

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY SESSION, 1998

<p>F I L E D</p> <p>August 10, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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STATE OF TENNESSEE,
00259

Appellee,

v.

JUDGE
ODELL SMITH,

Appellant.

) C.C.A. NO. 02C01-9707-CR -

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SHELBY COUNTY

HON. JOSEPH B. DAILEY,

(FIRST DEGREE MURDER

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D A V I D H E N R Y
A s s i s t a n t D i s t r i c t A t t o r n e y

C r i m i n a l J u s t i c e C e n t e r , S u i t e

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O P I N I O N F I L E D -----

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O P I N I O N

The Defendant, Odell Smith, appeals as of right his convictions of felony murder and especially aggravated robbery in the Shelby County Criminal Court.

The jury sentenced Defendant to life imprisonment without the possibility of parole for the felony murder. The trial court subsequently entered a judgment sentencing Defendant to twenty (20) years for the especially aggravated robbery conviction. The two sentences were ordered to be served concurrently, but consecutive to a prior offense for which Defendant was on parole at the time he committed the present offenses. Defendant argues the following eight (8) issues in this appeal:

1. Whether the evidence was sufficient to convict Defendant of the especially aggravated robbery of the victim;
2. Whether the trial court erred in instructing the jury on attempted robbery during its felony murder charge;
3. Whether Defendant was entitled to a jury instruction of reckless homicide, criminally negligent homicide, or attempted robbery;
4. Whether the trial court properly ruled that the State could impeach Defendant with past convictions for larceny, burglary, receiving stolen property and robbery with a deadly weapon during the guilt phase as well as

the penalty phase of the trial (Defendant's Issues 4 and 5);

5. Whether the trial court properly allowed the State to rebut Defendant's mitigation testimony with evidence of his cocaine use in prison (Defendant's Issue 6);

6. Whether the trial court properly admitted a photograph taken of the victim while he was alive (Defendant's Issue 7);

7. Whether the victim impact references made by the State during opening and closing statements were proper (Defendant's Issue 8); and

8. Whether the jury verdict regarding the statutory aggravator was ambiguous (Defendant's Issue 9).

The facts presented at trial reveal that on April 5, 1995, the victim in this case, Michael Spears, worked as the assistant manager of the Highway Oil Service Station located at 2840 South Perkins Road in Memphis, Tennessee. The victim's brother, Jeff Spears, was the manager of the service station. At trial, Jeff Spears testified at great length as to the operations of the station, which he had run for 18 years. He said that the customers would give their money to the employee on duty and that the employee kept the larger bills in his pockets. The employee always kept small bills in his front pocket and in his hand to make change. The employee also wore a clip-on coin dispenser. When the money in

the employee's pockets reached a few hundred dollars, the money was wrapped with a rubber-band, recorded, and put into a drop safe located inside the station. However, the employees always kept at least a hundred dollars in small bills on their person in order to make change for the customers.

Jeff Spears testified that he convinced his brother to move from Atlanta and to come work with him. Jeff Spears said that after 18 years of managing the service station that the place had never run as well as when his brother was working with him. Jeff Spears testified that he completely trusted his brother and that no money had ever been taken while his brother was the attendant on duty.

On the night of April 5, 1995, the 41-year-old Defendant was in a car with Solon Brown and Lillie Whitman. According to Ms. Whitman, Defendant said he wanted to stop at the Spears' gas station because he needed to "pick up some money" and that he "had to take care of some business." At this point, Whitman demanded to be taken home because she knew what Defendant was about to do "wasn't going to be right." Defendant became angry and slapped Whitman in the face, telling her she was "jinxed."

H e t h e n h a d B r o w n p u l l i n t o a l o t a c r o s s t h e s t r e e t f r o m t h e S p e a r ' s g a s s t a t i o n , w h e r e h e g o t o u t o f t h e c a r a n d w a l k e d o v e r t o t h e s t a t i o n . M s . W h i t m a n , w h o w a i t e d i n t h e c a r w i t h M r . B r o w n , s a i d t h a t a c o u p l e o f m i n u t e s l a t e r s h e h e a r d g u n s h o t s a n d t h a t s h e t o l d B r o w n t h a t " s o m e b o d y h a d g o t h u r t . " S h e t h e n s a w D e f e n d a n t r u n n i n g b a c k a c r o s s t h e s t r e e t t o w a r d s t h e c a r . M s . W h i t m a n t e s t i f i e d t h a t D e f e n d a n t s a i d , "[W] e g o t t o g e t o u t o f h e r e b e c a u s e I ' m n o t g o i n g b a c k t o j a i l . "

