

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED
March 4, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

DONALD WAYNE STROUTH,)
)
Appellant)
)
V.)
)
STATE OF TENNESSEE,)
)
Appellee.)
)
)

No. 03C01-9507-CC-00195

SULLIVAN COUNTY

HON. FRANK L. SLAUGHTER,
JUDGE

(Post-Conviction - Death Penalty)

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Donald Wayne Strouth, appeals as of right the denial of his second post-conviction petition by the Circuit Court of Sullivan County. Appellant filed a lengthy amended petition in the trial court; however, appellant raises only five issues on appeal. He argues that:

(1) the errors in his death sentence require reversal and cannot be proven to be harmless beyond a reasonable doubt because

- (a) the sentence was based upon the now invalid felony-murder aggravating circumstance;
- (b) the remaining aggravating circumstance is unconstitutional; and
- (c) the weight of the mitigating circumstances, i.e. the appellant's youth and his degree of culpability in the crime;

(2) the prosecutor's closing argument at sentencing violated the Tennessee and United States Constitutions;

(3) the State suppressed evidence that persons other than the appellant committed the offense, that the witnesses against the appellant were motivated to lie, and that the co-defendant was more culpable for the offense;

(4) jury instructions equating the absence of reasonable doubt with moral certainty are inconsistent with the constitutional requirement that the State must prove guilt beyond a reasonable doubt; and

(5) a jury instruction at sentencing prohibiting individual jurors from considering a mitigating circumstance unless jurors unanimously agreed upon it violates the Tennessee and United States Constitutions.

Finding these issues to be without merit, we affirm the trial court's denial of post-conviction relief in this capital case.

I. PROCEDURAL HISTORY

In 1978, appellant was convicted of the armed robbery and the first degree felony murder of James Keegan, a seventy-year-old shopkeeper in Kingsport.¹ The jury sentenced the appellant to death by electrocution, finding the presence of two aggravating circumstances: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind and (2) that the murder was

¹For a more complete recitation of the facts, see the opinion in appellant's direct appeal to the supreme court. *State v. Strouth*, 620 S.W.2d 467 (Tenn. 1981), cert. denied 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982).

committed while the defendant was engaged in committing a robbery. In a separate proceeding, his co-defendant, Jeffrey Dicks, was also convicted of the murder of Keegan and sentenced to death. On direct appeal to the supreme court, appellant's murder conviction and death sentence were affirmed. State v. Strouth, 620 S.W.2d 467 (Tenn. 1981), cert. denied 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982).² However, the court vacated the armed robbery conviction because it violated principles of double jeopardy.

Appellant filed his first post-conviction petition in 1982 alleging numerous constitutional violations. After a lengthy evidentiary hearing, the trial court denied relief and this Court affirmed that ruling on appeal. Strouth v. State, 755 S.W.2d 819 (Tenn. Crim. App. 1986), perm. to appeal denied (Tenn. 1987). Appellant's current post-conviction petition was filed on December 30, 1993 and, following an evidentiary hearing in the trial court, was dismissed.

II. MIDDLEBROOKS ERROR

Appellant first attacks his death sentence arguing that the felony-murder aggravating circumstance was found by the jury in his case in violation of the rule subsequently announced in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). He further argues that the error cannot be demonstrated to be harmless beyond a reasonable doubt. We disagree.

In 1992, our supreme court held that when a defendant is convicted of first degree murder solely on the basis of felony murder, use of the aggravating circumstance that the murder was committed during the perpetration of a felony fails to sufficiently narrow the class of death-eligible murderers. State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992). Use of this aggravating circumstance in a felony-murder conviction in order to assess the death penalty duplicates the elements of the

²Co-defendant Dicks' conviction and death sentence were also affirmed on direct appeal. State v. Dicks, 615 S.W.2d 126 (Tenn. 1981), cert. denied 454 U.S. 933, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981).

offense and violates the United States and Tennessee Constitutions. Id. Thus, in order to support death as a penalty for the crime of felony murder, a finding of at least one of the other statutory aggravating circumstances is necessary. Id. at 346-47. The rule announced in Middlebrooks has been held to apply retroactively. Barber v. State, 889 S.W.2d 185, 186 (Tenn. 1994), cert. denied ___ U.S. ___, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995).³

