

FILED

Nov. 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9505-CC-00140
Appellee,	*	CARROLL COUNTY
VS.	*	Hon. Julian P. Guinn, Judge
LEE RUSSELL TOWNES,	*	(Felony Murder, Burglary and
Appellant.	*	(Theft of Property under \$500)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Lee Russell Townes, was convicted of felony murder, burglary and theft of property under \$500.00. The trial court imposed a Range I, four-year sentence for the burglary conviction and an eleven-month, twenty-nine day sentence for the theft conviction. The sentences are concurrent. The life sentence for the felony murder is to be served consecutive to the other two terms.

In this appeal, the defendant presents the following issues for our review:

- _____ (1) whether the evidence is sufficient to support the conviction for first degree murder during the commission of a felony;
- (2) whether the trial court erred by allowing the prosecutor to exercise his peremptory challenge to excuse an African-American juror;
- (3) whether during closing argument the prosecutor improperly argued facts not in evidence;
- (4) whether the state failed to prove venue;
- (5) whether the trial court erred by allowing the introduction of a photograph of the victim; and
- (6) whether the trial court erred by imposing a consecutive sentence.

We find no error and affirm the judgment of the trial court.

Vera Gilbert, county service manager for the Northwest Development Counsel operated a community center in Carroll County. On December 11, 1993, the building was to be used for a fashion and talent show. Alvin Fields, the victim who was a sixty-five-year old retired school teacher who acted as the road manager for a gospel band, had scheduled a band performance at the event. Fields stopped at Ms. Gilbert's residence at approximately 7:00 a.m. to pick up the keys to the

center. Gilbert approximated that it would take two to three minutes to drive to the school.

Argel Reynolds, owner of a recording studio, and Patrick Steele, a band member, planned to meet Fields at the center at 7:00 a.m. to set up music equipment. When the two arrived at approximately 7:05 a.m., they saw Fields' car in the parking lot. After inspecting the center for about eight to ten minutes to make sure there would be enough electrical outlets, they discovered Fields' body lying on a landing half-way down a flight of stairs. Steele, who saw "quite a bit of blood," checked on the victim "to see if he was breathing." When the victim showed no signs of life, Reynolds and Steele notified the police. Reynolds showed the police "tracks" imprinted in the blood on the left side of the stairwell. A coat, a television and a refrigerator were taken from the office area of the center.

Jerry Thomas Francisco, Chief Medical Examiner for the state, helped perform the autopsy. He found stab wounds to the neck, chest, upper arm, leg, ear and defensive wounds to the right hand and fingers. The wound to the left side of the victim's neck severed both the jugular vein and the carotid artery. Dr. Francisco described the wound to the chest as penetrating the heart and lungs.

Linda Littlejohn, a forensic scientist for the Tennessee Bureau of Investigation, examined the shoes of both the victim and defendant and compared them to the shoe impressions at the scene. She testified that three photographs of shoe prints at the scene were impressions from the defendant's shoes; two of the prints were left by a third person; and one other could possibly have been from the defendant's shoes.

Samera Zavaro, a forensic scientist for the Tennessee Bureau of Investigation, analyzed a pair of work boots, four knives, a rag, a work jacket, a pair of the defendant's pants, and blood samples taken from the scene and from the victim. She testified that one of the knives had human blood on it but that she was unable to determine the blood type. Agent Zavaro found no blood on the boot or the rag. She testified that blood matching the victim's type was on the jacket and the defendant's pants.

Christopher Carpenter, a special TBI agent, investigated the crime scene and found that a clock in the office had been unplugged at 5:15. He testified that he received information from Corporal Virgil Bush of the McKenzie Police Department that the defendant had sold a refrigerator to Danny Johnson between 5:00 and 5:30 a.m. on the morning of the murder. Special Agent Carpenter and two other officers questioned the defendant. While he initially denied any involvement, he later confessed to the crime when the officers showed him a piece of glass found in the sole of the his boot. The officers saw what appeared to be blood on the defendant's shoes.

The defendant signed a written statement detailing his participation in the crimes. He stated that he went for a walk between 3:30 and 4:00 a.m., noticed that a door at the center was open, and walked inside. He claimed that there was glass already on the floor. He acknowledged that he carried a small refrigerator down the street, put it down, and started to walk away. He claimed that a friend, Danny Johnson, happened to drive by in a truck and agreed to buy the refrigerator. The refrigerator was taken to Johnson's house.