S e v e r a l w i t n e s s e s t e s t i f i e d a t t r i a l t h a t a b l a c k m a l e c a m e u p t o M i c h a e l S p e a r s a t t h e s e r v i c e s t a t i o n , s t r u g g l e d w i t h h i m , a n d t h e n s h o t a n d k i l l e d h i m . S p e c i f i c a l l y , R e m e y F l o w e r s t e s t i f i e d t h a t s h e h a d j u s t p a i d M i c h a e l S p e a r s f o r g a s . S p e a r s g a v e h e r c h a n g e f r o m a r o l l o f m o n e y h e h a d i n h i s h a n d . H e s t i l l h a d m o n e y i n h i s h a n d w h e n s h e w e n t t o p u m p t h e g a s . S h e t e s t i f i e d t h a t a b o u t t w o m i n u t e s l a t e r s h e h e a r d a s h o t a n d l o o k e d u p t o s e e a b l a c k m a l e s h o o t i n g M r . S p e a r s . R e m e y F l o w e r s ' m o t h e r , w h o w a s s i t t i n g i n t h e c a r w h i l e h e r d a u g h t e r p u m p e d t h e g a s , t e s t i f i e d t h a t h e r d a u g h t e r o n l y h a d t i m e t o p u m p a b o u t t w o d o l l a r s w o r t h o f g a s b e f o r e t h e s h o o t i n g o c c u r r e d , e v e n t h o u g h s h e h a d p a i d f o r t e n d o l l a r s w o r t h o f g a s .

Chris Peters had pulled up in his car to within 100 feet of the station moments before the shooting. He testified that he saw a black male struggle with Mr. Spears, knock off Spears' glasses, and then shoot Spears from a distance of only a few feet. He then saw the same black man run across the street carrying a gun. The gas station was well lit at the time and Peters later picked Defendant as the killer in a photo array. Peters drove to cut Defendant off from the getaway car in which Brown and Whitman were waiting. Defendant ran away, but then made a second attempt for the getaway car. Peters cut him off again, and Defendant pointed his gun at Peters. Defendant then turned and ran into a nearby drainage ditch. The getaway car also sped away at this point.

Peters returned to the scene of the shooting where he observed that Michael Spears had been shot once in the cheek and once in the neck. Michael Spears died from these injuries. After conducting an inventory, Jeff Spears determined that approximately \$53 dollars was missing.

Lillie Whitman testified that she later asked Defendant why he shot Michael Spears and that he responded, "[I]t was either [me] or

the man." Defendant told Whitman if she told anyone about the murder he would put a contract out on her life. The defense presented an alibi witness who testified that Defendant was at work on the night of the shooting.

Defendant chose not to testify at trial but he did testify during the sentencing phase for the felony murder where he repeatedly emphasized his lack of intelligence and the fact that he was a good person. Defendant denied committing the crime. A clinical psychologist testified that Defendant suffered from mild mental retardation, illiteracy, alcohol and drug dependence and brain damage. Furthermore, two of Defendant's sisters testified that Defendant was raised in a violent and abusive household. During cross-examination, Defendant was asked, over objection, about his obtaining cocaine in prison. The trial court admitted the testimony because it refuted Defendant's claim that he was so slow that he could not even hand his father, who was a mechanic, the tools he asked for.

In opening and closing arguments of the sentencing phase, the State referred to the pain Mr. Spears' death had caused his family,

even though no family members were called to testify. The only proof put on by the State during the sentencing phase related to the statutory aggravator, a prior conviction for robbery with a deadly weapon.

I. Sufficiency of the Evidence

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing 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, 319 (1979). This standard is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient

to support the verdict returned by the trier of fact. State v. Williams, 914 S.W.2d 940, 945 (Tenn. Crim. App. 1995) (citing State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982)); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. Cabbage, 571 S.W.2d at 835. A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. Grace, 493 S.W.2d at 476.

Moreover, a criminal offense may be established exclusively by circumstantial evidence. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973); State v. Jones, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995); State v. Lequire, 634 S.W.2d 608 (Tenn. Crim. App. 1981). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances

"must be so strong and cogent as to exclude beyond a reasonable doubt every other reasonable hypothesis save guilt of the defendant." State v. Crawford, 225 Tenn. 478, 470 S.W.2d 610 (1971); Jones, 901 S.W.2d at 396. In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, 470 S.W.2d at 613; State v. McAfee, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987).

Defendant claims that there was insufficient evidence to convict him of the especially aggravated robbery of Michael Spears. Tennessee Code Annotated defines especially aggravated robbery as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear" and where the robbery is "accomplished with a deadly weapon and where the victim suffers serious bodily injury." Tenn. Code Ann. §§ 39-13-401(a) and 39-13-403(a)(1)-(2).

Evidence presented at trial showed that Defendant told his friends that he needed money and to take him to the Spears's service

station. Several witnesses testified that a black male came up to the victim, struggled with him, and then shot and killed him. Remey Flowers testified that the victim had money in his hand when she went to pump the gas. She only had time to pump two dollars' worth of gas before the shooting occurred. Chris Peters testified that he saw Defendant struggle with the victim, knock off the victim's glasses and then shoot him. He identified Defendant as the person who shot the victim in a photo array.