It is apparent on the face of the record, and the State concedes, that the use of the felony-murder aggravating circumstance in appellant's case was in contravention of the rule set forth in Middlebrooks. At the guilt phase of appellant's trial, the jury found him guilty of the felony murder of James Keegan. In the sentencing phase of the trial, the jury's sentence of death was supported by two aggravating circumstances. One of these aggravators was that the crime was committed while the defendant was engaged in committing the felony of robbery. Pursuant to Middlebrooks, this aggravating circumstance cannot be used to support a sentence of death in appellant's case.

The Middlebrooks error, however, does not automatically mandate a reversal of appellant's death sentence or require a new sentencing hearing. This Court must review the record of the evidence at trial and evaluate whether the error is harmless beyond a reasonable doubt. See State v. Howell, 868 S.W.2d 238, 259 (Tenn. 1993), cert. denied 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). To perform that analysis, our supreme court in Howell delineated certain factors which potentially influence the sentence imposed at trial. Id. at 260. These relevant factors include: (1) the number and strength of the remaining valid aggravating circumstances; (2) the extent to which the prosecutor emphasizes the invalid aggravating circumstance during closing argument; (3) the evidence admitted to establish the invalid aggravator;

³Ordinarily, the statute of limitations would have expired on July 1, 1989, thereby preventing this late-filed post-conviction petition. Tenn. Code Ann. §40-30-102 (repealed 1995). See also State v. Masucci, 754 S.W.2d 90, 91 (Tenn. Crim. App. 1988). However, at least with regard to affording appellant the right to litigate the Middlebrooks issue, his present petition was timely under the rule announced in Burford v. State, 845 S.W.2d 204 (Tenn. 1992).

and (4) the nature, quality, and strength of the mitigating evidence. Id at 260-61. If the reviewing court determines that the jury would have imposed the same sentence had it given no weight to the invalid aggravating circumstance, the error is harmless and the sentence may be affirmed. Id at 262. When such analysis is performed in appellant's case, we conclude that the error was harmless beyond a reasonable doubt and affirm the sentence of death.

A. Howell Analysis

In addition to finding the felony-murder aggravating circumstance, the jury also found the aggravating circumstance that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. Tenn. Code Ann. §39-2404(i)(5) (Supp. 1978). There was strong and gruesome evidence introduced at appellant's trial to support a finding of the especially heinous, atrocious and cruel aggravator. James Keegan, the victim, was approximately seventy (70) years old at the time of the murder. The medical examiner found that Mr. Keegan had a jagged laceration over his right skull which penetrated the full thickness of the scalp through to the bone. This injury was a depth of one-half to three-quarters of an inch deep. Mr. Keegan also had a laceration across the right ear which transected and cut through the cartilage. Both of these wounds were made by a very sharp instrument. He also suffered a skull fracture so severe that the skull was pushed in toward the brain, which caused a laceration on the frontal lobe of the brain. This injury bruised the outer surface of the skin and was two inches in diameter. A blunt instrument, possibly a rock, likely caused this wound and rendered the victim unconscious. The fatal injury was a laceration of the throat that extended from ear to ear and was two and one-half to three inches in depth. As one law enforcement official described this wound, the "victim's throat was cut; head almost decapitated." Such description of the injuries in the record clearly evinces that the murder was especially heinous and atrocious. The infliction of such extensive wounds was grossly wicked and extremely evil and the

perpetrators clearly were disposed to inflict pain upon their victim. See State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985) (defining the terms heinous, atrocious, cruel, torture and depravity). The cruelty with which the perpetrators attacked this elderly man and showed no mercy toward him after he was already unconscious and helpless demonstrates a depravity of mind. See State v. Zagorski, 701 S.W.2d 808, 814 (Tenn. 1985), cert. denied 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986) (holding that infliction of gratuitous violence and needless mutilation of victims who were already helpless evinced depravity of mind).

