IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, 1993

STATE OF TENNESSEE,	)	
	)	NO. 03C01-9304-CR-00136
	)	
Appellee	)	Claiborne County
	)	
v.	)	Hon. Lee Asbury, Judge
	)	
JOHN HENRY WALLEN,	)	(First-Degree Murder)
	)	
Appellant	)	

CONCURRING AND DISSENTING OPINION

I concur with the majority's reversal and remand for a new trial. I dissent from their determination that appelalnt can be tried for first-degree murder and that prior acts are admissible under Rule 404(b), Tennessee Rules of Evidence.

A jury convicted John Henry Wallen of murder in the first-degree in the shooting death of state trooper Douglas Tripp and for the felonious possession of a deadly weapon with the intent to commit first-degree murder.[1] After a separate sentencing hearing, the jury imposed a life sentence. In this appeal as of right, appellant raises the following issues:

> 1. whether the evidence presented at trial is sufficient to prove the elements of premeditation and deliberation beyond a reasonable doubt, and whether the instruction informing the jury that premeditation may be formed

[1]Appellant has not challenged his conviction on the second count. Further, no judgment form for that conviction appears in the record. Although the judge indicated that any sentence for count two would be concurrent to the life sentence and would be imposed at the hearing on the motion for new trial, that did not occur.

in an instant was so prejudicial as to warrant a new trial;

2. whether appellant's statements to authorities and evidence obtained from searches of appellant's truck and residence should have been suppressed;

3. whether evidence of a prior uncharged crime was erroneously admitted as probative of appellant's motive and identity;

4. whether a defense expert should have been allowed to testify as to appellant's psychological condition at the time of his confession and the effect of his retardation on the issue of voluntariness; and

5. whether the defense challenge for cause of the juror Bailey should have been granted.

We find that the evidence presented at trial is insufficient as a matter of law to find the element of deliberation as required by State v. Brown, 836 S.W.2d 530 (Tenn. 1992). Moreover, the trial court committed reversible error by improperly admitting evidence of an uncharged crime. Therefore, appellant's conviction for first-degree murder is reversed and this case is remanded to the trial court for retrial on charges of second-degree murder or lesser included offenses.

FACTS

It was nearly midnight on May 19, 1991, when Tara Lynn Bott and her fiance drove through Tazewell, Tennessee, en route to his parents' home in Abingdon, Virginia. A steady drizzle was falling. As they passed the Tazewell Muffler Shop, Bott noticed a state trooper car parked in the lot in front of the shop. The dome light and headlights were on, but the trooper was not visible. Bott's curiosity was aroused when she noticed that the driver's window was down and the passenger's window was

shattered. The couple decided to take a second look. Upon closer investigation, they found Doug Tripp, a veteran state trooper, slumped into the passenger side of the automobile, unconscious and bleeding profusely from a number of wounds.[2] The police vehicle's engine was running. Sergeant Ben Evans, a Claiborne County Deputy Sheriff, received Bott's call from a nearby convenience store at 11:56 p.m. After calling the authorities, the couple returned to the scene. Bott, a nurse, detected a faint pulse and attempted, without success, to clear the blood from Doug Tripp's mouth and nasal passages.[3] The victim was declared dead upon arrival at the hospital.

Later, another witness reported seeing Doug Trip on the night of his death. Just after 11:30 p.m., David Smith of Middleboro, Kentucky, a casual acquaintance of Tripp, saw Tripp's patrol car parked in front of the Tazewell funeral home. When Smith waved, Tripp, who was sitting inside, returned the greeting. When Smith drove back through Tazewell at approximately 11:50 p.m., the patrol car was no longer at the funeral home. As Smith continued north, he passed a slow-moving red Toyota passenger car. At the muffler shop, he saw the state patrol car parked in the lot facing the road. Tripp was sitting in the vehicle with the dome light on, looking down, and appeared to be reading or writing. This time, when Smith waved, Tripp did not respond. Within a short time after Smith saw

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[2]Bott estimated that it was 11:45 p.m. when they first found Sergeant Tripp.

[3]The medical examiner concluded that Tripp had been shot eleven or twelve times. A group of small caliber gunshot wounds was present on the left side of the head and neck. A second group was located at the back of the shoulder. Five .22 caliber bullets were recovered from the body. The immediate cause of death was suffocation from the blood which pooled in Tripp's lungs and respiratory passages.

Tripp at the muffler shop, the Toyota came up from behind and sped around him.[4]

The police found little at the scene to assist in the investigation. When the police arrived, Sergeant Tripp was lying on the front seat of the patrol car. Tripp's revolver was in his holster with the cover snapped shut. Investigators found four spent .22 cartridges in the vehicle. The window on the passenger side was shattered. Lying under the steering wheel on the floor of the vehicle was a magazine. No murder weapon was found. No attempt was made to obtain fingerprints from the patrol car. Other than Smith and Bott, no other witnesses were found with information about the killing.

From the evidence at the scene, police concluded that the killer pulled up next to the patrol car and spoke to Tripp who rolled down the driver-side window. The killer fired a .22 rifle directly at the officer. The first group of shots hit Tripp on the left side of the head and neck. The second group of shots hit his left shoulder as he turned away and slumped over. At least one shot shattered the passenger window.

Despite the meager evidence, the investigating officers almost immediately connected the killing of Sergeant Tripp to an earlier incident and to John Henry Wallen. During the early morning hours of April 12, 1991, someone fired a series of shots at a Tazewell City Police vehicle parked in front of the police station. The police collected a number of .22 cartridges at the scene. According to Chief Tim Taylor, who did not testify, a dark colored pickup truck was seen in the

[4]Testimony of police officers indicates that several other vehicles were seen in the area that night. Apparently, no one reported seeing Wallen's dark maroon pickup.

vicinity of the police station at approximately the time of the shooting. Because John Henry Wallen drove a dark maroon pickup truck and had a .22 rifle which he used for target practice, Tazewell police suspected Wallen of involvement in the police car shooting. However, no charges were filed against him.

The investigating officers sent the shells found at the murder scene, the shells collected in the police parking lot, and some .22 shells obtained in an area where Wallen was known to have fired his .22 rifle to the T.B.I. laboratory. On the morning of May 24th, the laboratory notified the T.B.I. agents that all three sets of shells matched and had been fired from the same rifle.

Wallen was living at home with his parents, Henry and Betty Wallen. Immediately upon learning that the shells matched, the T.B.I. agents set up roadblocks at each end of the road that the Wallens used to reach a state highway. At about 9:30 a.m., the T.B.I. agents stopped Wallen on his way to work in Middleboro, Kentucky. He spoke at length with the officers who explained that they were looking for Tripp's killer who may have been driving a dark colored pickup truck. After obtaining Wallen's consent, the officers searched his truck finding a single spent .22 cartridge. The rifle rack in the truck was empty. Wallen told the agents that he liked Tripp and that he would help them find the murderer if he could.

At about 10:30 a.m., while Wallen was talking to T.B.I. agents, Betty Wallen left her home to go to a funeral. As she passed by the place where the police had stopped her son, she slowed to a stop.[5] The officers at first waved her on but

[5]One agent testified that they had already removed Wallen to the motel when Mrs. Wallen passed by. However, Mrs. Wallen

when they realized that she was Wallen's mother, they intercepted her before she reached the highway. The officers told her they were investigating Tripp's death and her son's possible involvement. She consented to the search of her car. When the police asked for consent to search her home, she agreed and signed the waiver form. However, she explained she was on her way to a funeral and would not return until about 12:30 p.m. If the officers could not wait that long, she asked that they find her husband who was plowing a nearby field and have him accompany them when they entered the house.

At about the time Mrs. Wallen passed by, the T.B.I agents asked Wallen if he would go with them to their motel room to make a formal statement. He agreed and was transported to the motel. Upon arrival, Wallen gave a statement admitting he had driven by the muffler shop on the night of the murder as he was on his way to his girlfriend's house. He denied seeing Tripp or knowing anything about the murder. The agent then confronted him with the fact that the shells from all three sites matched. At this point, Special Agent Rick Davenport read Wallen his Miranda rights. Wallen signed the rights waiver and also signed a consent form allowing a search of his home. Wallen then gave a second statement in which he admitted shooting Tripp at about 11:45 p.m. on May 19th. He said that Tripp came up behind him, flashed his blue lights, and pulled him into the lot. According to the statement, Wallen made up his mind that if Tripp pulled his gun on him, he would shoot him because Tripp had threatened him earlier. Wallen had told his girlfriend five months earlier that due to the harassment, one day either Tripp would kill him or he would have to kill Tripp. Tripp got out of his car, he drew his revolver, and yelled at

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and at least two other officers testified that Wallen was still in the police vehicle at the roadside when she drove by.

Wallen not to run. Wallen backed up until his driver's side was next to Tripp's window. He took the .22 automatic rifle on the seat beside him and emptied it into Tripp. Wallen also admitted that he shot at the city police car in April. The interview was not recorded but written by Agent Davenport and signed by Wallen.[6]

After learning that Wallen had consented to a search of his home, the agents waiting there entered the house without either Mr. or Mrs. Wallen. There they found Wallen's .22 rifle in a rack in his bedroom and a number of .22 "longs" and "shorts" at various locations in the house. The shell casings were later compared with Wallen's .22 rifle. At trial, T.B.I. forensic scientist, Don Carmen testified that the shell casings found at the scene of the murder had been fired by the rifle taken from Wallen's bedroom. The same rifle had fired the shots at the Tazewell Police vehicle and the shells collected from the yard at Wallen's former residence.