Jeff Spears, the victim's brother and manager of the service station, testified that approximately \$53 was missing. Jeff Spears testified at great length about the way in which money was handled at the service station by employees. He further stated that the station had never run as efficiently as it had since his brother, the victim, had come to work for him. He further testified how honest and truthful his brother was and how there had been no prior incidences of an employee misappropriating funds. Defendant presented no proof to refute the State's showing that the money was taken by the Defendant. There appears to be ample evidence with which a jury could believe Defendant confronted Michael Spears, took the money from his hand, and then shot and killed him,

thus meeting the statutory elements of especially aggravated robbery. See Tenn. Code Ann. § 39-13-401(a) and 39-13-403(a)(1)-(2). This issue is without merit.

II. Jury Instruction on Attempted Robbery

Defendant alleges it was error for the trial court to instruct the jury that it could convict Defendant of felony murder if it found the killing was committed during the course of a robbery or an attempt to commit a robbery. Defendant failed to raise this issue in his motion for new trial, and it has therefore been waived. Tenn. R. App. P. 3(e).

In any event, Defendant's speculation that the jury could have relied on the attempt language ignores the verdict reached by the jury. The jury in the instant case convicted Defendant of especially aggravated robbery. It is untenable to suggest that, while convicting Defendant for having committed the robbery, they would then convict him for felony murder based upon an attempted robbery. Had the jury believed that an attempted but unsuccessful robbery had occurred, it would never have convicted Defendant of

especially aggravated robbery. Even if error, it was harmless error. This issue is without merit.

III. Jury Instructions on Reckless Homicide,
Criminally Negligent Homicide and
Attempted Robbery

Defendant next alleges that the trial court erred in failing to instruct the jury as to the lesser offenses of reckless homicide and criminally negligent homicide and in failing to instruct the jury on attempted robbery. Defendant again failed to raise this issue in his motion for new trial. Thus, the issue is waived. Tenn. R. App. P. 3(e); see State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988).

Even addressed on the merits, it is clear from the proof in this case that the jury charges Defendant desires were not warranted. A trial court must fully instruct the jury on the general principles of law relevant to the issues raised by the evidence, including instructions on lesser offenses included in the indictment. See Tenn. Code Ann. § 40-18-110(a). However, before an instruction on a lesser offense is warranted, two preliminary determinations must

be made. First, the trial court must determine the lesser offenses of the offense charged in the indictment. State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996); see also State v. Mario Hawkins, C.C.A. No. 01C01-9701-CR-00014, Davidson County (Tenn. Crim. App., Nashville, July 2, 1998). Second, after determining the lesser offenses the court must determine whether such an instruction on any of the lesser offenses is warranted by the evidence. State v. Elder, C.C.A. No. 03C01-9702-CR-00053, Knox County (Tenn. Crim. App., Knoxville, Apr. 23, 1998) (no Rule 11 application filed) (citation omitted). Where the evidence clearly establishes the defendant's guilt on the greater offense, it is not error to fail to charge on the lesser included offense. State v. King, 718 S.W.2d 241, 245 (Tenn. 1986). A trial judge is not required to include instructions for lesser included offenses if the evidence offered would not support a conviction for the lesser included offenses. Trusty, 919 S.W.2d at 311 n. 5. Thus, the "trial court must determine whether the evidence, when viewed in the light most favorable to the defendant's theory of the case, would justify a jury verdict in accord with the defendant's theory, and would permit a rational trier of fact to find the defendant guilty of the lesser offense and not guilty of

the greater offense.” Elder, C.C.A. No. 03C01-9702-CR-00053, slip op. at 8 (citations and footnote omitted) (emphasis in original).

First, the evidence in this case, even when viewed in the light most favorable to the Defendant, is not sufficient for a rational trier of fact to find the Defendant guilty of reckless homicide or criminally negligent homicide and not guilty of felony murder. As previously discussed in this opinion, the evidence shows that this was an intentional killing by Defendant. Defendant had his friends drive him to the gas station, telling them that he needed to “pick up some money” and “take care of some business.” Lillie Whitman, a passenger in the car, knew what Defendant was about to do “wasn’t going to be right” and asked to be taken home. Defendant confronted the victim at the gas station where they struggled, and then Defendant shot the victim twice before running towards the getaway car. Two eyewitnesses identified Defendant as the person they saw struggle with the victim at the gas station and then fatally shoot him.

The record in this case clearly shows that Defendant was guilty of the greater offense. Therefore, it was not error for the trial court to not charge the jury on a lesser offense. See State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991). Defendant's statements made to his friends before the killing, the fact that the victim was shot two times, and his actions following the shooting, demonstrate that this killing was neither negligent nor reckless. The trial court did not err in not charging criminally negligent or reckless homicide.

