

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER SESSION, 1995

FILED

April 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

THOMAS SINCLAIR,)

Appellant.)

C.C.A. NO. 02C01-9503-CC-00066

MADISON COUNTY

HON. FRANKLIN MURCHISON
JUDGE

(Second Degree Murder)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF MADISON COUNTY

FOR THE APPELLANT:

GEORGE MORTON GOOGE
District Public Defender
26th Judicial District
227 W. Baltimore Street
Jackson, TN 38301

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ELLEN H. POLLACK
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JERRY WOODALL
District Attorney General

DONALD ALLEN
Assistant District Attorney General
P.O. Box 2825
Jackson, TN 38302

OPINION FILED _____

CONVICTIONS AFFIRMED; SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Thomas Sinclair, appeals as of right from a jury verdict convicting him of second degree murder and possession of a weapon with the intent to use it in the commission of a felony. For these crimes, the Defendant was sentenced as a Range I standard offender to serve concurrent sentences of twenty-five years and two years in the Tennessee Department of Correction. The Defendant appeals the verdict and his sentence. We affirm the judgment of the trial court in part and modify the sentence.

The Defendant presents seven issues on appeal: (1) That the evidence was insufficient to support a verdict of guilt on the second degree murder charge; (2) that the trial court erred in allowing the district attorney to lead witnesses on direct examination; (3) that the trial court erred by allowing the prosecutor to interrupt defense counsel's closing argument with an objection and by sustaining that objection; (4) that the trial court should not have allowed the State to call witness Mary Hall as a rebuttal witness because her eyewitness testimony was direct evidence; (5) that the trial court erred in refusing to grant the Defendant's motion in limine requesting that the State not be allowed to ask witness Frank Trice about his indictment as an accessory after the fact in this case; (6) that the trial court erred in charging flight; and (7) that the trial court erred in imposing the maximum sentence.

In the early morning hours of March 6, 1993, the victim, William Reid and his friend, Joe Jones, went to a local bar called Syd's Cafe, also known as T-Roy's. Jones testified that they arrived at the bar sometime after midnight. Jones said that he was sitting on a barstool at the counter when he heard somebody call Mr. Reid's name. He

heard three or four shots, then saw the victim on the floor. Jones did not see who fired the shots.

Benjamin Lewis, the assistant manager at Syd's Cafe, testified that he was in the back part of the bar by a pool table. He looked up towards the front of the bar through the hallway and saw someone with a gun. Because a crowd of people were running through the hallway to the back room, Lewis went through the kitchen to get to the front of the bar. Lewis testified that he then saw the Defendant shoot the victim from a distance of two to three feet. The Defendant then turned and walked out the front door. Lewis testified that he was the closest person to the victim at the time the Defendant walked away. He said that he and his father, the manager of Syd's Cafe, kept the crowd away from the body. Lewis said that he then left the bar and drove to a nearby service station to call the police.

The police arrived at the bar a few minutes later at approximately 3:00 a.m. and immediately secured the crime scene. They found a knife in the victim's pocket with two blades, one two inches long, and the other an inch and a half long. The knife was in a closed position and did not have any blood on it.

The Defendant testified that he and the victim had gotten into an altercation earlier in the evening. He said that he had been at another nearby bar during the early evening, where he played a game of pool and then sat talking to two women whom he knew. He testified that the victim came into the bar, waved a knife at him, then chased him into the parking lot. The Defendant said that he tried to leave in his friend's vehicle, but could not because they were blocked in by the surrounding cars. He said that he then ran from the parking lot with the victim chasing him for some distance before the victim stopped his pursuit.

The Defendant testified that he was very upset after the shooting. He said that he left the bar and tried to contact his brother to come get him. He eventually found his brother, who took him to a nearby town where the Defendant got his vehicle and a change of clothes. The Defendant then returned to Jackson and turned himself in to the police later that morning.

Dr. O'Brien Clary Smith, the doctor who performed the autopsy on the body, testified that the victim sustained three bullet wounds to his neck, chest, and head, from a distance of more than two feet away. The neck wound severed the spinal cord, causing paralysis from the armpits down. The head shot was immediately fatal, and the doctor testified that this shot was probably the last one fired. Dr. Smith also testified that the victim tested negative for drugs, but had a blood alcohol level of .17 at the time of his death.

I.

We will first address the Defendant's contention that the evidence was not sufficient to support a conviction for second degree murder beyond a reasonable doubt.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule 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).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor

may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

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. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., 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. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

The Defendant presents a conclusory argument that the evidence was insufficient because of conflicting evidence presented in the case and because the testimony of some of the witnesses at trial differed from their prior testimony at the preliminary hearing. Although this issue has technically been waived because of the

Defendant's failure to make appropriate references to the record, Tenn. Ct. of Crim. App. R. 10(b); T.R.A.P. 27(a)(7); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988), we will address the issue on the merits.

