

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED
June 10, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

V.)

GUSSIE WILLIS VANN,)

Appellant.)

C.C.A. NO. 03C01-9602-CC-00069

McMINN COUNTY

HON. R. STEVEN BEBB, JUDGE

(FELONY MURDER - DEATH PENALTY;
INCEST)

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

In this capital case, Gussie Willis Vann appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant, Gussie Willis Vann, and his wife, Bernice Vann, were together charged in a six (6) count indictment with premeditated first degree murder, felony murder (committed in the perpetration of rape), two (2) counts of rape of a child, and two (2) counts of incest. Prior to the Defendant's trial, upon motion of Bernice Vann, the trial of Ms. Vann was severed from that of the Defendant. The Defendant's trial was held first, and at the close of all proof, the State elected to dismiss the premeditated murder count. Following jury deliberation, the Defendant was convicted of felony murder and two (2) counts of incest. Co-defendant Bernice Vann later pled guilty to accessory after the fact to felony murder, facilitation to commit aggravated rape, and aggravated child abuse and neglect and received a total sentence of twenty-five (25) years.

Following the sentencing hearing in this case, the jury found the following three aggravating circumstances to be applicable: (1) the murder was committed against a person less than twelve (12) years of age and the Defendant was eighteen (18) years of age or older; (2) the Defendant had been previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involved the use of violence to the person; and (3) the murder was especially heinous, atrocious or cruel in that it involved torture or serious bodily abuse beyond that necessary to produce death. Tenn. Code Ann. § 39-13-204(l) (1), (2), and (5) (1991). The jury also found beyond a reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances and sentenced the Defendant to death by electrocution. The Defendant was sentenced to three years on each of the incest convictions.

The Defendant raises the following issues for our review:

(1) whether the evidence was sufficient to sustain the Defendant's convictions for felony murder and incest;

(2) whether the trial court erred by failing to instruct the jury on lesser included offenses;

(3) whether the admission of evidence of other crimes, wrongs, and acts was reversible error;

(4) whether instructional errors violated the Defendant's constitutional rights;

(5) whether the trial court failed to ensure that no prejudice resulted from the extensive publicity which attended this case;

(6) whether the trial court erred in refusing to suppress evidence seized from a search of the Defendant's residence;

(7) whether the evidence was sufficient to support the application of the aggravating circumstance concerning previous violent felonies;

(8) whether the evidence was sufficient to support the application of the "heinous, atrocious or cruel" aggravating circumstance, whether the aggravating circumstance itself is unconstitutionally vague, whether the prosecution engaged in misconduct in arguing an impermissible basis for this aggravating circumstance, and whether the trial court erred in its instruction concerning this aggravating circumstance;

(9) whether the "reasonable doubt" jury instruction violated the Defendant's due process rights;

(10) whether cumulative error requires reversal of the convictions; and

(11) whether the Tennessee death penalty statute is unconstitutional.

After a review of the record, we affirm all convictions and the sentence of death.

1. FACTS - GUILT/INNOCENCE STAGE

On July 30, 1992, at approximately 11:39 p.m., paramedics were summoned to the Vann home by Bernice Vann, the Defendant's wife. According to Ms. Vann, Necia Vann, eight (8) year old daughter of Ms. Vann and the Defendant, had accidentally fallen in the bathroom and hung herself.

The State's first witness, Robert West, a paramedic supervisor, testified at trial that when he arrived at the Vann home, he found Ms. Vann crying hysterically on the front porch and the Defendant holding the victim. The Defendant appeared to be conducting CPR. The Defendant told West that he had gone to the store and when he returned, the victim had apparently choked on popcorn. West testified that the victim was clad only in panties and that when he took the panties off, a gold chain fell out. He stated that a trace of blood appeared to be coming out of the victim's vagina and that the victim's anus opening appeared to have no muscle tone whatsoever. He also observed red marks on the victim's neck.

Dr. Robert Martin, the attending physician in the emergency room, testified that the victim arrived at the hospital with no vital signs. Upon initial examination, he noticed faint bruises on the victim's neck, a slight tear at the opening of her vagina, and evidence of multiple attempts of rectal penetration. The damage to the anal area did not appear to be fresh in that it was consistent with repeated penetration, occurring for at least several months prior to his examination. He testified that in his fifteen (15) years practicing in obstetrics and gynecology, he had never seen the female rectum of a child in such a condition. He did not find a "hangman's fracture" on the neck of the victim, indicating that the victim had been strangled rather than hung. When Dr. Martin informed the victim's parents of her death, he noted that Ms. Vann was visibly upset but that the Defendant appeared "totally nonchalant" and oblivious to the fact that his daughter was dead.

Photographs of the victim as she appeared in the emergency room were admitted into evidence.

Jerry Tate, a criminal investigator with the McMinn County Sheriff's Department, testified that he had been dispatched to the emergency room of the hospital to investigate the purported suicide of an eight (8) year old girl. When he entered the emergency room, he immediately noticed markings around the victim's neck. He confirmed the physician's testimony concerning the abnormal condition of the victim's genitalia. He testified that he had requested a rape kit be administered, and then he obtained permission from Ms. Vann and the Defendant to visit the scene to investigate the victim's death. Upon arrival at the Vann residence, Mr. Tate found the home very dirty, unsanitary, and crawling with vermin. He found a strip of a sheet tied to a dresser in the victim's bedroom and testified that he wondered how a child could tie the sheet around a dresser knob. He found a sheet with a portion torn out of it in a back bedroom. He seized that sheet, bed sheets from the victim's room, and the victim's clothes as evidence. He testified that after the Defendant was arrested some two weeks later, a search warrant was obtained. Upon execution of the warrant, a pornographic videotape, several packages of condoms, various pornographic magazines, a partially used jar of Vaseline jelly, a rope tied into a noose, and a dresser were seized. Numerous photographs and items taken from the home were then introduced into evidence. On cross-examination, Mr. Tate testified that blood, saliva, pubic hair, head hair samples, and a penile swab had been taken from the Defendant on the morning after the victim was brought to the hospital. Similar samples were taken from Ms. Vann within the following two week period.

Dr. William Foree, Jr., medical examiner for McMinn County, testified that he had examined the victim at approximately 5:30 a.m. on July 31, 1992.

Although the victim was an eight (8) year old child, she looked younger as she weighed only forty-five (45) pounds and was forty (40) inches tall. He observed blood coming from both the vaginal and the rectal areas of the victim, a laceration in the vaginal area, and abrasions on her lower extremities. He noted signs of asphyxiation due to the angle of depression on the victim's neck and concluded that the cause of death was strangulation. Due to the markings on the victim's neck, he further concluded that the strangulation was performed from behind the victim.

Dr. Ronald Toolsie, a pathologist at Bradley Medical Center, testified that he had been asked by Dr. Foree to conduct the autopsy of the victim. The postmortem investigation revealed evidence of ligature strangulation consistent with the rope found in the Vann home and evidence of repeated sexual abuse, with the most recent of that abuse probably occurring at around the time of death. He testified that there was a tiny tear to the lining of the vagina and fresh bruising appeared on the inside of the vaginal wall, indicative of injuries inflicted shortly prior to the victim's death. He described the victim's anus as being dilated three or four times wider than normal and stated that the victim had suffered repeated anal penetration over some period in the past. It was his opinion that marked lack of anal muscle tone would have made rectal penetration possible without leaving any appreciable injury. On cross examination Dr. Toolsie noted that the victim's hymen was intact. On redirect, however, he stated that it was possible that penetration had taken place, although "probably not with a penis."

T.B.I. Agent Richard Brogan testified that he assisted in the investigation of the victim's death and had taken a statement from the Defendant in the early morning hours of July 31, 1992. The Defendant's statement was introduced into evidence.