Secondly, Defendant alleges it was error for the trial court to not instruct the jury on the law of attempt on the especially aggravated robbery charge. Again this issue has been waived, Tenn. R. App. P. 3(e), but we will briefly address it. Defendant made no objection at the trial, so we do not have the benefit of the trial court's ruling on this issue. Nonetheless, we are able to find that this issue is substantively without merit. At trial, the State proved Defendant intended to confront the victim in order to "get some money." The victim always kept money on him, and even frequently had money in his hand to make change for customers. He normally carried larger bills in his pants pockets and smaller bills, mostly ones, in his front shirt pocket to make change. He would also typically have money in his hands, especially if someone had just paid him. The victim's brother, Jeff Spears, managed the service station and testified that the station had been doing business this way for years. He further testified that he had never had a problem with money missing, and that the station had never run as efficiently as it had since his brother had come to work for him. He also said that his brother was an honest and trustworthy person. Remy Flowers testified that just minutes before the robbery, she

gave the victim \$20 to buy gas. She testified that he gave her change out of the money in his hand. When she turned to go pump the gas, the victim still had money in his hand. Within two minutes, Defendant confronted the victim and struggled with him, knocking the victim's glasses off. He then shot the victim twice and ran away.

Jeff Spears subsequently discovered that approximately \$53 had been taken the night of the murder. Defendant offered no other explanation for the loss of the money. The victim often kept money in his hand when working and had money in his hand two minutes before Defendant approached him that night. However, no money was found in his hand or on the ground around him following the murder. According to the business records, \$53 was missing, which was about the amount an employee would keep with him to make change for customers. The mere fact that no money was found on Defendant's person is meaningless since Defendant eluded police for several days before being arrested.

Our courts have consistently stated it is unnecessary to charge a jury where "the charge would be a mere abstraction upon

hypothetical questions not suggested by proof." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citation omitted). "The giving of instructions on offenses for which there is no evidence in the record is to be avoided." State v. Davis, 751 S.W.2d 167, 170 (Tenn. Crim. App. 1988). There is no evidence in the record to support Defendant's claims that the money was lost or taken by someone else. Absent any proof to the contrary, we find the trial court did not err in not instructing the jury on the law of attempt on the especially aggravated robbery charge. This issue is without merit.

IV. Impeachment Evidence

In Defendant's issues Four and Five, Defendant argues that the trial court erred in allowing eleven former convictions to be used to impeach him should he choose to testify. The convictions included a three-year sentence for a 1975 conviction for grand larceny; a three-year sentence for a 1975 conviction for third-degree burglary; three one-year sentences for three 1975 convictions for petit larceny; four three-year sentences for four 1975 convictions for grand larceny; a two-to-five year sentence for a 1978 conviction for

receiving stolen property under \$100; and a 15-year sentence in 1975 for robbery with a deadly weapon. After conducting a Morgan hearing, the trial court allowed the State to impeach Defendant's credibility with these crimes. As a result, Defendant chose not to testify during the guilt phase of the trial although he did testify during the penalty phase.

A. The trial court properly allowed the State to impeach Defendant with ten convictions for larceny, burglary and receiving stolen property under \$100.

The Tennessee Rules of Evidence provide that a judgment of conviction may be used by the State to generally impeach the testimony of a defendant. See Tenn. R. Evid. 609; State v. Morgan, 541 S.W.2d 385 (Tenn. 1976). Convictions are not admissible if a period of more than ten years has elapsed between the date of release from confinement and the commencement of the prosecution unless their probative value, supported by specific facts and circumstances, substantially outweighs their prejudicial effect. Tenn. R. Evid. 609(b). The burden upon the State is greater than that standard applicable to prior offenses less than ten years old. As to the latter, the State must only show that the probative

value marginally outweighs the prejudicial effect. A trial court's ruling under Rule 609 will not be reversed absent an abuse of discretion. See Johnson v. State, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979).

In determining whether the probative value of a prior conviction on the issue of credibility is outweighed by its prejudicial effect on the substantive issues, a trial court should "(a) 'assess the similarity between the crime on trial and the crime underlying the impeaching conviction,' and (b) 'analyze the relevance the impeaching conviction has to the issue of credibility.'" State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App. 1992) (citation omitted); see also State v. Jerry Lee Finch, C.C.A. No. 02C01-9309-CC-00224, Lauderdale County (Tenn. Crim. App., Jackson, June 7, 1995), perm. to appeal denied (Tenn. 1995).

Here, the trial court did state specific findings of fact in admitting the prior convictions. Specifically, the trial court noted that the purpose of admitting the convictions is to help the jury assess Defendant's credibility, and it further stated that "few convictions . . . go more to the heart of the issue of credibility than

these types of convictions; larcenies, receiving stolen property and burglary." The court noted that had the convictions been for drug offenses they would not have been admissible because they do not tend to relate to a witnesses' credibility. The trial court's determination is supported by Tennessee law. The courts of this State have consistently held that such crimes as larceny, receiving stolen property and burglary are probative of a witnesses' credibility. See State v. Miller, 737 S.W.2d 556, 559-60 (Tenn. Crim. App.), perm. to appeal denied (Tenn. 1987) (burglary is a crime of dishonesty); State v. Hardison, 705 S.W.2d 684, 686 (Tenn. Crim. App. 1985) (petit larceny is a crime of dishonesty); State v. Robert Davis, C.C.A. No. 02C01-9407-CC-00148, Lauderdale County (Tenn. Crim. App., Jackson, Aug. 23, 1995) (receiving stolen property is a crime of dishonesty).