The Defendant admittedly shot and killed the victim on the morning of March 6, 1993, and later turned himself in to the police. Although the Defendant presented his case as one of self-defense, the jury, within their province as the trier of fact, found the Defendant guilty of second degree murder beyond a reasonable doubt. The Defendant said that he shot the victim out of fear because the Defendant was threatening him with a knife and had chased him with a large knife during an altercation earlier that evening. The record indicates that the only weapon on the victim was a knife found in a closed position in his pants pocket. No other weapons were found near the body. One witness testified that shortly before the shooting, he heard the Defendant say, "Wait, let me get my gun ready." Viewing this evidence in the light most favorable to the State, it supports a conviction for second degree murder.

Although the Defendant contends that conflicting testimony was presented at trial, such factual issues and issues regarding witness credibility are resolved by the jury. Here, the jury resolved the factual questions against the Defendant. The Defendant has not met his burden of overcoming the presumption of guilt and showing why the evidence is insufficient to support a conviction.

We conclude that the evidence in the record is sufficient to uphold the jury's verdict of guilt beyond a reasonable doubt. This issue has no merit.

II.

The Defendant next contends that the trial court erred when it refused to grant his motion in limine requesting that the prosecution be restrained from questioning witness Frank Trice about his indictment for accessory after the fact arising from this same case. The Defendant wanted Trice to testify about the altercation earlier in the evening between the Defendant and the victim and to testify that he had heard the victim say that he was going to kill the Defendant. The Defendant argues that because the trial court ruled the State could ask about the indictment, he could not present Frank Trice as a witness.

The trial court premised its ruling on the assumption that the witness had a vested interest in the outcome of the case, thus the State should be allowed to impeach this witness's testimony by showing prejudice or bias under Tennessee Rule of Evidence 616. The judge said that the jury should be allowed to consider that the witness was indicted in the same case as the Defendant when evaluating the witness's credibility. The trial judge told the defense that he would give the jury precautionary instructions not to presume the witness was guilty.

In Pique v. State, 499 S.W.2d 4, 6 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1973), this court held that "[a] witness in a criminal prosecution may be asked if he is not under indictment for a crime growing out of the same transaction as the case in which he is a witness, for the reason that the questions are designed to show the interest or bias of the witness in the case on trial." As in the case at bar, the defendant in Pique argued that the court erred in permitting the State to cross-examine the witness about his indictment for accessory after the fact of the crime for which the defendant was on trial. This court reasoned that the indictment was offered to show the witness's interest in the prosecution; if the defendant was acquitted, then the witness could not be convicted as an accessory after the fact. Id. at 6.

At trial, the Defendant asserted that the investigating officer had no proof of the witness's involvement in the case, nor did the State have a valid reason to indict the witness except to gain control of the witness and prevent the defense from calling him. Apparently, the Defendant is specifically arguing that the State's action in indicting the witness constituted substantial government interference which infringed on the Defendant's right to establish a defense.

The Defendant cites a North Carolina case, State v. Mackey, 293 S.E.2d 617 (N.C. Ct. App. 1982), in support of his contention. In Mackey, a witness testified favorably for the defense. Immediately after giving his testimony, he was approached by a police investigator and threatened with perjury charges if he did not tell the truth in the case. Id. The appellate court found that the police investigator and the district attorney's office put undue pressure on the witness until he later retook the stand and recanted his prior testimony. Id. at 618-19. Mackey, however, is distinguishable from the case at bar because here no evidence has been presented to show that governmental interference kept the defense witness from testifying. To the contrary, the defense decided not to call the witness when the trial court ruled that his pending indictment stemming from the same case could be brought out on cross-examination. No evidence has been presented to show that the witness was indicted solely to prevent him from testifying for the defense.

This situation is the same as that found in Pique. Trice had a significant stake in the outcome of the case, and the Defendant's acquittal would likely mean the dismissal of the accessory charge against him. The jury should have been able to consider the witness's interest in the outcome of the case when determining his credibility. We conclude that the trial judge did not err in ruling that the State could cross-examine the witness about his pending indictment.

III.

The Defendant argues that the trial court erred in allowing the State to ask leading questions on direct examination. The Defendant specifically points to three instances in which he claims the State impermissibly asked leading questions. The Defendant argues that the State was improperly allowed to ask "continual leading questions" of three witnesses during the trial. The Defendant contends that the trial court continued to allow the prosecution to lead its witnesses despite objections by the defense.

