IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 16, 2002 Session

STATE OF TENNESSEE v. JAMES ROBERT WILSON

Direct Appeal from the Criminal Court for Davidson County
No. 98-D-3052 Steve Dozier, Judge

No. M2000-00760-CCA-R3-CD - Filed May 24, 2002

Defendant, James Robert Wilson, was convicted by a Davidson County jury of first degree felony murder and especially aggravated robbery. He was ordered to serve concurrent sentences of life imprisonment for the felony murder conviction and twenty years for the especially aggravated robbery conviction. Defendant appeals his convictions and presents the following five issues for review: (1) whether the trial court erred by admitting audio taped threat evidence; (2) whether the trial court erred by denying Defendant's motion for a mistrial based on a witness's characterization of Defendant as a "robber"; (3) whether the trial court erred by denying Defendant's motion for a mistrial based on the State's comment that Defendant failed to call a witness; (4) whether the trial court erred by denying Defendant's request for a jury instruction on accomplice testimony; and (5) whether the trial court erred in failing to charge all applicable lesser-included offenses. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Peter J. Strianse, Nashville, Tennessee, for the appellant, James Robert Wilson.

Paul G. Summers, Attorney General and Reporter; Mark E. Davidson, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kimberly Haas, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On November 13, 1997, Timothy Wayne Holt (also known as Timbo) was fatally shot three times in the back of the head inside his home located at 713 Oneida Avenue in Nashville. The proof

at trial revealed that the victim was a well-known local marijuana dealer and merchant of stolen property. At the time of his death, the victim was married to Julie Holt, and the couple had a four year old son, Blake Holt. The couple maintained two residences, one at 713 Oneida Avenue, and another at 211 Archwood Drive in Madison. Mrs. Holt explained that the couple maintained two residences so that her husband could conduct his drug and stolen property business on Oneida street, while the family slept at their apartment in Madison.

Timbo employed many security devices at the Oneida residence. The home was equipped with a deadbolt lock, security system, and metal security gates on the front and rear door. Mrs. Holt testified that Timbo always kept the doors locked when he was inside. Timbo also kept a pit bull and a boxer for protection. Mrs. Holt testified that both dogs were very protective of the victim and would bark and become fierce when a strange person approached the home. On November 13, 1997, Mrs. Holt and her infant son arrived at the Oneida residence at approximately 7:00 p.m. When she arrived, Timbo was in the process of selling marijuana to a frequent customer, Derek Larkin (also known as Bushrod). Mrs. Holt testified that Bushrod purchased an ounce from Timbo, which Timbo measured by piecing it from a larger brick of marijuana. She stated that Timbo normally stored the brick of marijuana in a large black trash bag in the trunk of a car behind the home. Timbo stored marijuana in three (3) separate locations: (1) in ziplock bags inside the dog food; (2) inside his son's toys in the backyard; and (3) in the trunk of the car parked behind the house. Timbo stored the trunk's key in the top dresser drawer in the master bedroom. Mrs. Holt testified that Bushrod paid Timbo and then left. She also testified that the dogs did not like Bushrod, and often barked when he came to the house. Bushrod's testimony corroborated Mrs. Holt's account of the events on that night. She also testified that Timbo's pit bull usually barked when he was there.

Approximately fifteen minutes after Bushrod left, Mrs. Holt and the baby left to attend a wrestling match. She returned to the Oneida residence approximately two hours later at 9:00 p.m. She stated that although Timbo was not home, she paged him and he arrived at the Oneida residence thirty minutes later. Mrs. Holt testified that Defendant called the Oneida residence later that night. She stated that she knew that it was Defendant because when she answered the phone he identified himself as "B.J." or "Black James." She overheard Timbo and Defendant discussing a .40 caliber Glock pistol for $400.00. Timbo also informed Defendant that his brother, Michael Holt was not at his home. Mrs. Holt was well acquainted with Defendant, as he and Timbo were friends and often spent time together. Defendant had also been a frequent guest at the Oneida residence over the past two years. She recalled that Defendant often wore a black leather jacket.

Mrs. Holt left the Oneida residence while Timbo was on the phone with Defendant. As was her common practice, Mrs. Holt called Timbo when she reached the apartment in Madison, at approximately 10:30 p.m. She stated that when she called, the line was busy and although she paged him, Timbo did not respond. Mrs. Holt became alarmed because this was uncommon. She then called Jason Westmoreland, Timbo's "roommate," who often stayed at the Oneida residence. Mr. Westmoreland stated that he had dropped the victim off at the Oneida residence at approximately 10:00 p.m. She then called Michael Holt, the victim's brother, and asked him to check on Timbo.

Timbo's brother, Michael Holt, lived next door at 711 Oneida Avenue with his wife, Shannon Holt, and their infant son. Michael Holt was also known in the neighborhood as a drug dealer and weapons "merchant" and was incarcerated at the time of trial on a felony drug conviction. Michael Holt testified that on November 13, 1997, his family left home at 5:00 p.m., and returned home at approximately 10:00 p.m. As they were pulling into their driveway, his wife noticed that someone had opened the front door of Timbo's home, peered out, and shut the door quickly. Michael Holt testified that at approximately 10:30 p.m., Julie Holt called him upset because Timbo had not returned her calls or pages. Upon her request, he went next door to check on Timbo. He noticed that although all of the interior lights were on, the door was locked and no one appeared to be home. Seeing no signs of forced entry, he returned home. He then telephoned Julie Holt and asked her to bring the keys to the Oneida residence.

Mrs. Holt testified that when she arrived at the Oneida residence, she detected a "burnt smell" as she walked towards the front of the house. As she entered the home, she noticed that the phone was off the receiver. She then discovered Timbo's body laying face-down on the floor of her son's bedroom, and ran next door to get help. When Mrs. Holt returned, she discovered that Timbo was dead.

Mrs. Holt further testified that the day before Timbo was killed, he had purchased five pounds of marijuana from his supplier. When they found the victim's body, he had $13.00 in his pants pocket. She testified that it was common knowledge that the victim often kept cash and marijuana in the house. Timbo often stored the money from his drug sales in the front pocket of a Levi's shirt, that hung in the closet in the master bedroom. On the night he was murdered, Timbo had $2,000.00 in the pocket earlier in the evening, in denominations ranging from $5.00 to $100.00. After an initial inspection, Mrs. Holt discovered that the $2,000.00 was missing. She also noticed that the black trash bag, where Timbo stored the brick of marijuana, was empty on the kitchen table. The key to the trunk of the car where the marijuana was normally stored was also missing, but was later discovered in the passenger seat of the Bronco. However, the victim's stolen radios, and the Holt's own televisions, VCRs, and jewelry were not disturbed. Mrs. Holt and Michael Holt both testified that everything else in the house seemed to be intact. Although there were no signs of forced entry into the home, it was later discovered that the back door was wide open.