Also, in the case sub judice, there is little cause for concern that the jury would improperly use the crimes to find that Defendant had a propensity to commit especially aggravated robbery or murder since the prior crimes, larceny, burglary and receiving stolen property, were not crimes directly against the person. This Court has consistently held that where the impeaching crimes are

dissimilar to the crimes for which the defendant is on trial, the impeaching crimes are more likely to be admitted. Farm er, 841 S.W .2d at 839.

Furthermore, the defense relied upon by Defendant was that no one actually saw who committed the robbery and murder. In fact, at the sentencing phase, Defendant testified that he was not the one who committed the crimes. This put his credibility directly at issue, making crimes which reflect on his credibility all the more relevant. Id. The trial court provided the jury with an appropriate instruction limiting the consideration of these prior convictions to the issue of credibility.

This Court has also consistently held that the probative value of ten-year plus convictions may substantially outweigh any prejudicial effect where a defendant's criminal record shows "a continuing course of conduct which was probative of . . . credibility." Johnson, 596 S.W .2d at 104; see also State v. Andrew Walton, C.C.A. No. 02C01-9109-CR-00205, Shelby County (Tenn. Crim. App., Jackson, Aug. 12, 1992). In the instant case, Defendant's ten convictions for related crimes of dishonesty within

a three year period sufficiently establish a pattern of conduct which is highly probative of Defendant's credibility.

Defendant argues that the trial court did not point to specific facts and circumstances of the case and that it did not consider the interests of justice. However, in deciding that the past crimes should be admitted, the court specifically cited the fact that Defendant had been incarcerated for the past 14 years, between 1975 and 1994, for a pattern of misconduct, and the court read the dates of conviction of each offense into evidence. Based on these facts, the court decided that it would violate public policy to prohibit the admission of these crimes simply because Defendant had been incarcerated and for that reason could not commit further crimes. We find that the trial court properly considered the purpose of Rule 609 as well as the interests of justice when it stated that prohibiting the convictions would "fly in the face of public policy to apply the ten year rule under these circumstances."

Based on all the foregoing reasons, we believe the trial court's reasoning supports its conclusion that the probative value of admitting the convictions substantially outweighed the prejudicial

effect on the jury. Therefore, we cannot say that the trial court abused its discretion in ruling that the prior convictions would be admissible if Defendant chose to testify.

B. The trial court properly admitted Defendant's prior convictions for larceny, burglary and receiving stolen property during the sentencing phase of Defendant's trial.

Defendant alleges that even if his convictions were ruled admissible during the guilt phase of the trial, they should not have been allowed into evidence to impeach him during the sentencing phase of the trial. Defendant asserts that the trial court failed to reweigh the probative value of the testimony, the possible prejudice, and the interests of justice before making its decision to admit the impeaching evidence. He further alleges that had the court conducted a second balancing test, the result as to their admissibility would have been different during the sentencing phase.

Defendant cites no authority for the proposition that the trial court had to conduct a new Morgan hearing. Defendant never requested a new hearing, and Defendant's objection to the

admission of the prior crimes was made when the State attempted to impeach his credibility after Defendant had testified on direct examination. Defendant was fully aware from the first Morgan hearing that if he testified that the prior convictions could be used against him. The trial court was under no obligation to conduct a second Morgan hearing.

Furthermore, it is clear that the admission of the prior crimes was wholly proper. As the trial court noted, on direct examination during the sentencing phase the Defendant (1) claimed he did not commit the crime, (2) begged forgiveness from the family but said he had nothing to do with the murder, and (3) testified that he would never hurt anyone. Obviously, these statements put Defendant's credibility directly at issue. Miller, 737 S.W.2d at 560. The probative value of the larceny, burglary and receiving stolen property convictions remained the same between the guilt and sentencing phases of the trial.

Also, the prejudice to Defendant of admitting the crimes during the sentencing phase was actually less than it would have been during the guilt phase. The Defendant had already been convicted

of felony murder and aggravated robbery, so there was no concern the jury would convict Defendant based on a propensity to commit crimes. Therefore, even if a second Morgan hearing was required, the trial court's conclusion to allow the evidence pursuant to Rule 609 was proper.

C. The trial court properly admitted Defendant's conviction for robbery with a deadly weapon.

The trial court ruled at the Morgan hearing that the State could impeach Defendant with the prior conviction of robbery with a deadly weapon. Defendant then chose not to testify at trial and now claims that the trial court abused its discretion in ruling that the robbery was admissible.

Defendant was convicted of robbery with a deadly weapon in 1975 and was released from prison in 1994. Since his release falls within the ten-year rule, the proper analysis under Rule 609 of the Tennessee Rules of Evidence is whether the probative value on the issue of credibility outweighs its unfair prejudicial effect on substantive issues. This is obviously a less strict standard than for prior convictions in excess of ten years. See Tenn. R. Evid. 609(b).