Essentially, the Defendant told Brogan that he had arrived home at approximately 4:30 p.m. on July 30 and watched movies with his wife and children. The victim had gone to her bedroom and he had gone to "Mr. Zip," a local convenience store, where he bought a pack of Monarch cigarettes and two pieces of "Chico" candy sticks. Upon returning home, he undressed to take a shower when he heard Ms. Vann scream for him to come into the other room. He then ran into the hall to find Ms. Vann carrying the victim. After taking the victim into his arms, it appeared to him that she was not breathing. He instructed his wife to call 911 at a neighbor's home, and he then began CPR. The Defendant stated that when Ms. Vann returned with their neighbor, she got a blanket to cover the Defendant as he had been called out of the bathroom and had not had time to put on his clothes. When the paramedics arrived, the Defendant rode with them in the front of the ambulance, and when he reached the hospital he asked Ms. Vann what happened. According to the Defendant, she told him that she had found the victim sitting beside her dresser with a rope around her neck. However, he told hospital personnel that the victim was eating popcorn and possibly choked. He then stated that the victim had never given him any indication that she wanted to hang herself. He volunteered information that she often spent the night with her Uncle Dan, Linda Rogers, and a male friend of his, and subsequently admitted that he had been having an affair with Linda Rogers.

Ruby Crittenden, clerk at the "Mr. Zip" convenience store where the Defendant purportedly purchased cigarettes and candy on the night of the murder, testified that she did not remember seeing the Defendant in the store that evening. Cash register tapes from the time period in which the Defendant stated that he had purchased the items that evening were introduced into evidence to show that "Chico" candy sticks and cigarettes had not been purchased.

Linda Littlejohns, a T.B.I. crime lab expert in the trace evidence section, testified that she had conducted a physical comparison of the torn bed sheet found in the victim's bedroom with the remainder of the sheet found in the back bedroom. She analyzed them to see if they were the same color and if the fracture line of the frayed edges matched. Upon comparison, the sheet and piece of sheet had enough match characteristics to conclude that they had at one time been joined. However, she testified that she found no trace evidence on any of the sheet pieces or on the anal swab taken from the victim which she could connect to the jar of Vaseline jelly or unopened condoms found in the Vann residence.

Raymond Depriest, a T.B.I. expert in serology, testified that he had analyzed a pair of jeans and a t-shirt believed to have been worn by the victim on the day of the murder, as well as a hairbrush, a blue and white jumper, a penile swab, the victim's underwear, an anal swab taken from the victim, two packages of condoms taken from the Vann residence, and sheets from the victim's bed. With the exception of the sheets taken from the victim's bed, the analysis proved negative for the presence of sperm, saliva, or blood. He further determined that the semen stains found on the sheets taken from the victim's bed were consistent with the blood, saliva, and semen samples taken from the Defendant.

Chester Blythe, an expert in hair and fiber comparisons from the F.B.I. Forensic Science Training Unit, testified that he had compared the hair samples taken from the victim and Ms. Vann and concluded that hair debris found on the rope believed to have been used to strangle the victim matched that of Ms. Vann and the victim. However, the envelope labeled as containing the Defendant's hair samples had been empty, and consequently no comparison was conducted. He testified that he also conducted an examination on the torn piece of sheet taken from the Vann residence and found hairs that were microscopically similar to the hairs of the victim.

Some of the hairs had been forcibly removed. He also found a number of hairs on the bed sheet that were microscopically unlike the hair samples taken from the victim or her mother, and he testified that upon examination he concluded that they probably came from an adult.

John Mertens, an F.B.I. agent specializing in DNA analysis, testified that the DNA profiles of the semen stains found on the victim's bed sheet matched the DNA profile of the Defendant and the odds of finding another individual whose DNA profile would match those found on the sheet were one in ten thousand. The State then rested its case, and the defense moved for a verdict of acquittal on all counts. The motion was denied.

Jason Vincent Reid, a law clerk employed by Defendant's counsel, was the first witness called by the defense. He testified that earlier that morning he purchased from the "Mr. Zip" convenience store located in Riceville two (2) pieces of candy called "Chico" candy and a package of Monarch cigarettes, allegedly the same items the Defendant purchased on the evening of the murder. He submitted receipts totaling thirty-two (32) cents for the candy and one dollar and fifty cents (\$1.50) for the cigarettes. On cross examination, Mr. Reid admitted that he did not know what the price of these items would have been in 1992.

Troy Lee Jones, a neighbor of the Defendant, testified that he had assisted Ms. Vann in calling 911 on the night of the murder. He stated that in his opinion, when he arrived at the Vann residence, the Defendant was doing everything he could to save the victim's life. Ms. Vann told him that the victim had been eating popcorn and might have choked. On cross examination he stated that Ms. Vann had been hysterical and had said something about the victim hanging herself.

Sam Vann, Jr., brother of the Defendant, testified that he often visited the Defendant in the summer of 1992 and had observed the Defendant and Ms.

Vann sleeping on the couch with only bed sheets covering them. The defense then rested.

On rebuttal, Jerry Witt, a current employee of the "Mr. Zip" convenience store who had also worked for the store in 1992, testified that the price of "Chico" candy sticks had been ten (10) cents in 1992, but in 1993 the price was raised to fifteen (15) cents.

A motion for judgment of acquittal was renewed and denied, and the State chose to dismiss its premeditated murder count and proceed on the felony murder count. The jury was instructed, deliberated for approximately one hour, and found the Defendant guilty of felony murder, one count of incest by vaginal penetration, and one count of incest by anal penetration.

II. FACTS - SENTENCING PHASE

_____The State relied upon four aggravating circumstances in requesting the death penalty. The trial court directed a judgment against application of the aggravating circumstance involving a crime which was committed to avoid arrest. See Tenn. Code Ann. § 39-13-204(l)(6). The State produced the birth certificates of both the Defendant and the victim to prove that the murder was committed against a person less than twelve (12) years of age by a person eighteen (18) years of age or older, thereby supporting the applicability of the aggravating circumstance concerning the ages of the victim and the Defendant. See Tenn. Code Ann. § 39-13-204(l)(1).

The State then introduced copies of two prior judgments dated January 6, 1994. These judgments reflected that the Defendant was convicted of two counts of aggravated rape in support of the application of the aggravating circumstance concerning prior violent felonies. See Tenn. Code Ann. § 39-13-204(l)(2). The State relied on medical testimony from the guilt phase of the trial to support the applicability of the “heinous, atrocious or cruel” aggravating circumstance. See Tenn. Code Ann. § 39-13-204(l)(5).

In his own defense the Defendant testified that he came from a poor but loving family, and made a living by farming, driving a truck, and working in a carpet mill. He testified that he had been severely injured in an attempted truck hijacking in 1989, and had since suffered from seizures and a dislocated disk in his neck. He had a nervous breakdown in 1980 due to a dependance on pain medication prescribed for a back injury. He testified that he married Ms. Vann in 1982, but after the birth of their first child she had “gone to pieces.” He stated that he had been the

primary caretaker of the victim and her three (3) siblings. He then declared his innocence.

Eston Allen Gene Vann, brother of the Defendant, testified that the Defendant and his father had never gotten along because the Defendant was “not wanted,” and the Defendant’s father had often beaten him with a broom handle. The Defendant’s children had appeared to love him, especially the victim, and the Defendant had been the primary caretaker of the children.

Lisa Marie McMahan, sister of the Defendant, testified that the Defendant had always helped provide for his brothers and sisters. She stated that she believed her brother was definitely not guilty. The defense then introduced, by stipulation, medical records from Moccasin Bend concerning the Defendant’s treatment for depression and suicidal tendencies.

