

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9508-CR-00232
Appellee,	*	SHELBY COUNTY
VS.	*	Hon. Joseph B. Dailey, Judge
ANTONIO M. BYRD,	*	(First Degree Murder, Especially
Appellant.	*	Aggravated Kidnapping, Aggravated Rape, Especially Aggravated Robbery)

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OPINION FILED: _____

AFFIRMED AS MODIFIED

GARY R. WADE, JUDGE

OPINION

The defendant, Antonio M. Byrd, was convicted of especially aggravated kidnapping, especially aggravated robbery, aggravated rape, and first degree murder. Seventeen years old when the offenses occurred, the defendant was sentenced to life without the possibility of parole for the murder conviction. The trial court imposed concurrent twenty-three-year sentences on the other offenses, to be served consecutively to the life term.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues on this direct appeal:

- (1) whether the trial court erred by denying the defendant's motion to suppress his pretrial statement;
- (2) whether the trial court erred by denying a change of venue;
- (3) whether the trial court erred by denying individual voir dire;
- (4) whether the trial court erred by admitting photos of the victim's body;
- (5) whether the trial court erred by allowing the state to cross-examine the defendant about criminal conduct which may have occurred after the murder;
- (6) whether the trial court gave erroneous jury instructions on criminal responsibility;
- (7) whether the trial court erred by denying the defendant's request for special jury instructions;
- (8) whether the evidence at the penalty phase was sufficient to support the enhanced sentence;
- (9) whether a juvenile may be sentenced to life without the possibility of parole under Tenn. Code Ann. § 39-13-207;
- (10) whether the trial court erred by refusing to clarify jury instructions regarding "weighing" aggravating and mitigating circumstances;
- (11) whether the trial court erred by allowing an autopsy

photograph into evidence at the sentencing hearing;

(12) whether the trial court erred by allowing the victim's stepfather to testify at the sentencing hearing; and

(13) whether the trial court erred in the application of enhancement factors and by the imposition of consecutive sentences.

The convictions are affirmed. The sentences are affirmed, except the sentence for the rape conviction is modified to twenty (20) years.

On July 7, 1993, the defendant, Barry Smith, and fifteen-year-old Jimmy Jones, visited the residence of their friend, Sammie Taylor. Jones testified that late in the afternoon, Willie Davidson telephoned to ask if anyone would like to participate in a robbery. When Willie Davidson called a second time, he discussed his plan over the speakerphone. The defendant, Smith, Jones, and Taylor were all present when Davidson suggested an armed kidnapping and theft of a car. Later in the evening, Davidson's brother, Tracy Davidson, arrived at Taylor's house. Just before dark, all except Jones left the residence together to meet with Willie Davidson at Stevin Cash's residence.

At trial, Cash testified that earlier in the day, he had assisted Willie Davidson in purchasing a gun. Cash related that once the entire group had arrived at his residence, they continued to discuss their plans to steal a car, lock the owner in the trunk, and then commit some robberies. According to Cash, there was no mention of rape or murder. Cash related that he and the five others went to a Kroger. They decided not to steal a car there because of the large number of people present. Next, they went to St. Joseph's Hospital. They decided not to steal a car there due to security cameras in the parking lot.

Cash testified that Taylor and Tracy Davidson then left the defendant and the others. While away, Taylor and Tracy Davidson kidnapped the victim, Kimberly Wilburn, at gunpoint and locked her in the trunk of her 1992 teal-green Ford Taurus. When Taylor and Tracy Davidson returned to the others, they were driving a car later determined to be that of the victim. The defendant got in the back seat. When Cash asked where the owner of the car was, Tracy Davidson responded that she was in the trunk. Cash testified that when he learned that, he decided not to get in the car.

The defendant gave a pretrial statement to the investigating officers. He claimed that after accepting a ride in the stolen vehicle, he asked who owned the car; Tracy Davidson answered, "Be quiet, she['s] in the trunk." The defendant told officers he and the others then drove around for a while before stopping for gas. The defendant admitted pumping gas and paying for it. Afterward, the men drove to a steam plant and considered what to do with the victim. The defendant claimed that he started to open the trunk to let the victim out but hesitated when he saw a car approaching; he acknowledged then shutting the trunk, getting back into the car, and riding around until the other car had passed out of sight. Shortly thereafter, the men stopped again. The defendant claimed that when the victim got out, Tracy Davidson struck her. The defendant denied striking her. In his pretrial statement, which was entered into evidence, the defendant maintained there was no agreement to kill the victim: "it wasn't decided when we got out [of] the car. It just happened. It was mentioned, but they didn't say they were going to do it. It just happened."

At trial, the defendant testified that when the others started beating the victim, he walked away. He claimed that Willie Davidson warned the others to move

out of the way before running over the victim with the vehicle; he recalled that Smith warned Willie Davidson not to do it. The defendant claimed that he turned when he heard the tires "burn rubber" and saw Davidson run over the victim with the car. The defendant, who testified that he recalled Taylor pulling at the victim's clothes, admitted that he helped Smith, Taylor, and Tracy Davidson throw her body over the edge of the bridge; he insisted that he had not touched the victim until that time. The defendant claimed that the group never intended for him to be a primary participant in the events; he did acknowledge, however, that he acted as a lookout when the others later tried to burn the interior of the car.

Dr. O. C. Smith, a pathologist, testified that the impact of the car fractured the victim's skull and ruptured the brain, causing nearly instantaneous death. The liver and spleen were also torn. The ribs and chest were crushed. The victim also had bruising on the rest of her body, most notably in the neck area. The bruising was so extensive that one bruise could not be distinguished from another. Dr. Smith also described injuries to the vaginal area that would "indicate there was a penetrating force into the vaginal area." The vaginal injuries occurred "co-contemporaneously" with the victim's other physical injuries. There was no physical evidence, such as hair samples, sperm, or saliva, that would connect the defendant to the scene of the crime or to the injuries on the victim's body.

Jimmy Jones testified that around midnight, the five men returned to the Taylor residence in the victim's car. Jones¹ related that he heard the defendant

¹According to the Shelby County Criminal Court Clerk's office, neither Jimmy Jones nor Stevin Cash were indicted for their roles in the death of Kimberly Wilburn. Sammie Lee Taylor was convicted by a jury of especially aggravated kidnapping, especially aggravated robbery, aggravated sexual battery, and felony murder. Sammie Taylor's convictions have been affirmed by this court on direct appeal. State v. Sammie Lee Taylor, No. 02C01-9501-CR-00029 (Tenn. Crim. App., at Jackson, October 10, 1996). He received life without the possibility of parole for the

say to Tracy Davidson, "I think I hurt my hand when I hit her." Jones observed the defendant help remove items from the car and put several items in a bag. Later, Jones saw the victim's driver's license, her checkbook, and various other personal belongings. Jones testified that he saw the five men at the Taylor house the next morning. They traveled together in the stolen vehicle for the next two or three days, but the defendant never drove.

Carolyn McCroy, an employee of First Tennessee Bank in Memphis, testified that on the day after the murder, Smith attempted to cash a forged check drawn on the victim's account. McCroy became suspicious and asked the bank manager for assistance. After waiting briefly for approval, Smith left the bank.

Jerry Locke discovered the body the day after the murder and contacted the police. Officer Phil Nason, who investigated the crime scene, testified that he observed blood on the bridge and recovered the victim's purse and several credit cards. The victim's pants were down around her ankles and her panties had been ripped off. None of the physical evidence, such as hair fibers, finger prints, or blood samples, connected the defendant to the murder. Officer Nason measured the height of the bridge to be twenty-six feet and eight inches.

