IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1998 SESSION

FILED

November 19, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 01C01-9707-CC-00256**
Appellee,	)	
	)	**DICKSON COUNTY**
VS.	)	
	)	**HON. ALLEN W. WALLACE,**
DENNIS R. GILLILAND,	)	**JUDGE**
	)	
Appellant.	)	(Felony Murder)

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OPINION FILED: _____

CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING

JOE G. RILEY,
JUDGE

OPINION

The defendant, Dennis R. Gilliland, appeals as of right his conviction for felony murder by a Dickson County jury.[1] He received a sentence of life without the possibility of parole. The defendant raises the following issues on appeal:

> (1) the trial court erred in admitting testimony regarding the defendant's involvement in two (2) homicides three (3) weeks before the instant offense;
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> (2) the trial court erred in admitting into evidence currency found outside the Dickson County police station;
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> (3) the defendant was unfairly prejudiced when he appeared before the jury in handcuffs;
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> (4) the state did not prove venue by a preponderance of the evidence;
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> (5) the trial court erred in admitting into evidence certain personal effects of the victim without requiring a proper chain of custody;
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> (6) the evidence was insufficient to justify the guilty verdict;
>
> (7) the trial court erred by ruling that the state's withdrawal of its intent to seek the death penalty did not include a withdrawal of its intent to seek life without parole;
>
> (8) the trial court considered improper factors in sentencing the defendant to life without parole; and
>
> (9) newly discovered evidence warrants a new trial.

The defendant's conviction is affirmed, but the case is remanded for resentencing.

I.

On July 19, 1995, the defendant asked his mother for gas money. She first offered $10, but the defendant replied he needed more so she gave him

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[1] The jury convicted the defendant of premeditated first degree murder and felony murder. The trial court vacated the premeditated first degree murder conviction, finding the evidence insufficient.

$20. The defendant arrived at a local bar called “Daisy Dukes” at approximately 9:30 p.m. that evening. There he joined Ronnie Murphy.

After spending approximately three (3) hours in the bar, the defendant and Murphy left. Murphy testified that the defendant encountered Eddie Christy in the parking lot of the bar. The defendant told Christy about a shooting several weeks earlier wherein the defendant fired .20 gauge shotgun slugs at two (2) brothers named Walton. Both brothers were killed. The grand jury declined to indict the defendant, concluding the homicides were justifiable. Murphy testified that the defendant produced a .20 gauge single-shot shotgun from his truck to show Christy . Murphy observed a box of slug ammunition on the front seat of the defendant’s truck at that time.

The defendant followed Murphy to Murphy’s house where Murphy left his truck. They proceeded in the defendant’s truck to a convenience store to buy beer, arriving sometime after midnight. There was a discussion as to whether they had enough money to purchase the beer. The beer was ultimately purchased on the credit ticket of the defendant’s father.

The defendant and Ronnie Murphy drove to Donnie Murphy’s house. Donnie Murphy was not at home. Ronnie Murphy and the defendant went to the basement to play pool and drink beer. Shortly thereafter, Donnie Murphy and the victim, Bobby Bush, arrived at the house.

Donnie and Ronnie Murphy, the defendant, the victim and a person named Michael Heath played pool and drank beer in the basement. Ronnie Murphy and Michael Heath eventually left, leaving the defendant with Donnie Murphy and the victim. The victim began discussing the prior shootings with the defendant. Donnie Murphy testified that the victim did not believe the defendant’s statement that he shot the Walton brothers with .20 gauge shotgun

slugs from a distance of seventy-five (75) yards. The defendant then retrieved a .20 gauge shotgun from his truck. When the defendant opened the breech, a .20 gauge slug shell was ejected onto the floor.

The victim then pulled from his pocket at least two (2) $100 bills and several other bills, stating that he would bet all of the money that he too would have shot the brothers if faced with the same situation. The defendant looked at the victim's money and stated that he was not impressed. The victim responded that he was not attempting to impress the defendant.