Closing arguments were presented, and the jury was instructed. The jury found the three aggravating circumstances to be applicable, found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, and concluded that the punishment should be death.

III. ANALYSIS

1. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT’S CONVICTIONS FOR FELONY MURDER AND TWO COUNTS OF INCEST.

The Defendant contends that the evidence was insufficient to sustain the Defendant’s convictions for felony murder and incest. First, the Defendant argues that the evidence failed to prove he was the perpetrator of the crime. He states that the proof was entirely circumstantial and the circumstances were not so

strong and cogent as to exclude every other reasonable hypothesis by a reasonable doubt. He asserts that the State failed to exclude the reasonable hypothesis that Ms. Vann committed the murder. Second, he contends that the evidence failed to prove that the killing was committed in furtherance of a rape.

When the sufficiency of the evidence is questioned on appeal, the standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). This means that the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from it. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Likewise, the determination of the weight and credibility of the testimony of witnesses and reconciliation of conflicts in that testimony are entrusted exclusively to the trier of fact, in this case, the jury. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). Further, the standard for appellate review is the same whether the conviction is based upon direct or circumstantial evidence. State v. Johnson, 634 S.W.2d 670, 672 (Tenn. Crim. App. 1982).

An offense may be proven by circumstantial evidence alone. Price v. State, 589 S.W.2d 929, 931 (Tenn. Crim. App. 1979). However, where a conviction is based upon entirely circumstantial evidence, as the State concedes in this case, the jury must find that the proof is not only consistent with the guilt of the accused but inconsistent with his innocence. There must be an evidentiary basis upon which the jury can exclude every other reasonable theory or hypotheses except that of guilt. Pruitt v. State, 3 Tenn. Crim. App. 256, 460 S.W.2d 385, 390 (1970).

In this case, the evidence against the Defendant began with his own statements. His account of his whereabouts on the evening of the victim’s death

was directly contradicted by the testimony of the store clerk and the cash register receipts showing that the items he claimed to purchase had not been purchased. He also made odd comments, unrelated to the event, concerning other individuals when he stated that he never suspected that his daughter would commit suicide but that she had on a few occasions spent the night with her Uncle Dan, Linda Rogers, and a male friend of his. He also admitted to having an affair with Linda Rogers.

The jury could certainly have viewed his statements as self-serving and an attempt to deflect suspicion. He was seemingly offering other suspects who could have raped his daughter and some explanation for why he would have no sexual motive to rape her.

The behavior of the Defendant before and after being told of the victim's death also supported the State's theory. The Defendant told the paramedic at the scene that the victim had apparently choked on popcorn. However, the autopsy revealed that no popcorn was ingested by the victim. Dr. Martin, the emergency room physician, described the Defendant as "really cool" and "totally oblivious to the fact that he was just informed that his daughter was dead."

The medical evidence also pointed to the Defendant as the perpetrator. Dr. Toolsie, the pathologist who performed the autopsy on the victim, testified that the tearing of the muscle tissue in the victim's neck could only have resulted from the exertion of great force upon the victim. When asked if it would have been possible for a woman to exert such force, his response was that "[i]t would depend on how athletic she is."

Although Chester Blythe, the F.B.I. expert in hair and fiber comparisons, testified that hair found on the rope believed to have been used to strangle the victim matched those of Ms. Vann and the victim, hair samples taken from the Defendant were apparently lost. Consequently, no comparison was conducted.

In essence Defendant's argument is that either Bernice Vann or Defendant killed Necia Vann in the perpetration of rape, to the mutual exclusion of each other. He argues that the preponderance of the evidence indicates Bernice Vann committed the homicide.

With the jury being entitled to reject Defendant's alibi in his statement due to contradictory testimony contained in this record, the proof overwhelmingly shows that Defendant and his wife were the only adults present in the home when Necia Vann died. Furthermore, the jury was entitled to infer from the evidence that an adult male exerted the excessive force necessary to do the damage resulting from the ligature strangulation. The proof indicates that it was Defendant's sperm on the victim's bed sheet. It was the Defendant who was essentially nude with the victim when a neighbor and paramedics arrived. The jury, as the trier of fact, was entitled to reject certain evidence brought out through Defendant's cross-examination and direct examination which attempted to give an innocent explanation of the incriminating evidence against him.

In Pruitt v. State, supra, this Court quoted from Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958), wherein it held,

Weight of circumstantial evidence is a question for the jury to determine. The 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.

Pruitt at 391.

The most damaging evidence against the Defendant was perhaps the medical testimony related to the sexual assault upon the victim. He asserts that the State failed to prove that the murder was committed during the commission of rape. However, much of the medical and forensic testimony supports the State's theory.

The medical examiner, the paramedic who arrived at the scene, and the criminal investigator who was dispatched to the emergency room each testified that they observed blood coming from the victim's genital area. Dr. Toolsie, the medical examiner who performed the autopsy of the victim, testified that there was evidence of repeated sexual abuse, and that there was strong evidence that the most recent of the abuse "probably occurred at about the time of death." There was a tear to the lining of the vagina, fresh bruising was apparent on the inside of the vaginal wall, and the marked lack of muscle tone in the anal area made rectal penetration possible without leaving any appreciable injury. Dr. Toolsie also testified that the magnitude of the injury, including the tearing of muscles, with associated bleeding underlying the rope mark on the victim's neck, indicated that substantial pressure must have been applied to the ligature. He testified that the magnitude of the force required to produce the injury could not have been inflicted by a child and only by a female who was quite athletic.

Physical evidence also pointed to the Defendant as the perpetrator of the sex offenses. Except for a blanket wrapped around him, the Defendant was nude when paramedics arrived at his house on the night of the child's death. Semen stains found on the victim's bed sheets matched those of the Defendant, and an F.B.I. Agent specializing in DNA analysis testified that the odds of finding another individual whose DNA profile would match those found on the sheet were one in ten thousand.

In summary, while the evidence of the elements of the crimes was circumstantial, the conduct of the Defendant, the medical evidence, and the physical evidence were proof from which the jury could have concluded that the Defendant strangled the victim during the perpetration of rape. Also, proof of anal and vaginal

penetration was sufficient to support the two convictions of incest. Accordingly, this issue is without merit.

2. WHETHER THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES.

The Defendant contends that the trial court's failure to instruct the jury on any degree of homicide other than first degree felony murder constituted reversible error. Specifically, he asserts that the trial court had a "statutory and constitutional duty" to charge the lesser included offenses of criminally negligent homicide and facilitation of a felony. In response, the State argues the proof did not establish that any lesser included or lesser grade offenses should be charged.

Pertinent facts to this issue are that the Defendant was initially indicted on one count of premeditated murder and one count of felony murder, among other offenses. At the close of all proof, the State elected to dismiss the premeditated murder count and proceed only on the felony murder count. The trial court then instructed the jury solely on first degree felony murder.

This court has concluded that the only lesser included offenses of felony murder are reckless homicide and criminally negligent homicide. See State v.

Gilliam, 901 S.W.2d 385, 391 (Tenn. Crim. App. 1995); State v. Johnnie Lamont Dalton, No. 01C01-9408-CR-00291, Davidson Co. (Tenn. Crim. App., Nashville, filed July 11, 1995)(No Rule 11 application filed). However, as conceded by Defendant, he could not be convicted of reckless homicide because the statute defining this offense did not become effective until after the commission of the instant offense.

