

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1996

FILED

January 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

FRED EDMOND DEAN,)

Appellant.)

C.C.A. NO. 03C01-9508-CC-00251

SULLIVAN COUNTY

HON. FRANK L. SLAUGHTER
PRESIDING JUDGE

(Direct Appeal)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Sullivan County Criminal Court jury found Appellant Fred Edmond Dean guilty of second degree murder and attempted second degree murder. As a Range II multiple offender, Appellant received consecutive sentences of thirty years for the murder conviction and fifteen years for the attempted murder conviction. In this direct appeal, Appellant presents the following issues for review: (1) whether the trial court erred in refusing to direct the filing of a bill of particulars; (2) whether the evidence presented at trial is legally sufficient to sustain convictions for second degree murder and attempted second degree murder; (3) whether the evidence presented at trial is sufficient to establish a theory of self-defense; (4) whether the trial court erred in allowing the use of Massachusetts assault convictions to attack his credibility; and (5) whether the sentence is excessive.

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

I. FACTUAL BACKGROUND

As accredited by the jury's verdict, the proof shows that, on April 1, 1994, Karen Stiltner was in the process of moving out the apartment she had shared with Appellant since late January of 1994. Appellant had already moved out the apartment in early March, informing both the apartment owner and his employer of his move. Although the lease on the apartment terminated at the end of March, the apartment owner had given Ms. Stiltner until April 2 to move out.

On the morning of April 1, Ms. Stiltner arrived at the apartment at approximately 11:00 a.m. She spent the day packing her belongings. Later that afternoon, David Orfield, Ms. Stiltner's boyfriend, arrived at the apartment to assist with the move. At approximately 6:00 p.m., Appellant arrived at the apartment, carrying with him his .20 gauge shotgun. He asked Ms. Stiltner to remove her belongings by that night. Ms. Stiltner responded that the apartment owner had given her until April 2 to move out and that she might have to return the following morning to complete the move. Ms. Stiltner and Mr. Orfield then left the apartment with a load of Ms. Stiltner's belongings.

A short time later, Ms. Stiltner and Mr. Orfield returned with Michelle Lubecke to retrieve another load. Appellant again requested that Ms. Stiltner remove her belongings by that night, and, according to Ms. Lubecke, threatened to kill anyone that returned to the apartment. The group then left with another load of Ms. Stiltner's belongings.

After the group had departed, Appellant made a visit to the apartment owner in an effort to re-rent the apartment by himself. The apartment owner agreed to hold the apartment for Appellant for a few weeks until he was ready to move in but told him that Ms. Stiltner had until April 2 to leave the apartment. Appellant then returned to the apartment and began moving Ms. Stiltner's belongings out of the apartment onto the porch. Without the permission of the apartment owner, Appellant changed the lock on the door of the apartment. He then left to get something to eat with a female companion.

Accompanied by Mr. Orfield, Ms. Lubecke, and Stewart Harkleroad, Ms. Lubecke's boyfriend, Ms. Stiltner returned to the apartment for one last load. Upon arrival, the group was unable to enter the apartment because of the new lock. In order to gain access, Mr. Harkleroad kicked the door open. The group then proceeded into the apartment and continued with the move.

As Mr. Orfield and Mr. Harkleroad attempted to move a dresser through the front door, Appellant returned to the apartment, still carrying his shotgun. Appellant became very angry and demanded that everyone leave the apartment. When the two men refused to leave, Appellant began swinging his shotgun by the barrel, striking Mr. Orfield in the back with the stock of the gun. In response, Mr. Orfield and Mr. Harkleroad forced Appellant against a wall and took away his gun. Mr. Harkleroad determined that the gun was unloaded and leaned it against the wall. Mr. Orfield and Mr. Harkleroad returned to the dresser, and Appellant left the room. A short time later, Appellant emerged from the kitchen with an iron skillet and again demanded that the two men leave. Mr. Harkleroad reached into his pocket but, at the request of Ms. Lubecke, never removed the pocketknife that he kept there.