Ms. Lee Carrington, a long-time neighbor, lived at 715 Oneida Avenue. Ms. Carrington testified that on November 13, 1997, at approximately 10:00 p.m., she heard some commotion outside. She testified that the noise sounded like someone banging on a car door three times with a fist. When Ms. Carrington looked out the window, she saw what appeared to be a man standing in the driveway between her and Timbo's home. She then went out on the porch and asked the man if Timbo knew that he was there. The man, who continued to look in the direction of Michael Holt's home, replied emphatically, "ma'am, yes, ma'am; yes, ma'am." She recalled that the man had the voice of an older teenager and was approximately between the ages of nineteen and twenty-one. She testified that he was black and was wearing dark clothing and a large dark bulky jacket that fit slightly below the waist. She observed that the man was standing next to the window of the Bronco, and appeared to be as tall as the window's metal frame. After she turned away, she saw a blur run

past her as someone ran through her yard and down Oneida street. She recalled that it was odd that the pit bull in Timbo's backyard did not bark at the man, because he normally barked at strangers. Later, officers measured the Bronco's door frame and it was estimated to be approximately sixty to sixty three inches in height. Michael Holt and Julie Holt each testified that Defendant was often respectful towards older people and usually answered them by saying, "yes, ma'am" or "no, ma'am."

Mr. Ronnie Calhoun testified that in November of 1997, he lived at 802 Chickasaw, which was adjacent to Oneida. On November 14, 1997, when he returned home from work, his wife informed him that she had found a blue jacket in the ditch in front of their home. When she found it, the sleeves were turned inside out as if someone had taken it off in a hurry. Although she washed the jacket before he arrived home, she did not see any stains on the jacket. Thinking that the jacket might have been related to the murder, he contacted police with the evidence. When shown a photo of the jacket that was recovered, Ms. Carrington testified that it did not resemble the jacket that she saw the man wearing on the night of the homicide.

Michael Holt testified that within a few days of his brother's death, he posted signs offering a $10,000 reward for information on his brother's killer. Shortly thereafter, Mr. Burke, the owner of a local pawn shop, gave him two videotapes and a $100.00 bill. Michael Holt later turned this evidence over to police.

Timothy Burke testified that he and Timbo were close friends. Burke gave Michael Holt surveillance video tapes of the pawn shop in an attempt to help him apprehend his brother's killer. In his opinion, anyone who did business with him on the days surrounding Timbo's murder probably did business with Timbo, and he felt that the killer might be on one of the tapes. Mr. Burke also admitted that he gave Michael Holt a $100.00 bill that Defendant had spent in the pawn shop shortly after Timbo's death. Mr. Burke testified that on November 12 and 13, Defendant asked him if he could borrow some money. He stated that Defendant explained that he needed money to buy things for his baby's arrival. He testified that Defendant also tried to borrow money from several of his customers, however they refused because Defendant already owed them money. However, on November 14, 1997, Defendant came into the pawn shop and spent approximately $300.00, and Mr. Burke noticed that Defendant had much more money in his pocket. When he inquired where Defendant got the money, Defendant responded, "I hit a lick," meaning he had made some money. Mr. Burke identified Defendant in both of the videos that were played in the jury's presence. He testified that the video tapes were recorded on November 12 and 13, 1997. Mr. Burke admitted that the tapes were not formally marked or labeled by date. In the background, Defendant could be heard asking people for money. Defendant was also seen wearing a quarter-length black leather coat. He stated that Defendant frequently wore the coat before November 13, but that he never wore it after that date. Instead, Defendant began to wear a blue thermal lumber jacket. Mr. Burke also testified that before November 14, 1997, he had seen Defendant carrying a .357 caliber revolver.

Dr. Bruce Levy, the Medical Examiner for Davidson County, testified on behalf of Dr. Emily Ward, the medical examiner who performed the autopsy on the victim. Dr. Ward was unavailable to testify at trial. Dr. Levy testified that based on Dr. Ward's examination, the victim died as a result

of three gunshot wounds to the head. "Stippling" was noted around two of the three bullet wounds, which indicated that when the gun was fired, the barrel was between approximately six inches to twenty-four inches away from the victim's head. However, he testified that the bullets fractured the skull in such a way that he was unable to determine the sequence of the three shots. Dr. Levy stated that based on the evidence, at least one shot was fired while the victim was still standing. In his expert medical opinion, all of the shots were fatal and would have led to death within a matter of minutes.

Tandra Walker testified that in November of 1997, she was dating and living with her boyfriend, Michael Garcia and his family. She was acquainted with Defendant, who was a friend of Mr. Garcia's. Ms. Walker stated that late one night in 1997, Defendant appeared at their home unexpected. She testified that Mr. Garcia got up to answer the door while she remained in bed. She stated that she knew it was Defendant because she heard him talking in the den, located only a few feet from her bedroom. Mr. Garcia then came back in the room and stated that he had to leave with Defendant, although he did not say where they were going. Mr. Garcia returned home later that night and awakened her. She testified that he was acting "strange" and told her that Defendant had confessed to killing someone. Mr. Garcia also told her that Defendant had blood on his clothing and that he saw the murder weapon in Defendant's car. Early the next morning, between five and six o'clock, the phone rang and Mr. Garcia woke up and turned on the morning news. She stated that the news was reporting about Timbo's murder. She admitted that after this date, they continued to socialize with Defendant and his girlfriend.

Ms. Walker testified that in the fall of 1998, Defendant began to make threatening calls to her home. The court then held a jury out hearing to determine whether evidence of the threats and the audio taped calls were admissible. Upon review, the trial court only permitted Ms. Walker to testify of the conversations she had with Defendant. She testified that in 1998, Defendant began calling her home looking for Mr. Garcia. The first call was placed on the morning after Mr. Garcia was released from jail. Ms. Walker testified that over the course of two days, she received approximately twenty calls from Defendant. She stated that although she recorded some of the later calls, she did not tape their initial conversations. Ms. Walker recalled that Defendant's tone of voice was often harsh and menacing. She stated that in many of the calls, Defendant referred to Mr. Garcia as a "Florida ass n----- and homicide ass n-----." He also threatened to harm Mr. Garcia and Ms. Walker if his calls were unreturned. She tried unsuccessfully to block Defendant's calls and finally changed her number to an unpublished listing. At the time of trial, she was still dating Mr. Garcia.

