IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1998 SESSION

STATE OF TENNESSEE,	*	No. 01C01-9801-CR-00032
Appellee	*	DAVIDSON COUNTY
VS.	*	Hon. J. Randall Wyatt, Jr., Judge
DONALD K. MOORE, JR.	*	(Felony Murder)
Appellant.	*	

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OPIINION FILED: _____

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

The appellant was convicted by a jury in the Davidson County Criminal Court of one count of felony murder and one count of especially aggravated robbery. The trial court imposed consecutive sentences of life imprisonment in the Tennessee Department of Correction for the felony murder conviction and twenty (20) years incarceration in the Department for the especially aggravated robbery conviction.

In this appeal as of right, the appellant presents the following issues for review:

> (I) Whether the evidence is sufficient to sustain the appellant's convictions of felony murder and especially aggravated robbery;
>
> (II) Whether the trial court committed plain error when it failed to give the jury a curative instruction regarding a witness' reference to a prior "hung decision;"
>
> (III) Whether the trial court committed plain error when it failed to dismiss a juror who heard prejudicial, out-of-court statements;
>
> (IV) Whether the trial court erred by admitting into evidence threatening letters written by the appellant; and
>
> (V) Whether the trial court erred by imposing consecutive sentences.

Following a review of the record, we affirm the judgment of the trial court.

I. Factual Background

The appellant's convictions resulted from the killing of Hiawatha Bennett, a taxicab driver who was found dead in his cab near 25th Street and Eden Street in Nashville. At the appellant's trial, Yakou Murphy, a participant in the crimes, testified on behalf of the State. He stated that, in the early morning hours of February 22, 1996, he and the appellant went to the Krystal restaurant on Metro

Center Boulevard in Nashville, where they remained for several hours. During that time, the appellant noticed that Ernest Simpson, an off-duty police officer and Krystal employee, was armed with a gun. The appellant engaged Mr. Simpson in conversation about the gun.

At some point, Mr. Murphy fell asleep. When he awakened, he decided to call a taxicab. Mr. Murphy testified that he went to the register and asked Lola Brown, a Krystal employee, if he could use the telephone in the restaurant. She replied that customers are not permitted to use the telephone and directed him to a pay telephone located across the street at the McDonald's restaurant. Mr. Murphy and the appellant crossed the street to the pay telephone, called the Diamond Cab Company, and retumed to the Krystal in order to wait for the taxicab.

Neither the appellant nor Mr. Murphy had money to pay for a taxicab. They agreed, therefore, that they would jump out of the taxicab when it approached their destination. Mr. Murphy denied that he and the appellant planned to rob the taxicab driver. However, he testified that, on the morning in question, the appellant was carrying a .380 caliber pistol and Mr. Murphy was carrying a 9mm pistol.

Roy Gillespie, the owner of Diamond Cab Company, confirmed at trial that the victim, Hiawatha Bennett, was a driver employed by his company and was dispatched to the Krystal on Metro Center Boulevard in the early morning hours of February 22, 1996. Mr. Murphy testified that when Mr. Bennett arrived, the appellant entered the vehicle and seated himself directly behind the taxicab driver. Mr. Murphy sat beside the appellant in the back seat. The appellant and the taxicab driver began arguing about the cab's destination. The appellant then pulled out his gun and ordered the driver to give him money. The driver surrendered approximately $20.00, whereupon the appellant shot the driver several times in the head. Mr. Murphy also pulled out his gun and fired one shot at the floorboard of the

vehicle.

Immediately after firing his gun, Mr. Murphy exited the taxicab and ran toward Pearl-Cohn High School. The appellant met him there, and they both proceeded to a house on Herman Street belonging to a friend named Christopher Davis. At Mr. Davis' house, the appellant counted out the proceeds of the robbery and gave Mr. Murphy approximately ten dollars. Both the appellant and Mr. Murphy stayed the night at Mr. Davis' house. Later that morning, according to the testimony of Jeffrey Council, a garbage truck driver, Mr. Council discovered the taxicab and the driver's body at the intersection of 25th Street and Eden Street in Nashville, near Pearl-Cohn High School.