Despite Appellant's angry demands, Mr. Orfield and Mr. Harkleroad refused to leave the apartment and again returned to the dresser. At this point, Appellant retrieved and loaded his shotgun. Mr. Orfield noticed Appellant pointing the shotgun at them, and just before Appellant fired, ducked out of the way. Mr. Harkleroad was struck in the chest by the shotgun blast. At the time of the shooting, Ms. Stiltner was in the kitchen packing groceries, and Ms. Lubecke was in the hallway outside the apartment. Immediately following the shot, all four

individuals, including the injured Mr. Harkleroad, fled the apartment. Appellant, still carrying his shotgun and making threats, followed the group out of the apartment.

When he reached the front yard, Mr. Harkleroad collapsed face-down, where Ms. Lubecke attempted to come to his aid. Mr. Orfield ran to a neighbor's house to seek help, and Ms. Stiltner sought cover between two vehicles. Having heard the commotion, Natasha Newton, a downstairs neighbor, came out of her apartment to investigate. From approximately five feet away, Appellant again fired his weapon in the direction of Ms. Stiltner, just missing her head. Appellant then fled the scene. Mr. Harkleroad was eventually transported to the emergency room where he was pronounced dead.

Following the shooting, Appellant proceeded to his parents' home. Accompanied by his father, Appellant then turned himself into authorities. Appellant was arrested and charged by presentment with first degree murder and attempted first degree murder in violation of Tennessee Code Annotated Section 39-13-202(a)(1). From January 24, 1995 through January 27, 1995, Appellant was tried before a jury in the Sullivan County Criminal Court. At trial, Appellant alleged that, at the time of the shooting, he had been maintaining a residence at the apartment for the last few weeks while Ms. Stiltner lived elsewhere. He further alleged that Mr. Harkleroad threatened him with a knife just before the shooting.

At the conclusion of the trial, the jury found Appellant guilty of second degree murder and attempted second degree murder. On March 10, 1995, the

trial court imposed an effective sentence of forty-five years in the Tennessee Department of Correction. Appellant appeals both his convictions and his sentences.

II. BILL OF PARTICULARS

Appellant first alleges that the trial court erred in refusing to direct the filing of a bill of particulars. On September 13, 1994, Appellant filed a pre-trial motion for a bill of particulars, specifically seeking the facts upon which the State was relying to show premeditation and deliberation. The trial court, while not overruling the request, held that the State had already satisfactorily informed Appellant of all essential particulars of the charged offenses, eliminating any need for a bill of particulars.

The Tennessee Rules of Criminal Procedure provide that, upon motion of the defendant, a trial court may direct the filing of a bill of particulars. Tenn. R. Crim. Pro. 7(c) (Supp. 1995). The purpose of a bill of particulars is to provide the defendant with enough information about the charge to prepare a defense, to avoid prosecutorial surprise at trial, and to preserve a plea of double jeopardy. State v. Campbell, 904 S.W.2d 608, 611 (Tenn. Crim. App. 1995). A bill of particulars is not meant to be used for the purposes of broad discovery. State v. Wiseman, 643 S.W.2d 354, 360 (Tenn. Crim. App. 1982). The standard for evaluating a motion for a bill of particulars is whether it is necessary that the defendant have the particulars sought in order to prepare a defense and to avoid prejudicial surprise at trial. State v. Hicks, 666 S.W.2d 54, 56 (Tenn. 1984). If the requested information is in the indictment or has been provided by the State in some other satisfactory form, a bill of particulars is not required. Id.

Here, the trial court determined that, by means of the indictment and the preliminary hearing, the State had provided sufficient particulars on the charged offenses to permit Appellant to prepare a defense and to avoid prosecutorial surprise at trial. The indictment provided the time and place of the incident and the names of the victims. Furthermore, according to the trial court, the preliminary hearing, which was not made part of the record, revealed evidence supporting the theory that Appellant acted with premeditation and deliberation. It is the duty of the appellant to prepare a fair, accurate, and complete record on appeal to enable meaningful appellate review. Tenn. R. App. P. 24. Absent an adequate record, we must presume that the rulings of the trial court were correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Under these circumstances, we conclude that the trial court's refusal to direct the filing of a bill of particulars was not error.

