

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1995 SESSION

STATE OF TENNESSEE,)	C.C.A. NO. 03C01-9406-CR-00198
)	
Appellee,)	
)	
VS.)	McMINN COUNTY
)	
RICKY THOMPSON,)	HON. R. STEVEN BEBB
)	JUDGE
)	
Appellant.)	(First Degree Murder, Aggravated Assault,
)	Arson)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CRIMINAL COURT OF CARTER COUNTY

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OPINION FILED: _____

REVERSED & REMANDED

DAVID H. WELLES, JUDGE

OPINION

In this capital case, the Defendant, Ricky Thompson, was convicted of first degree murder, aggravated assault, and arson. After the sentencing hearing, the jury found two aggravating circumstances: (1) that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of murder; and (2) that the murder was extremely 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)(3) and (5) (1991). The jury found that the State had proven beyond a reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances and sentenced the Defendant to death by electrocution. The Defendant was also sentenced to six years and four years, respectively, for the aggravated assault and arson convictions.

On appeal, the Defendant raises numerous issues for our review which involve errors occurring during both the guilt and sentencing phases of the trial. Having carefully considered the Defendant's contentions as to errors occurring during the guilt phase, we conclude that the trial court erred in excluding expert and certain impeachment testimony concerning the defendant's mental state at the time of the murder. We, therefore, reverse the Defendant's conviction for first degree murder, aggravated assault, and arson and remand this matter to the trial court for a new trial. Also, as to the alleged errors occurring during the sentencing phase, in an advisory capacity, we conclude that the trial court erred in sentencing the Defendant on the aggravated assault and arson convictions by failing to comply with the mandate of State v. Pearson, 858 S.W.2d 879 (Tenn. 1993), failing to make findings as to which enhancement factors applied to which convictions, and failing to make findings as to why the Defendant deserved consecutive sentences, and direct that on remand, if the

Defendant is convicted of these offenses, the trial court comply with these requirements.

BACKGROUND

The state's proof introduced at the guilt phase of the trial demonstrated that on the afternoon of October 25, 1989, the Defendant, accompanied by his two children, Vanessa and Ricky, took his wife, Nina, to work at a Jiffy convenience store at approximately 2:00 p.m. The Defendant and the two children sat in a booth and ordered hot dogs. Around 3:30 p.m., the manager of the store told Nina to tell her family that they would have to leave because "we can't allow your family to hang around here while you[re] on the job." Nina told the Defendant that he would have to leave, but at 4:00 p.m., he was still there. Nina again told the Defendant that he would have to leave. When the Defendant finally left at approximately 4:30 p.m., he told Nina and the manager that "you bitches will pay."

The Defendant left Vanessa, age five, with Nina, and he took Ricky, age nine months, with him. He returned to the store a few minutes after he left to bring Vanessa's medicine as she had been sick earlier in the day. Vanessa went home with one of Nina's co-workers, and Nina finished working her shift.

Christy Rominger, Nina's niece, stopped by the Jiffy store to check on her aunt later that evening. Nina received a phone call from the Defendant while Christy was at the store, and during the conversation Nina asked the Defendant if she could pick up "little Ricky." The Defendant refused permission, and Nina became very upset. Christy stayed with her aunt, and they called the McMinn County Sheriff's Department. Officers responded, but no report was filed. After Vanessa was brought back to the

store, Christy, Nina, and Vanessa left in Christy's car to spend the night at Christy's father's house because Christy felt that nobody would look for Nina there.

In the early morning hours of the next day, around 2:00 or 2:30 a.m., the Defendant returned to the Jiffy store and asked the clerk, Kevin Helms, if he knew where Nina was. As instructed by Nina before she left, he told the Defendant that he thought Nina had left with the Defendant. The Defendant offered Kevin some pills and showed him a clip of gun cartridges. Around 4:00 a.m., the Defendant returned to the Jiffy store and bought a paper and two gallons of gasoline. Around 4:30 a.m., he returned a third and final time, and he motioned for Kevin to come outside. He showed Kevin a rifle and said "something about he was mad enough to shoot somebody," but he never mentioned his wife specifically.

The Defendant also went to the home of Nina's mother, Elizabeth Vann, in the early morning hours of October 26. According to Ms. Vann, the Defendant asked if Nina was there and then went to the car and got little Ricky, holding him up in front of Ms. Vann and threatening to "blow his damn brains out" and "kill that bitch Nina."

Later that morning, Christy, Nina, and Vanessa drove to the Defendant's trailer. Nina told Christy and Vanessa to stay in the car while she talked to the Defendant. However, after only a few minutes, Vanessa got out of the car and Christy followed. The girls heard Nina and the Defendant arguing, but came to the door anyway. Nina let the girls in, and they went to Vanessa's room to get some clothes. Little Ricky was in a play pen in the kitchen, and Nina and the Defendant were talking. At some point, Nina picked up little Ricky, and when Christy and Vanessa returned to the kitchen, Nina motioned with her eyes for Christy and Vanessa to run. The three of them ran out the door to Christy's car, with Nina carrying little Ricky in her arms. Nina jumped in the front

seat on the passenger's side, Christy sat on the front seat on the driver's side, and Vanessa laid on the floorboard in the back seat, directly behind Christy.

When Nina ran from the trailer with little Ricky, the Defendant picked up an assault rifle, which had been laying in the living room, and followed. He tapped on the passenger side window and ordered Nina to get out of the car. Nina got out with little Ricky in her arms. According to Christy, Christy began blowing the car horn and screaming for help. The Defendant told her to "shut the f__k up," and then he shot her in the right leg. The Defendant turned the gun on Nina. Christy managed to open the car door, grab Vanessa, and run across the street.

Though accounts of the following events vary slightly, testimony from three of the Defendant's neighbors who witnessed the shooting relates that Nina was holding little Ricky and facing the Defendant from approximately five to six feet away when she turned and started to walk away. The Defendant fired the rifle, striking Nina in the buttocks. She fell to the ground, begging the Defendant not to shoot. Little Ricky crawled out from under her as the Defendant approached, and the Defendant "kicked or moved Nina with his foot." He then fired several more shots directly into Nina's body. One of the neighbors stated that after shooting her, the Defendant "turned his wife over and shook her and acted like he was talking to her." Another witness testified that as the Defendant started to walk away, he told his dead wife that he would see her later.

The Defendant then picked up little Ricky and fired several more shots into cars and into the air. Carrying little Ricky and the rifle, he walked back toward his trailer, and within a few minutes, neighbors witnessed black smoke coming from the trailer. The Defendant carried little Ricky across the street to an auto parts store where the Defendant bought a soft drink, took some pills, and waited for the police to arrive.

At trial, Dr. William E. Foree, Jr., McMinn County Medical Examiner, testified that Nina Thompson had died as a result of "massive bleeding and blood vessel disruption, and massive internal damage" from multiple gunshot wounds to the body. Nina had been shot five times in the arm, the chest, and the buttocks.

The murder weapon, a Russian self-loading semi-automatic rifle that was found inside the burned trailer, was introduced into evidence at trial. Mike Donnelly, state arson investigator, testified that based upon his investigation and examination of the burn patterns at the scene of the trailer fire, it was his opinion that a combustible liquid had been poured in the bathroom, the bedroom, the hallway, the kitchen, and the living room of the trailer and subsequently ignited. He stated that the fire had probably ignited on the front steps because this was consistent with the "pour pattern and access to the pour pattern." Dr. Robert C. Bernstorf, an emergency room physician at Athens Community Hospital, testified that he had treated the infant Ricky M. Thompson for first and second degree burns on the day of the fire and that the baby's hair was singed, blisters were on the tip of his nose, the front part of his lower leg was burned, and a bloody blister wound was on his right leg.

The Defendant's proof consisted of testimony from Marvin Farris, a detective with the McMinn County Sheriff's Department. Officer Farris had interviewed several of the witnesses at the trailer court and had interviewed the Defendant at the McMinn County Jail. The defense attempted to introduce the statement that the Defendant had given Officer Farris, and the State objected on the ground that the statement was self-serving hearsay. The objection was sustained, and defense counsel attempted to explain that they needed to let Mr. Farris examine the statement to show that he had not written down everything that the Defendant had said. Defense counsel told the court that the defense had a witness who would testify that Officer Farris had told him some additional things that the Defendant had said that did not appear in the

statement. The state complained that the defense was attempting to impeach something that was inadmissible. Defense counsel then asked Officer Farris whether he had told a news reporter that the Defendant had seemed concerned about his wife's welfare when he had taken the Defendant's statement. Officer Farris responded, "I don't remember." When asked whether he had told the news reporter that the Defendant had not seemed to know that his wife was dead, Officer Farris replied, "I might have." The defense later attempted to call David Stone, the news reporter who had spoken to Officer Farris, in order to impeach the officer's testimony, but the trial court ruled that the testimony was inadmissible hearsay.