Lola Brown, a Krystal employee who was working on February 22, 1996, at the Metro Center Boulevard restaurant, also testified for the State. Ms. Brown stated that she noticed two black males in the restaurant on the morning in question. They remained at the restaurant for several hours and did not order anything. One of the men asked her if he could use the telephone in the restaurant. She directed him to pay telephones located outside the Krystal and across the street at the McDonald's restaurant. The man also asked her for change and she obliged, giving him four quarters. Ms. Brown could not see the McDonald's pay telephone from inside the Krystal restaurant, but she did see a Diamond taxicab drive into the Krystal's parking lot. Although she did not observe the two men leave, she noticed that they were not inside the restaurant after the taxicab's departure. Later that day, Ms. Brown helped the police draw a sketch of the two suspects. Additionally, at trial, Ms. Brown positively identified the appellant as one of the two men she saw inside the Krystal restaurant on February 22, 1996.

Ernest Simpson, an employee of the Metropolitan Nashville Police Department and part-time manager of the Krystal restaurant on Metro Center

Boulevard, testified that he was working at the restaurant on February 22, 1996. He was armed with a handgun, because his duties included being a security guard in addition to managing the restaurant. At approximately 3:00 a.m., Mr. Simpson observed two black males in the restaurant. One of the men inquired about his gun. During the ensuing conversation, Mr. Simpson was able to view both men for ten to fifteen minutes. Later that morning, at 3:30 a.m., Mr. Simpson noticed a Diamond taxicab in the Krystal's parking lot. He testified that he did not see the two men enter the taxicab, but they left the restaurant at approximately the same time as the cab departed. At trial, Mr. Simpson positively identified the appellant as one of the two men he saw in the Krystal restaurant on February 22, 1996.

Antonio Cartwright testified that he had known the appellant for approximately two years. In February, 1996, he occasionally stayed overnight at a house on Herman Street which was frequented by the appellant, Yakou Murphy, Christopher Davis, Ronald Benedict, and Dimitrice Martin. The house was "[n]ot even a block" from Pearl-Cohn High School. Mr. Cartwright stated that it was not unusual to see guns at the residence. He had specifically seen a 9mm handgun and a .380 caliber handgun.

Mr. Cartwright first became aware of the slain taxicab driver while watching the news on television. The newscast indicated that the body was discovered near Pearl-Cohn High School and provided a description of the two suspects. From the location of the body and descriptions of the suspects, Mr. Cartwright thought that the appellant might be involved in the incident.

Mr. Cartwright testified that, on the day after the shooting, he encountered the appellant, who asked him if he had heard about the taxicab driver. When Mr. Cartwright responded affirmatively, the appellant asked him if he knew who had shot the driver. Mr. Cartwright told the appellant that he thought the

appellant and "G-Berry" were involved. The appellant stated that "G-Berry" was not involved but did not deny his own participation. When Mr. Cartwright asked why the taxicab driver was killed, the appellant responded that the driver "did not want to come on with money, so he had to go." The day after this conversation, the appellant left Nashville for San Diego, California.

Dimitrice Martin testified that, at the time of the murder, she was staying at the residence on Herman Street. On February 22, 1996, she learned of the shooting from Ronald Benedict, another visitor at the house. She also saw a news report on television. Subsequently, she overheard a conversation between the appellant, Yakou Murphy, and Christopher Davis. In that conversation, the appellant and Mr. Murphy stated that they had been at the Krystal on Metro Center Boulevard, had called a taxicab, and had robbed the driver. They explained that they shot the taxicab driver, because he did not have a lot of money. Mr. Davis remarked that what they had done was "stupid." The appellant replied that Mr. Davis was "tripping." Ms. Martin testified that on February 24, 1996, the appellant traveled to California.

Dimitrice Martin also testified that, after the appellant's arrest and while she was incarcerated on an unrelated robbery charge, she began receiving letters from the appellant. She received five letters from the appellant between March 23, 1997, and April 17, 1997. The letters indicated that the appellant was incarcerated and threatened retaliation should Ms. Martin testify at the appellant's trial.

