IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED

February 2, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	
	*	**C.C.A. No. 03C01-9811-CR-00395**
Appellee,	*	
	*	**KNOX COUNTY**
vs.	*	
	*	**Hon. Richard Baumgartner, Judge**
ADRIAN ARNETT,	*	
	*	**(Aggravated rape, two counts;**
Appellant.	*	**especially aggravated kidnapping;**
	*	**aggravated robbery; aggravated**
	*	**assault; setting fire to personal**
	*	**property)**

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OPINION FILED: _____

AFFIRMED AS MODIFIED

David G. Hayes, Judge

OPINION

The appellant, Adrian Arnett, appeals the verdict of a Knox County jury finding him guilty of two counts of aggravated rape, one count of especially aggravated kidnapping, one count of aggravated robbery, one count of aggravated assault, and one count of setting fire to personal property.[1] The trial court imposed an effective fifty year sentence for these offenses.[2] In his appeal as of right, the appellant challenges the sufficiency of the convicting evidence for each conviction. Second, he challenges the trial court's application of certain enhancement and mitigating factors with respect to specific convictions and the imposition of consecutive sentences.

Following review, we affirm the judgments of conviction for especially aggravated kidnapping, aggravated robbery, aggravated assault, and setting fire to personal property. However, because we find that the appellant's two convictions for aggravated rape violated the prohibition against double jeopardy, we modify the judgment to reflect the merger of the two aggravated rape convictions into a single conviction of aggravated rape. The effective fifty year sentence is affirmed.

BACKGROUND

On the morning of July 6, 1996, seventeen year old Brandon McDonald drove to Knoxville with his seventeen year old girlfriend Monica Smith from his home in Morristown. McDonald and Smith arrived at Reese Hall on the University of Tennessee campus between 8:30 and 9:00 p.m. to visit Smith's sister. Around 11:00 p.m., McDonald and Smith left for the "Old City" for a late dinner. McDonald parked his white, four-door Isuzu Rodeo near the "Underground" off Jackson Avenue. As the two were discussing their plans for dinner, two black males approached McDonald's vehicle.

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[1] These convictions arose from a single criminal episode and involved two victims. The victim of the two counts of aggravated rape and one count of especially aggravated kidnapping was Monica Smith. The victim of the aggravated robbery, aggravated assault, and setting fire to personal property was Brandon McDonald.

[2] The trial court imposed the following sentences for the respective offenses: aggravated rape, twenty-five years; aggravated rape, twenty-five years; especially aggravated kidnapping, twenty-five years; aggravated robbery, eleven years; aggravated assault, six years; setting fire to personal property, two years. The especially aggravated kidnapping charge was run consecutive to one count of aggravated rape for an effective sentence of fifty years. All other sentences were ordered to run concurrently, as well as concurrent, with an outstanding federal sentence.

McDonald described one of the men as short, with short hair, a thick build, wearing a red shirt, and carrying a gun. This person was later identified as the appellant. The other man was thinner, taller, wearing a black jersey, and younger than the appellant. McDonald began arguing with the two men "trying to make sense of the whole thing," when he was struck with the gun across the temple and the side of the mouth by the appellant. The blow dazed McDonald and injured his mouth. He next remembered awakening in the back seat of his vehicle; Smith was on the seat beside him.

The appellant got into the driver's seat, handed the gun to his co-defendant, and placed a bandana across his face. The co-defendant held the gun on McDonald and Smith demanding their wallets; both gave their money to their assailants. When the assailants were distracted, McDonald pushed Miss Smith toward her door and he slid toward his door. McDonald jumped out of the moving vehicle; the vehicle, with Miss Smith still inside, never stopped. McDonald ran to the "Underground" and related these events to local law enforcement officers.

Miss Smith testified that after McDonald jumped from the vehicle, the appellant closed the door and warned her not to jump. The co-defendant in the passenger seat held the gun on her and kept telling the appellant "this has gone too far" and "let me out;" the co-defendant assured her that she would not be harmed. When the vehicle stopped, the appellant dragged Miss Smith from the vehicle with his arm around her neck and the gun to her head. She pleaded with him not to hurt her. However, he threw her down to the ground where she landed on her back. He ordered her to remove her clothes and she refused. The appellant unzipped his pants, removed her shorts, and then ripped off her panties.

