



## OPINION

The appellant, Buford E. Gaiter, was convicted of facilitation of a felony, murder in the first degree, a Class A felony, and attempt to commit especially aggravated robbery, a Class B felony, by a jury of his peers. The trial court, finding that the appellant was a standard offender, imposed the following Range I sentences: (a) facilitation of a felony, confinement for twenty-two (22) years in the Department of Correction and (b) attempt to commit especially aggravated robbery, confinement for eleven (11) years in the Department of Correction. The sentences are to be served consecutively. The effective sentence imposed by the trial court was confinement for thirty-three (33) years in the Department of Correction.

The judgment of the trial court is affirmed.

On the evening of February 7, 1993, James L. Moore, Demond Baker, and the appellant were driving around in Moore's vehicle. The appellant asked Moore and Baker if they wanted to rob some establishment. The parties discussed if they should go to Lebanon, Baker's hometown, to commit the robbery. Moore said he thought they should rob a business in Murfreesboro. It was agreed that they would rob the first store they passed.

The Jr. Food Store was approximately 350 yards from the Nottingham Apartments. It happened to be the first store. The appellant had both of Moore's pistols. He gave Moore the .25 caliber automatic pistol. The appellant kept the .22 caliber pistol. It was agreed that Moore would enter the store and rob the clerk of the store's receipts. The appellant agreed to stay outside the store and maintain a lookout. Baker remained with Moore's vehicle.

The appellant went inside a telephone booth outside the convenience store. Moore went inside, exhibited the pistol, and demanded that the clerk open the cash register and give him the money. Moore shot the clerk three times. He then went behind the counter, attempted to open the cash register, but he was unable to operate the register. When Moore exited the store, he told the appellant that he had shot the clerk. He then went to his vehicle, and he and Baker fled the scene. As Baker ran to the car, he thought the

appellant was right behind him. However, for some unknown reason, the appellant stayed at the scene of the crime. Moore and Baker went to an apartment located in the University Apartment complex.

Kerry D. Neal arrived at the store shortly after the clerk had been murdered. He saw the appellant walking slowly across the parking lot. Neal entered the store to purchase cigarettes. The appellant entered the store after Neal. When the clerk did not appear, Neal went looking for him. He found the victim lying behind the counter. He told the appellant to call 911. The appellant went outside and called 911 from the telephone booth. Neal called 911 on the store's telephone.

Dr. George Smith, who maintained an office next door to the convenience store, went to the store to purchase something to drink. As he approached the store entrance, the appellant stopped him and said that the store was closed. Dr. Smith knew the store was open this late so he entered anyway. When he discovered that the clerk had been shot, he rendered medical assistance. He attended the clerk until the paramedics arrived. The clerk was then transported to a local hospital.

Moore and Baker were concerned that the appellant had not arrived at the apartment. Baker drove Moore's vehicle to the vicinity of the convenience store, and slowed or came to a complete stop in the street. He was able to see the appellant talking to the police officers. Baker returned to the apartment and told Moore what he had seen.

When the police officers arrived, they interviewed Neal, Smith, and the appellant. The appellant identified himself as "Jaques A. Harris." The appellant met Moore and Baker shortly after the interview was completed. They subsequently drove to the hospital, the appellant exited the vehicle, and entered the emergency room so that he could determine the clerk's condition. He then left the hospital with Moore and Baker.

Dr. Smith had seen Baker when he returned to the vicinity of the convenience store. He was curious as to why the vehicle had stopped in the street. Later, Smith saw this same vehicle exit the apartment complex. He followed the vehicle to the hospital and he saw the appellant exit the vehicle. However, he did not see the appellant inside the hospital. When Smith returned home, he began thinking about the vehicle he had seen. It puzzled him. He called the police officers and advised them of what he had seen.

The appellant gave the officers the address of Jaques Harris, a student at Middle Tennessee State University. The day after the murder the officers located Harris. They realized that Harris was not the person that was inside the convenience store.

Officer Terry Spence was patrolling in the vicinity of the Nottingham Apartments prior to the murder. There were three individuals standing in front of an apartment. Spence noticed several individuals entering and exiting the apartment. He shined his head lights on the three individuals, exited the cruiser, and approached them. Moore, the appellant, and Arthur L. Cole, Jr., were the three individuals. Spence knew Cole from previous encounters. When Spence returned to police headquarters, he viewed a video tape that was removed from a security camera located inside the convenience store. The camera had captured Moore murdering the clerk. The appellant also appeared in the video tape. Spence recognized Moore and the appellant as two of the individuals he had seen with Cole. He advised the investigating officers of his encounter earlier that evening.

The investigating officers contacted Cole. They related that they wanted to talk with an individual named Jaques A. Harris. Cole contacted the appellant and advised him that the officers wanted to talk to him. The appellant agreed to meet the officers. When the officers contacted Cole later that day, he advised the officers that the appellant was willing to talk to them. The appellant subsequently met the officers at Cole's apartment.

The appellant gave the officers an exculpatory statement. He admitted that he knew Moore, and they had lunch together that day. He had also driven Moore's vehicle. However, he denied being with Moore and Baker when the crime was committed. He stated that he was walking to the store to purchase food when he was paged. He stopped at the Burro Lounge and used the telephone. He subsequently went to the convenience store where he discovered the clerk had been shot. He admitted seeing Moore and Baker at the apartment after the officers completed the interview. He also said that he went to the hospital because he was concerned about the clerk and wanted to determine his condition.

The appellant identified Moore as the person who shot the clerk. Apparently, Moore did not implicate the appellant following his arrest. However, Baker gave a statement following his arrest that revealed the appellant's role in the commission of the crimes.

The parties entered into a stipulation regarding the cause of the clerk's death. The stipulation stated that the clerk "died as a result of three gunshots fired from a Raven .25 caliber pistol . . . [fired] by James Lafayette Moore on February 7, 1993."

**I.**

The appellant contends that the trial court committed error of prejudicial dimensions in denying his motion to suppress the statement he gave to Murfreesboro police officers on February 9, 1993. He argues that he made it clear that he wanted an attorney, but he was not given the opportunity to call an attorney. He also argues that he was a suspect, and the officers should have advised him of his rights before the initial questioning.

When the initial contact occurred between the officers and the appellant, the appellant expressed concern that he would be arrested. The officers assured the appellant that he would not be arrested. Once he gave a statement concerning what he knew about the murder he would be free to leave.

