 (citation omitted). As already mentioned, defense counsel failed to object at any time during the trial to the introduction into evidence of the organizer. In any case, we conclude that the record supports by a preponderance of the evidence either the appellant's or his co-defendant's authorship of the memoranda. Id. The organizer was found in the appellant's vehicle following the murder, the appellant has never contested his ownership of the organizer. Indeed, the appellant conceded at trial that the organizer belonged to him, although he maintained that co-defendant Rhodes "messed" with the organizer prior to the killing.

Finally, with respect to Tenn. R. Evid. 403, although the introduction at

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Rhodes. See Tenn. R. Evid. 901(a); Cohen, Sheppeard, and Paine, Tennessee Law of Evidence (1995) §901.1, p. 613 ("[t]he procedures used for Rule 104(b) are also to be used for authentication issues). Moreover, assuming that co-defendant Rhodes was the author of the memoranda, a preponderance of the evidence at trial supported the existence of an unindicted conspiracy between the appellant and co-defendant Rhodes to commit first degree murder, permitting the introduction of the memoranda pursuant to Tenn. R. Evid. 803(1.2)(E). See State v. Stamper, 863 S.W.2d 404, 406 (Tenn. 1993). See also State v. Gaylor, 862 S.W.2d 546, 553-554 (Tenn. Crim. App. 1992), perm. to appeal denied, (Tenn. 1993)("[i]n order to prove a conspiracy, it is not necessary that the State show a formal agreement between the parties to do the unlawful act; a mutual implied understanding is sufficient ... . The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprises"); Cohen, Sheppeard, and Paine, Tennessee Law of Evidence (1995) §803(1.2).6, p. 521 ("the speaker need not be charged with any crime").

trial of the electronic organizer was certainly prejudicial, we have previously observed that any evidence is prejudicial. State v. Hunter, No. 01C01-9411-CC-00391 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1996). The issue is one of simple fairness. Id. We cannot say that the introduction of the electronic organizer was unfairly prejudicial to the appellant so as to constitute an abuse of discretion by the trial court. This issue is without merit.

c. The "Gruesome Photograph"

The appellant, citing Tenn. R. Evid. 403, next contests the introduction at trial of a photograph depicting the victim's body as it was discovered at the scene of the murder. The State argues that the photograph was relevant to the State's theory that the murder of Ronald Phillips was premeditated and deliberate. Specifically, the State contends that the photograph illustrated that the victim suffered multiple gunshot wounds, and the photograph was consistent with the scenario that, after being shot in the arm while sitting in his living room and in an attempt to escape his assailants, the victim crawled to the bathroom where he was shot in the head at point-blank range.

In determining the admissibility of photographs, the court must first determine that the evidence is relevant to the issues at trial and then decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993)(citing State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978)). See also State v. Barnard, 899 S.W.2d 617, 623 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). The admissibility of photographs falls within the sound discretion of the trial court, whose ruling will not be overturned except upon a clear showing of an abuse of discretion. See State v. Cazes, 875 S.W.2d 253, 262-263 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App.),

perm. to appeal denied, (Tenn. 1995).

At the April 19 suppression hearing, the trial court denied the appellant's motion to suppress numerous photographs of the victim's body at the crime scene. The trial court concluded:

> I'm going to allow both parties to develop legitimate theories. As the court observed earlier, the photographs are gruesome. ... But this is an extreme crime of violence ... . And I think the State is entitled to develop their theory [that the killing was premeditated and deliberate]. ... [T]his is a crime of violence. You can't sugarcoat that.

The court advised the State to avoid the introduction of duplicative photographs and invited defense counsel to renew their objections at trial.

We note that, at the suppression hearing, defense counsel focused almost exclusively on the possible introduction at trial of two close-up photographs of the gunshot wound to the victim's head. Apparently with respect to the introduction of those photographs, defense counsel offered to stipulate "that the victim was shot at close range with buckshot and a sawed-off 12 gauge." No stipulation was agreed upon. In any case, at trial, the State decided against introducing the close-up photographs, relying instead upon the less explicit photograph which is the subject of this appeal. Defense counsel objected. The court, overruling the appellant's objection, found that the photograph "definitely [has] probative value," particularly with respect to the number and location of wounds on the victim's body. The court also observed, "The pictures are graphic, but they are certainly not nearly as bad as some the court has seen."