Miss Smith further testified that "he tried to put his penis inside of me, but he couldn't get it in. So he used his finger, and then he tried again and put his penis inside of me then." She screamed and he slapped her and then put his hand over her mouth. She testified that he ejaculated inside her and that she felt some of the semen on her leg. During the rape, she observed the co-defendant approach them to tell the appellant to hurry. Following the rape, the appellant completely disrobed Ms. Smith, placed her on her stomach, and tied her arms with her bra and her legs

with her shirt. Ms. Smith untied herself and sought help at a nearby residence. Several items of Ms. Smith's clothing were later found in the area.

Melinda Holbert testified that she lived adjacent to the Whittle Springs Golf Course Clubhouse. Around midnight, on July 6, she let her dogs out into the backyard. She heard noises in her backyard on the other side of the privacy fence; her motion light activated and then she heard two car doors slam. When the vehicle proceeded toward Mrs. Holbert's front yard, she heard a "cheer" from the vehicle. She described the vehicle as a white "Bronco" four wheel drive. After the vehicle left, Mrs. Holbert and her husband went into the backyard to investigate. Immediately, Mrs. Holbert's son came to the back of the house and told his parents that there was a girl, Miss Smith, on the front porch claiming she had been raped. Miss Smith was transported to the hospital.

The attending physician testified that Miss Smith had an abrasion in the middle of her back and multiple bumps, bruises, and cuts to her legs. The doctor related that Ms. Smith had "a string of mucus on [her] inner thigh." He observed no evidence of tears, scrapes or bruising to the vaginal area. Additionally, he obtained specimens of other secretions from the vaginal pool. With reference to McDonald, the doctor stated that he suffered from a bruised face. McDonald told the doctor that he was hit in the face with a gun.

Ron Trentham of the Knoxville Police Department testified that he was working as a security guard at Green Hills Apartments on the night of July 6. Trentham explained that the Green Hills Complex had only one entrance. Around 1:00 a.m., Trentham observed two black males climb the fence into the complex. He explained that earlier that evening, a police dispatch had described two young males suspected in a "carjacking" and that these two males fit the given description. He described one male as tall and thin, with a small Afro. The other male was heavyset, wearing a red bandana and a baseball cap. Before the officer was able to stop the two men, they disappeared.

The officer proceeded back to his post and thereafter saw the "heavier" man walking up behind him toward the main entrance. The man had a clear glass

containing a liquid, which the officer discovered was rubbing alcohol, and a cigarette lighter. The officer spoke with the man who identified himself as the appellant. The appellant denied ownership of the glass and liquid; he explained that he was taking the alcohol to his mother. The officer noticed that the appellant was very nervous and his clothes were wet from perspiration. The appellant voluntarily provided that his girlfriend had scratched his arms. The officer stated that the scratches were fresh because of the redness surrounding them.

Officer Trentham left his post for fifteen minutes to answer another unrelated call. When leaving, he observed the appellant, with the alcohol in hand, walking away from Green Hills near Crestview and Natchez. When he returned from the other call, the officer again met the appellant near Natchez at Babe Ruth Park. The appellant had nothing in his hands. The appellant told the officer "that car you are looking for is on fire up here." The officer directed the appellant to stay there while he directed the fire department to the fire. However, when the officer left, the appellant disappeared.

Crystal Eldridge testified that, while visiting a friend on Natchez Avenue the evening of July 6, she observed two males approaching the Green Hills Complex. About fifteen minutes later, she observed that same man carrying a glass jar with a clear substance heading toward the park. A few minutes later she heard a horn and saw the white "jeep" in the park "blazing." The man walked near them and started laughing and told them not to call the fire department and "to let the M-----F----- burn." She identified the appellant as that man recognizing him from middle school as "Adrian." The appellant no longer carried the glass of clear liquid. Later, Ms. Eldridge identified the appellant from a lineup. Another witness identified the appellant and testified that she heard the appellant state "[l]et the M.F. burn. They can't get any fingerprints off of it, anyway."

A few days later, McDonald and Smith viewed nearly five hundred photographs at the police station. Both were unable to positively identify anyone. At a later physical lineup, although uncertain, McDonald identified the appellant because he "fit . . . the description. . . in [his] memory of the person that did this." At trial, McDonald identified the appellant as the person who struck him in the face with

the gun. Additionally, at the lineup, Miss Smith, although not totally certain, identified the appellant as the person who raped and robbed her. At trial, Miss Smith was unable to identify the appellant as her rapist.