At trial, Wallen presented an alibi defense. His father testified that Wallen stayed home after his arrival that evening at about 10:30 p.m. A friend's mother and his girlfriend's mother testified that Wallen had made several telephone calls to their homes between 11:00 p.m and 1:00 a.m. Based on these facts, the jury convicted appellant of first-degree murder and with possession of a firearm with the intent to commit first-degree murder.

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[6]The statement mentions that Wallen pulled up a stop sign, put it in the back of his truck, and took it to Joe Evans' house where he threw it in the front yard. It isn't clear who Joe Evans is or when this occurred. According to the statement it happened "before I saw Tripp."

I. SUFFICIENCY OF THE EVIDENCE

Appellant asserts that the evidence is insufficient to support a conviction for murder in the first-degree. Specifically he argues that the prosecution failed to prove the elements of premeditation and deliberation beyond a reasonable doubt.

Appellant was tried and convicted by a jury. A guilty verdict from the jury, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978).

When the sufficiency of the evidence is challenged the standard for review by an appellate court 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 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). In determining its sufficiency, this court should not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d at 836. Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App.), cert. denied, (Tenn. 1978).

Appellant was convicted of first-degree murder on May 4, 1992 for a crime committed on May 19, 1991. According to

Tennessee statute, first-degree murder is "an intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(1)(1994 Supp.). A deliberate act is one "performed with a cool purpose," and a premeditated act is one "done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(1)&(2)(1991 Repl.). The law in Tennessee has long recognized that once a homicide is established, it is presumed to be murder in the second-degree. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992); Clarke v. State, 402 S.W.2d 863, 867 (Tenn. 1966); Witt v. State, 46 Tenn. 5, 8 (1868). The two distinctive elements of first-degree murder are deliberation and premeditation. Without proof of these two elements, a conviction for first-degree murder cannot be upheld. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992); State v. Brown, 836 S.W.2d at 538; See Everett v. State, 528 S.W.2d 25 (Tenn. 1975).

Since the Supreme Court decisions in Brown and West, we have often been required to scrutinize the evidence and determine whether the prosecution has produced sufficient evidence to prove beyond a reasonable doubt the existence of both distinguishing elements.[7] State v. Joe Nathan Person, No. 02C01-9205-CC-00106, slip op. at 5 (Tenn. Crim. App., Jackson,

[7]The Supreme Court released its opinion in Brown on June 1, 1992, approximately one month after appellant's trial. While the holding in Brown is not to be applied retroactively, see e.g., State v. Willie Bacon, Jr., No. 1164 (Tenn. Crim. App., Knoxville, Aug. 4, 1992), perm. to appeal denied, (Tenn. 1992), it is applicable to cases that were "in the pipeline." See State v. Brooks, 880 S.W.2d 390 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994); State v. Alta Jean Krueger, No. 03C01-9206-CR-00213 (Tenn. Crim. App., Knoxville, Oct. 6, 1993), perm. to appeal denied, (Tenn. 1994); State v. David Lee Richards, No. 03C01-9207-CR-00230 (Tenn. Crim. App., Knoxville, March 23, 1993), perm. to appeal denied, (Tenn. 1993); State v. William Paul Roberson, No. 01C01-9206-CC-00200 (Tenn. Crim. App., Nashville, Feb. 25, 1993), perm. to appeal denied, (Tenn. 1993); State v. David L. Hassell, No. 02C01-9202-CR-00038 (Tenn. Crim. App., Jackson, Dec. 30, 1992). Counsel raised the Brown issues in appellant's motion for new trial and has once again raised them on appeal.

Sept. 29, 1993), perm. to appeal denied, (Tenn. 1994); State v. David L. Hassell, No. 02C01-9202-CR-00038, slip op. at 13 (Tenn. Crim. App., Jackson, Dec. 30 1992).

In Brown, our Supreme Court recognized that Tennessee courts had often commingled the elements of premeditation and deliberation. State v. Brown, 836 S.W.2d at 537-541 (citations to other cases omitted). A failure to distinguish between the two elements destroys the statutory distinction between first- and second-degree murder. Id. at 841 (quoting 2 W.LaFave and A. Scott, Substantive Criminal Law § 7.7 (1986)).

Premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. Deliberation is the process of weighing matters such as the wisdom of proceeding with the killing, the manner in which it will be accomplished, and the likely consequences if apprehended. State v. Brown, 836 S.W.2d at 540-41. Deliberation, by its very nature requires proof that the offense was committed "upon reflection, without passion or provocation, and otherwise free from the influence of excitement." State v. David Hassell, slip op. at 6. See also State v. Deborah Mae Furlough, No. 01C01-9109-CR-00261, slip op. at 9 (Tenn. Crim. App., Nashville, Nov. 18, 1993). The circumstances must suggest that the murderer reflected on the consequences of the act and that the thought process took place in a cool mental state. Id. at 6-7. The deliberation and premeditation must be akin to the deliberation and premeditation shown for a murder performed by poisoning or lying in wait. State v. Brown, 836 S.W.2d at 539 (quoting Rader v. State, 73 Tenn. 610, 619-620 (1880)); Tenn. Code Ann. § 39-13-201(b)(2)(1991 Repl.). The cool purpose must be formed and the deliberate intention conceived in the absence of passion. Id.

LaFave's treatise on criminal law, which the Supreme Court quoted in Brown, provides insight into the nature of proof from which a jury may properly infer the elements of premeditation and deliberation:

> Three categories of evidence are important for this purpose:
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> (1) facts about how and what the defendant did prior to the actual killing which show he [or she] was engaged in activity directed toward the killing, that is planned activity;
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> (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and
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> (3) facts about the nature of the killing from which it may be inferred that the manner of the killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design . . . .

2 W. LaFave and A.Scott, Substantive Criminal Law, § 7.7 (1986) (emphasis in the original). See State v. David Hassell, slip op. at 7.

In this case with no eyewitnesses and only shell casings to connect Wallen with the murder, the evidence of premeditation and deliberation is largely circumstantial. The record contains little information about appellant's activities just prior to the murder. We know that appellant and his girlfriend apparently had a disagreement while in Kentucky which prompted their departure. According to Wallen's statements and his father's testimony, which was partially rejected by the jury, Wallen arrived home before 10:30 p.m. and made several

phone calls.[8] Later, he drove by, saw his girlfriend's car, and headed home.[9]

The other evidence of Wallen's activities before the murder comes from Wallen's second statement. In that statement, he asserted that after he drove by his girlfriend's home, and turned around, Trooper Tripp began following him. When they arrived at the muffler shop, Wallen pulled in. The trooper got out of his car with this gun drawn. When he put his gun away and got back in his car, Wallen picked up his loaded rifle from the truck seat and "shot the rifle empty" intending to kill.

The record contains facts from which a reasonable juror could have found that Wallen had a motive for the murder. He was carrying the rifle because another police officer, Joe Wolfenbarger, was "stopping him a lot." He had told his girlfriend, months before, that one day he would have to kill Tripp or Tripp would kill him. Louise Arnold, the girlfriend's mother, testified that Wallen hated some police officers. Wallen admitted shooting up an empty Tazewell City police car about a month before the murder.[10] He further admitted that he had decided to shoot Tripp if Tripp pulled his gun. From these facts, a rational juror could readily conclude that appellant

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[8]The mother of Wallen's girlfriend testified that she refused to call the girlfriend to the phone.

[9]The record demonstrates the inaccuracy of Wallen's statement. He claimed that Tripp frightened him by screaming and threatening him with his revolver, but Tripp's revolver was found snapped securely in his holster. Moreover, the position of Tripp's car as shown on the map drawn by appellant is at odds with the testimony of other witnesses. Aside from appellant's obviously incredible version, the record contains no facts about appellant's activities just prior to the killing. Additionally, nothing in the record describes Wallen's actions or demeanor after the murder. We know only that he went home and that the police later discovered the murder weapon hanging on his bedroom wall.

[10]The admissibility of the evidence relating to this shooting is discussed below.

was hostile toward the police in general and that he was fearful of Tripp. However, proof that an accused had a motive to kill, without more, does not prove that the killing was premeditated and coolly executed. See e.g., State v. Brooks, 880 S.W.2d 390 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1944)(turbulent relationship and argument just prior to killing insufficient to prove deliberation where jury instruction was inaccurate statement of the law).

The nature of this killing provides little from which a jury could conclude that the crime was committed according to a preconceived design and free from passion or provocation. Nothing indicates that Wallen sought an encounter with Tripp or that their meeting was anything but pure chance. Certainly, the manner of the killing suggests that Tripp did nothing to provoke the encounter. He was seated with his gun strapped in the holster. He was shot repeatedly at close range. While Wallen fired twelve or thirteen shots, repeated blows or shots, by themselves, are not enough to establish premeditation and deliberation. State v. Brown, 836 S.W.2d at 543. A vicious beating may well be evidence of rage or passion, and emptying one's rifle is as likely to be a sign of panic or loss of control as an indication of a cool, deliberate killing.