Two days after the murder, the victim's car was discovered at an elementary school. The vehicle was in good condition except for damage to the interior. Two of the twenty fingerprints found in the car matched those of the defendant.

felony murder conviction. After Sammie Lee Taylor's trial, Willie Davidson, Tracy Davidson, and Barry Smith all pled guilty to especially aggravated robbery, especially aggravated kidnapping, and first degree murder. The rape charges were voluntarily dismissed by the state. All three defendants received life without the possibility of parole on the murder charges.

Three days after the murder, Sergeant H. A. Ray of the Memphis Police Department took all five men to the police department for questioning. The defendant was originally believed to be a possible witness, not a suspect. After questioning Smith and Tracy Davidson, the police became suspicious of the defendant. Because he was a juvenile, the police contacted the defendant's mother before any interrogation. When the defendant's mother arrived, he gave a statement which was entered into evidence at trial.

The defendant initially challenges the sufficiency of the evidence as to each of the four convictions. He insists that he did not personally commit any of the crimes and that the state failed to present any evidence that he had solicited, directed, aided, or attempted to aid any of the others charged or had otherwise acted with an intent to promote or assist the commission of the offense.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e).

We are also guided in our review by other well-established principles. A crime may be established by the use of circumstantial evidence only. State v.

Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958). An accused may be convicted of a criminal offense based upon circumstantial evidence alone so long as the facts and circumstances are "so strong and cogent as to exclude [beyond a reasonable doubt] every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). "A web of guilt must be woven around the defendant ... from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 613.

A kidnapping occurs when one "knowingly removes or confines another unlawfully so as to interfere with ... liberty ... [u]nder circumstances exposing the other to substantial risk of bodily injury...." Tenn. Code Ann. §§ 39-13-302, -303. It becomes aggravated when, among other things, "the victim suffers bodily injury...." Tenn. Code Ann. § 39-13-304. It is especially aggravated, and thereby a Class A felony, where the injury is serious or a gun is used to accomplish the kidnapping. Tenn. Code Ann. § 39-13-305. Although the trial court did not instruct the jury on the criminal responsibility for the conduct of another statute in relation to the kidnapping, robbery and rape charges, it did generally instruct the jury that the defendant may be held criminally responsible for the conduct of another if "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, [he] solicits, directs, aids, or attempts to aid another person to commit an offense[.]" See Tenn. Code Ann. § 39-11-402(2). The trial court charged and the statute "requires proof of intent to promote or assist the commission of the offense." State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994). The penalty for criminal responsibility of another is the same as that imposed for the principal offense. Tenn. Code Ann. § 39-11-401. "[A] person ... acts intentionally with respect to the nature of the conduct

or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a). The Sentencing Commission Comments to this section have explained the definition of "intentional" as follows:

Intentional conduct or an intentional result occurs when the defendant wants to do that act or achieve the criminal objective. A defendant acts knowingly, on the other hand, when he or she is aware of the conduct or is practically certain that the conduct will cause the result, irrespective of his or her desire that the conduct or result will occur.

Id. In Maxey, this court held that the statute attaching criminal liability for the conduct of another requires the culpable mental state of intent. 898 S.W.2d at 757. Knowing, reckless, and negligent mental states are insufficient. Id.

For the evidence to be sufficient to sustain a conviction under the criminal responsibility for the conduct of another statute, there must be proof that the defendant intended, as defined in Tenn. Code Ann. § 39-11-302(a), to promote or assist the commission of the offenses, or to benefit in the proceeds or results of the offense. Tenn. Code Ann. § 39-11-402(2). In addition, there must be proof that the defendant solicited, directed, aided, or attempted to aid another to commit the offense. Id.

We will first consider whether the evidence was sufficient to support the especially aggravated kidnapping conviction. As stated, especially aggravated kidnapping is defined as a knowing removal or confinement of another so as to substantially interfere with the other's liberty, where the confinement is accomplished with a deadly weapon or the victim suffered serious bodily injury. Tenn. Code Ann. §§ 39-13-302 to -305. In our view, the proof clearly established that the defendant was a full participant in the especially aggravated kidnapping of

the victim.

In conjunction with the others, the defendant planned to rob someone of their car and lock the victim in the trunk. Proof demonstrated that he intended to "promote" the kidnapping of the victim. Tenn. Code Ann. § 39-11-402(2). That the defendant chose to join in the course of events after he learned of the victim's presence in the trunk is proof of his culpability; that he purchased gasoline for the stolen vehicle and pumped the gas was evidence of aid and assistance. When the defendant opened the trunk to release the victim and then closed it as a car approached, he exercised a measure of control over the victim. The evidence, in our view, was sufficient to establish the defendant's guilt either as a principal or as criminally responsible for the acts of the others.

There is also sufficient evidence, in our view, to sustain a conviction for especially aggravated robbery. Especially aggravated robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear" that is "[a]ccomplished with a deadly weapon" and where "the victim suffers serious bodily injury." Tenn. Code Ann. §§ 39-13-401, -403. The facts clearly show a robbery occurred. The defendant participated in the plan. As indicated, he exercised at least some direct control over the victim while she was in the trunk of the stolen car. The robbery, at the point of his participation, was of a continuing nature. There was evidence that the defendant helped plan the car theft, exercised control over the victim for part of the time the robbery took place, and struck the victim during the series of events causing her serious injury and, ultimately, death. Again, the proof was sufficient to show guilt as either a principal offender or responsible for the acts of the others.

Aggravated rape is accomplished by unlawful sexual penetration of a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon ...; [or]

(2) The defendant causes bodily injury to the victim; [or]

(3) The defendant is aided or abetted by one (1) or more other persons; and ... [f]orce or coercion is used to accomplish the act

Tenn. Code Ann. § 39-13-502.

Dr. Smith, the assistant medical examiner who performed the autopsy on the victim, testified that the victim's vagina had been forcibly penetrated as the other injuries were inflicted. The circumstances of the crimes clearly suggest coercion. There was testimony that at least one of the men had a gun and, of course, evidence that the victim suffered serious bodily injury.

The question is whether the evidence was sufficient to hold this particular defendant responsible for the sexual penetration of the victim. No part of the proof at trial indicated that the men had planned to rape the victim. The circumstances suggest that the rape was spontaneous. There was no physical evidence connecting the defendant to the specific crime. Dr. Smith described the vaginal injury as suggestive of "a penetrating force into the ... area." There was no semen or hair at or near the vaginal area. In order to sustain the conviction, this court must find evidence in the record upon which a rational jury could conclude that the defendant had a culpable mental state. See Tenn. Code Ann. §§ 39-11-302(1), -402(2).

Viewed in the light most favorable to the state, the evidence establishes that the defendant, present during the entire course of events taking

place after the car theft, released the victim from the trunk of the car and struck her at least once, and then helped dispose of the body after the murder. He kept a lookout while the others set fire to the interior of the vehicle. Some of the actions may have been preliminary to the rape. That the defendant exercised a measure of control over the victim and may have helped incapacitate the victim before the sexual assault is inculpatory. While there is no physical evidence that the defendant actually committed the rape of the victim, that is not required to support a conviction. That the defendant actively participated in the scheme indicates that he had the requisite intent for the other crimes. Circumstances suggest that the defendant was much more than a casual observer, more than merely present.