Ralph Perrigo, a special agent with the FBI, interviewed the appellant. During the interview, the appellant stated that he went to "B. Dog['s]" residence at the Green Hills Apartment Complex on the date in question. The appellant was wearing a red bandana at the time of the interview. The appellant described B. Dog as a fourteen year old male, five foot seven inches tall, weighing one hundred twenty pounds, with short hair about an inch long on top. Perrigo explained that the description fit that of Brandon Moore. In a search of the appellant's home, the officers discovered a red bandana and a red shirt in the appellant's bedroom.

Brandon Moore, the appellant's accomplice, testified at trial on behalf of the State. Moore, fourteen years old at the time of the offenses, related that he was incarcerated at a juvenile facility stemming from his guilty pleas to armed robbery, rape, kidnapping, and assault. Moore's testimony corroborated the testimony of McDonald and Smith.

An expert in forensic serology with the FBI testified that he identified semen from six different samples contained in the rape kit performed on Miss Smith. Those samples were later analyzed for DNA testing. Another expert forensic scientist testified that she compared the semen samples from the victim to blood samples taken from the appellant. She determined that one sample of the semen was an "extremely rare" conclusive match at five genetic locations to the DNA in the appellant's blood. She opined "[t]he probability of finding someone else that would have the same DNA profiles as were obtained in those samples is one in sixty-seven billion in the black population."

The defense presented no proof in this case. Following the jury's instructions and deliberations, the jury returned guilty verdicts on all counts in the indictment.

I. SUFFICIENCY OF THE EVIDENCE

A. Identification of the Appellant

The appellant challenges the sufficiency of the convicting evidence for each of his six convictions. With regard to each conviction, he argues that the State failed to establish his identity as the perpetrator of the offenses. In a criminal case it is incumbent upon the prosecution to prove beyond a reasonable doubt not only the commission of the crime charged but also its perpetration by the accused. State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995).

The relevant question upon a sufficiency review of a criminal conviction, be it in the trial court or an appellate 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, 315, 99 S.Ct. 2781, 2789 (1979). See also Tenn. R. App. P. 13(e); Tenn. R. Crim. P. 29(a). 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). 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). In State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990), this court held that findings of guilt may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence.

The appellant argues that under the dictates of Jackson v. Virginia, 443 U.S. at 307, 99 S.Ct. at 2781, the following grounds overwhelmingly establish that the State failed to prove his identity as the perpetrator of the offenses:

> (1) the victims' inconclusive identifications at the physical lineup;
> (2) with specific regard to the aggravated kidnapping charge, that the victim Smith should have been able to positively identify her assailant based upon the length of the ride from the "Old City" to Whittle Springs golf course;
> (3) with specific regard to the rape, that the victim Smith should have been able to positively identify her assailant due to the length of time for the rape since her face was near the perpetrator's face;
> (4) the DNA evidence was inconclusive based upon the lack of proof that the samples Q-8 and Q-10 were obtained from the victim's

vagina;[3]
(5) another semen sample only "match[ed] three of six loci" to the appellant's DNA;
(6) with specific regard to the aggravated assault conviction, the victim, McDonald had a few seconds to observe his perpetrators;
(7) McDonald's admission to drinking alcohol undermines his description and identification;
(8) the testimony from Moore "is not to be believed" because of his "paltry" juvenile sentence and his obvious "motive to fabricate."

Clearly, the identification of the appellant was a primary issue at trial and now on appeal. In Dyle, 899 S.W.2d at 612, the Tennessee Supreme Court promulgated an identity instruction which must be given in those cases where identification is a material issue and the instruction is requested by defense counsel. "Identity will be a material issue when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence." Id. at 612, n. 4. The court further held that it is plain error not to give the instruction when identity is a material issue. Id. However, if the defendant failed to request the instruction, the trial court's failure is reviewable under harmless error. Id.; see also Tenn. R. Crim. P. 52(a). Because defense counsel failed to request that such a special instruction on eyewitness identification be given, our review is based upon the harmless error standard.

Although in the present case, the trial court failed to give the requisite Dyle instruction, the trial court provided the jury with instructions evaluating the witnesses' capacity and opportunity to observe the defendant, the witnesses' memory, the witnesses' credibility or bias, and witnesses' in-court demeanor. We conclude that the trial court's failure to provide the Dyle instruction was harmless. The proof regarding identification was more than sufficient. First, the identification was substantially corroborated by direct and circumstantial evidence. Obviously, each

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[3]The nurse identified the items contained in the rape kit consisting of two separate swabs from the vaginal vault, a saliva swab, pubic combings, and hairs from the victim's head. The swabs were given to the nurse for packaging. The kit was later transported to the FBI laboratory.

Special Agent Errera of the FBI testified that semen was present in six different areas in the sexual assault kit. He stated that three swabbings, Q8, Q9, and Q10, all contained semen and were preserved for DNA analysis. The agent did state that these swabbings "were not specifically identified" from where they were obtained on the victim's body. However, he opined that the Q11 vaginal smear was taken from either the Q8, Q9, or Q10 swab. Furthermore, he identified Q11 as a vaginal smear in which he identified sperm cells. Item Q11 was not forwarded for DNA analysis. A slide, Q12, was also produced from the smear containing semen obtained from the inner thigh of the victim. This item was not forwarded for DNA analysis. Another envelope, Q13, containing the pubic hair combings of the victim evidenced a semen stain as well which was preserved for DNA testing.

Agent Smrz of the FBI testified that she analyzed the following specimens: Q8, Q10, and Q13. On Q8 and Q10, she concluded that the DNA found in the semen matched the blood obtained from the appellant in five of six genetic locations was "an extremely rare event" excluding the appellant as the perpetrator to "one in sixty-seven billion in the black population." With Q13, she concluded that the DNA in the semen matched the blood of the appellant at three genetic locations.

victim had a reasonable opportunity to identify the victim, as well as, the other bystander witnesses. The descriptions of the appellant and his clothing at various times by numerous witnesses including that of his co-defendant were almost identical. Although both victims expressed some reservation in identifying the appellant from a physical lineup, the victim McDonald positively identified the appellant in court, and at no point did any witness misidentify the appellant or identify any other person as the perpetrator. The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made. See State v. Strickland, 885 S.W.2d 85, 87-88 (Tenn. Crim. App. 1993).

Further, although inconsistencies or inaccuracies may make the witness a less credible witness, the jury's verdict will not be disturbed unless the inaccuracies or inconsistencies are so improbable or unsatisfactory as to create a reasonable doubt of the appellant's guilt. The positive identification testimony of numerous witnesses sufficiently supports the appellant's conviction; their testimony was not so improbable or unsatisfactory as to create a reasonable doubt of the appellant's guilt. Moreover, their identification of the appellant was corroborated by the results of the DNA profile analysis.

B. In-Court Identification Challenge

The appellant contends that the victim, McDonald's, in-court identification of him was "suspect and insufficient to sustain his convictions" for aggravated robbery and aggravated assault. The relevant issue, however, is whether those alleged "suspect" out of court identifications affected the witnesses' in-court identification. This issue is waived; the appellant failed to present any argument of this issue in his brief nor did he cite any authority for his position. See Tenn. R. App. P. 27(a)(7), (h); Tenn. Ct. Crim. App. R. 10(b).

C. Setting Fire to Personal Property

The appellant argues that the State failed to present any direct proof that he burned McDonald's vehicle. Primarily, he contends that no one saw him burn the vehicle, no testimony was produced which established that alcohol was an accelerant for the fire, and no witness placed him beside the vehicle.

Before an accused can be convicted of setting fire to personal property, the State must prove beyond a reasonable doubt that the accused knowingly damaged personal property, by fire or explosion, without the consent of all persons who have a possessory or proprietary interest therein. Tenn. Code Ann. § 39-13-303 (1991). The circumstantial proof relating to the burning of McDonald's Isuzu Rodeo unerringly pointed to the appellant. McDonald identified the appellant as the person who unlawfully took his Isuzu Rodeo. The appellant's accomplice testified that he and the appellant parked the stolen Rodeo in the park next to the Green Hills Complex. Two witnesses saw the appellant and his co-defendant covertly enter the complex. The co-defendant stated that the appellant retrieved a glass containing rubbing alcohol from his apartment. Two other witnesses observed the appellant with the glass containing the alcohol. Minutes thereafter, the vehicle belonging to McDonald was burning. The appellant was observed in the area by several witnesses and actually told them to "let the M--------- F-----, burn. They can't get any fingerprints off of it, anyway." Accordingly, we conclude that the circumstantial evidence was overwhelming as to exclude any other explanation except for the appellant's guilt. See State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. Crim. App. 1987). This issue is without merit.

D. Aggravated Rape (Two Counts)

The appellant argues that the proof failed to establish his identity as the person who twice sexually penetrated the victim. At this juncture, and although not raised as an issue, we are constrained to examine the record to determine whether the facts support multiple convictions or but a single conviction of aggravated rape by the appellant. Following our review, we conclude that the appellant's convictions for aggravated rape under counts one and two must be merged. We find, as plain error, that the two convictions for aggravated rape violate principles of double jeopardy. See Tenn. R. Crim. P. 52(b); State v. Ogle, 666 S.W.2d 58, 60 (Tenn. 1984).

The issue of multiple punishments arising from a single criminal episode was addressed by our supreme court in State v. Phillips, 924 S.W.2d 662 (Tenn. 1996). To determine whether offenses are multiplicitous, several general principles must be considered:

> (1) A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution;
> (2) If each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and
> (3) Where time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act.

Id. at 665. Additionally, the court, in Phillips, provided several factors for guidance in determining whether multiple convictions violate double jeopardy, i.e.:

> (1) The nature of the act;
> (2) The area of the victim's body invaded by the sexually assaultive behavior;
> (3) The time elapsed between the discrete conduct;
> (4) The accused's intent, in the sense that the lapse of time may indicate a newly formed intent to again seek sexual gratification or inflict abuse; and
> (5) The cumulative punishment.

Id.

The conduct at issue involves two acts of vaginal sexual penetration, i.e., one digital and one penile. The testimony of the victim relating to the separate counts provides, "he tried to put his penis inside of me, but he couldn't get it in. So he used his finger, and then he tried again and put his penis inside of me then." Clearly, the penetrations invaded the same body area of the victim, with only seconds elapsing between the two penetrations. Obviously, from the victim's testimony, the digital penetration was merely the means of completing the penile penetration. We are unable to conclude that the intervening seconds between the penetrations provided a sufficient lapse of time so as to permit the development of "a newly formed intent" as the digital penetration only served to facilitate the penile penetration. Phillips, 924 S.W.2d at 665. Accordingly, we find that the two vaginal penetrations of Smith were not separate and distinct offenses. As such, the appellant's convictions and sentences for aggravated rape violate protections against double jeopardy. See, e.g., State v. Michael D. Evans, No. 03C01-9703-CR-00104 (Tenn. Crim. App. at Knoxville, Dec. 9, 1997).

We, in turn, examine the evidence to determine its sufficiency to support the appellant's conviction for aggravated rape. Tenn. Code Ann. § 39-13-502(a)(1) defines aggravated rape as the "unlawful sexual penetration of a victim by the defendant . . . accompanied by any of the following circumstances: (1) [f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon . .

." The victim Smith testified that the appellant put "his penis inside me." Moreover, both Smith and Moore testified that the appellant had the gun in his hand while committing the rape. Thus, we find the evidence sufficient to sustain a conviction for aggravated rape. This issue is without merit.

II. SENTENCING

This court's review of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d). See also State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). This presumption is only applicable if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appellant to show that the sentence imposed was improper. Id.; State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991); Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d). The record reflects that the trial court considered the relevant principles of sentencing; accordingly, the presumption is afforded.

The appellant is twenty-four years old, single, and has a ninth grade education. The appellant reported working at Labor World and McHenry Produce for a total of four months. He also reported that he worked elsewhere; however, he could not remember the specifics. The presentence report indicates the following convictions: (1) two misdemeanor assaults; (2) disorderly conduct; (3) resisting arrest; and (4) a misdemeanor weapons offense.[4] In addition, the appellant has a previous history of failure to comply with the conditions of probation. Although the appellant did complete a thirty day period of judicial diversion, he received probation in three of the above offenses and was revoked in all three cases. Moreover, at the time of the present offenses, the appellant was on probation for misdemeanor assault.

[4]Although not entitled to consideration for purposes of enhancement, the appellant has two federal convictions, one for carjacking and one for possession of a weapon during the commission of a violent offense. Both arise from the criminal episode in the case before us.

A. Enhancement Factors

The appellant only challenges enhancement factors related to his convictions for aggravated rape and especially aggravated kidnapping. In sentencing the appellant, the trial court applied the following enhancement factors to each of the offenses:

> (1) "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;"
> (2) "leader in the commission of an offense involving two or more criminal actors;"
> (8) "defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;"

See Tenn. Code Ann. § 40-35-114. Additionally, the trial court found the following applicable to the especially aggravated kidnapping conviction:

> (3) "[t]he offense involved more than one victim;"
> (5) "the defendant treated . . . a victim . . . with exceptional cruelty during the commission of the offense;" and
> (6) "the personal injuries . . . sustained by . . . the victim were particularly great."

See Tenn. Code Ann. § 40-35-114. With specific reference to the aggravated rape conviction, the court additionally applied:

> (5) "the defendant treated . . . a victim . . . with exceptional cruelty during the commission of the offense;"
> (6) "the personal injuries . . . sustained by . . . the victim were particularly great;"
> (7) "the offense . . . was committed to gratify the defendant's desire for pleasure or excitement;"
> (12) ". . . the actions of the defendant resulted in . . . serious bodily injury to a victim."

The trial court did not apply any mitigating factors.

Although the appellant concedes application of enhancement factors (1), (2), (3), (7), and (8), he contends that the trial court misapplied enhancement factors (5), (6), and (12). We agree that the court's application of factors (1), (2), (3), and (8) were supported by the evidence.

Tenn. Code Ann. § 40-35-114(5)

With reference to "exceptional cruelty" enhancement factor, Tenn. Code Ann. § 40-35-114(5), as applied to the aggravated rape offense, the appellant contends that it is inapplicable. He argues that the victim's forced removal from the vehicle at gunpoint, being thrown to the ground, and having her clothes forcibly removed, were

all "part and parcel" of the offense of aggravated rape.

To support this aggravating factor, the State must prove "exceptional" cruelty, normally found in cases of abuse or torture, "demonstrat[ing] a culpability distinct from the appreciably greater than that incident to" the crime. See State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997). We acknowledge the inherently cruel nature of both the rape and kidnapping of the victim and do not wish to minimize the anguish of the victim. However, we are bound by precedent and therefore are unable to conclude that the record supports application of the "exceptional cruelty" enhancement factor for either offense. Poole, 945 S.W.2d at 98; see also State v. Manning, 883 S.W.2d 635, 639 (Tenn. Crim. App. 1994) (rejecting this factor where victim abducted and forced to perform four sexual acts at knife point while verbally abused and threatened); State v. Edwards, 868 S.W.2d 682 (Tenn. Crim. App. 1993) (rejecting this factor where victim was gagged, threatened, and struck during commission of offense).

Tenn. Code Ann. § 40-35-114(6)

Next, he contends error by the trial court in applying Tenn. Code Ann. § 40-35-114(6), that the personal injuries sustained by the victim were "particularly great." In applying this factor, the trial court found:

> she [the victim] has continued to have to live with this event since it has occurred. She has had to go through many counselors. She has had to take medication. She no longer lives a normal lifestyle . . . . And she continues to be a victim of this offense, and I think that psychological injuries, as well as physical injuries, should be taken into account.

This finding is supported by the record. The victim impact statement of Miss Smith relates that she is currently on anti-depressant medication and has been treated by various counselors. She continues to be haunted by the trauma of her ordeal. The appellant challenges application of this factor only upon grounds that the record does not support a finding that the victim's bodily injuries were "particularly great." We would agree. However, this factor may be applied if the proof established that the victim sustained emotional trauma and that the psychological scarring is "particularly great." See Kissinger, 922 S.W.2d at 487. The record supports the trial court's finding that the psychological injuries sustained by the victim were greater than those which ordinarily result from this offense. Thus, we conclude the

application enhancement factor (6) to the aggravated rape conviction was appropriate.

Tenn. Code Ann. § 40-35-114(12)

The appellant's next contention of error is the application of Tenn. Code Ann. § 40-35-114(12). The trial court found the application of this factor appropriate in that:

> the defendant willfully inflicted bodily injury upon a person during the commission of the felony in that he injured [the victim] when it was not necessary for him to do that.

We agree with the trial court that the victim sustained bodily injury. However, in order to support this enhancement factor, ". . . the actions of the defendant [must] result in . . . serious bodily injury to a victim. . . ." Tenn. Code Ann. § 40-35-114(12). The proof does not support infliction of "serious bodily injury" as defined by the statute. Accordingly, this enhancement factor is inapplicable.

Tenn. Code Ann. § 40-35-114(7)

Although uncontested, we conclude upon *de novo* review that the trial court misapplied Tenn. Code Ann. § 40-35-114(7), that the "offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," to the aggravated rape. In support of this factor, the State argues that it was "evidenced by the fact that he ejaculated." This is the precise argument rejected by the supreme court in State v. Kissinger, 922 S.W.2d 482, 491 (Tenn. 1996) ("[t]hat an offender experienced orgasm does not in and of itself prove the existence of the factor"). The record fails to establish any further proof that this aggravated rape was committed to satiate any sexual desire or a "desire to overpower or brutalize" creating "pleasure or excitement." Id. at 489-491. Accordingly, this enhancement factor does not apply.

B. Mitigating Factors

The appellant argues that the trial court failed to apply to his especially aggravated kidnapping conviction the mitigating factor contained in Tenn. Code Ann. § 39-13-305(b)(2), "[i]f the offender voluntarily releases the victim alive . . ., such actions shall be considered by the court as a mitigating factor at the time of sentencing." The trial court rejected this factor based upon its conclusion that the

legislature's intent of "voluntarily release" did not contemplate a victim being left "bound in a wooded area, naked." Understanding the trial court's reluctance to apply this factor, the plain language of the statutory subsection (b)(2) designed by our legislature imposes mandatory consideration of this mitigating factor if the victim is released alive. See Tenn. Code Ann. § 39-13-305(b)(2); see, e.g., State v. Quinton Cage, No. 01C01-9605-CC-00179 (Tenn. Crim. App. at Nashville, Jan. 26, 1999), perm. to appeal denied, (Tenn. July 12, 1999); State v. Winford Lee Pipkin, No. 01C01-9605-CR-00210 (Tenn. Crim. App. at Nashville, Dec. 4, 1997).

However, in view of the fact that the appellant bound the victim before leaving her, we entitle this mitigating factor very little weight.

Next, the appellant contends that the trial court should have applied non-enumerated mitigating factors provided by Tenn. Code Ann. § 40-35-113(13) to both offenses. Specifically, he argues: (1) the lack of a juvenile record; (2) that his current probation status was not revoked until the present charges; (3) his completion of a period of judicial diversion "which indicates that he has the capability to conform his actions to that required of law abiding citizens and could be rehabilitated to return to those law abiding ways;" (4) that he was truthful on his presentence report "about those employers he remembered;" and (5) that he has "earned money in a law-abiding manner." We are unimpressed with these assertions of so-called mitigating proof and find them to be without value.

In sum, we conclude that enhancement factors (1),(2), and (8) apply to all of the above offenses. Additionally, we conclude that factor (3) applies to the especially aggravated kidnapping conviction and that factor (6) applies to the aggravated rape conviction. Both offenses are Class A felonies. As a Range I offender convicted of a Class A felony, the sentencing range is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a). The presumptive sentence for Class A felonies is the midpoint in the range. When both enhancement and mitigating factors are present, the court begins with the midpoint and enhances within the range as appropriate for the enhancement factors and reduces the sentence appropriately for the mitigating factors. Tenn. Code Ann. § 40-35-210(c) and (e). If there are enhancement factors but no mitigating factors, the court may increase the

sentence within the range. Tenn. Code Ann. § 40-35-210(d).

Upon our *de novo* review, we conclude that four enhancement factors are applicable and one mitigating factor, entitled to little or no weight, warrants the maximum sentence of twenty-five years for the especially aggravated kidnapping conviction. For the aggravated rape conviction, we conclude that four enhancement factors and no mitigating factors apply, thus, warranting the maximum sentence of twenty-five years. All other sentences, being uncontested, are affirmed.

C. Consecutive Sentences

The trial court imposed an effective fifty year sentence by ordering the twenty-five year sentence for aggravated rape run consecutively to the twenty-five year sentence for aggravated kidnapping. The appellant argues that consecutive sentences were not warranted in this case. In opposition to the consecutive sentences, the appellant argues that:

> (1) "no one was seriously injured as a result of his actions although the risk for that was present and an unfired weapon was involved;"
> (2) the appellant "was not so callous in disregarding human life that he killed Ms. Smith, left her where she would be certain to die, or ran over McDonald after he jumped from the car;"
> (3) twenty-five years "is a sufficiently lengthy period of time for [the appellant] to rehabilitate himself through prison education programs and work programs especially in view of his proven abilities to work and to complete a program of judicial diversion."
> (4) the legislature contemplated the serious nature of the offenses in determining their status as Class A offenses, and accordingly, there was "nothing so particularly severe about the commission of these offenses to make stacking the 25-year sentences reasonably related."

In ordering consecutive sentences, the trial court found that the appellant was "a dangerous offender" as this was "a horrifying crime with horrifying results." See Tenn. Code Ann. § 40-35-115(b)(4). Further, the trial court observed:

> In addition to that, it indicated his propensity for violence on previous occasions. He had a weapon possessions on previous occasions. He used a weapon in the commission of this offense. He was on probation when he committed this offense. I think [the appellant] is a danger to society and needs to be confined for a long period of time.

Before consecutive sentences can be imposed, the trial court must (1) first determine that one or more of the statutorily enumerated criteria of Tenn. Code Ann. § 40-35-115 exists, see also Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976); and

(2) if the defendant is found to be a dangerous offender, find that the aggregate sentence is reasonably related to the severity of the offenses and is necessary to protect the public from further criminal activity of the offender. State v. Wilkerson, 905 S.W.2d 933, 937 (Tenn. 1995). See also State v. Lane, 3 S.W.3d 456 (Tenn. 1999) (holding Wilkerson factors were limited to sentencing of “dangerous offenders”). Notwithstanding proof of these criterion, a sentencing court retains the discretion of imposing consecutive sentences. On appeal, the exercise of the trial court's discretion is afforded great weight, provided the court correctly applied the principles of consecutive sentencing. Moreover, in determining whether the trial court providently exercised its discretion, "the overriding concern" is the fairness of the resulting sentence under all the circumstances.

Consecutive sentences are imposed upon dangerous offenders to protect society against offenders who commit aggravated crimes that pose a high risk to human life. Under Gray, a finding that a defendant is a "dangerous offender" is to be based solely upon the circumstances surrounding the crimes for which the defendant is being sentenced. The court stated in Gray: "[a] defendant may be classified as a dangerous offender if the crimes for which he is convicted indicate that he has little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." 538 S.W.2d at 393 (emphasis added); see also Tenn. Code Ann. § 40-35-115(b)(4). We find this definition aptly described the appellant’s conduct in the commission of the offenses in this case. The record supports the trial court's findings regarding the appellant's classification as a dangerous offender. Tenn. Code Ann. § 40-35-115(b)(4). Moreover, we find that based on the appellant's prior criminal history, his prior unsuccessful attempts at rehabilitation, and his probationary status at the time of the present offenses, a sentence of confinement is necessary to protect the public from the appellant's future criminal conduct. Furthermore, considering the five counts involved in the instant case, consecutive sentences are reasonably related to the severity of the crimes. The appellant has failed to establish that the trial court abused its discretion in ordering consecutive sentences. Thus, we conclude that consecutive sentences are warranted in the present case.

III. CONCLUSION

For the foregoing reasons, we affirm the judgments of conviction for especially aggravated kidnapping, aggravated robbery, aggravated assault, and setting fire to personal property. We merge the appellant's judgment of conviction for aggravated rape under count two with his conviction under count one for a single aggravated rape conviction under count one. Accordingly, the sentence for count two is vacated. Moreover, we affirm the length of the remaining sentences and imposition of consecutive sentences for an effective fifty year sentence. This cause is remanded to the trial court for modification consistent with this opinion.

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DAVID G. HAYES, Judge

CONCUR:

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ALAN E. GLENN, Judge

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JOE H. WALKER, III, Special Judge