Alfred E. Gray III, a detective with the Murder Squad Division of the Metropolitan Nashville Police Department, testified that he was the lead detective in the investigation of Mr. Bennett's death. On February 28, 1996, he visited the Herman Street residence. While he was inside the residence interviewing Antonio Cartwright and Ronald Benedict, four individuals including Dimitrice Martin ran into

the house. Three of the individuals appeared to be armed and fled when Detective Gray showed them his identification. According to Detective Gray, a 9mm handgun and an assault rifle were later recovered from the Herman Street residence.

Following his initial visit to the Herman Street residence, Detective Gray transported Ms. Martin and Mr. Cartwright to the police station for questioning about the murder. Detective Gray was told that the appellant and an individual named "K", later identified as Yakou Murphy, were the perpetrators of the crime. On the basis of this information, Detective Gray prepared a photographic lineup, which included a photograph of Yakou Murphy. From the lineup, Lola Brown, a Krystal employee, identified Yakou Murphy as one of the men she had seen in the Krystal on the morning of the murder.

On March 14, 1996, Detective Gray arrested Yakou Murphy. Mr. Murphy told the police that the appellant had robbed and shot the taxicab driver. Detective Gray discovered that the appellant was in San Diego, California and, on March 21, 1996, traveled to San Diego in order to arrest the appellant. Detective Gray returned to Nashville with the appellant on March 22, 1996.

Tommy M. Heflin, a special agent with the Tennessee Bureau of Investigation at the Forensic Services Crime Laboratory and an expert in firearms identification, testified that he received certain items for testing from Detective Gray, including three fired .380 caliber cartridge casings, one fired 9mm cartridge casing, and one 9mm semi-automatic pistol. He additionally received three fired .380 caliber bullets, one recovered from the neck of the victim and two recovered from the taxicab, and one fired 9mm bullet recovered from the left leg of the victim. Testing revealed that the three .380 cartridge casings were fired from the same firearm. Moreover, the 9mm cartridge casing was fired from the recovered 9mm semi-automatic pistol. Furthermore, Mr. Heflin determined that all three .380 caliber

bullets were fired from the same gun and that the 9mm bullet was fired from the recovered 9mm pistol.

Dr. Ann Bucholtz testified that she is a forensic pathologist and licensed medical doctor. She was employed as a forensic pathologist by the Davidson County Medical Examiner's Office. In a stipulated statement, she recounted that, pursuant to her duties, she performed an autopsy on the victim. Dr. Bucholtz determined that the cause of Mr. Bennett's death was seven gunshot wounds.

II. Analysis

A. Sufficiency of the Evidence

The appellant complains that there was insufficient evidence to sustain his convictions for felony murder and especially aggravated robbery. He contends that the accomplice testimony of Yakou Murphy was unreliable and uncorroborated by independent evidence.

In Tennessee, appellate courts accord considerable weight to the verdict of a jury in a criminal trial. In essence, a jury conviction removes the presumption of the defendant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that "no reasonable trier of fact" could have found the essential elements of the offense of felony murder and especially aggravated robbery beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom.

State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

In the instant case, the appellant was convicted pursuant to Tenn. Code. Ann. § 39-13-202 (1997) of first degree murder in the perpetration of a felony. Felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any … robbery … ." Id.

The appellant was also convicted pursuant to Tenn. Code. Ann. ' 39-13-403(a) (1997) of especially aggravated robbery which is "robbery as defined in § 39-13-401[, the intentional or knowing theft of property from the person of another by violence or putting the person in fear]: … Accomplished with a deadly weapon; and … Where the victim suffers serious bodily injury." Id.

Yakou Murphy testified at the appellant's trial that he was present when the appellant pointed a .380 caliber pistol at the victim and demanded money. When the appellant did not receive a satisfactory amount of money, he shot the victim several times. The State concedes that Mr. Murphy was an accomplice to the appellant's crimes. The rule of law in Tennessee is well settled that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). However, corroborating evidence "'need not be adequate, in and of itself, to support a conviction; it is sufficient if it … fairly and legitimately tends to connect the defendant with commission of the crime charged.'" Id. (quoting State v. Gaylor, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992)). In other words, slight circumstances will suffice to furnish the necessary corroboration of an accomplice's testimony. State v. Sparks, 727 S.W.2d 480, 483

(Tenn. 1987); State v. Robinson, 971 S.W.2d 30, 42 (Tenn. Crim. App. 1997), perm. to appeal denied, (Tenn. 1998). Moreover, such evidence may be direct or entirely circumstantial. Bigbee, 885 S.W.2d at 803. Whether an accomplice's testimony has been sufficiently corroborated is a question for the jury. Id.