Even assuming error arguendo, Appellant's conviction for second degree murder, rather than first degree murder, eliminates any possible prejudice arising from the trial court's refusal to direct a bill of particulars on the subjects of premeditation and deliberation. Appellant argues that the requested bill of particulars would have revealed a lack of evidence supporting premeditation and deliberation and would have allowed him to devote more of his time and resources to defending against other elements of the charged offenses. However, even though the jury chose not to convict Appellant of first degree murder, some evidence adduced at trial did support the theory that Appellant acted with premeditation and deliberation. Most importantly, Ms. Lubecke testified that, prior to the shooting, Appellant threatened to kill anyone who returned to the apartment. Also, one of Appellant's co-workers testified that,

earlier that same day, Appellant made threatening remarks regarding “busting the head” of an individual that was harassing he and his girlfriend. Thus, Appellant has failed to adequately demonstrate how his defense was prejudiced by a lack of particulars on the subjects of premeditation and deliberation.

III. SUFFICIENCY OF EVIDENCE

Appellant alleges that the evidence presented at trial is insufficient to sustain convictions for second degree murder and attempted second degree murder. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, 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, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof

are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilty. State v. Tuggle, 639 S.W.2d 913, 194 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

A. SECOND DEGREE MURDER

In order to sustain a conviction for second degree murder in this case, the evidence must show that Appellant knowingly killed Mr. Harkleroad. See Tenn. Code Ann. § 39-13-210(a)(1). Tennessee Code Annotated Section 39-11-302(b) provides the following with respect to the knowing requirement:

“Knowing” refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct of that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Appellant argues that, at the very worst, his actions against Mr. Harkleroad constituted voluntary manslaughter because, at the time of the shooting, he was “in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” See id. § 39-13-211(a).

The record reveals that, following a physical altercation initiated by Appellant, he pointed a shotgun at Mr. Harkleroad and, at very close range, fired. While there was some evidence that Appellant was in an emotional state at the time of the shooting, the jury apparently concluded that Appellant was aware that

his conduct was reasonably certain to cause the death of Mr. Harkleroad. In light of all the evidence adduced at trial, it was within the province of the jury to reject Appellant's theory of voluntary manslaughter and to find instead that Appellant was guilty of second degree murder. Thus, we conclude that, when viewed in the light most favorable to the State, the evidence presented at trial is legally sufficient to sustain Appellant's conviction for second degree murder.

B. ATTEMPTED SECOND DEGREE MURDER

In order to sustain a conviction for attempted second degree murder in this case, the evidence must show that Appellant intended to kill Ms. Stiltner and, in firing his weapon, believed that she would be killed. See Tenn. Code Ann. §§ 39-12-101(a)(2), 39-13-210(a)(1). Appellant argues that his actions against Ms. Stiltner constituted, for the reasons discussed previously, only attempted voluntary manslaughter or perhaps reckless endangerment. See id. §§ 39-13-211(a), 39-13-103(a). Appellant further argues that he did not possess the required intent to kill Ms. Stiltner, as evidenced by the fact that, given his distance from her at the time of the shooting, he would not have missed had he intended to actually shoot her.

The record reveals that, following the shooting of Mr. Harkleroad, Appellant pursued the fleeing group out of the apartment and fired at least one shot, narrowly missing Ms. Stiltner. There was conflicting testimony at trial regarding whether Appellant was aiming at Ms. Stiltner when he fired the weapon or whether the weapon discharged during a struggle between Appellant and Ms. Stiltner. In light of the verdict of guilt, it is clear that the jury, based on all of the evidence adduced at trial, concluded that Appellant fired upon Ms. Stiltner with

the intent of hitting her and that only fortuity saved her from the fate of Mr. Harkelroad. As the exclusive trier of fact, such a determination was the jury's to make. Thus, when viewed in the light most favorable to the State, the evidence presented at trial is legally sufficient to sustain Appellant's conviction for attempted second degree murder.

IV. SELF-DEFENSE

Appellant alleges that the evidence presented at trial is sufficient to establish his theory of self-defense. He argues that the shooting was justified because Mr. Harkleroad forcibly entered his apartment, refused to leave, and attacked him.