It is a well-established principal of law that a conviction may not be based upon conjecture, guess, or speculation. Rucker v. State, 129 S.W.2d 208 (Tenn. 1939); State v. Jenkins, 733 S.W.2d 528 (Tenn. Crim. App. 1987). While the standard of review is the same whether a conviction is based upon direct or circumstantial evidence, either of which may be sufficient, a purely circumstantial case, as is the rape charge against the defendant, must exclude to the jury's satisfaction every other reasonable theory except that of guilt. Marable v. State, 313 S.W.2d 451 (Tenn. 1958); see State v. Brown, 551 S.W.2d 329 (Tenn. 1977). The jury had the opportunity to consider the theory that the defendant, by his collective actions, helped another commit the offense of aggravated rape. Tenn. Code Ann. § 39-11-402(2). A weapon was utilized. Expert testimony established that the victim had been raped; the vaginal area had been injured by a penetrating force. The defendant acted as a lookout for the other men during the ordeal. By reasonable inference from the circumstances, a rational trier of fact could have concluded that the defendant aided and assisted in the commission of the offense of aggravated rape.

We next review the sufficiency of the evidence for the first degree murder conviction. At the time of the offense, first degree murder was defined as "[a]n intentional, premeditated, and deliberate killing of another" Tenn. Code Ann. § 39-13-202 (emphasis added). See also State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). The sufficiency of the convicting evidence, for purposes of this appeal, depends entirely upon whether the state was able to prove each and every one of the essential elements: intent, premeditation, and deliberation.

We begin our analysis with a review of each of these three elements.

An "intentional" act is statutorily defined as follows:

"Intentional" refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

Tenn. Code Ann. § 39-11-302(a). Sentencing Commission Comments to this section describe conduct as intentional "when the defendant wants to do the act or achieve the criminal objective." A "[d]eliberate act' means one performed with a cool purpose[.]" Tenn. Code Ann. § 39-13-201(b)(1). A "[p]remeditated act' means one done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(2). So, from all of this, it would appear that the burden of the state at trial was to prove that the defendant had consciously engaged in conduct which resulted in the death of the victim (intentionally) and that he perpetrated the killing with a cool, calculated purpose (deliberately) and after reflective judgment (premeditatedly).

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

consequences of his act. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). Though similar, deliberation and premeditation are defined separately and are distinct elements. See Tenn. Code Ann. § 39-13-201(b); see also State v. Brooks, 880 S.W.2d 390, 392-93 (Tenn. Crim. App. 1993). They may be inferred from the circumstances where those circumstances affirmatively establish that the defendant premeditated his assault and then deliberately performed the act. State v. Richard Nelson, No. 02C01-9211-CR-00251 (Tenn. Crim. App., at Jackson, Oct. 14, 1993). This court has previously held that the holding in Brown requires "proof that the offense was committed upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement" before a second degree, intentional murder can be elevated to murder in the first degree. State v. David L. Hassell, No. 02C01-9202-CR-00038, slip op. at 3 (Tenn. Crim. App., at Jackson, Dec. 30, 1992). This court has held that the elements of deliberation and premeditation are questions for the jury and may be inferred from the manner and circumstances of the killing. Gentry, 881 S.W.2d at 3. Still, a jury may not engage in speculation.

Viewed in the light most favorable to the state, the evidence here establishes all of the elements of first degree murder. The proof showed that Willie Davidson initiated the robbery and kidnapping. After beating the victim, he apparently ordered everyone out of the way and drove over her. The question, of course, is whether the evidence is sufficient to hold the defendant Byrd criminally responsible under Tenn. Code Ann. § 39-11-402(2). The defendant admitted in his pretrial statement that he participated in a group discussion about the possibility of killing the victim. There was also evidence that the defendant struck the victim at least once. That, in our view, was sufficient evidence for the jury to conclude the defendant shared the requisite criminal intent. See Tenn. Code Ann. § 39-11-402(2). Striking the victim qualifies as "aiding" Willie Davidson in the commission of

the murder. The defendant's "presence and conduct before and after the crime are circumstances from which ... the criminal intent may be inferred." State v. McBee, 644 S.W.2d 425, 428-29 (Tenn. Crim. App. 1982). The fact that the defendant participated in and helped plan the robbery and kidnapping may support an inference that he intended the murder as well. Moreover, the defendant helped dispose of the body and kept a lookout while the other defendants attempted to burn the inside of the car. This "conduct ... after the crime" also supports the inference that the defendant aided and assisted in the crime. See McBee, 644 S.W.2d at 428-29.

These facts are similar to those in State v. John V. Woodruff, No. 01C01-9507-CR-00217 (Tenn. Crim. App., at Nashville, Aug. 1, 1996), perm. to app. filed Oct. 1, 1996. In Woodruff, the defendant helped with a kidnapping. He then drove the victim to the area where she was eventually killed. Initially, the defendant and his co-defendants released the victim near a park. As they were driving away, one co-defendant demanded, "we gotta get her, we gotta get her." Woodruff, slip op. at 13. The defendant stopped the car and waited while the other two co-defendants got out and killed the victim. Id. This court ruled that "based on [the defendant's] response to [the co-defendant's] statement as well as his involvement in the events leading up to the murder, any rational trier of fact could have found [the defendant] possessed the requisite mental state" Id. at 14. The same rationale applies here. The jury could rationally conclude the defendant possessed the requisite mental state.

I

The defendant claims that the trial court erred by denying his motion to suppress his pretrial statement. Originally brought to the police station during the

morning hours as a possible witness, the defendant was reclassified as a suspect after a one and a half to two hour interrogation of another co-defendant. Officer H. A. Ray then handcuffed the defendant to a chair in the squad office and asked the defendant to contact his mother. The defendant was offered the use of the rest room and something to eat and drink. The defendant's mother arrived at approximately 5:15 p.m. Upon being advised of his Miranda rights, the defendant and his mother signed a waiver of rights form.

At the suppression hearing, the defendant claimed that four police officers burst through the front door of the Taylor house between 8:00 and 9:00 a.m. He insisted that two officers held a gun to his head before he was transported to the police station. He claimed that they threatened to beat him, harassed him, and denied him food. The defendant testified that he gave the incriminating statement only because he thought he had to. On cross-examination, however, the defendant acknowledged that his statement was not coerced. At the conclusion of the proceeding, the trial judge made the following findings of fact:

The proof ... indicates that the statement was given freely and voluntarily. The advice of rights form was signed by both Mr. Byrd and his mother.... [T]hen the four-page statement was given and signed by both Mr. Byrd and his mother, dated, time was placed on it by his mother. He initialed each of the first three pages. He was advised of his rights again.

He stated in the statement, as well as from the stand under oath today, that the answers ... freely and voluntarily were his answers that he did give on that date. He stated from the stand, under oath, that no one coerced him.

The defendant asserts that this statement was not voluntary because he had been in custody for approximately eight hours before his mother arrived; he claims that he was hungry and that he was concerned about the emotional state of

his mother. The defendant also argues that the police violated Tenn. Code Ann. § 37-1-115, which provides that after an arrest, a juvenile should be released to his parent's custody within a reasonable time or be brought before the juvenile court. He argues that a violation of this statute also suggests the statement was involuntary.

Initially, the confession must meet constitutional safeguards. Miranda v. Arizona, 384 U.S. 436 (1966). This court must examine the "totality of the circumstances" to ascertain whether the particular defendant knowingly and voluntarily waived his constitutional rights prior to making a confession. Fare v. Michael C., 442 U.S. 707, 728 (1979); Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975).

Factors relevant in determining whether a confession is voluntary include (1) the length of time between the arrest and the confession; (2) the occurrence of intervening events between the arrest and confession; (3) the giving of Miranda warnings; and (4) the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-04 (1975); State v. Chandler, 547 S.W.2d 918, 920 (Tenn. 1977). The overriding question, however, is whether the behavior of law enforcement officials served to overbear the defendant's will to resist. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980); see State v. Howard, 617 S.W.2d 656, 658-59 (Tenn. Crim. App. 1981) .

Our scope of review is limited. The findings of fact made by the trial judge at a hearing on a motion to suppress are binding on appellate courts if there is any evidence to support that determination. Chandler, 547 S.W.2d at 923. Deference must generally be afforded a determination that a confession has been

given voluntarily and without coercion. Lowe v. State, 584 S.W.2d 239, 241 (Tenn. Crim. App. 1979).