In this case, we concur in the jury's determination that the testimony of Yakou Murphy was sufficiently corroborated by independent evidence. Ernest Simpson and Lola Brown both identified the appellant as one of the men in the Krystal on the morning of the shooting. Dimitrice Martin testified that, following the shooting, she overheard the appellant and Mr. Murphy admit to participation in the robbery and murder. Likewise, Antonio Cartwright testified that, following the robbery and shooting, the appellant implied to Mr. Cartwright that he was involved in the incident, explaining that the taxicab driver "didn't want to come on with the money, so he had to go." Moreover, Tommy Heflin testified that three cartridge casings and three bullets recovered from the taxicab and the victim's body were fired from a .380 caliber weapon, corroborating Mr. Murphy's testimony that the appellant was armed with a .380 caliber pistol on the morning of the shooting. In summary, there was an abundant amount of evidence to corroborate the testimony of Mr. Murphy and establish the guilt of the appellant. This issue is without merit.

B. Plain Error

i. Witness' Statement Concerning a Prior "Hung Decision"

The appellant next contends that the trial court committed plain error when it failed to give the jury a curative instruction regarding a witnesses' reference during trial to a prior "hung decision." The appellant argues that this statement was prejudicial to the appellant's case, because the jury could have deduced thereby that a prior trial had occurred and that no verdict had been rendered. The appellant argues that this statement encouraged the jury to return a guilty verdict on the basis

of information irrelevant to the current trial.

The appellant's trial counsel elicited the disputed testimony when he cross-examined Lola Brown about a mistake she had made in her testimony in the previous trial. In response to defense counsel's questioning, Ms. Brown testified, "I had told them that I knew that I had made a mistake and that I was very sorry. They also let me know that it was … some kind of hung decision or whatever." At this point, the trial court interjected, "[Y]ou don't need to get into what they say." The appellant's trial counsel did not contemporaneously object to the witness' statement or request a curative instruction.

We have previously observed that the absence of a curative instruction is reversible only when there has been a request for such an instruction. State v. Greer, No. 01C01- 9404-CR-00140, 1995 WL 358623, at *3(Tenn. Crim. App. at Nashville, June 15, 1995). As a general rule, the failure of defense counsel to interpose a contemporaneous objection, request a curative instruction, or move for mistrial constitutes waiver of the issue on appeal, absent plain error. See Robinson, 971 S.W.2d at 42; State v. Griffis, 964 S.W.2d 577, 599 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1997); State v. Seay, 945 S.W.2d 755, 762 (Tenn. Crim. App. 1996); Tenn. R. App. P. 36(a); Tenn. R. Crim. P. 52(b). Moreover, we note that the appellant failed to raise this issue in his motion for new trial. Tenn. R. App. P. 3(e) provides that failure to specifically state an issue in a motion for new trial results in waiver of the issue on appeal. Again, however, we do have the authority to address this issue as plain error. Tenn. R. Crim. P. 52(b).

Before plain error may be recognized pursuant to Tenn. R. Crim. P. 52(b), the error must be "an especially egregious error that strikes at the fairness, integrity, or public reputation of judicial proceedings." State v. Adkisson, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). In State v. Adkisson, this court listed the

following factors to be considered in determining whether to address plain error: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the issue is necessary to do substantial justice. Id. at 641-42.

The appellant cites State v. Claybrook, 736 S.W.2d 95, 100 (Tenn. 1987), for the proposition that a clear and unequivocal rule of law has been breached. In Claybrook, the Supreme Court reiterated the rule that, during the voir dire of prospective jurors,

> "whenever there is believed to be a significant possibility that a juror has knowledge of the jury verdict at a prior trial, or has been exposed to other potentially prejudicial material, the examination of each juror, with respect to his exposure, shall take place outside the presence of other chosen and prospective jurors."