The record reflects the appellant told the officers that he was willing to talk to them. An officer asked the appellant: "Do you mind talking to us about that [the murder]?" The appellant responded: "I don't mind at all unless it's something that I think might, you know, be a question now I'm not really sure of [then I may want to] talk to my lawyer." The officers discussed the homicide with the appellant for a period of time. The officers then took a recorded statement from the appellant. The officers gave the appellant the Miranda warnings before taking the recorded statement. The appellant refused to execute a written waiver form.

When the statement was concluded, the appellant left the police station. An officer drove him to where he wanted to go.

**A.**

In Miranda v. Arizona,<sup>1</sup> the United States Supreme Court held that the statement of

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<sup>1</sup>384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

an accused, "whether exculpatory or inculpatory, stemming from custodial interrogation[.]" cannot be introduced into evidence unless the state demonstrates that "procedural safeguards" were used to protect the accused's privilege against self-incrimination.<sup>2</sup> Miranda requires that a person subjected to "custodial interrogation" must be given the following warnings: (a) he has the right to remain silent, (b) any statement he makes may be used against him, and (c) "he has a right to the presence of an attorney, either retained or appointed."<sup>3</sup> These "procedural safeguards" are commonly referred to as the Miranda warnings.

The United States Supreme Court limited its holding in Miranda to "custodial interrogation."<sup>4</sup> The Court defined the phrase "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>5</sup> A person is "in custody" within the meaning of Miranda if there has been "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."<sup>6</sup> The Court has refused to extend the holding in Miranda to non-custodial interrogations.<sup>7</sup>

In this case, the appellant was not in "custody" within the meaning of Miranda. As previously stated, he voluntarily accompanied the officers to police headquarters with the understanding that he would not be arrested. When the statement was completed, he was permitted to leave. A police officer actually drove the appellant to the location that he designated. Therefore, the officers were not required to advise the appellant of the Miranda warnings when the interview commenced. Additionally, this Court finds that the appellant gave the statement freely and voluntarily.

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<sup>2</sup>384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

<sup>3</sup>384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706-07.

<sup>4</sup>384 U.S. at 478-79, 86 S.Ct. at 1630, 16 L.Ed.2d at 725-26; State v. Cooper, 912 S.W.2d 756 (Tenn. Crim. App.), per. app. denied (Tenn. 1995).

<sup>5</sup>Miranda, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

<sup>6</sup>California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983) (citation omitted).

<sup>7</sup>See Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) (an accused was not entitled to the Miranda warnings when special agents of the Internal Revenue Service questioned him in the dining room of his home).

## B.

The statement made by the appellant concerning counsel was not sufficient to invoke the Fifth Amendment right to counsel. In Davis v. United States,<sup>8</sup> the United States Supreme Court explained that an accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."<sup>9</sup>

In this case, the appellant's statement was not a clear articulation that he was invoking his right to counsel. It failed to "meet the requisite level of clarity."<sup>10</sup> The essence of his statement was a willingness to talk to the officers, but, if he thought that he had a need for an attorney, he would tell the officers. Thus, the officers were not required to stop the interview when the appellant made the statement.

This issue is without merit.

## II.

The appellant contends that the trial court committed prejudicial error in denying his motion in limine. He sought to exclude a video tape that captured Moore killing the victim and the appellant's subsequent entry into the convenience store. He argues that the video tape was irrelevant because Moore took the witness stand and testified that he entered the convenience store and killed the clerk. He also refers to the stipulation between the parties.

Questions concerning the admissibility of evidence rest within the sound discretion of the trial court.<sup>11</sup> This Court will not interfere with the exercise of this discretion absent

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<sup>8</sup>512 U.S. \_\_\_\_\_, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

<sup>9</sup>512 U.S. at \_\_\_\_\_, 114 S.Ct. at 2355, 129 L.Ed.2d at 371.

<sup>10</sup>Davis, 512 U.S. at \_\_\_\_\_, 114 S.Ct. at 2355, 129 L.Ed.2d at 371.

<sup>11</sup>State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994); State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994); State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993); State v. Baker, 751 S.W.2d 154, 163 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

a clear abuse appearing on the face of the record.<sup>12</sup> The trial court did not abuse its discretion by permitting the state to introduce the video tape that was recorded through the eyes of a security camera inside the store. Moreover, the contents of the video tape had probative value which far outweighed any prejudicial affect that the introduction of the video tape may have had on the trier of fact.<sup>13</sup>

The state was required to establish that (a) Moore murdered the victim and (b) he demanded money from the victim at gunpoint as well as inflicted serious bodily injury to the victim. The best evidence of these facts was the video tape. While Moore did testify concerning his conduct, he had a shady past and had been convicted of the murder and attempt to commit an especially aggravated robbery. It is possible that the jury may have opted to discredit his testimony. The contents of the video tape corroborated his testimony and assisted the state in making Moore a more credible witness. It also permitted the triers of fact to view the appellant, who also appeared on the video tape, to determine if his actions were the same as described in the statement he gave the police.

This issue is without merit.

### III.

The appellant argues that the trial court committed prejudicial error in refusing to exclude evidence that the appellant asserted a false identification, Jaques Harris. This evidence was relevant, and the probative value of this evidence far outweighed any prejudicial effect it may have had on the trier of fact.<sup>14</sup>

The appellant's use of a false identity reveals his state of mind on the night of the murder. Moreover, the appellate courts of this state have consistently held that the trier of fact can draw an inference from an accused's effort to conceal his or her identity that the accused was "engaged in some activity in which it was deemed necessary to conceal his

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<sup>12</sup>Stephenson, 878 S.W.2d at 542; Van Tran, 864 S.W.2d at 477; Harris, 839 S.W.2d at 73; Baker, 751 S.W.2d at 163

<sup>13</sup>Tenn. R. Evid. 403.

<sup>14</sup>Tenn. R. Evid. 403.



or her identify."<sup>15</sup>

#### IV.

The appellant moved the trial court to continue the case, or, in the alternative, to move the case to another county due to the "publicity and media coverage before and during the trial." He premised his motions upon the publicity given to a murder in Nashville. The morning the trial commenced, a Nashville newspaper had two front page articles pertaining to the murder of a young girl by three individuals.

There is nothing in the record to establish the appellant's claim of extensive or unfair "publicity and media coverage before and during the trial." Defense counsel brought a copy of the Tennessean to the courtroom and asked "that it be marked for identification." This paper was subsequently moved into evidence. The appellant made no further effort to establish his claim by competent proof.