First, the appellant argues that the testimony of Dr. Jerry Francisco, Sheriff Sammy Davidson, and Special Agent Dan Royce sufficiently established

the infliction of multiple gunshot wounds upon the victim. The photograph was first introduced during the testimony of Sheriff Sammy Davidson, illustrating his oral description of the condition and location of the victim's body as it was found on the morning of September 1. Our supreme court has held that photographs may be introduced in order to illustrate testimony. Stephenson, 878 S.W.2d at 542 (a photograph illustrating the testimony of a detective concerning the location of the victim's body and the location of a bullet hole properly admitted pursuant to Tenn. R. Evid. 403). Moreover, the decision to admit or limit cumulative evidence rests within the sound discretion of the trial court. State v. Brown, 836 S.W.2d 530, 552 (Tenn. 1992)(photographs of victim's body admissible despite oral testimony "graphically" describing victim's injuries). See also State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), cert. denied, __ U.S. _ _, 114 S.Ct. 1577 (1994)(color photographs of the deceased victims at the scene of the crime were admissible despite the introduction of an extensive color videotape showing the victim's bodies as they were found). We cannot conclude that the trial court abused his discretion in this respect.

Second, the appellant argues that his offer to stipulate at the suppression hearing that the victim was shot at close range with a shotgun precluded the introduction at trial of the challenged photograph. The appellant cites State v. Norris, 874 S.W.2d 590 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993), in support of his position. Yet, this court's opinion in Norris, 874 S.W.2d at 597, merely suggests that a stipulation by defense counsel is a factor which a trial judge should consider in weighing the probative value of a photograph against the possibility of unfair prejudice under Tenn. R. Evid. 403. Although the presence of an offer to stipulate may be an important factor in the Rule 403 calculus, see Banks, 564 S.W.2d at 951, "[a] party's offer to stipulate a certain fact should not always lead to a Rule 403 exclusion of evidence on that fact ... . Each side is entitled to prove its case." Cohen, Sheppeard, and Paine,

Tennessee Law of Evidence, (1995) § 403.7, p. 157. As noted earlier, in order to convict the appellant of first degree murder, the State was required to prove beyond a reasonable doubt that the appellant premeditated and deliberated Phillips' murder. Tenn. Code Ann. § 39-13-202(a)(1); Tenn. Code Ann. § 39-11-401; Tenn. Code Ann. §39-11-402(2).

The appellant also relies upon Gladson v. State, 577 S.W.2d 686, 687 (Tenn. Crim. App. 1978), for the proposition that "the State, by refusing to stipulate, cannot make inadmissible and inflammatory evidence admissible or noninflammatory." Initially, the record in the instant case does not reflect that the State ever refused to agree to any stipulation. Moreover, the "inadmissible and inflammatory" photographs in Gladson, 577 S.W.2d at 687, depicted the cranial bone of the victim, surgically revealed during the autopsy, and the brain of the victim, removed from the victim's body by the pathologist. The State in Gladson argued that the pictures established the cause of death. Defense counsel offered to stipulate that the victim died as a result of injuries received in an altercation between the victim and the defendant. Moreover, the State had already introduced pictures of the victim's body, taken before the autopsy, showing the victim's wounds. In contrast, in the instant case, the contested photograph is one of only two photographs of the victim's body introduced by the State during the appellant's trial. We agree with the trial court that the picture introduced at trial is not particularly gruesome. Additionally, the State introduced the picture for the purpose of proving multiple gunshot wounds, which would support the State's theory of a premeditated and deliberate killing. As pointed out by the State, defense counsel never offered to stipulate that the victim suffered multiple gunshot wounds or, of course, that the killing was premeditated and deliberate. Again, the only stipulation proffered by defense counsel evidently related to the possible introduction at trial of close-up photographs of the gunshot wound to the victim's head. Furthermore, at trial,

defense counsel did not renew their offer with respect to the photograph at issue on this appeal.