A defendant is entitled to a jury instruction on lesser grades or classes of the charged offense as long as these lesser grades or classes of offense are supported by the evidence. State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996). According to Trusty, lesser grades or classes of any offense are established by statutory scheme. Trusty at 310-311. There was absolutely no proof in the case sub judice that the offense was committed in a state of passion produced by adequate provocation, to justify a jury instruction on voluntary manslaughter. Furthermore, it is impossible to reconcile ligature strangulation in this particular case with any theory of criminal negligence. See State v. Daniel L. Crow, No. 01C01-9110-CC-00304, Humphreys County (Tenn. Crim. App., Nashville, filed July 8, 1993) (perm. app. denied). Therefore the trial court did not err in declining to give a jury instruction on the lesser included offense of criminally negligent homicide. The evidence in the record was that the killing was committed during the perpetration of rape, or that it was an accidental choking from eating popcorn, or that the victim had committed suicide. An additional theory of Defendant was that the death occurred while he was away from the home at the convenience store. The argument by Defendant that the lesser grade or included offenses of second degree murder and facilitation of a felony were supported by the proof is mere conjecture.

Where the evidence clearly shows that the Defendant was guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of a

lesser included offense or lesser grade offense, the trial court's failure to charge on a lesser offense is not error. State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996); State v. King, 718 S.W.2d 241, 245 (Tenn. 1986); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), *cert. denied*, 112 L.Ed. 861 (1991)

The record in this case is devoid of any evidence to support a jury charge on the offenses of criminally negligent homicide, facilitation of a felony, or any other lesser grades of felony murder. See Tenn. Code Ann. §§ 39-13-212 and 39-11-403 (1991). Failure of the trial court to instruct the jury on the lesser offenses was not error. This issue is without merit.

3. WHETHER THE ADMISSION OF EVIDENCE OF OTHER CRIMES, WRONGS, AND ACTS WAS REVERSIBLE ERROR.

The Defendant next argues that a photograph depicting the victim's exterior vaginal and anal injuries and evidence concerning a pornographic video, several pornographic magazines, condoms found in the dresser in the Defendant's bedroom, and a half-empty jar of vaseline were inadmissible pursuant to Rule 404(a) and (b), Tennessee Rules of Evidence. He argues that even if admissible, the probative value of the evidence was "substantially outweighed" by its prejudicial effect pursuant to the standard set forth in State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978).

During the emergency room physician's testimony a photograph of the victim's rectum and vaginal area was introduced into evidence. Although Dr. Martin, the emergency room physician, testified that the damage to the anal area was not fresh in that it was consistent with abuse that had been ongoing for several months, the pathologist who performed the autopsy, Dr. Toolsie, testified that the postmortem investigation revealed evidence of repeated sexual abuse, the most recent of which

probably occurred around the time of death. Dr. Toolsie further testified that there had been a tear to the lining of the vagina and that fresh bruising appeared on the lining of the vaginal wall. Dr. Toolsie and Dr. Foree, the medical examiner for McMinn County, also testified that they observed blood coming from both the vaginal and rectal areas of the victim when they conducted their examinations.

The Defendant contends that the evidence concerning past incidents of sexual abuse was evidence of other crimes that was inadmissible pursuant to Rule 404(b), Tennessee Rules of Evidence. The rule, in pertinent part, provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes.

To be admissible, a photograph must be relevant to some issue at trial, and its prejudicial effect must not outweigh its probative value. State v. Banks, 564 S.W.2d at 951. The discretion of a trial judge in allowing the admission of a photograph into evidence will not be overturned absent a clear showing of an abuse of discretion. State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994); State v. Bordis, 905 S.W.2d 214, 226 (Tenn. Crim. App.1995)(citations omitted).

We conclude that in this case it was not error to admit the photograph of the victim's vaginal and rectal area. Although somewhat graphic, the photograph was relevant to establish the nature of the injury and to corroborate the pathologist's testimony concerning how the victim could have been penetrated anally at the time of the murder without appreciable mark or injury. This evidence was relevant in proving that the killing was committed in furtherance of rape.

Equally without merit is the Defendant's assertion that the testimony of Officer Tate concerning pornographic materials, vaseline, and condoms seized from

the Defendant's home was inadmissible evidence of prior bad acts. At trial, Officer Tate testified that two (2) weeks after the murder he and Investigator Alley obtained a search warrant for the Defendant's residence. Upon execution of the warrant, Officer Tate stated that he found a pornographic video entitled "Satin Finish," a half-empty jar of vaseline, a rope, several pornographic magazines, and several unused condoms in the home. The Defendant then moved for a mistrial based upon the fact that the trial court had reserved ruling on the admissibility of the tape and pictures from the tape and the State had nonetheless pursued this line of questioning. The trial court denied the motion.

The Defendant asserts that the testimony of Officer Tate prejudiced the Defendant by portraying him as a sexual deviant. However, a review of the record indicates that the State did not elicit the testimony of Officer Tate in regard to the contents of the videotape and the magazines but rather attempted to cut it off. Though we do not agree with the State that the evidence was clearly admissible and was "hardly the sort to inflame the jury," we conclude that any error in this instance was harmless. The tape and magazines were not presented to the jury, and the investigator was not allowed to go into detail in his testimony concerning the pornographic materials. Accordingly, the error does not "affirmatively appear to have affected the result of the trial on the merits." Rule 52(a), Tenn. R. Crim. P.

4. WHETHER INSTRUCTIONAL ERRORS VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

The Defendant contends that the trial court erred by (a) refusing to instruct the jury that the State's case was entirely circumstantial; (b) instructing the jury that it could convict the Defendant of murder if "his act or failure to act...unlawfully contributed to the death of the deceased;" (c) instructing the jury that "the burden of proceeding by offer of proof is upon the Defendant to show that death resulted from some other cause not attributable to the Defendant;" and (d) instructing the jury that it could convict the Defendant of rape, and hence, of felony murder, based on evidence of anal penetration of the deceased. We find these complaints to be without merit.

(A) REFUSING TO INSTRUCT THE JURY THAT THE STATE'S CASE WAS ENTIRELY CIRCUMSTANTIAL.

At the conclusion of the guilt phase of the trial, the Defendant requested the trial court to instruct the jury that there had been no direct evidence presented linking the Defendant to the charged offenses. The trial court refused such request and instead gave the following instruction:

The guilt of the Defendant as well as any fact required to be proved may be established by direct evidence, by circumstantial evidence, or by both combined.

Direct evidence is defined as evidence which proves the existence of the fact in issue without inference or presumption. Direct evidence may consist of testimony of a person who has perceived by the means of his senses the existence of a fact, sought to be proved or disproved.

Circumstantial evidence consists of proof of collateral facts and circumstances which do not directly prove the fact in issue but from which that fact may be logically inferred.

When the evidence is made up of entirely circumstantial evidence, then before you would be justified in finding the Defendant guilty, you must find that all the essential facts are consistent with the hypothesis of guilt,

as that is to be compared with all the facts proved; the facts must exclude every other reasonable hypotheses except that of guilt; and the facts must establish such a certainty of guilt of the Defendant as to convince the mind beyond a reasonable doubt that the Defendant is the one who committed the offense. It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together, must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the Defendant, and no one else, committed the offense.

These instructions were taken from the Tennessee Criminal Pattern Jury Instructions, 37.06, and are accurate statements of the law. Marable v. State, 203 Tenn. 440, 313 S.W.2d 451, 456-57 (1958). Where the trial court's instructions on a matter are proper, its denial of a special request is not error. Shell v. State, 584 S.W.2d 231, 235 (Tenn. Crim. App. 1979). We conclude that the trial court's thorough instruction of the law was sufficient to counter the Defendant's request for a specific instruction that the State's case was based entirely upon circumstantial evidence. This issue is without merit.