The trial court made an inquiry about the articles in the newspaper and whether it would have an effect upon the prospective jurors' ability to render a fair and impartial verdict. The jurors remained silent. The trial court also made inquiry about the prospective jurors' knowledge of the murder for which the appellant was being tried. There were positive responses. However, these individuals were not seated as jurors.

It is a well-established rule of law that questions concerning continuances and changes in venue are addressed to the sound discretion of the trial court.<sup>16</sup> An appellate court will not interfere with the exercise of this discretion unless the record clearly establishes that the court abused this discretion.<sup>17</sup>

This issue is without merit.

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<sup>15</sup>Mendolia v. State, 192 Tenn. 656, 668-69, 241 S.W.2d 606, 612 (1951); Sotka v. State, 503 S.W.2d 212, 221 (Tenn. Crim. App.), cert. denied (Tenn. 1972); see generally State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986).

<sup>16</sup>State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983).

<sup>17</sup>State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995); State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994); State v. Smith, 857 S.W.2d 1, 6 (Tenn. 1993), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 114 S.Ct. 561, 126 L.Ed.2d 461 (1993).

## V.

The appellant contends that he was denied a fair trial as a result of the composition of the jury panel. He contends:

1. The Defendant was denied a trial by a jury of his peers, to-wit: he is a black American and all the jurors who were called upon for service in this jury and who sat in judgment on him were caucasian.
2. The Trial Court erred in overruling the Defendant's challenge to the array of jurors for the reason that there were no black Americans available in the jury panel for jury service.
3. The Defendant was denied a fair trial by jury in that the jury venire did not proportionately represent the community in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Article I, Sections 8, 9, and 16 of the Tennessee Constitution.<sup>18</sup>

Although the prospective jurors were in the courtroom prior to and during the voir dire proceedings, the appellant waited until the jury was almost seated before he made a Batson<sup>19</sup> motion. However, it is not clear whether African-Americans were part of the panel available to be selected as jurors. The trial court noted that there were African-Americans that were included in the panel. Both defense counsel and the trial court noted there were African-Americans sitting in the courtroom, but neither defense counsel nor the trial court knew if these individuals were members of the jury panel. Defense counsel stated:

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<sup>18</sup>These issues have been waived. The appellant predicated his objection upon the decision of the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). He subsequently abandoned this theory and asserted these issues. It has long been established in this jurisdiction that a party cannot assert one ground at trial, abandon that ground, and assert a new ground in the motion for a new trial or the appellate court. See State v. Harris, 839 S.W.2d 54, 65-66 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993); State v. Adkisson, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994); State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993); State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App.), per. app. denied (Tenn. 1990); State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989); State v. Dobbins, 754 S.W.2d 637, 641 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Davis, 751 S.W.2d 167, 171 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Brock, 678 S.W.2d 486, 489-90 (Tenn. Crim. App.), per. app. denied (Tenn. 1984). However, this Court opts to consider the issues on the merits since a constitutional issue is embraced by the issues. See Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b).

<sup>19</sup>See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

I'm not sure if any of the African Americans who are here in the audience are on the jury panel. Of course, we don't know that by looking at the questionnaires. We don't know until they're called by your Honor to come and sit before us. But I felt it important to protect Mr. Gaiter's rights and make that motion before the Court.

The trial court stated:

I know they haven't been systematically excluded. Whether we've got any in here, I don't know either, but I know we had some on the list of the names that were called. Now, whether or not they were here, I don't know.

The appellant attempted to establish an evidentiary basis for his motion post-trial. The Election Commission Registrar and a deputy clerk testified regarding the selection of names for jury service. It was established that the African-American population of Rutherford County was approximately nine (9) percent. An equal number of names was selected for each of the twenty-one districts in the county. One of the districts consisted mainly of African-Americans. The names were selected from the voter registration list. Most of the records do not contain either the race or the sex of the individuals selected.

The trial court found that the system utilized in Rutherford County did not systematically exclude African-Americans. The record supports the factual finding of the trial court in this regard. The appellate courts of this state have consistently held that the use of voter registration lists provides a constitutional means of selecting citizens for jury service.<sup>20</sup>

This issue is without merit.

## VI.

The appellant contends that the trial court committed error of prejudicial dimensions

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<sup>20</sup>See State v. Caruthers, 676 S.W.2d 935, 939 (Tenn. 1984), cert. denied, 469 U.S. 1197, 105 S.Ct. 981, 83 L.Ed.2d 982 (1985); State v. Boyd, 867 S.W.2d 330, 335 (Tenn. Crim. App. 1992), per. app. dismissed (Tenn. 1993). This Court has previously held that the voter registration list is one of the most inclusive sources of names for potential jurors. Boyd, 867 S.W.2d at 335 (citing Jefferson v. State, 559 S.W.2d 649, 653 (Tenn. Crim. App. 1977)).

by permitting Moore to relate statements made by Baker. He argues that this constituted inadmissible hearsay. Furthermore, this testimony violated his constitutional right to confront and cross-examine Baker, the person who made the statements related by Moore. The trial court permitted the statement to be introduced as a statement made by a co-conspirator during the course of a conspiracy.<sup>21</sup>

The evidence contained in the record reveals that Moore, Baker, and the appellant conspired to commit a robbery. They first discussed going to Lebanon, Baker's hometown, to commit the robbery. They settled on robbing the next establishment they reached. The convenience store in question was a short distance away.

Moore testified that he gave Baker his car keys to go see where the appellant was after the attempted robbery. Baker went to the vicinity of the convenience store and returned to the apartment. He advised Moore that the appellant was at the convenience store talking to a police officer. Of course, this fact was also established by the video tape taken from the security camera and the testimony of two police officers who saw the appellant and interviewed him as a potential witness. The appellant appeared at the apartment approximately ten minutes later.

This evidence was admissible as a statement of a co-conspirator. Tenn. R. Evid. 803(1.2)(E) provides that a "statement offered against a party that is . . . (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy" is admissible as an exception to the hearsay rule. However, assuming arguendo that it was error to admit this evidence, the error was harmless since this same fact was established by the video tape from the security camera and two police officers.<sup>22</sup>

This issue is without merit.

## VII.

The appellant contends that the trial court committed error of prejudicial dimensions in denying his motion for a mistrial. The motion was predicated upon Moore's testimony

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<sup>21</sup>Tenn. R. Evid. 803(1.2)(E).