Tennessee Code Annotated Section 39-11-611 provides the following:

A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is imminent danger of death or serious bodily injury. The danger creating the belief in imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

Any person using force intended or likely to cause death or serious bodily injury within their own residence is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to self, family or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully or forcibly entered the residence, and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

Thus, the test for self-defense is three-fold: (1) the defendant must reasonably believe he or she is threatened with imminent loss of life or serious bodily injury; (2) the danger creating the belief must be real or honestly believed to be real at the time of the action; and (3) the belief must be founded on reasonable grounds. Id. sentencing commission comments. A presumption exists that a person using force against an intruder in the person's residence is in reasonable fear of imminent death or serious injury. Id. Whether force is justified as self-defense involves factual determinations to be resolved by the jury. State v. Clifton, 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994).

It is evident from the verdict of guilt that, based upon the facts and circumstances leading up to and surrounding the shooting, the jury determined that the actions taken by Appellant failed to meet the three-fold test for self-defense. This Court has consistently held that such a factual determination lies exclusively within the province of the jury. See State v. Bunting, No 03C01-9506-CR-00182, 1996 WL 224789, at *2 (Tenn. Crim. App. May 6, 1996), perm. app. denied, (Tenn. Oct. 7, 1996); State v. McCormick, No. 01C01-9502-CC-00027, 1995 WL 580854, at *3 (Tenn. Crim. App. Oct. 5, 1995); State v. Mize, No. 03C01-9405-CR-00163, 1995 WL 562243, at *4 (Tenn. Crim. App. Sept. 22, 1995). In light of evidence that Appellant had moved out of the apartment prior to the shooting and that Ms. Stiltner, and presumably her guests, had the apartment owner's permission to enter the apartment at the time of the incident, the presumption giving residential occupants the right to use deadly force against intruders is inapplicable. Furthermore, there was testimony at trial that neither Mr. Orfield nor Mr. Harkleroad threatened Appellant with imminent loss of life or

serious bodily injury. For these reasons, the jury's decision to reject Appellant's claim of self-defense is adequately supported by the record.

V. IMPEACHMENT BY PRIOR CONVICTIONS

Appellant alleges that the trial court erred in allowing the use of Massachusetts assault convictions to attack his credibility. On September 24, 1993, Appellant was convicted by a Massachusetts trial court of two counts of assault by means of a dangerous weapon, one count of assault on a police officer, and one count of assault and battery by means of a dangerous weapon. Appellant received an effective sentence of two-and-a-half years in a house of correction. The Massachusetts sentencing court suspended the sentence until September 25, 1995 and placed Appellant on probation. The trial court determined that these convictions were admissible under Tennessee Rule of Evidence 609 for the purpose of attacking Appellant's credibility. Appellant argues that the convictions were only misdemeanors under Massachusetts law and therefore inadmissible under Rule 609. Appellant further argues that the probative value of these convictions failed to outweigh their unfair prejudicial effect.

Tennessee Rule of Evidence 609 provides the following:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

(1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, identity may be established by other evidence.

(2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Tenn. R. Evid. 609(a) (emphasis added). Subsection (2) refers only to the length of the sentence imposed and makes no reference to whether the conviction qualifies as a felony or a misdemeanor under the law of the jurisdiction where it was imposed. Here, the Massachusetts sentencing court imposed an effective sentence of two-and-a-half years. Whether the convictions constitute felonies or misdemeanors under Massachusetts law is immaterial for the purposes of Rule 609.

In determining whether the probative value of a prior conviction on the issue of credibility is outweighed by its unfair prejudicial effect on the substantive issues, a trial court should (1) assess the similarity between the crime on trial and the crime underlying the impeaching conviction and (2) analyze the relevance the impeaching conviction has to the issue of credibility. *State v. Farmer*, 841 S.W.2d 837, 139 (Tenn. Crim. App. 1992) (quoting Neil Cohen et al., Tennessee Law of Evidence, § 609.9, at 288 (2d ed. 1990)). The ruling of a trial court under

Rule 609 should not be reversed absent an abuse of discretion. See State v. Johnson, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979).

Here, the record fails to demonstrate how the probity of the convictions outweighs their prejudicial effect. We believe that, given the violent nature of the prior convictions and the similarly violent nature of the offenses charged as well as the prior convictions' lack of any real relevance to the issue of credibility, the assault convictions' probative value on the question of Appellant's credibility fails to outweigh the prejudicial effect on the substantive issue of Appellant's guilt. We therefore find that the trial court's decision to admit the assault convictions was erroneous. However, there is overwhelming evidence of Appellant's guilt, including eyewitness testimony and Appellant's own admissions. Further, the jury found that Appellant was guilty only of the lesser included offenses of second degree murder and attempted second degree murder. Under these circumstances, the trial court's error was harmless. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

VI. SENTENCING

Finally, Appellant alleges that his sentence is excessive. Specifically, Appellant argues that the trial court erred in determining his offender status, in establishing the length of his sentence, and in imposing consecutive sentences.