Moreover, the supreme court found that this aggravating circumstance was present in appellant's case. In its opinion on the petition to rehear appellant's direct appeal, the court stated:

"Appellant and his companion-in-crime Jeffrey Dicks, struck James Keegan on the head with a rock, rendering him unconscious. While Mr. Keegan was in an unconscious state, appellant and his companion slit Mr. Keegan's throat and left him to bleed to death - a cold-blooded, intentional, conscienceless and pitiless act. An act which can only be characterized as heinous and atrocious, and one which evinces a depraved state of mind and justifies the imposition of the death penalty, no mitigating circumstances being shown."

This passage was quoted in the opinion on appellant's first post-conviction petition, where this Court also upheld the application of this aggravating circumstance. Strouth v. State, 755 S.W.2d 819, 830-31 (Tenn. Crim. App. 1986). Based upon the supreme court's earlier ruling on the application of this aggravating circumstance and our independent review of the record, it is apparent that the qualitative nature of this aggravating circumstance and the high quantum of proof supporting it demonstrate the substantial weight it carried with the jury.

Secondly, we must consider the extent to which the prosecutor emphasized the invalid felony-murder aggravator in his closing argument. Our review of the record does not indicate that the district attorney placed any unusual emphasis on this aggravating circumstance. At sentencing, the State sought to prove six aggravating circumstances and argued each of these in its closing argument. The portion on the

felony-murder aggravator was not exaggerated or pronounced. In his brief, appellant cites extensively to the district attorney's argument in an attempt to demonstrate undue emphasis. However, appellant is mistaken in concluding these excerpts pertained to the felony-murder aggravator. An objective reading reveals that the prosecution was trying to substantiate the aggravator that the murder was committed to avoid arrest or prosecution, i.e. a witness killing.

Also relevant to our determination is the evidence which was admitted to establish the invalid aggravating circumstance. We must consider whether an invalid aggravator was established by evidence that was materially inaccurate or admissible only to support the invalid aggravator, or whether the evidence was otherwise admissible in the guilt or sentencing phases. Howell, 868 S.W.2d at 261. This factor had little impact in appellant's case. The evidence that the murder was committed during the commission of a felony came during the State's case in chief at the guilt phase and resulted in appellant's conviction of felony murder. No additional evidence was introduced to support the invalid aggravator at sentencing. An aggravating factor which duplicates the elements of the underlying crime, such as in appellant's case, has less relative tendency to prejudicially affect the sentence imposed. Id.

Finally, we must consider all the relevant mitigating evidence. This includes the nature, strength, and quality of such evidence. Very little was offered in mitigation at the sentencing phase of the trial. An exculpatory statement the appellant made to a law enforcement official was introduced, but nothing else was offered. Counsel for the defense sought to introduce evidence on the Christian philosophy of death as a punishment, but the court excluded such evidence as irrelevant. Appellant now argues that much weight should be given to his youth at the time of the offense and his lesser degree of culpability in the crime as mitigating evidence. However, these two mitigating circumstances were not argued before the jury. Thus, they could have had little effect on its weighing of the aggravators against the mitigators.

Nevertheless, we will consider this evidence on review to determine what impact, if any, it may have had in the final outcome of the trial.

First, we note that appellant's exculpatory statement carries little or no weight in mitigation because another statement made by appellant was contradictory and placed him at the scene of the crime. Any positive effect this statement may have had was virtually eliminated when measured against testimony and physical evidence at trial that demonstrated his primary role in the crime. Appellant next argues that his age, nineteen, at the time of the offense weighed heavily in mitigation. The record reflects that appellant was living independent of his parents at that time, usually with a male or female friend; was not regularly employed; traveled routinely between Tennessee and North Carolina; and had been involved in other criminal activity as a juvenile. This hardly paints the picture of a man whose youthful age contributed to poor judgment. Nor does it demonstrate an innocent young man whose inexperience in criminal matters may have led him into an unlawful situation. Appellant also argues that he did not actually commit the murder, but was merely present when it occurred. He submits that this lesser degree of culpability should be considered in mitigation. The evidence submitted at trial, however, belies appellant's contention. The proof demonstrated a strong likelihood that appellant actually perpetrated the murder. Several witnesses placed appellant at or near the scene of the crime around the time of the murder. A pair of bloody pants was introduced at trial as appellant's and the medical examiner stated that the patterns of stains were consistent with someone who stood over the victim and slit his throat. Appellant's girlfriend testified that she saw appellant wearing the pants and helped him dispose of them several days after the murder. She later led police to the location where they had been discarded. Appellant's girlfriend also testified that appellant intimated to her that he did it, providing her with details of the crime, and he gave her some fruits of the robbery. The co-defendant's wife also testified that appellant told her he did it. Also, some time prior to the murder, appellant's girlfriend had given him a hawkbill knife as a gift. Any