<sup>22</sup>Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

that he and the appellant went to the appellant's motel room and smoked "primo," a mixture of crack cocaine and cigarette tobacco, on the date in question.

The appellant did not object or move for a mistrial when the testimony was received into evidence. Moore and two additional witnesses completed their testimony the first day of trial. The appellant did not make his motion for a mistrial until the next day. As a result, the appellant has waived this issue.<sup>23</sup>

A motion for a mistrial, like an objection, must be made contemporaneously with the objectionable testimony.<sup>24</sup> In State v. Leach, defense counsel did not make a contemporaneous objection or motion when the objectionable testimony was received into evidence. He waited until another witness had testified before making a motion for a mistrial. This Court held that Leach had waived the issue. Furthermore, Rule 36(a), Tenn. R. App. P., provides that a party is not entitled to relief when the party "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."

Besides failing to object, defense counsel questioned Moore at great length about his drug use on the date in question. He specifically referred to the testimony which is challenged in this issue. Moore referred to "we" when describing the illicit drugs that had been consumed. This too resulted in the waiver of the issue. A party cannot compound the error allegedly made by a trial court and later seek relief based upon this error.

Also, if this issue was considered on the merits, this Court would hold that the appellant is not entitled to relief based upon this error. This Court parenthetically notes that when the trial court denied the motion for a mistrial, the court advised counsel that a curative instruction would be included in the charge given to the jury.

## VIII.

The appellant contends that the trial court committed error of prejudicial dimensions by permitting the state to introduce the clothing Moore wore on the night in question, the

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<sup>23</sup>State v. Leach, 684 S.W.2d 655, 658 (Tenn. Crim. App. 1984), per. app. denied (Tenn. 1985); Tenn. R. App. P. 36(a).

<sup>24</sup>Leach, 684 S.W.2d at 658.

.25 caliber pistol used to kill the victim, the .22 caliber ammunition found in Moore's motor vehicle, and the shell casing found at the scene of the murder. He argues that all of these items were not relevant to the issues that the jury would ultimately resolve.<sup>25</sup>

It is a well-established rule of law that questions concerning the admissibility of evidence are addressed to the sound discretion of the trial court.<sup>26</sup> An appellate court will not interfere with the exercise of this discretion absent clear abuse appearing on the face of the record.<sup>27</sup>

The appellant ignores the fact that the state was required to establish that a felony was committed. This is especially true when the trial court charges the jury on the offense of facilitation to commit a felony, and the jury convicts the accused of this offense. Moore's clothing was admissible to establish that he was the same person Officer Spence saw earlier in the evening, and Moore was the same person who murdered the victim, an event recorded by the security camera. Also, the .25 caliber weapon, the murder weapon, was admissible along with the casings that were fired from a .25 caliber weapon. Consequently, the trial court did not abuse its discretion by allowing the state to introduce this demonstrative evidence.

The .22 caliber ammunition and the ammunition box found in Moore's motor vehicle were relevant to show that two weapons were used to commit the crime. It corroborated the fact that the guns belonged to Moore. Thus, this issue is without merit.

## IX.

The appellant identified Moore as the murderer to the police. During Moore's cross-examination, defense counsel attempted to paint a picture that Moore was testifying to seek revenge for the appellant's actions in this regard. When the assistant district attorney general questioned Moore during re-direct examination, he asked Moore what Arthur Cole

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<sup>25</sup>Tenn. R. Evid. 401.

<sup>26</sup>State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993); State v. Baker, 751 S.W.2d 154, 163 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

<sup>27</sup>Harris, 839 S.W.2d at 73; Baker, 751 S.W.2d at 163.

had told the police. Defense counsel interposed an objection on the ground the question called for hearsay. The assistant district attorney general stated that this evidence fell within the state of mind hearsay exception. The trial court denied the objection. Moore testified that Cole told the police he, Cole, was not sure that the person in the video tape was Moore, but the person depicted in the video tape wore his hat the same way Moore wore his hat.

While it is doubtful that this evidence was admissible pursuant to Tenn. R. Evid. 803(3), the evidence was nevertheless admissible. Tenn. R. Evid. 803(1.1) provides: "A statement of identification of a person made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." The Advisory Commission Comment to this rule states: "Note also . . . that witnesses other than the declarant may testify about the identifying declaration." Arthur Cole was called as a prosecution witness. Thus, the appellant had every opportunity to cross-examine Cole regarding his alleged identification of Moore.

This issue is without merit.

## **X.**

The appellant contends that the trial court committed error of prejudicial dimensions by (a) allowing Officer Spence to testify about an encounter with Moore, Cole, and the appellant and that the appellant was seen in an area of high drug trafficking and engaged in suspicious activity earlier on the night in question; and (b) allowing Officer Michael Turner to testify about the appellant's demeanor when he was questioned at the scene of the crime. He argues different grounds for each issue.

## **A.**

Officer Terry Spence encountered Cole, Moore, and the appellant in the Nottingham Apartment complex. He testified on direct examination:

There were several cars that were parked in front of where

they were standing. I put my headlights on them, got out of my vehicle, walked up to the subject, one of the subjects I knew as Arthur [Cole]. They just didn't look right standing there. There was a lot of traffic coming in and out of the apartment where they had been, and I asked who they were. (Emphasis added).

No objection was interposed when this testimony was received into evidence.

During cross-examination, defense counsel and Officer Spence had the following colloquy:

Q. Now you didn't arrest those individuals did you?

A. No, sir, I didn't.

Q. And when you saw those individuals at Nottingham Apartments, you weren't investigating a crime, were you?

A. No, sir. There was just a lot of high -- I call it ruffraff coming out of Apartment A-3. (Emphasis added).

Again, no objection was interposed when this testimony was received into evidence during cross-examination.

Officer Spence and another witness finished their testimony the first day. The following morning the appellant moved for a mistrial based in part on the testimony of Officer Spence as hereinabove set forth. As a result, the appellant has waived this issue.<sup>28</sup>

A motion for a mistrial, like an objection, must be made contemporaneously with the objectionable testimony.<sup>29</sup> In State v. Leach, defense counsel did not make a contemporaneous objection or motion when the objectionable testimony was received into evidence. He waited until another witness had testified before making a motion for a mistrial. This Court held that Leach had waived the issue. Furthermore, Rule 36(a), Tenn. R. App. P., provides that a party is not entitled to relief when the party "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."

This issue is without merit.