The record is equally sparse on the issue of Wallen's mental state either before or after the murder. He had an argument with his girlfriend. One could reasonably infer he was upset because she refused to speak to him on the telephone. In his confession, he told the police that he had "made up" his mind "if Tripp pulled a gun on me I was going to use my gun on him." It is impossible to tell from the context whether this

decision was reached months earlier or seconds before the killing.[11]

Since Brown, courts have examined the sufficiency of the state's proof in first-degree murder cases a number of times. In State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), for example, defendant was locked in a bitter land dispute with TVA and held a grudge against that agency's employees. State v. Gentry, 881 S.W.2d at 2. He had stated several times he would kill any TVA employee who came on his property. When he saw a TVA vehicle enter his land, he returned to his house, armed himself, and waited for it to arrive. Several eyewitnesses testified to his calm demeanor as he waited by his barn for the man to approach. During their brief conversation, the victim was not offensive or threatening. When the defendant pointed his gun in the victim's face, the victim resisted, and the defendant fired several shots at point blank range. This court found that the evidence was sufficient to prove that defendant had a motive, had planned his actions, and had killed in accordance with a preconceived design. Id. at 5.

In State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994), defendant handcuffed the victim to a tree and choked him to death with a wire. Evidence suggested that defendant came to Anderson County intending to rob and kill him. He was armed with a gun and knife. He later got a ride with his ultimate victim, pretended to be a police officer, "arrested" him, handcuffed him, drove him to another location, choked him, and

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[11]We are cognizant of the fact that appellant's statement was never taped or transcribed word for word. The record contains only the police officer's version written in his hand and signed by appellant. A word for word transcription would have provided a more complete and, possibly, a more coherent statement.

stole his truck. The Supreme Court concluded that the evidence was sufficient to establish first-degree murder.

In State v. Tune, 872 S.W.2d 922 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993), defendant entered the victim's garage carrying a shotgun. He pointed it toward the victim and wondered aloud whether it would fire. After saying he was not going to shoot the victim, he conversed with the victim. Moments later he declared that he would shoot and shot the victim. Witnesses detailed threats made by defendant against the victim two weeks earlier. Again, the court found sufficient evidence to sustain the first-degree murder conviction.

No similar evidence exists in this case. Granting the state the strongest legitimate view of the evidence, the record demonstrates that Wallen was hostile toward police and afraid of Tripp. On the evening of May 18, 1991, Wallen had a fight with his girlfriend and was upset and angry. That night at approximately 11:45 p.m., Wallen shot Tripp twelve or thirteen times with his .22 rifle while Tripp was parked in the Tazewell Muffler Shop lot. Wallen left the lot, went home, and put the rifle in the gun rack in his room. Like Gentry, Wallen carried a known grudge against a certain group. Unlike Gentry, the record contains nothing from which a jury could conclude that Wallen coolly and calmly decided to murder Tripp and then carried out that intent according to his preconceived plan without passion or provocation. Like Brimmer and Tune, Wallen was armed. Unlike Brimmer and Tune, Wallen did not begin his evening with the intent to kill and did not state his intent weeks earlier.

In this case, due to its circumstantial nature, two equally speculative theories were presented to the jury - the state's and defendant's. While the jury was entitled to reject defendant's theory in favor of the state's, affirmative evidence sufficient to establish proof of each element beyond a reasonable doubt must appear. Mere speculation as to Wallen's frame of mind is insufficient to establish first-degree murder.

The record arguably contains some evidence from which the jury could have found premeditation. Wallen stated he had decided to kill Tripp if Tripp pulled his gun. There is, however, no evidence from which a reasonable factfinder could find sufficient proof of deliberation.

Deliberation is present when the circumstances suggest that the murderer reflected upon the manner and consequences of his act before acting. State v. Gentry, 881 S.W.2d at 4. While the evidence is sufficient to prove Wallen's intent to kill, there is no evidence to establish that Wallen reflected upon the killing and committed it free from the influence of excitement.[12] Therefore, appellant's conviction for first-degree murder must be set aside. He may, of course, be retried for lesser included offenses.

In a related issue, appellant contends that the jury instruction on first-degree murder was inadequate to instruct the jury on the elements of deliberation and premeditation. The instruction contained the "conceived in an instant" language our Supreme Court disavowed in Brown. Since we have set aside the

[12]In so holding, we are not suggesting any acceptance of Wallen's claim of self-defense. Absence of provocation does not necessarily include absence of excitement or passion.

conviction for first-degree murder, it is unnecessary to address this issue.

II. EVIDENTIARY ISSUES

Appellant has lodged a three-pronged attack against evidence presented at trial. First, he argues that evidence concerning the attack on the Tazewell police car was inadmissible under Rule 404(b) of the Tennessee Rules of Evidence, was irrelevant to any material issue at trial, and was highly prejudicial. Next, he contends that his statements to the police and evidence obtained from the two searches should have been suppressed. Last, he argues that a defense psychologist should have been allowed to testify about his psychological state, especially his mental retardation, as part of the totality of the circumstances that existed when he gave his statements to the police.

A. Evidence of Uncharged Prior Crime under Rule 404(b)

First, we must determine whether testimony about and physical evidence of the shooting of the Tazewell police car a month earlier were admissible under Tennessee Rules of Evidence 404(b). According to the rule, the following conditions must be satisfied before allowing such evidence:

> (1) the trial court must hold a jury-out hearing, if requested;
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> (2) the trial court must determine that a material, disputed issue exists for the admission of evidence;[13] and
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> (3) the trial court must find that the probative value of the evidence is not outweighed by the danger of unfair prejudice.

[13] See State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985).

Tenn. R. Evid. 404(b)(1), (2), & (3). The Advisory Commission Comment to the rule notes that the evidence that the defendant committed the other crime must be "clear and convincing." Adv. Comm'n Comments, Tenn R. Evid. 404(b); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985). See also State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981); Caruthers v. State, 406 S.W.2d 159, 161 (Tenn. 1966).[14] The rule also requires, upon request, that the trial court "state on the record the issue, the ruling, and the reason for the ruling." Adv. Comm'n Comments, Tenn. R. Evid. 404(b).

Evidence of other crimes to prove or allow an inference of guilt on the crime charged, that is, to establish character, is generally inadmissible. State v. Rounsaville, 701 S.W.2d S.W.2d 817, 820 (Tenn. 1985); Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980); State v. Frank Frierson, No. 01C01-9112-CR-000357, slip op. at 34, (Tenn. Crim. App., Nashville, July 22, 1993). Most relevant evidence is admitted unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Tenn. R. Evid. 402, 403 (emphasis added). Evidence of other crimes, on the other hand, is excluded unless it falls within certain well-defined exceptions. State v. Rickman, 876 S.W.2d 824, 827 (Tenn. 1994)(emphasis added). Even if other crimes evidence is relevant to a disputed material issue, it is still excluded "if its probative value is outweighed by the danger of unfair prejudice." Tenn. R. Evid. 404(b)(3). "If the unfair probative value outweighs the prejudice or is dangerously close to tipping the scales, the court must exclude the evidence despite its relevance to some

[14]While Rule 404(b) was adopted in 1990, it was drafted in accord with State v. Parton, 694 S.W.2d 299 (Tenn. 1985). Therefore, the pre-rule cases that follow Parton are still good law.

material issue other than character." State v. Luellen, 867 S.W.2d 736, 741 (Tenn. Crim. App. 1992).

Appellate courts have identified a number of factors to be used in the weighing process. When identity is the disputed material issue, as it arguably is here, the factual circumstances of the other crime and the crime on trial "must be substantially identical and must be so unique that proof that the defendant committed the other offense fairly tends to establish that he also committed the offense with which he is charged." Bunch v. State, 605 S.W.2d at 230.[15] A second factor is the timing of the two incidents. The remoteness in time weakens the logical connection between the two crimes and increases the risk of unfair prejudice. State v. Burchfield, 664 S.W.2d 284, 288 (Tenn. 1984).

A third factor - the strength of the state's other evidence - is relevant to determining the probative evidence of the other crime. If the record contains sufficient direct evidence for the jury to determine the material issue, the probative value of the other crimes evidence is lessened. State v. Luellen, 867 S.W.2d at 741; State v. Bunch, 605 S.W.2d at

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[15] See also State v. Howell, 868 S.W.2d 238 (Tenn. 1993)(defendant's undisputed possession of murder weapon in prior murder in felony-murder trial); State v. Burchfield, 664 S.W.2d 284 (Tenn. 1984)(defendant's illegal sexual conduct with a different victim inadmissible in child sexual abuse case); State v. Simon Nelson, No. 2 (Tenn. Crim. App. Jackson, April 25, 1990), perm. to appeal denied, (Tenn. 1990)(defendant charged with assault with intent to commit first-degree murder seen carrying same weapon and driving same car earlier on same day tends to establish identity); State v. Bobby Lee Tate, No. 1228 (Tenn. Crim. App., Knoxville, Sept. 7,1989)(prior rape admissible where methods used by rapist are virtually identical); State v. George Allen Fletcher, No. 86-114-III (Tenn. Crim. App., Nashville, June 10, 1987)(conviction for possession of marijuana with intent to sell inadmissible in trial for possession of LSD with intent to sell absent substantive evidence of facts and circumstances connecting it to present case on trial.)