Id. (citation omitted). The appellant asserts that "no such examination took place, all the jurors presumably heard the "hung decision" statement and that statement clearly prejudiced appellant."

Initially, Claybrook is not applicable in the instant case, as the error complained of by the appellant did not occur in the context of the voir dire of prospective jurors. Moreover, the extent of each juror's exposure to the information at issue is clear upon the face of the record, because the information was part of the testimony adduced at trial. Thus, we can also conclude that the jury in this case was not exposed to "extraneous" information giving rise to a rebuttable presumption of prejudice. See, e.g., State v. Blackwell, 664 S.W.2d 686, 689 (Tenn. 1984); State v. Osborne, No. 01C01-9708-CC-00327, 1998 WL 917809, at *3 (Tenn. Crim. App. at Nashville, December 21, 1998); State v. Dozier, No. 02C01-9610-CC-00357, 1997 WL 684944, at *9 (Tenn. Crim. App. at Jackson, November 4, 1997), perm. to

appeal denied, (Tenn. 1998). Rather, Ms. Brown's testimony resulted in the presentation to the jury of potentially prejudicial evidence of questionable relevance. Tenn. R. Evid. 402 and 403.

Yet, as noted by the State, defense counsel's persistent questioning of Ms. Brown concerning her prior testimony invited her objectionable response, raising an inference that the appellant's failure to object at trial was indeed a tactical decision. In any event, in light of the strength of the State's proof and the ambiguous nature of Ms. Brown's statement, we conclude that any error was harmless beyond a reasonable doubt. See State v. Cook, 816 S.W.2d 322, 326 (Tenn. 1991); Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Thus, we conclude that the factors set forth in State v. Adkisson do not weigh in favor of finding plain error.

ii. Juror's Exposure to Out-of-Court Statements

The appellant asserts for the first time on appeal that the trial court also committed plain error when it failed to dismiss a juror who heard prejudicial, out-of-court statements. During the trial, the judge was notified that a juror, Rudy Kalis, may have been exposed to certain out-of-court statements. The trial court conducted a jury-out hearing in order to determine the content and possible prejudicial impact of the statements.

During the hearing , Mr. Kalis testified that, as he was entering the courtroom the previous morning, he noticed a large group of police officers. When Mr. Kalis made an observation concerning the number of police officers, one of the officers responded, "[W]e're just trying to be careful. There is a trial up there with a – with a young fellow who might be part of a gang." Mr. Kalis stated that the police officer then mentioned the appellant's name. The trial court and the appellant's trial attorney questioned Mr. Kalis in order to determine whether he could remain

impartial after hearing the police officer's statement. Mr. Kalis assured the trial court and the appellant that he could fairly and objectively assess the evidence and that he would not share the extraneous information with other jurors. Following this exchange and after discussing the matter with the appellant, defense counsel informed the court of the appellant's agreement that Mr. Kalis should remain on the jury. Nevertheless, the appellant now contends that the trial court's failure to dismiss Mr. Kalis constituted plain error.

Although the court's inquiry occurred mid-trial, on appeal the appellant is seeking to impeach the jury's verdict on the basis of Mr. Kalis' exposure to the police officer's statement. We conclude that the trial court was in the best position to determine whether Mr. Kalis would be unable to perform his duties and assess any potential prejudice to the appellant. State v. Young, 866 S.W.2d 194, 195-197 (Tenn. Crim. App. 1992). See also Tenn. R. Crim. P. 24(e)(1) ("[a]lternate jurors … shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties"). Findings of fact made by the trial judge after an evidentiary hearing are afforded the weight of a jury verdict unless the evidence contained in the record preponderates against his findings. Id. at 197. At trial, the appellant was satisfied that the trial court had reached the proper conclusion, as is this court on appeal. Id. We conclude that a finding of plain error is not warranted by the record. This issue is without merit.