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<sup>28</sup>Leach, 684 S.W.2d at 658; Tenn. R. App. P. 36(a).

<sup>29</sup>Leach, 684 S.W.2d at 658.



## B.

The investigating officers considered the appellant a witness because he entered the convenience store shortly after Moore murdered the victim. Officer Michael W. Turner took a statement from the appellant at the convenience store. The assistant district attorney general asked Officer Turner to describe the appellant's demeanor -- how the appellant was acting while being questioned. The appellant interposed an objection on the ground that the testimony was not relevant. The trial court denied the objection. Officer Turner stated:

Very scared and appeared very nervous, shaking. When I asked him for his date of birth, he had a hard time recalling his date of birth. Right offhand, he was not thinking real clear at the time at that point when I asked that particular question.

The appellant now argues that this testimony "placed Mr. Gaiter's credibility and character at issue, in violation of Rule 404 and 608", Tennessee Rules of Evidence.

This issue has been waived. The appellant's objections were based on relevancy. He now has abandoned that ground and asserts a different ground for his theory that this evidence was not admissible.<sup>30</sup>

This Court parenthetically notes that Officer Turner was questioned at length about this particular testimony during cross-examination. Officer Turner testified that the appellant was cooperative, that the other witnesses exhibited the same demeanor as the appellant, and that he was not surprised by the demeanor of either the appellant or the other two witness. Moreover, this testimony did not violate Tenn. R. Evid. 404 or 608 as he claims.

This issue is without merit.

## XI.

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<sup>30</sup>State v. McPherson, 882 S.W.2d 365, 373 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993); State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989).

The appellant contends that the trial court committed error of prejudicial dimensions by (a) failing to permit him to question Arthur Cole regarding an arrest for sexual battery when the Rutherford County Grand Jury returned a No True Bill and refused to indict Cole; and (b) allowing Cole to testify as to the "general knowledge on the street" that Moore had shot other people.

**A.**

Arthur Cole had an extensive record of criminal convictions. Defense counsel was permitted to ask Cole about all of his criminal convictions. However, the trial court refused to permit the appellant to ask Cole about a charge of sexual battery. The matter had been submitted to the Rutherford County Grand Jury approximately two weeks prior to the commencement of this trial. The grand jury returned a "No True Bill."

The trial court did not abuse its discretion by ruling that the appellant could not cross-examine Cole about the prior sexual battery offense. First, the grand jury refused to indict Cole for this offense. Second, as a general rule, specific instances of sexual conduct are not probative of the truthfulness or untruthfulness of a witness.<sup>31</sup>

This issue is without merit.

**B.**

The appellant contends that the trial court committed error of prejudicial dimensions because the court permitted the state to introduce into evidence through Arthur Cole that it was "general knowledge on the street" that Moore had shot someone else. He argues that this testimony unfairly prejudiced the jury against him.

This issue has been waived. The appellant has failed to cite any authority in support of the argument accompanying this issue.<sup>32</sup>

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<sup>31</sup>State v. Ford, 861 S.W.2d 846, 849-850 (Tenn. Crim. App. 1992); State v. Jackson, 697 S.W.2d 366, 371 (Tenn. Crim. App.), per. app. denied (Tenn. 1985); see Advisory Commission Comment to Tenn. R. Evid. 608; see also Neil P. Cohen et al., Tennessee Law of Evidence, § 608.6 at pp. 267-68 (2d ed. 1990).

<sup>32</sup>Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b); State v. Dickerson, 885 S.W.2d 90, 92-93 (Tenn. Crim. App.), per. app. denied (Tenn. 1993); State v. Killebrew, 760 S.W.2d 228, 231-32 (Tenn. Crim. App.) per. app. denied (Tenn. 1988).

This Court parenthetically notes that the defense elicited from Moore that he had been involved in two additional shooting incidents. Counsel also established that Moore had not been prosecuted for either incident.

This issue is without merit.

## XII.

The appellant contends that the trial court committed error of prejudicial dimensions by permitting Dr. George Smith to testify concerning his mental impressions and conclusions regarding a motor vehicle he viewed at the scene of the murder and later that evening while en route to the hospital. Dr. Smith saw a white car stop in the street near the convenience store. Later, he decided to go to the hospital to determine the victim's condition. While en route to the hospital, he saw this same white vehicle pull away from an apartment complex. He followed the motor vehicle. The vehicle went to the hospital, stopped at the emergency room, and the person he saw at the convenience store, the appellant, got out of the vehicle. However, he did not see the appellant inside the hospital. He subsequently called the Murfreesboro Police Department and reported his observations.

The assistant district attorney general asked the witness to relate to the jury why the car caused him so much concern. An objection was made to this testimony. The trial court permitted the testimony pursuant to the state of mind exception to the hearsay rule.

This issue has been waived. The appellant failed to cite any authority for his argument in support of this issue.<sup>33</sup> Moreover, if it was error for the trial court to admit this evidence, it was harmless.<sup>34</sup> The testimony did not implicate the appellant in the commission of the attempted robbery or the murder.

This issue is without merit.

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<sup>33</sup>Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b); Dickerson, 885 S.W.2d at 92-93; Killebrew, 760 S.W.2d at 231-32.

<sup>34</sup>Tenn. R. App. P. 36(b).

### **XIII.**

The appellant made a call to 911 at the request of another person who was in the convenience store shortly after the attempted robbery and murder. A copy of the call was made, identified, and moved into evidence. On the tapes, the appellant identified himself as Jaques Harris. Defense counsel objected to the admission of the tape into evidence. He based his objection upon the grounds of relevancy, improper character evidence, and as a challenge to appellant's credibility. He also indicated that it was stipulated that the appellant called 911. The state denied there had been a stipulation. The trial court permitted the tape to be played for the jury.

Again, questions concerning the admissibility of evidence are addressed to the sound discretion of the trial court. An appellate court will not interfere with the exercise of this discretion absent clear abuse appearing on the face of the record. In this case, the trial court did not abuse its discretion. This was a telephone call made by the appellant minutes after the attempted robbery and murder. It was clearly relevant. Furthermore, this was not an attempt to improperly establish the appellant's character or challenge his credibility.

This issue is without merit.

### **XIV.**

The appellant contends that the trial court committed error of prejudicial dimension by (a) permitting Demond O. Baker, accompanied by two deputy sheriffs, to be brought into the courtroom and identified by the detective in charge of the investigation of the attempted robbery and murder, (b) permitting the detective to relate the hearsay utterances made by Courtland Hatcher, and (c) permitting the detective to disclose that he had won only two cases in eighteen years based on fingerprint evidence.