The defense also attempted to call Dr. Roger Meyer, a clinical psychologist and founder of Brainerd Psychological Services, to testify as to the Defendant's mental condition, but the state objected because of a lack of notice. The trial court sustained the objection.

David Vann, son of Elizabeth Vann and brother of the victim, testified that his mother had never told him that the Defendant had come to her house in the early morning hours of October 26 and threatened to kill little Ricky and Nina. Two of the Defendant's neighbors testified that the Defendant had always appeared to have been good with his children. Nancy Smith, cousin of the Defendant, testified that the Defendant had been the primary caretaker of the children and that he had not worked because of mental problems. She also testified that she had never heard the Defendant threaten his wife.

The last witness for the defense was the Defendant himself. He testified that he and Nina had married in 1987 and that they had "argued a lot" from the beginning. The Defendant admitted that he had gone to the home of Elizabeth Vann on the morning of October 26 but denied making any threats. He also denied making threats in front

of Kevin Helms at the Jiffy store but admitted that he had told Mr. Helms that the police would "have a war on their hands" if they tried to take his child. He denied threatening the store manager, Vicky Devaney.

The Defendant testified that he had drunk about sixteen wine coolers and had taken some Valium on the evening before the shooting. When Christy, Vanessa, and Nina came by the trailer the next morning, the Defendant and Nina went into the trailer to discuss her job. According to the Defendant, Nina told him that she would quit if that was what he wanted. The Defendant told her that the only problem was the way that she treated him when he came to the store. He described the discussion as more of a "spat" than an argument.

The Defendant testified that Vanessa and Christy had gone to the bedroom, but when they had returned, Nina had asked him if she could pick up little Ricky. The next thing the Defendant knew, the three of them were running to the car with his son. The Defendant stated that he had picked up his rifle but that it had not been his intention to kill anyone, rather he had only wanted to stop Nina from taking little Ricky. He testified that he had tapped on the car window to get Nina's attention, and when Nina had opened the car door, the door had hit the barrel of his gun and the gun had gone off, hitting Christy in the leg. The Defendant testified that during this time, the main thought going through his head had been that Nina had once tried to kill little Ricky by punching him in the back of the head. He stated that he could not remember anything that had happened after the gun went off the first time.

On cross-examination, the Defendant admitted that he had been jealous of his wife and that the jealousy was part of the reason he had gone to the Jiffy store so much. The Defendant admitted showing the rifle to Kevin Helms on the morning of the murder but stated that the reason he had taken the gun with him was because he was

drunk and high on pills. He testified that he had bought the gasoline to mow lawns and that he couldn't remember whether he had set the trailer on fire.

Based on this evidence in the guilt phase, the jury found the Defendant, Ricky Thompson, guilty of first degree murder, aggravated assault, and arson.

In the sentencing phase of the trial, the State's first witness was Christy Rominger. She testified that Nina's five-year-old daughter, Vanessa, had been lying in the floorboard directly behind the driver's seat when the Defendant had shot Christy. Margaret Grady, a neighbor of the Defendant, testified that she had been at her mailbox when a visitor had pulled in her driveway and yelled at her to "duck." She testified that she had then heard shots and had raised her head to see the Defendant shoot his wife and then turn the gun and start shooting in her direction.

In mitigation, the Defendant's cousin, Nancy Smith, testified concerning the Defendant's background. She stated that the Defendant had lived with his parents in Detroit, Michigan, until he was approximately thirteen years old. She described the Defendant as being "different from the other kids." He was slower and was not allowed to go outside because he would run away. He was not able to learn with the rest of the class, and at the age of twelve, he was diagnosed as schizophrenic.

The Defendant's parents divorced when he was about thirteen years old, and he was raised by his father and his grandparents. The Defendant's father had been an alcoholic, and Ms. Smith recalled one instance in which he had punished the Defendant for playing with matches by burning his hand with a cigarette lighter. The Defendant's mother had also drunk excessively, and Ms. Smith remembered his mother choking him on one occasion.

Ms. Smith testified that the Defendant had been hospitalized numerous times for mental problems. While living in Michigan, the Defendant was confined to Ellaveese, a state mental hospital, for more than a year and a half. When he moved to Tennessee sometime during the seventies, the Defendant was again admitted to hospitals due to his mental problems. On one occasion, the Defendant staged a motorcycle accident as a suicide attempt and suffered a head injury. Ms. Smith recalled at least one other automobile accident in which he sustained a head injury. She testified that the Defendant had been on prescription medicine for schizophrenia for many years.

Dr. Thomas Williams took the stand to testify that he had treated the Defendant for head injuries sustained from various causes, but on cross-examination, he stated that he did not think there had been any neurological damage as a result of the injuries. Dr. Steven Ross Rogers testified that in 1988 he had diagnosed the Defendant as suffering from Graves disease, an autoimmune disorder which affects the thyroid gland causing an elevated thyroid hormone level. The Defendant suffered from fevers at night, and Dr. Rogers prescribed Valium to counteract the anxiety associated with this disease.

The last witness for the defense was Dr. Roger Meyer, a clinical psychologist. Dr. Meyer testified that medical records of the Defendant revealed that in 1970 he had been seen by a therapist for over a year and a half for mental and emotional problems. He had attempted suicide on numerous occasions and had exhibited signs of schizoid affected schizophrenia, chronic and differentiated schizophrenia, and paranoid schizophrenia. In 1977, the Defendant was evaluated and put on social security disability for his mental condition.

After conducting psychological and neuropsychological tests on the Defendant, Dr. Meyer determined that the Defendant suffers from a passive-aggressive personality disorder, drug and alcohol abuse, and neuropsychological problems. He concluded that the Defendant may not, in fact, remember what he did on October 26. He further concluded that the Defendant suffers from hyperactivity, schizophrenia, and brain damage from alcohol abuse and head injuries and that these conditions would have impaired his ability to think and handle problems effectively. On cross-examination, Dr. Meyer admitted that the Defendant had apparently exaggerated some of his symptoms and that the results from the Minnesota Multiphasic Personality Inventory had been thrown out for this reason.

Based on the proof, the jury found the existence of the following two aggravating circumstances beyond a reasonable doubt: (1) that the defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of the murder; and (2) that 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)(3) and (5) (1991). In addition, the jury found that the State had proven beyond a reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances and as a result, sentenced the Defendant to death.

PART I.

GUILT PHASE - TRIAL ERRORS

A. Sufficiency of the Proof

The Defendant first contends that the State failed to present sufficient evidence to demonstrate that the killing of Nina Thompson was committed with "premeditation and deliberation" as required under Tennessee law to convict someone of first degree murder. Rather, the Defendant argues that he acted without cool purpose, in the heat of passion and provocation, without time to reflect, and on impulse. He claims that the killing was committed while he was in an "emotional frenzy," drunk, high on Valium, stressed, and involved in a heated dispute with the victim over his child. He also claims that there was no preconceived design to kill but rather that the crime was precipitated by the victim taking his child.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). This court is required to afford the state the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as factual issues raised by the evidence are resolved by the

trier of fact, not this court. Cabbage, 571 S.W.2d at 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the state, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

A Defendant challenging the sufficiency of the proof has the burden of illustrating to this court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Tennessee Code Annotated section 39-13-201(a), (b) (1991) provides that a deliberate act is "one performed with a cool purpose" and a premeditated act is "one done after the exercise of reflection and judgment." The existence of premeditation and deliberation is a question of fact that may be inferred from the manner and circumstances of the homicide. State v. Tune, 872 S.W.2d 922, 925 (Tenn. Crim. App. 1993). In Tune, this court held that "[w]hile willful killing with a deadly weapon is not sufficient by itself to support an inference of premeditation, there were other circumstances before the jurors from which they could infer the existence of both premeditation and deliberation in this Defendant's mind." Id.