The defendant told the officers that he returned to the center about 7:00 a.m. after having reservations about his conduct. He claimed that the victim arrived later, sought an explanation, and picked up a knife that was lying on a desk. After denying that he had broken into the center, the defendant struggled with the victim over the knife; he claimed that when they stumbled down the stairs, the victim suffered a knife wound to the neck. The defendant asserted that he tried to stop the bleeding but eventually ran from the premises. He said that “[he] did not mean to kill [the victim].” The defendant did, however, acknowledge that he hid his blue work pants and blue work shirt in an outbuilding near Olivet Baptist Church; he denied having worn a jacket or hat.

The knife, located in a ditch, was wrapped in a rag. A pair of pants and a coat were found inside an old shed. Agent Carpenter testified that he initially suspected that the defendant’s brother, Eugene Townes,¹ was involved in the crime. When cross-examined, Agent Carpenter acknowledge that seven months after his arrest, the defendant gave him a copy of an anonymous letter which led to the discovery of the victim’s billfold at the residence of John David Wallace. He conceded that he had not taken any shoe prints from the defendant’s brother, other suspects, or the police officers who were involved in the investigation of the crime scene. He did testify the defendant never claimed that his brother was involved in the offense.

TBI Agent Tommy Heflin assisted in the investigation of the scene. He testified that he observed eight bloody shoe prints on the landing where the victim lay and on five of the steps going upstairs. He concluded that three of the prints on

¹ To avoid confusion between the defendant and his brother, Eugene Townes, the defendant will be referred to as “defendant” and Eugene Townes will be referred to as “Townes.”

the steps were from the defendant's shoes and one print on the landing was similar to that of the defendant. One partial print was found on the landing between the victim's legs; his analysis established that the print came from a person other than the defendant. Another shoe print belonging to a third person was found on the landing near the victim. Several partial prints were also discovered in the dust in the lobby located close to the stairs. Testifying that he was very careful not to step in any blood as he took photographs of the scene, Agent Heflin discovered broken glass down the hall from the stairs where someone had broken into an office. Because no bloody shoe prints were found in the office area, Agent Heflin believed that the office had been broken into before the victim was killed. The impressions of two sets of tires were discovered in front of the building. Agent Heflin testified that the prints did not match a set of tire impressions taken from a Williams Furniture truck. During the course of his investigation, Agent Heflin found unlocked entrances at the end of the building where the tire tracks were located and at the front of the center.

Russell Davis, II, a TBI forensic scientist, analyzed the broken glass samples taken from the school building and compared the samples to the broken glass removed from the defendant's shoes. He found "no differences between [the] two sets of glass." Agent Davis conceded that he did not perform blood typing on the glass particles. He also stated that he found no pieces of glass on the soles of the victim's shoes.

Officer Virgil Bush, Jr., of the McKenzie Police Department testified that he and Sergeant Nolan went to the center before the removal of the body. He testified that neither he nor Sergeant Nolan stepped in the blood. Officer Bush

testified that Johnson admitted that he bought a refrigerator and also claimed that a television set had been taken. The television was never found, however.

Detective Joe Walker of the McKenzie Police Department acknowledged at trial that there had been “rumors” after the defendant’s arrest that Eugene Townes had committed the crimes. He also testified that there were “unsubstantiated” reports that a Williams Furniture Company truck had been to the center on the morning of the crime; Townes, an employee of Williams Furniture Company, drove the truck on occasions. Detective Walker acted on the tip that the victim’s wallet was at the residence of John David Wallace, Sr. Detective Walker discovered that Eugene Townes had visited frequently and stayed overnight there on more than one occasion; however, Eugene Townes denied knowing anything about the television set or coat taken from the center. Conceding the defendant’s brother was on his initial list of suspects, Detective Walker testified that other members of the defendant’s family reported that the defendant knew who committed the crime.

Danny Johnson testified that the defendant sold him the refrigerator for twenty dollars at about 5:30 or 6:00 a.m. on the day of the offense. He claimed that he dropped the defendant off down the street from the center at about 6:35 a.m. At that point, the defendant said that he intended to visit James Hoyt who lived nearby.

John David Wallace, Sr., testified for the defense. He claimed that on the weekend of the murder, the defendant had not visited his home but Eugene Townes had. Seven months later, the wallet was found underneath the residence.

Willie Joe Gilbert, who lived one and a half blocks from the center, testified that the defendant and his brother played cards at his house on the night before the murder. He stated that the two left sometime before 5:00 a.m but he was unsure of whether they left together.