All three of these issues have been waived. The appellant has failed to cite

authority to support the argument he makes in support of each issue.<sup>35</sup>

## XV.

The appellant challenges the sufficiency of the evidence. He contends:

There was no evidence in the record to support the verdict of guilty of facilitation of a felony, to-wit: first degree murder, and attempted especially aggravated robbery, and said verdict shows prejudice against the Defendant.

The evidence is insufficient as a matter of law to sustain a conviction.<sup>36</sup>

The verdict is against the weight of the evidence as it pertains to the jury's finding that the Defendant was involved with James Lafayette Moore and Demond Oliver Baker as an accomplice or co-conspirator at the time of the commission of the offense.<sup>37</sup>

The evidence presented during the trial of this cause [did not provide] sufficient independent corroboration of the testimony of accomplice James Moore to support the jury's finding of guilt on behalf of this Defendant.

The defendant was denied a fair trial by a combination of all the foregoing errors.

The Trial Court erred by failing to charge the jury on lesser included offenses of first degree murder and facilitation of a felony, to-wit: attempted especially robbery.

## A.

When an accused challenges the sufficiency of the convicting evidence, this Court

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<sup>35</sup>Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b); Dickerson, 885 S.W.2d at 92-93; Killebrew, 760 S.W.2d at 231-32.

<sup>36</sup>This issue is too general. Thus, it does not comply with the provisions of Rule 27(a)(4), Tennessee Rules of Appellate Procedure; State v. Matthews, 805 S.W.2d 776, 778-79 (Tenn. Crim. App.), per. app. denied (Tenn. 1990); see Villers v. State, 833 S.W.2d 98, 99 n. 1 (Tenn. Crim. App.), per. app. denied (Tenn. 1992); State v. Dykes, 803 S.W.2d 250, 254-55 (Tenn. Crim. App.), per. app. denied (Tenn. 1990); State v. Newsome, 744 S.W.2d 911, 914 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

<sup>37</sup>It has long been established that the intermediate appellate courts may not weigh the evidence. See Matthews, 805 S.W.2d at 778; Cary v. Arrowsmith, 777 S.W.2d 8, 23 (Tenn. Ct. App.), per. app. denied (Tenn. 1989). Consequently, this sub-issue cannot be considered.

must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt."<sup>38</sup> This rule is applicable to findings based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence.<sup>39</sup>

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence.<sup>40</sup> Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence.<sup>41</sup> To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence.<sup>42</sup>

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court.<sup>43</sup> In State v. Grace,<sup>44</sup> our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact.<sup>45</sup> This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational

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<sup>38</sup>Tenn. R. App. P. 13(e).

<sup>39</sup>State v. Jackson, 814 S.W.2d 740, 742 (Tenn. Crim. App.), per. app. denied (Tenn. 1991); State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

<sup>40</sup>Matthews, 805 S.W.2d at 779.

<sup>41</sup>Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed. 2d 49 (1956).

<sup>42</sup>State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

<sup>43</sup>Cabbage, 571 S.W.2d at 835.

<sup>44</sup>493 S.W.2d 474, 476 (Tenn. 1973),

<sup>45</sup>State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

trier of fact to find that the accused is guilty beyond a reasonable doubt.<sup>46</sup>

**B.**

Before an accused can be convicted of the facilitation of a felony, the state must prove beyond a reasonable doubt that the accused (a) knew another person was going to commit a specific felony and (b) knowingly furnished substantial assistance in the commission of the felony although the accused did not possess the requisite intent to be criminally responsible for the felony.<sup>47</sup> In other words, the state must prove the commission of a specified felony and the assistance the accused gave to the person committing the specified felony.<sup>48</sup>

In this case, the evidence established that Moore committed murder in the first degree in the perpetration of a felony and an attempt to commit especially aggravated robbery. The record establishes that the appellant, Moore, and Baker were riding in Moore's vehicle when they began discussing the commission of a robbery. They first discussed going to Lebanon, Baker's hometown, to commit the robbery. The three decided that they would rob the next available business establishment. The appellant had both of Moore's pistols. He gave the .25 caliber to Moore to commit the robbery. He kept the .22 caliber pistol. The appellant stood outside the convenience store while Moore went inside to take money at gunpoint. Baker was the "wheel man" and remained with Moore's vehicle. Moore killed the clerk, he attempted to open the cash register, and, when he was unable to open the register, he exited the store.

These facts, if believed by the jury, are sufficient to support the appellant's convictions for an attempt to commit especially aggravated robbery and the facilitation to commit murder in the first degree.

**C.**

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<sup>46</sup>Tuggle, 639 S.W.2d at 914.

<sup>47</sup>Tenn. Code Ann. § 39-11-403(a).

<sup>48</sup>See State v. Andre P. Virges, Shelby County No. 02-C-01-9206-CR-00124, slip op. at 5 (Tenn. Crim. App., Jackson, February 23, 1994).

Two statutes establish the criminal responsibility of a person for the conduct of another person.<sup>49</sup> These statutes provide:

Section 39-11-401. Parties to offenses.--(a) A person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both.

(b) Each party to an offense may be charged with the commission of the offense.

Section 39-11-402. Criminal responsibility for conduct of another.--A person is criminally responsible for an offense committed by the conduct of another if:

(1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;

(2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or

(3) Having a duty imposed by law or voluntarily undertaken to prevent the commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

The record establishes that the appellant suggested they rob a business establishment, gave Moore one of the guns, and participated in the robbery by waiting outside the convenience store to make sure Moore was not surprised by another person entering the store. Although the appellant did not physically enter the store during the course of the robbery, it is clear that he acted with the intent to assist the commission of the offense. As such, the appellant is criminally responsible for the conduct of Moore, the principal.<sup>50</sup>

**D.**

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<sup>49</sup>Tenn. Code Ann. §§ 39-11-401 and -402.

<sup>50</sup>Tenn. Code Ann. §§ 39-11-401(b); 39-11-402(2).



The appellant contends that he was convicted exclusively upon the uncorroborated testimony of an accomplice. In this jurisdiction, it is a well-established rule of law that the testimony of an accomplice must be corroborated before an accused can be convicted of a criminal offense. In this case, there is sufficient circumstantial evidence to corroborate Moore's testimony.

The appellant admitted in his statement that he had been with Moore on the date in question. They had lunch together.