When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, this presumption of correctness is "conditioned upon the

affirmative showing that the trial court in the record considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, “even if we would have preferred a different result.” State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially that the record fails to demonstrate adequate consideration of certain principles of the Criminal Sentencing Reform Act, as mandated by Ashby. First, the trial court failed to consider, on the record, the mitigating factor offered by Appellant at his sentencing hearing. Next, the trial court failed to make, on the record, appropriate findings to justify the imposition of consecutive sentences. See Tenn. Code Ann. § 40-35-115. Finally, the trial court failed to address, on the record, applicable sentencing purposes, considerations, and alternatives. See id. §§ 40-35-102 to -104. Thus, our review of Appellant’s sentence will be purely de novo.

Appellant was convicted of second degree murder, a Class A felony, and attempted second degree murder, a Class B felony. See Tenn. Code Ann. §§ 39-13-210(b); 39-12-107(a). As a Range II multiple offender convicted of a Class A felony, Appellant's statutory sentencing range for second degree murder was twenty-five to forty years. See id. § 40-35-112(b)(1). As a Range II multiple offender convicted of a Class B felony, Appellant's statutory sentencing range for attempted second degree murder was twenty-five to forty years. See id. § 40-35-112(a)(2). The trial court found the following enhancement factors applicable to both sentences:

- (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
- (2) the offense involved more than one victim;
- (3) the personal injuries inflicted upon the victim were particularly great;
- (4) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;
- (5) the defendant had no hesitation about committing a crime when the risk to human life was high;
- (6) the felony was committed while on probation from a prior felony conviction; and
- (7) the crime was committed under circumstances under which the potential for bodily injury to a victim was great.

Id. § 40-35-114(1), (3), (6), (8), (10), (13), (16). The trial court found no mitigating factors. At the conclusion of the sentencing hearing, the trial court imposed consecutive sentences of thirty years for the second degree murder conviction and fifteen years for the attempted second degree murder conviction. We will address each of Appellant's sentencing arguments in turn.

A. OFFENDER STATUS

Appellant contends that the trial court erred in sentencing him as a Range II multiple offender. To qualify as a Range II multiple offender, a defendant must have received:

(1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; or

(2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

Tenn. Code Ann. § 40-35-106(a). In sentencing Appellant as a Range II multiple offender, the trial court relied upon a North Carolina conviction for armed robbery and a Massachusetts conviction for assault and battery with a dangerous weapon. Appellant challenges only the trial court's reliance upon the Massachusetts conviction, arguing that this offense is not a felony in Massachusetts and therefore cannot be considered for the purposes of determining his offender status.

With regard to the consideration of out-of-state convictions to determine offender status, Tennessee Code Annotated Section 40-35-106(b)(5) provides the following:

Prior convictions include convictions under the laws of any other state, government, or country which, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.

Here, the trial court found that the elements of the Massachusetts offense matched the elements of aggravated assault under Tennessee Code Annotated Section 39-13-102(a)(1). We agree. Since aggravated assault is designated a Class C felony, the trial court properly considered the Massachusetts offense as

a Class C felony for the purposes of determining Appellant's offender status. Coupled with the uncontested North Carolina conviction, the Massachusetts conviction is sufficient to qualify Appellant as a Range II multiple offender.

B. LENGTH OF SENTENCE

Appellant maintains that the trial court erred in determining the length of his sentence by improperly applying certain enhancement factors and failing to apply certain mitigating factors.