evidence of mitigation was substantially diminished by the proof at trial and the jury was justified in giving it little weight.

All four of the factors Howell requires us to consider support a finding that the jury's consideration of the invalid aggravating circumstance was harmless error beyond a reasonable doubt. The remaining aggravator was strongly supported by the proof; the prosecutor did not target the invalid aggravator in his closing argument; no inadmissible evidence was introduced to support the invalid aggravator and the mitigating circumstances carry little weight in light of the factual proof offered at trial. In the absence of the invalid aggravating circumstance, we believe the jury would have imposed the same sentence. See Barber v. State, 889 S.W.2d 185, 188-89 (Tenn. 1994), cert. denied ___ U.S. ___, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995) (holding the application of the felony-murder aggravator harmless beyond a reasonable doubt where remaining aggravator - especially heinous, atrocious or cruel - was supported by proof that elderly victim was murdered by repeated blows to the head). The trial court did not err in ruling that the Middlebrooks error was harmless beyond a reasonable doubt.

B. Constitutionality of remaining aggravator

The appellant also challenges the remaining aggravating circumstance that the murder was "especially heinous, atrocious or cruel in that it involved torture or depravity of mind." The crux of his argument is that the trial court failed to give the jury definitions of these terms as directed by our supreme court, thus rendering the aggravator vague and uninformative. See State v. Williams, 690 S.W.2d 517 (Tenn. 1985). Appellant raised this same issue in his first post-conviction petition. Strouth v. State, 755 S.W.2d 819, 830-31 (Tenn. Crim. App. 1986). This Court found that Williams had not been applied retroactively and determined that appellant was not entitled to relief. Id. Although not fully explained, a similar challenge was apparently made in his direct appeal and rejected also. See State v. Strouth, 620 S.W.2d 467,

470 (Tenn. 1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982) (appellant alleges vagueness of the statutes and contends that the statute gives the jury “unguided and unrestrained” discretion in imposing the death penalty). As a result, we cannot again consider this issue. A court is precluded from considering any ground which has been previously determined. Tenn. Code Ann. §40-30-111 (repealed 1995). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Tenn. Code Ann. §40-30-112(a) (repealed 1995). A full and fair hearing occurs if a petitioner is given the opportunity to present proof and argument on the issue. House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 1685, 134 L.Ed.2d 787 (1996). Appellant does not contest the adequacy of the evidentiary hearing on this issue. Thus, this Court’s previous determination of this exact ground for relief cannot be reviewed again. Additionally, the applicable statute of limitations has expired on this issue.

Appellant attempts to revive this issue under the holding in Houston v. Dutton, 50 F.3d 381 (6th Cir.), cert. denied ___ U.S. ___, 116 S.Ct. 272, 113 L.Ed.2d 272 (1995). In Houston, the Sixth Circuit held that the unadorned words of the especially heinous, atrocious or cruel aggravator, without any definitional instructions, were too vague and uninformative to guide the jury. Id at 387. However, the citation to this recent authority does not change the fact that the issue has been previously determined. This Court has already passed judgment on this issue in 1986 and declined to give retroactive application to Williams. Appellant sought to appeal this decision, but the supreme court denied permission to appeal. It has already been determined and we must decline to review the issue again. Moreover, our supreme court has continued to uphold the constitutionality of this aggravating circumstance, even without the instructions suggested in Williams. See Hartman v. State, 896 S.W.2d 94, 106 (Tenn. 1995) and cases cited therein. The supreme court is the supreme judicial tribunal of the state and all other courts are constitutionally inferior