Carol Townes, the defendant's cousin, resided with Danny Johnson at the time of the murder. She testified that she came in between 6:30 and 7:00 a.m and saw Johnson and the defendant walking out of the house. The three decided to go out for a beer but changed their minds and dropped the defendant off near a friend's house located about three to four minutes away from the center. She testified that she saw the defendant, who was unarmed, walk in a direction away from the center. She conceded that the defendant had told her he had stolen the refrigerator around 5:30 a.m.

At trial, the defendant admitted stealing the refrigerator but denied any participation in the murder. He claimed that his brother killed the victim and that he had lied to the police in order "to protect" him. He contended that he entered an open door and saw the glass to an office had been broken into when he took the refrigerator. He conceded that he sold the refrigerator. The defendant testified that Johnson and Ms. Townes argued as they were on their way to buy beer so he decided to drop in on James Hoyt. Hoyt was not at home, however. The defendant claimed that he then saw his brother drive by in the Williams Furniture Company truck. He contended that the furniture truck and the victim's car were parked at the center. He looked inside the center and found the body. The defendant claimed that he then saw his brother running down the hallway; he testified that he got a rag to try to stop the victim's bleeding and tried to pick him up. The defendant contended that he then picked up the knife and wrapped it in the rag. He testified

that he knew his brother had killed the victim and ran; he claimed that he put the knife in a ditch and returned home. On cross-examination, the defendant was unable to explain why the rag did not have blood on it.

I

The defendant first contends that the evidence was insufficient to support the verdict of felony murder. He does not contest the sufficiency of the evidence for his other two convictions.

When sufficiency is at issue, of course, this court must review the record to determine if the evidence adduced at trial was sufficient “to support the finding of the trier of fact of guilt beyond a reasonable doubt.” Tenn. R. App. P. 13(e). On appeal, 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). This court may not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). A verdict against the defendant removes the presumption of innocence and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The defendant has the burden of overcoming this presumption of guilt.

Furthermore, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in their testimony are matters entrusted exclusively to the jury as the trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). 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), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

At the time of the offense, felony murder was defined as the “reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy.” T.C.A. § 39-13-202(a)(3). In order “to sustain a conviction of first-degree-felony-murder, the killing must have been in pursuance of, rather than collateral to the unlawful act described by the statute.” State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988). The death of the victim “must have had an intimate relation and close connection with the felony, ... and not be separate, distinct, and independent from it” State v. Farmer, 201 Tenn. 107, 116, 296 S.W.2d 879, 883 (1956). In State v. Brown, 756 S.W.2d 700, 703 (Tenn. Crim. App. 1988), this court ruled that “[t]he fact that the murder occurred after the robbery was completed does not make the murder collateral to the robbery. The jury reasonably could conclude . . . that the murder was accomplished in order to prevent identification of the defendants by the victim.”

In our assessment, the proof is adequate. This record is replete with evidence, primarily circumstantial, that the defendant recklessly killed the victim after an unlawful entry with the intent to commit a theft. A crime may be established by the use of circumstantial evidence. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Bordis, 905 S.W.2d 214, 200 (Tenn. Crim. App. 1995).

Here, the victim’s blood was found on the defendant’s clothing. An analysis of the glass taken from the defendant’s boots established that the glass came from the office door where the refrigerator had been located. Moreover, the

defendant confessed his crime in a signed statement; that the jury chose not to accept his recantation was well within their prerogative.

The defendant also argues that the presence of shoe prints not made by the defendant supports a finding that the defendant did not commit the crime; however, some prints matched. Again it was the prerogative of the jury to determine the value of this evidence; they had a basis for their conclusions.

The defendant also claims that his felony murder conviction cannot stand because the crimes of burglary and theft are “separate and distinct offenses [occurring] prior in time” to the murder. He contends that he had no criminal intent to commit burglary or theft during his second entry and cannot, therefore, be guilty of felony murder. The state’s theory at trial was that the defendant intended to steal more items during the second unlawful entry but was surprised by the victim. The state argued that the defendant killed the victim in order to cover up his crime. The jury convicted the defendant based on the theory of the state. The evidence presented at trial supported their decision. In our opinion, a rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to support a conviction of first degree murder during the commission of a felony. See Jackson v. Virginia, 443 U.S. 307 (1979).

