IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1999 SESSION

STATE OF TENNESSEE,	)	
	)	#M1999 00249 CCA R3 CD
Appellee,	)	C.C.A. No. 01C01-9901-CR-00021
	)	
vs.	)	Davidson County
	)	
ANTONIO DEMONTE LYONS,	)	Hon. J. Randall Wyatt, Jr., Judge
	)	
Appellant.	)	(Felony Murder)
	)	

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

Antonio Demonte Lyons comes before the court in his second appeal related to the homicide of thirteen-month-old Alexandria Gleaves. Lyons first came before this court in 1997, at which time he challenged the constitutional validity of his guilty plea to the offense of second degree murder for the death of Gleaves. This court remanded the case to the trial court with instructions to make findings of fact regarding the voluntariness of Lyons' guilty plea. In 1998, the trial court set aside Lyons' second degree murder conviction, and the case proceeded to jury trial upon the indictment of felony murder committed during the perpetration of aggravated child abuse. The defendant was found guilty of felony murder, and he is now serving a sentence of life with possibility of parole. In this direct appeal of the felony murder conviction, he raises five issues for our consideration:

1. Whether the prohibition against double jeopardy prevents the defendant from being tried for felony murder after the trial court accepted a guilty plea to the lesser offense of second degree murder, which was later set aside.
2. Whether the evidence sufficiently supports his conviction.
3. Whether videotapes of the defendant's statement were obtained in violation of his Fifth Amendment rights.
4. Whether the cumulative effect of the prosecutor's closing remarks were so prejudicial as to require a new trial.
5. Whether due process permits the imposition of a life sentence after the defendant had received a sentence of 40 years pursuant to his now set-aside guilty plea for the same criminal act.[1]

We have reviewed the record, the briefs of the parties, and the applicable law. Because we find no error requiring reversal, we affirm the judgment of the trial court.

In the light most favorable to the state, the evidence at trial demonstrated the following. On December 12, 1993, seventeen-year-old Antonio Lyons was living with his girlfriend, Kimberly Jackson, and Jackson's two children, five-year-old Ireneta Jackson and thirteen-month-old Alexandria Gleaves. On that date, Jackson left the home at approximately 1:30 p.m. to go to her job at Krystal. According to company records, she clocked in at 2:07 p.m. Upon her departure from the home, Lyons was alone with the two children. According to Jackson, both children were fine when she left. Two neighbors stopped by the house that evening, although neither saw the children. According to young Ireneta, a man who used to

[1]We have addressed the issues in a different order than they were raised by the defendant in his brief.

stay in the home[2] attempted to give the victim a "clear bottle" but the baby regurgitated its contents. When the victim cried, this man put his hands over her mouth.

Jackson clocked out at her place of employment at 10:34 p.m., and she went straight home. When she arrived, the victim seemed sick. The defendant told Jackson that Ireneta had given the victim a small bottle of vodka, although Ireneta denied this. The defendant and Jackson discussed taking the victim to a doctor, but Jackson decided against taking immediate action.

That night, Jackson, the defendant and the victim slept in Jackson's bed. According to Jackson, the victim was sweating and feverish. When Jackson awoke the next morning around 10:30 or 11:00 a.m., the victim's condition had deteriorated. She was having trouble breathing and was vomiting. Jackson sent the defendant to purchase some orange juice for the victim. The defendant left on foot and was gone from the home for approximately one hour.

A state of chaos ensued as the morning wore on. The victim lost consciousness and stopped breathing. Jackson ran next door to Sarah Buchanan's house to call her father to take the victim to a doctor. When Ms. Buchanan surmised the situation, she took the phone from Jackson and called 911. Jackson, the defendant, neighbors and paramedics were in and out of Jackson's home in the minutes that followed. The victim was rushed to Vanderbilt Hospital in an ambulance, and the defendant accompanied the victim. Jackson stayed behind and came to the hospital later. An emergency physician testified that the victim was dead on arrival.

An autopsy revealed that the victim died from blood loss and accumulation of blood in the abdomen due to lacerations of the mesentery. The medical examiner opined that the injury was produced by blunt trauma to the abdomen inflicted twelve to 24 hours prior to the victim's death. According to the

[2]Apparently, Ireneta was not able to identify the defendant.

medical examiner, the injury would require a considerable amount of force. Accidental causes might include such occurrences as a kick from a horse, an impact from a large, wild boar, or impact of the abdomen with a protruding object, such as a steering wheel in an automobile collision. As to non-accidental causes, the average adult would have sufficient strength to cause this type of injury, but a six-year-old[3] would not. The medical examiner further testified that the injury was inconsistent with having come from a metal bed rail in Ireneta's and the victim's bedroom because of the absence of a linear-type mark on the victim. Further, the medical examiner explained that a fall from a top bunk bed unto the bed rail in the bedroom would create insufficient force to cause the injury. To cause an injury like the victim's, a fall from a distance of at least 25 to 30 feet would be required.

Later that day, Detectives Jeff West and Frank Pierce interviewed Jackson. Jackson agreed to allow the detectives to photograph her home and gave them information which led them to the defendant as someone who had been around the victim in the hours prior to her death. The detectives then interviewed the defendant. The defendant waived his Miranda rights, and his interview with the detectives was recorded on videotape.

In the interview, the defendant recounted the events leading up to the victim's death. He claimed that after Jackson left home for work on December 12, he watched football in Jackson's bedroom from 3:00 p.m. until 6:00 p.m. During this time, the victim was with him, and Ireneta was asleep in her bedroom. Around 7:00 p.m., the victim's behavior became unusual. The defendant thought she was intoxicated. He gave her a bath and put her to bed, but the victim awakened around 8:00 p.m. The victim vomited three or four times and had diarrhea, and the defendant rocked her until Jackson came home. The defendant claimed that he, Jackson and the victim went to bed in Jackson's room that evening, and about 4:00 a.m. he woke up and went downstairs with the victim. For a time, the two slept on a couch downstairs together, although they later returned to the bedroom upstairs.

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[3]Throughout the trial, defense counsel referred to Ireneta as being nearly six years old, although the evidence indicated she was five years and less than two months old at the time of her sister's death.

The next morning, the defendant borrowed a bottle nipple from a neighbor and went to a store to purchase orange juice, chips, cookies and a bottle.

During the interview, the detectives informed the defendant that the victim was killed by a blow to the abdomen. Thereafter, the detectives left the room. The videotape continued to record, and the defendant can be heard whispering, "Damn, damn, damn, damn, damn, why did I do it?" Later, he said, "I ain't going to say she got punched in the stomach, you know what I'm saying, anything could have punched her in the stomach."

To counter the state's proof, the defendant testified that he loved the victim like his own child and did not harm her. Further, he testified that he knew of no injury which had occurred to the victim while she was in his care, other than Ireneta giving the victim a small bottle of vodka. Several witnesses offered evidence of the defendant's good character and his aptitude for getting along well with children. Further, the defense presented proof of Jackson's poor parental skills and of instances on which she whipped Ireneta. A neighbor testified that Jackson told inconsistent stories about how the victim had received some bruises, saying alternatively that the child fell down some stairs and that she fell off a training potty. The defense elicited testimony that Jackson had attempted to choke Ireneta and accused the child of killing the victim after returning home from the hospital on December 13.[4] The defendant claimed that he and Jackson had a romantic encounter in a motel room after the victim's death, but Jackson did not remember going to a motel with the defendant. Jackson testified she did not have any misgivings about the defendant's care of the victim until the autopsy report was explained to her.

The defendant testified that he uttered "Damn, damn, damn, damn, damn, why did I do it?" as an self-admonition about why he had come to the police station voluntarily, only to be accused of a crime by the detectives. Regarding his

[4]When questioned about the incident, Jackson testified she did not remember it. Jackson doubted she would ever act in such a manner.

commentary about anyone punching the victim in the stomach, he claimed he meant that he had not injured the victim and anyone could have done it.

Upon consideration of this evidence, the jury returned a verdict of guilty of the charged offense of first degree felony murder in the perpetration of aggravated child abuse.

I

First, we consider whether the constitutional prohibition against double jeopardy prevents the defendant from being tried for felony murder after the trial court had previously accepted a guilty plea to the lesser offense of second degree murder, which was then set aside prior to the trial that brought about the felony murder conviction.

Notwithstanding the defendants vociferous argument and reliance on uncontrolling federal caselaw,[5] this issue has been definitively addressed by this court. We faced an identical situation in State v. Collins, 698 S.W.2d 87, 88 (Tenn. Crim. App. 1985), perm. app. denied (Tenn. 1985), where the defendant had pleaded guilty to the lesser offense of second degree murder and received a sentence of 30 years. Thereafter, the defendant mounted a successful post-conviction challenge, and his guilty plea was set aside. Id. He was then tried on the original charge of first degree murder, found guilty, and given a life sentence. See id. In rejecting the defendant's claim that double jeopardy barred prosecution of him for any offense greater than second degree murder, the court said, "When the accused himself procures a judgment to be set aside upon his own initiative and he voluntarily accepts the result, then he cannot by his own act avoid the jeopardy in which he stands and then assert it as a bar to a subsequent jeopardy." Id. at 90 (citing State ex rel. Austin v. Johnson, 218 Tenn. 433, 404 S.W.2d 244 (1966)); cf. State v. Dennis Wagner, No. 03C01-9309-CR-00304, slip op. at 8-9 (Tenn. Crim.

[5]Further, the case upon which the defendant principally relies, Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1973), was overruled by Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979).

App., Knoxville, Sept. 7, 1994) (defendant may not assert double jeopardy as bar to retrial after successful motion for new trial), perm. app. denied (Tenn. 1994); State v. Clemons, 873 S.W.2d 1 (Tenn. Crim. App. 1992) (no double jeopardy bar against prosecution of defendant who successfully challenged his conviction in post-conviction proceeding); State v. James Jiles Fields, III, No. 01C01-9006-CR-00133 (Tenn. Crim. App., Nashville, Dec. 20, 1990) (defendant not entitled to dismissal of indictment on double jeopardy grounds where he had previously been convicted of the offense but the judgment was set aside in post-conviction proceeding), perm. app. denied (Tenn. 1991).

In sum, the state faced no double jeopardy bar in prosecuting the defendant of the charged offense, despite his previous plea to a lesser offense, when that plea had been set aside as a result of the defendant's own actions.

II

In the next issue, the defendant challenges the sufficiency of the convicting evidence. He makes numerous attacks to the state's proof; however, his essential claim is that the state's case is entirely circumstantial and not so cogent and convincing as to overcome the presumption of innocence.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

Moreover, a criminal offense may be established exclusively by circumstantial evidence. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973); State v.

Jones, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995); State v. Lequire, 634 S.W.2d 608 (Tenn. Crim. App. 1987). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 225 Tenn. 478, 470 S.W.2d 610 (1971); Jones, 901 S.W.2d at 396. In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, 470 S.W.2d at 613; State v. McAfee, 737 S.W.2d 304, 305 (Tenn. Crim. App. 1987).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. 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 the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. Cabbage, 571 S.W.2d at 835.

The defendant stands convicted of felony murder committed in the perpetration of aggravated child abuse. Felony murder as defined at the time of the victim's death included "[a] reckless killing of a child less than thirteen (13) years of age, if the child's death results from aggravated child abuse, as defined by § 39-15-402, committed by the defendant against the child." Tenn. Code Ann. § 39-13-202(a)(4) (Supp. 1993) (revised 1994, rewritten 1995). Aggravated child abuse occurs where a person "knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury . . ." and "[t]he act of abuse results in serious bodily injury to the child . . . ." Tenn. Code Ann. § 39-

15-401(a) (Supp. 1993) (child abuse); Tenn. Code Ann. § 39-15-402(a)(1) (Supp. 1993) (aggravated child abuse).