In the light most favorable to the state, the evidence reflected that several witnesses heard the Defendant threaten to kill his wife before the shooting. Arlean Walden testified that she had heard the Defendant threaten Nina on several occasions. Vicky Devaney testified that the Defendant had told both her and Nina that "you bitches will pay." Elizabeth Vann, the victim's mother, testified that in the early morning hours

on the day of the murder, the Defendant had told her that he was going to "kill that bitch Nina." Kevin Helms testified that on the evening before the murder, the Defendant had shown him a rifle and had stated that anyone who tried to get his baby "would have a war on their hands." The Defendant carried a loaded assault rifle around in his car while he was looking for his wife on October 25 and 26. He left the loaded gun in the living room of his trailer, easily accessible if anyone came to "get his baby." The jury could have easily found that the Defendant had formed an intent or design to kill prior to the actual killing. See State v. Brown, 836 S.W.2d 530, 540 (Tenn. 1992); see also State v. West, 844 S.W.2d 144, 147 (Tenn. 1992).

The evidence also supports the finding that the Defendant acted with deliberation in that the circumstances suggest that he reflected upon the manner and consequences of his act. The Defendant fired his first shot into Christy Rominger. He then shot Nina as she turned to walk across the street. After falling to the ground, Nina begged him not to shoot, but the Defendant stepped towards her and proceeded to fire several more shots into her body. We are satisfied that the evidence in this case was sufficient to establish the elements of premeditation and deliberation so as to warrant the jury's verdict.

B. Right to Present a Full Defense

The Defendant next insists that he was denied his right to present a defense when the trial court refused to allow him to present evidence which would negate the mens rea of first degree murder. Specifically, he contests the trial court's preclusion of the testimony of Dr. Roger Meyer and the testimony of a news reporter which the Defendant contends would have impeached the testimony of an investigating officer

and would have shown that the officer had observed the Defendant's disturbed mental state at the time of the offense.

During the guilt phase of the trial, the Defendant sought to call Dr. Roger Meyer, a clinical psychologist, who, under ex parte orders from the trial court, had examined the Defendant. The State objected on the ground that the defense had not given written notice pursuant to Tennessee Rule of Criminal Procedure 12.2(b) which requires the following:

If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the district attorney in writing of such intention and file a copy of such notice with the clerk.

If there is failure to comply with this requirement, "the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental condition." Tenn. R. Crim. P. 12.2(d).

The defense argued that it had arrived at its decision to use the testimony of Dr. Meyer only after hearing testimony from other witnesses, who brought the Defendant's mental condition at the time of the shooting into question, and therefore, notice had not been given. The trial court agreed with the State and excluded the testimony. The defense also argued that although written notice pursuant to Tenn. R. Crim. P. 12.2(b) had not been given, the State had actual notice. The defense noted that Dr. Meyer had sent his first bill to the court when he had examined the Defendant under the court's ex parte orders and that the bill had been placed in the court's file. The defense also noted that the State had its own expert on call for the sentencing phase of the trial and argued that this expert could be used to rebut the testimony of Dr. Meyer.

The Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant "the right . . . to have compulsory process for obtaining witnesses in his favor." Exercise of the right assists the adversarial process in its truth-seeking function by ensuring that the trial court hears all admissible facts pertinent to the case. Bowling v. Vose, 3 F.3d 559, 561 (1st Cir. 1993). However, as the Supreme Court noted in Taylor v. Illinois, 484 U.S. 400, 408, 108 S.Ct. 646, 652, 98 L.Ed.2d 798 (1988), "[i]t is not an absolute right." The Court found that a trial court may exclude a defense witness for a discovery violation without trampling on his constitutional rights. The Court issued no hard test, but rather listed various considerations that a judge should use as a guide in balancing a defendant's right to have witnesses testify in his or her behalf against "countervailing public interests." 484 U.S. at 414-15, 108 S.Ct. at 656. These include the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." Id.

In applying this test to the case at bar, we agree with the Defendant that the psychological testimony of Dr. Meyer, an expert witness, could be considered reliable. In assessing the fairness of the trial court's decision, we look to defense counsel's reason for failing to notify the State of its intention to present Dr. Meyer's testimony, and we conclude that the reason is plausible. It is quite possible that the decision to introduce the psychological testimony was not reached until testimony was heard from certain State's witnesses. Moreover, the State had actual notice that Dr. Meyer had been retained by the defense, and the State had contacted its own expert witness to prepare for a rebuttal. Lastly, we conclude that the "truth-determining function" of the trial process was not at risk. As his only rational defense, the Defendant was entitled to present evidence which would negate the Defendant's ability to form the required mens rea for the offense.

The Defendant also cites a large body of federal authority which holds that exclusion of testimony is constitutionally permissible only if the defendant has willfully defied discovery rules at the expense of the integrity of the judicial process. See United States v. Mitan, 966 F.2d 1165, 1175-76 (7th Cir. 1992); Horton v. Zant, 941 F.2d 1449, 1467 (11th Cir. 1991); Eckert v. Tansy, 936 F.2d 444, 446 (9th Cir. 1991); Escalera v. Coombe 852 F.2d 45, 47-48 (2d Cir. 1988); Chappee v. Vose, 843 F.2d 25, 29-32 (1st Cir. 1988). In Chappee, the First Circuit held that "[e]xclusionary sanctions must appropriately be reserved for hard-core transgressions." 843 F.2d at 31.

Nothing in the record in this case indicates that the Defendant's failure to provide notice was willful and deliberate. Rather, the trial court seemed to base its decision on the fact that the State would not have an opportunity to rebut the expert's testimony.

In the case at bar, the Defendant was attempting to present evidence relating to the Defendant's mens rea at the time he committed this crime.¹ Alternative sanctions were available. The trial court could have granted a reasonable continuance to allow the State time to interview Dr. Meyer and to have its own expert present for rebuttal. We conclude that the trial court's exclusion of Dr. Meyer's testimony was error.

The State argues that even if the trial court committed error, such error was harmless beyond a doubt because the Defendant was allowed to introduce the testimony of Dr. Meyer during the sentencing phase of the trial, and the jury, nevertheless, returned a death sentence. Although, admittedly, Dr. Meyer's testimony during the sentencing phase included several strong assertions that the Defendant

¹In a recent decision which follows a line of Tennessee cases that provide a basis for concluding that evidence to negate the element of intent is admissible in Tennessee, this court concluded that "evidence, including expert testimony, on an accused's mental state is admissible in Tennessee to negate the elements of specific intent, including premeditation and deliberation in a first-degree murder case." State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994). See also Davis v. State, 161 Tenn. 23, 28 S.W. 2d 993, 997 (1930); Drye v. State, 181 Tenn. 633, 184 S.W.2d 101 (1944); State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992) perm. to app. denied (Tenn. 1993). Although Phipps was decided subsequent to the trial of this case, we find that the history and rationale cited in Phipps is helpful in dealing with this issue.

lacked the necessary capacity to form the requisite intent for first degree murder and the jury still sentenced the Defendant to death, it is for this same reason that we cannot deem the error to be harmless.

The evidence conclusively established that the Defendant shot his wife. A primary issue was whether the Defendant, at the time of the shooting, possessed the required mental state to warrant a first degree murder conviction. Because Dr. Meyer's testimony, which focused solely on the Defendant's mental status, was excluded in the guilt phase, the jury did not hear nor was it instructed to consider this evidence in relation to the Defendant's ability to form the requisite intent. The Defendant's medical history revealed that he had been diagnosed as schizophrenic at the age of twelve, that he had been hospitalized numerous times for mental problems, that he had attempted suicide on numerous occasions, and that he had been receiving social security disability payments due to his mental condition since 1977. At the sentencing phase of the trial, Dr. Meyer testified that after conducting numerous tests on the Defendant, he had determined that the Defendant suffered from a passive-aggressive personality disorder, drug and alcohol abuse, and neuropsychological problems and that those conditions would have impaired his ability to think and handle problems effectively. We cannot say that we are convinced that exclusion of this evidence was harmless. See T. R. A. P. 36(b); Tenn. R. Crim. P. 52(a). This case must therefore be reversed and remanded for a new trial.