230. Moreover, the probative value is influenced by the strength of the evidence offered to prove that the other crime was perpetrated by defendant. State v. Bunch, 605 S.W.2d at 231-232. If that evidence is weak, the inference that the same person committed both crimes is also weakened. If the inference connecting the two crimes is weak, the evidence must be excluded because the prejudicial effect necessarily outweighs the probative value. Id.

In summary, prior to admitting evidence of other crimes or bad conduct, a trial court must hold a jury-out hearing.[16] After hearing the evidence and arguments of counsel, a trial court must determine whether the proffered evidence is relevant to a disputed, material issue in the case (other than the propensity of defendant to commit crimes) and whether the state has established that relevance by clear and convincing evidence. If relevant, the court must then weigh the probative value of the evidence against its potential for unfair prejudice by considering the unique facts and circumstances of the case. These circumstances include (1) the similarities between the other conduct and that charged, (2) the time that has elapsed between the two events, (3) the strength of other evidence in the state's case to prove the disputed issue, and (4) the strength of the evidence of and connecting defendant to the other crime. If the probative value of the other crimes evidence and the legitimate inferences which may be drawn therefrom is sufficiently strong to outweigh its prejudicial effect, the evidence may be admitted. If the unfair prejudice is "dangerously close to tipping the scales," the court must exclude the evidence despite its relevance to some material issue. State v. Luellen, 867 S.W.2d at 741.

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[16]The rule requires a hearing only "upon request." Tenn. R. Evid 404(b)(1).

In this instance, the trial judge did not articulate his reasons for admitting the evidence.[17] While the rule requires the court, upon request, to "state on the record the material issue, the ruling and the reasons for admitting the evidence," Tenn. R. Evid. 404(b)(2), neither the state nor the defense made such a request. Nonetheless, the absence of the analysis from the record hampers our proper review. See State v. West, 844 S.W.2d 144, 150 (Tenn. 1992). The better practice is for a judge to provide his or her reasoning even if counsel does not make a formal request. N. Cohen, D. Paine, S. Sheppeard, Tennessee Law of Evidence, § 404.7, at 133 (2d ed. 1990)(hereafter Cohen, supra).

The trial judge held a pretrial hearing to determine the admissibility of the other crimes evidence. At the hearing, the state argued that the evidence was probative of identity, motive, and intent. Although the trial judge's comments prior to ruling imply that the evidence was relevant to the disputed

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[17]The trial court's ruling is as follows:

> THE COURT: Very well. In the opinion of the Court, the evidence is admissible. The Court understands that it has a clear duty to properly instruct the jury as to how this evidence should be considered, which the Court will undertake to do when it charges the jury. But it is the ruling of the Court that these shell casings located at the various scenes indicated, that is the scene of the alleged incident in this case, the scene of the alleged incident involving the Tazewell police car, the home that the defendant once occupied, and also the shell casing in the defendant's vehicle will be admissible in evidence, and the Court will instruct the jury, the limits to be placed on the consideration of that evidence.

We note that the trial judge ruled only that the shell casings were admissible. He did not address the admissibility of testimony concerning the police car shooting or of appellant's statement confessing to the police car shooting.

issue of identity, the court's limiting instruction to the jury allows consideration of the evidence on all three issues. On appeal, the state contends that the evidence was properly admitted only on the issues of motive and intent. We find that the evidence of the police car shooting was inadmissible for any purpose.

First, the evidence was clearly inadmissible to prove motive and intent. Motive is generally thought to be the reason one did a particular act. Intent, for purposes of first-degree murder, is the "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202 (a)(1)(1994 Supp.). Even if appellant fired the shots at the unoccupied Tazewell police car, the act does not establish his reason or intent to kill an officer with a different police department a month later.

Tennessee courts have generally admitted evidence of other crimes to establish motive in three types of cases. See Cohen, supra § 404.8, page 134-135. In the first, the evidence suggests that a second crime was committed to conceal or continue a prior crime.[18] In the second type, a prior crime may establish an accused's desire to obtain or retain money, property, or a relationship which led to another crime.[19] In the

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[18]See McLean v. State, 527 S.W.2d 76 (Tenn. 1975) (pharmacist's prior illegal sale of controlled substance to informer established continuing relationship and intent to commit crime); Gibbs v. State, 300 S.W.2d 890 (Tenn. 1957) (second murder committed to conceal first); Lee v. State, 254 S.W.2d 747 (Tenn. 1953)(involvement in racketeering explained bribe to police officer.

[19]See State v. Johnson, 743 S.W.2d 154, 158 (Tenn. 1987), cert. denied, (Tenn. 1988)(affair with another woman establishes motive to kill wife); State v. Berry, 592 S.W.2d 553 (Tenn. 1980)(misuse of bank card demonstrated need for money which provided motive to kill affluent father-in-law); State v. Jones, 623 S.W.2d 129 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1981)(prior arson for insurance proceeds relevant to motive for current arson charge); State v. Mark

last type, evidence of the other crime may tend to show that the accused had previously opposed or attempted to injure the victim.[20] Here, the evidence of the other crime does not fit easily into any of these categories.

The shooting of the police car constituted an act of violence against the Tazewell police force. Its occurrence did not provide a motive for the killing of Trooper Tripp. The killing did nothing to conceal appellant's connection with the shooting of the police car. It did not assist appellant in getting or keeping anything. It did nothing to demonstrate prior specific opposition to this victim. While it may indicate a general opposition to police, the inferences connecting that general opposition to the specific victim are tenuous at best. In other words, the probative value is very slight. State v. Bunch, 605 S.W.2d at 230.

The state relies on Claiborne v. State, 555 S.W.2d 414 (Tenn. Crim. App.), cert. denied, (Tenn. 1977) for the proposition that evidence of prior violence toward police is admissible to prove motive. In Claiborne, defendant was also

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Steven Johnson, No. 01CO1-9212-CR-00408 (Tenn. Crim. App., Nashville, Sept. 2, 1993), perm. to appeal denied, (Tenn. 1994)(act of passing bad checks establishes motive for arson); State v. Robert Gene Malone, No. 03C01-9110-CR-00307 (Tenn. Crim. App., Knoxville, March 31, 1992)(intent to buy kilo of cocaine relevant to motive to commit arson for insurance proceeds); State v. Jackie Lee Redd, No. 03C01-9101-CR-0007 (Tenn. Crim. App., Knoxville, July 25, 1991), perm. to appeal denied, (Tenn. 1992)(prior relationship in drug business established accused had motive to murder to avoid paying back money he owed victim).

[20]McGowen v. State, 427 S.W.2d 555 (Tenn. 1968)(evidence of prior violent and homosexual acts toward victim relevant to prove motive to burn victim's car); State v. Elrod, 721 S.W.2d 820 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1986)(prior attempt to solicit someone to kill ex-wife relevant to solicitation to murder ex-wife); State v. Donald C. McCary, No. 03C01-CR-00103 (Tenn. Crim. App., Knoxville, May 11, 1994)(prior sexual contact with witness involving bribery relevant to motive in current offense for similar crime.)

charged with the first-degree murder of a police officer. Id. at 415. Prior to the murder, defendant committed two robberies. Id. at 416. Eyewitnesses, including one who saw both crimes, positively identified defendant at both robberies. During the first robbery, defendant told the victim that he hoped the police would show up because he wanted to kill a cop. At the second robbery, he shot and killed a police officer. Id.

The court held that where evidence of the earlier crime is "so intimately associated with [the latter and so closely related in time and place that they formed] one continuous transaction, the whole transaction may be shown." Id. at 417. In this case, the crimes are not closely related in time or place. They cannot be construed as a continuous transaction. Further, while Claiborne's remarks to the clerk at the scene of the first crime established defendant's intent to kill a police officer, Wallen's shooting of a parked, unoccupied city police car does not establish his intent to kill a state trooper a month later.

The state also argues that the facts of the first crime was extremely probative because it was the prosecution's only evidence of motive. Motive is rarely a critical element in a given case. It may establish circumstantial proof of some critical element, however. Cohen, supra, Section 404.8, page 133. Contrary to the state's argument, this record contains more than sufficient proof of motive.[21] In his confession, appellant told the police that he feared Tripp. He admitted going armed because of police harassment. Months earlier he told his girlfriend that "one day he would have to kill Tripp or Tripp would kill him." His girlfriend's mother conceded on the

[21]On the other hand, there is scant evidence of any motive for the prior crime.

stand that appellant hated at least "some policemen." Certainly, the evidence of the other crime was not the sole, nor the best, evidence that Wallen held a grudge against the police.

Intent and motive should not be confused with propensity. State v. Parton, 694 S.W.2d at 303. Here, the line between motive and propensity is very fine indeed. The risk was great that the jury would conclude that appellant was the kind of violent, angry person who shot at police cars and, that, therefore, he likely murdered Douglas Tripp. Because the probative value was slight and the danger of unfair prejudice great, the evidence was inadmissible on the issues of intent and motive.

We find that the evidence was equally inadmissible on the issue of identity. In Bunch v. State, four persons were positively identified by the victims as those who robbed a small cafe. Bunch v. State, 605 S.W.2d at 228. A few hours later, three persons, one of whom remained in the car, held up a nearby grocery store utilizing the same distinctive method. Id. The two who entered the store were positively identified as being the same persons identified in the cafe robbery. Defendant Bunch was identified as the third member of the group in the cafe robbery, but was not identified in the second robbery since he remained outside in the car. Id. at 229. Because the crimes were substantially identical and were sufficiently distinctive to warrant an inference through their similarities that the person who committed the first robbery also committed the second, testimony of the prior robbery was admissible on the identity of the unidentified participant in the second robbery.[22] Id. at 231.