(B) THE "PROXIMATE CAUSE" INSTRUCTION

The Defendant also contends that the trial court's instruction as to proximate cause relieved the prosecution of its burden of proving criminal intent and deprived the Defendant of his right to a unanimous jury verdict. He first maintains that the trial court's instruction contradicted the felony murder instruction by permitting a murder conviction based on an act or failure to act which "unlawfully contributed" to the death of the victim rather than the felony murder requirement that he "unlawfully killed" the victim.

The instruction in question was taken practically verbatim from the Tennessee Criminal Pattern Jury Instructions, 42.14, regarding “cause of death” which was in existence at the time of trial, and stated as follows:

Before the Defendant can be convicted of any degree of homicide, the State must have proven beyond a reasonable doubt that the death of the deceased, Necia Vann, was brought about as a result of the criminal agency of the Defendant; that is, that the death of the deceased was due to the unlawful act of the Defendant.

One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependant upon and arising out of the original cause.

To convict the Defendant, it is not necessary that his act or failure to act be the sole cause, nor the most immediate cause of death. It is only necessary that the Defendant unlawfully contributed to the death of the deceased.

Death following a wound from which death might ensue, inflicted with intent to kill, is presumed to have been caused by such wound, and the burden of proceeding by offer of proof is upon the Defendant to show that death resulted from some other cause not attributable to the Defendant. However, while the burden of proceeding may shift, the burden of proof never shifts and is always upon the State to prove beyond a reasonable doubt that the death of the deceased was brought about by the unlawful act of the Defendant.

If you find the Defendant’s acts, if any, did not unlawfully cause or contribute to the death of the deceased, or if you have a reasonable doubt as to this proposition, then you must acquit him.

Again we conclude that these jury instructions were accurate statements of the law at the time of trial, and the trial court gave correct instructions as to the elements of felony murder in such a manner as to avoid confusing the jury. We also find that the Defendant’s complaint that the instruction precluded a unanimous verdict is without merit.

(C) THE “BURDEN SHIFTING” INSTRUCTION

The Defendant asserts that the fourth paragraph of the above mentioned instruction is unconstitutional in that it shifted the burden of proof to the Defendant. Specifically, the Defendant argues that the portion of the instruction stating that the “burden of proceeding by offer of proof is upon the Defendant to show that death resulted from some other cause not attributable to the Defendant” confused the jury and shifted the burden to the Defendant to prove that his wife committed the murder. Although a similar instruction has recently met disapproval in State v. Ruane, 912 S.W.2d 766, 776 (Tenn. Crim. App. 1995), it is settled law that a single instruction to a jury may not be viewed in isolation but must be viewed in the context of the overall charge. See State v. Bolin, 678 S.W.2d 40, 43 (Tenn. 1984). In this case, as admitted by the Defendant in his brief, the trial court fully explained that the burden of proof is always upon the State to prove that “the death of the deceased was brought about by the unlawful acts of the Defendant.” We therefore conclude that when taken in the overall context, even if the instruction was given in error, the error was harmless. This issue is also without merit.

(D) THE “SEXUAL PENETRATION’ INSTRUCTION

The Defendant next asserts that the trial court’s instruction on sexual penetration was in error. Specifically, he asserts that because the court defined sexual penetration as “[a]nal intercourse, or any other intrusion, however slight of . . . [t]he anal opening of another person’s body,” the jury could thereby convict the Defendant of felony murder based on evidence of anal penetration. He contends that the jury should not have been allowed to convict the Defendant of felony murder based on anal penetration because the evidence of anal penetration was based upon past incidents of sexual abuse not connected with the murder.

The Defendant has quoted in his brief only part of the trial court's instruction which in its entirety states the following:

Sexual penetration means sexual intercourse, or any other intrusion, however slight, of any part [sic] of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

The Defendant is thereby incorrect in asserting that the trial court instructed the jury that only evidence of anal penetration would allow him to be convicted of felony murder. Moreover, we have previously determined that the evidence was sufficient to convict the Defendant of felony murder and incest by anal penetration. This issue is without merit.

5. WHETHER PRETRIAL PUBLICITY PREJUDICED THE DEFENDANT.

The Defendant next claims that the trial court erred in failing to change venue, in failing to inquire regarding the nature of each juror's exposure to prejudicial publicity, and in failing to admonish the jury pursuant to Rule 24(f), Tenn. R. Crim. P. We disagree.

(A) CHANGE OF VENUE

The Defendant contends that the trial court erred by denying his motion for a change of venue due to pretrial publicity. He claims that because only four (4) prospective jurors in the entire venire had not heard of the case and the trial court excused more than twenty-five (25) persons initially for cause, the trial court should have been aware of the prejudicial nature of the pretrial publicity and should have granted the motion. In support of his argument, the Defendant cites State v. Hoover, 594 S.W.2d 743 (Tenn. Crim. App. 1979). The matter of change of venue

addresses itself to the sound discretion of the trial court, and a denial of a change of venue will only be reversed on appeal for an affirmative and clear abuse of discretion. State v. Bates, 804 S.W.2d 868, 877 (Tenn. 1991), *cert. denied*, 502 U.S. 841 (1992). In this case we find no abuse of discretion on the part of the trial court.

In Hoover, 594 S.W.2d at 746, this court listed a group of seventeen (17) factors to be considered in determining whether to grant a change of venue. Among these are the nature, extent, and timing of the pretrial publicity, the degree of care exercised in the selection of the jury, the venire's familiarity with the publicity and its effect upon them as shown through their answers on voir dire, and the Defendant's utilization of his peremptory challenges.

In this case, we conclude that the trial court carefully and meticulously orchestrated the jury selection process to insure the Defendant a fair trial. He instructed the prospective jurors as to their responsibilities, questioned them extensively as to pretrial publicity, excused jurors for cause, and allowed *voir dire* in panels of three (3) prospective jurors. Moreover, the Defendant only exercised five (5) of his fifteen (15) peremptory challenges. This issue is without merit.

(B) FAILURE TO INQUIRE AS TO THE NATURE OF EACH JUROR'S EXPOSURE TO PRETRIAL PUBLICITY.

The Defendant asserts that no efforts were made to assess the likelihood of prejudice from pretrial exposure and that the trial court should have been exceptionally vigilant to ensure that prospective jurors had not been exposed to inadmissible matters contained in the media reports. However, as previously stated, we conclude that the trial court thoroughly discussed the presumption of innocence and the State's burden of proof with each of the potential jurors. Each of

the jurors who served on the jury indicated that they either had no prior opinion of the case or that they could set that opinion aside. This issue is without merit.

**(C) FAILURE TO ADMONISH THE JURY PURSUANT TO RULE 24(f),
TENN. R. CRIM. P.**

The Defendant contends that the trial court erred in admonishing the jury only once. He contends that the admonishment given the evening before the trial commenced and before the jury was sworn was insufficient to protect against the risk that the jurors would be exposed to media coverage of the case. We disagree.

When the potential jury was selected, the trial court instructed the jury as follows:

At this point since we have a jury, and I want to say to you that you are embarking upon tomorrow morning a case that is very important, very important to the State of Tennessee and very important to Gus Willie Vann, and as I said to you this morning, all I ask and that we all ask is that you try your very best to do what you believe justice is under the facts of this case, that you listen hard to the evidence and make the best decision you can make and we will all be happy. Since at this point the jury has not been sworn and no evidence has been presented we are going to allow you to go to your home this evening. However, let me say to you that you need to feel as if you were under oath because these lawyers in both sides are depending on you for justice, as well as Mr. Vann and the witnesses that the State is using in their prosecution. They and myself are depending on you for justice. And in order to do justice I would ask that you refrain tonight from watching the television news reports, from reading the newspapers, and discussing this case with your spouse or girlfriend or boyfriend. I don't mean you can't say, 'I'm on the jury,' but I think that needs to be it really. One of the hardest things that you will be required to do I guess is not talk about it. But just tell them, if it [is] your friends or somebody who wants to know, or your husband or wife, 'Hey, I've been instructed not to talk about it and I will tell you about it when its over.'