The Defendant also argues that he was denied the opportunity to present vital evidence concerning his mental status when he was precluded from presenting evidence that a police officer observed that the Defendant was mentally disturbed on the day of the killing. At trial, the defense recalled Officer Marvin Farris during its case-in-chief. Officer Farris testified concerning the Defendant's demeanor after the shooting when he had interviewed him at the McMinn County Jail, stating that he had

not noticed anything unusual about the Defendant's demeanor or speech. When asked whether after the interview he had told David Stone, a news reporter, that the Defendant "had seemed concerned about his wife's welfare," Officer Farris replied, "I don't remember." When asked whether he had told Mr. Stone that the Defendant had wanted to know how she was getting along and didn't seem to know that she was dead, Officer Farris replied, "I might have. I do not remember."²

David Stone was subpoenaed by the Defendant in an attempt to impeach Officer Farris. A motion to quash the subpoena was filed by Mr. Stone, and the State objected to Mr. Stone's testimony on the ground that his testimony would be inadmissible hearsay. After hearing argument, the trial court ruled that the Mr. Stone's testimony could not be used as an inconsistent statement to impeach Officer Farris because at trial Officer Farris had not absolutely denied making such statement and his prior statement could not therefore be used to impeach him.

Although the State contends that Tennessee follows the minority view that direct contradiction is required when one seeks to impeach a witness, this court finds no authority for such a contention. Tennessee Rule of Evidence 613 authorizes the use of a prior inconsistent statement to impeach, but does not define "inconsistent." In Reagan v. Mabry, 67 Tenn. 168, 169 (1874), our supreme court held that when a witness has been asked whether he made a contradictory statement and neither admits nor denies but claims that he doesn't remember, the statement is admissible because such statement when proven may have been such as to amount to a direct contradiction of the witness and may also convince the jury that the witness did not speak the truth in saying that he did not remember making the statement. See also

²The State objected to neither this line of questioning nor the officer's testimony. Accordingly, any argument that the testimony was inadmissible as hearsay was waived. See Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988); T.R.A.P. 36(a).

State v. Cate, 746 S.W.2d 727, 730 (Tenn. Crim. App. 1987); State v. Billy Joe Bourff, No. 03C01-9305-CR-00162, Campbell County (Tenn. Crim. App., Knoxville, June 23, 1994); Neil Cohen et. al, Tennessee Law of Evidence, § 613.2 (2d ed. 1990 & Supp. 1993). Such is the case before us. Officer Farris neither admitted nor denied that he had made the statement to Mr. Stone, but rather told the court that he "might have. I don't remember." Accordingly, the trial court committed error in precluding this testimony.³

C. Instructional Errors

The Defendant challenges the jury instructions given at the guilt phase on three grounds. He first argues that the trial court's jury instruction on voluntary intoxication relieved the State from its burden of proof and precluded the Defendant from presenting a full defense.

At trial, the court gave the following instruction on involuntary intoxication:

Voluntary drunkenness or intoxication. You have heard evidence concerning the alleged drunkenness of the defendant at the time of this offense. You are instructed that voluntary drunkenness is generally no defense to a criminal charge. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible for his conduct. This is so unless his drunkenness had continued for such a long period of time so as to result in settled insanity by the time of the offense. It is the duty of persons to refrain from placing themselves in a condition which poses a danger to others.

However, as an exception to this rule, voluntary drunkenness can be a defense to the crime of murder in the first degree, depending upon the fact whether the drunkenness prevented the deliberation and

³However, because the statement would be admissible only to impeach Officer Farris's prior testimony, Tennessee law would require that the court instruct the jury that it could consider Mr. Stone's testimony only for purposes of impeachment and not as substantive evidence. See State v. Reece, 637 S.W.2d 858, 861 (Tenn. 1982); McFarlin v. State, 214 Tenn. 613, 381 S.W.2d 922 (1964).

premeditation essential to constitute the crime of murder in the first degree.

The voluntary drunkenness of one charged with taking the life of another can be looked to only for the purpose of determining whether such drunkenness had so affected the mind of the person so charged that, at the time, he was incapable [sic] of forming in his mind a premeditated and deliberate design to kill. But in legal estimation a drunken man may be guilty of murder in the first degree as if he were sober, if it shall appear from the facts that the killing was willful, deliberate, malicious, and premeditated.

Therefore, it is your duty to consider the defendant's drunkenness, if any, in connection with all the other facts and circumstances in proof, in deciding whether the act was done with premeditation and deliberation. If you find that the defendant's drunkenness was to such an extent that he was incapable at the time of forming [sic] in his mind a premeditated and deliberate design to kill, or if you have a reasonable doubt as to this question, then you must find the defendant not guilty of murder in the first degree.

Specifically, the Defendant contends that this instruction was erroneous because it unconstitutionally permitted the jury to consider intoxication evidence only if the Defendant was "incapable of forming a premeditated and deliberate design to kill." He argues that a reasonable juror would have understood this instruction to mean that intoxication could only preclude a finding of first degree murder if the Defendant was in such a state that he had no mental capacity to form such an intent, i.e., that he was mentally unable to premeditate and deliberate.

We conclude that the instruction, taken directly from Tennessee Pattern Jury Instructions--Criminal § 36.08, did not mislead the jury. The fourth paragraph of the instruction states that it is the jury's duty to "consider the defendant's drunkenness, if any, in connection with all the other facts and circumstances in proof, in deciding whether the act was done with premeditation and deliberation." The second paragraph stated that voluntary drunkenness can be a defense to first degree murder if "the drunkenness prevented the deliberation and premeditation essential to constitute the crime." Though the instruction referred to the capacity of the Defendant to form the "premeditated and deliberate design to kill," the instruction also informed the jury that

it must consider whether the drunkenness actually "prevented the deliberation and premeditation essential to constitute the crime" This issue is without merit.

The Defendant next contends that the jury instruction on the element of malice impermissibly shifted the burden of proof on an essential element of the crime in violation of the Supreme Court decision in Sandstrom v. Montana, 422 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The contested portion of the charge reads as follows:

Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought [sic], exists in the mind of the slayer. Malice is an intent to do injury to another, a design formed in the mind of doing mischief to another.

Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit and heart regardless of social duty and fatally bent on mischief. Implied malice may be found to exist where the wrongdoer did not intend to slay the person [sic] killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event, there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.

Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then you may infer malice sufficient to support a conviction of murder in the second degree, but again [sic] this inference may be rebutted by either direct or circumstantial evidence or by both regardless [sic] of whether the same be offered by the defendant or exists in the evidence of the state. A "deadly weapon" is any weapon or instrument which from the manner in which it is used or attempted [sic] to be used is likely to produce death or cause great bodily injury.

Malice cannot be inferred from deadly intent only, because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life or to save himself from great bodily harm and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation the killing might or might not be manslaughter, but it would not be murder.

You are reminded that the state always has the burden of proving every element of the crime charged beyond a reasonable doubt. A permissible inference may or may not be drawn from an elemental fact

from proof by the state of a basic fact. However, all inferences permitted to be drawn may be rebutted. An inference [sic] does not place any burden of proof of any kind upon the defendant.

Later, the jury instructions provided as follows:

If the state has proven beyond a reasonable doubt that a killing had occurred, the [sic] you may infer that the killing was done maliciously, but this inference may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the state.

In Sandstrom, the United States Supreme Court held that jury instructions which can be interpreted as a conclusive presumption or that shift the burden of persuasion to the defendant violated the defendant's constitutional right to due process. 442 U.S. at 522-24. In determining whether a jury instruction meets constitutional muster, courts must ascertain whether the challenged charge creates a mandatory presumption or a permissive inference. See Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). A mandatory presumption violates due process because it shifts the burden to the defendant. A permissive inference, however, does not violate the Constitution because the State must still prove facts from which an element such as malice might be reasonably inferred.

In Francis, in determining whether or not a given charge embodied a presumption or a permissive inference, the Court noted the following:

If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of the offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created a [sic] unconstitutional presumption.

471 U.S. at 315, 105 S.Ct. at 1971.

In the jury instructions given in the case at bar, the court told the jury that the State always has the burden of proving every element of the charge beyond a reasonable doubt. The court also told them that a permissible inference "may or may not" be drawn from proof by the State of a basic fact. Finally, the court told the jury that "[a]n inference does not place any burden of proof of any kind upon the defendant."

In considering what the Defendant argues is "presumption of malice" in the context of the entire charge, we conclude that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. This issue is without merit.