Around 3:20 a.m., the victim said he was going to drive home. Donnie Murphy attempted to dissuade the victim from doing so, as he had consumed numerous beers and had a previous DUI conviction. The victim persisted and departed, stating that he planned to travel home by a route not frequented by the police. The defendant left shortly after the victim, stating he would drive by the victim's house to make sure that he arrived safely. He took a cooler containing the group's remaining beer.

Beverly Sue Heath was a neighbor of the victim. At approximately 4:10 a.m. on the morning in question she saw a vehicle driving down the road in front of her house "throwing sparks" and sounding as if it had a flat tire.

Vera Bush, the victim's mother, testified that she awoke briefly at 3:00 a.m. that morning and noticed her son was not at home. She woke again at 4:45 and noticed her son's wrecked truck parked in an unusual place. The victim had an elaborate method of parking his truck as it did not have an operable reverse gear. The victim was neither in the truck nor the house.

The defendant ran out of gas that morning around 5:30. He approached Oda Lovins' house and asked him for a ride to a gas station. The defendant

pumped $5 worth of gas in a can and offered to tip Lovins $10 for his effort. Lovins observed a "fairly good wad of bills" in the defendant's billfold. After fueling his truck from the can, the defendant drove back to the station and purchased gasoline for which he paid $21 in cash.

The defendant then drove to the farm of Bill Freeman. Freeman stated that he had known the defendant for only eighteen (18) months and was not sure why the defendant came by his house that morning. The defendant began talking about the Walton homicides. Later that day Freeman discovered a cooler of beer on his truck, and a farmhand related that he saw a truck similar to the defendant's driving away from the farm.

From the Freeman farm, the defendant proceeded to Green's Market where he purchased a case of beer with $20 cash. He then drove to Clarksville where he ate breakfast at a pancake restaurant and rented a room at the Quality Inn. The defendant paid $44 in cash for the room, rented a movie for $7, and tipped the maid $5 for delivering the movie to the room.

A mail carrier discovered the victim's body lying along a road in rural Houston County around 10:30 that morning. The victim, who had a large sum of currency the previous evening, had only change in his pocket when found.

The defendant's whereabouts for the rest of the day are disputed. The defendant claimed to have visited a riverfront park after leaving the pancake restaurant, then to have traveled back to the "old Lock B bottoms" where he remained until that evening when he presented himself at the Dickson County Sheriff's office. The state presented evidence of the defendant's stay at the Quality Inn in Clarksville.

Lieutenant Randy Starkey with the Dickson County Sheriff's Office

testified that he was at the Sheriff's Station No. 2 on the evening of July 20, 1995, when the defendant arrived at the station and engaged him in conversation. Starkey stated that the defendant had been to the station several times as a result of the investigation of the Walton homicides. Thus, when the defendant mentioned drinking beer with the victim at the Murphy residence the previous night, Starkey became interested. He asked the defendant what the defendant knew about the victim. The defendant asked if the victim had gotten into some trouble. Starkey then related the story of the victim being found murdered that morning.

Investigator Ted Tarpley and TBI Agent Steve Watkins testified that they were advised by the victim's family shortly after beginning their investigation that the defendant should be considered as a potential suspect. They soon learned the defendant was already at the Sheriff's Station No. 2.

The defendant related his version of the previous evening's events to the officers. The defendant neglected to tell the officers about running out of gas, buying beer and renting a motel room that morning. The defendant told the officers he spent the night watching three (3) barges at the river bottoms.[2] The defendant related that he had only $5 in his possession at that time. The fact that the defendant was carrying a shotgun was discovered in normal conversation. Agent Watkins went to the defendant's truck and seized a breeched, unloaded .20 gauge shotgun. Watkins also noticed that the interior of the truck appeared to have been washed recently. Water was pooled in the floorboard, and the truck appeared cleaner than would be expected after driving on gravel roads. The bed was noticeably dirtier than the rest of the truck.

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[2] Raymond D. Wilson was the operator on duty at a lock and dam eight (8) miles from the location where the defendant claims to have spent the evening after leaving the Murphy home. Wilson reported no river traffic in the time frame the defendant claimed to have seen the three (3) barges.