Mr. Garcia testified that he and Defendant were friends for almost two years. He also knew Timbo, and he knew that Defendant and Timbo were friends. Mr. Garcia stated that on November 13, 1997, Defendant appeared at his home late at night. Mr. Garcia was in the bed with his girlfriend, Ms. Walker, when Defendant knocked on his door. When he answered the door, he noticed something "reddish" on the front of Defendant's black leather jacket. He testified that Defendant was upset, and confessed to killing Timbo. Mr. Garcia then assumed that the red stain on Defendant's chest was blood. Although Defendant wanted to spend the night, Mr. Garcia refused. Defendant then told Mr. Garcia to come ride with him. He testified that when he looked at

Defendant, Defendant had a "strange" look in his eyes. Mr. Garcia agreed to go because he was afraid that Defendant would harm him or his family.

When Mr. Garcia got into the car, he saw what appeared to be a .357 revolver in Defendant's passenger seat. He testified that Defendant then drove to Defendant's brother's house near Riverside Drive. Steve Wilson, Defendant's brother, greeted them at the door and Defendant informed him that he had killed Timbo. Then, Defendant and his brother went into the house and Defendant reappeared in different clothing and a blue lumber jacket. Mr. Garcia further testified that Defendant showed him what appeared to be a "chunk" of money. Defendant then took the money and a package from the trunk and carried both into his brother's house. Mr. Garcia stated that Defendant later bragged that he had "hit for two G's," meaning two thousand dollars. When Defendant left his brother's house, he drove to Shelby Park where he backed his car up and unloaded the remaining bullets from the revolver. Mr. Garcia testified that he watched as Defendant threw the revolver and the bullets into the Cumberland River. Defendant then drove to the home of his girlfriend, Toni Avant, where he went inside. After waiting in the car for a couple of minutes, Mr. Garcia knocked on the door and asked Defendant to leave. He stated that on their way home, Defendant drove down a street that was parallel to Oneida, looking for signs of police activity. Seeing no police cars, Defendant took Mr. Garcia home. When Mr. Garcia returned home, he told his girlfriend what had happened and then went to sleep. He stated that Defendant called early the next morning and told him to turn on the news to watch the story of Timbo's murder.

Mr. Garcia further testified that he and Defendant talked about the events on the night of the homicide every day for several months. Defendant told Mr. Garcia that on November 13, 1997, he called Timbo to purchase some marijuana. According to their agreement, Timbo would leave a quarter bag of marijuana in the mailbox and Defendant would pick it up, and leave the money for the marijuana in the mailbox. However, Defendant decided to go to Timbo's door, and after identifying himself, Timbo opened the door. While Timbo was breaking off some marijuana from a brick, Defendant took out his gun and demanded Timbo's money. Timbo led Defendant into one of the bedrooms and gave Defendant a "bunch of money." While Timbo was giving Defendant the money, Timbo kept smiling and saying, "you can have it, you can have it." Defendant replied, "I know I can have it." Defendant then ordered Timbo to get on the ground, but when Timbo tried to run away Defendant shot him in the back of the head three times. Defendant described in detail that "the blood came out of his head like a water faucet, like a water fountain . . . ." Defendant then ran from the victim's house, but stopped beside a vehicle in Timbo's front yard when he saw that Michael Holt was arriving home. As he watched Michael Holt, Timbo's neighbor, an older lady, spoke to him. Defendant stated that although he responded to her, he never took his eyes off Michael Holt's home.

Mr. Garcia further testified that Defendant confided that the gun he had used to kill Timbo belonged to Terry Fisher (also known as Mug). On November 13, 1997, Defendant retrieved this gun that Mug stored in a car behind his mother's house. Defendant further admitted to Mr. Garcia that he needed money quickly because he had a "real bad dope case pending" and he was expecting a new baby's arrival. Mr. Garcia stated that Defendant told him that he had spent between $500.00

to $700.00 on lay-away items for the baby, and had paid his lawyer $1000.00. Defendant also stated that he sold the marijuana recovered from the victim to Daryl Haley. Mr. Garcia testified that he was present when Daryl Haley saw Defendant at Tim Burke's pawn shop approximately a week after the murder and asked Defendant, "[w]hy you sold me that dead man's weed?" He then witnessed Defendant grab Mr. Haley and rush him out the back door. Defendant told Mr. Garcia that after the murder, he gave the black leather coat to Marlin Thompson to get it out of his possession. Mr. Garcia acknowledged that although he knew Defendant had murdered Timbo, he continued to remain friends, spent time with him, and even double-dated a couple of times.

In August of 1998, Mr. Garcia surrendered to authorities due to a probation violation warrant and was incarcerated until the middle of September. He testified that the day before his release, Defendant stole his car. Although Mr. Garcia reported the auto theft to police, he did not mention the murder. Shortly thereafter, Defendant began making threatening calls to Ms. Walker's home, where Mr. Garcia was living. Mr. Garcia stated that Defendant threatened to kill him and his family because Defendant feared that Mr. Garcia had contacted the police about the murder. In the calls, Defendant referred to him as a "police ass n-----" and a "snitch." Mr. Garcia testified that five of the calls were recorded on his girlfriend's answering machine. The tapes of the calls were played for the jury during the trial. Mr. Garcia admitted that a portion of these calls were related to property that he had in his possession, which belonged to Defendant. Mr. Garcia testified that several days after the phone calls began, Defendant drove into his yard and pointed a pistol at him. Frightened by Defendant's actions and the threats, Mr. Garcia spoke to his lawyer and then went to police. He testified that he was never promised anything in exchange for his testimony.

Daryl Haley, whose step-son Marlin Thompson was Defendant's friend, testified that a few days after the victim was shot, he purchased almost two ounces of marijuana from Defendant for approximately $125.00. He stated that this price was a bargain because an ounce of marijuana normally sold for $100.00. He added that they completed the transaction at Mr. Haley's home, and that during the sale he inquired, "this isn't any-- that dead man's weed?" Defendant claimed that he had traded a gun for the marijuana. Mr. Haley later reported this transaction to police. Contrary to Mr. Garcia's testimony, he denied having made the statement in any other location.