Here, the trial court's finding that the statement was voluntary is well supported by the record. There was testimony that the defendant was offered food and was not disturbed by officers while he waited for his mother to arrive. The trial judge accredited that account. Moreover, the defendant acknowledged that he had not been coerced into giving the statement. In our view, the circumstances support the conclusion that the defendant made a knowing and intelligent waiver of his constitutional rights.

When officers take a juvenile into custody, the officers should, "within a reasonable time" (1) release the child to his parents or guardian or (2) take the child before the juvenile court. Tenn. Code Ann. § 37-1-115. Subsequent provisions provide that "[a]n extra-judicial statement, if obtained in the course of the violation of this part ... shall not be used against [a child]." Tenn. Code Ann. § 37-1-127(c). Rulings in this court have "held that § 37-1-127(c) guarantees only that a juvenile's statements in violation of § 37-1-115 will not be used against him or her in a proceeding in juvenile court." State v. Lundy, 808 S.W.2d 444 (Tenn. 1991); see also Coyler v. State, 577 S.W.2d 460 (Tenn. 1979).

A violation of Tenn. Code Ann. § 37-1-115 is not a basis for the exclusion of a statement. Even if it were, the officers appear to have complied with the statute. The defendant was instructed to contact his mother after a relatively short time at the police station. The defendant was not deprived of the counsel of his mother. She came to the station as soon as convenient and the defendant was soon thereafter released.

II

The defendant next contends that because of pretrial publicity, the trial court should have granted his motion for a change of venue. In support of his claim, the defendant filed a certified copy of the minutes of a Memphis City Council meeting which had taken place a month earlier. Dr. Maynard Sisler, the victim's stepfather, presented a petition signed by about 36,000 Shelby County citizens who "were outraged by the senseless lawlessness--by the senseless violence." Several published newspaper articles were entered as exhibits. Photographs of the defendant and the prior criminal record of all defendants were apparently included in the accounts.² The confession was printed in full. Comments by the Assistant District Attorney General were published:

"I hear these .. kinds of cases all the time, but this is about as heinous as I've heard[," said McDowell, who noted that [while] "some states have the death penalty for juveniles, the state legislature of Tennessee hasn't seen fit to do that, and I'm not sure they haven't made a mistake."

The defendant also entered into evidence an informal survey conducted by a law student. The survey showed that approximately seventy percent of those questioned had heard something about the murder. Despite having heard some reports of the accounts of the murder, seventy-eight percent of those questioned felt they could be fair if they served on the jury. None of those questioned were familiar with the confessions the defendants had made.

The trial court denied the motion because the bulk of the publicity occurred over a year before the scheduled trial date. Further, the survey indicated an impartial jury could be selected.

²The articles were not included in the record on appeal.

The pertinent portion of Rule 21(a), Tenn. R. Crim. P., provides as follows: "[T]he venue may be changed ... if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Whether to grant or deny a motion for change of venue is a matter of judicial discretion. Rippy v. State, 550 S.W.2d 636, 638 (Tenn. 1977). The appellate court will not interfere with the exercise of discretion absent clear abuse. State v. Melson, 638 S.W.2d 342, 360 (Tenn. 1982). The ultimate test is whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity. State v. Garland, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981). The burden of proof is on the defendant. Adams v. State, 563 S.W.2d 804 (Tenn. Crim. App. 1978). Prejudice will not be presumed on the mere showing that there was considerable pretrial publicity. Dobbert v. Florida, 432 U.S. 282 (1977); State v. Kyger, 787 S.W.2d 13, 19 (Tenn. Crim. App. 1989).

Simply stated, the record does not preponderate against the findings of the trial court. Moreover, there is nothing in the proof at the hearing on the motion to change venue suggesting that the jury had been prejudiced by the pretrial publicity.

III

The defendant next claims that the trial court erred by refusing individual voir dire. Counsel based the request on three factors: (1) there was substantial press coverage of co-defendant Sammie Taylor's trial; (2) there was substantial press coverage of the remaining three co-defendants' pleading guilty; and (3) the four other co-defendants had all implicated the defendant in their trials or their guilty pleas. Although exhibits supporting the existence of substantial press

coverage were not entered into the record on appeal, both the trial judge and prosecuting attorney acknowledged there had been significant press coverage of these events. The trial judge denied individual voir dire, but ruled that prospective jurors could be questioned at the bench and out of the hearing of the others, if anyone admitted to knowledge of pretrial publicity that was so compelling "they couldn't set it aside."

The trial judge questioned all of the potential jurors before they were examined by either the state or the defense. A few jurors were dismissed due to the hardship associated with sequestration. The trial judge also dismissed two jurors who conceded they were biased and could not be fair to the defendant. Thereafter, during the voir dire by the assistant district attorney general, each individual on the venire admitted having seen or heard publicity about the case. When the prosecuting attorney asked if the prospective jurors could be fair in spite of the pretrial publicity, most responded affirmatively; however, three of the panel indicated they could not be fair and were excused.

Defense counsel asked about the nature of the prospective jurors' knowledge. The trial judge refused to allow the question, noting the responses could taint the other jurors. At that point, defense counsel again renewed her motion for individual voir dire. In an action which appeared to be a departure from his original intentions, the trial judge overruled the motion and limited questions to whether the potential juror had heard pretrial publicity that would affect their partiality.

The prevailing practice is to examine jurors collectively. State v. Jefferson, 529 S.W.2d 674, 681 (Tenn. 1975); State v. Oody, 823 S.W.2d 554, 563

(Tenn. Crim. App. 1991); State v. Hopper, 695 S.W.2d 530, 539 (Tenn. Crim. App. 1985). Our supreme court has ruled that the "ultimate goal of voir dire is to insure that jurors are competent, unbiased, and impartial." State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994), cert. denied, 115 S. Ct. 743 (1995). Over twenty years ago, however, in Sommerville v. State, 521 S.W.2d 792, 797 (Tenn. 1975), our supreme court held that "whenever there is believed to be a significant possibility that a juror has knowledge of the jury verdict at a prior trial, or has been exposed to other potentially prejudicial material, the examination of each juror, with respect to his exposure, shall take place outside the presence of other chosen and prospective jurors." Our supreme court reaffirmed this proposition in State v. Claybrook, 736 S.W.2d 95 (Tenn. 1987). In Claybrook, eighty percent of the first group of prospective jurors had heard information about the case; two jurors acknowledged that they had heard the defendant had been in prison before. Id. at 100. These facts, found to be sufficient to trigger the right to individual voir, required a new trial. Id.

These rulings suggest that the trial court erred by placing restrictions on the defendant's examination of potential jurors. It can be reasonably argued that such a limitation encroaches upon an individual's right to a fair and impartial jury. In State v. Porterfield, 746 S.W.2d 441 (Tenn. 1988), however, our supreme court approved a method of jury selection very similar to that used by the trial judge in this case. In Porterfield, the defense counsel argued the trial court improperly limited the "questioning of prospective jurors with respect to exposure to pre-trial publicity." Id. at 446. The trial judge had asked the jurors whether they had heard any inflammatory publicity which they could not set aside and was careful to make sure "nothing inflammatory or prejudicial to the defendants was revealed." Id. Every prospective juror who indicated they could not base their decision only on the

evidence presented at trial was excused. Id. Our supreme court found no error. The ruling in Porterfield stands for the proposition that if no prejudicial information is elicited during voir dire and if the jurors assert they can disregard the pretrial publicity, there is no error in denying individual voir dire. Id. at 446-47.