As previously mentioned, in making its determination regarding probative value, the trial court should "(a) 'assess the similarity between the crime on trial and the crime underlying the impeaching conviction,' and (b) 'analyze the relevance the impeaching conviction has to the issue of credibility.'" Farm er, 841 S.W .2d at 839.

In the case sub judice, the trial court properly found the probative value of the conviction outweighed any prejudicial effect. First, the robbery conviction does bear on Defendant's credibility. This Court has held that robbery is a crime of dishonesty. State v. Caruthers, 676 S.W .2d 935, 941 (Tenn. 1984) (holding that admission of defendant's previous armed robbery conviction was proper in trial for first degree murder). It logically follows that it directly relates to Defendant's credibility on the witness stand. This is especially true where a defendant, as in the instant case, flatly denies he committed the crime. See Miller, 737 S.W .2d 556.

Defendant's argument pertaining to this issue focuses on Tennessee case law holding that evidence of a defendant's conviction for an offense similar to the one for which he is presently

on trial should not be introduced because there is too great a danger of it improperly showing a propensity to commit that type of crime. See, e.g., State v. Roberts, 703 S.W.2d 146 (Tenn. 1986) (could not show prior assault and battery conviction in an aggravated assault case); Long v. State, 607 S.W.2d 482 (Tenn. Crim. App. 1980) (could not show prior second degree murder conviction in murder assault case). However, the fact that a prior conviction involves a similar crime for which a defendant is being tried does not automatically require its exclusion. In this case, Defendant was convicted of especially aggravated robbery and felony murder. The prior conviction was for robbery with a deadly weapon. The trial court acknowledged that the similarity of the crimes was an issue, but it found that there was a difference between them in that the crimes for which Defendant was on trial were more serious than the impeaching prior offense.

The mere fact a prior conviction of the accused is identical or similar in nature to the offense for which the accused is being tried does not, as a matter of law, bar the use of the conviction to impeach the accused as a witness. See Miller, 737 S.W.2d at 560. The appellate courts of this State have held that the offense of

robbery is "highly probative of credibility" because it involves dishonesty. State v. Crank, 721 S.W.2d 264, 266 (Tenn. Crim. App.), perm. to appeal denied (Tenn. 1986); State v. Tune, 872 S.W.2d 922, 927 (Tenn. Crim. App.), perm. to appeal denied (Tenn. 1993). Thus, the appellate courts of this State have held that convictions for this felony may be used to impeach an accused being tried for this offense absent circumstances which require a different result. Tune, 872 S.W.2d at 927.

We find no such circumstances in this case. In fact, the robbery conviction in the case before us is "particularly probative regarding credibility." Id. Even assuming the robbery conviction should not have been admitted, any error was harmless in light of the compelling evidence against Defendant as discussed in previous issues. Tenn. R. App. P. 36(b). This issue is without merit.

V. Mitigation Testimony

Defendant argues he is entitled to a new sentencing hearing because the State questioned him about his obtaining cocaine while in prison. Specifically, he asserts that the probative value of this

testimony is outweighed by the prejudicial effect. Tenn. R. Evid. 403.

The defense attempted to show that Defendant was easily susceptible to bad acts at the urging of others. Defendant repeatedly testified that he is mentally slow. He said that he was employed at a business that repaired washing machines, but that he could not learn the trade because he would forget what he was told to do. The only thing he was able to do was hand the repairman the tools. He further testified that while his brothers learned the family business of repairing cars, that he was never able to do so. In fact, he testified his father would get angry with him because he could not even bring the proper tool his father asked for. He also said that he went to special education classes and that he had been seen by doctors because he was mentally slow.

On cross-examination, the State asked Defendant if the reason he got into trouble while in prison was because of his use of cocaine. Defendant said that cocaine was the reason. He later testified that he only obtained and used cocaine once in prison.

The State's questioning about Defendant's ability to obtain drugs was relevant to rebut Defendant's assertions that he was not even able to do simple tasks. Despite his argument that he could not even find the right tools for his father, he was able to find cocaine in prison.

The trial court ruled this information to be relevant to rebut Defendant's mitigation testimony. In doing so it stated:

[T]his conduct while in prison is offered not as it relates to the underlying offense for which we're here this week but as it relates to the mitigation that you elicited through direct regarding your client's limited abilities, his inability to find the necessary tools to help his father, his inability to comprehend enough about the washing machine business to help Mr. Bledsoe -- all these limitations that your client had suggested that he was just a very dull and slow individual that had very limited abilities. This, I think, is an attempt to demonstrate that he's a shrewder person than was painted on direct . . . The statute itself clearly specifically states that the State is entitled to offer proof that rebuts mitigation. And I think this is a fair interpretation of this proof.

We find that the evidence is probative to rebut Defendant's implication that it was always others who got him into trouble.

Defendant repeatedly testified that he unintentionally surrounded himself with people who were bad influences on him and always got him into trouble. Defendant's decision to find and use cocaine while in prison does rebut his repeated assertion that it was always someone other than himself who got him into trouble. When the State asked him about the circumstances of his cocaine use in prison, he again claimed he was naive about the drug and only put some in his nose because a man at the prison "showed me what it was about." He claimed he was hospitalized and had to be told by his doctor to "not accept things from people that try to give me things like that."