In the absence of enhancement and mitigating factors, the presumptive length of sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range while the presumptive length of sentence for a Class A felony is the midpoint in the statutory range. Tenn. Code Ann. § 40-35-210(c) (Supp. 1995). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence but still within the range. Id. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

1. PREVIOUS CRIMINAL HISTORY

Appellant first argues that the trial court improperly applied enhancement factor (1), concerning his previous criminal history. Appellant's pre-sentence report reveals convictions for assault and battery, criminal trespass, driving under the influence of the intoxicant, disorderly conduct, public intoxication, and marijuana possession. The fact that the majority of Appellant's convictions are misdemeanors does not negate the application of this enhancement factor. See State v. Dixon, No. 01C01-9402-CC-00052, 1995 WL 563274, at *2 (Tenn. Crim. App. Sept. 20, 1995). Given the number of convictions and the consistency with which they appear over seventeen years, except for a period when Appellant was incarcerated in North Carolina, we believe that his criminal history, beyond that which is necessary to sentence him as a Range II multiple offender, is significant. Thus, we conclude that the trial court's application of enhancement factor (1) was proper.

2. MULTIPLE VICTIMS

Appellant argues that the trial court improperly applied enhancement factor (3), concerning multiple victims. When a defendant is indicted, convicted, and sentenced for each victim involved, as Appellant was here, enhancement factor (3) is inapplicable. See State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1994). The State concedes that the application of enhancement factor (3) was improper, and we agree.

3. PARTICULARLY GREAT PERSONAL INJURIES

Appellant argues that the trial court improperly applied enhancement factor (6), concerning the particularly great personal injuries inflicted upon the victim. When death is an element of the offense, as it is in the case of second degree

murder, enhancement factor (6) is inapplicable. See State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987). Furthermore, the record does not support a finding of particularly great personal injuries in the case of Ms. Stiltner. The State concedes that the application of enhancement factor (6) was improper, and we agree.

4. HIGH RISK TO HUMAN LIFE

Appellant argues that the trial court improperly applied enhancement factor (10), concerning the high risk to human life. While enhancement factor (10) is inapplicable when the only person subject to injury is the victim, this Court has consistently held that it is applicable when other individuals, besides those actually victimized, are subject to a high risk of injury. See State v. Johnson, 909 S.W.2d 461, 464 n.1 (Tenn. Crim. App. 1995); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). Here, the record reveals that, when Appellant shot and killed Mr. Harkleroad, Mr. Orfield was standing very close by in the small apartment. The record further reveals that, when Appellant pursued the fleeing group from the apartment and fired upon Ms. Stiltner, Mr. Orfield, Ms. Lubecke, the dying Mr. Harkleroad, and Ms. Newton were all present and in close proximity to Appellant. Thus, because other individuals besides the actual victims were subject to a high risk of injury during the commission of each offense, we conclude that the trial court's application of enhancement factor (10) was proper.

5. GREAT POTENTIAL FOR BODILY INJURY

Appellant argues that the trial court improperly applied enhancement factor (16), concerning the great potential for bodily injury. The initial inquiry is whether proof that the potential for bodily injury was great also proves an essential

element of the offense charged. State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). Appellant maintains that both of these offenses, by their very nature, involve great potential for bodily injury to the victims and that, as a result, enhancement factor (16) is inapplicable. However, not unlike enhancement factor (10), when the great potential for bodily injury involves individuals other than the victims, enhancement factor (16) is applicable. See State v. Robinson, No. 01C01-9209-CR-00270, 1993 WL 114624, at *4 (Tenn. Crim. App. April 15, 1993). As discussed previously, during the commission of the murder, the potential for bodily injury to Mr. Orfield was great. Furthermore, during the commission of the attempted murder, the potential for bodily injury to all those present was great. Thus, we conclude that the trial court's application of enhancement factor (16) is proper.

6. FIREARM

The State argues that the trial court should have applied enhancement factor (9), providing that "[t]he defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense." Tenn. Code Ann. § 40-35-114(9). The use of a firearm is not an element of second degree murder. State v. Raines, 822 S.W.2d 376, 385 (Tenn. Crim. App. 1994). It is undisputed that Appellant employed a .20 gauge shotgun during the commission of both offenses. Thus, we conclude that the application of enhancement factor (9) is proper.