During initial questioning of the defendant, Agent Watkins received a telephone call that he should investigate the Liberty Church Cemetery as a source of possible leads in the victim's death. The defendant was asked to remain voluntarily at the station while officers investigated the cemetery. Officer C.J. Butts testified that during this time the defendant walked freely in and out of the station; and, although he was usually accompanied, the defendant did have an opportunity to be alone outside of the station that evening.

Earlier in the day, Liberty Church Cemetery was reported to authorities as a site of vandalism. The cemetery is located in Dickson County, a short distance from the victim's residence. Closer inspection revealed a vehicle had driven into the cemetery and knocked over four or five headstones. It was later determined that the victim's truck had knocked the stones over, coming to rest on one of them. A wider set of tracks was also detected at the scene. It was theorized by the state that a larger vehicle pulled the smaller vehicle out of the cemetery. Subsequently, TBI agents were able to show paint on the bumper of the defendant's truck consistent with paint from the victim's truck.

When the officers returned to the station, the defendant was read his rights and his truck was formally seized. The defendant maintained his version of events as previously related to the officers. During questioning, the defendant stated that he had never been inside the victim's truck, nor had the victim been in his. The defendant was arrested for the victim's murder.

The next day two sets of currency were found on the grounds of Sheriff's Station No. 2. The first, $35, was folded and wet and found near a downspout. The second set, $120, was found shortly thereafter and was dry.

At trial, the state presented forensic evidence that the victim died as a result of a .20 gauge shotgun slug being fired into his head from a distance of

less than thirty-six (36) inches. TBI agents testified as experts about blood traces removed from the defendant's truck. A forensic scientist, established as an expert in DNA testing, found the blood to be consistent with the victim's blood. The probability of randomly selecting another Caucasian, unrelated to the victim and having the same DNA profile as the blood found in the defendant's truck, was one in 286,000.

II.

The defendant's first issue alleges that he was prejudiced by the jury being allowed to hear that he was involved in two homicides in the weeks prior to the victim's death. The defendant specifically alleges the state's sole purpose of introducing evidence of these homicides was to show the jury that he had a propensity to kill.

The decision of the trial court regarding the admission of this evidence is governed firstly by the Tennessee Rule of Evidence 401. Rule 401 defines relevant evidence as 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."

Tennessee Rule of Evidence 403 provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The admissibility of other crimes, wrongs, or acts may not be admitted to show the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). In other words, the state could not introduce the prior homicides for the purpose of showing the defendant had a predisposition to kill. Evidence is admissible under Rule 404(b) under the

following conditions:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than the conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
>
> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(1)-(3).

The trial court conducted a pre-trial hearing and concluded the prior homicides were material to giving the jury a complete picture of the interaction between the defendant and the victim shortly before the victim's death. The trial court further ruled that there was little, if any, unfair prejudice to the defendant by admitting the evidence

Only in an exceptional case will evidence of another crime, wrong or bad act be relevant to any issue other than the defendant's character. State v. Drinkard, 909 S.W.2d 13, 16 (Tenn. Crim. App. 1995). The evidence may be admissible to prove issues such as motive, intent, knowledge, absence of mistake or accident, common scheme or plan, identity, completion of the story, opportunity and preparation. Neil P. Cohen et al., *Tennessee Law of Evidence* § 404.6 (3d ed. 1995).

The homicides related the reason for the confrontation between the defendant and the victim in the basement of the Murphy residence. The victim scoffed at the defendant's claim to have shot two (2) men at a distance of seventy-five (75) yards with a .20 gauge slugs. The victim flashed a large amount of cash and bet that he would have done the same thing. From other witnesses, the jury was apprised of the defendant's obsession with the prior

homicides. The evidence was not admitted to show a character trait of the defendant or to prove conduct in conformity with a character trait. Furthermore, there was never an attempt by the state to show that the prior shootings were crimes or wrongs.[3] Thus, the crucial inquiry becomes whether the probative value of this evidence is outweighed by its prejudicial effect.