Lastly, the Defendant contends that the jury was unconstitutionally instructed on the meaning of "reasonable doubt" at both the guilt phase and the sentencing phase of the trial. During the guilt phase, the court gave the following instruction:

The state has the burden of proving the guilt of the defendant beyond a reasonable doubt....

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required as to every proposition of proof requisite to constitute the offense.

The Defendant argues that the use of the expression "moral certainty" in this instruction was unconstitutional pursuant to the United States Supreme Court decision in Victor v. Nebraska and Sandoval v. California, ___ U.S. ___, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). In Victor, the Supreme Court ruled that the phrase "moral certainty" may have lost its historical meaning and that a modern jury might "understand it to allow conviction on proof that does not meet the reasonable doubt standard." 114 S.Ct. at 1247. It reasoned that "'moral certainty' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable

doubt," but "something less than the very high level of probability required by the Constitution in criminal cases." Id. Yet the court upheld the conviction in Victor because the jurors were told that they must have "an abiding conviction, to a moral certainty, of the truth of the charge," and the court concluded that the instruction "impress[ed] upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused." Id. (citing Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979)).

In the present case, the trial court used the phrase "moral certainty" in conjunction with an explanation that reasonable doubt is "that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt." On several occasions, Tennessee courts have held that identical and similar instructions were consistent with constitutional principles. State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993); Richard Caldwell v. State, No. 02C01-9405-CC-00099, Madison County (Tenn. Crim. App., Jackson, Dec. 28, 1994).⁴ As in these cases, we conclude that the instruction as given, adequately defined the degree of doubt necessary for a guilty verdict.⁵

D. Voir Dire and Jury Selection

The Defendant next complains that the trial court violated his rights during voir dire and jury selection by : (1) precluding the exercise of the Defendant's "for cause" and peremptory challenges by improperly limiting the scope of voir dire; (2) erroneously failing to exclude jurors for "cause;" (3) prohibiting individual voir dire of the entire

⁴But see Rickman v. Dutton, 864 F.Supp. 686, 709 (M.D. Tenn. 1994).

⁵Likewise without merit is the Defendant's claim that similar instructions used during the sentencing phase were constitutionally infirm.

panel; and (4) improperly excluding jurors who expressed scruples concerning the death penalty.

The Defendant first contends that because he was denied the right to individually question potential jurors concerning their opinions and knowledge of the offense, he was denied his right to establish necessary grounds for cause or for his peremptory strikes. Specifically, when two of the jurors gave limited responses when asked about their opinions concerning the Defendant's guilt and the defense requested individual voir dire to probe the exact nature of the prospective jurors' knowledge of the facts, the trial court denied the motion because he contended that the procedure would be physically impossible with limited space and manpower, and there would be no way to keep a record. Because of this denial, the Defendant asserts that he was forced to use two peremptory challenges to remove these jurors.

Tennessee Rule of Criminal Procedure 24(a), in pertinent part, states that the trial 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." It further states that "[t]he court . . . may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors." Although the rule provides no test for determining whether the scope of questioning is adequate to fulfill the rule's purpose, Tennessee courts have held that "the scope and extent of voir dire is entrusted to the discretion of the trial judge, and his actions will not be disturbed unless clear abuse of discretion is shown." State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992).

The trial judge in this case indicated a disposition to focus the voir dire on whether prospective jurors had formed opinions about the case, and if so, whether they could set their opinions aside. He twice asked them if there were any of them "who feel

like because what you have read or heard that you could not grant Mr. Thompson that presumption of innocence at this point," and the two jurors mentioned above did not respond affirmatively. The trial judge's inquiry was sufficient, and he did not abuse his discretion in limiting voir dire.

The Defendant next contends that the trial court's failure to excuse a prospective juror for cause when her answers did not "unequivocally" show that she could be impartial was reversible error. During voir dire, Shirley Evans was called as a prospective juror, and when asked if she had read anything about the killing, she replied that she "had read it yesterday and when it happened." When asked if she had formed an opinion, she replied, "When I first read it it [sic] did." When asked if her opinions would keep her from giving the Defendant the presumption of innocence, she stated that she "would try to be fair." When further questioned about whether she would start out with any preconceived opinions or ideas that would keep her from presuming that the Defendant is innocent, she admitted, "I guess I would." Later in the questioning, when asked whether her opinion was so strongly held that it would affect her ability to listen to the proof in the case, Ms. Evans stated, "No, I can listen to it. I believe everybody deserves a fair trial." And finally, when questioned about whether her opinion would go back into the jury room with her and be a part of her decision, she replied, "No. I think I can be fair."

Tennessee Rule of Criminal Procedure 24(b)(2) provides in part that "[i]f [a juror] admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial." In her answers, Mrs. Evans stated that her opinion would not affect her ability to listen to the proof in the case and that her opinion would not be a part of her decision. Again, the trial judge did not abuse his discretion in failing to excuse Ms. Evans for cause.

The Defendant next faults the trial judge for denying repeated requests for individual sequestered voir dire of prospective jurors based on possible exposure to prejudicial pretrial publicity.

In State v. Porterfield, 746 S.W.2d 441, 447 (Tenn. 1988), the Tennessee Supreme Court held that individual voir dire is mandated only when there is a "significant possibility" that a juror has been exposed to potentially prejudicial material. However, in Porterfield, where the trial judge inquired of every prospective juror whether they could set aside their recollection and render a decision based only upon the evidence presented at trial, the court found that there had been no abuse of discretion in denying individual voir dire. Id.

As noted above, the trial court twice asked the prospective jurors about their ability to set their opinions aside. He instructed them that if they were chosen as jurors, they would have to decide the case based upon the evidence presented at trial. We conclude that under these circumstances, there was no abuse of discretion in denying individual voir dire.

Lastly, the Defendant argues that the trial judge erred in excusing certain jurors for cause and in limiting the attempts of defense counsel to rehabilitate suspect jurors during voir dire. Specifically, the Defendant challenges the voir dire of four prospective jurors.

In Wainwright v. Witt, 469 U.S. 412, 425, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), the United States Supreme Court reaffirmed as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment the test of "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his

instructions and his oath." In State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989), the Tennessee Supreme Court held that "the trial court's finding of bias of a juror because of his views of capital punishment shall be accorded a presumption of correctness and the burden shall rest upon the Defendant to establish by convincing evidence that that determination was erroneous."

When questioned by the state as to whether any of the jurors had a "religious or moral or philosophical view that would keep [them] from returning a death penalty even though the facts [might] show that it [was] warranted," one of the prospective jurors responded, "I can't." Upon further questioning, the juror stated that she couldn't "live with" herself if she voted to impose such a penalty. The trial court allowed defense counsel to attempt to rehabilitate her, to no avail. This prospective juror was properly excluded for cause.

Another prospective juror told defense counsel that he could listen to the evidence and give his opinion as to guilt, but stated that "for me to 'give him death,' I couldn't do that." The juror remained staunch in his position, despite further questioning by defense counsel. Finally, the trial court instructed that the juror's answer should be accepted and that defense counsel should "move on." This prospective juror was also properly excluded for cause.

A third prospective juror was questioned by the court as to whether she would "listen to the evidence and consider both the death penalty and life imprisonment as alternative punishment." She responded, "Yes." Defense counsel then attempted to question her regarding what kinds of cases would warrant the death penalty. The State objected, and the trial court sustained the objection. Counsel approached the bench, and out of the hearing of the jury, the trial court informed defense counsel that no more questions regarding what kinds of cases warranted the death penalty would be allowed

because that type of questioning would "open the door to some speculation outside the law."

Defense counsel then asked the juror if she would say that the Defendant deserved the death penalty if she heard that the victim in this case "lost her life as a result of having been shot with an assault rifle." She replied, "No. I would have to hear the circumstances." This prospective juror was not struck for cause but rather with a peremptory challenge from the defense.

Defense counsel questioned a fourth prospective juror as to whether he would automatically apply the death penalty if he heard that the defendant had used a weapon to kill the victim. The juror replied, "No." However, when defense counsel questioned the juror concerning whether he could give a presumption of innocence if small children were involved, he at first stated that "[i]t would be hard to do knowing that there is small children involved," but later told the court that he could apply the presumption of innocence "at this moment." This juror was also excluded with a peremptory challenge by the defense.