Here, the trial court was commendably concerned that the jury understand its duty to not discuss the case. The trial court had previously spent a great deal of time during *voir dire* insuring that the jurors had not formed and would not form an opinion until the case was submitted to the jury. The Defendant has failed to show that any of the jurists who actually sat on the case were prejudiced by any publicity or the trial court's failure to repeatedly admonish them. See State v. Garland, 617 S.W.2d 176, 187 (Tenn. Crim. App.1981); State v. Kyger, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). This claim is also without merit.

6. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS.

The Defendant next claims that the admission of evidence taken from his home pursuant to a defective search warrant should have been suppressed. He contends that the warrant was fatally defective in that it did not show a time sequence as to when the victim died nor a nexus to any incriminating evidence to be found in the home.

On August 14, 1992, a warrant was issued for a search of the Vann residence. Several items taken pursuant to the search were admitted into evidence at trial. The affidavit in support of the warrant stated that the victim had been "chronically sexually abused, both anally and vaginally;" that the pathologist who examined the victim determined that sexual penetration of the victim occurred within forty-eight (48) hours of death; that a sworn statement of another child had been obtained indicating that Bernice Vann procured a vibrator from "the bathroom;" that the Defendant told several people that no semen would be found on the victim; that Bernice Vann indicated that a rope had been about the victim's neck and that "that rope or other material used in strangulation of the child may provide required

evidence to further establish the manner in which death was inflicted.” The very next sentence stated that “[t]he mobile home of Gussie Willis Vann and Bernice Vann is equipped with a satellite dish which provides access” to adult television programming. The affidavit also stated that photographs of the “death scene” had shown videotapes which appeared to have been non-commercially copied, an open jar of vaseline, and a booklet titled “How to Help Your Kids Say No To Sex.”

The Defendant relies upon the Supreme Court’s decision in State v. Longstreet, 619 S.W.2d 97 (Tenn. 1981), for the proposition that the search warrant was defective because it failed to show a nexus between any incriminating evidence found regarding the victim’s death and the Vann residence. In Longstreet, law enforcement officers obtained a warrant to search the defendant’s vehicle after a shooting. The supporting affidavit was based partially on information from the victim’s uncle which established the victim and the defendant were dating and had recently argued. The victim’s uncle also related that he loaned the defendant a .22 caliber rifle shortly before the shooting. Officers searched the defendant’s vehicle and found the weapon.

It was later discovered that the affidavit in support of the search warrant contained a false statement by the police officer making the oath. He stated that he had received information from the uncle “within the past twenty-four hours” which was proven to be false. There was also nothing in the affidavit which would establish probable cause to believe that the gun was in the defendant’s car. The court affirmed the intermediate appellate court’s holding that the search warrant was defective.

An affidavit is an indispensable prerequisite to the issuance of any search warrant. Tenn. Code Ann. § 40-6-103. Before a search warrant is issued, the issuing magistrate must make a practical common sense decision as to whether,

given all of the circumstances set forth in the affidavit, that there is a reasonable probability that evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). An affidavit supporting a search warrant must be reviewed in a common sense, non-hyper technical fashion. State v. Moon, 841 S.W.2d 336, 339 (Tenn. Crim. App. 1992).

In the case before us, we conclude that the affidavit sufficiently provided a nexus between the Vann home and incriminating evidence of the crime. Medical examiners had reported that the victim had suffered multiple incidents of sexual abuse, one such episode occurring around the time of her death. Photographs of the scene where the victim died had shown sexually explicit materials. A reliable source told officers that she had seen a vibrator in the home. The wife of the Defendant indicated that a rope had been about the victim's neck. Read in a "common sense" fashion, the affidavit established that the Vann residence was the death scene and that items connected to the rape and murder could be found there. This issue is without merit.

7. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FINDING OF THE “PRIOR VIOLENT FELONY” AGGRAVATOR.

_____The Defendant argues that the introduction of his two (2) prior convictions for aggravated rape are insufficient to support the jury’s reliance on the aggravating circumstance which states that “[t]he Defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person.” Tenn. Code Ann. § 39-13-204 (1)(2). The Defendant contends that since aggravated rape may be proved by a showing that there was unlawful sexual penetration of a victim less than thirteen (13) years old, aggravated rape does not necessarily involve violence to the person.

_____At sentencing, the State relied upon two (2) judgments of conviction for aggravated rape against the Defendant. Defense counsel objected, contending that in a case of aggravated rape where the child is under thirteen, there could be a consensual relationship in which there would be no violence. The trial court overruled the objection.

The Defendant’s argument is without merit. In Hoyt v. State, 928 S.W.2d 935, 948 (Tenn. Crim. App. 1995), this court stated unequivocally that “rape is a serious offense which is injurious to both the body and mind of the victim.” The Tennessee Supreme Court has impliedly acknowledged the use of aggravated rape as an aggravating circumstance. See State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994), *cert. denied*, 115 S.Ct. 909 (1995). This issue is without merit.

8. WHETHER THE “HEINOUS, ATROCIOUS OR CRUEL” AGGRAVATING CIRCUMSTANCE WAS PROPERLY APPLIED.

The Defendant claims that the finding of Tennessee Code Annotated section 39-13-204(l)(5) aggravating circumstance was improperly applied because (a) the evidence was insufficient to support the finding; (b) the prosecution engaged in misconduct by arguing an impermissible basis for the aggravator; and (c) the jury was not instructed that, as an element of the aggravating circumstance, it must find that the Defendant specifically intended to inflict torture or serious physical abuse.

(A) INSUFFICIENT EVIDENCE

The Defendant maintains that the evidence is insufficient to support the finding of the “heinous, atrocious or cruel aggravating circumstance.” He argues that the State’s evidence established only that the cause of death was ligature strangulation, and because there was no testimony as to how long the victim would have been conscious or whether ligature strangulation causes severe pain, this aggravator was not supported by the evidence.

Tennessee Code Annotated section 39-13-204(l)(5) provides as an aggravating circumstance that “[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.” “Torture” has been defined as the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. State v. Williams, 690 S.W.2d 517, 529 (Tenn.1985). The proof in this case is that the victim died while her father, a person in a position of private trust, penetrated the victim both anally and vaginally. Thus, there is more than adequate proof of the infliction of severe mental pain upon the eight (8) year old victim.

In State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996), our Supreme Court recently held that the term “serious physical abuse” as used in the aggravator means something distinct from “torture,” that “serious” alludes to a matter of degree, and that the abuse must be physical and must be “beyond that” or more than what is “necessary to produce death.” Dr. Foree, the medical examiner, testified that he had observed blood coming from the victim’s vaginal and rectal area. He also noted a laceration in the vaginal area and abrasions on the lower extremities. Dr. Toolsie, the pathologist, testified that the sexual abuse occurred around the time of death as fresh bruising had appeared on the vaginal wall. He also testified concerning other signs of trauma to the victim which included a contusion on the scalp, a laceration on the inside of the victim’s mouth, and bruises on the lower extremes of the victim’s body. The knot on the victim’s head was an inch in diameter. In describing the neck injury and cause of death he determined that “[t]he magnitude of this muscle injury [the strangulation] with associated bleeding indicates that the pressure that must have been applied to the ligature was very substantial.” The strangulation was such that it tore the muscles in her neck. He stated that “muscles are very resilient organs . . . [which] are not prone to being torn very easily at all This was a violent strangulation.”