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[22]The evidence was not admissible, however, in the cases of the other two defendants who were positively identified at the second robbery since identity was not a material, disputed issue. Bunch v. State, 605 S.W.2d at 231.

In Bunch and in Claiborne, the identification of the perpetrator of the first crime was not in question. Eyewitnesses gave clear and convincing identification testimony in both cases. In contrast, no such testimony is present here. The only evidence connecting appellant with either crime was appellant's confession and the shell casings. The identity evidence in both cases was identical. Therefore, evidence of the first shooting contributed no significant additional information upon which the jury could conclude that appellant had committed the second crime.

In reality, the evidence was relevant only to describe the investigation and to explain appellant's arrest.[23] However, providing the jury with a complete overview of police investigative procedures is not an exception contemplated by Rule 404(b). The defense did not question the ballistics evidence or contend that the rifle found in appellant's bedroom was not the murder weapon. The evidence of the prior crime had little, if any, probative value on any material issue in dispute. The legitimate inferences that could be drawn from this evidence were minimal and the danger that the jury would draw improper conclusions from the evidence was great. We conclude that it was error to admit the evidence of the shooting of the Tazewell City police car in this trial.

We are unable to conclude that the error was harmless. The admission of evidence allowing an inference of propensity, especially when it does not relate substantially to any disputed, material evidence is inherently prejudicial. State v.

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[23]In fact, the prosecutor at the suppression hearing explained to the court that the information was essential to the jury's understanding of how the shells led to Wallen. The witness who reportedly saw a "dark colored pickup" in the vicinity of the police station was not produced in court.

Burchfield, 664 S.W.2d at 288. Often, it is so prejudicial that a limiting instruction is insufficient to cure the error. There are limits to the human mind. A limiting instruction concerning highly prejudicial evidence with little, if any, probative value is unlikely to have the desired result. See Harrison v. State, 394 S.W.2d 713, 717 (Tenn. 1965).

In this case, the inadmissible evidence concerning the other crime undoubtedly affected the outcome in this case. Absent this inadmissible evidence, the result of the trial may have been different. Since we have reversed the judgment of the trial court and remanded, upon retrial, evidence concerning the earlier shooting at the Tazewell City police station must be excluded.

B. Suppression Issues

Appellant challenges the trial court's admission of the statements he made to the police both before and after he was given the Miranda warning as well as the admission of items found in the search of his truck and home. The police did not advise appellant of his constitutional rights until after he made two oral and one written statement and after he had consented to the search of his truck. A second written statement and consent to search his house was given after police read him the required Miranda warnings and after he signed a waiver. We find that those statements obtained prior to appellant's waiver of his constitutional rights must be suppressed. The confession which he gave after being advised of his rights and the evidence obtained as a result of the searches of his truck and his residence were properly admitted at trial.

1. Appellant's Pre-Miranda Statements

Testimony at the suppression hearing indicates that sometime on May 23, the T.B.I. laboratory notified the agents in Claiborne County that the shell casings found at the murder scene, at the earlier shooting of the Tazewell police car, and from a location where appellant shot targets were all fired from the same rifle. The next morning just before 9:30 a.m., John Wallen left his home to go to work in his 1979 dark maroon pick-up truck. About a hundred yards down the gravel road which led to Route 25-E, he was stopped by a police car that was blocking the road. He pulled onto the side of the road. Within a couple of minutes, two additional police vehicles pulled in behind him. Shortly thereafter, Wallen was placed in the front seat of Agent Davenport's car. For approximately an hour, the agents, both T.B.I. and F.B.I., interviewed him at the side of the road. They revealed that they were investigating Doug Tripp's death and, particularly, were looking for persons who drove dark-colored pick-up trucks.

According to the agents, Wallen was cooperative and friendly. When they asked to search his truck, he readily consented. He volunteered information about three men who had been involved in a series of burglaries whom he thought might have had a motive to kill Tripp. When asked to accompany the agents to their motel room to make a formal statement, Wallen agreed. He left his truck keys with officers who would remain and search his truck and rode to the motel in the front seat of a T.B.I. agent's unmarked car. En route, he told the agents that Tripp's murder might be drug-related.

Wallen and the agents arrived at the Imperial Motel at approximately 10:45 a.m. In the motel room, Wallen gave T.B.I. Agent Davenport a generally exculpatory statement which Davenport reduced to writing. He told the agents that he had

been by the Muffler Shop that evening on his way to his girlfriend's trailer, that he bought gas at a nearby service station, but that he did not see Tripp. The interview was neither taped nor preserved on video. Officers who were present testified to the events that took place.

Appellant contends that he was subject to custodial interrogation from the moment the police stopped him at the roadside and that, since he was not advised of his rights until after the first formal statement at the motel, the statements were inadmissible. At the conclusion of a lengthy suppression hearing, the trial judge found that "the State has carried the burden of proving that the statement should be admitted in evidence, and that the results of the searches should be admitted in evidence."

It is well settled that a trial court's determination at a suppression hearing is presumptively correct on appeal. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The trial court's ruling resolves any conflicting testimony in the state's favor. Id. The presumption of correctness may be overcome on appeal only if the evidence in the record preponderates against the trial court's findings. Id.

Whether or not a suspect has been subjected to "custodial interrogation" is a factual issue controlled by the facts and circumstances of each individual case. In this case, our review is hampered by a lack of factual findings as required by Rule 12(e) of the Tennessee Rules of Criminal Procedure. We have carefully reviewed the record, and even viewing the evidence in the light most favorable to the state, we find that the evidence preponderates against the admission of those

statements obtained prior to the administration of the Miranda warnings.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. The corresponding provision of the Tennessee Constitution provides "[t]hat in al criminal prosecutions the accused shall not be compelled to give evidence against himself." Tenn. Const. art. 1, § 9. In Miranda v. Arizona, the United States Supreme Court held that the Fifth Amendment requires that those in custody be advised of the right against incrimination, and that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

Miranda applies only to custodial interrogations. Id. The Court has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of . . . freedom of action in any significant way." Id. A person is "in custody" within the meaning of Miranda, if the person was "deprived of freedom of action in any significant way." Oregon v. Mathiason, 429 U.S. 492, 495 (1977); State v. Furlough, 797 S.W.2d 631, 639 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990). The ultimate inquiry is whether there has been a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983); State v. Smith, 868 S.W.2d 561, 570 (Tenn. 1993). "The test to be applied is whether a reasonable person in the

suspect's position would have believed himself or herself to be in custody." Berkemer v. McCarty, 468 U.S. 420, 422 (1984); State v. Furlough, 797 S.W.2d at 639.

To determine whether a suspect was in custody for the purposes of Miranda, Tennessee courts do not rely upon any single factor but have examined the totality of the circumstances. State v. Smith, 868 S.W.2d at 570; Childs v. State, 584 S.W.2d 783, 787 (Tenn. 1979); State v. Morris, 456 S.W.2d 840, 842-43 (Tenn. 1970); State v. Nakdimen, 735 S.W.2d 799, 802 (Tenn. Crim. App. 1987). Each case must be determined on its own facts after a consideration of all of the circumstances. State v. Morris, 456 S.W.2d at 842; State v. Nakdimen, 735 S.W.2d at 800.

> The critical factors which govern the inquiry are:
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> 1. the nature of the interrogator;
> 2. the nature of the suspect;
> 3. the time and place of the interrogation;
> 4. the nature of the interrogation;
> 5. the progress of the investigation at the time of the interrogation.

State v. Morris, 456 S.W. 2d at 842.

Unlike defendants in many recent cases in which custody was not found, Wallen was not invited to come for an interview at his own convenience. See, e.g., State v. Furlough, 797 S.W.2d at 638; State v. Davis, 735 S.W.2d 854, 855 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987). The investigators were not social workers from the Department of Human Services or relatively unsophisticated deputies. See, e.g., State v. Barbara June Sherrill, No. 01C01-9302-CC-00047, slip op. at 4 (Tenn. Crim. App., Nashville, Aug. 5, 1993). They

were experienced T.B.I. and F.B.I. agents who blockaded a narrow road specifically to stop this person in this particular place.[24]

Appellant was detained by the roadside for at least an hour and then at the motel for another hour before he was informed of his constitutional rights. When his mother drove by she was given no information about him and he was not allowed to speak to her. Only when she was out of sight and appellant was on his way to the motel was she informed that he might be involved in the murder. Police vehicles were parked in front of and behind appellant's truck. The police had the keys to Wallen's truck which they searched after he was taken to the motel. Moreover, he was taken, not to the police station where his parents or an attorney might expect to find him, but to a private motel room where he was completely alone with his interrogators for another hour before being advised of his rights. Isolation of a suspect from others is indicative of custodial interrogation. State v. Furlough, 797 S.W.2d at 639. See also State v. Nakdimen, 735 S.W.2d at 801.