7. STRONG PROVOCATION

Appellant argues that the trial court should have applied mitigating factor (2), providing that "[t]he defendant acted under strong provocation." Tenn. Code

Ann. § 40-35-113(2). The convictions returned by the jury negate the application of this mitigating factor. In finding Appellant guilty of second degree murder and attempted second degree murder, the jury rejected both his theory of self-defense and his argument that, at worst, his actions constituted voluntary manslaughter and attempted voluntary manslaughter. These findings destroy any argument that Appellant acted under strong provocation when he fired upon Mr. Harkleroad and Ms. Stiltner. The nature and circumstances of these offenses do not demonstrate the kind of strong provocation required to mitigate the sentences. See State v. Galbreath, No. 01C01-9406-CC-0204, 1995 WL 518878, at *5 (Tenn. Crim. App. Sept. 1, 1995). Thus, we conclude that mitigating factor (2) is inapplicable.

In sum, with regard to offender status, we find that, on the basis of prior North Carolina and Massachusetts felony convictions, the trial court correctly sentenced Appellant as a Range II multiple offender. With regard to length of sentence, we find that the following enhancement factors apply to both of Appellant's sentences:

(1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(2) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(3) the defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

(4) the defendant had no hesitation about committing a crime when the risk to human life was high;

(5) the felony was committed while on probation from a prior felony conviction; and

(6) the crime was committed under circumstances under which the potential for bodily injury to a victim was great.

Tenn. Code Ann. § 40-35-114(1), (3), (9), (10), (13), (16). We further find that no mitigating factors apply to Appellant's sentences. In light of six enhancement factors and no mitigating factors, we conclude that a mid-range sentence of thirty years for second degree murder and mid-range sentence of fifteen years for attempted second degree murder is reasonable and justified.

C. CONSECUTIVE SENTENCING

Appellant contends that the trial court erred in imposing consecutive sentences. When imposing sentences for multiple offenses, the trial court has the discretion to order the sentences served concurrently or consecutively. Tenn. Code Ann. § 40-20-111(a). The imposition of consecutive sentences is appropriate if the defendant has been convicted of more than one offense and the trial court finds, by a preponderance of the evidence, one or more of the following criteria:

(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) 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;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor . . . ;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

1. COMMISSION OF OFFENSES WHILE ON PROBATION

The State first argues that the imposition of consecutive sentences is proper because Appellant committed the offenses while on probation. See id. § 40-35-115(b)(6). The record indicates that, at the time of the commission of these offenses, Appellant was on probation for multiple assault convictions from Massachusetts. Based on this fact, the imposition of consecutive sentences is appropriate. See, e.g., State v. Franklin, 919 S.W.2d 362, 366 (Tenn. Crim. App. 1995).

2. EXTENSIVE HISTORY OF CRIMINAL ACTIVITY

The State also argues that the imposition of consecutive sentences is proper because Appellant has an extensive history of criminal activity. See Tenn. Code Ann § 40-35-115(b)(2). Appellant's pre-sentence report reflects, over a seventeen-year period beginning at age eighteen, convictions for assault with a deadly weapon, armed robbery, assault and battery, criminal trespass, driving under the influence of an intoxicant, disorderly conduct, public intoxication, marijuana possession, and numerous driving offenses.¹ This Court has previously held that proof of two drug offense convictions, two weapons offense convictions, and numerous misdemeanor driving offenses was sufficient to support a finding that the defendant had an extensive criminal record, giving the trial court the discretion to impose consecutive sentences. See State v. Chrisman, 885 S.W.2d 834, 839 (Tenn. Crim. App. 1994). The proof here is similarly sufficient to support a finding that Appellant's criminal activity has been

¹ Without citing any supporting authority, Appellant argues that the trial court cannot use his criminal history to both enhance his sentences and to impose consecutive sentences. We disagree. There is no prohibition against using the same facts and circumstances both to enhance Appellant's sentences under applicable enhancement factors and to order those sentences served consecutively. See State v. Meeks, 867 S.W.2d 361, 377 (Tenn. Crim. App. 1993); State v. Davis, 825 S.W.2d 109, 113 (Tenn. Crim. App. 1991).

extensive. Based on this finding, the imposition of consecutive sentences is appropriate. See, e.g., State v. Tuttle, 914 S.W.2d 926, 933 (Tenn. Crim. App. 1995).

In sum, we find that, because Appellant committed the offenses while on probation and because Appellant has an extensive history of criminal activity, consecutive sentences are justified. Upon de novo review, we conclude that the record supports the sentences imposed.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOHN K. BYERS, SENIOR JUDGE