In reviewing the evidence in the light most favorable to the State as mandated by the Supreme Court’s ruling in Jackson v. Virginia, 443 U.S. 307, 319 (1979), we conclude that a rational trier of fact could certainly have found that the murder was heinous, atrocious, or cruel beyond a reasonable doubt. This issue is without merit.

(B) PROSECUTORIAL MISCONDUCT

The Defendant also contends that the prosecutor engaged in misconduct in referring to “the repeated, repeated, repeated anal abuse of this child” when arguing for the application of the “heinous, atrocious or cruel” aggravator.

In successful claims of prosecutorial misconduct, the Defendant must show that the argument was so inflammatory or the conduct so improper that it affected the verdict to his detriment. Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (Tenn. 1965). In reviewing an allegation of improper conduct, this court should consider several factors including the intent of the prosecutor, the curative measures undertaken by the court, the improper conduct viewed in context and in light of the facts and circumstances of the case, the cumulative effect of the remarks with any other errors in the record, and the relative strengths and weaknesses of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). The trial judge has wide discretion in controlling the argument of counsel. This discretion will not be interfered with on appeal in the absence of abuse thereof. Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975).

During closing argument in the penalty phase, the prosecutor made the following argument to the jury:

The third is that the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. You have also received evidence of that in this trial. This is the evidence you have received, these neck injuries, of what was necessary to produce death. You have also received into evidence other injuries that go beyond that necessary to produce death. These are just a few: the doctors have testified, the pathologist and others testified, there is the contusion to the head, there is the injury to the vaginal area that was probably under the evidence you heard contemporaneous or close to death, but there was repeated, repeated, repeated anal abuse of this child. There were fading injuries that have been testified too [sic]. There was a cut lip. All of this is evidence that at this

point in this trial stands uncontradicted as to these injuries, and they were beyond that necessary to produce death.

The Defendant failed to contemporaneously object resulting in waiver of this issue. Tenn. R. Crim. P. 52(a); *see* Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988), *cert. denied*, 493 U.S. 874 (1989); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). However, in addressing the merits, we conclude that when viewed in its entirety, the prosecutor's closing argument did not rise to the level of prosecutorial misconduct.

(C) IMPROPER JURY INSTRUCTION

Citing State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985), the Defendant maintains that the jury was improperly instructed on this aggravator because the instruction omitted “any requirement that the jury find that severe physical or mental pain was ‘willfully’ inflicted by the Defendant.” The following instruction, in pertinent part, was given by the trial court:

Tennessee law provides that no death penalty shall be imposed by a jury but upon a unanimous finding that the State has proven beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances which shall be limited to the following:

- . . .
- (3) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.

You are instructed that the word:

. . .

‘Torture’ means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.

The Defendant has misconstrued the holding in Williams. No saving restriction that the Defendant must have “willfully” inflicted severe pain on the victim

was placed upon Tennessee Code Annotated section 39-13-204(l)(5), but rather the court has repeatedly held that the instruction sufficiently narrows the class of death-eligible defendants. See State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996); State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991); State v. Cazes, 875 S.W.2d 253, 267 (Tenn. 1994), *cert. denied*, 115 S.Ct. 743 (1995). This issue is without merit.

9. WHETHER THE “REASONABLE DOUBT” INSTRUCTION VIOLATES DUE PROCESS.

The Defendant contends that he was denied his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the jury was unconstitutionally instructed concerning the meaning of “reasonable doubt” at the guilt and sentencing phase of the trial. However, as the Defendant accurately notes, the Supreme Court and this court have consistently upheld the constitutionality of the instruction. See State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), *cert. denied*, 115 S.Ct. 909 (1995); State v. Michael Dean Bush, ___ S.W.2d ___, No. 03S01-9603-CC-00047, slip op. at 29-32, Cumberland Co. (Tenn., April 7, 1997)(for publication)(petition for reh’g, filed 4/14/97). This issue is also without merit.

10. WHETHER THE CUMULATIVE EFFECT OF ALL ERRORS VIOLATES THE DEFENDANT’S CONSTITUTIONAL RIGHTS.

The Defendant contends that the cumulative effect of all errors alleged both at trial and at sentencing violates his constitutional rights. However, as this court finds no reversible error with respect to the Defendant’s prior issues, this issue is without merit also.

11. WHETHER TENNESSEE’S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The Defendant submits that the “Tennessee death penalty statute and the imposition of the sentence of death in this State violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 8, 9, 16 and 17, and Article II, Section 2 of the Tennessee Constitution” because (a) the statute fails to narrow the class of death-eligible defendants; (b) the sentence is imposed arbitrarily and capriciously; (c) electrocution is cruel and unusual punishment; and (d) the appellate review process is constitutionally inadequate. Defendant has acknowledged in his brief “that the majority of the issues raised” regarding the constitutionality of the Tennessee death penalty statute have been decided adversely to his arguments by the Tennessee Supreme Court. Defendant also admits he raised the issues “in order to preserve them for later review.”

(A) THE STATUTE FAILS TO NARROW THE CLASS OF DEATH ELIGIBLE DEFENDANTS.

The Defendant first asserts that the aggravating circumstances set forth in Tennessee Code Annotated section 39-13-204, “have been so broadly interpreted that they fail to provide such a ‘meaningful basis’ for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death” as mandated in Furman v. Georgia, 408 U.S. 238, 313 (1972). We disagree.

(1) THE “PRIOR VIOLENT FELONY” AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL.

The Defendant contends that this aggravating circumstance is overly broad and contrary to the legislative intent in the manner in which it interprets “prior

conviction” for purposes of capital sentencing. However, this issue has been previously addressed by our Supreme Court in State v. Caldwell, 671 S.W.2d 459, 465 (Tenn. 1984), as correctly noted by the Defendant in his brief, in which “prior conviction” was defined as the date of the conviction for purposes of capital sentencing, and, therefore, is neither overly broad nor contrary to legislative intent. This issue is without merit. See also State v. Nichols, 877 S.W.2d 722, 736 (Tenn. 1994), *cert. denied*, 115 S.Ct. 909 (1995).

**(2) THE “AVOIDING, INTERFERING WITH, OR PREVENTING THE
LAWFUL ARREST OR PROSECUTION OF THE DEFENDANT”
AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL.**

The Defendant maintains that because this circumstance has been applied in cases where a victim “could have identified the perpetrator” the circumstance in itself does not sufficiently narrow the population of death eligible defendants. The trial court directed a judgment against the application of this aggravating circumstance. Therefore, this circumstance was neither found by the jury nor charged in this case, and the issue is moot.

**(3) THE “HEINOUS, ATROCIOUS, OR CRUEL” CIRCUMSTANCE
IS VAGUE AND OVER BROAD.**

The Defendant asserts that this circumstance is unconstitutional in that it does not include an element of intent, but we have previously addressed this claim in this opinion and found it to be without merit. See § III(8)(C).

**(4) IN COMBINATION, SUBSECTIONS (1)(2), (5), (6), AND (7) DO
NOT NARROW THE CLASS OF DEATH ELIGIBLE DEFENDANTS.**

The Defendant argues that, in combination, these aggravating circumstances encompass the majority of homicides committed in this State, and the statute does not therefore narrow the class of death eligible defendants. Again, the Supreme Court has repeatedly rejected this argument. See State v. Keen, 926 S.W.2d at 742.

(B) THE DEATH SENTENCE IS IMPOSED CAPRICIOUSLY AND ARBITRARILY.