tribunals subject to its actions. Barger v. Brock, 535 S.W.2d 337, 340 (Tenn. 1976). As an inferior appellate court, we must abide by the decisions of the supreme court. Id at 341. See also State v. James Thomas Jefferson, No. 01C01-9403-CR-00084 (Tenn. Crim. App. at Nashville, May 24, 1996); State v. Davis, 654 S.W.2d 688, 690 (Tenn. Crim. App. 1983) (the supreme court's determination on an issue is conclusive and binding on this Court and all other inferior courts of this state); Presley v. State, 528 S.W.2d 52, 54 (Tenn. Crim. App. 1975) (we may not ignore the prior decisions of our supreme court and we are bound by them).⁴ This issue is without merit.

III. PROSECUTION'S CLOSING ARGUMENT

Appellant's second issue attacks the alleged impropriety of the prosecution's closing argument at the sentencing phase of the trial. He contends that it violates the Tennessee and United States Constitutions. Like the preceding issue, this claim has been previously determined and we cannot again consider it.

In appellant's direct appeal to the supreme court, he argued that the prosecution's closing argument was improper. The supreme court held that "we have carefully considered the argument and are of the opinion that the trial judge correctly ruled on objections to the argument and that, in context, the argument was within the bounds of reason." State v. Strouth, 620 S.W.2d 467, 472-73 (Tenn. 1981), cert. denied 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982). Again, in appellant's first post-conviction petition, he raised the issue in light of intervening case law. However, this Court again rejected his contentions and found the argument did not impair the appellant's constitutional rights. Strouth v. State, 755 S.W.2d 819, 832 (Tenn. Crim. App. 1986). The appellate courts' attention to this issue on two separate occasions indicates that appellant has been given more than one opportunity to

⁴Appellant also attacks a menagerie of other alleged errors that were claimed and decided in his first post-conviction petition. His contention is that the invalid felony-murder aggravator somehow revives these claims or makes them more egregious and that they require reversal of the death sentence. This argument is without merit. The issues were decided previously and cannot be brought again. See Tenn. Code Ann. §40-30-111 (repealed 1995).

present evidence and argument on the issue. As such, the issue is previously determined. See House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 1685, 134 L.Ed.2d 787 (1996). We are precluded from considering it again. Tenn. Code Ann. §§40-30-111 and 112(a) (repealed 1995). Any prohibitions on closing argument found in State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) are not new rules of constitutional law and do not give rise to any new claims under appellant's current post-conviction petition. This issue is without merit.

IV. ALLEGED BRADY VIOLATIONS

Appellant's third issue alleges suppression of exculpatory evidence by the prosecution in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The issue was not raised previously because appellant claims that he discovered such evidence only after his attorney was permitted in 1995 to examine the files kept by the District Attorney. He classifies the evidence into three categories: (1) evidence of other suspects; (2) information about the motivation of witnesses; (3) evidence that the co-defendant Jeffrey Dicks actually killed the victim. We do not find that the State suppressed any material exculpatory evidence in violation of Brady.

In order to substantiate a due process violation under the rule of Brady, an appellant must demonstrate: (1) the State suppressed the information; (2) the information must have been favorable to the accused; and (3) the information must have been material.⁵ State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995) (citations omitted). See also State v. Philpott, 882 S.W.2d 394, 402 (Tenn. Crim. App. 1994) and State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992). The burden of showing this constitutional violation falls on the appellant and requires a showing that the omission is so significant as to deny the defendant the right to a fair trial. Edgin,

⁵An additional requirement, that the defendant request the information, was also discussed by our supreme court. Edgin, 902 S.W.2d at 389. The record before us does not contain the technical record from the trial court for appellant's trial. Therefore, we are unable to ascertain whether a request for such information was made pursuant to Brady. However, for purposes of this appeal, we will assume that his trial counsel made such a motion. Furthermore, the United States Supreme Court has held that the test for materiality applies irrespective of such a request. Kyles v. Whitley, 514 U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

902 S.W.2d at 389 (citations omitted). Appellant fails to satisfy the three prongs of the test for any category of evidence and we find this issue to be without merit.