Wallen did not blurt out incriminating statements pursuant to routine questioning. See State v. Anthony Angelo Scales, No. 01C01-9310-CR-00353 (Tenn. Crim. App., Nashville, July 28, 1994), perm. to appeal denied, (Tenn. 1994).[25] He answered questions directed to him. The agents were not seeking

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[24]The gravel road begins at Route 25-E, passes the Wallen farm, and then returns to the highway. Testimony in the record indicates that officers were stationed on the road in both directions from the Wallen home.

[25]In Scales, defendant was known to have sold stolen merchandise to the victim in the past. The police went to the defendant's girlfriend's home to interview defendant as a witness. During the course of the interview, the investigator noticed what appeared to be blood on defendant's tennis shoes. When questioned about the stain, defendant suddenly blurted out that he had not killed the victim but that he had been present.

routine information that might lead to a suspect. See State v. Smith, 868 S.W.2d 561, 570 (Tenn. 1993).[26] Rather, they had strong evidence that led them to believe Wallen was the killer. Wallen did not voluntarily come to an interview only to be informed that he was not under arrest. He was never told that he was free to leave or that he did not have to answer questions.[27] See e.g. State v. Smith, 868 S.W.2d at 570 (defendant knew he was free to go and was allowed to leave when he asserted his rights); State v. House, 743 S.W.2d 141, 147 (Tenn. 1987)(defendant told he was free to leave); State v. Davis, 735 S.W.2d at 855 (officer told Davis he was not being charged and need not make a statement); State v. William L. Cooper, No. 02C01-9407-CC-00152 (Tenn. Crim. App., Jackson, May 17, 1995)(defendant told he was not under arrest, was not required to make any statement, and that he would be allowed to leave at end of interview.)

At the time agents approached, detained, and interviewed Wallen, he was the single suspect. See State v. Nakdimen, 735 S.W.2d at 801. The agents knew that the shell casings matched. They already had a search warrant for

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[26]Smith, husband of the victim, was interviewed for thirty-five minutes at the police station for the purpose of getting general information about his whereabouts and the location of their twins. After the officers notified Smith that his wife and stepsons were dead, Smith asked to talk with an attorney. At that time he was allowed to return home. State v. Smith, 868 S.W.2d at 570. See also State v. House, 743 S.W.2d 141 (Tenn.1987)(defendant was only one of several persons being questioned for investigative purposes and returned home at end of interview); State v. Hartman, 703 S.W.2d 106 (Tenn. 1985)(evidence of murder not discovered until 3 months after F.B.I. interviewed defendant); State v. Childs, 584 S.W.2d 783, 787 (Tenn. 1979)(officers had only general information that defendant was acquainted with the victim); State v. Morris, 456 S.W.2d 840, 843 (Tenn. 1970)(statements taken by officer for the purpose of filling out routine accident forms).

[27]When defense counsel asked Agent Davenport if appellant was free to leave, the agent responded only that "the question never came up" because appellant never asked to leave.

appellant's home. Except for obtaining appellant's .22 rifle, which could easily be accomplished with the warrant, the investigation was complete when Wallen was stopped on the road. See State v. Stephen Wade Mosier, No. 01C01-9310-CR-00358 (Tenn. Crim. App., Nashville, July 28, 1994)(investigation complete except for interview with defendant). The purpose of this interrogation was obviously to obtain an incriminating statement from appellant if possible.

Based on the totality of these facts, we find that appellant was deprived of his freedom of action in a significant way. The police immobilized his truck on the road, took possession of his keys, and transported him to a motel room where he was isolated from everyone but his interrogators for at least two hours before he was Mirandized. The purpose of the interrogation was to obtain an incriminating statements. Under these circumstances, a reasonable person would have not felt free to leave. Totality of the circumstances suggests that appellant was in custody from the moment he was stopped by the police blockade. The evidence preponderates against the trial court's findings. Appellant's pre-Miranda statements were taken in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. The trial court erred in denying appellant's motion to suppress those statements. On remand, the pre-Miranda statements may not be admitted.

2. Appellant's Post-Miranda Statement

After obtaining appellant's first written statement in which he denied any personal involvement in or knowledge of the murder of Sergeant Tripp, F.B.I. Agent Hunley advised appellant of his rights. According to the Agent Davenport's testimony, Hunley went over the rights and gave Wallen an opportunity to

read the waiver. Davenport then went back over the rights and asked Wallen if he understood. Wallen told the agents that he understood his rights and was willing to waive them. He signed the waiver at 11:30 a.m., a little over an hour after arriving at the motel. At about the same time he signed a form giving consent to search his parents' house.

Agent Davenport then told Wallen that the shell casings found in Tripp's car, those found at the scene of the city police car incident, and those he had fired in target practice matched. Wallen became visibly agitated and said that the officers might as well kill him. He asked the agents if they had any guns he could see. Davenport was unarmed, but Hunley, who was carrying a .9 millimeter pistol, removed it from its holster and handed it to an agent outside the door. At 11:45 a.m., Wallen began his incriminating statement. By 1:40 p.m. Davenport had reduced the statement to writing. A third agent read the statement to appellant, went over it verbatim, and had him initial the corrections.[28] After Wallen signed the statement, the officers took him to Hardee's to get something to eat. At some point, another agent prepared an arrest warrant and formally arrested the appellant. After his arrest Wallen was allowed to make a telephone call.

Appellant contends that his lack of mental ability combined with the coercive circumstances rendered his confession involuntary. The state argues that despite Wallen's mild mental retardation, he was competent to waive his constitutional rights, was advised of those rights in clear, plain language,

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[28]The statement contains several "corrections" which Wallen initialed. However, these "corrections" were not made by Wallen. They appear to be parts of words or letters crossed out by Agent Davenport when he was writing out the statement. The statement contains no changes of any substance.

and demonstrated an understanding of them. The trial court at the close of the suppression hearing found that the statement was admissible without making any accompanying findings of fact.

As we have noted, on appeal, the trial court's ruling in a suppression hearing is presumed correct unless the evidence in the record preponderates against it. State v. Stephenson, 878 S.W.2d at 544. Defendant has the burden of showing that the evidence preponderates against a finding that a confession was, in fact freely and voluntarily given. State v. Buck, 670 S.W.2d 600, 610 (Tenn. 1984); State v. Nakdimen, 735 S.W.2d at 800.

Factors relevant to determine whether a confession is voluntary include (1) the length of time between the arrest and the confession; (2) the occurrence of intervening events between the arrest and the confession; (3) the giving of Miranda warnings; and (4) the purpose and conflagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-604 (1975); State v. Chandler, 547 S.W.2d 918, 923 (Tenn. 1977). The overriding question is whether the behavior of law enforcement officials served to overbear the accused's will to resist. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980).

In this case, appellant signed a written waiver of his constitutional rights. He raised no questions about the waiver. He made his statement immediately thereafter. Nothing in the record indicates that he asked for an attorney or that he announced an intent to remain silent after the waiver was signed. Therefore, the single issue we must determine is whether the appellant voluntarily waived his constitutional rights before giving his confession.

Prior to the United States Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966) the admissibility of an accused's in-custody statements depended on whether they were voluntary within the meaning of the Fourteenth Amendment's Due Process Clause and Article I, Section 9 of the Tennessee Constitution. State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992). In Miranda, the admissibility of otherwise voluntary statements was limited by the requirement that the state demonstrate the use of procedural safeguards effective to secure the privilege against self-incrimination. Id. An accused may waive these rights if the waiver is voluntary, knowing, and intelligent. Id. at 269. "The accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda v. Arizona, 384 U.S. at 467. The state has a heavy burden to establish clearly and convincingly that a waiver was "freely, voluntarily and knowingly exercised." State v. Lee, 560 S.W.2d 82, 84 (Tenn. Crim. App. 1977), cert. denied, (Tenn. 1978). Courts should indulge every reasonable presumption against waiver of a fundamental right. State v. Van Tran, 864 S.W.2d 465, 472 (Tenn. 1993).

We recognize that the question of whether the waiver was intelligent and knowing is a close one in this case. Evidence before the trial court indicated that appellant is of limited mental capacity and that he is more than usually dependent upon others. The police illegally interrogated appellant for over two hours prior to explaining his rights. Moreover, part of the interrogation took place in a motel room where appellant was isolated from family, friends, and the general public. These factors weigh heavily in favor of finding the absence of a knowing and intelligent waiver.

A totality of the circumstances suggest otherwise, however. Appellant successfully passed his driver's test. He was able to read at a fifth grade level which enabled him to sufficiently fill out the forms required by his job. Despite his mild mental deficiency, his teachers did not refer him for testing or consider him a candidate for special education.

The agents read the rights and the waiver to appellant at least twice. He had the opportunity to read the waiver for himself. He told the officers that he had a twelfth grade education and that he understood his rights.[29] In State v. Van Tran, our Supreme Court found that a defendant with limited English ability and with reading comprehension below fourth grade level could validly waive his rights. State v. Van Tran, 864 S.W.2d at 471-473. The fact that an accused may not understand all the consequences of waiver is insufficient to invalidate a waiver if the accused comprehends that he or she need not talk, that he or she could have a lawyer, and that the statements could be used against him or her. Id. at 473.