The State is statutorily entitled to rebut the mitigation proof put on by Defendant. Specifically, the sentencing statute states that "evidence may be presented as to any matter that the court deems relevant to the punishment and may include . . . any evidence tending to establish or rebut any mitigating factors." Tenn. Code Ann. § 39-13-204(c). Based on the fact that Defendant consistently denied ultimate responsibility, claiming others convinced him to do bad things, the State clearly had a right to rebut this theory. This issue is without merit.

V I. A d m i s s i b i l i t y o f P h o t o g r a p h o f V i c t i m

D e f e n d a n t a l l e g e s i n t h i s i s s u e t h a t t h e t r i a l c o u r t e r r e d i n a d m i t t i n g a p h o t o g r a p h o f t h e v i c t i m t a k e n w h i l e h e w a s a l i v e . D e f e n d a n t c l a i m s t h e p h o t o g r a p h h a d m i n i m a l e v i d e n t i a r y v a l u e a n d s e r v e d o n l y t o i n f l a m e t h e p a s s i o n s o f t h e j u r y .

T e n n e s s e e c o u r t s h a v e f o l l o w e d a p o l i c y o f l i b e r a l i t y i n t h e a d m i s s i o n o f p h o t o g r a p h s i n b o t h c i v i l a n d c r i m i n a l c a s e s . State v. Banks, 564 S.W .2d 947, 949 (Tenn. 1978) (citations omitted). This policy translates into the rule that "the adm issibility of photographs lies within the discretion of the trial court." Id. The trial court's "ruling in this respect, w ill not be overturned on appeal except upon a clear showing of an abuse of discretion." Id. (citations omitted); see also State v. Stephenson, 878 S.W .2d 530, 542 (Tenn. 1994); State v. Bordis, 905 S.W .2d 214, 226 (Tenn. Crim . App.), perm . to appeal denied (Tenn. 1995). However, before a photograph may be admitted into evidence, it must be relevant to an issue that the jury must decide and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. State v. Braden, 867 S.W .2d 750, 758 (Tenn. Crim . App.), perm .

to appeal denied (Tenn. 1993) (citation omitted); see also Tenn. R. Evid. 401 and 403.

In the instant case, the State intended to call eyewitnesses who were customers pumping gas at the time of the murder. Two of these witnesses did not know the victim by name, but could identify him from a picture. The picture was intended to help establish the identity of the person they saw murdered. The State told the court during a bench conference regarding this matter, that it needed to introduce the photograph because two witnesses did not know the victim by name. The trial court responded, "all right." We agree with the State that simply because the trial court did not reiterate the State's argument by restating it for the record, does not mean it did not agree with the reasoning offered by the prosecutor. It is unlikely the trial court would have admitted the photograph if it did not agree with the State's rationale regarding the photograph's probative value.

Furthermore, the trial court found that the prejudice from the photograph was minimal. Specifically, it stated, "This is a fairly neutral, nondescript sort of picture of this individual sitting on a

couch looking at the camera. It's not taken in a church or at a graduation ceremony or with a pack of boy scouts or something like that." From this statement, the trial court obviously found that the probative value of the photograph was not outweighed by any prejudicial effect. See Tenn. R. Evid. 403.

We agree with the trial court's finding that the photograph had "specific evidentiary value" and that it was not the type of picture that would inflame a jury. The trial court did not abuse its discretion in admitting the photograph. This issue is without merit.

VII. Victim Impact Evidence

Defendant argues that the State's effort during the penalty phase to refer to the impact of the victim's death on the victim's family was improper. Specifically the prosecutor stated the following during opening arguments at the sentencing stage:

I'm not going to call members of the family up here and have them cry and make them hurt. They've been through enough. But one of the things we can also show you is victim impact evidence. And I'll incorporate the face of Mr.

Jeff Spears [victim's brother] into our proof. We don't need to say anything else. You saw his face. If it didn't show you pain, then there's no use in me bringing someone up here. You can take that into consideration. It's part of our proof.

The defense objected, but the trial judge reserved his ruling on the objection until after he had heard all of the proof during the sentencing stage. The State did not put on any members of the victim's family during the penalty phase. The State only put on evidence of the statutory aggravator, robbery by the use of a deadly weapon. After Defendant presented his proof, he renewed his objection to any reference to the victim's family during closing arguments. The court overruled the objection, noting that Tennessee Code Annotated section 40-38-204 intended the State to have the opportunity to rebut mitigating proof. The court went on to say that in cases where no mitigating proof is put on by a defendant, then the State would be limited to only proving the enhancement factors. However, since Defendant spent much of the sentencing phase discussing his personality, his childhood, and his mental limitations, then the State had a right to rebut these qualities by discussing what Defendant did and how it affected the family of the victim.