The first category of alleged Brady material is evidence that law enforcement officials had other suspects whom they investigated during the course of the investigation of Keegan's murder. We fail to see how such evidence is exculpatory of the appellant. Notes from law enforcement officials reflect that after investigating these persons and verifying certain information, they were eliminated as suspects. Obviously, there was insufficient evidence and information available to charge these persons with a crime and they could not have exonerated the appellant. Any claim that trial counsel did not know specifically of two suspects and their possible motive is irrelevant. At appellant's trial, his defense attorney questioned a police detective about the presence of twelve (12) other suspects in the case and mentioned one by name. The detective admitted there were at least that many suspects. Therefore, evidence of other suspects was presented to the jury and appellant was indeed aware that other suspects were considered.

Appellant's claim that the State suppressed evidence relevant to the credibility of certain witnesses also fails to satisfy the three prongs of a Brady violation. Betty Dicks, the wife of the co-defendant, testified at appellant's trial about incriminating statements appellant made to her concerning the murder. The jury was aware that Ms. Dicks was the wife of the co-defendant and this was certainly relevant to her credibility. However, appellant now argues evidence that Dicks' mother had threatened court officials and possibly attempted bribery of witnesses to protect her son was relevant to Betty Dicks' testimony. We note that evidence impeaching a witness' credibility may be exculpatory within the meaning of Brady. Hartman v. State, 896 S.W.2d 94, 101 (Tenn. 1995) (citations omitted). However, Dicks' mother was not a witness and never testified at appellant's trial. As such, the information was irrelevant to Betty Dicks' testimony and could not have been used for impeachment purposes. The alleged nexus between the two is far too remote.

Appellant also alleges that exculpatory evidence about Barbara Davis, appellant's girlfriend at the time of trial, was also suppressed. Davis testified at appellant's trial to certain incriminating statements he made to her. He now alleges that she recanted such testimony at Dicks' trial and that several years after appellant's conviction, she sent a letter to the district attorney denying that appellant ever made incriminating statements to her. Any evidence that came into existence after appellant's trial does not fall within the purview of Brady and cannot logically be considered suppressed by the State.

Evidence about Jeffrey McMahan's testimony was also allegedly suppressed. McMahan, a friend of the appellant who lived in North Carolina, testified that appellant told him he had killed a man in Wilmington, that he had robbed quite a few stores, and that he usually left "an empty cash register and dead bodies." Appellant contends that other information the State obtained from McMahan in a deposition for post-conviction proceedings was suppressed. Again, this is not Brady material; if the State was not aware of it prior to or at the time of trial, it could not have been suppressed.

The final category of suppressed evidence is an allegation that the State withheld evidence that appellant's co-defendant, Jeffrey Dicks, actually killed the victim. In support of this claim, the appellant relies upon a report from a polygraph examination given to Dicks; a statement by a witness who said she saw fresh blood on Dicks' shoe after the murder; and the State's argument at Dicks' trial that he committed the murder. Again, we fail to see how any of this information is exculpatory of the appellant. Evidence that a polygraph examination was administered to Dicks and that the results were "indicative of deception" does not exonerate the appellant. It diminishes the credibility of Dicks, but does nothing favorable for the appellant. The questions propounded to Dicks were irrelevant to appellant's case because they did not concern the appellant's involvement in the crime. Likewise, a statement by a witness who saw Dicks shortly after the murder and observed fresh blood on his shoe does not exonerate the appellant either. It is beyond question that both appellant and

Dicks were at the scene of the crime. Due to the tremendous amount of blood loss suffered by the victim, Dicks' presence at the scene plausibly accounts for this fresh blood. The fact that he had blood on his shoe in no way proved that he actually committed the murder. Such testimony would have led to nothing more than an inference that he was present at the scene, which was not contested at appellant's trial. Lastly, any argument the State made at Dicks' trial pinpointing him as the murderer does not fall within the purview of Brady because the argument of counsel is not evidence.