On multiple grounds, the Defendant asserts that the death penalty is imposed capriciously and arbitrarily, but all grounds have been previously addressed by our Supreme Court. He asserts that (1) unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty; (2) the death penalty is imposed in a discriminatory manner due to economics, race, geography, and gender; (3) there is a lack of uniform standards for jury selection; (4) the death qualification process skews the make-up of the jury and results in a prosecutorially prone jury; (5) defendants are prohibited from addressing jurors' misconceptions about such matters as cost of incarceration versus execution, deterrence, and method of execution; (6) the jury is required to agree unanimously in order to impose a life sentence; (7) the jury is required to unanimously agree that mitigating circumstances are applicable in violation of Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990); (8) the jury is not instructed on the meaning and function of mitigating circumstances; (9) the jury is not required to make the ultimate determination that death is the appropriate penalty because of the "mechanistic" procedure for guiding the jury's decision making; and (10) the defendant is denied final closing argument in the penalty phase of the trial. We find the Defendant's arguments to be without merit. They have been specifically rejected in State v. Smith, 893 S.W.2d 908, 926 (Tenn. 1994), *cert. denied*, 116 S.Ct. 99

(1995), and their substance rejected in State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990); State v. Boyd, 797 S.W.2d 589 (Tenn. 1990), *cert. denied*, 112 L.Ed. 861 (1991); State v. Teal, 793 S.W.2d 236 (Tenn. 1990); State v. Black, 815 S.W.2d 166 (Tenn. 1991); State v. Smith, 857 S.W.2d 1 (Tenn. 1993), *cert. denied*, 114 S.Ct. 561 (1994); and State v. Cazes, 875 S.W.2d 253 (Tenn. 1994).

(C) ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT.

The Defendant contends that electrocution is an unnecessarily painful and torturous form of execution. However, this issue has also been previously determined by our Supreme Court, and accordingly, we conclude that this issue is without merit. See State v. Black, 815 S.W.2d at 179.

(D) THE APPELLATE REVIEW PROCESS IS CONSTITUTIONALLY INADEQUATE.

The Defendant asserts that the appellate review process is not meaningful and is conducted in violation of due process. The Defendant notes that no death sentence has been overturned on the grounds that it was disproportionate. He attacks the absence of written findings concerning mitigating circumstances, the inadequacy of the information found in forms completed by trial courts as required by Tennessee Supreme Court Rule 12, and the lack of any published indicia or criteria for consideration which can be addressed by the Defendant.

Numerous cases, however, have held that Tennessee's proportionality review is adequate to meet State constitutional standards. See State v. Coleman, 619 S.W.2d 112, 115-16 (Tenn. 1981); State v. Barber, 753 S.W.2d 659, 663-668 (Tenn. 1988); State v. Keen, 926 S.W.2d 727, 743-44 (Tenn. 1994). Moreover, in this particular case, published opinions and available trial court reports prepared

pursuant to Rule 12 of the Tennessee Supreme Court have been reviewed, and this examination revealed that the Defendant's death sentence is neither excessive nor disproportionate considering both the nature of the crime and the Defendant. See State v. Coe, 655 S.W.2d 903 (Tenn. 1983); State v. Irick, 762 S.W.2d 121 (Tenn. 1988); State v. Cauthern, 778 S.W.2d 39 (Tenn. 1989) (death sentence reversed and remanded for new sentencing hearing on ground of trial court error in admitting statement by the defendant during sentencing hearing); State v. Keen, 926 S.W.2d 727 (Tenn. 1994) (death sentence reversed and remanded for new sentencing hearing due to error in jury instruction).

The sentence of death in this case was not imposed in an arbitrary fashion. The evidence in the record supports the jury's finding of the statutory aggravating circumstances, and that the aggravating circumstances clearly outweighed the evidence introduced to establish any mitigating factors beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206(c)(1).

12. WHETHER THE INDICTMENT CHARGING THE DEFENDANT WITH INCEST IS FATALLY DEFECTIVE.

In a supplemental brief the Defendant raises the issue of whether the indictment charging him with incest is fatally defective pursuant to this court's holding in State v. Roger Dale Hill, Sr., No. 01C01-9508-CC-00267, Wayne Co. (Tenn. Crim. App. Jun. 20, 1996) (Rule 11 application granted, Jan. 6, 1997). In Hill this court held that an indictment alleging the Defendant "did unlawfully sexually penetrate [M.H.] a person less than thirteen (13) years of age, in violation of Tennessee Code Annotated [§] 39-13-512" was "fatally defective because [the indictment] does not allege that he sexually penetrated [M.H.] intentionally, knowingly, or recklessly." Hill, slip op. at 5. The Defendant in the case at bar maintains that the indictment charging him with two (2) counts of incest did not allege the proper mens rea. We do not agree.

The indictment at issue charged the following:

GUSSIE WILLIS VANN AND BERNICE ANN VANN
on or about the 30th day of July, 1992, in McMinn County, Tennessee, and before the finding of this indictment did unlawfully engage in sexual penetration, of the vaginal opening as defined in T.C.A. 39-13-501, of Necia Vann, a person the said Defendants know to be their daughter, in violation of T.C.A. 39-15-302, all of which is against the peace and dignity of the State of Tennessee.

...

On or about the 30th day of July, 1992, in McMinn County, Tennessee, and before the finding of this indictment did unlawfully engage in sexual penetration of the anal opening as defined in T.C.A. 39-13-501, of Necia Vann, a person the said Defendants know to be their daughter, in violation of T.C.A. 39-15-302, all of which is against the peace and dignity of the State of Tennessee.

In State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993), this court held that an indictment is not fatally defective "if the elements of the offense

are necessarily implied from the allegations made.” This court, citing Marshall, recently held that “[i]f an offense is alleged in such a way that the defendant cannot fail to be apprised of the elements of the offense, the indictment is sufficient, notwithstanding the fact that an element may not be specifically alleged.” See State v. John Haws Burrell, No. 03C01-9404-CR-00157, slip op. at 31, Anderson Co.(Tenn. Crim. App., Knoxville, Feb. 11, 1997)(Rule 11 application filed, April 10, 1997).

The Defendant in this case was charged with incest. Tenn. Code Ann.

§ 39-15-302 defines the offense as follows:

(a) A person commits incest who engages in sexual penetration as defined in § 39-13-501, with a person he or she knows to be, without regard to legitimacy:

(1) The person’s natural parent, child, grandparent, grandchild, uncle, aunt, nephew, niece, stepparent, stepchild, adoptive parent, adoptive child; or

(2) The person’s brother or sister of the whole or half-blood or by adoption.

(b) Incest is a Class C felony.

Tennessee Code Annotated section 39-11-301(c) states that “[i]f the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge, or recklessness suffices to establish the culpable mental state.” The above statute and applicable definitions neither require nor “plainly dispense” with the requirement of a culpable mental state, and thus, the terms of Tennessee Code Annotated section 39-11-301(c) apply. Pursuant to the above cited case law, however, to sufficiently allege elements of the offense, the indictment must allege or “necessarily imply” that the Defendant’s sexual penetration of his daughter was done either intentionally, knowingly, or recklessly. It is our opinion that the mens rea of “knowingly” is necessarily implied by the allegation in the indictment that Defendant engaged in the sexual penetration of a person known by the

Defendant to be his daughter in violation of Tennessee Code Annotated section 39-15-302. This issue is without merit.

IV. CONCLUSION

The Defendant has offered no grounds that warrant relief from his convictions of felony murder, incest by vaginal penetration, and incest by anal penetration. Moreover, we conclude that the Defendant has failed to establish any ground warranting relief from his sentence of death. The judgment of the trial court is affirmed.

THOMAS T. WOODALL, Judge

CONCUR:

DAVID H. WELLES, Judge

DAVID G. HAYES, Judge