II

Next, the defendant argues that the trial court erred by permitting the state to exercise a peremptory challenge to dismiss a black juror in violation of the rule in Batson v. Kentucky, 476 U.S. 79 (1986). The state argues that no constitutional violation occurred because the prosecutor provided several neutral

reasons for its challenge. We agree that the evidence does not support a claim of purposeful discrimination in the use of the peremptory challenges.

In Batson, the United States Supreme Court held that the prosecutor's use of peremptory challenges to intentionally exclude jurors of the defendant's race violated his right to equal protection under the fourteenth amendment to the U.S. Constitution. See also art. 1, § 9, Tenn. Const. In Powers v. Ohio, 499 U.S. 400 (1991), the Supreme Court upheld the principles in Batson but eliminated the requirement that the defendant and the wrongfully excluded juror be of the same race in order for there to be an equal protection claim. See State v. Ellison, 841 S.W.2d 824, 826 (Tenn. 1992).

When the defendant is able to establish a prima facie case of purposeful discrimination against a prospective juror from a cognizable racial group, the prosecution must come forward with a neutral explanation for the challenge of these jurors. State v. Ellison, 841 S.W.2d at 827; see Batson v. Kentucky, 476 U.S. at 97. The explanation must be more than an assumption that black jurors will be biased simply because the defendant is black. On the other hand, the explanation does not have to rise to the level of justifying a challenge for cause. It is the trial court's responsibility to determine whether there has been a purposeful discrimination on the part of the state. Batson v. Kentucky, 476 U.S. at 98; see also State v. Bell, 745 S.W.2d 858, after remand, 759 S.W.2d 651 (1988). "[T]he exercise of even one peremptory challenge in a purposefully discriminatory manner would violate equal protection." State v. Ellison, 841 S.W.2d at 827. If the court were to determine a neutral reason does not exist, the conviction must be reversed. State v. Ellison, 841 S.W.2d at 826; see also Batson v. Kentucky, 476 U.S. at 100.

The defendant must show that “these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude [certain of] the venireman from the petit jury on account of their race.” Id. at 96. A trial court must look to the “totality of the relevant facts” to determine whether the state’s use of peremptory challenges gives rise to an inference of discriminatory purpose. Bell, 759 S.W.2d at 653.

Here, the defendant and the victim are black. The record reflects that the state exercised three of its four peremptory challenges. One of the three challenges was used to remove an African-American. The jury ultimately chosen to consider the evidence was composed of one black and eleven white members.

The prosecutor made the following comment to the venireman that was eventually excused:

I’m not picking on you because you’re black but it’s obvious to me you are. And the defendant is black and the victim is black. And, consequently, I might think that you might have some more interest in it than maybe some other people, that it could be somebody that you knew.

The venireman responded that he had “heard a right smart about” the offense and that he knew three or four of the witnesses. In response to a question of whether he knew the defendant, he replied, “I think I do. If I don’t, I believe -- if Carl Townes is his brother I know him, because I know the whole family.” The prospective juror did state, however, that he could be fair despite the relationship. Later, the prosecutor submitted a peremptory challenge. A bench conference was held, and the trial court sua sponte required the prosecutor to state the reasons for his challenge. The prosecutor gave the following reasons:

(1) that the juror knew the defendant’s brother and that the defendant and his brother were known to the state and police officers as crack and cocaine dealers;

(2) that the juror was evasive because he would not look the prosecutor in the eye and kept his hands over his face;

(3) that because the juror wore an earring and gold chain he would “have less interest in the system” and would not “make a good juror for the [s]tate and [would] lean to the defendant”; and

(4) that the prosecutor believed the juror had a friendship with the defendant which he had not revealed.

The prosecutor also stated that a named African-American from Carroll County stated a belief that the challenged juror would not likely be supportive of the state.

At the conclusion of the bench conference, the trial court made no specific findings about the prosecutor’s discriminatory intent. Later, the prosecutor informed the trial judge that he preferred to have an African-American juror so that there would be no perception that the gravity of the offense was lessened by the fact that there was a black defendant and a black victim. Another African-American was eventually selected to serve on the jury; the prosecutor had a peremptory challenge available but did not use it. Again, the trial court made no specific findings but instead impaneled the jury consisting of one black and eleven white members.