Our supreme court has relied on Porterfield in finding there was no error by the denial of individual voir dire. See Cazes, 875 S.W.2d at 262; State v. Howell, 868 S.W.2d 238 (Tenn. 1993). In Cazes, where the jurors stated they could render a verdict based solely on the evidence presented at trial, the supreme court found no error, noting "a trial court's findings of juror impartiality may be overturned only for 'manifest error.'" 875 S.W.2d at 262 (citations omitted). In Howell, sixty-four percent of the prospective jurors had heard about the case. 868 S.W.2d at 247. The court refused individual voir dire for all prospective jurors but indicated if a prospective juror remembered the specific content of any pretrial publicity, questions had to be submitted on an individual basis. On the basis that all jurors who were exposed to pretrial publicity indicated they could still be fair, the court in Howell found the trial court did not abuse its discretion. Id. at 248.

In view of the rulings in Porterfield, Cazes, and Howell, it appears that the trial court here acted within its discretion in generally denying individual voir dire. Prospective jurors who indicated they could not be impartial were excused for cause. No prejudicial information was released to the panel; thus there was no taint. Although restrictive, the procedure provided by the trial court permitted individual voir dire of those who had heard pretrial publicity so compelling they could not set it aside. Finally, all the jurors who eventually heard the case indicated they could be fair and render an impartial verdict. Under these circumstances and despite some reservations about the propriety of the procedure, we cannot say the

trial court violated either the spirit or the letter of Porterfield and its progeny.

See also State v. Sammie Lee Taylor, No. 02C01-9501-CR-00029 (Tenn. Crim. App., at Jackson, Oct. 10, 1996); State v. Ricky Thompson, No. 03C01-9406-CR-00198 (Tenn. Crim. App., at Knoxville, Jan. 24, 1996), app. denied, concurring in results only, (Tenn., July 1, 1996).

The defendant also complains about the trial court's refusal of an inquiry into the specific types of pretrial publicity jurors had heard, relying primarily on Tenn. R. Crim. P. 24 (a) and (b)(2), which provide in part as follows:

(a) Examination. The court ... shall permit questioning by the parties for the purpose of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges.

(b) Challenges for Cause. ... Any party may challenge a prospective juror for cause if: ... the prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. Both the degree of exposure and the perspective juror's testimony as to his or her state of mind shall be considered in determining acceptability.

Clearly, the trial court failed to adhere to the rule. The procedure utilized precluded both the state and the defense from determining the nature and quality of the information known to the jurors. The rule grants the defense the right to exercise his peremptory challenges "intelligently." Here, the defense was simply denied the privilege of examining the "degree of exposure" potential jurors had had to the pretrial publicity. Any knowledge by prospective jurors of the circumstances of the offense is always a concern in the search for the constitutionally-required fair and impartial jury.

The right to question prospective jurors, however, is a statutory right. It does not always imply a right of constitutional dimensions. "Questions about the content of the publicity to which jurors have been exposed are not constitutionally

compelled, and the trial court's failure to ask these questions is not reversible error unless it rendered the defendant's trial fundamentally unfair." Howell, 686 S.W.2d at 247 (quoting Mu'Min v. Virginia, 500 U.S. 415, 425-26 (1991)).

Our standard of review is whether the trial judge's ruling "affirmatively appear[s] to have affected the result of the trial on the merits." Tenn. R. Crim. P. 52(a). This is a most difficult standard to achieve. It is not surprising that the defendant has failed to do so here. We cannot conclude the defendant's trial was "fundamentally unfair" under Mu'Min. Each of the jurors ultimately impaneled made unqualified assertions that they could be fair and impartial. The record of the trial does not demonstrate any fundamental unfairness in the conduct of the trial. "Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the [d]efendant to show that a juror is in some way biased or prejudiced." State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993). Here, the defendant has been unable to carry this significant burden.

IV

Next, the defendant claims that the trial court erred by admitting particularly prejudicial photographs. The first depicts the body of the victim when it was first discovered. Very little blood is visible in this photo; while gruesome, the content is not excessively so. A second photograph shows that the victim's pants had been lowered, her panties removed, and her shirt and bra had been lifted above her breasts. Little blood is visible. A third photo established the extent of bruising over the entire body. It is the most gruesome of the three.

The admissibility of photographs is governed by Tenn. R. Evid. 403. See also State v. Banks, 564 S.W.2d 947 (Tenn. 1978). "Although relevant,

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Tenn. R. Evid. 403. The evidence must be relevant and its probative value must outweigh any prejudicial effect. Banks, 564 S.W.2d at 950-51. Whether to admit the photographs is within the discretionary authority of the trial court and will not be reversed absent a clear showing of an abuse. State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993); State v. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985).

In our view, each of the photographs had considerable probative value that outweighed the inevitable prejudice. The photographs were especially helpful to support the state's theory that the victim had been sexually assaulted and had sustained serious injuries before being struck by the vehicle. They corroborated proof of the nature and degree of the defendant's participation in the crime.

V

Next, the defendant contends that the trial court erred by allowing the state to cross-examine the defendant about possible attempts to commit other robberies which may have occurred the night after the murder. In a jury-out hearing, the state argued that the defendant's activities on the evening following the killing were probative of his intent on the evening of the killing; the defendant contended that these events were irrelevant and highly prejudicial. The trial court ruled as follows:

I think it is relevant to show his knowledge of and participation in the events on the night Ms. Wilburn was killed if his defense is basically I had no idea this was going to happen and I was just kind of tagging along. And then the next night the same group of people, while still driving Ms. Wilburn's car, continue this course of conduct.

Rule 404(a), Tenn. R. Evid., establishes that evidence of a person's character or a trait of character is generally not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion. Subsection (b) provides as follows:

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. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Generally, this rule is one of exclusion; there are, as stated, exceptions. See State v. Parton, 694 S.W.2d 299 (Tenn. 1985); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980); Carroll v. State, 370 S.W.2d 523 (Tenn. 1963); see also State v. Rickman, 876 S.W.2d 824 (Tenn. 1994) (favorably citing both Parton and Bunch). Most authorities suggest trial courts take a "restrictive approach of 404(b) ... because 'other act' evidence carries a significant potential for unfairly influencing a jury." See Neil P. Cohen, et al., Tennessee Law of Evidence § 404.7 at 131. This best explains the traditional posture of the courts that any testimony of prior bad acts by a defendant, when used as substantive evidence of guilt of the crime on trial, are not usually permissible. Parton, 694 S.W.2d at 302-03. The general exceptions to the rule are when the evidence is offered to prove the motive of the defendant, his identity, his intent, the absence of mistake, opportunity, or as a

part of a common scheme or plan. Bunch, 605 S.W.2d at 229.

Traditionally, courts have not permitted the state to establish through acts of prior misconduct any generalized propensity on the part of a defendant to commit crimes. See, e.g., State v. Teague, 645 S.W.2d 392 (Tenn. 1983). A jury cannot be allowed to convict a defendant for bad character or any particular "disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial." Rickman, 876 S.W.2d at 828 (citations omitted).

The trial judge's rationale for admitting the evidence was essentially that if the defendant intentionally and knowingly attempted to commit robberies the next evening after the murder, he must have intentionally and knowingly participated in the events leading up to the murder. From one point of view, this might have qualified as "propensity evidence." On the other hand, the defendant claimed that he was merely present and that his participation in the crimes at issue was incidental; any implication that his participation with the others was by mistake, however, was rebutted in great measure by his continued associations with the other offenders soon after these crimes and his participation in these other unlawful acts. The evidence was more probative than prejudicial from that perspective. In the context of the entire trial, any error in this ruling was harmless. In our view, the testimony, while somewhat damaging to the defendant, did not likely affect the results of the trial.