We are troubled by the fact that appellant was detained for over two hours by the police without being advised of his constitutional right. The statements made during that time must be suppressed. However, there is no indication that the giving of those statements in any way affected the validity of the waiver of his rights or the voluntariness of his final statement. Neither the pre-Miranda statements nor the circumstances, troubling as they are, tainted the later Mirandized confession. See, e.g., State v. Crump, 834 S.W.2d at 271; State v. Smith, 834 S.W.2d at 919-20.

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[29]The interrogation was recorded neither on audio nor on video tape. Only the officers testified at the suppression hearing.

A motel room may be a questionable venue in which to conduct an official interrogation. However, nothing indicates that the officers selected the motel room for improper reasons or that police actions in that room were unduly coercive. Appellant's agitation and fear is understandable. He was confessing to killing a police officer to other police officers. However, nothing indicates that the agents who interrogated Wallen used undue coercion. When appellant expressed fear that he would be killed, Agent Hunley removed his weapon and passed it out of the room. He did not display it as appellant alleges. Additionally, during the two hours consumed by the giving and writing of the last statement, appellant was allowed to use the lavatory and have something to drink. After signing the statement, he was taken for food before being transported to the police station and booked.

The voluntariness test under the Tennessee Constitution is more protective of individual rights than the test under the Fifth Amendment. State v. Stephenson, 878 S.W.2d at 544. However, our examination of the totality of the circumstances surrounding this interrogation does not indicate that Wallen's relinquishment of his rights was the product of intimidation, coercion, or deception. Once appellant was confronted with the incriminating evidence, his demeanor changed. His rights were explained and waived. He never asserted his right to an attorney or to remain silent, but gave a full confession. We conclude that the evidence supports the trial judge's finding that appellant's waiver of rights was valid and that his confession was voluntary. No error was committed by the introduction of the post-Miranda statement.

3. Searches of Appellant's Truck and Residence

Appellant consented to a search of his truck and of his residence. The consent to search the truck was obtained during appellant's detention at the roadside. The record contains little testimony concerning this search which uncovered a .22 shell and some unused paper targets that were later admitted at trial. At the motel, shortly after signing the Miranda waiver, appellant consented in writing to a search of his residence. Police officers waiting in his parents' front yard had in their possession a search warrant and Mrs. Wallen's signed consent form.[30] Initially, the officers honored Mrs. Wallen's request not to enter unless her husband could be found. However, when the fact of Wallen's unconditional consent was radioed to the officers, they entered and made a complete search of the house. In a gun rack on Wallen's bedroom wall, officers found his .22 rifle. They also located a variety of .22 cartridges, some "longs" and some "shorts." Tests indicated that the rifle taken from Wallen's bedroom was the rifle that fired the fatal shots at Sergeant Tripp. The rifle, the shells, and the testimony of the T.B.I. specialist were all introduced at trial.

Appellant argues that, in both instances, his consent was involuntary and that the evidence derived from this search should not have been admitted at trial. The question of whether a consent to search is voluntary is a question of fact to be determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). The burden of establishing that consent was, in fact, freely and voluntarily given falls on the state. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

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[30]The officers testified that they preferred a search based upon consent because a warrant could more readily be found inadequate, thereby invalidating the search.

For the same reasons that we found that appellant had knowingly and intelligently waived his Miranda rights, we find that the evidence in the record does not preponderate against the conclusion that his consents to search were knowing and intelligent. Appellant's consent was not induced by police improprieties. The police officer testified[31] that appellant consented freely and voluntarily to the search of his truck. Likewise, nothing indicates that Wallen's will to resist had been overcome by any police activity when he signed the consent to search form. Despite his slight mental retardation, the record supports a conclusion that appellant was able to consent knowingly and intelligently to the search. Consequently, the trial court did not err in admitting evidence obtained from the searches.

Two issues remain. One, the defense challenge to Juror Bailey, is unlikely to arise again. There is no need for further discussion on that issue. We will address the second issue, however, the admissibility of expert testimony on appellant's mental state, since it may arise in a new trial.

C. Expert Testimony

Appellant argues that the trial court erred in refusing to admit the testimony of clinical psychologist Diana McCoy who had testified extensively in a pretrial hearing.[32] Appellant offered the evidence to rebut the state's claim that

[31]Only the officers testified at the suppression hearing.

[32]The issue at the pretrial hearing was appellant's mental competence for purposes of death penalty sentencing. At the conclusion of the hearing, the trial judge found that although appellant's I.Q. was shown to be 69 and that he was mildly retarded, the defense had failed to show that his deficiencies had appeared before the age of 18. Therefore, he was eligible for the death penalty pursuant to Tennessee Code Annotated Section 39-12-203.

his was reliable. The state argues that the testimony was irrelevant.

Dr. McCoy is a licensed clinical psychologist with extensive experience in the identification, assessment, and evaluation of persons who may be mentally retarded. The trial court readily accepted her as an expert. Dr. McCoy spent twelve and one-half hours testing and interviewing appellant. She used standard tests, such as the Weschler Adult Intelligence Scale (WAIS-R), the Wide Range Achievement Test (WRAT-R), and the Peabody Picture Vocabulary Test. In addition, she spent several hours interviewing friends and members of appellant's family, his girlfriend, and reviewing his school records.

During the pretrial hearing, Dr. McCoy testified that appellant's full scale I.Q. score was 69 which placed him in the mildly retarded range. His mental age was slightly less than eleven years. He was in the second percentile in word knowledge and scored very low in reading comprehension. Wallen's I.Q. score was corroborated by his very low score on an adaptive behavior test. His school records indicated that he had never tested above fifth grade level in reading. Although appellant took the state proficiency examination four times, he never passed any of the sections except for one in math. At graduation from high school, he received only a certificate of attendance.

During trial, T.B.I. agent David Davenport testified that appellant had graduated from high school, had read the waiver, and had understood his rights and the interrogation. The state filed a motion in limine to exclude Dr. McCoy's testimony at trial. When appellant proposed to call Dr. McCoy, the trial judge conducted a jury-out hearing. Defense counsel

argued that Dr. McCoy's testimony was relevant to the issue of appellant's ability to read and understand and would assist the jury in determining the weight to give to the confession. In the alternative, defense counsel sought to admit the testimony to establish appellant's mild mental retardation. The state argued that the admission of expert testimony on that question would invade the province of the jury.

The trial judge agreed that the defense had both a right to rebut the testimony of the state's witnesses and the right to present evidence about the circumstances under which the confession was obtained. However, he ruled that any testimony by Dr. McCoy was inadmissible because

1. the jury was required to make "that decision;"

2. the testimony would not materially assist the jury;

3. facts in the record were insufficient to enable an expert to have an opinion;

4. although the evidence was relevant to rebut the state's assertion that appellant could read and understand, McCoy's testimony could not be used for that purpose; and

5. "nothing" in the law made the evidence admissible.

When the trial court refused to admit Dr. McCoy's testimony, the defense asked to introduce testimony only on appellant's mental handicap to enable argument as to the impact of that handicap. The trial court denied this request as well. In an offer of proof, defense counsel summarized Dr. McCoy's testimony. Further, counsel stated that Dr. McCoy would testify that the circumstances of the interrogation would have affected the voluntariness of the confession and appellant's ability to read and understand the statement written by Agent Davenport.

Since the mid-nineteenth century, Tennessee's procedure on the admission of confessions, sometimes referred to as the "orthodox" rule, has remained the same. See Wynn v. State, 181 S.W.2d 332 (Tenn. 1944); Self v. State, 65 Tenn. 244 (1873); Boyd v. State, 21 Tenn. 39 (1840). Under the "orthodox" rule, the trial judge makes the initial decision regarding the voluntariness of the confession. Wynn v. State, 181 S.W.2d at 333. However, once the trial court determines that the confession is admissible, the weight to be given to the confession is a matter for the jury. State v. Pursley, 550 S.W.2d 949, 950 (Tenn. 1977).[33] The jury is faced with two questions. First, they must decide whether defendant actually made the confession, and, second, they must determine whether the statements are true. Id. To aid in resolving these questions, the jury may hear evidence of the circumstances under which the confession was obtained. Id. The jury must consider the confession "in light of all the surrounding circumstances and in connection with all the other evidence in the case." Espitia v. State, 288 S.W.2d 731, 733 (Tenn. 1956).

The United States Supreme Court has found that "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilty or innocence." Crane v. Kentucky, 476 U.S. 683, 689 (1986). If a defendant is "stripped of the power to describe to the jury the circumstances that prompted his confession," the defendant may be denied the fundamental constitutional right to a fair trial as guaranteed

[33]The "orthodox" rule stands in contrast to the "Massachusetts" rule accepted in some jurisdictions. In those jurisdictions, a trial court makes a preliminary, pretrial determination as to the admissibility of a confession. However, the issue of voluntariness is then resubmitted to the jury for a final determination. See Jackson v. Denno, 378 U.S. 368 (1964); State v. Pursley, 550 S.W.2d 949 (Tenn. 1977).

by the 6th and 14th Amendments to the Constitution. Id. at 689, 690.

However, while Crane makes it clear that a defendant may not be totally precluded from presenting evidence of the circumstances surrounding the taking of a confession, it does not require the admission of all evidence offered on that issue. In Crane, the trial court excluded the evidence presented at the pretrial hearing because it was relevant only to the legal issue of voluntariness which had already been determined by the trial court. The Supreme Court had no difficulty concluding that evidence relevant to voluntariness could also be germane to the probative weight it deserved. Therefore, it was error to exclude that evidence simply because of its use at the suppression hearing. Id. at 688. If excluding the evidence denied the defendant the opportunity to present a complete defense, the constitutional right to a fair trial was violated. Id. at 690.