We concede that, under normal circumstances, evidence of prior homicides would be inadmissible. However, the facts of this case are unique. The defendant's repeated references to the Walton homicides before and after this murder were necessary to explain the complete story of the subject homicide. Furthermore, the victim and the Walton brothers were all killed with .20 gauge slugs. Moreover, the jury was aware the prior homicides were ruled justifiable.

The trial court emphasized to the jury that the evidence was to be used only for the limited purpose of "paint[ing] a picture." The jury is presumed to have followed the trial court's instructions. State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994).

The probative value of this evidence was not outweighed by its prejudicial effect. We further conclude that even if the admission of evidence of the prior homicides was error, it was harmless in light of the other evidence against the defendant. Tenn. R. App. P. 36(b).

This issue is without merit.

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[3] The defendant called as one of his witnesses the prosecuting attorney who investigated the Walton shootings. The prosecutor confirmed the grand jury determination that the homicides were justifiable, and that this determination "reaffirmed [his] own thoughts."

III.

The defendant's second issue alleges that the trial court erred in admitting evidence of the $155 found on the grounds of the Sheriff's department the day after the defendant was arrested. Officers initially found $35 lying on the ground near a downspout. The bills were damp and folded. Soon thereafter, $120 was found a short distance from the initial discovery. Those bills were dry and unfolded. The state theorized the money was the victim's, and the defendant discarded it while outside the station between interviews.

The defendant pointed out that the station grounds were open to the public, and the money could have been lost by any number of people. The resulting nexus, he claims, is so remote as to constitute unfair prejudice.

The trial court held a hearing outside the presence of the jury to determine the admissibility of the evidence. The trial court found that the evidence was relevant and not unfairly prejudicial. The standard of review for a trial court's decision of relevancy is an abuse of discretion standard. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). We conclude there was no abuse of discretion by the trial court in admitting this evidence. It was for the jury to determine the amount of weight to be given the evidence.

This issue is without merit.

IV.

The defendant's third issue for appeal alleges that he suffered prejudice by appearing before the jury on three occasions while handcuffed. The incidents apparently occurred in the basement when the defendant and the jury were being brought into the building at the same time. The defendant's counsel

complained to the trial court twice in chambers, then objected on the record to the occurrences.

Criminal defendants are required to be afforded the physical indicia of innocence. State v. Smith, 639 S.W.2d 677, 681 (Tenn. Crim. App. 1982). This precludes a criminal defendant appearing before the jury in shackles. Id. Inadvertent viewing of a criminal defendant in restraints can, however, be cured by instructions and inquiries of the trial court. Id.

This Court is unable to review the first two alleged incidents. The record only reflects that defense counsel had an in-chambers conference with the trial judge. This conference is not in the record.

Nevertheless, the trial court admonished a deputy present to tell the Sheriff that the practice must stop. It apparently did. The trial court subsequently instructed the jury to disregard any glimpses of the defendant in restraints in their determinations of guilt or innocence. The jury was polled as to their ability to abide by the trial court's instruction. All jurors responded affirmatively. Jurors are presumed to follow the instructions of the trial court. Butler, 880 S.W.2d at 399.

This issue is without merit.

V.

The defendant's fourth issue alleges that the state failed to sufficiently prove venue. The defendant contends that the evidence shows the victim was killed where the body was discovered in Houston County. The defendant further contends that intent to rob the victim was not proven, thereby removing a necessary element of felony murder.