VI

The defendant next claims that the trial court erred by giving incorrect jury charges on criminal responsibility. It is useful to briefly describe all of the jury instructions. First, the trial judge gave instructions for all of the offenses charged as

well as each of their lesser included offenses. After instructing the jury on the elements of those offenses, the trial judge defined for the jury direct evidence and circumstantial evidence. He also gave a reasonable doubt instruction. Next the trial judge instructed on impeaching witnesses and witness credibility in general. Finally, the trial judge gave the following instruction on criminal responsibility for the conduct of another:

The defendant is criminally responsible for an offense committed by another if the defendant solicits, directs, aids, or attempts to aid another person to commit an offense, and the defendant acts with intent to promote or assists the commission of offense or to benefit in the proceeds or results of the offense.

This is the only reference to the content of the statute governing criminal responsibility for the conduct of another. At no point in the instructions did the trial judge explain how the criminal responsibility for another statute might have been relevant to the charges of murder, kidnapping, robbery, or rape. That might have been helpful. On the other hand, no limitations were placed so that the jury could properly infer that the statute applied generally to all charges.

Upon motion of the state and immediately after the instructions on criminal responsibility for another, the trial judge provided an additional instruction:

When one enters into a scheme with others to commit a kidnapping and killing ensues, all defendants may be held responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the others as long as the defendant intended to commit the kidnapping and a killing resulted during the perpetration of or attempt to perpetrate the kidnapping. Each defendant is responsible for the murder, regardless of whether he intended for the victim to die or participated in the act of murder.

The language was apparently taken from the case of State v. Brown, 756 S.W.2d 700, 703 (Tenn. Crim. App. 1988), where this court discussed the law governing felony murder. The transcript shows that the state sought this instruction to

supplement the instructions for first degree murder. While the supplement appears to have been an attempt to further explain felony murder in the context of criminal responsibility for the conduct of another, the trial judge commented as follows:

So it was intended to be read in conjunction with aiding and abetting and not as a part of felony murder, and its intent was to further clarify for the jury the charge of criminal responsibility of another ... in [a] fact situation such as we have here.

In our view, it is difficult to ascertain whether the instruction was directed toward the felony murder count or the first degree premeditated count; if the instruction had applied to the latter, it would have dispensed with the intent requirement, the most essential element of the offense. Our court has held that a jury instruction which stated the mens rea for liability under Tenn. Code Ann. § 39-11-402(2) was "intentionally, knowingly, or recklessly" was a misstatement of law, as the statute requires a "mens rea of intent." State v. Maxey, 898 S.W.2d 756, 758 (Tenn. Crim. App. 1994). Because of the holding in Brown, however, it was the obvious intent of the trial court to supplement the felony murder charge. In context, that may have been evident to the jury.

Nevertheless, the instruction misstated the law. If the jury viewed the supplemental instruction as clarifying the law required to convict the defendant of felony murder, the law has changed since the opinion was released. The year after Brown was released, the legislature rewrote the felony murder statute to provide as follows: "A first degree murder is ... [a] reckless killing of another committed in the perpetration of, or attempt to perpetrate any ... kidnapping[.]" Tenn. Code Ann. § 39-13-202(a)(2) (1989) (emphasis added). The legislature added the requirement that the killing be "reckless." Prior to the enactment of the 1989 act, felony murder was essentially a strict liability crime. See Tenn. Code Ann. § 39-2-202(a)(1)(Supp. 1988). There only had to be a nexus between the qualifying felony and the death of

the victim. See State v. Severs, 759 S.W.2d 935 (Tenn. Crim. App. 1988). This law was in effect at the time of these crimes. Thereafter, our court has held that the addition of the "reckless" requirement was a "substantial departure from the previous code which was primarily a codification of common law offenses in effect since statehood." State v. Gilliam, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995). The 1989 Act is different from prior law "in that the presumption of recklessness is removed." Id. at 390. To prove felony murder under the 1989 Act the prosecution must prove both "(1) that the killing was committed with the culpable mental state of reckless and (2) that the killing was committed in the perpetration of an enumerated felony." Id. (Footnote omitted).

The trial judge has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see Tenn. R. Crim. P. 30. "[T]he defendant has a constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). Jury instructions must, however, be reviewed in the context of the overall charge rather than in isolation. Sandstrom v. Montana, 442 U.S. 510 (1979); see State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994). Erroneous jury instructions require a reversal unless the error is harmless beyond a reasonable doubt. State v. Carpenter, 773 S.W.2d 1 (Tenn. Crim. App. 1989). That the defendant was convicted of first degree premeditated murder instead of felony murder does, in our view, render the error harmless beyond doubt. In context, the erroneous charge applied to felony murder only. Other parts of the jury instructions correctly defined premeditated murder. The jury was instructed to consider first degree premeditated murder before felony murder; according to the instructions, a guilty verdict precluded consideration of the latter. That made the Brown instructions mere surplusage. That is, the jury is presumed by law to have followed

the instructions; it having done that, felony murder never came into play. Criminal responsibility for the conduct of another was properly defined; a single charge is enough to apply to each count in the indictment.

VII

In a related issue, the defendant asserts that the trial court erred by denying his request for special jury charges. The defendant sought the following additional instructions: (1) mere presence at the scene of an alleged crime is insufficient to convict; (2) a conviction may not be based solely upon conjecture, guess, speculation, or a possibility; (3) "in order to find this defendant guilty of felony murder during the commission of a kidnapping, you must find that he is a willing and active participant in the kidnapping ... in order to hold him accountable for all of the consequences flowing from the kidnapping"; and (4) the law presumes a homicide to be a second degree murder as opposed to first degree murder.

The trial court, of course, has a duty to give a complete charge of the law applicable to the facts of the case. Harbison, 704 S.W.2d at 319; see also Tenn. Code Ann. § 49-18-110. While the defendant may request special instructions, jury instructions are sufficient where they adequately state the law. See, e.g., State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App. 1980). When a trial court's charge to the jury is complete, it need not give additional special instructions requested by the defendant. See State v. Story, 608 S.W.2d 599, 603 (Tenn. Crim. App. 1980).

Certainly, mere presence at a crime is insufficient to support a conviction. The defendant's first and second special requests were adequately embodied in the reasonable doubt instruction. The third special request was

already covered in the instruction on felony murder. Regarding the final instruction, it is true that "[t]he law in Tennessee has long recognized that once the homicide has been established, it is presumed to be murder in the second degree." State v. Brown, 836 S.W.2d 530, 534 (Tenn. 1992). Accordingly, the state bears the burden of proof on the elements of premeditation and deliberation sufficient to elevate the offense to first degree murder. Id. Any error in refusing that instruction, however, was clearly harmless. The instructions on first degree murder clearly set forth the elements the state was required to prove beyond a reasonable doubt. This would have been sufficient to support the conviction. See State v. Charles Montague, No. 03C01-9306-CR-00192, slip op. at 19 (Tenn. Crim. App., at Knoxville, Nov. 21, 1994), app. denied, concurring in results only, (Tenn., Dec. 28, 1995).

VIII

The defendant also insists that the evidence at the penalty phase, conducted after the guilty verdicts, was insufficient to support the enhanced sentence of life without parole. A sentencing hearing was held pursuant to Tenn. Code Ann. § 39-13-207.

The victim's step-father, Dr. Maynard Sisler, testified that he helped rear the victim for sixteen years. He related that the victim's death "has been a deep and devastating wound from which we are not yet recovered." He described the victim as kind and giving. The state submitted a morgue photo of the victim to establish that the death was "heinous, atrocious, and cruel." See Tenn. Code Ann. § 39-13-205(i)(5). Various family members of the defendant's testified that he was an obedient child who was more of a follower. The defendant's mother testified that the defendant was learning disabled.