Generally, a leading question is one which "suggests the specific answer desired." Neil Cohen, et. al, Tennessee Law of Evidence § 611.6 (1990 & Supp. 1993). Leading questions are only allowed on direct examination to develop testimony, such as to elicit preliminary matters including name, age or address, to refresh recollection of a witness, or to shorten the time needed for the witness to testify. Tenn. R. Evid. 611(c). Leading questions are also allowed on direct examination of a "hostile witness," provided the witness is declared so by the court. Finally, leading questions are appropriate when a party in a civil case calls an adverse party. Id.; Cohen, supra.

After examining the record, we do not find that the State continually led the witnesses. While questioning two of the witnesses, the State merely summarized the witnesses' testimony in preparation of asking the next question. The State in this instance was doing no more than developing each witness's own testimony. See Tenn. R. Evid. 611(c). In the third instance of which the Defendant complains, he objected once to the State's leading of a rebuttal witness. Because the witness was apparently having difficulty understanding the State's questions and testifying to the sequence of events, the trial court allowed the leading question to be asked. Again, the State in this instance was not suggesting "the specific answer desired," but rather was minimally

leading the witness to develop testimony. In each instance, the testimony introduced on examination by the State through leading questions had already been established.

Under Tennessee law, the trial judge has wide discretion in controlling leading questions, and unless the question was not only clearly leading, but also clearly prejudicial, this court will not interfere with the action of the trial court. Mothershed v. State, 578 S.W.2d 96, 99 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1978). The Defendant has not shown that the State's use of leading questions in these three instances was improper or constituted prejudicial error. Although we do not believe that the trial court erred in allowing the questions, we conclude that any error was harmless. T.R.A.P. 36(b).

IV.

The Defendant next argues that the trial court erred in allowing the State to present Mary Hall as a rebuttal witness when her testimony could only be deemed direct evidence that should have been presented in the State's case-in-chief.

The allowing of rebuttal evidence is within the sound discretion of the trial judge. State v. Green, 613 S.W.2d 229, 234 (Tenn. Crim. App. 1980), perm. to appeal denied, id. (Tenn. 1981). Rebuttal evidence is "any competent evidence which explains or is in direct reply to or a contradiction of material evidence introduced by the accused or which is brought out on his cross-examination." Id. at 234. The determination of whether one is a rebuttal witness is based upon the content of the evidence offered, not

the order in which the witness is presented. State v. West, 825 S.W.2d 695, 698 (Tenn. Crim. App. 1982).

During his testimony at trial, the Defendant argued that the victim was wielding a large knife at him, and he shot the victim in self-defense. Mary Hall testified that she was sitting beside the victim at the bar immediately before the shooting and that the victim had no weapon in his hand when the Defendant approached. The Defendant contends that the State knew from the outset of the trial that the defense would be one of self-defense; therefore, the State should have called Mary Hall in its case-in-chief. He argues that the State had the Defendant's statement made to police which said the victim had a knife, and that the State's questioning of three witnesses during its case-in-chief indicates that the State knew the Defendant would argue self-defense. Thus, to allow the testimony of Hall in rebuttal was error.

At trial, the prosecutors told the court that they did not find out that Hall was a witness until the night before they called her to the stand. Moreover, the State argued that Hall's testimony was properly admitted to refute the Defendant's proof of self-defense. The trial court agreed that although the State may have had some indication that self-defense was the theory on which the Defendant was going to rely, self-defense was not actually raised until the Defendant testified. Thus, evidence to refute the theory of self-defense was properly allowed in rebuttal.

The Defendant relies on State v. West, 825 S.W.2d 695 (Tenn. Crim. App. 1992), in which this court reversed a defendant's conviction for murder because the trial court had improperly allowed the State's witness to testify on rebuttal that the defendant had shot the victim for no cause when this testimony was direct evidence that should have been proffered during the State's case-in-chief. However, unlike the case at bar, the rebuttal witness called in West was the State's strongest witness. Id. At 698.

Furthermore, the State in that case knew of this witness long before trial, but did not reveal her existence to the defense. Id.

Here, the witness was not called to recount eyewitness testimony; she was called to directly refute the Defendant's testimony that the victim had a weapon in his hand. We, therefore, cannot conclude that the trial judge erred or abused his discretion in allowing the State to call Mary Hall as a rebuttal witness. This issue has no merit.

V.

The Defendant next argues that the trial court erred by allowing the prosecutor to interrupt the defense counsel's closing argument without stating the basis for the objection and by sustaining the State's objection.