An accused is entitled to a trial in the county in which the offense was committed. State v. Marbury, 908 S.W.2d 405, 407 (Tenn. Crim. App. 1995); State v. Bloodsaw, 746 S.W.2d 722, 723 (Tenn. Crim. App. 1987). The burden is on the state to prove that the offense was committed in the county specified in the indictment. Marbury, 908 S.W.2d at 407; Bloodsaw,746 S.W.2d at 724. If one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either county. Tenn. R. Crim. P. 18(b). Tenn. Code Ann. § 39-11-201(e) provides that the state must prove venue "by a preponderance of the evidence." The factual information must be sufficient to cause the fact finder to believe that an allegation is probably true. For the evidence to preponderate, it must have the greater convincing effect in the fact finders' belief. *See* Marbury, 908 S.W.2d at 408. Venue may be shown by either direct or circumstantial evidence. *See* State v. Hutcherson, 790 S.W.2d 532, 533 (Tenn. 1990). A jury is entitled to draw a reasonable inference as to venue from proven facts. State v. Reed, 845 S.W.2d 234, 238 (Tenn. Crim. App. 1992).

The state proved that the victim's truck was wrecked in Dickson County and driven to his mother's house. The victim's crushed watch, a lighter, and a pack of cigarettes were found in the Liberty Church Cemetery . The jury could reasonably infer that the robbery took place there. The murdered victim was found in Houston County missing a large sum of cash he had the night before. The state presented sufficient circumstantial evidence that the victim was robbed, an element of the felony murder, in Dickson County, making venue proper in that county.

This issue is without merit.

VI.

The defendant's fifth issue asserts the trial court erred in admitting evidence consisting of a cap, change, keys, and a pack of cigarettes without establishing a proper chain of custody. The defendant contends the state did not call the officer responsible for the collection and storage of the evidence.

In order to admit physical evidence, the party offering the evidence must either introduce a witness who is able to identify the evidence or must establish an unbroken chain of custody. State v. Holloman, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992). Whether the required chain of custody has been sufficiently established to justify the admission of evidence is a matter committed to the sound discretion of the trial court, and the court's determination will not be overturned in the absence of a clearly mistaken exercise of that discretion. Id. The identity of tangible evidence need not be proven beyond all possibility of doubt, and all possibility of tampering need not be excluded. The circumstances must establish a reasonable assurance of the identity of the evidence. State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989).

The trial court found, after a hearing out of the presence of the jury, that Agent Watkins was sufficiently able to identify the evidence for its admission. The defendant makes no argument to the contrary. The identity of the evidence was sufficiently established.

This issue is without merit.

VII.

The defendant's next issue is a challenge to the sufficiency of the evidence. He alleges the state failed to prove his identity as the perpetrator and

failed to prove the underlying felony of robbery beyond a reasonable doubt.

In Tennessee, whether sufficiency of the evidence for acquittal purposes is being considered by the trial court upon motion or by an appellate court upon review, the standard to apply is the same. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). That standard is "whether, after viewing 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, 99 S.Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. *See* State v. Sheffield, 676 S.W.2d 542, 547 (Tenn.1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978).

Although the evidence of the defendant's guilt is circumstantial in nature, circumstantial evidence alone may be sufficient to support a conviction. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993); State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). However, in order for this to occur, the circumstantial evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with innocence and must exclude every other reasonable theory or hypothesis except that of guilt. Tharpe, 726 S.W.2d at 900. In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 900 (quoting Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970)).

While following the above guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the

circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); *see also* State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d at 391.

The defendant was convicted of felony murder. Felony murder requires a jury to find beyond a reasonable doubt that the defendant killed the victim in the perpetration of or attempt to perpetrate a robbery. Tenn. Code Ann. § 39-13-202(a)(2). Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear. Tenn. Code Ann. § 39-13-401.

The state presented evidence showing the defendant had little money on the night of July 19, 1995; while the victim had a great deal of money. Several hours later, the defendant had an abundance of cash, while the victim was found dead with only some change on him. The state presented evidence that the victim's blood was found in the defendant's truck after the defendant stated the victim had never been in his truck. Paint consistent with paint samples taken from the victim's truck was found on the defendant's bumper. The state presented evidence that the defendant was killed with a .20 gauge shotgun slug. The defendant was known to have had a .20 gauge shotgun and slug ammunition in his possession prior to, and after, the murder. The defendant was untruthful as to his whereabouts at the time immediately following the victim's murder. Taken in a light most favorable to the state, the evidence is sufficient for a jury to find beyond a reasonable doubt that the defendant killed the victim in the perpetration of a robbery.