In sentencing the defendant to life without parole, the jury found the following aggravators:

The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death, Tenn. Code Ann. § 39-13-204(i)(5);

The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another, Tenn. Code Ann. § 39-13-204(i)(6); and

The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit ... any first degree murder, ... robbery ... [or] kidnapping. Tenn. Code Ann. § 39-13-204(i)(7).

The standard of review of the jury sentence is set forth in Tenn. Code Ann. § 39-13-207(g); that statute provides as follows:

When a defendant has been sentenced to imprisonment for life without the possibility of parole, such defendant may appeal such sentence to the Tennessee court of criminal appeals. The court of criminal appeals shall first consider any errors assigned and then the court shall review the appropriateness of the sentence. A sentence of imprisonment for life without possibility of parole shall be considered appropriate if the state proved beyond a reasonable doubt at least one (1) statutory aggravating circumstance contained in section 39-13-204(i), and the sentence was not otherwise imposed arbitrarily, so as to constitute a gross abuse of the jury's discretion.

In our view, the sentence of life without the possibility of parole is within the jury's discretion. The proof established that the murder was "especially cruel" and involved "torture or serious physical abuse beyond that necessary to produce death." There was testimony that the victim was beaten so severely that one bruise could not be distinguished from the next. The victim suffered injuries from the beating apart from the injuries suffered when struck by the car. The beating qualified, in our view, as "serious physical abuse beyond that necessary to produce death." There was also adequate testimony that the killing was committed

so that the defendant and the others might avoid detection and arrest. The body was thrown over the bridge to avoid discovery. It was within the jury's prerogative to find that the victim was killed to avoid detection. The final factor was also established. The evidence very clearly showed the murder was committed while the defendant was engaged in a kidnapping.

All three aggravators were established by the evidence. Once the aggravators were established, it is within the jury's "considered discretion" whether to impose the sentence of life without parole. Tenn Code Ann. § 39-13-207(c).

IX

The defendant also questions whether a juvenile may be sentenced to life without the possibility of parole under Tenn. Code Ann. § 39-13-207. The defendant's argument is two-fold: (1) a life without parole sentence for a juvenile is contrary to the intent of the legislature; and (2) such a sentence for a juvenile is cruel and unusual punishment and, therefore, prohibited under the Tennessee and United States constitutions. We disagree with both contentions.

Once a juvenile has been transferred from juvenile court, the juvenile is treated as an adult, except that he may not receive the death penalty. Tenn. Code Ann. § 37-1-134(a)(1). The juvenile transfer statute provides as follows:

[The juvenile court] may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if ... [t]he child was sixteen (16) years or more of age at the time of the alleged conduct The district attorney general may not seek ... a sentence of death for the offense for which the child was transferred.

Tenn. Code Ann. § 37-1-134(a)(1). The legislature has made a specific exception for the death penalty. If a specific exception were also intended for the penalty of

life without the possibility of parole, the legislature would have made an exception for that as well. Moreover, the statutes providing for the sentence of life without the possibility of parole provide no exception for juveniles. See Tenn. Code Ann. §§ 39-13-204 through -207.

The defendant's next contention is that a sentence of life without the possibility of parole for a juvenile is cruel and unusual punishment in violation of both the Tennessee and United States Constitutions. See generally U.S. Const. amend. VIII; Tenn. Const. art. I, § 16. In determining whether a sentence violates constitutional prohibitions against cruel and unusual punishment, courts must consider whether the sentence is in conformity with contemporary standards of decency, is proportional to the offense, and is no more than necessary to accomplish a legitimate penological objective. State v. Black, 815 S.W.2d 166, 189-90 (Tenn. 1991).

Proportionality analysis is controlled by State v. Harris, 844 S.W.2d 601 (Tenn. 1992). In Harris, our supreme court adopted the standards enunciated in Justice Kennedy's concurrence in Harmelin v. Michigan, 501 U.S. 957, 994 (1991). The first step is to compare the sentence with the crime committed.

Unless this threshold comparison leads to an inference of gross disproportionality, the inquiry ends--the sentence is constitutional. In those rare cases where this inference does arise, the analysis proceeds by comparing (1) the sentences imposed on other criminals in the same jurisdiction, and (2) the sentences imposed for commission of the same crime in other jurisdictions.

Harris, 844 S.W.2d at 603.

The defendant's sentence passes constitutional muster under the standards set forth in both Black and Harris. Under Black, the sentence conforms

with standards of decency and serves legitimate penological functions. See Black, 815 S.W.2d at 189-90. Under Harris guidelines, there is no inference of "gross disproportionality." See Harris, 844 S.W.2d at 603. Finally, the United States Supreme Court has found the Eighth Amendment does not prohibit states from imposing capital punishment on offenders who commit murder at the age of 16. Stanford v. Kentucky, 492 U.S. 361, 380 (1989). The corresponding provisions of our state constitution demand no higher standard. See also State v. Sammie Lee Taylor, No. 02C01-9501-CR-00029 (Tenn. Crim. App., at Jackson, Oct. 10, 1996).

X

The defendant next argues that the trial court erred by refusing to clarify jury instructions regarding "weighing" the aggravating and mitigating circumstances. The trial judge charged the jury as follows:

[Y]ou are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial.

...The burden of proof is upon the state to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt.

... In choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, you shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances.

The defendant sought a supplemental instruction to clarify the "weighing process." The supplemental instruction provided in part:

In order to impose the sentence of imprisonment for life without the possibility of parole, the jury must unanimously find that the State has proven beyond a reasonable doubt that the statutory aggravating circumstance(s) outweigh any mitigating circumstance(s).

(emphasis added). The state argues the trial judge did not err by refusing the supplemental instruction because the instruction misstated the applicable law. We agree.

To sustain a sentence for life without the possibility of parole, the state does not have to prove that the aggravating factors outweigh the mitigating factors. The state only has to prove beyond a reasonable doubt that an aggravating circumstance exists. The relevant statute contains the following provision:

If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven ... to outweigh any mitigating ... circumstances ..., the jury shall, in its considered discretion, sentence the defendant to either imprisonment for life without the possibility of parole or imprisonment for life.

Tenn. Code Ann. § 39-13-204(f)(2)(emphasis added). There is no requirement that the aggravators outweigh the mitigators; the only requirement is that the aggravators be established beyond a reasonable doubt. Id. Thus, the trial court did not err by refusing the supplemental instruction.

XI

The defendant insists that the trial court erred by allowing an autopsy photograph into evidence at the sentencing hearing. The state submitted the photo to establish the murder was heinous and atrocious. The trial court made the following observations about the photo:

[W]hile this photograph clearly was not admissible during the case in chief, the guilt-innocence portion of the trial ... In this sentencing phase at this point I think this photograph is probative. Obviously it is a shocking photograph. No one can disagree with that. No one can dispute that. But by definition anything that is heinous or atrocious is going to be shocking.

The photo shows the victim from the shoulders up. There is considerable bruising and discoloration. While the photo is particularly gruesome, it is also especially probative on the claim that the murder was heinous or atrocious. See Tenn. R. Evid. 403; see also State v. Banks, 564 S.W.2d 947, 950-51 (Tenn. 1978). The value of the evidence, in our view, outweighed any prejudice.

XII

Next, the defendant insists that the trial court erred by allowing the victim's stepfather to testify as to the impact of the crime at the sentencing hearing. Dr. Sisler testified that his family had been devastated by the death of the victim, who he described as kind and gentle. The defendant argues this testimony is irrelevant to establishing any of the aggravators and that the evidence was unduly prejudicial.