Applying the standard as set forth in Alley, the Defendant has failed to establish by convincing evidence that the court's actions were erroneous. In the case of the two jurors who were excluded for cause, to allow repetitious questioning would have been pointless. The trial court's restrictions in all instances were justifiable, and this issue is without merit.

E. Amended Indictment

The Defendant next complains that the trial court erred by permitting the State to amend the second count of the indictment by deleting the word "serious" from the

language charging aggravated assault. Count two of the indictment, in its original form, charged that the Defendant "on or about the 26th day of October, 1989 . . . did unlawfully, willfully and feloniously make an aggravated assault on Christy Rominger by shooting Christy Rominger in her leg with a deadly weapon, to-wit: a rifle causing serious bodily injury" Upon motion of the State, and over objections of the Defendant, the trial court entered an order allowing the State to amend the wording of the second count by deleting the word "serious" before the phrase "bodily injury." The Defendant contends that by allowing the State to prove "bodily injury" rather than serious bodily injury pursuant to Tennessee Code Annotated section 39-2-101(b) (Supp. 1988), the state was allowed to diminish its burden of proof.

Tennessee Code Annotated section 39-2-101(a) (Supp. 1988) differentiates bodily injury from serious bodily injury, while subsection (b) states the following:

(b) A person is guilty of the offense of aggravated assault . . . if such person:

(1) Attempts to cause or caused serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; [or]

(2) Attempts to cause or willfully or knowingly causes bodily injury to another with a deadly weapon;

The law was changed in 1989 to delineate one who commits aggravated assault as one who:

(1) Commits an assault as defined in § 39-13-101, and:

(A) Causes serious bodily injury to another; or

(B) Uses or displays a deadly weapon

Tenn. Code Ann. § 39-13-102(a)(1) (1991).

The Defendant argues that the State was allowed to delete the word "serious" because it was surplusage to conform to the 1989 law. The State, however, contends

that the Defendant's argument is based upon a misreading of the charge and the record in that the indictment does not specify the section of the 1982 statute upon which it relied. The State asserts, and we agree, that the record reflects that the State was intending to proceed under Tennessee Code Annotated section 39-2-101(b)(2) rather than (b)(1) in proving aggravated assault. In arguing the motion to amend the indictment, the prosecutor remarked that "the statute states that if a deadly weapon is used that only bodily injury must occur," and requested that the court delete the word "serious" as surplusage. The aggravated assault charge was founded not on the Defendant causing serious bodily injury but rather on his use of a deadly weapon. Thus, the change in the indictment did not lessen his burden of proof. This issue is without merit.

F. Admission of Evidence

The Defendant argues that evidence concerning the burns his child received during the trailer fire was irrelevant to the Defendant's guilt or innocence on the arson charge, or if relevant, should nonetheless have been excluded under Rule 403 of the Tennessee Rules of Evidence as being unfairly prejudicial.

At trial, the State attempted to elicit testimony from the emergency room physician who treated little Ricky for burns on the day of the shooting. The testimony concerned the treatment of little Ricky, and defense counsel objected on grounds of relevancy and prejudice. The trial court overruled the motion, agreeing with the State that the testimony was circumstantial evidence that the Defendant committed arson.

Tennessee Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Three of the Defendant's neighbors testified that they had seen the Defendant take little Ricky behind his trailer and that the trailer had erupted into flames a few minutes later. The evidence that little Ricky sustained burns while he was behind the trailer with his father would tend to make the "existence of the fact" that the Defendant had set the fire "more probable than it would be without the evidence."

In the alternative, the Defendant contends that the evidence was unduly prejudicial under Tennessee Rule of Evidence 403 which states that "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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The physician's testimony did not rise to the level of "unfair prejudice." It was brief and not particularly graphic or emotional. This issue is also without merit.

PART II.

SENTENCING PHASE - TRIAL ERRORS

A. Aggravating Circumstances

The Defendant first contends that the evidence was not sufficient to prove beyond a reasonable doubt that any person other than the victim and the Defendant's son, little Ricky, were at risk during the murder. He argues that because the express terms in the aggravating circumstance of Tennessee Code Annotated section 39-2-203(i)(3) (1982) state that the defendant must have created a risk of death to two or more persons other than the victim "during his act of murder," Christy Rominger, Vanessa, or Margaret Grady could not be considered as persons to whom a "great risk of death was created," because the danger to which they were exposed did not occur "during his act of murder."

In State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984), the Tennessee Supreme Court held that this aggravator is applicable if the risks to another person occurred "at or shortly prior to or shortly after an act of murder upon which a prosecution is based." In the case at bar, the Defendant shot at Christy Rominger within minutes of the murder. Vanessa, the victim's daughter, was sitting directly behind Christy in the line of fire. After the Defendant fatally shot his wife, he purportedly shot in the direction of Margaret Grady's trailer, forcing her to duck. Under our sufficiency of the evidence analysis, the jury could have easily concluded that this statutory aggravator was applicable.

B. Prosecutorial Misconduct

The Defendant next contends that the State engaged in numerous instances of prosecutorial misconduct in the sentencing phase, especially in its closing argument. Specifically, he claims that in closing argument the prosecutor repeatedly inflamed the passions of the jury, asked for a death sentence based upon the wishes of the victim's family, told the jury that he, the judge, and the police wanted the death penalty, argued that deterrence could be used as a basis for the death penalty, and argued about matters not in the record.

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, 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).

The Defendant contends that during closing argument and throughout the sentencing phase of the trial, the prosecutor referred to the victim as "little mama" and to the Defendant's son as "little Ricky" solely to inflame the jury. No objection was made to these references at trial, and even if there had been, we find that the prosecutor's conduct was not improper. The victim was the mother of the Defendant's son, and the son was called "little Ricky" by all who knew him because the Defendant had the same name.

The Defendant also argues that the prosecutor unconstitutionally argued that the death penalty should be imposed because the prosecutor, the judge, and the police wanted it. This type of argument has been held to be improper. See Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985). However, in the case at bar, the remark of the prosecutor was actually, "I can't sentence the defendant to death, the judge can't sentence the defendant to death, law enforcement can't, that remains the province of the jury as it should be." It appears that the prosecutor was merely focusing the attention of the jury on their responsibility, and his argument, in this respect, was not improper.

The Defendant next claims that by telling the jury that a person who is facing the death penalty "will exaggerate and won't tell the whole facts to the good doctor," the prosecutor was arguing facts outside the record in an attempt to discredit the testimony of the Defendant's expert witness. Although we agree that this statement may have been improper, we do not find that, standing alone and in cognizance of the Judge factors, it is sufficient to warrant reversal.

The Defendant next contends that remarks by the prosecutor constituted references to "the [victim's] family and opinions and characterizations of the crimes and the defendant" of the type found impermissible in Booth v. Maryland, 482 U.S. 496, 502, 107 S.Ct. 2529, 2533, 96 L.Ed.2d 440 (1987).

During closing argument the prosecutor made the following remarks:

Ladies and gentlemen of the jury, the defense argued about whether little Vanessa and little Ricky will do later, and of course that's, we don't know what they are going to say later, but I say to you as that as they get older and they want ato [sic] know what happened to their mother and how she died and all the facts with regard to that they will ask about the jury and they will ask about this case and they will want to know what this jury did with the man that cold bloodily cut down the young mother, did the jury give him the death penalty--

In Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court essentially overruled the Booth doctrine in holding that a jury may constitutionally consider evidence about the effect of the victim's death upon his or her survivors. However, in a footnote, the Court stated the following:

Our holding today is limited to the holdings of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. Booth also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

111 S.Ct. at 2611.

Even if the Payne decision did not overrule Booth's holding that evidence of the victim's family members' opinions concerning the appropriate sentence is inadmissible, the prosecutor's argument in this case could not be regarded as a family member's opinion about the appropriate sentence. The prosecutor, in rebutting the defense's argument that the children would someday want to know who their father is, argued the

same issue in that the children would someday want to know what happened to the man that killed their mother. This issue is without merit.

Lastly, the Defendant contends that the prosecutor improperly argued that the death penalty should be imposed as a deterrence to others. In closing arguments, the prosecutor told the jury that the death penalty was similar to a "lighthouse" in that it helps society "get back on course." He continued by stating that "those folks out there contemplating, premeditating, can see that in proper cases in the state of Tennessee a jury will render the death penalty--." The defense objected, and the trial judge sustained the objection, but gave no curative instructions.