This issue is without merit.

VIII.

The defendant contends in his seventh issue that when the state gave notice it was withdrawing its election to pursue the death penalty, the election to seek life without parole was also withdrawn by implication.

Tenn. Code Ann. § 39-13-208 provides that written notice of intent to seek the death penalty pursuant to Tenn. R. Crim. P. 12.3(b) also constitutes notice of intent to seek life imprisonment without the possibility of parole. This notice must be filed thirty (30) days prior to trial. Tenn. Code Ann. § 39-13-208(b). Failure to timely file notice shall, by motion of the defendant, result in a reasonable continuance. Tenn. Code Ann. § 39-13-208(b). Failure to file notice results in the defendant being sentenced by the trial court to life imprisonment if the defendant is found guilty of first degree murder. Tenn. Code Ann. § 39-13-208(c).

The state filed a formal notice on March 25, 1996, that it intended to seek the death penalty. On June 24, 1996, the state notified the defendant by letter that it was "electing not to pursue the death penalty." When the sentencing phase of the trial began, the state reaffirmed its intention to seek life imprisonment without the possibility of parole. The defendant objected, arguing that because notice of intent to seek the death penalty was withdrawn, the implied notice to seek life without parole was withdrawn as well. The defendant contends the trial court's decision to allow the state to pursue a sentence of life without parole forced him to waive his right to jury sentencing in order to be able to introduce mitigation evidence. Approximately three months after the guilty verdict was returned, the trial court conducted a sentencing hearing.

The notice of intent to seek the death penalty, by statute, constituted notice of an intent to seek a sentence of life imprisonment without the possibility

of parole. Tenn. Code Ann. § 39-13-208(b). We cannot, however, say that a letter from the District Attorney General to defense counsel advising that the state would no longer seek the death penalty operated as an implied withdrawal of the notice of intent to seek life without the possibility of parole as a matter of law.

Regardless, we need not address this issue further. For other reasons as will be explained *infra*, the defendant's case is remanded to the trial court where the defendant will have the opportunity to seek jury sentencing.

IX.

The defendant next alleges that the trial court erred in imposing a sentence of life imprisonment without the possibility of parole. Specifically, he alleges the trial court considered non-statutory aggravating factors to arrive at a sentence of life without parole.

The trial court at a separate sentencing hearing found the felony murder aggravating circumstance applicable and sentenced the defendant to life without parole. Tenn. Code Ann. § 39-13-204(i)(7). The defendant claims the trial court did not actually rely on the aggravating factor stated, but used the prior homicides the defendant committed to enhance his sentence.

As the defendant waived jury sentencing, the trial court determined the application of aggravating and mitigating factors. *See* Tenn. Code Ann. § 39-13-205(c). The state submitted the following aggravating factor for the trial court's consideration:

> The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit,

> any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Tenn. Code Ann. § 39-13-204(i)(7)(effective July 1, 1995).

In determining the sentence, the trial court made extensive oral findings. Although the sole aggravating factor submitted by the state was felony murder, the trial court made extensive findings about the prior criminal history of the defendant. The trial court first noted several charges relating to violence for which there were no convictions. Furthermore, the court noted a vandalism charge and two (2) simple assault charges that had been dismissed; a vandalism conviction and three (3) aggravated assault charges which were reduced to simple assault; and two (2) misdemeanor firearm convictions. Based upon the foregoing, the trial court concluded that the defendant had a "background of violence." The court then stated this was not being considered as an enhancement factor, but that it shows the "personality that we have of Mr. Gilliland. He was a violent man according to his record."

The trial court then went on to state that the defendant's involvement in the two (2) justifiable homicides was not to be considered at the hearing. Nevertheless, the trial court concluded that the defendant's "attitude" about the homicides is one that "this Court is scared of." The court further found, based upon this information, that the defendant had a "frame of mind that's a killer."