In State v. Payne, 791 S.W.2d 10, 18-19 (Tenn. 1990), aff'd, 501 U.S. 808 (1991), our supreme court addressed this very issue and held that while the evidence might be "technically irrelevant," the evidence was "relevant to this defendant's personal responsibility and moral guilt." The United States Supreme Court affirmed this decision, holding that evidence about the character of the victim and the emotional impact of the crimes on the victim's family is admissible. Payne v. Tennessee, 501 U.S. 808, at 824 (1991).

There is some irony in that Payne, a United States Supreme Court case out of this state, upholds the principle that victim impact may be admissible as evidence and yet none of the aggravating circumstances listed in our state's current statutory scheme include victim impact. From that standpoint, the testimony was not likely relevant and, perhaps, should have been excluded. In the context of the

sentencing proceeding and the proof offered at trial, however, the impact evidence was harmless. The jury was properly charged as to the appropriate consideration. Victim impact was not a part of the instruction.

XIII

Finally, the defendant argues that the trial court erred in the imposition of his sentences for especially aggravated robbery, especially aggravated kidnapping, and aggravated rape. The trial judge sentenced the defendant to twenty-three years for each offense. The sentences are to be served concurrently with each other but consecutive to the sentence of life without the possibility of parole. The defendant contests the length of the sentences as well as the fact that they were ordered to be served consecutively to the sentence of life without the possibility of parole.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the

nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

The trial judge found the following enhancement factors applied to all offenses:

- (1) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense, Tenn. Code Ann. § 40-35-114(5);
- (2) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great, Tenn. Code Ann. § 40-35-114(6);
- (3) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114(7);
- (4) The defendant had no hesitation about committing a crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114(10); and
- (5) The crime was committed under circumstances under which the potential for bodily injury to a victim was great, Tenn. Code Ann. § 40-35-114(16).

In mitigation, the trial judge found that the defendant played a minor role in the commission of the offenses, Tenn. Code Ann. § 49-35-113(4); that the defendant had a poor family history; and that the defendant was a youthful offender.

The defendant asserts all five enhancement factors were inherent in each of the offenses. See Tenn. Code Ann. § 40-35-114. The trial judge, after saying, "I don't think you can separate or try and divide up and compartmentalize the facts ...," failed to consider each crime separately. The appropriate method of weighing enhancement and mitigating factors requires that. See State v. Chrisman, 885 S.W.2d 834 (Tenn. Crim. App. 1994). Thus, the sentences carry no

presumption of correctness. We must conduct a de novo review.

An especially aggravated robbery occurs when the robbery is accomplished with a deadly weapon and the victim receives serious bodily injury. Tenn. Code Ann. § 39-13-403. That the defendant allowed the victim to be treated with exceptional cruelty is not necessarily inherent in the offense of especially aggravated robbery. See, e.g., State v. Kern, 909 S.W.2d 5, 7 (Tenn. Crim. App. 1993). There is proof that the victim was treated with exceptional cruelty. Enhancement factor (7), commission of a crime for gratification and pleasure, likewise is not inherent in the offense of especially aggravated robbery. There was no proof, however, that the robbery was committed for pleasure or excitement. Accordingly this factor should not have been applied. The remaining three factors are inherent in the offense and should not have been applied. That the victim suffered personal injury, is inherent because one of the elements of especially aggravated robbery is that the victim suffer serious bodily injury. Tenn. Code Ann. § 40-35-114(6); see Jones, 883 S.W.2d at 602. That the defendant had no hesitation about committing a crime when the risk to human life was high and that the risk of bodily injury to a victim was great are, according to established precedent, inherent in the offense of aggravated robbery. Tenn. Code Ann. § 40-35-114(10) and (16); See State v. Claybrooks, 910 S.W.2d 868, 872-73 (Tenn. Crim. App. 1994). Although there is a single enhancement factor and the trial court obviously gave some weight to the inapplicable factor, the cruelty exhibited towards the victim was exceptional. We hold that the gravity of the acts warrants a twenty-three-year sentence.

We now consider the sentence for especially aggravated kidnapping. That offense occurs when the victim suffers serious bodily injury during the course

of the kidnapping. Tenn. Code Ann. § 39-13-305(4). That the defendant allowed the victim to be treated with exceptional cruelty is not inherent in the offense and is particularly applicable in this case because the defendant assisted in beating the victim so severely that one bruise could not be distinguished from another. That the victim suffered great personal injury may be inherent in an especially aggravated kidnapping, depending on the particular facts of a situation. Here the indictment charged the especially aggravated kidnapping occurred because the victim suffered serious bodily injury. Thus, this factor is inherent in the offense as charged and should not have been applied. Tenn. Code Ann. § 40-35-114(7); See Jones, 883 S.W.2d at 602. That the offense was committed for pleasure or excitement is not inherent in the offense of especially aggravated kidnapping. Yet there is no real proof of that enhancement factor. The holding in Jones would require that.

There are two remaining enhancements: that the defendant had no hesitation about committing a crime when the risk to human life was high and that the crime was committed under circumstances where the potential for bodily injury to a victim was great. Tenn. Code Ann. § 40-35-114 (10) and (16). In Jones, our supreme court held that these factors are not inherent in offenses where serious bodily injury is an element of the offense charged. Thus, we find both factors to be applicable. Locking the victim in the trunk of the car and releasing her to the hands of five men who had previously discussed killing her created a significant risk and predictable result. The enhancement factors, in our view, fully support the twenty-three year sentence.

We next consider the sentence for aggravated rape. That the defendant allowed the victim to be treated with exceptional cruelty was properly applied, as the rape occurred while the defendants were severely beating the

victim. Tenn. Code Ann. § 49-35-114(5). That the victim suffered great bodily injuries was also properly applied. The indictment alleged that the rape was aggravated because the defendants used a weapon; there was proof of that. So, bodily injury was not an essential element of the offense. Tenn. Code Ann. § 49-35-114(6). That the offense was committed to gratify the defendant's desire for pleasure or excitement is not applicable. Our court had held that this factor is not an essential element of a rape and may be applied when proven. State v. Adams, 864 S.W.2d 31 (Tenn. 1993). Because there was simply no proof establishing the defendant's motivation, this factor was misapplied.

We now consider the remaining two factors. In Claybrooks, 910 S.W.2d at 872, our court concluded that every robbery accomplished with a weapon necessarily entailed a high risk to human life as well as the risk of bodily harm. Accordingly, those factors were not proper enhancers. Id. Under the rule announced in Claybrooks, we must conclude that when a rape is aggravated because of the use of a weapon, risk to human life and the risk of bodily harm are inherent in the crime. Thus, these two factors were improperly applied. A modification to twenty years is appropriate.

We now turn to whether the trial court erred by ordering the sentences to be served consecutively to the sentence for life without the possibility of parole. Consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exist:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal

person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation;

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). Even if the court finds one of these factors applicable, however, aggravating circumstances must be present before consecutive sentences may be imposed. Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976)

The trial court determined that the defendant was a dangerous offender and thus qualified for consecutive sentences. The defendant contests that classification.

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involve aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to

the severity of the offenses. Gray, 538 S.W.2d at 393. In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct." The Wilkerson decision, which modified somewhat the strict, factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938.

The defendant would qualify as a dangerous offender. Tenn. Code Ann. § 40-35-115(4). He had no hesitation about committing a crime in which the risk to human life was high. The circumstances were aggravated in every sense. At trial, the defendant denied any responsibility for the offenses. The failure to accept any responsibility shows an absence of any rehabilitative qualities and demonstrates the necessity for societal protection by lengthy incarceration. Thus, consecutive sentencing is warranted.

In conclusion, the convictions and sentences, as modified, are affirmed.

Gary R. Wade, Judge

CONCUR:

Joe B. Jones, Presiding Judge

William M. Barker, Judge