Toni Avant testified that she dated Defendant in November 1997. On November 13, 1997, she went riding with Defendant, Marlon Thompson and Stacy Newman. She remembered that Defendant was wearing a black leather coat that night, which he never wore after that date. After riding around Shelby Park, they returned home at approximately 5:30 p.m. She then walked with Defendant to his mother's home to retrieve a gun for Mug, which was stored in a car behind the home. When they returned to her home, Defendant placed a phone call and then left. Later that evening, between 10:30 and 11:30 p.m., Defendant returned to her home heavily intoxicated. It appeared that he had been drinking heavily and taking Valiums. Within minutes of Defendant's arrival, Mr. Garcia knocked on the door and Defendant left again. However, before he came back, Defendant called her from a pay phone. The next morning, she woke Defendant and told him about the news report of Timbo's murder. She recalled that Defendant called Mr. Garcia during the news broadcast. Ms. Avant testified that after Timbo's murder, Defendant wore a bullet proof vest for a

couple of days; he did not wear one before the murder. Ms. Avant further testified that shortly before Timbo's murder, Defendant stated that he needed money to cover attorney fees and pay a lay-away at Kmart that was about five or six hundred dollars. After the murder, Defendant gave her a receipt showing that the Kmart lay-away was paid off. However, the receipt was misplaced before trial. During her direct testimony, she admitted that when interviewed by detectives in November and December 1997, she lied and stated that Defendant was with her the entire night of November 13, 1997. However, Ms. Avant testified that the statement she provided detectives in September of 1998 was accurate, and that her testimony at trial was true.

Detective Pat Postiglione of the Metro Murder Squad Unit was the lead investigator in the victim's murder. Detective Postiglione testified that during his initial investigation he interviewed numerous witnesses including the victim's wife, brother, and several other people. Although he promptly arrived at the Oneida residence on November 13, 1997, he was unable to find physical evidence identifying a possible suspect. After further discussion with Michael Holt, Defendant's name, among others, arose as a possible suspect. He stated that Defendant was investigated because he regularly bought marijuana from Timbo and they often dealt in stolen equipment together. Detective Postiglione later received information from Mrs. Holt that Defendant had called Timbo the night of his murder. Detective Postiglione testified that initially, Defendant was not a suspect. However, he recalled that during the interview, Defendant appeared nervous. Defendant admitted that he and Timbo were well acquainted, but denied any involvement in the murder. Defendant also denied owning a leather jacket on November 13, 1997. Defendant claimed that on the night Timbo was murdered, he was with his girlfriend, Toni Avant. He stated that on that night, he was not with anyone named Mike. Defendant stated that he did not hear of Timbo's murder until November 15, 1997, two days after it occurred. Detective Postiglione testified that he followed up on Ms. Carrington's statement that the man she saw was as tall as the window on the victim's Bronco. He later determined that Defendant was approximately the same height.

Detective Postiglione stated that the investigation was stagnant until Michael Garcia approached him in 1998. In September of 1998, Wayne Davis, Mr. Garcia's attorney, contacted the district attorney's office and reported that Mr. Garcia might have some possible information about the victim's murder. When interviewed, Mr. Garcia admitted that he was afraid that Defendant might harm him or his family. After Mr. Garcia gave a statement to police, Detective Postiglione investigated the facts and confirmed details provided by Mr. Garcia. Mr. Garcia also took Detective Postiglione to the location where Defendant disposed of the weapon and identified the home belonging to Defendant's brother on Riverside Drive. Detective Postiglione testified that Mr. Garcia also provided information about the marijuana sale, which led them to Daryl Haley. Detective Postiglione testified that the information given by Mr. Garcia was corroborated through further investigations and the statements of additional witnesses. Detective Postiglione also stated that Mr. Garcia was not promised anything in exchange for his cooperation. Detective Postiglione testified that the following information was not released to the public: the location of the bullet wounds, the number of wounds, the type of bullet used, the amount of marijuana stolen, the amount of blood the victim lost, and the fact that the suspect possibly wore a black leather coat. Subsequently, Defendant was arrested and charged with the murder.

Although scuba divers searched the Cumberland River in 1998, they were unable to recover the revolver and bullets that Defendant had purportedly thrown into the river in November of 1997. However, they did recover another gun from the river bed. Special Agent Tommy Heflin of the Tennessee Bureau of Investigations Crime Laboratory examined the bullets and fragments removed from the victim's head. He determined that the bullets were .38/.357 caliber bullets, and were designed to fit into the cartridge of a .357 revolver or a .38 special handgun. He further testified that the bullets did not match the gun that was recovered from the Cumberland River, which had probably been in the river for several years.

Detective Damion Huggins of the Metro Vice Division testified that Defendant contacted him on October 8, 1998, to give a statement about Timbo's murder. Defendant was familiar with Detective Huggins because Detective Huggins formerly worked as a uniformed officer in the housing projects. After Detective Huggins administered "Miranda warnings," Defendant waived these rights and gave the following statement that Detective Huggins transmitted to written form:

> James Wilson told me, (Officer Huggins), that on the night of Timothy Holt's murder, a girl named, Toni, himself, Marlin Thompson and a girl named Staci all went out to eat. After eating, James Wilson had a lot to drink and took some Valiums. He said they all went to Toni's apartment at 619 S. 7th St and went to sleep. Prior to going to sleep James Wilson and Toni went to James's mother's residence and James Wilson put some pills and cash into a Cadillac parked in the rear of the house, 601 S. 9th St. James Wilson then states Mike Garcia came to 619 S. 7th Street to get him to ride around. Toni's mother at 619 S. 7th Street answered the door. James Wilson rode around with Mike Garcia and they stopped by Garcia's home, but, James was tired and stayed inside the car. (They were in M. Garcia's Chevy Caprice, red in color.) M. Garcia came out and took James Wilson back to 619 S. 7th Street. James Wilson said he then heard about the murder at work at the pawn shop the next day. James Wilson says that he had heard rumors about the wife of T. Holt and her boyfriend and insurance money as possible motive. James Wilson claims his innocence.

The State rested its case-in-chief.

Steve Wilson, Defendant's brother, testified on Defendant's behalf. His testimony directly refuted Mr. Garcia's account of the events the night of November 13, 1997. He testified that his brother never confessed to him that he had killed Timbo. He further denied that his brother came to his home with marijuana or cash. He also testified that he did not help his brother dispose of a bloody black leather jacket. He then testified that in November of 1997, he lived at 2616 Airpark Drive, and that his brother, Rozelle Wilson, lived near Riverside Drive. Rozelle Wilson, Defendant's half-brother, also offered testimony to the court. He also denied assisting Defendant destroy evidence related to Timbo's murder.

Defendant testified that on the night of November 13, 1997, he went out to eat with his girlfriend, Toni, and friends Marlin Thompson and Stacey Newman. He also consumed alcohol and approximately twelve Valiums during the entire night. He stated that although he was driving earlier that night, the Valiums and the alcohol "kicked in" at approximately 8:00 p.m. and impaired his driving abilities. He stated that he was so intoxicated that when he pulled into Toni's yard, he almost hit her house and a tree. He testified that he was unable to drive for the rest of the night. While at Toni's home, he received a page from Mug and walked down the street to retrieve the .357 that "Mug" had stored in a car behind Defendant's mother's home. He testified that he also stashed some cash and pills in the trunk. Later that night, he loaned that gun to Mr. Garcia. Defendant stated that Mr. Garcia stopped by Toni's house to pick up the gun and they rode around town. Before Mr. Garcia returned him to Toni's house, he called her from a pay phone. He stated that this was not unusual because Toni's house was a well-known drug haven. Defendant testified that Mr. Garcia never returned the weapon and instead, he offered Defendant marijuana to sell in exchange for the cost of the gun. He took the marijuana, and sold it to Daryl Haley at Mr. Haley's home. He said that while there, Mr. Haley asked him in a joking manner, "this ain't that dead man's weed that, you know, that they're talking about around here is it?" He merely replied that he had traded a gun in exchange for the marijuana. He stated that he then became suspicious of where Mr. Garcia got the marijuana.

Defendant testified that he first heard of Timbo's murder the next morning at Mr. Burke's pawn shop. Defendant claimed that he and Timbo were good friends who often dealt in stolen property. He denied going to Timbo's home on November 13, 1997. He also refuted claims that he was wearing a black leather coat on the night Timbo was murdered. Instead, he stated that he had previously loaned his black leather coat to Marlon Thompson. He also denied wearing his black leather coat to Mr. Burke's pawn shop on the dates November 12 or 13.

Defendant further testified that he and Mr. Garcia became estranged in September of 1998. Defendant testified that earlier that year, he asked Mr. Garcia to store a MAC-11, a semi-automatic handgun which belonged to Corey Preston. He testified that the gun was in good condition and was worth approximately four to five hundred dollars. He became angry with Mr. Garcia because Garcia refused to return the gun. Defendant testified that he called Mr. Garcia to demand that he return the property. However, he denied ever calling Garcia a snitch in these phone conversations. Defendant stated that in order to reimburse Mr. Preston for the cost of the gun, he stole Mr. Garcia's auto and sold various parts off the car.

Corey Preston testified that he had owned a MAC-11 gun that he asked Defendant to store for him. He stated that when he attempted to get the gun back from Defendant, Defendant stated that Michael Garcia had the gun. Mr. Preston then pressured Defendant to retrieve the gun from Mr. Garcia, but Defendant reimbursed him for the cost instead.

George Duzane testified that he represented Defendant in 1998 on a drug charge. He stated that Defendant never paid him a lump sum of $1,000.00 in 1997 or 1998. Instead, he produced

receipts in court showing that Defendant only paid him $250.00, and later, $500.00 towards legal fees.

Edward Bell testified that in November of 1997, he lived on Prince Street and knew Timbo from the neighborhood. At the time of the trial, Mr. Bell was eighteen years old and a senior at Maplewood High School. He stated that on the night that Timbo was murdered, he was "hanging out" on Joy Circle, two streets away from Oneida, when he heard four or five gunshots. He then saw Bushrod running across the street wearing a black bullet proof vest. He testified that Bushrod also had a .357 in his hand. He stated that he was able to identify the weapon as a .357 because of its long barrel and brown handle. He remembered that Bushrod was breathing heavily as he ran past them on the opposite side of the street. He stated that in March 1998, he called the victim's mother-in-law, Ms. Vivian Chapman, and relayed these facts. He stated that although he was contacted by police, he refused to provide a statement because he was afraid of Bushrod.

In rebuttal, the State offered the testimony of Ms. Vivian Chapman, the victim's mother-in-law. She corroborated Mr. Bell's statement that he contacted her in March of 1998 about her son-in-law's murder. However, she stated that Mr. Bell only told her that Bushrod was wearing a bullet proof vest and that he had a gun. Although she encouraged Mr. Bell to report this information to police, she testified that he was reluctant to get involved.

ANALYSIS

I. Threat Evidence

In his first issue, Defendant argues that the trial court erred by admitting audio taped threat evidence that was irrelevant and unfairly prejudicial. Defendant initially claims that he was unfairly prejudiced by the State's untimely disclosure of the audio tapes on discovery. Tenn. R. Crim. Proc. 16(a)(1)(A). However, Defendant has waived this issue by failing to raise an objection under Rule 16 in the trial court. Tenn. R. App. P. 36(a); State v. Weeden, 733 S.W.2d 124, 125 (Tenn. Crim. App. 1987). Furthermore, there is no evidence in the record which reveals when the tapes were made available to Defendant. In any event, we find that Defendant has failed to show that he was prejudiced by the alleged "delayed production" of the audio tapes.

Defendant challenges the relevancy of the audio taped threat evidence under Rules 401, 402, and 403 of the Tennessee Rules of Evidence. Defendant further argues that even if the evidence was relevant, the probative value failed to outweigh the prejudicial effect. We disagree.

The test for the admissibility of threat evidence is generally one of relevance. See State v. Brown, 871 S.W.2d 492, 495 (Tenn. Crim. App. 1993). Evidence is generally admissible when it is relevant to a material issue at trial. Tenn. R. Evid. 401. Rule 401 of the Tennessee Rules of Evidence defines "relevant evidence" as evidence having any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Tenn. R. Evid. 403. The decision to admit

relevant proffered evidence is within the sound discretion of the trial court and will not be overturned on appeal absent a clear showing of abuse of that discretion. See State v. Edison, 9 S.W.3d 75, 77 (Tenn. 1999); State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997).

We find no abuse of discretion. During the trial, the State sought to introduce evidence that Defendant made threatening calls to Mr. Garcia, the State's primary witness. The State sought to introduce evidence of the threats through direct testimony and also through audio taped phone messages. Defendant objected to the admission of the audio taped calls, arguing that the evidence was irrelevant and highly prejudicial. After a jury out hearing, the trial court admitted the audio taped threat evidence after finding that it was relevant to a material issue at trial. The court also found that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The trial court found that calls three, five, and part of call four were admissible, but that calls one, two and part of call four were inadmissible. Defendant, however, requested that the trial court play all of the calls to put them in context. The language used by Defendant on the audio taped calls was menacing, vulgar and riddled with profanity. Specifically, in call three, Defendant referred to Mr. Garcia as a "homicide-type ass n-----. Police ass n-----." In call four, Defendant also stated, "[n]ow you gotta tell me and we can get this shit straight. Or we goddammit go to war or whatever you wanna to do. Uh, this police type shit [inaudible]. Got those police numbers in my beeper." Then, in call five, Defendant stated, "[m]y man, quit putting police number[s] in my beeper . . . You the police, you the one who needs to be worried about 'em. You the goddamn boy. Coward ass, n-----, putting the police number in my beeper like a bitch . . . I can't wait to see you, boy. I can't wait to catch up with you, boy . . . I can't put my hands on you . . . you might die on me. You're a goddamn diabetic. I can't put my goddamn hands on you. I might kill you."