During closing arguments, the prosecutor referred to the picture of the victim stating, "Mr. Smith [Defendant] got up there and cried and said, 'I want to live.' If only this picture could talk; 'I want to live.'" He also referred to the victim's family, saying "How long do you think they've been crying . . . [a] year and a half?" He further said that the killing had hurt the victim's family and had taken "dreams away from their families."

Defendant argues that all the foregoing statements were so inflammatory that they prejudiced the sentencing hearing making it fundamentally unfair. Argument regarding the victim and the impact of his death upon his family is not precluded under either the Eighth Amendment to the United State Constitution or Article I, § 16 of the Tennessee Constitution. State v. Payne, 791 S.W.2d 10 (Tenn. 1990), aff'd, Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). However, the United States Supreme Court expressly declined to foreclose challenges pursuant to statutory sentencing guidelines and the 14th Amendment. In a concurring opinion, it was noted that:

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We merely hold that, if a

State decides to permit consideration of this evidence, the Eighth Amendment erects no per se bar. If such testimony so infects the sentencing hearing as to render it fundamentally unfair, the defendant may seek the appropriate relief under the Due Process Clause.

Id. 501 U.S. at 831, 11 S.Ct. at 2612 (O'Connor, J., concurring). In other words, this does not mean that such argument is otherwise relevant and admissible under Tennessee law. In fact, in State v. Clarence C. Nesbit, C.C.A. No. 02C01-9510-CR-00293, Shelby County (Tenn. Crim. App., Jackson, Apr. 22, 1997) (transferred to supreme court May 8, 1997, No. 02S01-9705-CR-00043), a panel of this Court concluded that victim impact testimony is not admissible pursuant to Tennessee Code Annotated section § 39-13-204(c). In Nesbit this Court said:

Under Tennessee's capital sentencing scheme, 'the only evidence which is relevant during the sentencing phase . . . is that evidence which is relevant to establish or disprove the existence of aggravating circumstances or mitigating factors.' State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991) (citing Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979); Tenn. Code Ann. § 39-13-204(c). Any evidence that does not go to the proof of one or the other of those issues is irrelevant to the jury's deliberation. Cozzolino, 584 S.W.2d at 768. (Footnotes omitted).

Slip op. at 31-32.

It is undisputed that victim impact is not listed as a statutory aggravating circumstance. Tenn. Code Ann. § 39-13-204(1). Therefore, we conclude that the argument was irrelevant to the jury's sentencing determination and was therefore improper.

Our review must now focus upon whether the impermissible argument so affected the jury's determination as to require a remand for another sentencing hearing. In this case, the victim impact references were brief and were introduced solely by the prosecutor during his opening and closing arguments at the sentencing hearing. No members of the victim's family even testified. In the context of the total argument by the prosecutor, the part involving victim impact was insignificant. Notwithstanding the impermissibility of these statements, we conclude that the error in allowing the victim impact argument during the penalty phase was harmless beyond a reasonable doubt. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

VIII. Ambiguous Verdict

Defendant asserts in this issue, raised for the first time on appeal, that the jury's verdict regarding the statutory aggravator was ambiguous, and that he is therefore entitled to a new sentencing hearing. We disagree. Again, this issue is deemed waived, but we will nevertheless briefly address it. See Tenn. R. App. P. 3(e).

The trial judge charged the jury as follows:

The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person. The state is relying upon the crime of robbery by the use of a deadly weapon, which is a felony involving the use of violence to the person. (emphasis added).

The jury completed the verdict form with the language "robbery by use of a deadly weapon." Defendant asserts that since he was convicted of especially aggravated robbery, the jury could have been confused between the old robbery charge and the robbery conviction in the instant case. Specifically, Defendant asserts that when the jury wrote down "robbery by use of a deadly weapon," the jury could have meant especially aggravated robbery. If the jury had in fact relied on the robbery conviction in the instant

case to establish the aggravator, then it would be a violation of State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); see also State v. James Lloyd Julian, II, C.C.A. No. 03C01-9511-CV-00371, Loudon County (Tenn. Crim. App., Knoxville, July 24, 1997), perm. to appeal denied (Tenn. 1998).

However, we find Defendant's assertion to be pure speculation. The jury was specifically told that to find an aggravating circumstance, Defendant must have been "previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person" (emphasis added). The jury was also informed that the State was relying on "robbery by use of a deadly weapon" as the aggravator. In finding Defendant guilty, the jury found as the aggravator "robbery by use of a deadly weapon."

There is no basis for Defendant's claim that, after being properly instructed, and listing the aggravating factor on the jury form as "robbery by use of a deadly weapon," the jury actually meant "especially aggravated robbery." Absent evidence to the contrary, a jury is presumed to have followed its instruction. State

v. Melvin, 913 S.W.2d 195, 201 (Tenn. Crim. App. 1995), perm. to
appeal
denied (Tenn. 1995). This issue is without merit.

For the reasons set forth herein, the judgment of the trial court
is affirmed.

T H O M A S T . W O O D A L L , J u d g e

C O N C U R :

J O H N H . P E A Y , J u d g e

P A U L G . S U M M E R S , J u d g e