C. Trial Court's Admission into Evidence of the Appellant's Letters

The appellant additionally complains that the trial court erred by admitting threatening letters written by the appellant to Dimitrice Martin. Initially, the appellant cites Tenn. R. Evid. 403 and contends that certain excerpts from the letters that were read into evidence by Dimitrice Martin were unfairly prejudicial. The appellant submits the following remarks from several different letters to illustrate his argument:

> Whatever you do, do not get on that stand against anybody, because for one it is a death wish. Anybody get on that stand against me, I'm going to eat they ass out the frame. I'm telling you from experience, the only way you can get out of that sh-- is to stay quiet, shut the fu-- up, you get what I am saying, my queen. And by you hitting that stand, you're giving the jurors reasonable doubt to believe that I did the sh--, because for the simple fact that you stay at the house and we hung together.

Tenn. R. Evid. 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury… ." See also State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. On appeal, this court will not overturn a trial court's determination pursuant to Rule 403 absent an abuse of discretion. State v. Cribbs, 967 S.W.2d 773, 793 (Tenn.), cert. denied, __ U.S. __, 119 S.Ct. 343 (1998).

"'Any attempt by an accused to conceal or destroy evidence, including an attempt to suppress the testimony of a witness, is relevant as a circumstance from which guilt of the accused may also be inferred.'" State v. Maddox, 957 S.W.2d 547, 552 (Tenn. Crim. App. 1997)(citations omitted). The letters written by the appellant clearly reflect an attempt to suppress testimony. On the basis of the record before this court, we cannot conclude that the trial court erred in determining that the probative value of this evidence outweighed its prejudicial impact.

The appellant also argues that a passage from a letter written on March 20, 1997, to Dimitrice Martin should not have been admitted into evidence pursuant to Tenn. R. Evid. 404(b), because the passage referred to the appellant's

incarceration. Moreover, the appellant contends that the prejudicial effect of this specific excerpt outweighed any probative value. The excerpt, in its entirety, reads as follows:

> So you've got four counts of Aggravated Robbery. Have you went to court yet? Whatever you do, do not get on that stand against anybody, because for one it is a death wish. It will go with you forever. And that's what the white man wants for folks to snitch or whatever, so they can sit back and laugh, knowing they know what happens to snitches. That's what I am trying to tell "K." They are tricking him. I put it like this, they got to earn they stripes. I don't want to be no sell out or labelled as no snitch. I mean if you want to be locked up, that's on you, but if you don't, you can avoid it by sitting in the cut, staying quiet, because *this is not the kind of place* for no black queen or no black king.

(Emphasis added).

We first note that the appellant has waived any objection to this specific statement, because he failed to properly object to its admission at trial. During the appellant's trial, the trial court conducted a hearing to allow the appellant to voice his objections to particular passages in the letters. Defense counsel proffered a general objection to the admission of the letters, including the March 20, 1997, letter pursuant to Tenn. R. Evid. 403 and 404. However, counsel failed to direct the trial court's attention to the appellant's vague reference to his incarceration. Indeed, even when the trial court mentioned the March 20, 1997, letter, defense counsel failed to proffer a specific objection, nor did counsel request a Rule 404(b) hearing.

Tenn. R. Evid. 103(a)(1) provides that error may not be predicated upon a ruling which admits evidence, unless a timely objection or motion to strike appears in the record, stating the specific ground for the objection. The Tennessee Court of Appeals has similarly held that "[w]hen documentary evidence contains matters that are properly admissible, a general objection to the whole document is

insufficient." Monday v. Millsaps, 264 S.W.2d 6, 18 (Tenn. App. 1953). This issue has been waived.

Even if we were to address the merits of this issue, we find that the trial court did not err in admitting the March 20, 1997, letter. As noted earlier, the State introduced the letter for the purpose of establishing the appellant's attempts to suppress testimony. Although the letter arguably implied that the appellant was incarcerated when he wrote the letter, the jury was informed by the testimony of Detective Gray that the appellant was arrested on March 21, 1996, and charged with the murder of Hiawatha Bennett. Thus, it is difficult to conclude that the appellant was prejudiced by the aforementioned passage when it was a matter of common sense for the jury to know that the appellant was either incarcerated or on bond pending the appellant's trial. Cf. Carroll v. State, 532 S.W.2d 934, 936 (Tenn. Crim. App. 1975); State v. Smith, No. 01C01-9205-CC-00152, 1995 WL 84021, at *17 (Tenn. Crim. App. 1995). Moreover, it is dubious that the appellant's incarceration for the offense for which he was being tried constituted an "other crime, wrong, or act" within the meaning of Tenn. R. Evid. 404(b). We conclude that this issue is without merit.