Our Court has held that "[a]ny attempt by an accused to conceal or destroy evidence, including an attempt to suppress the testimony of a witness, is relevant as a circumstance from which guilt of the accused may be inferred." State v. Maddox, 957 S.W.2d 547, 551 (Tenn. Crim. App. 1997) (quoting Tillery v. State, 565 S.W.2d 509 (Tenn. Crim. App. 1978)). Although Defendant's repeated reference to "police" and "homicide" might be subject to different interpretations, "it [is] a fair inference that the defendant was delivering a veiled threat to keep the witness from talking to law enforcement authorities." Maddox, 957 S.W.2d at 552. Furthermore, considering the nature of the case, we find that the probative value was not outweighed by unfair prejudice. Therefore, the trial court did not err by admitting the audio taped threat evidence. Defendant is not entitled to relief on this issue.

II. Motion for Mistrial/Improper Comment

In his next issue, Defendant claims that the trial court erred by denying Defendant's motion for a mistrial based on Detective Postiglione's characterization of Defendant as a "robber." Defendant further argues that the trial court's refusal to grant a mistrial was reversible error. We disagree.

The comment at issue was made by Detective Postiglione during cross-examination. The statement was as follows:

> Counsel: Now, do you think the reason Mr. Bell didn't want to come forward was because Bushrod was known in the neighborhood as being a robber?
>
> Detective: I don't know of anybody in the neighborhood other than he said, she said and could be that could really say that Bushrod robbed me on this particular day or that particular day. But, I mean, James Wilson's name has come up in the same vein in the area.

Counsel proceeded with questioning before approaching the trial court with a motion for a mistrial based on the detective's statement. Defense counsel requested a mistrial on the basis that the answer given was unresponsive and was an unsolicited characterization of Defendant as a "robber." The trial court denied the request stating that based on the large amount of hearsay and speculation that was already admitted at trial, he did not find the detective's statement so damaging as to warrant a mistrial. Although the trial court offered to give a curative instruction, defense counsel declined.

The decision of whether to grant a mistrial is within the sound discretion of the trial court. See State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This Court will not disturb the trial court's decision absent a clear showing of abuse of discretion. See State v. Burns, 979 S.W.2d 276, 294 (Tenn. 1998). A mistrial is appropriate only if a miscarriage of justice will occur otherwise. See State v. Allen, 976 S.W.2d 661, 668 (Tenn. Crim. App. 1997). In other words, a mistrial should be declared in a criminal case only when there is a "manifest necessity" requiring such action. See State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). In determining whether there is a "manifest necessity" for a mistrial, "no abstract formula should be mechanically applied and all circumstances should be taken into account." State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993). The party seeking a mistrial bears the burden of establishing a "manifest necessity." See State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

In this case, we find that Defendant has failed to show a "manifest necessity" requiring a mistrial. Furthermore, by declining the trial court's offer of a curative instruction, Defendant is not entitled to relief when he fails "to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a); see State v. McPherson, 882 S.W.2d 365, 371 (Tenn. Crim. App. 1994). The trial court did not abuse its discretion by declining Defendant's motion to grant a mistrial. Defendant is not entitled to relief on this issue.

III. Closing Argument

Defendant argues that the trial court erred by denying his motion for a mistrial based on the State's comment during closing argument on Defendant's failure to call a witness. We disagree.

During the course of the trial, the jury heard several witnesses testify about Marlon Thompson. Defendant testified that he had been with Marlon Thompson on the night the victim was shot. He further testified that he had given his black leather jacket to Mr. Thompson before the shooting. In contrast, the State presented proof that Defendant had been wearing the black leather jacket on the night the victim was shot. Mr. Garcia, the State's primary witness, testified that he observed blood smeared on the Defendant's black leather jacket shortly after he confessed to killing the victim. Although Mr. Thompson was present in the courtroom during the trial, neither party called him as a witness. During closing argument, the State argued the following:

State:	Now, Marlon Thompson's been here all week. If this Defendant thought that Marlon would help him out –
Defense Counsel:	Your Honor –
State:	– he could've –
Defense Counsel:	– Defendant –
State:	– called him.
Defense Counsel:	– has no burden to prove anything in a criminal case.
Court:	All right.
State:	The Defendant presented proof. Marlon Thompson's been here all week.

Defendant failed to request a mistrial following the State's comment. The initial problem with the Defendant's position, though, is that he did not object to the State's argument based upon the missing witness inference. Rather, he objected on the basis that the argument tended to shift the burden of proof to him. A defendant may not object on one ground in the trial court and then assert a new or different theory to support the objection on appeal. See State v. Adkisson, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994). Asserting a new ground for objecting to the introduction of evidence constitutes waiver of the issue on appeal. Id. at 635.

Notwithstanding waiver, we find no evidence that the State's comment impermissibly shifted the burden of proof to Defendant. In its jury instructions, the trial court stated that "the State has the burden of proving the guilt of the Defendant beyond a reasonable doubt, and this burden never shifts but remains on the State throughout the trial of the case. The Defendant is not required to prove his innocence."

On appeal, Defendant argues that the trial court erred by permitting the State to argue the missing witness inference. Defendant has waived this issue by failing to object on this basis at trial.

See Adkisson, 899 S.W.2d at 642. However, this Court may, in its discretion, consider an issue which has been waived upon a finding of "plain error." Under the "plain error" doctrine, "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). In determining whether an error constitutes "plain error," this Court has set forth the following factors for consideration:

> a) the record must clearly establish what occurred in the trial court;
>
> b) a clear and unequivocal rule of law must have been breached;
>
> c) a substantial right of the accused must have been adversely affected;
>
> d) the accused did not waive the issue for tactical reasons; and
>
> e) consideration of the error is 'necessary to do substantial justice.'

Adkisson, 899 S.W.2d at 634-35.

This test was formally adopted by our Supreme Court in State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000), which emphasized that all five factors must be established before plain error may be recognized. Id. The Court also stated that complete consideration of all the factors is unnecessary when it is clear from the record that at least one of the factors cannot be established. Id. Additionally, the "'plain error' must [have been] of such a great magnitude that it probably changed the outcome of the trial." Adkisson, 899 S.W.2d at 642.

In his brief on appeal, Defendant argues that the trial court improperly permitted the State to argue the "missing witness argument." Under well-established Tennessee law, the State is entitled to argue that if the defendant had the ability to produce a witness whose testimony would be material to an issue, the fact that he does not do so creates a permissive inference for the jury that the testimony may have been unfavorable. See State v. Middlebrooks, 840 S.W.2d 317, 334 (Tenn. 1992); State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984). However, before the State can comment on a missing witness, the record must show that (1) the witness had knowledge of material facts; (2) a relationship exist[ed] between the witness and the defendant that would naturally incline the witness to favor the defendant; and (3) the missing witness was available to the process of the court for trial. See Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979). Additionally, the prosecutor should get an advance ruling from the trial judge before arguing the adverse witness inference. See Francis, 669 S.W.2d at 90. Moreover, "the Delk requirements are to be strictly construed, particularly when the rights of a criminal defendant may be affected." Id. at 89.

Defendant concedes that the first and third Delk requirements were met, but argues that the evidence failed to satisfy the second prong. The record reveals that Defendant testified that he and Mr. Thompson were "good friends," and that they went out to eat and drink on the night Timbo was

murdered. He further stated that he and Defendant were close and often exchanged clothing. Based on this evidence, it is reasonable to infer that "a relationship exist[ed] between the witness and the defendant that would naturally incline the witness to favor the defendant." See Delk, 590 S.W.2d at 440. Therefore, we find that all three Delk requirements were satisfied. However, the record fails to contain evidence that the prosecution sought an advance ruling from the trial court before arguing the missing witness inference. See Francis, 699 S.W.2d at 90.

After a thorough review of the record, we find no evidence that "the substantial rights of the accused were adversely affected." Adkisson, 899 S.W.2d at 634-35. The State's reference to the missing witness during closing argument was not repeated or extensive, nor did the prosecutor revisit this issue. Furthermore, Defendant did not request a curative instruction and also commented in closing argument on the State's failure to call Mr. Thompson to testify. Therefore, we find no evidence that the State's comment, if error, rose to the level of "plain error" as it did not affect "the substantial rights of the accused." Tenn. R. Crim. P. 52(b). Neither did the alleged error rise to the requirement that consideration of the error is "necessary to do substantial justice." Adkisson, 899 S.W.2d at 642. Defendant is not entitled to relief on this issue.

IV. Accomplice Instruction

In his next assignment of error, Defendant argues that the trial court erred by refusing to grant his request to instruct the jury on accomplice testimony in light of Mr. Garcia's testimony. He contends that the trial court's refusal to charge the jury was reversible error. We disagree.

Defendant concedes that he has waived this issue by failing to raise it in his motion for new trial. Tenn. R. App. P. 3(e). Yet, Defendant asks this Court to find that the trial court's refusal to instruct the jury on accomplice testimony was "plain error." As stated above, the "plain error" doctrine recognizes that an error affecting "the substantial rights of an accused may be noticed at any time . . . where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). For a "substantial right" to have been affected, the error must have prejudiced the defendant and affected the outcome of the trial court proceedings. See Adkisson, 899 S.W.2d at 642. However, our Court has also held that recognition of an error does not result in automatic reversal of a trial court's judgment since the error may be harmless. See id. For the reasons stated hereafter, we find no error by the trial court.

It is a well-settled rule of law that an accused cannot be convicted of a felony on the uncorroborated testimony of an accomplice. See State v. Anderson, 985 S.W.2d 9, 15 (Tenn. Crim. App. 1997). A person is an accomplice if he or she knowingly, voluntarily and with common intent participated with the principal offender in the commission of the crime alleged in the charging instrument. See State v. Griffis, 964 S.W.2d 577, 588 (Tenn. Crim. App. 1997). "A common test is whether the alleged accomplice could have been indicted for the offense." State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). The question of who determines whether a witness is an accomplice depends upon the evidence introduced during the course of a trial. See id. When the undisputed evidence clearly establishes the witness is an accomplice as a matter of law, the trial court must determine that the witness is an accomplice. See id. On the other hand, if the evidence

adduced at trial is unclear, conflicts, or is subject to different inferences, the jury, as the trier of fact, is to decide if the witness was an accomplice. See id. In any event, the jury, as the trier of fact, must determine whether an accomplice's testimony has been sufficiently corroborated. See id.

We find that the trial court did not err by refusing to instruct the jury on accomplice testimony. The record reveals that on November 13, Defendant appeared at Mr. Garcia's home and confessed to killing the victim. Mr. Garcia further testified that Defendant asked to spend the night, but he refused. Defendant then instructed Mr. Garcia to ride with him. Mr. Garcia testified that although he first refused, he agreed because Defendant had a "strange look in his eyes" and he feared for his family's safety. Mr. Garcia then accompanied Defendant as Defendant disposed of the alleged murder weapon and changed clothes at his brother's home. However, there was no evidence at trial that Mr. Garcia participated in planning or killing the victim or that he was present when Timbo was shot. At most, the evidence shows that Mr. Garcia could have been charged as an accessory after the fact. However, an accessory after the fact is not subject to indictment for the offense committed by his or her principal, therefore he or she cannot be considered as an accomplice within the rule requiring that the testimony of an accomplice be corroborated. See State v. Allen, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). Defendant is not entitled to relief on this issue.

V. Lesser-Included Offenses

In his final issue, Defendant argues that the trial court erred in instructing the jury on second degree murder rather than reckless homicide and criminally negligent homicide as lesser-included offenses of felony murder. Defendant failed to raise this issue in his motion for a new trial. Generally, this court will not consider issues that are not raised in the motion for new trial. See Tenn. R. App. P. 3. As noted above, "plain error" is an error affecting "the substantial rights of an accused may be noticed at any time . . . where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). Failure to properly charge a lesser-included offense has been found to be "plain error." See State v. Brooks, 909 S.W.2d 854, 860-61 (Tenn. Crim. App. 1995). However, upon review of the record and relevant law, we conclude that any error was only harmless error.

Defendant was indicted by the Davidson County grand jury for first degree felony murder (Count I), and especially aggravated robbery (Count II). The language of Count One of the indictment is as follows:

> THE GRAND JURORS of Davidson County, Tennessee, duly impaneled and sworn, upon their oath, present that:
>
> JAMES ROBERT WILSON
>
> on the 14th day of November, 1997, in Davidson County, Tennessee and before the finding of this indictment, recklessly did kill Timothy Wayne Holt, during the perpetration of or attempt to perpetrate robbery, in violation of Tennessee Code Annotated § 39-13-202, and against the peace and dignity of the State of Tennessee.