However, in Banks, 564 S.W.2d at 951, the supreme court noted that, even absent a stipulation, the failure of the defense to dispute the testimony that the photographs illustrate may also render the State's burden of justification under Rule 403 difficult to sustain. Under Tenn. R. Evid. 402 and Tenn. R. Evid. 403, evidence must be relevant to an issue in dispute. State v. Melson, 638 S.W.2d 342, 365 (Tenn. 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770 (1983). In the instant case, the appellant did not deny at trial that the victim was shot twice, nor did he deny that the victim was shot with premeditation and deliberation. Rather, he contended that he was not a party to the offense committed by Galen Rhodes. See Tenn. Code Ann. §39-11-401 and Tenn. Code Ann. § 39-11-402(2). Nevertheless, even if the admission of the photograph constituted error under Tenn. R. Evid. 403, it does not affirmatively appear that the admission affected the results of the trial. Banks, 564 S.W.2d at 953; Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). This issue is without merit.

d. The Appellant's Letters to Daniel Lee Burcham

The appellant, citing Tenn. R. Evid. 402 and Tenn. R. Evid. 403, also contends that the trial court erroneously permitted the State to cross-examine the appellant concerning the contents of letters written by the appellant to his cousin, Daniel Lee Burcham, who was incarcerated at the Tishimongo County Jail in Mississippi. As mentioned earlier, the appellant informed his cousin in the letters that he was forming his own "nation of gangsters," and that he was "a governor for the 74 Gangster Disciples." Moreover, the appellant wrote, "How about psycho killer? Ha! Ha! That's me."

At the April 19 suppression hearing, defense counsel submitted a Motion

to Suppress the letters. The trial court indicated that "[i]f [the letters are] legitimately tied to [the State's] theory, ... I'm not going to foreclose them from the use of [the letters]. ... It's subject to objection." The State did not attempt to introduce the letters during its case-in-chief, instead using the contents of the letter to impeach the appellant's denial at trial of participation in gang activity and his denial of participation in Phillips' murder.

Initially, the appellant failed to object at trial to the State's use of the letters and has, therefore, waived this issue. See Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1); Pilkey, 776 S.W.2d at 952. Additionally, Tennessee's Rules of Evidence have retained the traditional rule that a witness' prior inconsistent statements may be used to impeach the witness. State v. Philpott, 882 S.W.2d 394, 406 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Moreover, a prior inconsistent statement introduced for purposes of impeachment may nevertheless be considered by the jury as substantive evidence if the statement is admissible under a hearsay exception or other rule of evidence. State v. Black, No. 01C01-9401-CC-00006 (Tenn. Crim. App. at Nashville, July 14, 1995). In the instant case, the appellant's statements were clearly admissible as admissions of a party opponent under Tenn. R. Evid. 803(1.2). Finally, we cannot say that the introduction of the contents of the letter was error under Tenn. R. Evid. 402 or Tenn. R. Evid. 403. This issue is meritless.

e. The Appellant's Statements to Lester Posey

The appellant next contends that the trial court erred when it sustained the State's objections at trial to defense counsel's direct examination of a witness, Lester Posey, concerning statements made by the appellant to Posey at the Hardin County Jail. Initially, we agree with the State that the appellant has waived this issue due to his failure to failure to cite in his brief any authority in support of his argument. Tenn. R. App. P. 27(a)(7); Ct. Crim. App. R. 10(b).

Nevertheless, we briefly address the merits of the appellant's contention.

The decision to admit or exclude evidence is generally left to the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Davis, 872 S.W.2d 950, 955 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993). See also State v. Anthony, No. 01C01-9504-CC-00115 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1996); State v. Dumas, No. 02C01-9502-CR-00031 (Tenn. Crim. App. at Jackson, October 4, 1995). However, as mentioned earlier, during cross-examination of the appellant, the State attempted to impeach, using prior inconsistent

statements by the appellant, the appellant's testimony that he was not a member of a gang, nor was he knowledgeable about gangs. Impeachment by use of a prior inconsistent statement will allow for introduction of a consistent statement made before the inconsistent one. State v. Tizard, 897 S.W.2d 732, 746-747 (Tenn. Crim. App. 1994). See also State v. Livingston, 907 S.W.2d 392, 398 (Tenn. 1995); State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993), cert. denied, 510 U.S. 1168, 114 S.Ct. 1200 (1994); Dumas, No. 02C01-9502-CR-00031. Moreover, the appellant did not produce at trial a "parade of witnesses" that would justify the trial court's exercise of discretion in limiting credibility bolstering evidence in order to avoid undue prejudice to the State. Tizard, 897 S.W.2d at 747.[24] Accordingly, the appellant's statements to Posey were admissible. Nevertheless, any error was harmless as, in fact, during redirect examination, Posey testified that he had "educated" the appellant about gangs, that the appellant did not know about gangs, and that the appellant wanted to learn about gangs in order to protect his cousin, Daniel

[24]Only Posey and the appellant testified concerning the appellant's education about gangs at the Hardin County Jail and his motives for acquiring the knowledge.