During defense counsel's closing argument, he said, "The real kicker is the State calls a surprise witness, Ms. Hall." The State objected, stating that such a statement was "not proper jury argument." The trial court sustained the objection. Defense counsel then again referred to Ms. Hall as a surprise witness, to which the State again objected. Defense counsel explained to the court that he did not understand that he could not refer to Hall as a surprise witness, but that he thought the State's previous objection referred to the word "kicker." The trial court instructed defense counsel to simply refer to Ms. Hall as a witness or a rebuttal witness, and to proceed on with Ms. Hall's testimony rather than spending time characterizing her status as a witness.

On appeal, the Defendant argues that facts in the record support the characterization of Hall as a surprise witness, thus defense counsel's reference to her as a surprise witness was relevant and a fair comment on the evidence. Apparently, the Defendant's primary contention is that the State objected to the Defendant's closing

argument only for the purpose of interrupting his presentation, and to sustain the State's groundless objection constituted prejudicial error on the part of the court. Additionally, by sustaining the prosecution's objection, the court effectively diminished the Defendant's right to be heard under Article One, Section Nine of the Tennessee Constitution.

The Defendant's argument is without merit. The control of closing argument rests largely within the sound discretion of the trial court, and this court will not interfere with that discretion absent clear abuse. State v. Thomas, 755 S.W.2d 838, 843 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988); State v. Coe, 655 S.W.2d 903, 912 (Tenn. 1983), cert. denied, 464 U.S. 1063 (1984). We see nothing improper about the prosecutor objecting to the characterization of the witness as a "surprise witness," nor does the record indicate that the prosecution used this objection merely to interrupt the flow of the Defendant's argument. Neither do we find that the trial judge abused his discretion in sustaining the objection.

We conclude that the Defendant's argument is without merit.

VI.

The Defendant argues that the trial court erred in charging the jury on flight. He contends that the flight instruction was inappropriate and unwarranted because he turned himself in voluntarily to the police within hours of the murder. The Defendant argues that because of the trial court's error in giving the charge, this court should grant a new trial.

The trial court's instruction conformed with the language used in the Tennessee Pattern Jury Instructions, section 37.16. Tennessee allows the court to give an

instruction as to the inference to be drawn from flight. State v. Harris, 839 S.W.2d 54, 74 (Tenn. 1992), cert. denied, 113 S.Ct. 1368 (19). The court instructed the jury that whether the Defendant fled was a question solely for their decision, that they were not required to infer flight, and that flight alone was insufficient to prove guilt. The trial court also explained that the jury could consider the flight as an inference of guilt, but the reasons for the flight and the weight to be given the flight were for their own consideration.

In construing the Tennessee Pattern Jury instruction for flight, this court in State v. Payton, 782 S.W.2d 490, 497 (Tenn Crim. App.), perm. to appeal denied, id. (Tenn. 1989), held that it takes "both a leaving of the scene of the difficulty and a subsequent hiding out, evasion or concealment in the community, or a leaving of the community to constitute flight." The Defendant argues that a flight charge was unwarranted because he left the scene of the crime out of fear of reprisal rather than a guilty mind, and he subsequently turned himself in to the police. The record reflects that the Defendant immediately left the crime scene after the shooting and took several hours, during which he drove to another town, before reporting to the police. Flight from the crime scene may be taken in any manner, whether it be open, hurried or concealed. State v. Hill, 875 S.W.2d 278, 284 (Tenn. Crim. App. 1993), perm. to appeal denied, id. (Tenn. 1994); Rogers v. State, 455 S.W.2d 182, 187 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1970).

The record contains sufficient evidence from which a reasonable person could infer that the Defendant was attempting to conceal himself or evade police in the hours after the shooting in order to evade arrest. The jury was entitled to consider this evidence and determine whether flight was established, and, if so, whether an inference of consciousness of guilt arose. Hill, 875 S.W.2d at 284. The trial court properly instructed the jury on flight, and it was within their province as trier of fact to determine

whether the Defendant did in fact flee the scene and whether the flight supported an inference of guilt. We conclude that the trial court did not err in giving this instruction to the jury.

VII.

The Defendant's final argument concerns the propriety of the sentence imposed. The Defendant argues that the trial court erred in imposing the maximum sentence of twenty-five years for the second degree murder conviction.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper

weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

At the sentencing hearing, the defense presented several witnesses to testify about the Defendant's good character and his background as a working, law-abiding citizen who provided for his family. The court found the Defendant's prior history as a hard-working, generous man to be a mitigating factor in determining the sentence. Tenn. Code Ann. § 40-35-113(13).