In reference to Count One, the judge only instructed the jury on second degree murder as a lesser-included offense of felony murder. Defendant claims that the trial court erred by instructing the jury on second degree murder as a lesser-included offense of felony murder. He argues that because he was indicted under the pre-1995 felony murder statute which required the requisite mental state of "reckless," the trial court should have instructed the jury on the offenses of reckless homicide and criminally negligent homicide as lesser-included offenses of felony murder. Tenn. Code Ann. § 39-13-202 (1991). However, the current felony murder statute (the one applicable to this offense), does not include "reckless" or any other culpable mental state (other than the required mental state of the underlying felony). Tenn. Code Ann. § 39-13-202(b); see State v. Ely, 48 S.W.3d 710, 721 (Tenn. 2001). We find that the "reckless" language contained in the indictment was surplusage, see State v. Jones, 953 S.W.2d 695, 700 (Tenn. Crim. App. 1996), and its use cannot change the essential elements of the offense. See State v. Witherspoon, 769 S.W.2d 880, 884 (Tenn. Crim. App. 1988).

Tennessee Code Annotated section 40-18-110(a) (1997) provides that a trial court must charge the jury with all lesser-included offenses included in the indictment without any request on the part of the defendant to do so. Our Courts have interpreted this provision to mean that "a trial court must instruct the jury on all lesser-included offenses if the evidence introduced at trial is legally sufficient to support a conviction for the lesser offense." State v. Burns, 6 S.W.3d 453, 464 (quoting State v. Langford, 994 S.W.2d 126, 128 (Tenn. 1999)). In Burns, our Supreme Court adopted a modified version of the American Law Institutes's Model Penal Code definition of lesser-included offenses. See id. at 466. Under this modified test, an offense is lesser-included if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> > (1) a different mental state indicating a lesser kind of culpability; and/or
> >
> > (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of
>
> > (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> >
> > (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Id. at 467.

In Ely, our Supreme Court applied the Burns test to determine whether the offenses of second degree murder, reckless homicide, and criminally negligent homicide were lesser-included offenses of felony murder. 48 S.W.3d at 718-20. The court determined the following:

> Under current law, the offense of felony murder requires proof of the following elements:
>
> 1. That the defendant unlawfully killed the alleged victim;
>
> 2. that the killing was committed either in the perpetration of or the attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse or aircraft piracy; or as the result of the unlawful throwing, placing or discharging of a destructive device or bomb; and
>
> 3. that the defendant intended to commit the alleged felony.
>
> See Tenn. Code Ann. § 39-13-202(a)(2), (a)(3), (b) (1997).
>
> . . . .
>
> To compare, the offenses of second degree murder, reckless homicide, and criminally negligent homicide require proof that:
>
> 1. the defendant unlawfully killed the alleged victim; and
>
> 2. the defendant acted either knowingly (second degree murder), recklessly (reckless homicide), or with criminal negligence (criminally negligent homicide).
>
> See Tenn. Code Ann. §§ 39-13-210, -212, -213 (1997).
>
> . . . .
>
> Applying part (a) of the Burns test to the lesser offenses of second degree murder, reckless homicide, and criminally negligent homicide, we note that all require proof of a specific mental state, which is not an element of that felony murder. Thus, none of these offenses can be considered lesser-included offenses under part (a). Moreover, these offenses do not qualify as lesser-included offenses

under part (c) of Burns because they obviously do not fall within the category of attempt, facilitation, or solicitation.

Applying part (b) of the test, an offense may qualify as lesser included if "it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing (1) a different mental state indicating a lesser kind of culpability; and/or (2) a less serious harm or risk of harm to the same person, property or public interest." Burns, 6 S.W.3d at 466-67. We note that the relevant portion of the Burns test does not say "a less culpable mental state," but rather, "a different mental state indicating a lesser kind of culpability." (emphasis added) We made this distinction deliberately, recognizing that there are certain offenses in the Code that are related but have different mental states that do not fit neatly into the hierarchy of intentional, knowing, reckless, or negligent.

. . . .

Tennessee has a single first degree murder statute that encompasses both premeditated murder and felony murder. See Tenn. Code Ann.§ 39-13-202 (1997). Premeditated murder and felony murder are not designated by that statute as separate and distinct offenses but rather as alternative means by which criminal liability for first degree murder may be imposed. See Carter v. State, 958 S.W.2d 620, 624-25 (Tenn. 1997); State v. Hurley, 876 S.W.2d 57, 70; see also State v. Darden, 12 S.W.3d 455, 458 (Tenn.2000). The mental state required for the commission of felony murder is intent to commit the alleged felony. Tenn. Code Ann. § 39-13-202(b). While this is a different mental state than that required for premeditated murder, in terms of culpability it equates with the intent required for the commission of premeditated murder.

When comparing the offense of felony murder to the lesser homicide offenses, it is immediately apparent that one accused of felony murder is held to a higher level of culpability as felony murder is considered the more serious offense and merits a more severe punishment than either second degree murder, reckless homicide, or criminally negligent homicide. In other words, when a death results from the commission of, or the attempt to commit, a felony, the mental state required for the commission of the felony is deemed a more culpable mental state than knowledge, recklessness, or negligence.

After comparing the respective elements of felony murder, second degree murder, reckless homicide, and criminally negligent homicide, it appears that the elements of the lesser offenses are a subset of the elements of the greater and otherwise differ only in the mental state required. *We hold that* because the mental states required for the lesser offenses differ only in the level of culpability attached to each in terms of seriousness and punishment, *the offenses of second degree*

murder, reckless homicide, and criminally negligent homicide are lesser-included offenses of felony murder under part (b) of the Burns test.

See Ely, 48 S.W.3d at 719-21 (emphasis added).

Even if the trial court erred by failing to instruct the jury on the offenses of reckless homicide and criminally negligent homicide as lesser-included offenses of felony murder, we find that the error was harmless beyond a reasonable doubt. In this case, the trial court instructed the jury on both felony murder and the lesser-included offense of second degree murder. The jury convicted Defendant of felony murder. "[B]y finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses." State v. Williams, 977 S.W.2d 101, 106 (Tenn.1998). Defendant is not entitled to relief on this issue.

CONCLUSION

Accordingly, the judgment of the trial court is affirmed.

_____

THOMAS T. WOODALL, JUDGE