In the present case, the medical examiner testified that the victim received the fatal injury between twelve and 24 hours prior to her death. Paramedics found the child pulseless and not breathing at 12:09 p.m., and when the child arrived at the hospital at 12:30 p.m., the examining physician found her "basically dead." Thus, the victim received the fatal injury approximately in the time between noon and midnight of December 12. During this time, the victim was in the presence of three people – young Ireneta, Jackson, and the defendant. The medical examiner testified that a child of Ireneta's age would not have sufficient strength to inflict such an injury. Jackson was away from the home from 1:30 p.m. until sometime after 10:34 p.m. The defendant was in the home with the victim during the entire time frame during which the injury was inflicted, and he did not testify that Jackson inflicted a significant blow upon the victim or that he heard any indication of such. Further, he affirmatively testified that he did not know who had killed the victim. While alone in an interrogation room, the defendant made statements that may fairly be viewed as inculpatory. Both Jackson and the defendant denied injuring the victim; the question of which one of them to believe was one for the jury to resolve as the finder of fact. Unfortunately for the defendant, the jury chose to discredit his testimony in favor of that of Jackson.

Furthermore, the record is devoid of any indication that the victim was injured and ultimately died by accidental means, self-inflicted injury or natural causes. See State v. Shepherd, 902 S.W.2d 895, 901 (Tenn. 1995). The medical examiner opined that a fall would have to be from a minimum distance of 25 to 30 feet in order to cause this type injury, and there is no evidence that a fall from such a height was possible in the home. The medical examiner further opined that the victim's injury was inconsistent with having fallen on the bed rail in the children's bedroom. No evidence raises any suspicion of any other mechanism of accidental injury. It would be incredible to posit that an infant of thirteen months is capable of committing suicide. Finally, there is no indication whatsoever that the victim was

terminally ill; indeed, such would be exceedingly rare in an infant.

Affording due deference to the jury's resolution of issues of witness credibility and weight of the evidence, Cabbage, 571 S.W.2d at 835, we conclude that the evidence leads to one conclusion – that the defendant is guilty of the crime of felony murder committed in the perpetration of aggravated child abuse. Put another way, the state has successfully woven the inescapable "web of guilt" around the defendant. Crawford, 470 S.W.2d at 613; McAfee, 737 S.W.2d at 305.

In resolving this issue, we have not overlooked the defendant's argument that aggravated child abuse requires protracted or prolonged abuse over a period of time, as opposed to a single episode of abuse absent proof of intent to kill. This simply is not the law. Neither the first degree murder statute nor the aggravated child abuse statute mandates any such requirement.[6]

Moreover, we have considered and rejected the defendant's claim that if his videotaped statements are viewed as a confession, they cannot support a conviction absent corroboration. In Tennessee, "[a] confession may sustain a conviction where there is other evidence sufficient to show the commission of the crime by someone." Taylor v. State, 479 S.W.2d 659, 661-62 (Tenn. Crim. App. 1972). In other words, the state must establish the *corpus delicti*. *Corpus delicti*, meaning literally "the body of the crime," consists of two elements in a homicide case: (1) that there has been a death of a human being, and (2) that the death was produced by criminal agency. See, e.g., State v. Shepherd, 862 S.W.2d 557, 564 (Tenn. Crim. App. 1992). *Corpus delicti* must be established beyond a reasonable doubt. Id. In the case at bar, the defendant's videotaped statements are but a portion of the evidence against him, and as such, corroboration was unnecessary.

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[6]We acknowledge that a prior version of the first degree murder statute inculpated,

> "A killing of a child less than thirteen (13) years of age, if the child's death results from a protracted pattern or multiple incidents of bodily injury committed by the defendant against such child and the death is caused either by the last injury or the cumulative effect of such injuries."

See Tenn. Code Ann. § 39-13-202(a)(4) (1991). However, that portion of the first degree murder statute was not in effect at the time of the defendant's crime.

In any event, that the victim died is beyond question. Moreover, the state sufficiently eliminated accidental, self-inflicted and natural causes as the mechanism of death, thereby effectively establishing the only other possible cause of death as being through criminal agency.

We reject the defendant's challenge to the sufficiency of the convicting evidence.

III

The defendant next claims that the videotapes of his statements to law enforcement officials were obtained in violation of his Fifth Amendment rights.