In Tennessee, it has usually been held improper for an attorney to argue that a particular penalty will be either a specific or a general deterrence. See State v. Henley, 774 S.W.2d 908, 913 (Tenn. 1989); State v. Irick, 762 S.W.2d 121, 129-31 (Tenn. 1981). However, in Henley, the supreme court refused to reverse because it did not appear that the argument had influenced the jury. 774 S.W.2d at 913.

Though this argument may have been improper, in the context of the record as a whole, we cannot conclude that it affected the verdict and prejudiced the Defendant. This issue is also without merit.

C. Instructional Errors

The Defendant challenges the jury instructions given at sentencing on eight grounds. He first argues that the jury instructions precluded the jury from considering mitigating evidence of mental or emotional disturbance which did not rise to the level of "extreme" mental or emotional disturbance. In its instructions, the trial judge quoted from the language in Tennessee Code Annotated section 39-2-203(j)(2) (1982) that in arriving at the punishment the jury shall consider the mitigating factors including, but not limited to "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." The Defendant contends that the modifier "extreme" misled the jury in its consideration of the evidence.

The Tennessee Supreme Court has repeatedly rejected this argument. See State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 16-17 (Tenn. 1993). This issue is without merit.

Equally without merit is the Defendant's argument that the jury instructions precluded the jury from considering mitigating evidence of mental illness and intoxication which did not rise to the level of "substantially" affecting the Defendant's ability to conform his conduct to the law pursuant to the language in Tennessee Code Annotated section 39-2-203(j)(8) (1982). This argument was also rejected in Smith, 857 S.W.2d at 16-17.

Next the Defendant contends that trial court erred in failing to charge the jury on applicable statutory mitigating factors in Tennessee Code Annotated section 39-2-203(j) (1982). Specifically, the Defendant contests the trial court's failure to charge the jury on the statutory mitigating circumstance which states that "[t]he defendant has no

significant history of prior criminal activity." Tenn. Code Ann. § 39-2-203(j)(1) (1982).

The Defendant's argument ignores basic Tennessee law that the trial court is not required to instruct on matters not fairly raised by the evidence. State v. Davis, 649 S.W.2d 12, 14 (Tenn. Crim. App. 1982). To the contrary, Tennessee courts have held that the giving of instructions for which there is no evidence in the record is to be avoided. Whitwell v. State, 520 S.W.2d 338, 344 (Tenn. 1975). In this case, the defense put on no evidence concerning the Defendant's past criminal history during the sentencing phase. Accordingly, the trial judge was not required to instruct on this statutory mitigating factor.

The Defendant also contends that because the trial judge instructed the jury that it should make no distinction between "mitigating circumstances that I have read you and those otherwise raised by the evidence which are specifically raised by either the state or the defense," and then refused to give any special instructions on mitigating factors raised by the defense, the trial judge misled the jury about their duty to fully consider mitigating evidence. The Defendant argues that the jury could have construed the instructions and the lack thereof as indicative that the Defendant had no further mitigating evidence.

The Defendant submitted a large number of proposed special instructions on mitigating circumstances. The trial judge refused to include these instructions, relying on the Tennessee Supreme Court decision in State v. Hartman, 703 S.W.2d 106, 118 (Tenn. 1985), which held the following:

the only mandatory instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged, and the jury must be told that they shall weigh and consider any facts or circumstances that are raised by the evidence that they find to be mitigating circumstances, in making the determination of which circumstances, aggravating or mitigating, outweigh the other.

The trial judge adhered to the holding in Hartman, instructing the jury on the applicable statutory mitigating factors set forth in Tennessee Code Annotated section 39-13-204(j) (1991), including an instruction on (j)(9):

Any other mitigating factor which is raised by the evidence produced by either the prosecution or the defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The trial judge then added the following instructions, following the language used in Tennessee Pattern Jury Instructions--Criminal § 7.04:

No distinction shall be made between mitigating circumstances that I have read to you and those otherwise raised by the evidence which are specifically requested by the state or the defense.

The defendant does not have the burden of proving a mitigating circumstance. If there is some evidence that a mitigating circumstance exists, then the burden of proof is upon the state [sic] to prove, beyond a reasonable doubt, that mitigating circumstance does not exist.

In State v. Richard Odom, No. 02C01-9305-CR-00080, Shelby County (Tenn. Crim. App., Jackson, Oct. 19, 1994), perm. to appeal granted, (Tenn., Feb. 6, 1995), this court held that the trial judge did not err in giving these same instructions and by refusing to grant the Defendant's request for special instructions on specific non-statutory mitigating circumstances. Likewise, we conclude that the jury was not misled by these instructions. This issue is without merit.

The Defendant next contends that he was entitled to other requested jury instructions in order to properly instruct the jury on its duties. Specifically, the Defendant contests the trial judge's refusal to give a special instruction which told the jury that "[w]hatever your sentence is in this case, whether it is death by electrocution or imprisonment for life, the responsibility for making this decision rests entirely with you, as individual jurors."

The record reveals that the trial judge instructed the jury that "[I]t is now your duty to determine, within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense." Such instruction was certainly sufficient to instruct the jury on its duty. This issue is also without merit.

The Defendant next assigns as error the trial judge's instruction on the aggravating circumstance concerning the "heinous, atrocious, or cruel" nature of the crime. Tennessee Code Annotated section 39-2-203(i)(5) (1982) provided as an aggravating factor that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." With the 1989 revisions, this statute's counterpart now reads 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." Tenn. Code Ann. § 39-13-204(1)(5) (Supp. 1995). The offense was committed on October 26, 1989, and the trial court erroneously instructed the jury under the latter definition.

The Defendant cites State v. Stephenson, 878 S.W.2d 533 (Tenn. 1994), and State v. Keen, ___ S.W.2d ___, No. 02S01-9112-CR-00064, Shelby County (Tenn., Jackson, May 23, 1994), for the proposition that a reversal is required if a jury is not instructed with the law as it existed at the time of the offense. In both of these cases, however, the jury was instructed on old law. In the case at bar, the jury was given the definition of "heinous, atrocious, or cruel" under the new statute, which placed a higher burden on the State to prove the act involved torture or serious physical abuse. We conclude that the error is harmless beyond a doubt. T. R. A. P. 36(b); Tenn. R. Crim. P. 52(a).

The Defendant also argues that the use of the disjunctive "or" in this jury instruction deprived the Defendant of his right to a unanimous jury verdict because

some of the jurors could have found the crime to be "heinous," while others found it to be "atrocious" or "cruel." However, our supreme court has held that "[a]s used in circumstance (i)(5), the three adjectives 'heinous,' 'atrocious,' and 'cruel' are complimentary. Although listed disjunctively, they state a unitary concept defined and limited by 'torture or depravity of mind.'" State v. Van Tran, 864 S.W.2d 465, 479 (Tenn. 1993). This issue is without merit.

Equally without merit is the Defendant's argument that this jury instruction was unconstitutionally vague. Our supreme court has repeatedly held that under either definition of "heinous, atrocious, or cruel," the statutory aggravating circumstance is not unconstitutionally vague. See State v. Cazes, 875 S.W.2d at 267; State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991).

D. Sentencing Criteria

The Defendant first contends that the trial court erred in sentencing him on the aggravated assault and arson counts by failing to comply with the mandate of State v. Pearson, 858 S.W.2d 879 (Tenn. 1993). In Pearson, our supreme court held that if a crime is committed when the Criminal Sentencing Act of 1982 governed, but sentence is imposed when the Criminal Sentencing Reform Act of 1989 governs, the trial court must calculate the sentence which would be imposed under both acts and impose the lesser of the two sentences. Id. at 884.

In this case, the crime was committed on October 26, 1989, and the Defendant was sentenced on May 15, 1992. The trial court failed to calculate the sentence under both acts, and the State concedes this error. We must therefore remand this cause for resentencing on the aggravated assault and arson convictions.