Burcham. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

f. Galen Rhodes Invocation of his Privilege Against Self-Incrimination Outside the Presence of the Jury

The appellant next asserts that co-defendant Rhodes should have been required to assert his Fifth Amendment privilege before the jury. Our supreme court has determined that it is not error to refuse to force a witness to take the stand to claim his Fifth Amendment privilege in front of a jury. State v. Harris, 839 S.W.2d 54, 72 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993). See also State v. Dicks, 615 S.W.2d 126, 129 (Tenn.), cert. denied, 454 U.S. 933, 102 S.Ct. 431 (1981)("'[n]either side has a right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege ... '").[25] This issue is without merit.

g. Sufficiency of the Evidence

I. The Appellant's Conviction for Premeditated and Deliberate First Degree Murder

The appellant also challenges the sufficiency of the evidence supporting his conviction for premeditated and deliberate first degree murder. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); Cazes, 875 S.W.2d at 259; Tenn. R. App. P. 13(e).

[25]We note that the trial court informed the jury that co-defendant Rhodes had invoked his Fifth Amendment privilege.

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also Harris, 839 S.W.2d at 75.

The State may prove a criminal offense by direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). See also Brown, 836 S.W.2d at 541 (“the cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence”). Before a jury may convict a defendant 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). See also State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). As in the case of direct evidence, the weight to be given circumstantial evidence and “‘[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.’” Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)(citation omitted). In this case, both direct and circumstantial evidence was available for the jury's consideration.

At the time of this offense, the relevant statute defined first degree murder as "[a]n intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1). A person acts intentionally "with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1991). Additionally, premeditation necessitates "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992), and "the exercise of reflection and judgment," Tenn. Code Ann. § 39-13-201(b)(2) (1991). Deliberation requires a "cool purpose" and the absence of "passion or provocation." Tenn. Code Ann. § 39-13-201(b)(1) and Sentencing Commission Comments.

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. Brown, 836 S.W.2d at 543. Again, although the jury may not engage in speculation, State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995), the jury may infer premeditation and deliberation from the circumstances surrounding the killing. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994). Our supreme court has delineated several circumstances which may be indicative of premeditation and deliberation, 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 the victim, and the making of preparations before the killing for the purpose of concealing the crime. Brown, 836 S.W.2d at 541-542. This court has also recently noted several factors from which the jury may infer the two elements, including planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. Bordis, 905 S.W.2d at 222 (quoting 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7 (1986)).

Additionally, a person may be charged with the commission of an offense if the offense is committed by the conduct of another for which the person is criminally responsible. Tenn. Code Ann. § 39-11-401.[26] A person is criminally responsible for an offense committed by the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense ... , the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402(2).[27]

Merely to illustrate the weakness of the appellant's challenge to the sufficiency of the evidence in this case, we will review once again a portion of the incriminating evidence adduced at trial The appellant confessed that he was present at the time of the murder. Moreover, he admitted that he assisted Rhodes in repairing the murder weapon shortly before the murder and practiced firing the weapon both in Corinth, Mississippi, and in Tennessee, in the vicinity of the victim's home. The appellant's girlfriend, Tonja Stuckey, testified that the appellant had informed her prior to the murder that he wanted to become the leader of a gang and would have to kill someone in order to achieve his goal.

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[26]The record reflects that the trial court included an instruction on criminal responsibility in its charge to the jury.

[27]In his brief, the appellant argues, "All evidence solicited at trial against North was circumstantial. ... Rhodes ... admitted to doing the killing. The State's only theory against North was that [the murder] was the result of gang activity." The appellant then cites Tenn. Code Ann. § 39-11-106(a)(36) (1996 Supp.), which provision defines a criminal street gang, in support of its position that the State failed to establish the essential elements of first degree murder with respect to the appellant.