Tennessee Rule of Criminal Procedure 12(f) requires that all pretrial motions, including motions to suppress evidence, must be raised prior to trial or be waived. Tenn. R. Crim. P. 12(f); see Tenn. R. Crim. P. 12(b)(3) (motions to suppress evidence classified as pretrial motions). Provided however, the court may grant relief from the waiver for cause shown. Tenn. R. Crim. P. 12(f). In the case at bar, the record reflects no pretrial motion to suppress the videotapes.[7] It was not until the trial was underway that the defense moved the court to suppress the videotapes on the basis that, because the defendant was a minor at the time, he did not have the legal capacity to waive his rights. The defense did not at this time request relief from the waiver provision of Rule 12(f). As such, the issue has been waived.

Further, the defendant did not raise the issue in his motion for new trial, as required by Tennessee Rule of Appellate Procedure 3(e). The issue is waived on this basis. See Tenn. R. App. P. 3(e).

Moreover, the defendant makes different arguments on appeal than he made in the trial court. In his appellate brief, he makes no claim that the tapes

[7]The defendant moved *in limine* to exclude testimony about the recorded statement of the defendant asking himself, "Why did I do it?," on the basis that the statement was open to misinterpretation by the jury.

were *per se* inadmissible because he was a juvenile incapable of waiving his rights. Among other arguments, he now claims that the videotapes should have been suppressed because they were made in an oppressive, threatening setting and that he was "tricked" into waiving his Miranda rights. It is well-established that a litigant may not advance one theory for inadmissibility of evidence at trial and another on appeal. See, e.g., State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988). If the issue had been timely raised below, we would nevertheless find it waived by the defendant's change of theory in the appellate court.

IV

In his next issue, the defendant claims that the cumulative effect of the prosecutor's closing remarks were so prejudicial as to require a new trial. At trial, the defendant made no objection to any of the remarks he now alleges were prejudicial. As such, this issue is waived. Tenn. R. Crim. P. 52(a); see, e.g., State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992) (failure to make contemporaneous objection). Further, the issue was not raised in the motion for new trial and is waived for that reason, as well. Tenn. R. App. P. 3(e).

V

Finally, we consider whether due process permits the imposition of a life sentence after the defendant received a sentence of 40 years pursuant to a guilty plea for the same criminal act that was later set aside, resulting in the trial that brought about the present conviction. In support of this argument, the defendant relies upon North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072 (1972), overruled in part by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). In Pearce, the Supreme Court held that a presumption of judicial vindictiveness arises from the imposition of a harsher sentence on retrial following a successful appeal, absent an affirmative showing of the basis for the more severe sentence. Pearce, 395 U.S. at 722-26, 89 S. Ct. at 2079-81. The defendant claims that the doctrine of Pearce prevents him from receiving a greater sentence than the forty year-sentence that was imposed at the time of his previous guilty plea to second degree murder. However, as the state points out, the defendant has overlooked relevant

United States Supreme Court precedent.

In Alabama v. Smith, the high court faced a situation virtually identical to the one at bar. The defendant in Smith was indicted with charges of burglary, rape and sodomy. Smith, 409 U.S. at 795-96; 109 S. Ct. at 2203. He pleaded guilty to burglary and rape; the sodomy charge was dismissed, and the trial court sentenced him to concurrent 30-year terms. Id. at 796; 109 S. Ct. at 2203. Later, the defendant successfully challenged his guilty plea, and a state appellate court set it aside. Id.; 109 S. Ct. at 2203. Thereafter, the defendant went to trial on the three original charges and was found guilty. Id.; 109 S. Ct. at 2203. The trial court imposed an effective sentence of life plus 150 years, explaining that the harsher sentence was justified by the egregious facts presented at trial, of which the court had been unaware at the time of the former guilty plea. Id. at 796-97; 109 S. Ct. 2203. The Smith defendant claimed he was entitled to a presumption of vindictiveness under Pearce, but the Supreme Court disagreed. The court held that in such a situation, "the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge."[8] Id. at 801; 109 S. Ct. at 2205. In its rationale, the court cited the more complete information available to a sentencing court after a trial. Id.; 109 S. Ct. at 2205-06. Further, the court noted it had previously upheld the prosecutorial tactics of recommending a lenient sentence or a lesser charge in the plea bargaining process and "threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial." Id. at 802; 109 S. Ct. at 2206 (citing Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 667 (1978)). A prosecutor may go further and actually affirmatively provide for a more lenient sentence upon a guilty plea. Id.; 109 S.Ct. at 2206 (citing Corbitt v. New Jersey, 439 U.S. 212, 221-23; 99 S. Ct. 492, 498-99 (1978)). Thus, in evaluating whether judicial vindictiveness has occasioned an increased sentence upon trial following a set-aside guilty plea, Pearce applies only were there is a "reasonable