Our Supreme Court applied the ruling in Crane in State v. Brimmer. 876 S.W.2d 75 (Tenn. 1994). In that case, the defense offered the testimony of a doctor who would have testified that, based on his listening to a taped thirty minute segment of an interrogation, he believed that defendant was an individual who "very plausibly could have been coerced." Id. at 79. The trial court refused to admit the testimony because "the basis for the doctor's opinion was not sufficiently trustworthy to go to the jury on the issue as to who and what may have influenced defendant's mental state at the time he gave his confession." Id. The Brimmer court found that excluding this testimony did not deprive defendant of the right to present a defense. Id. at 75. We understand both Crane and Brimmer to mean that a trial court may refuse to admit evidence pertaining

to defendant's confession if the evidence does not comply with evidentiary rules that serve the interests of fairness and reliability. Id. (citing Crane v. Kentucky, 476 U.S. at 689). If, however, defendant is precluded from presenting evidence relevant to the circumstances surrounding the confession that would ordinarily be admissible, and, if that exclusion prevents defendant from presenting a complete defense, then defendant has been deprived of the constitutional right to a fair trial.

Unlike Crane, the trial court in this case did not exclude the evidence because it was irrelevant to the jury's consideration of whether appellant had made the confession or whether the confession was true. Conversely, the trial court found that the evidence was relevant. Neither was the exclusion based on an insufficient basis as in Brimmer. The record shows that Dr. McCoy spent many hours testing and interviewing appellant and others familiar with him. The trial judge accepted Dr. McCoy as an expert and relied on her testimony in making his decision on death penalty eligibility under Tennessee Code Annotated Section 39-123-203. In this case, the trial court excluded the evidence based on his understanding of Rules 702, 703 and 704 of the Tennessee Rules of Evidence.

Admission of expert testimony is controlled by Rule 702. Under Rule 702, expert testimony is admissible if two tests are satisfied. The threshold question for determining admissibility is whether the testimony "will substantially assist the trier of fact to understand the evidence or to determine a fact in issue." Tenn. R. Evid. 702. This represents a significant departure from Tennessee common law which required that an expert's testimony be "necessary." Cohen, supra, § 702.1 at 354. The standard is generally considered to be more lenient than the previous "necessity"

standard but more stringent than that in the Federal Rules of Evidence in which the word "substantially" is omitted. Id. Dr. McCoy's proffered testimony clearly meets this first test. Appellant's ability to read, to understand, and to function under stress were significant factors for the jury to consider in their assessment of the truth of the statements in the confession and in their determination that appellant actually made those statements. These factors are of special importance in this case since the interrogation was not taped but was a written summary by the police officer.

The second test requires that the subject matter of the expert testimony involve "scientific, technical or other specialized knowledge." Tenn. R. Evid. 702. Without question, the results and interpretation of the tests and other data gathered through interviews involved scientific and specialized knowledge that was unavailable to the jury in any other form. The trial court erred in ruling that Dr. McCoy's testimony would not "materially" assist the jury. This does not mean that every remark Dr. McCoy may have made from the witness stand would have been admissible; however, when considered as a whole, her testimony would have provided the jury with substantial assistance in evaluating the physical and psychological circumstances of the interrogation.

Once the threshold admissibility standards are met, two unique relevance rules apply to expert testimony. First, the facts upon which an expert's testimony is based are not limited to those admissible at trial. The expert testimony should be admitted if the data or facts on which the expert relies are "of a type reasonably relied upon by experts in the particular field." Tenn. R. Evid. 703. See State v. Schimpf, 782 S.W.2d 186, 194 (Tenn. Crim. App. 1989), perm. to appeal

denied, (Tenn. 1990)(quoting State v. Johnson, 717 S.W.2d 298, 303 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1986)). If a clinical psychologist's opinion is based on facts that are reasonably relied upon by other experts in that field, and, if the facts are trustworthy, then the testimony is admissible even if those facts are not in evidence. Adv. Comm'n Comments, Tenn. R. Evid. 703.

Second, the testimony must not invade the province of the jury. State v. Schimpf, 782 S.W.2d at 192. The jurors as the triers of fact must make the ultimate decision concerning the weight to be given to a confession. However, Tennessee law has long held that an expert's opinion is not objectionable merely because it embraces an ultimate issue to be decided by the trier of facts. See State v. Furlough, 797 S.W.2d 631, 651 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990); State v. Atkins, 681 S.W.2d 571, 576 (Tenn. Crim. App. 1984), cert. denied, (Tenn. 1985). Where expert information is necessary for an intelligent decision, it does not matter that the opinion and one solution to the ultimate issue coincide. National Life & Accident Insurance Co. v. Follett, 80 S.W.2d 92, 96 (Tenn. 1935). In 1990, these rulings were incorporated in Rule 704 of the Tennessee Rules of Evidence. If jurors lack experience or knowledge on a given subject and will be substantially assisted by expert testimony in their fact-finding task, the testimony should not be excluded because it addresses an ultimate issue.

Expert testimony can also invade the province of the jury if it impermissibly comments on the credibility of a witness. State v. Schimpf, 782 S.W.2d at 192. "[T]he jury is the lie detector in the courtroom." United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986)(quoting United State v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959

(1974)). Recently, this court reversed a conviction and remanded the case for a new trial because an expert had testified that the victim in a child sex abuse case should be believed. State v. Edward H. Jones, No. 03C01-9301-CR-00024, slip op. at 13 (Tenn. Crim. App., Knoxville, Sept. 15, 1994). In Jones, a pediatrician who had physically examined the four-year old victim and interviewed her mother opined that the victim's story must be believed. This court found error because a pediatrician's ability to ascertain the truthfulness of an alleged child sexual abuse victim is not sufficiently reliable to substantially assist a jury in determining the issue of credibility. Id. at 13. This court found that the pediatrician's testimony impermissibly bolstered the victim's testimony at trial. Id. at 14.

Unlike the pediatrician's comment in Jones, Dr. McCoy's testimony would not have been an impermissible comment on the credibility of a witness. First, the jury was engaged in determining the weight to be given to a confession rather than the credibility of a testifying witness. Second, in order to determine the weight, the jurors needed to understand the physical and psychological environment in which the confession was obtained. The defense developed the facts relating to the physical environment during cross-examination of the state's witnesses. However, appellant's ability to read and understand was particularly relevant in this case.

The state asserted that appellant had graduated from high school and was able to read and understand the interrogation procedure. Dr. McCoy's findings, which showed that the appellant's I.Q. was 69 and that he did poorly on reading comprehension tests, were facts unavailable to the jury in any other form. Her status as an expert was unquestioned.

Her opinion on appellant's ability to read the confession as written by the police officer and to understand the rights waiver were based on reliable, trustworthy facts generally relied upon by experts in the field. Her testimony would have been of substantial assistance to the jury in determining whether appellant had made the statement and whether the statements should be believed. It would not have invaded the province of the jury.

Finally, the trial court excluded the psychologist's testimony because the "law" did not make it admissible. This ruling obviates the rule of relevancy. Rule 402 provides that "[a]ll relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application." Tenn. R. Evid. 402 (emphasis added). In other words, once evidence is found to be relevant it is admissible unless another rule or law requires exclusion. Once the special relevance rules are satisfied, an expert's testimony is admissible unless the court determines that its prejudicial effect substantially outweighs its probative value, that it would confuse or mislead the jury, or that it would be cumulative of other evidence already in the record. Tenn. R. Evid. 403. The record contains nothing to indicate that Dr. McCoy's testimony should have been excluded under Rule 403.

Tennessee courts have previously admitted expert testimony on the subject of the defendant's mental retardation when the evidence was probative of an issue before the jury. See State v. Brown, 836 S.W.2d 530 (Tenn. 1992)(evidence of low intellect relevant to issue of intent, premeditation, and deliberation); State v. Rutherford, 876 S.W.2d 118 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994)(mental

retardation is just another circumstance to consider in determining whether defendant possessed the requisite mental state). Such testimony, however, has been excluded when it is irrelevant, see Phipps v. State, 474 S.W.2d 154 (Tenn. Crim. App.), cert. denied, (Tenn. 1971); or when the testimony is an attempt to dodge the procedural requirements of an insanity defense.

The decision to admit or exclude expert testimony is within the sound discretion of the trial court. State v. Hawk, 688 S.W.2d 467, 472 (Tenn. Crim. App. 1985). Unless there is a clear showing of an abuse of discretion, an appellate court will not disturb that decision. In this case, however, there was no legal basis for excluding the evidence. Dr. McCoy's testimony meets the requirements for admissibility pursuant to Tennessee Rules of Evidence 702, 703, and 704. Upon retrial, the trial court should carefully consider any proffered expert testimony in light of long established Tennessee legal principles and the Tennessee Rules of Evidence as discussed above.

CONCLUSION

For the reasons discussed above, the conviction for first-degree murder is reversed. On remand, the state may retry appellant for second-degree murder or any of the lesser included offenses. If appellant is retried, evidence at trial should be admitted in conformity with the findings expressed in this opinion.

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Penny J. White, Judge