Even if we were to conclude that any of the evidence was in some way exculpatory, it does not satisfy the third prong of materiality. In order for such evidence to be material, there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995) (quoting Kyles v. Whitley, 514 U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). The Supreme Court went on to say that the

touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'

Kyles, 115 S.Ct. at 1566 (citations omitted). The Court in Kyles urged that the cumulative effect of suppressed evidence be considered to determine materiality. Id at 1567. Even if the jury had been presented with evidence of the two specific suspects and their motives, along with the allegedly impeaching information about Dicks, Davis and McMahan, and evidence of Jeffrey Dicks' deceptive answers in the

polygraph examination, we do not find that such evidence creates a “reasonable probability” of a different result. The Brady claims are without merit.⁶

V. JURY INSTRUCTIONS - MORAL CERTAINTY

Appellant next contends that the jury instruction on reasonable doubt which included the term “moral certainty” relieved the jury of its duty to find all elements of the crime beyond a reasonable doubt.⁷ It is apparent that this issue could have been raised in an earlier proceeding, either on direct appeal or in appellant’s first post-conviction petition. However, it was not. There is a presumption of waiver when a ground for relief was not raised in any prior proceeding which was held. Tenn. Code Ann. §40-30-112(b)(1) (repealed 1995). The supreme court has directed us to evaluate waiver using an objective standard under which a petitioner is bound by the action or inaction of his attorney. House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 1685, 134 L.Ed.2d 787 (1996). We must consider the issue waived for failure of appellant’s counsel to raise this issue in a prior proceeding.

VI. JURY INSTRUCTIONS - MITIGATING CIRCUMSTANCES

Appellant’s final issue asserts that the jury instructions prohibited the jury from considering a mitigating circumstance unless it was unanimously agreed upon. Similar to the above issue, appellant has waived it for failure to pursue it in an earlier proceeding. Tenn. Code Ann. §40-30-112(b)(1) (repealed 1995). Nothing in the

⁶Appellant also claims that he was denied a full and fair evidentiary hearing on this issue at the trial court level. A full and fair evidentiary hearing is one in which the appellant is given the opportunity to present proof and argument on the issue. House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 1685, 134 L.Ed.2d 787 (1996). Our review of the transcript from the post-conviction hearing reveals that the trial judge gave appellant much leniency in this lengthy proceeding. He specifically gave appellant’s counsel a recess to permit him to locate additional documents supporting these allegations and indicated his willingness to hear all of appellant’s argument. Appellant was in no way denied his right to a full and fair hearing.

⁷In support of this issue, appellant cites Caldwell v. State, No. 02C01-9405-CC-00099 (Tenn. Crim. App. at Jackson, December 28, 1994) to support his claim. He argues that this Court in Caldwell granted relief on this incorrect jury instruction. Counsel for appellant has misconstrued the holding in Caldwell. This Court in Caldwell remanded the case for an evidentiary hearing on a Fourth Amendment issue, but held that jury instructions almost identical to those in appellant’s case were proper. In addition, the supreme court subsequently overruled the remand for an evidentiary hearing. Caldwell v. State, 917 S.W.2d 662 (Tenn. 1996).

record demonstrates a reason why the issue was not raised in an earlier appeal and we must consider it waived. Tenn. Code Ann. §40-30-112(b)(2) (repealed 1995). Moreover, any attempt to pursue such a claim on the merits is fruitless. Our supreme court has repeatedly upheld the instructions in the face of similar challenges. See e.g. State v. Bigbee, 885 S.W.2d 797, 814 (Tenn. 1994); State v. Nichols, 877 S.W.2d 722, 735 (Tenn. 1994), cert. denied ___ U.S. ___, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); State v. Harris, 839 S.W.2d 54, 74 (Tenn. 1992), cert. denied 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993); and State v. Bates, 804 S.W.2d 868, 882 (Tenn. 1991), cert. denied 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 98 (1991).

VII. CONCLUSION

Upon a thorough review of the record in this case, we hold that the error in applying the felony-murder aggravator to appellant's case was harmless beyond a reasonable doubt. Likewise, none of the other issues demonstrate any infirmity in the conviction or death sentence rendered in this case. The judgment of the trial court dismissing the appellant's post-conviction petition is affirmed. Unless stayed by a court of competent jurisdiction, the appellant's sentence of death by electrocution shall be carried out on August 29, 1997.

William M. Barker, Judge

CONCUR:

John H. Peay, Judge

David G. Hayes, Judge