[8]The Smith defendant alleged evidence of *actual* vindictiveness. The high court declined to consider the evidence because it was beyond the scope of the grant of *certiorari*, but it noted that the question might be open to the state supreme court upon remand. Smith, 490 U.S. at 803; 109 S. Ct. at 2207.

likelihood that the increase in sentence is the product of actual vindictiveness on the sentencing authority." Id. at 799; 109 S. Ct. at 2205 (citation omitted). Where that reasonable likelihood does not exist, the defendant bears the burden of proving actual vindictiveness. Id. at 799-800; 109 S. Ct. at 2205 (citation omitted).

Accordingly, Smith, and therefore Pearce, do not provide for a presumption of judicial vindictiveness where the defendant receives a greater sentence following a trial than he had previously received on a guilty plea which he had subsequently successfully attacked. See also State v. Jeffrey Scott Boling, No. 225, slip op. at 7-8 (Tenn. Crim. App., Knoxville, Oct. 24, 1990). We turn, then, to the evidence he presented of actual vindictiveness. In support of the motion for new trial, defense counsel filed his own affidavit, in which he alleged,

> [One of the prosecutors] advised the defendant that if he proceeded to trial and was convicted he would be sentenced to serve a longer sentence than the forty years he had been sentenced to serve on his plea of guilty to murder in the second degree. . . . [The prosecutor] insisted that greater punishment would possibly result if the defendant insisted on a trial than if he would still plead guilty to murder in the second degree. This greatly frightened the defendant who cried and asked to speak with his parents to discuss the threat of a longer sentence after which he insisted on a trial.

The affidavit makes no allegation of *judicial* vindictiveness; it is concerned solely with allegations of *prosecutorial* vindictiveness. We are at a loss to divine how the alleged ill motive of the prosecution is attributable to the trial court in its sentencing of the defendant.

Furthermore, the record reflects that the trial judge who accepted the guilty plea died before the resolution of this case. The conviction was vacated and the sentencing upon retrial was done by another judge. The risk of vindictiveness by the second judge being confronted with resentencing simply does not exist. See State v. John L. Goodwin, III, No. 01C01-9601-CR-00013, slip op. at 13-14 (Tenn. Crim. App., Nashville, July 23, 1997), perm. app. denied (Tenn. 1998). Additionally, the trial court imposed the minimum sentence for the crime of first degree murder – life with possibility of parole.

In any event, as discussed in Smith, the above-described actions of

the prosecutor were not improper. A prosecutor may "threaten[] a defendant with increased charges if he does not plead guilty, and follow[] through on that threat if the defendant insists on his right to stand trial." Smith, 490 U.S. at 802; 109 S. Ct. at 2206 (citing Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 667 (1978)). Furthermore, a prosecutor does nothing improper by agreeing to a more lenient sentence upon a guilty plea than he chooses to seek if the defendant exercises his right to a trial. Id.; 109 S.Ct. at 2206 (citing Corbitt v. New Jersey, 439 U.S. 212, 221-23; 99 S. Ct. 492, 498-99 (1978)). As noted in section I above, a defendant who voluntarily procures the setting aside of a guilty plea to a lesser offense will not be heard to complain when he faces trial for the original, greater offense.

For these reasons, we see no merit in this issue.

The judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOE G. RILEY, JUDGE

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ALAN E. GLENN, JUDGE