Officer Spence saw the appellant, Moore, and Cole together in the Nottingham Apartments on the night in question. The apartments are only 350 yards from the convenience store, the situs of the offenses. The appellant admitted that he was one of the individuals Officer Spence saw that night.

The appellant admitted in his statement that he was at the convenience store. He was one of the individuals who found the victim behind the counter. He also called 911. In addition, he appeared on the video tape taken by the store's security camera. Neal, a store customer, testified that the appellant was not excited under the circumstances. The appellant acted nonchalantly while inside the convenience store and going to call 911.

Dr. Smith stated he saw Moore's vehicle near the convenience store. The person he described, Baker, was driving the vehicle.

The appellant admitted in his statement that he was with Moore and Baker after the crime was committed. He also admitted riding with Moore and stopping at the hospital so that he could determine the victim's condition. Dr. Smith saw the vehicle pull from the apartment complex. He followed the vehicle to the hospital and saw the appellant exit the vehicle. It was the same vehicle he saw acting suspiciously near the convenience store.

When questioned at the convenience store, the appellant gave the officers a false name, Jaques Harris. He admitted in his statement that he gave the false name to the officers.

In his statement, the appellant stated he knew that Moore had a .25 caliber pistol, and he described the pistol. He also admitted talking to Moore about committing other robberies, but he refused to participate in the robberies. He had ridden in Moore's car on other occasions, and he had also driven Moore's vehicle. He further admitted that he was

with Moore the day following the commission of the crimes.

## E.

The elements of both crimes were established by the state. Furthermore, Moore's testimony was sufficiently corroborated. In short, the evidence adduced at the trial was clearly sufficient to support a finding by a rational trier of fact that the appellant was guilty of an attempt to commit especially aggravated robbery and the facilitation to commit murder in the first degree beyond a reasonable doubt.<sup>51</sup>

## F.

The issue complaining of the failure of the trial court to charge other lesser included offenses has been waived.<sup>52</sup> The appellant failed to cite authority in support of this issue. However, this Court parenthetically notes that the evidence did not support any additional lesser included offenses. Consequently, the trial court was not required to charge such offenses.

## XVI.

The appellant raises seven sentencing issues:

The Trial Court erred in allowing Ms. Pat Guffey to testify at the sentencing hearing on October 22, 1993, as her testimony was irrelevant to any issue regarding the Court's sentencing decision, and further, her testimony was irrelevant and filled with inadmissible hearsay statements in violation of the Defendant's right to a fair sentencing hearing pursuant to Tenn. Code Ann. § 40-35-209.

The Trial Court erred in finding only one mitigating factor pursuant to Tenn. Code Ann. § 40-35-113 where the Code specifically sets forth separate factors to be considered by the trial court, and this Court considered three factors each separately designated by the Code as one factor in this case.

The Trial Court erred in finding five enhancing factors pursuant to Tenn. Code Ann. § 40-35-114 which were used to increase the Defendant's punishment at the sentencing hearing,

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<sup>51</sup>Tenn. R. App. P. 13(e); see Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979).

<sup>52</sup>Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

wherein three of the factors are themselves essential elements of the offense as charged in the indictment, specifically subsections 9, 10, and 16. Further, the trial court enhanced the Defendant's sentence pursuant to Tenn. Code Ann. § 40-35-114(13) based upon the Defendant being on probation when the crime was committed, however, sub-section 13 states clearly that it can only be used to enhance if the Defendant is on probation from a prior felony conviction. (Emphasis added).

The Trial Court erred in considering for sentencing purposes the Defendant's placement on the diversion program in March, 1992, and further considering that he was on probation for a misdemeanor at the time of the commission of this offense, where the State failed to provide defense counsel pursuant to this [sic] Court's Order in response to a Motion for Discovery with the Defendant's prior arrest history?

The Trial Court erred in sentencing the Defendant to the term of 22 years for a Class A felony, as a standard, range I, offender, where he has no prior felony convictions and the enhancement factors do not justify the same.

The trial court erred in sentencing the Defendant to a term of 11 years for a Class B felony, where he has no prior felony convictions and the enhancement factors do not justify the same.

The Trial Court erred in sentencing the Defendant to serve consecutive sentences based upon all factors, Tenn. Code Ann. § 40-35-115, and the record as a whole.

#### A.

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct."<sup>53</sup> This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances."<sup>54</sup> The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts.<sup>55</sup> However, this Court is required to give great

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<sup>53</sup>Tenn. Code Ann. § 40-35-401(d).

<sup>54</sup>State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

<sup>55</sup>State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993).

weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor, appearance, and inflection in their voices.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment.<sup>56</sup>

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous.<sup>57</sup> Thus, this Court will undertake a review of the record, based upon the foregoing guidelines, to determine if the appellant has established that the sentences imposed by the trial court were erroneous.

## B.

The appellant contends that the trial court committed error of prejudicial dimensions in permitting Ms. Pat Guffey to testify about the impact the victim's death had upon her life. Ms. Guffey was engaged to marry the victim. The state concedes that the trial court should not have permitted the witness to testify. The witness did not fall within the parameters of the applicable statute.<sup>58</sup> However, it should be noted that the statute has been amended to include "a person who has had a close personal relationship with the victim and is designated by the court to be a victim representative."<sup>59</sup>

The erroneous admission of this testimony was harmless.<sup>60</sup> It does not appear that

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<sup>56</sup>See Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

<sup>57</sup>Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

<sup>58</sup>Tenn. Code Ann. § 40-35-209(b).

<sup>59</sup>Tenn. Code Ann. §§40-38-202; 40-38-203(2) (Supp. 1995).

<sup>60</sup>Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

the trial court enhanced the sentences in this case based upon the erroneous testimony.

**C.**

The appellant contends that the trial court failed to consider mitigating factors that are established by the record. He argues that (1) he played a minor role in the commission of the offense,<sup>61</sup> (2) he assisted the authorities in uncovering offenses committed by other persons and in detecting or apprehending other persons who had committed these offenses,<sup>62</sup> (3) he assisted the authorities in locating and recovering any property or persons involved in the crime,<sup>63</sup> (4) he placed an emergency call to 911 after the victim was discovered and stayed at the scene until the emergency personnel arrived,<sup>64</sup> and (5) he identified Moore as the person who murdered the victim.<sup>65</sup> The trial court found that the appellant did assist the authorities albeit the court did not know or understand the appellant's reason for doing so. However, the trial court found that factors 2, 3, 4, and 5 all related to this mitigating factor, and, as a result, the appellant was only entitled to the consideration of one mitigating factor, not five factors as he contends.

