

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1999 SESSION

FILED

February 7, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

v.

DEWAYNE R. CROSS,

Appellant.

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C.C.A. No. 03C01-9902-CC-00053

Blount County

Honorable D. Kelly Thomas, Jr., Judge

(Rape)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

ALAN E. GLENN, JUDGE

OPINION

The defendant, Dewayne R. Cross, appeals as of right his conviction of rape by a Blount County jury. The trial court sentenced the defendant to nine years imprisonment at one hundred percent, concluding that he was a violent offender. The defendant presents two assignments of error:

- I. Whether the evidence presented in its entirety and as contained in the record was sufficient as a matter of law to support the verdict of the jury finding the defendant guilty of rape.
- II. Whether the court erred when it overruled the defendant's objection pursuant to Tennessee Rules of Evidence 401 and 403 to the showing of a video-taped statement of the defendant to the jury thus violating the defendant's constitutional right to a fair trial.

Based upon our review, we affirm the conviction.

FACTS OF THE CASE

On May 30, 1997, the sixteen-year-old victim attended a party at the home of a Maryville High School friend. Sometime that night, the defendant and approximately six other men arrived at the party. After a dispute among party-goers over missing compact discs, the victim went outside the house and sat in a lawn chair.

While she was sitting alone outside, the defendant approached her. The defendant told the victim his name was Arthur. He put his arm around her and led her to the side of the house. The victim testified that when she asked the defendant what he was doing, he told her to be quiet or he would hurt her. The victim testified she was frightened and believed the defendant would hurt her if she called for help.

At the side of the house, the defendant forced the victim to the ground, removed her clothing, and raped her. The victim estimated that the rape lasted five to ten minutes. She stated she was crying and in a great deal of pain.

When the defendant left, the victim pulled her clothes back on and noticed blood on her underwear. She returned to the house where she saw Julia Williams. Williams testified that the victim told her she had been raped. Williams stated the victim was crying and her hair was disheveled. Sarah Kelso said the victim told her she had been raped and was bleeding. Kelso testified the victim was crying and looked disheveled.

Andrea Dawn Maynor, a Maryville police officer, came to the house at approximately 11:00 that evening in response to a call about a shooting. Maynor described the victim's condition:

Q. And what did you notice when you did so, if anything?

A. She was shaking. She was very, very upset. She was able to speak when questions were asked to her. Even when I touched her arm in a way to comfort and reassure her, her whole body was just in a very jerking, shaking motion. She was just extremely traumatized.

Q. And what, if anything, did she say had happened?

A. She said, "He raped me."

Q. Did she say who it was?

A. She – her statement was, "He raped me."

The victim was transported to the East Tennessee Children's Hospital where Dr. Ronald Ford, an expert in the area of sexual trauma in children and young adults, examined her. Dr. Ford testified regarding the trauma he observed to the victim's vaginal area. Dr. Ford believed the trauma was caused by "forced penetration" and that it was "very unlikely in consensual sex to have that severe an injury."

The victim identified the defendant in a photographic lineup. A few days after the rape, the defendant was arrested for murder. An interview was conducted and recorded on videotape. In the interview, the defendant admitted to having sex with the victim. An edited version of this interview was played for the jury.

After due deliberation, the jury found the defendant guilty of rape.

DISCUSSION OF LAW

I. Whether the evidence presented in its entirety and as contained in the record was sufficient as a matter of law to support the verdict of the jury finding the defendant guilty of rape.

When a challenge is made to the sufficiency of the evidence, the standard for appellate review is whether, after considering the evidence in a 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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The defendant's burden of showing insufficiency is heavy, since all conflicts in testimony are resolved in favor of the State, and the State is entitled to the strongest

legitimate view of the evidence as well as all reasonable or legitimate inferences that may be drawn therefrom. State v. Burns, 979 S.W.2d 276, 287 (Tenn. 1998).

To obtain a conviction for rape, the State must prove an unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:

- (1) Force or coercion is used to accomplish the act;
- (2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;
- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The sexual penetration is accomplished by fraud.

Tenn. Code Ann. § 39-13-503(a) (1997). Rape is a Class B felony. Tenn. Code Ann. § 39-13-503(b) (1997).