In our view, the record does not support the defendant’s claim of purposeful discrimination in the use of peremptory challenges. On appeal, the trial court’s finding of intentional discrimination is entitled to appropriate deference by a reviewing court.” State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994). Implied in the ruling of the trial court is that there was no discrimination. The defendant argues on appeal that the venireman did not in fact know the defendant because he stated that he knew the family of Carl Townes, who is not related to the defendant. The record, however, does not suggest that this fact was brought to the attention of the prosecutor or the trial court. When the venireman stated that he knew the victim,

several witnesses, and the circumstances of the crime, he provided the state with racially neutral reasons for excusing the prospective juror.

III

As his third issue, the defendant asserts that the prosecutor improperly argued facts not in evidence during closing argument. He contends that the prosecutor's misconduct misled the jury and deprived him of a fair trial.

Trial courts have substantial discretionary authority in determining the propriety of final argument. Although counsel is generally given wide latitude, courts must restrict any improper argument. Sparks v. State, 563 S.W.2d 564 (Tenn. Crim. App. 1978). Closing argument must be temperate, must be based upon evidence introduced during trial, and must be relevant to the issues at trial. State v. Sutton, 562 S.W.2d 820 (Tenn. Crim. App. 1978). The bounds of proper argument largely depend upon the facts in evidence, the character of the trial, and the conduct of opposing counsel. See State v. Byerley, 658 S.W.2d 134 (Tenn. Crim. App. 1983); Evans v. State 557 S.W.2d 927 (Tenn. Crim. App. 1977); Gaston v. State, 506 S.W.2d 802 (Tenn. Crim. App. 1973).

The test to be applied in reviewing prosecutorial misconduct is whether “the improper conduct could have affected the verdict to the prejudice of the defendant.” Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965). The factors are set out in Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), as adopted by the Tennessee Supreme Court in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984):

(1) the conduct complained of, viewed in light of the facts and circumstances of the case,

- (2) the curative measures undertaken by the court and the prosecutor,
- (3) the intent of the prosecutor in making the improper argument,
- (4) the cumulative effect of the improper conduct and any other errors in the record, and
- (5) the relative strength or weakness of the case.

Both the state and the defense must be given the opportunity to argue not only the facts in the record but any reasonable inferences drawn therefrom. See Russell v. State, 532 S.W.2d 268 (Tenn. 1976). Confusing or irrelevant arguments should not be permitted. See Burns v. State, 591 S.W.2d 780 (Tenn. Crim. App. 1979); Brazelton v. State, 550 S.W.2d 7 (Tenn. Crim. App. 1977).

The argument challenged by the defendant consisted of a statement made by the prosecutor, “I’m going to submit ... one other possibility. Exhibit 12 is the shoe print that [Agent Littlejohn] says was between the [victim’s] legs [and was] not consistent with that tread. Look at that print and tell me if that is not possible that is a footprint on top of a footprint.” The trial court overruled the defendant’s objection because the assertion qualified as argument based upon the evidence in the record; no curative instructions were given.

The exhibit was clearly admitted into evidence; it was not, however, included in the record on appeal. It is the defendant’s burden to prepare a record which conveys a fair, accurate and complete account of what transcribed in the trial court with respect to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993); State v. Boling, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992). Because he did not do so, this court

must presume that the trial court's determination is correct. State v. Ballard, 855 S.W.2d at 561; State v. Boling, 840 S.W.2d at 951.

In any event, the prosecutor's statement was well within the scope of proper argument. There was a legitimate factual issue over whose shoe prints were at the scene. Evidence was introduced that the shoe prints were made by a third person. In our view, the prosecutor made an arguable inference from the evidence presented at trial. See Russell v. State, 532 S.W.2d at 271. That is permissible.

V

Next, the defendant asserts that the state failed to prove venue by a preponderance of the evidence. He argues that because two officers testified differently, the evidence was insufficient to establish that the crime took place in Carroll County.

Article I, § 9 of the Tennessee Constitution provides that in all criminal prosecutions by indictment or presentment, the accused has a right to a trial by an impartial jury chosen from the county in which the crime was committed. See also Tenn. R. Crim. P. 18. Thus founded in the constitution, proof of venue is necessary to establish jurisdiction. Hopson v. State, 201 Tenn. 337, 299 S.W.2d 11, 14 (1957). Venue may be shown only by a preponderance of the evidence. The burden is on the state. Harvey v. State, 213 Tenn. 608, 376 S.W.2d 497, 498 (1964); Hopper v. State, 205 Tenn. 246, 326 S.W.2d 448, 451 (1959). Slight evidence, including circumstantial evidence, will be sufficient if the evidence is uncontradicted. State v. Bennett, 549 S.W.2d 949 (Tenn. 1977). Further, a jury may infer that a murder was committed in the county where the body was found.