This Court finds that the trial court properly found that the appellant had a major, not a minor, role in the commission of the offenses in question. Furthermore, the trial court properly found that the appellant was entitled to consideration of one mitigating factor rather than four mitigating factors. All of the facts stated in support of the different factors actually relate to only one mitigating factor.

**D.**

The trial court found that there were five (5) enhancement factors supported by the

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<sup>61</sup>Tenn. Code Ann. § 40-35-113(4).

<sup>62</sup>Tenn. Code Ann. § 40-35-113(9).

<sup>63</sup>Tenn. Code Ann. § 40-35-113(10).

<sup>64</sup>Tenn. Code Ann. § 40-35-113(13).

<sup>65</sup>Tenn. Code Ann. § 40-35-113(13).

record. The following factors were used to enhance the appellant's sentences within the appropriate range: (1) he had a previous history of unwillingness to comply with the conditions of an alternative sentence,<sup>66</sup> (2) he possessed a firearm during the commission of the offense,<sup>67</sup> (3) he had no hesitation about committing a crime where the risk to human life was high,<sup>68</sup> (4) he committed a felony while he was on probation,<sup>69</sup> and (5) he committed the offenses under circumstances where the potential for bodily injury to a victim was great.<sup>70</sup>

In discussing the appellant's contention that he played a minor role, the trial court found that it was the appellant who suggested that they rob the next store they reached. The court also considered the fact that the appellant was older than the two other actors in these offenses. He also had possession of Moore's two pistols. He gave Moore the .25 caliber to use in the robbery. In short, the trial court properly found that the appellant was the leader in the commission of the offenses. If the trial court did not use this factor in sentencing the appellant, it should be considered in establishing the length of the sentences.<sup>71</sup>

The trial court properly used enhancement factor (8) to enhance the appellant's sentences. While on probation, the appellant was in the possession of two firearms,<sup>72</sup> he consumed illicit drugs which means that he possessed the drugs,<sup>73</sup> and he assumed a false identity.<sup>74</sup> The appellant violated the conditions of his probation when he committed these offenses.<sup>75</sup>

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<sup>66</sup>Tenn. Code Ann. § 40-35-114(8).

<sup>67</sup>Tenn. Code Ann. § 40-35-114(9).

<sup>68</sup>Tenn. Code Ann. § 40-35-114(10).

<sup>69</sup>Tenn. Code Ann. § 40-35-114(13).

<sup>70</sup>Tenn. Code Ann. § 40-35-114(16).

<sup>71</sup>See State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993); State v. Pearson, 858 S.W.2d 879, 881(Tenn. 1993).

<sup>72</sup>Tenn. Code Ann. § 39-17-1307(a)(1).

<sup>73</sup>Tenn. Code Ann. § 39-17-418 (a).

<sup>74</sup>Tenn. Code Ann. § 39-16-301(a)(1).

<sup>75</sup>See State v. Keel, 882 S.W.2d 410, 419 (Tenn. Crim. App.), per. app. denied (Tenn. 1994).

The trial court also properly applied enhancement factor (9) to enhance the appellant's sentence for the crime of facilitation of murder in the first degree.<sup>76</sup> However, the trial court should not have used this factor to enhance the sentence for the crime of attempt to commit especially aggravated robbery.<sup>77</sup> The use of a weapon is an essential element of especially aggravated robbery.<sup>78</sup>

The state concedes that enhancement factor (16) should not have been used to enhance either sentence. This is the prevailing view in this jurisdiction.<sup>79</sup>

The fact that the trial court erroneously applied certain enhancement factors does not equate to a reduction in the sentences imposed.<sup>80</sup> This Court finds that the sentences imposed are both proper and reasonable based upon the circumstances of the offense, to deter others from committing these offenses, and to avoid depreciating the seriousness of the offenses. Furthermore, the appellant has been given ample opportunity to rehabilitate himself through the community corrections program and probation. He failed in this regard.

## E.

The appellant complains that the trial court abused its discretion by ordering that the two sentences are to be served consecutively. To the contrary, a trial court may require sentences to be served consecutively when the accused "is sentenced for an offense

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<sup>76</sup>See State v. Butler, 900 S.W.2d 305, 312-313 (Tenn. Crim. App. 1994); State v. Raines, 882 S.W.2d 376, 385 (Tenn. Crim. App.), per. app. denied (Tenn. 1994).

<sup>77</sup>See State v. Eldridge, 888 S.W.2d 457, 462 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); Tenn. Code Ann. § 40-35-114.

<sup>78</sup>Tenn. Code Ann. § 39-13-403.

<sup>79</sup>See State v. Hill, 885 S.W.2d 357, 363-64 (Tenn. Crim. App.), per. app. denied (Tenn. 1994) (aggravated assault); State v. Billy Lee Perry, Sumner County No. 01-C-01-9211-CR-00346, slip op. at 13-14 (Tenn. Crim. App., Nashville, November 18, 1993) (attempt to commit murder in the first degree); State v. Antonio M. Herron, Shelby County No. 02-C-01-9407-CR-00144, slip op. at 7 (Tenn. Crim. App., Jackson, March 22, 1995) (aggravated robbery); State v. Joseph Henry Claybrooks and Ronnie W. Jackson, Williamson County No. 01-C-01-9403-CC-00092 (Tenn. Crim. App., Nashville, November 3, 1994) (aggravated robbery); State v. Melvin Wilkerson, McMinn County No. 03-C-01-9105-00136 (Tenn. Crim. App., Knoxville, January 9, 1992), per. app. denied (Tenn. 1992) (aggravated robbery).

<sup>80</sup>State v. Keel, 882 S.W.2d at 423.



committed while on probation."<sup>81</sup> The record reflects that the appellant was on probation when the offenses were committed. As previously noted, the appellant has had ample opportunity to rehabilitate himself. Furthermore, the public needs to be protected from the appellant since he insists upon living a life that continually involves criminal conduct. In this case, an innocent person lost his life. Consecutive sentencing was appropriate.

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JOE B. JONES, JUDGE

CONCUR:

(Not Participating)  
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JERRY SCOTT, PRESIDING JUDGE

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JOE D. DUNCAN, SPECIAL JUDGE

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<sup>81</sup>Tenn. Code Ann. § 40-35-115(b)(6).