First, as the State argues and the appellant concedes, the definition set forth in Tenn. Code Ann. § 39-11-106(a)(36) was added to the statute by amendment in 1995 and became effective on July 1 of that year, more than one month following the appellant's trial. In any event, the amendment was enacted in conjunction with the amendment to Tenn. Code Ann. § 40-35-114 (1996 Supp.), which provides that membership in a criminal street gang, under certain circumstances, is an enhancement factor for purposes of sentencing. Tenn. Code Ann. § § 40-35-114(21). Membership in a criminal street gang is not an element of first degree murder which the State was required to prove at trial beyond a reasonable doubt.

Second, the appellant incorrectly characterizes the State's theory. As noted above, the State relied, in part, upon the theory of criminal responsibility, as set forth in Tenn. Code Ann. §§ 39-11-401 and 39-11-402. In pursuing its theory that, at least, the appellant participated in the murder to the extent required by § 39-11-402, the State presented proof to establish that the appellant aspired to gang membership and, moreover, a prominent position within a gang, which aspiration supplied a motive for the murder. As noted earlier, the necessary elements of first degree murder may be shown by circumstantial evidence. Brown, 836 S.W.2d at 541. Moreover, this court has held that evidence concerning a defendant's motive is one factor from which a jury may infer premeditation and deliberation. Bordis, 905 at 222.

The testimony of the appellant's mother suggested that the appellant might have known the victim. The weapon was recovered, following the murder, from the scene of the appellant's automobile accident, as was a fired shotgun shell matching a rifle slug fragment extracted from the victim's body. The appellant's electronic organizer, recovered from the appellant's vehicle, contained memoranda including the entry "Murder." The police recovered gloves from both the appellant's vehicle and the victim's stolen vehicle driven by co-defendant Rhodes. The presence of the gloves was consistent with the absence of fingerprints at the scene of the murder and in the victim's vehicle. The statements of co-defendant Rhodes, introduced by the appellant at trial, indicated that the appellant fully participated in the killing. [28] Finally, the statements of the appellant and Rhodes suggested that, after shooting the victim in the arm and prior to the fatal shot, the appellant and Rhodes debated whether to kill the victim while the victim begged for his life. We conclude that the evidence adduced at trial amply supports the appellant's conviction. The appellant's contention is meritless.

ii. The Appellant's Sentence of Life Without Parole

The appellant also contends that, during the sentencing phase of the trial, the court erroneously instructed the jury on the aggravating factors set forth in Tenn. Code Ann. § 39-13-204(5), (6), and (7) (1994 Supp.). In essence, he challenges the sufficiency of the evidence supporting the application of those

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[28]We acknowledge, and the trial court properly instructed the jury, that the testimony of the appellant's accomplice, Galen Rhodes, if uncorroborated, could not support a guilty verdict. Barnard, 899 S.W.2d at 626. See also State v. Hensley, 656 S.W.2d 410, 412 (Tenn. Crim. App. 1983). Nevertheless, the corroborating evidence need not be sufficient to support a guilty verdict by itself, and the evidence may be circumstantial. Hensley, 656 S.W.2d at 412. See also State v. Comer, No. 85-170-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1986)("slight circumstances are sufficient to satisfy the required corroboration of an accomplice's testimony"). Moreover, "[p]resence, companionship, and conduct before and after the commission of the offense, are circumstances from which one's participation may be inferred." State v. Pendleton, No. 87-189-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1988)(citing State v. McBee, 644 S.W.2d 425, 428 (Tenn. Crim. App. 1982)). Finally, the sufficiency of evidence corroborating the testimony of an accomplice is a matter for the determination of the jury. Comer, No. 85-170-III. In the instant case, abundant corroborative evidence was presented to the jury at trial and supports its verdict.

factors. Pursuant to Tenn. Code Ann. § 39-13-207 (1994 Supp.), the jury in this case unanimously found that the State had proven, beyond a reasonable doubt, the three aggravating factors:

> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;[29]
>
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another; and
>
> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any ... burglary, theft ... .[30]