The court found several enhancement factors to be applicable: (5) the defendant treated the victim with exceptional cruelty during the commission of the offense; (9) the defendant possessed or employed a firearm during the commission of the offense; (10) the defendant had no hesitation about committing a crime when the risk to human life was high; and (13) the Defendant committed the crime while on release status for two previous crimes. Tenn. Code Ann. § 40-35-114.

After considering the applicable mitigating and enhancing factors, the trial court sentenced the Defendant as a Range I standard offender for second degree murder. This Class A felony has a sentencing range of fifteen to twenty-five years, and the court imposed the maximum sentence of twenty-five years to be served in the Department of Correction.

The Defendant contends that the sentence was excessive because the trial court erroneously found non-statutory enhancement factors and improperly applied the permissible statutory factors. Contrary to the Defendant's assertions, we do not find in the record that the trial court used non-statutory factors to enhance the sentence.

We will address the Defendant's arguments that the trial court improperly applied the statutory enhancement factors.

The presentence report reflects that the Defendant had only a few years of formal education. He has a steady work history and had worked at a sheet metal business for approximately ten years until the time of his conviction. The Defendant had a prior felony conviction in 1979 for larceny, a 1989 arrest for disturbing the peace, and at the time of the killing, had pending misdemeanor charges for driving under the influence and carrying a concealed weapon.

The Defendant first contends that the application of factor five, that the Defendant "treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense," was error. We agree that this factor should not have been applied.

The court found this factor to be applicable because the Defendant shot the victim numerous times. Although the Defendant undoubtedly acted with cruelty in shooting and killing the victim, to be applicable this factor requires a showing of "exceptional" cruelty. Exceptional cruelty is usually found in cases of abuse or torture. See State v. Davis, 825 S.W.2d 109, 113 (Tenn. Crim. App. 1991), perm. to appeal denied, id. (Tenn. 1992); State v. Haynes, 720 S.W.2d 76, 86 (Tenn. Crim. App. 1986). In Manning v. State, 883 S.W.2d 635, 639 (Tenn. Crim. App. 1994), this court found the exceptional cruelty factor was not applicable in a case in which the defendant abducted the victim and forced her to participate in four sexual acts while holding a knife to her person, using abusive language toward her, and making threats to harm her.

In the case sub judice, the facts did not show that the Defendant tortured or beat the victim for an extended period of time, nor did the killing involve any unusual type of

abuse. The entire shooting took place within a matter of seconds. The physician who performed the autopsy testified that the third shot was immediately fatal, thus the victim was not consciously suffering for an extended length of time. Beyond the cruelty inherent in every shooting, we find no evidence in the record to support a finding of exceptional cruelty.

The Defendant also contends that the trial court erroneously enhanced the sentence because the Defendant was out on bond for prior misdemeanor convictions at the time of the shooting. Tenn. Code Ann. § 40-35-114(13). The Defendant was on bond for the charges of driving under the influence and carrying a concealed weapon. The Defendant correctly argues that the trial court erroneously enhanced the sentence based on pending misdemeanor charges when the factor requires that the Defendant be on bond for a felony conviction. The statute specifically requires that the felony for which a defendant is being sentenced “was committed while on . . . release status if such release is from a prior felony conviction.” Tenn. Code Ann. § 40-35-114 (13) (emphasis added). Thus, we must conclude that the trial court improperly applied this factor.

We conclude that the record supports the application of enhancement factors (9) and (10). The carrying of a firearm was not an element of second degree murder and could properly be used to enhance the sentence. The trial judge did not abuse his discretion in finding factor (10), that the Defendant had no hesitation about committing a crime when the risk to human life was high, because the Defendant repeatedly fired a weapon in a busy public place while numerous people were nearby. Additionally, we find enhancement factor (1), that the Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the range, to be applicable. The Defendant, while not having an extensive record, had a previous felony conviction and two misdemeanor charges pending.

The sentence to be imposed by the trial court is presumptively the minimum sentence in the range. Tenn. Code Ann. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the enhancement factors, then reduce the sentence as required by the mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight given to any existing factor is within the trial court's discretion, so long as it complies with the purposes and principles of sentencing and the court's findings are adequately supported by the record.

Because we find the court erroneously applied two of the enhancement factors, we conclude that the record does not support the imposition of the maximum sentence. In finding three applicable enhancement factors and one mitigating factor, we conclude that the sentence for second degree murder should be modified to a mid-range sentence of twenty (20) years.

The judgment of the trial court is affirmed in part, and the sentence is modified.

DAVID H. WELLES, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE