

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 14, 2023 Session

FILED
04/04/2023
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. LESLIE LAMONT COLEMAN

**Appeal from the Circuit Court for Bedford County
No. 19083 Forest A. Durard, Jr., Judge**

No. M2022-00278-CCA-R3-CD

The defendant, Leslie Lamont Coleman, was convicted of aggravated robbery, a Class B felony, and sentenced to twenty years in the Department of Correction, to be served consecutively to his sentence in a prior felony murder case. On appeal, the defendant argues: (1) the evidence is insufficient to sustain his conviction because the only proof connecting him to the crime was the uncorroborated testimony of his alleged accomplice; (2) the trial court committed plain error by ruling the State could question the defendant about his prior felony murder conviction under Tennessee Rules of Evidence 608 and 609 if he chose to testify; and (3) the trial court erred in sentencing by imposing the maximum Range II sentence of twenty years. After review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J. ROSS DYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and TOM GREENHOLTZ, JJ., joined.

Brian D. Wilson, Assistant Public Defender, Tennessee Public Defenders Conference, Franklin, Tennessee (on appeal); James R. Tucker, Jr. and Douglas Neely, Assistant Public Defenders, Shelbyville, Tennessee (at trial), for the appellant, Leslie Lamont Coleman.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Assistant Attorney General; Robert J. Carter, District Attorney General; and Michael D. Randles and Amber Sandoval, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

This case arises out of the defendant's and an accomplice's robbery of a Circle K convenience store during the early morning hours of January 15, 2019.

Amanda Foster testified she was the assistant store manager of the Circle K at the time of the incident. At 12:44 a.m., Ms. Foster went outside to take a break. There were no customers in the store or at the gas pumps at the time. While she was standing outside the front door, two African-American men approached her wearing sweatshirts, toboggans, and masks. At least one of the men was armed with a knife. Ms. Foster noted that one man appeared to be younger and smaller than the other man.

When the men got close to Ms. Foster, one of them said, "let's go," and pointed inside the store. Ms. Foster went inside, and the men followed her. They then directed her to open the cash register. In addition to taking money from the register, the men collected cigarettes and directed Ms. Foster to unlock the safe, which had a ten-minute time delay. While waiting for the safe to open, one of the men took beer from the cooler. Both men also went into the back room of the store and "started taking everything they could fit in their pockets."

The two men talked amongst themselves throughout the robbery, and Ms. Foster heard the smaller/younger man continually refer to the bigger/older man "Pops." The men took \$78 from the cash register, cigarettes, E-cigarettes, and "vapes" from behind the register area. Ms. Foster also remembered that the bigger/older man took an 18-pack of Bud Light bottles from the cooler, as well as a "dark gray [tool]box with red snaps on it" from the back office. Ms. Foster said that throughout the robbery, she was "standing there with [her] hands up praying." At some point during the robbery while they were still waiting for the safe to open, the donut delivery driver pulled into the parking lot and the men "took off running" without taking anything from the safe. Both men dropped several items as they fled the store. The men ran toward Wartrace Pike, and when they were out of sight, Ms. Foster locked the door and called 911.

Ms. Foster recalled that about thirty minutes before the robbery, she saw a white Dodge Avenger occupied by two African-American males drive past the front of the store and circle around the back. When shown a photograph of what was later determined to be the defendant's car, Ms. Foster noted that the defendant's car looked exactly like the car she saw prior to the robbery. According to Ms. Foster, not only were both vehicles white, but they both also had a black stripe with the word Avenger.

The State played the surveillance footage of the incident for the jury, during which Ms. Foster pointed out that one of the robbers was wearing a toboggan, a mask, and a white tee shirt with a long-sleeved shirt underneath and appeared to be wearing gloves and was armed with a knife. Ms. Foster also noted the other robber was wearing a hood, a mask,

gloves, a blue sweatshirt with white stripes on the sleeves, and black sweatpants. In another surveillance video, Ms. Foster was able to discern that the robber in the blue sweatshirt was also armed with a knife.

On cross-examination, Ms. Foster acknowledged she could not identify the defendant in court as one of the robbers.

Deputy Joseph Guthrey with the Bedford County Sheriff's Office was on routine patrol near the Circle K at the time of the robbery and noticed a donut delivery truck pull into the parking lot. As Deputy Guthrey got closer, he saw the driver get into the truck and proceed quickly towards the highway. The truck then came to an abrupt halt, the driver jumped out of the truck and ran to the deputy, informing him that the convenience store had just been robbed. The driver told the deputy that the robbers "ran out of the store and down the back of the hill." Deputy Guthrey turned right on Wartrace Pike where he saw a white Dodge car.

Deputy Guthrey pulled up behind the vehicle and activated his blue lights but, when he did, "two individuals jump[ed] in the car" and "t[ook] off." Deputy Guthrey pursued the white car while he called the 911 dispatcher to relay the situation. He was eventually ordered to terminate the pursuit due to the high rate of speed. Traffic camera footage that captured a brief portion of the chase was played for the jury, and Deputy Guthrey confirmed the footage showed the Dodge vehicle he was chasing and his patrol car. When shown a photograph of what was later determined to be the defendant's vehicle, Deputy Guthrey said it appeared to be the vehicle he chased that evening. Deputy Guthrey acknowledged that when speaking with dispatch, he initially referred to the vehicle he was chasing as a Dodge Charger.

Officer Josh Graves with the Shelbyville Police Department ("SPD") was dispatched to the armed robbery call at the Circle K. While en route, Officer Graves received information that the suspect vehicle was on Wartrace Pike being pursued by another officer. Officer Graves arrived at the Circle K less than two minutes after receiving the dispatch, and he spoke with Ms. Foster who was "upset" and "flustered." Ms. Foster reported that two men armed with knives had committed the robbery and that they had taken "[c]igarettes, a couple of e-cig refill packs[, and] . . . a toolbox[.]" Ms. Foster told Officer Graves she saw a white Dodge Avenger in the parking lot shortly before being approached by the robbers.

Officer Graves searched the area between the Circle K and the hill going down towards Wartrace Pike and found "[i]tems [that] had been dropped along the pathway towards Wartrace Pike that were described as the items that were taken from the store." Officer Graves collected the items, among which was a "Vibe refillable electronic vape,"

and submitted the items to the evidence department. The Circle K store manager, Christopher Goebel, contacted Officer Graves later that morning after conducting an inventory and reported an accurate listing of the items that were stolen. According to Mr. Goebel, the items stolen were “a couple of cartons of cigarettes, Newport 100’s and L&M Menthol 100’s,” a couple of vape “flavor tanks,” a “My Blu Starter Kit” and a “Pack of Gear” for vaping, as well as a small gray and red toolbox for store use.

Lieutenant Fred Harvey with the SPD testified he overheard the dispatch call reporting the armed robbery, and based on the initial information received, he believed a white Dodge Charger was involved. Lieutenant Harvey agreed there were similarities between a Dodge Charger and Dodge Avenger.

Less than an hour after the robbery, Lieutenant Harvey saw a vehicle in the Magnolia Village apartment complex “that generally matched the description” of the car from the robbery, but it was an Avenger not a Charger. Because he believed he was looking for a Charger, Lieutenant Harvey returned to the police station where he quickly learned the suspect vehicle was actually an Avenger. Lieutenant Harvey then went back to the Magnolia Village apartments, still within approximately an hour of the robbery, and felt the hood of the Dodge Avenger. The weather outside was cold, but the hood of the Avenger was noticeably warm, indicating it had been driven recently. Lieutenant Harvey ran the license plate and learned the vehicle was registered to the defendant at the address of Apartment H-3 in the Magnolia Village apartment complex. Lieutenant Harvey identified a photograph of the vehicle.

Lieutenant Charles Merlo with the SPD conducted surveillance of the Dodge Avenger at the Magnolia Village apartments the morning after the car was located by Lieutenant Harvey. Lieutenant Merlo also verified with the apartment manager that the defendant and his girlfriend, Marilyn Claybrooks, lived in Apartment H-3. Around mid-day, Lieutenant Merlo saw two men exit the breezeway of apartment building H and get into the Dodge Avenger. The vehicle did not return to the complex during the remainder of Lieutenant Merlo’s shift.

The next day, January 16th, Lieutenant Merlo was called to a scene where patrol officers had pulled over the suspect vehicle. The vehicle was occupied by the defendant, Marilyn Claybrooks, and Deontre Farris. Lieutenant Merlo interviewed Ms. Claybrooks, and she indicated she had been home at the time of the robbery. Lieutenant Merlo observed that Mr. Farris was wearing an item of clothing that one of the robbers was wearing in the surveillance video. The defendant later gave consent for officers to search his vehicle, and the search uncovered some gloves, a knife, and a toolbox. Lieutenant Merlo also participated in the execution of a search warrant at the defendant’s apartment, during which

officers found numerous items connected to the robbery, including cigarettes, Bud Lite boxes, “My Blu Vapors,” and items of clothing.

Officer Russ Grubbs with the SPD testified that on the morning of January 16th, he was maintaining surveillance at the Magnolia Village apartments when he saw the Dodge Avenger leave the complex. Officer Grubbs followed the vehicle until it ultimately stopped at a bank where he and other officers made contact with the occupants of the vehicle. Officer Grubbs identified a photograph showing two of the vehicle’s occupants standing outside the car and, notably, one of the individuals was wearing blue pants with white stripes that resembled the clothing worn by one of the robbers.

Sergeant Bill Logue, a crime scene investigator with the SPD, testified he was on-site when other officers executed a search warrant of the defendant’s apartment, where Ms. Claybrooks and Mr. Farris also resided, and later conducted a consent search of the defendant’s car. At the apartment, officers discovered a light blue sweatshirt jacket with white stripes and a hooded gray sweatshirt on the sofa in the living room that resembled the clothing worn by one of the robbers shown in the surveillance video. On the coffee table, officers saw a Bud Lite beer bottle and a Blu vape implement. In the bedroom determined to be Mr. Farris’s bedroom, officers found a white glove on the floor that resembled the glove worn by one of the robbers, as well as a Bud Lite bottle. In the bedroom determined to be the defendant’s and Ms. Claybrooks’s, officers found six packs of Newport cigarettes, two glass bottles of “vaping products,” and two folding knives. A pair of black cargo pants was also found in the bedroom, consistent with the pants worn by the robber in the white tee shirt.

In the kitchen of the defendant’s apartment, officers discovered a Bud Light beer carton in the trash can, as well as an empty package of L&M cigarettes, which was one of the brands stolen in the robbery. Officers collected five packs of L&M cigarettes, Black and Mild cigars, and a box of Vibe vaping product from one kitchen drawer, and Vuse vaping products from another drawer. In a backpack Ms. Claybrooks referred to as her purse, officers found a “My Blu Starter Kit,” which was an item reported stolen in the robbery. Sergeant Logue noted that the Blu vaping product found on the coffee table could have come from the starter kit in the backpack.

Sergeant Logue recalled that the search of the defendant’s car produced two pairs of white gloves and one pair of black gloves, a folding knife, and a toolbox with red latches that the Circle K store manager identified as belonging to the store. Officers also found a pack of Newport cigarettes and two Bud Lite beer bottles in the car. Sergeant Logue recalled the surveillance footage showed that one robber was wearing white gloves and one robber was wearing dark gloves.

Deontre Farris, the co-defendant in the case, testified that the defendant and his mother were dating in January 2019, but he had not known the defendant very long. Mr. Farris admitted he and the defendant went to the Circle K store on the night of January 15th, and Mr. Farris identified them both on the surveillance footage. Mr. Farris said the defendant drove to the Circle K and parked on the street at the side of the store. The defendant then gave him a mask and a knife. Mr. Farris agreed that he and the defendant both had on masks and gloves during the robbery and were carrying knives. Mr. Farris recalled they waved the clerk into the store, and Mr. Farris personally took “cigarettes and Blacks and a vape” from the register area as well as cash from the register. Mr. Farris identified the defendant in the court as the individual with whom he robbed the store. Mr. Farris averred he had not been promised leniency or favorable treatment for his testimony. Mr. Farris acknowledged he initially did not talk to the police but decided to do so after learning he was having another child and “want[ed] to try to clean things up[.]” Mr. Farris admitted he had previously taken his mother’s white Dodge Avenger without her permission.

Marilyn Claybrooks testified that on the night of the robbery, the defendant and Mr. Farris were talking in the living room when she went to bed. Ms. Claybrooks recalled that earlier that day, the defendant mentioned he was going to ask his stepmother for money because they “were behind” on their rent payment and the car payment on the white Dodge Avenger was “past due.”

Ms. Claybrooks stated she and the defendant “owned a toolbox for work” that was “[b]lack and . . . ha[d] a lot of different tools in it[.]” She then said it might have been gray, but she really did not remember. When later shown the toolbox that had been admitted into evidence, Ms. Claybrooks said it did not look familiar. Ms. Claybrooks recalled Mr. Farris had known the defendant for a couple of months at the time of the robbery, but she had never heard her son call the defendant “Pops.” Ms. Claybrooks confirmed Mr. Farris had taken the white Dodge Avenger one prior occasion without permission.

Detective Cody Swift with the SPD recounted his actions in investigating the robbery, which included interviewing the defendant. In his interview, the defendant denied involvement in the robbery, claiming he did not leave home that night. Detective Swift also reviewed a recorded call between the defendant and Ms. Claybrooks from jail. In the call, the defendant told Ms. Claybrooks that Mr. Farris’s “dumb butt still had the pants on” when he was arrested and that the defendant had “told the stupid butt to take all of that . . . damn shit off.” Detective Swift watched the surveillance footage from the store and noticed the larger robber, who was wearing a white tee shirt, “kind of walked pigeon toed, toes were pointing straight out when he walked.” Having observed the defendant walk on multiple occasions, Detective Swift noted the defendant’s gait was “identical” to the larger robber in the videos. The surveillance footage also contained audio, which Detective Swift

compared to the defendant's voice in the jailhouse call between the defendant and Ms. Claybrooks. Detective Swift concluded the "defendant has a very unique voice and both are the same in all of the videos." Based on the similarities, Detective Swift determined the defendant was the larger robber in the white tee shirt.

Following the conclusion of the proof, the jury convicted the defendant as charged and, after a sentencing hearing, the trial court imposed a sentence of twenty years to be served consecutively to the defendant's sentence in a prior felony murder case.

Analysis

On appeal, the defendant argues the evidence is insufficient to sustain his conviction because the only proof connecting him to the crime was the uncorroborated testimony of his alleged accomplice, the trial court committed plain error by ruling the State could question him about his prior felony murder conviction under Tennessee Rules of Evidence 608 and 609 if he chose to testify, and the trial court erred in imposing the maximum Range II sentence of twenty years. The State submits that the evidence is sufficient to sustain the jury's verdict and that the trial court did not abuse its discretion in sentencing the defendant. Additionally, the State contends the defendant has failed to show a breach of a clear and unequivocal rule of law or that consideration of the evidentiary issue is necessary to do substantial justice, and therefore, the defendant is not entitled to plain error relief. Upon our review of the record, we agree with the State and affirm the defendant's conviction and sentence.

I. Sufficiency – Accomplice Testimony

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court 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 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "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." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court has stated the following rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere, and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

On appeal, the defendant does not challenge the sufficiency of the evidence as it relates to the elements of the offense. Rather, the defendant maintains the State failed to provide sufficient evidence to corroborate the testimony of Mr. Farris as an accomplice.

It is well-established that “a conviction may not be based solely upon the uncorroborated testimony of an accomplice.” *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001) (citing *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994)). This Court has defined the term “accomplice” to mean “one who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime.” *State v. Allen*, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). The test of whether a witness qualifies as an accomplice is “whether the alleged accomplice could be indicted for the same offense charged against the defendant.” *Id.* It is not in dispute that Mr. Farris qualified as an accomplice.

Our supreme court has described what is required to establish sufficient corroboration as follows:

[T]here must be some fact testified to, entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant’s identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice’s evidence.

Shaw, 37 S.W.3d at 903 (quoting *Bigbee*, 885 S.W.2d at 803). The corroborating evidence need only be “slight.” *State v. Griffs*, 964 S.W.2d 577, 589 (Tenn. Crim. App. 1997). Whether sufficient corroboration exists is for the jury to determine. *Shaw*, 37 S.W.3d at 903.

At trial, Deontre Farris identified the defendant as the individual who robbed the Circle K convenience store with him. In corroboration of Mr. Farris’s testimony, the State presented evidence that several items matching the description of items stolen from the Circle K were found in the defendant’s home and automobile. Of particular note, a gray toolbox with red latches was taken from the store office, and a toolbox matching the description was found in the back seat of the defendant’s car and was unfamiliar to Ms. Claybrooks as belonging to the defendant. Possession of recently stolen property, unless it is satisfactorily explained, creates a permissible inference that the person who possessed the stolen property gained possession through theft. *See State v. James*, 315 S.W.3d 440, 450 (Tenn. 2010).

In addition, while in jail, the defendant had a call with Ms. Claybrooks during which he discussed Mr. Farris’s attire and commented that Mr. Farris’s “dumb butt still had the pants on” when he was arrested and that the defendant had “told the stupid butt to take all of that . . . damn shit off.” The surveillance footage showing Mr. Farris’s attire during the robbery and the defendant’s subsequent comment that he told Mr. Farris to change his clothes suggests the defendant knew what Mr. Farris was wearing during the robbery because he was the other participant.

Moreover, Detective Swift testified he was able to identify the defendant as a participant in the robbery based on Detective Swift’s review of the surveillance footage and interactions with the defendant. Detective Swift elaborated that he noticed on the surveillance footage that the larger robber, who was wearing a white tee shirt, “kind of walked pigeon toed, toes were pointing straight out when he walked.” Having observed the defendant walk on multiple occasions, Detective Swift noted the defendant’s gait was “identical” to the larger robber in the videos. The surveillance footage also contained audio, which Detective Swift compared to the defendant’s voice in the jailhouse call between the defendant and Ms. Claybrooks. Detective Swift concluded the “defendant has a very unique voice and both are the same in all of the videos.” These exhibits were all played for the jury from which it could make its own assessment.

Furthermore, Ms. Foster testified she saw a white Dodge Avenger with two African-American men drive past the front of the store and circle around the back about thirty minutes before the robbery. Shown a photograph of the defendant’s vehicle, Ms. Foster stated the defendant’s vehicle looked exactly like the car she observed, noting both cars were white and had a black stripe with the word Avenger. Deputy Guthrey arrived at the

scene as the robbers were fleeing and saw them get into a white Dodge vehicle. Less than an hour after the robbery, Lieutenant Harvey saw a white Dodge Avenger matching the general description from the robbery parked at the Magnolia Village apartment complex. Lieutenant Harvey felt the hood of the vehicle, and despite the cold temperature outside, the hood of the Avenger was noticeably warm, indicating it had been driven recently. Lieutenant Harvey ran the license plate of the vehicle and learned it was registered to the defendant at an address in the Magnolia Village apartment complex. Subsequent searches of the defendant's residence and vehicle revealed numerous items connected to the robbery, including knives, gloves, and items of clothing, in addition to items consistent with items stolen in the robbery.

The sum of the circumstantial evidence presented by the State fairly and legitimately tended to connect the defendant with the commission of the crime sufficient to corroborate the testimony of Mr. Farris. Accordingly, the evidence is sufficient to sustain the jury's verdict, and the defendant is not entitled to relief.

II. Rule 608 and 609 Ruling

The defendant asserts the trial court committed plain error when it ruled that the State could question him about his prior felony murder conviction under Tennessee Rules of Evidence 608 and 609, which "limited [his] ability to testify in his own defense and affected the outcome of the trial." The defendant acknowledges relief can only be granted under plain error review because the issue was not raised in his motion for new trial.

Under the plain error doctrine, a defendant may obtain relief only if all of the following criteria are satisfied: (1) the record clearly establishes what occurred in the trial court, (2) a clear and unequivocal rule of law was breached, (3) a substantial right of the accused was adversely affected, (4) the issue was not waived for tactical reasons, and (5) consideration of the error is necessary to do substantial justice. *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016); *State v. Hester*, 324 S.W.3d 1, 56 (Tenn. 2010).

Tennessee Rule of Evidence 609 permits an accused's credibility to be impeached by prior criminal convictions on cross-examination if (1) the conviction is for a crime punishable by death or imprisonment in excess of one year, or the conviction is for a misdemeanor which involved dishonesty or false statement; and (2) less than ten years has elapsed between the date the accused was released from confinement and the commencement of the subject prosecution. Tenn. R. Evid. 609(a)(1), (2), (b). The State must give reasonable pretrial written notice of the particular conviction or convictions it intends to use as impeachment, and the trial court, upon request, must conclude that the probative value of the prior conviction on the issue of credibility outweighs its unfair

prejudicial effect on the substantive issues. Tenn. R. Evid. 609(a)(3); *State v. Mixon*, 983 S.W.2d 661, 674 (Tenn. 1999).

In deciding whether the probative value of a prior conviction outweighs its unfair prejudicial effect, “[a] trial court should first analyze the relevance the impeaching conviction has to the issue of credibility.” *Mixon*, 983 S.W.2d at 674 (citation omitted). If the trial court finds that the prior conviction is probative of the defendant’s credibility, then the court should ““assess the similarity between the crime on trial and the crime underlying the impeaching conviction.”” *Id.* (quoting Neil P. Cohen et al., *Tennessee Law of Evidence* § 609.9 at 376 (3d ed. 1995)). The more similar the impeaching conviction is to the offense for which the defendant is on trial, the greater the risk of a prejudicial effect to the defendant. *Id.* This Court reviews a trial court’s ruling on the admissibility of prior convictions for impeachment purposes under an abuse of discretion standard. *See State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003).

Tennessee Rule of Evidence 608 permits a party to cross-examine a witness with specific instances of conduct if probative of truthfulness or untruthfulness. Tenn. R. Evid. 608(b). Before allowing such examination, the trial court upon request must hold a hearing outside the jury’s presence and determine that the alleged conduct has probative value and a reasonable factual basis exists for the inquiry. *Id.* 608(b)(1). If the conduct occurred more than ten years before commencement of the prosecution, it is admissible if the party is given sufficient advance notice of intent to use such evidence and the court “determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect[.]” *Id.* 608(b)(2). If the witness is the accused, the State must provide reasonable written notice of the impeaching conduct before trial and the court “upon request must determine that the conduct’s probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.” *Id.* 608(b)(3). This Court reviews a trial court’s ruling under Rule 608(b) using an abuse of discretion standard. *State v. Reid*, 91 S.W.3d 247, 303 (Tenn. 2002).

Prior to trial, the State notified the defendant of its intent to cross-examine him about his prior convictions for felony murder and especially aggravated robbery if he testified at trial. The parties addressed the matter during a break in the State’s proof. The defense argued the convictions should not be admitted, asserting that the especially aggravated robbery conviction was too similar to the present offense and the felony murder conviction was “too inflammatory.” In ruling on the issue, the trial court stated:

A murder conviction is a felony. It is within the parameters of 609. I believe it could be used for the purpose of impeachment and would be a legitimate question if he testified and was asked about that, then I will be

glad to give an instruction to the jury and instruct them on that. Especially aggravated robbery is too close to the same for what he is on trial for. (IV: 340)

The trial court stated that its ruling extended to Rule 608 as well.

We conclude the defendant is not entitled to plain error relief because consideration of the issue is not necessary to do substantial justice. The defendant's primary assertion is that the trial court's ruling "limited [his] ability to testify in his own defense" to present an alibi defense. However, the defendant presented no proof regarding his alleged alibi. The defendant could have presented evidence of alibi through the testimony of other witnesses and/or cross-examination of the State's witnesses. Of particular note, the defendant filed a notice of alibi before trial indicating an alibi would be provided by Donna Johnson who resided at 119 Pickle Street in Shelbyville, but the defendant failed to present the testimony of Ms. Johnson or any other witness at trial that could establish an alibi for him. Because the defendant could have presented evidence that he did not participate in the robbery through means other than his own testimony and did not do so, we conclude consideration of the issue is not necessary to do substantial justice. Therefore, the defendant cannot establish all five factors of the plain error standard and is not entitled to relief.

III. Sentencing

The defendant challenges the sentence imposed by the trial court on two fronts. First, he asserts the trial court "erroneously claimed it did not have the discretion to merge two prior convictions for the purpose of determining sentence range." And, second, the defendant asserts the trial court erred in finding as an enhancement factor that he was a leader in the commission of the offense.

In determining an appropriate sentence, a trial court must consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on mitigating and enhancement factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant makes on his own behalf as to sentencing; and (8) the potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -113, -114, -210(b). In addition, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* § 40-35-103(4).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory presumptive minimum sentence and rendered enhancement factors advisory only. *See* Tenn. Code Ann. §§ 40-35-114, -210(c). Although the application of the factors is advisory, a court shall consider “[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.” *Id.* § 40-35-210(b)(5). The trial court must also place on the record “what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.” *Id.* § 40-35-210(e) (2018).

When an accused challenges the length and manner of service of a sentence, this Court reviews the trial court’s sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). If a trial court misapplies an enhancement or mitigating factor in passing sentence, said error will not remove the presumption of reasonableness from its sentencing determination. *Bise*, 380 S.W.3d at 709. This Court will uphold the trial court’s sentencing decision “so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute.” *Id.* at 709-10. The standard of review applicable to the length of sentences adopted in *Bise* has also been applied to the trial court’s determination of an offender’s range classification. *State v. Layton Ward, Jr.*, No. W2017-00736-CCA-R3-CD, 2018 WL 1091792, at *2 (Tenn. Crim. App. Feb. 23, 2018) (citing *State v. Joseph Cordell Brewer, III*, No. W2014-01347-CCA-R3-CD, 2015 WL 4060103, at *7-8 (Tenn. Crim. App. June 1, 2015)). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm’n Cmts.; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

The trial court conducted a sentencing hearing, at which the defendant and his sister, Donna Johnson, testified on the defendant’s behalf. Thereafter, in the parties’ argument to the court, the State asserted the defendant should be sentenced as a Range II offender, noting that even though the defendant’s two prior felonies occurred on the same day “they are not subject to the merger rule” because they were both crimes of violence. The defendant argued the trial court had discretion to merge his prior convictions for purposes of determining the sentencing range. The trial court determined the defendant’s two prior convictions could not be merged for purposes of range classification because both convictions were “obviously very violent offenses.”

In determining the defendant’s sentence within Range II, the trial court found as enhancement factors that the defendant had a previous history of criminal convictions and criminal behavior in addition to those necessary to establish the range, the defendant was a leader in the commission of the offense, the personal injuries inflicted upon the victim were particularly great given the victim’s documented psychological injuries, and the

defendant was on parole when he committed the offense. *See* Tenn. Code. Ann. § 40-35-114(1), (2), (6), and (13). The trial court found no applicable mitigating factors and imposed a sentence of twenty years at 100% to be served consecutively to the defendant's prior felony murder sentence.

A. Merger

The defendant argues the trial court erred in finding it did not have discretion to merge the defendant's prior offenses, which "occurred simultaneously and meet the 24-hour rule[.]" for purposes of determining his sentencing range. He posits that Tennessee Code Annotated section 40-35-106(b)(4) gives the trial court discretion on whether to apply the exception for violent offenses because it does not contain the words "must" or "shall," and that the trial court should have at least made the consideration. The State disagrees that the statute gives the trial court discretion.

Tennessee Code Annotated section 40-35-106(b)(4) provides:

Except for convictions for which the statutory elements include serious bodily injury, bodily injury, threatened serious bodily injury or threatened bodily injury to the victim or victims, or convictions for the offense of aggravated burglary under § 39-13-1003, convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions[.]

Subsection (c) states that "[a] defendant who is found by the court beyond a reasonable doubt to be a multiple offender shall receive a sentence within Range II." *Id.* § 40-35-106(c). The Sentencing Commission Comments reiterate that "[s]ubsection (c) makes clear that it is mandatory that the trial judge designate the defendant as a multiple offender when the defendant has the required number of prior convictions." *Id.* Sentencing Comm'n Cmts.

Nothing in the plain language of the statute suggests the trial court has discretion to consider multiple violent offenses committed within a 24-hour time period as one offense for range classification purposes. In addition, the Sentencing Commission Comments to subsection (b) provide examples and use mandatory language:

Thus, if a defendant is convicted of two homicides, even though the homicides occurred at the same moment, such *would constitute* separate convictions for a subsequent violation of the law. As another example, if the defendant was convicted of robbing several people in the same store, such *would constitute* separate convictions for enhancement purposes for a new

violation of the law. This is in accord with the policy of giving greater “weight” to crimes of violence.

Id. (emphasis added). We read the statute, taken as a whole, to be very clear and compulsory, even absent the use of words such as “shall” or “must.” The trial court’s determination with regard to the defendant’s range was not an abuse of discretion and is entitled to a presumption of reasonableness.

B. Enhancement

The defendant argues the trial court erred in finding as an enhancement factor that the defendant was a leader in the commission of the offense, asserting there is no proof he planned or provided encouragement for its commission. We disagree. The proof at trial showed that the car used in the robbery was registered to the defendant, and Mr. Farris testified the defendant was the one who drove to the store and provided him with a mask and knife. The defendant was older than Mr. Farris and dating Mr. Farris’s mother. Ms. Foster testified the younger robber called the older robber “Pops” throughout the robbery. Based on these circumstances, the trial court could determine that the defendant was a leader in the commission of the robbery. *See State v. Woodard*, No. E2017-01893-CCA-R3-CD, 2018 WL 4378005, at *4 (Tenn. Crim. App. Sept. 13, 2018) (“Both Mr. Smith and Ms. Harris testified the defendant planned the robbery, acted as the getaway driver, and provided the handgun used during the commission of the robbery. . . . The ‘enhancement for being a leader in the commission of an offense does not require that the defendant be the sole leader but only that he be “a” leader.’ Therefore, the record supports the trial court’s application of enhancement factor (2).” (quoting *State v. Hicks*, 868 S.W.2d 729, 731 (Tenn. Crim. App. 1993))). In any event, even if the trial court misapplied this enhancement factor, the defendant’s sentence is still valid. The trial court applied multiple other enhancement factors that the defendant does not challenge, and the trial court’s primary emphasis was on the defendant’s commission of the offense while on parole which is without question.

Conclusion

Based upon the foregoing authorities and reasoning, the judgment of the trial court is affirmed.

J. ROSS DYER, JUDGE