Reynolds v. State, 199 Tenn. 349, 287 S.W.2d 15, 16 (1956); Cagle v. State, 507 S.W.2d 121 (Tenn. Crim. App. 1973).

Here, three witnesses testified about the location of the crime. In response to the prosecutor's question as to whether the crime took place in Carroll County, Officer Bush stated, "No, sir, it's in Weakley County." He then followed his answer with the statement that he "believe[d]" that the center was in Weakley County. The prosecutor then stated, "I don't think so." Officer Bush then replied, "Well, I don't know about that. It's not?" The prosecutor then called another officer to clarify the issue. Detective Walker testified that during his investigation he "found out for sure" that the center was in Carroll County. Juanita Johnson also testified that the crime scene was in Carroll County.

In our view, the state met its burden. There is no merit to the defendant's claim.

V

Next, the defendant challenges the admission of a color photograph of the victim's body. The state argues that it introduced the picture to show the location of the body and the quantity of blood surrounding the victim.

The admissibility of photographs from the scene of the crime is governed by Tennessee Rule of Evidence 403 and State v. Banks, 564 S.W.2d 947 (Tenn. 1978). The evidence must be relevant and its probative value must outweigh any prejudicial effect. Tenn. R. Evid. 403; State v. 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. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985).

Here, the state sought to introduce a color photograph of the victim portraying the victim lying on his back with his head tilted backwards. The picture does not show the victim's face but does reflect a substantial amount of blood close to the victim's body and splatters of blood on the floor and the wall. A blue hat is also shown lying next to the victim. The state argued at trial that the photograph should be admitted because the defendant made an issue of the blood and because it was relevant to show that anyone who walked near the victim would probably get blood on his or her feet.

While the photograph of the victim was unpleasant, it demonstrated the large amount of blood surrounding the victim. In this context, the photograph had substantial probative value in showing the likelihood of leaving a shoe imprint in the blood if a person walked near the victim. Identity of the person who committed the crime was a key issue at trial. Under these circumstances, we hold that the trial court did not abuse its discretion by admitting the single photograph of the victim.

VI

The defendant's final contention is that the trial court erred by ordering a life sentence for his felony murder conviction to be served consecutively to the concurrent sentences imposed for his convictions of burglary and theft. The state argues that because the defendant did not include the presentence report, the defendant failed to properly preserve the issue for appellate review under the standard set forth in State v. Ballard, 855 S.W.2d 557, 560-561 (Tenn. 1993); State v. Boling, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992). A motion to correct and

modify the record to add the presentence report, however, was permitted after the state submitted its brief. State v. Lee Russell Townes, No. 02C01-9505-CC-00140 (Tenn. Crim. App., at Jackson, August 17, 1995). Therefore, we will address the merits of the claims made by the defendant.

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 the 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, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one

of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution: "[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." State v. Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria² 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;

² The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

(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).

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 involved 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.

More recently, 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." State v. Wilkerson, 905 S.W.2d at 938.

To summarize, in addition to fitting into one of the seven statutorily mandated classifications, the record must also establish that the aggregate sentence reasonably relates to the severity of the offenses and the total sentence is necessary for the protection of the public from further crimes by the defendant. State v. Wilkerson, 905 S.W.2d at 938; Gray v. State, 538 S.W.2d at 392. The

record must show that the sentencing principles and all relevant facts and circumstances were considered before the presumption of correctness applies.

We first address the issue of whether the defendant may properly be placed in one of the seven statutorily mandated classifications. The trial judge found the defendant to be a dangerous offender. We agree with the determination that the defendant had no hesitation about committing a crime in which the risk to human life was high. The record establishes that the defendant knew the victim and committed the murder out of fear of the victim calling the police to report the defendant's crimes. When a defendant falls within the statutory classifications for eligibility to be considered for consecutive sentencing, the only remaining considerations are whether (1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) "the terms are reasonably related to the severity of the offenses." State v. Wilkerson, 905 S.W.2d at 938. Here, the trial court found that the sentences imposed were necessary to protect society and were proportionate to the seriousness of the offense. Because the trial court followed the mandates of Wilkerson, the presumption that the trial court imposed a lawful sentence prevails in this instance. See State v. Ashby, 823 S.W.2d at 169. In our view, there is a reasonable relationship between the sentence and the gravity of the crime.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

Joe B. Jones, Presiding Judge

Jerry L. Smith, Judge