The record clearly supports the jury's sentencing determination. This issue is without merit.

h. The Constitutionality of the Appellant's Sentence

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[29]The appellant contends that this factor is unconstitutionally vague, and its application violates the appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution. (The appellant actually cites in his brief Article 1, Sections 8 and 10 of the Tennessee Constitution. We can only assume that he intended to cite Section 16, as Section 10 concerns double jeopardy.) However, in Odom, 928 S.W.2d at 26, our supreme court upheld the constitutionality of the "heinous, atrocious, or cruel" aggravating circumstance, as amended in 1989. Moreover, the trial court's instructions to the jury concerning the definitions of the abstract terms did not detract from the narrowing effect of the additional requirement that the murder involved torture or serious bodily injury beyond that necessary to produce death. Id.

[30]The appellant contends in his brief that the trial court should not have charged this aggravating circumstance to the jury during the sentencing phase, as the jury had "found [the appellant] not guilty of felony murder," and the State had dismissed the theft charge.

As mentioned earlier, in addition to premeditated and deliberate first degree murder, the appellant was also indicted for theft of property, including the victim's 1981 Oldsmobile Toronado and his stereo, worth more than $1,000, a class D felony. Tenn. Code Ann. § 39-14-105(3) (1991). At the close of the State's proof, the appellant submitted to the trial court a Motion for a Judgment of Acquittal of the theft charge. The State conceded that "the proof is clear that the value is less than $500 of the items taken together." The court reduced the charge to misdemeanor theft of property worth less than $500. The appellant was also indicted for first degree murder during the perpetration of a burglary or theft. Tenn. Code Ann. § 39-13-202 (a)(2).

At the conclusion of the trial, the jury returned a verdict of guilty with respect to premeditated and deliberate first degree murder. In accordance with the trial court's instructions, the jury made no finding concerning the felony murder charge. Moreover, the foreman of the jury indicated that the jury had neglected to make any findings concerning the theft charge. In light of the appellant's conviction for first degree murder, the State elected to dismiss the theft charge.

Initially, as pointed out by the State, a defendant need not have been convicted of the offense supporting the application of Tenn. Code Ann. § 39-13-204 (I)(7). See, e.g., State v. Brimmer, 876 S.W.2d 75, 83-84 (Tenn.), cert. denied, __ U.S. __, 115 S.Ct. 585 (1994). Moreover, the record clearly indicates that the jury made no findings concerning the appellant's guilt or innocence of theft or felony murder and the offenses underlying the felony murder charge. Finally, we do note that the trial court failed to instruct the jury on the elements of either burglary or theft at the sentencing phase. This was error. Id. at 83. However, the trial court had previously defined both theft and burglary in its guilt phase instructions. Any error was harmless. Id.

The appellant also contends that a sentence of life without the possibility of parole violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.[31] First, he argues that "the sentence of life without the possibility of parole based upon the meager facts solicited at trial as well as the sentencing hearing, is cruel and unusual punishment." The State correctly notes that the appellant has failed to cite any authority in support of his proposition. Accordingly, he has waived this issue. See Tenn. R. App. P. 27(a)(7) and Ct. Crim. App. R. 10(b).

In any case, we conclude that the appellant's contention is meritless. In Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680 (1991), the United States Supreme Court upheld the imposition of a mandatory sentence of life imprisonment without the possibility of parole for a conviction of possession of more than 650 grams of cocaine in the face of an Eighth Amendment challenge. Certainly, therefore, a sentence of life imprisonment without the possibility of parole for first degree murder would not violate that provision. Moreover, in State v. Black, 815 S.W.2d 166, 187-188 (Tenn. 1991), our supreme court reaffirmed its position that the death penalty is not a *per se* violation of Article I, § 16 of the Tennessee Constitution. Logically, therefore, the appellant's sentence is not, *per se*, cruel and unusual punishment under the Tennessee Constitution.

The court in Black outlined the standard for determining whether a legislatively approved punishment is cruel and unusual under the Tennessee Constitution. Id. at 189. A reviewing court must engage in three inquiries:

> (1) Does the punishment for the crime conform with contemporary standards of decency?
> (2) Is the punishment grossly disproportionate to the offense?
> (3) Does the punishment go beyond what is necessary to

[31]Again, the appellant also cites in his brief Article I, § 10 of the Tennessee Constitution. This section has no apparent relevance to the appellant's argument.

accomplish any legitimate penological objective.