The court concluded as follows:

> There is no smoking gun to point to knowingly doing it, but if you put all the pieces together, including the personality of the defendant that I've considered in this case, when you put all that together bit by bit, I conclude that it was a knowing killing; that the aggravating circumstances exist, and I think Mr. Dennis Gilliland should be sentenced to life without the possibility of parole, and I so order it (emphasis added).

Our analysis of the trial court's findings is guided by the well-established

principle that evidence is admissible at a first degree murder sentencing hearing only if relevant to an aggravating circumstance or a mitigating factor raised by the defendant. State v. Bates, 804 S.W.2d 868, 882 (Tenn. 1991); Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979) (both cases involving the death penalty). The first degree murder sentencing statute specifically provides that life without the possibility of parole may be imposed only when a statutory aggravating circumstance has been proven by the state beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(f)(1), (2). Consideration of extraneous matters is improper.

The only aggravating factor before the trial court was the felony murder aggravator which required the state to prove beyond a reasonable doubt that the defendant "knowingly" committed the murder while committing or attempting to commit the robbery. Tenn. Code Ann. § 39-13-204(i)(7). Although the trial court specifically mentioned numerous prior charges without convictions, numerous misdemeanor convictions and the defendant's commission of the two (2) justifiable homicides, the trial judge indicated he was not considering these matters. Nevertheless, the trial judge stated these matters related to the "personality" of the defendant. In sentencing the defendant to life without the possibility of parole, the trial court specifically stated that considering all the evidence, "including the personality of the defendant," this was a "knowing" felony murder. Thus, we can only conclude that the trial court indeed considered these matters in sentencing.

Had the jury sentenced the defendant, these matters certainly would not have been brought to their attention and could not have been relied upon to arrive at a sentence of life without parole. The trial judge, just as a jury, can only rely upon proper evidence to establish an aggravating circumstance. Since the

trial judge relied upon improper evidence, the sentence must be vacated and the

defendant resentenced.

X.

In his final issue, the defendant alleges that newly discovered evidence warrants a new trial in this case. Officer C.J. Butts testified at the hearing on the defendant's motion for new trial that he inspected the defendant's truck on the night of his arrest with a "blue light" and was not able to detect any traces of blood. Subsequently, TBI agents detected traces of the victim's blood in the defendant's truck. The defendant claims Officer Butts' findings were not available to him at trial; the guilty verdict should be reversed; and the case should be remanded for a new trial.

In seeking a new trial based on newly discovered evidence, there must be a showing that defendant and his counsel exercised reasonable diligence in attempting to discover the evidence, and that neither the defendant nor his counsel had knowledge of the alleged newly discovered evidence prior to trial. State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994); State v. Singleton, 853 S.W.2d 490, 496 (Tenn. 1993). In addition, there must be a showing of the materiality of the testimony, and the trial court must determine whether the result of the trial would likely be changed if the evidence were produced. Nichols, 877 S.W.2d at 737; Singleton, 853 S.W.2d at 496. The granting or refusal of a new trial on the basis of newly discovered evidence rests within the sound discretion of the trial court. State v. Walker, 910 S.W.2d 381, 395 (Tenn. 1995); State v. Goswick, 656 S.W.2d 355, 358 (Tenn. 1983).

The trial court considered the alleged newly discovered evidence at the defendant's hearing on his motion for new trial. Officer Butts was admittedly untrained in the use of the "blue light." The TBI agent who recovered the blood traces from defendant's truck testified as an expert in collecting blood samples.

The trial court found there was no showing by the defendant that the evidence was newly discovered or would likely have changed the outcome of the trial. We agree.

This issue is without merit.

CONCLUSION

For the reasons stated above, the conviction for felony murder is affirmed. The sentence of life without parole is vacated and this cause remanded for resentencing. Upon remand, the defendant shall have the right to request jury sentencing pursuant to Tenn. Code Ann. § 39-13-204(k).

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JOE G. RILEY, JUDGE

CONCUR: (But in accord with Judge Tipton's concurring opinion)

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JOHN H. PEAY, JUDGE

(See concurring opinion)
JOSEPH M. TIPTON, JUDGE