Although the defendant argues the evidence presented at trial was insufficient to establish he used force or coercion to accomplish the act, a review of the record reveals substantial evidence of coercion. The victim testified the defendant led her around the side of the house and told her to be quiet or he would hurt her. She stated the defendant shoved her to the ground, placed his arm across her chest with all of his weight on top of her, pulled down her clothing and his own pants, and then penetrated her. She testified that it was her first sexual experience. Afterwards, the victim told Kelso and Williams that she had been raped. Kelso testified in detail as to the victim's appearance and statements:

- A. I asked [the victim] why she was crying. Because I had never seen her like that before.
- Q. And what did she answer?
- A. She looked down and she was shaking. She said, Sarah, I didn't want to, I tried to stop him, he wouldn't stop. And I kept asking her what happened. And she kept telling me, he wouldn't stop, he wouldn't stop, I've never done anything like that before, he wouldn't stop. She kept repeating he would not stop.
- Q. Did she say how she felt physically?
- A. She said she was very – she was hurting, physically hurting, in pain.

The defendant argues the victim's failure to cry out or resist during the incident is conclusive evidence the defendant did not use force or coercion. He also argues the

victim's description of how he removed her clothing was not credible. However, the finder of fact is charged with determining the credibility of witnesses, the weight given to their testimony, and the reconciliation of conflicts in the evidence. State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993), perm. app. denied (Tenn. 1994). To the extent that there were conflicts or inconsistencies in the victim's testimony, it was the responsibility of the jury to resolve them. State v. Embry, 915 S.W.2d 451, 455 (Tenn. Crim. App. 1995), perm. app. denied (Tenn. 1996). A jury verdict for the State accredits the testimony of the State's witnesses and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Based upon the evidence in the record, we conclude the evidence presented was sufficient to sustain the verdict of guilty of rape.

II. Whether the court erred when it overruled the defendant's objection pursuant to Tennessee Rules of Evidence 401 and 403 to the showing of a video-taped statement of the defendant to the jury thus violating the defendant's constitutional right to a fair trial.

Here, the defendant argues the trial court abused its discretion in allowing the State to play a videotaped statement the defendant gave after his arrest for murder. At trial, the defendant objected to the introduction of the videotaped statement, arguing that nothing on the tape was relevant to the rape charge and that the probative value of the tape would be outweighed by the danger of unfair prejudice.

The edited version of the videotape which was played for the jury was lacking in both video and audio clarity. Although according to the defendant's brief, the original tape was about two hours in length, the edited tape lasted only about fifteen minutes. At the beginning of the edited tape, the defendant is shown sitting at a small desk with his head on his arms. If he was "moaning," as his brief asserts, it was not apparent. In fact, he shows little emotion throughout the tape, other than to smile at several comments made by the two law enforcement officers who were present, the comments appearing to be intended to make the defendant feel more at ease. The officer's question about "covering up" for his friends came after the defendant told them he came to the party with two other young men. Thus, the officer's question regarding "covering up" appears innocuous, and somewhat confusing, but not suggestive that he was being questioned about a crime other than rape.

During the taped questions and answers, the defendant stated he was wearing a "Georgetown" shirt that night, and he had sexual relations with the victim behind the house.

However, he claimed that the act was consensual. He also admitted he told the victim his name was "Arthur" and apparently then agreed with the officers who suggested he did so in order that the victim could not later contact him. Thus, because of this information, the tape was relevant to the prosecution of the victim's complaint. Although some of the tape, such as the location of the defendant's residence and directions to it, was not relevant, neither was it prejudicial.

The Tennessee Rules of Evidence permit the introduction of all relevant evidence, which is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Rule 403 allows the exclusion of relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Tenn. R. Evid. 403. The determination of relevance or the probative value of the evidence is within the discretion of the trial judge, whose determination will not be overturned absent a showing of an abuse of that discretion. State v. Bigbee, 885 S.W.2d 797, 807 (Tenn. 1994).

The defendant's admission to having sex with the victim is certainly relevant to the issue of rape. Given the probative nature of the videotape and its limited potential for prejudice, the trial court did not abuse its discretion in finding this evidence was admissible.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

JOE H. WALKER, III, SPECIAL JUDGE