Id. at 189 (citing State v. Ramseur, 524 A.2d 188, 210 (1987), and Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925 (1976)(plurality opinion)). See also Becker v. State, No. 01C01-9312-CR-00443 (Tenn. Crim. App. at Nashville, July 21, 1994). First, this court has previously held that a sentence of life imprisonment without possibility of parole plus sixty-two years for a juvenile did not violate contemporary standards of decency. State v. Taylor, No. 02C01-9501-CR- 00029 (Tenn. Crim. App. at Jackson, October 10, 1996). Therefore, we cannot say in the instant case that the appellant's sentence offends those standards.

Second, we must determine whether the punishment is proportionate to the crime. Our supreme court has observed:

> [B] ecause reviewing courts should grant substantial deference to the broad authority legislatures possess in determining punishments for particular crimes, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare."

State v. Harris, 844 S.W.2d 601, 602 (Tenn. 1992)(citation omitted). See also State v. Holder, No. 01C01-9501-CC-00015 (Tenn. Crim. App. at Nashville, March 22, 1996). In Harris, 844 S.W.2d at 603, the supreme court adopted the methadology for determining proportionality set forth by Justice Kennedy in Harmelin, 501 U.S. at 996-1009, 111 S.Ct. at 2702-2709 (Kennedy, J., concurring in part and concurring in judgment). The reviewing court must compare the sentence imposed to the crime committed to determine if there exists an inference of gross disproportionality. If no inference arises, the inquiry ends. When the inference does arise, the court must compare the appellant's sentence with the sentences imposed on other criminals in the same jurisdiction and in other jurisdictions. Examining the appellant's sentence of life imprisonment without the possibility of parole in light of the gravity of his offense, we conclude that there is no inference of gross disproportionality.

Finally, the appellant's punishment accomplishes legitimate penological objectives, including deterrence and retribution. Taylor, No. 02C01-9501-CR-00029. See also Middlebrooks, 840 S.W.2d at 340.

The appellant further submits the following argument to this court:

> [T]he review by the appellate court on this issue of life without possibility of parole should be reviewed as a death penalty case. In other words, the Court would take the same factors as determined in the case of State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) as to which persons are death eligible defendants, to determine whether or not the Court should sustain the sentence of life without possibility of parole. ... In Middlebrook, ... the Supreme Court indicated that before the State could pursue the death penalty it must restrict the class of death eligible offenses, and that the State must utilize additional procedures that assure reliability in determination that death is the appropriate punishment in a given capital case.

Initially, in Harmelin, 501 U.S. at 994-996, 111 S.Ct. at 2701-2702, a majority of the United States Supreme Court declined to apply the "individualized capital sentencing doctrine" outside the capital context, approving a sentencing scheme requiring the mandatory imposition of a sentence of life imprisonment without the possibility of parole. "We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further." Id. at 996, 2702. Moreover, the appellant cites no authority for the proposition that principles of due process or the prohibition against cruel and unusual punishment embodied in the Tennessee Constitution mandate the expansion of the doctrine in our state to cases involving a possible sentence of life without parole. In any event, Tennessee's legislature has provided individualized sentencing, albeit subject to less stringent appellate review than mandated in the capital context, for those defendants who face a sentence of life without parole. See Tenn. Code Ann. § 39-13-204; Tenn. Code Ann. § 39-13-207. Compare Tenn. Code Ann. §39-13-206 (1994 Supp.) Moreover, the appellant's assertion in his brief that he "did not kill anyone" is patently insufficient to demonstrate unreliability of constitutional proportions inherent in this state's sentencing scheme. This issue is meritless.

III. Conclusion

After a thorough review of the record and the applicable law, we affirm the judgment of conviction and the sentence imposed. Moreover, in accordance with Tenn. Code Ann. § 39-13-207(g), we conclude that the jury appropriately found three statutory aggravating factors and did not arbitrarily impose a sentence of life imprisonment without the possibility of parole.

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DAVID G. HAYES, Judge

CONCUR:

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PAUL G. SUMMERS, Judge

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PAUL R. SUMMERS, Special Judge