The Defendant also contends that the trial court misapplied enhancement factors on both the aggravated assault and the arson charge. In sentencing the Defendant to six years on the aggravated assault charge and four years on the arson charge, the trial court did not delineate which enhancement factors it applied to which offense. The trial court simply listed the following factors as applicable:

- (1) the previous history of criminal convictions or criminal behavior;
- (2) the offense involved more than one victim;
- (3) at least one of the victims was particularly vulnerable because of age;
- (4) the defendant treated or allowed a victim to be treated with exceptional cruelty;
- (5) the personal injuries inflicted was [sic] particularly great;
- (6) the defendant had no hesitation about committing a crime when the risk to human life was high; and
- (7) the crime was committed under circumstances under which the potential for bodily injury to a victim was great.

The Sentencing Reform Act of 1989 provides that "[w]henver the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." Tenn. Code Ann. § 40-35-210(f) (1991). These findings by the trial judge must be recorded in order to allow an adequate review on appeal. Because the trial court failed to specify to which count the enhancing factors applied, we again must remand for resentencing.⁶

Lastly the Defendant argues that the trial court erred in finding the Defendant to be a "dangerous offender" pursuant to State v. Gray, 538 S.W.2d 391 (Tenn. 1976),

⁶The State concedes that the factors "the offense involved more than one victim," "at least one of the victims was particularly vulnerable because of age," and "the crime was committed under circumstances under which the potential for bodily injury to a victim was great," were improperly applied to the aggravated assault charge. It also concedes that all of the factors except "that the defendant had no hesitation about committing a crime when the risk to human life was high" were improperly applied to the arson charge.

and State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), perm. to appeal denied, id. (Tenn. 1991), and ordering the Defendant's sentences to be served consecutively. The trial court made no findings other than simply ruling that the Defendant was a "dangerous offender." Accordingly, this case should be remanded for the trial court to make appropriate findings as to this issue, and to do so considering our supreme court's recent opinion of State v. Wilkerson, ___ S.W.2d ___ (Tenn. 1995).

E. Proportionality Review

The Defendant contends that pursuant to Tennessee Code Annotated section 39-13-206(c)(1)(D) (1991), the sentence of death is excessive and disproportionate to the penalty imposed in other cases similar to this case. Tennessee Code Annotated section 39-13-206(c)(1)(D) (1991) requires this court to review the sentence of death to make that determination, considering both the nature of the crime and of the defendant. In view of the necessity to remand this case for a new trial, we choose to omit this statutory review. See State v. Stephenson, 878 S.W.2d 530, 558 (Tenn. 1994); State v. Richard Odom, No. 02C01-9305-CR-00080, Shelby County (Tenn. Crim. App., Jackson, Oct. 19, 1994), perm. to appeal granted, (Tenn., Feb. 6, 1995). However, we note that the trial court did not file a report with the Clerk of the Supreme Court in Knoxville or include one in the technical record as required by Tennessee Supreme Court Rule 12. Accordingly, the trial court is instructed to comply with this rule.

CONSTITUTIONAL CHALLENGES

The Defendant first contends that the sentence of death unconstitutionally infringes upon the Defendant's right to life. Specifically, he argues that because the right to life is fundamental, the punishment of death is not necessary to promote any

compelling state interest, and there are less restrictive means of achieving any state interest in punishing the Defendant. Although this argument is somewhat novel in its approach, the Tennessee Supreme Court has held that the State's death penalty statute, per se, meets due process requirements. See State v. Black, 815 S.W.2d at 190.

The Defendant next contends that by seeking the death penalty at trial but offering the Defendant a life sentence if he pleaded guilty, the State burdened the Defendant's right to a trial by jury. The Defendant cites the United States Supreme Court decision in United States v. Jackson, 390 U.S. 570, 583, 88 S.Ct. 1209, 1217, 20 L.Ed.2d 138 (1968), for the proposition that the United States Constitution prohibits such a practice.

The Court's ruling in Jackson involved statutes which prohibited the imposition of the death penalty on defendants who pleaded guilty. In Jackson, the Supreme Court concluded that the Federal Kidnapping Act, which allowed imposition of the death penalty solely by means of a jury verdict, was unconstitutional because it infringed upon the defendant's Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial. The Court noted that "[u]nder the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant who is ingenious enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die."

Tennessee's death penalty statute has no provision which allows the imposition of the death penalty solely by means of a jury verdict. This issue is without merit.

The Defendant next argues that the trial court unconstitutionally limited the consideration of mitigating evidence by requiring the jury to unanimously agree on the sentence of life or death. The Tennessee Supreme Court has specifically rejected this argument in State v. Smith, 857 S.W.2d at 18.⁷ This issue is also without merit.

The Defendant next raises a number of issues that he contends either render Tennessee's death penalty statute unconstitutional or result in its arbitrary and capricious imposition. Each of these challenges has been previously addressed and rejected by this court and the Tennessee Supreme Court in prior opinions. We, therefore, find it unnecessary to discuss in detail the reasons for our holdings. We specifically reject the following arguments, relying upon the authority cited below.

(1) The death penalty statute does not narrow the class of death eligible defendants. See State v. Smith, 868 S.W.2d at 582; State v. Van Tran, 864 S.W.2d at 482; State v. Middlebrooks, 840 S.W.2d 317, 341-47 (Tenn. 1992).

(2) The prosecutor's unlimited discretion in selecting candidates for the death penalty results in arbitrary and capricious infliction of the death penalty. See State v. Brimmer, 876 S.W.2d 75, 86 (Tenn. 1994); State v. Cazes, 875 S.W.2d at 268.

(3) The death penalty is unconstitutional because it is imposed in a discriminatory manner based on economics, race, geography, and gender. See State v. Smith, 857 S.W. 2d at 23; State v. Evans, 838 S.W.2d 185, 196 (Tenn. 1992).

(4) The lack of uniform procedures mandating individual sequestered voir dire during jury selection renders the imposition of the death penalty arbitrary and capricious. See State v. Cazes, 875 S.W.2d at 269.

(5) By excluding jurors who have scruples against the death penalty, the jury selection process skews the make-up of the jury to make it prosecution-prone and thereby violates the Defendant's constitutional rights. See State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993); State v. Richard Odom, No. 02C01-9305-CR-00080, Shelby County (Tenn. Crim. App., Jackson, Oct. 19, 1994), app. granted, (Tenn., Feb. 6, 1995).

⁷But see Houston v. Dutton, No. 3:86-0749 (M.D. Tenn., May 19, 1994).

(6) The death penalty is imposed in an arbitrary and capricious manner because the defendant is prohibited from addressing jurors' misconceptions concerning parole eligibility, cost of execution versus cost of life imprisonment, deterrence, and method of execution. See State v. Cazes, 875 S.W.2d at 268; State v. Black, 815 S.W.2d at 179.

(7) Because the jury is instructed that it must unanimously agree to impose a life sentence but is not instructed as to the effect of a non-unanimous verdict, the Defendant's constitutional rights are violated. See State v. Brimmer, 876 S.W.2d at 87; State v. Richard Odom, No. 02C01-9305-CR-00080, Shelby County (Tenn. Crim. App., Jackson, Oct. 19, 1994), app. granted, (Tenn., Feb. 6, 1995).

(8) The jury instructions created the likelihood that the jurors were led to believe that they were required to unanimously agree on mitigating circumstances. See State v. Brimmer, 876 S.W.2d at 87; State v. Harris, 839 S.W.2d at 74-75.

(9) The jury is not required to make the ultimate determination that death is the appropriate penalty. See State v. Brimmer, 876 S.W.2d at 87; State v. Richard Odom, No. 02C01-9305-CR-00080, Shelby County (Tenn. Crim. App., Jackson, Oct. 19, 1994), app. granted, (Tenn., Feb. 6, 1995).

(10) The death penalty is arbitrary and capricious because the Defendant is denied the right to final closing argument at the penalty phase of the trial. See State v. Brimmer, 876 S.W.2d at 87; State v. Caughron, 855 S.W.2d at 542.

(11) Electrocutation is a cruel and unusual punishment, thereby violating the Defendant's constitutional rights. See State v. Cazes, 875 S.W.2d at 268; State v. Black, 815 S.W.2d at 179.

CONCLUSION

We have carefully considered the Defendant's contentions as to the alleged errors occurring during the guilt phase of the trial and conclude that the trial court erred in excluding the testimony of Dr. Meyer and Mr. Stone. It is impossible for this court to say that the exclusion of this evidence did not affect the jury's decision as to the guilt of the Defendant on these charges. Accordingly, this case is remanded for a new trial

on the convictions for first degree murder, aggravated assault, and arson, in accordance with this opinion.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE