

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 15, 2003

**STATE OF TENNESSEE v. MICHAEL DWIGHT STEWART
and JAMES HENRY BROWN**

**Direct Appeal from the Criminal Court for Davidson County
No. 2001-B-1193 Steve Dozier, Judge**

No. M2002-02592-CCA-R3-CD - Filed February 24, 2004

THOMAS T. WOODALL, J., concurring.

I concur in the result reached by the majority, and the reasoning used in the majority opinion on all issues except its conclusion that enhancement factor (7), that Defendant Brown was motivated by a desire to satisfy his pleasure or excitement, is inapplicable.

While proof of this enhancement factor was not as strong as evidence of its application in other cases, I still feel it was adequately proven. At the sentencing hearing, Defendant Brown admitted that he and his co-defendant never discussed raping the victim and that “[t]his wasn’t - - this wasn’t planned. Never meant to hurt [the rape victim].” The Defendant admitted that he was unable to penetrate the victim on his first attempt, and denied penetrating her or attempting to penetrate her with anything other than his penis. He admitted that he told the victim to “bend over like she was a football player” after ordering her to take off her clothes for the second time. All of this was in addition to the Defendant asking the victim “did it feel good.”

I conclude that the record adequately supports the trial court’s application of enhancement factor (7).

THOMAS T. WOODALL, JUDGE