D. Consecutive Sentencing

The appellant complains that the trial court erred by imposing consecutive sentences. The trial court imposed consecutive sentences of life imprisonment for the felony murder conviction and twenty years incarceration for the especially aggravated robbery conviction.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code. Ann. § 40-35-401(d) (1997). This presumption of correctness is "conditioned

upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is upon the appellant to demonstrate the impropriety of the sentence. State v. Wilkerson, 905 S.W.2d 933, 934 (Tenn. 1995).

Our review of the appellant's sentence requires an analysis of (1) the evidence, if any, received at trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code. Ann. 40-35-102, -103, and –210 (1997).

Additionally, Tenn. Code. Ann. § 40-35-115 (1997) provides that consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exist:

> The defendant is a professional criminal … ;
>
> The defendant is an offender whose record of criminal activity is extensive;
>
> The defendant is a dangerous mentally abnormal person … ;
>
> The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor … ;
>
> The defendant is sentenced for an offense committed while on probation; or
>
> The defendant is sentenced for criminal contempt.

Tenn. Code. Ann. § 40-35-115(b).

Moreover, in State v. Wilkerson, 905 S.W.2d at 938, our supreme court ruled that consecutive sentences cannot be required for any of the classifications listed above "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." The court in Wilkerson described sentencing as "a human process that neither can nor should be reduced to a set of fixed or mechanical rules." Id. (footnote omitted).

The trial court in this case based the imposition of consecutive sentences upon the classification of the appellant as a dangerous offender. Tenn. Code. Ann. § 40-35-115(b)(4). The trial court found that the appellant "apparently had no regard, whatsoever, for human life … and no hesitation about committing a crime in which the risk to human life is high." The court observed:

> Hiawatha Bennett is somewhere in a graveyard. He has no recourse at all. He doesn't have any mitigating factors. He doesn't have any enhancement factors. In fact, I don't know that anybody representing him is even here today. But he is a human being – or was a human being who deserves the respect to be able to make an honest living without being riddled [with bullets] right here in Nashville, Tennessee, because of some young person with no hesitation to kill someone with a weapon running around shooting people and ended his life.

The trial court failed to explicitly state on the record its findings concerning the Wilkerson factors that the consecutive sentences reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the appellant. Nevertheless, exercising our power of de novo review, we conclude that the court properly sentenced the appellant.

In this case, the appellant and his accomplice called and requested a taxicab, knowing that neither man possessed money to pay for a taxicab. Both men were armed. Once in the taxicab and while the taxicab was proceeding down a public street, the appellant pulled out his gun and demanded money. Because the

victim, Hiawatha Bennett, did not move quickly enough or because he did not possess enough money, the appellant shot the victim six times at close range, killing Mr. Bennett. The proceeds of the robbery amounted to approximately $20.00. Subsequently, the appellant bragged to acquaintances about his role in the murder and then threatened to harm any acquaintance who testified against him or spoke to the police about the appellant's involvement in the murder. We agree that the circumstances of these offenses demonstrate the appellant's lack of regard for human life and the absence of any hesitation to commit a crime in which the risk to human life was high. Moreover, the manner in which these crimes were committed militates against an earlier release into the community and supports the imposition of consecutive sentencing.

Additionally, the testimony at trial established that the appellant habitually carried firearms. The pre-sentence report reflects a juvenile criminal record which includes a drug offense and several theft offenses. Finally, the pre-sentence report reflects that the appellant admitted to the daily abuse of marijuana prior to his arrest in this case. It is accordingly apparent from the record that consecutive sentencing is necessary to protect the public from further criminal conduct by this appellant. This issue is meritless.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

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Norma McGee Ogle, Judge

CONCUR:

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John H. Peay, Judge

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Joseph M. Tipton, Judge